

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
STUDENT HEARING OFFICE**

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STUDENT,<sup>1</sup> )  
By and through PARENT, )

*Petitioner,* )

v. )

DISTRICT OF COLUMBIA )  
PUBLIC SCHOOLS, )

*Respondent.* )

Bruce Ryan, Hearing Officer

Issued: October 29, 2011

2011 OCT 31 AM 9:39  
STUDENT HEARING OFFICE

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**HEARING OFFICER DETERMINATION**

**I. INTRODUCTION AND PROCEDURAL BACKGROUND**

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed August 29, 2011, on behalf of a 16-year old student (the "Student") who resides in the District of Columbia and has been determined to be eligible for special education and related services under the IDEA. Petitioner is the Student's grandmother and legal guardian. Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by: (1) failing to ensure parental participation in the July 27, 2011 educational placement decision; and (2) failing to provide an appropriate individualized education program ("IEP") and educational placement for the Student as of July 27, 2011.

DCPS filed its Response on September 9, 2011, which denied the allegations. DCPS asserts: (a) that sufficient efforts were made to obtain Petitioner's participation pursuant to 34 C.F.R. § 300.322; (b) that the IEP team properly determined that the Student's placement would

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<sup>1</sup> Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

remain full-time Outside General Education; (c) that on 07/27/11 DCPS issued a Prior Written Notice for the Student to attend a special education program at his neighborhood DCPS high school (the “**High School**” and “**High School Program**”); and (d) that the Student’s previous non-public school (“**Private School A**”) could no longer provide the Student with a FAPE based on the pending revocation of its certification by the Office of the State Superintendent of Education (“OSSE”) and its ultimate closure. As of August 30, 2011, the Student was parentally placed at a new non-public, special education day school located in D.C. (“**Private School B**”).

A resolution meeting was held September 14, 2011, which did not resolve the Complaint. The parties agreed to end the 30-day resolution period early, and thus the 45-day IDEA timeline for decision began to run, on that date. A Prehearing Conference (“PHC”) was then held on September 26, 2011, at which the parties discussed and clarified the issues and requested relief.

Timely five-day disclosures were filed by both parties on October 5, 2011, and the Due Process Hearing was held in Room 2006 on October 13, 2011. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence:

**Petitioner’s Exhibits:** P-1; P-3 through P-5; P-7 through P-10; P-12 through P-14.<sup>2</sup>

**Respondent’s Exhibits:** R-1 through R-13 (without objection).

In addition, the following Witnesses testified on behalf of each party:

**Petitioner’s Witness:** (1) Petitioner; (2) Student’s Uncle; (3) Educational Advocate (“EA”); (4) Special Education Coordinator (“SEC”), Private School B; and (5) Teacher, Private School B.

**Respondent:** Ms. Nicole Garcia, DCPS Progress Monitor.

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<sup>2</sup> Petitioner withdrew Exhibits P-2 and P-6 at hearing; Exhibit P-11 was excluded based on DCPS’ objection; and DCPS’ objections to Exhibits P-4 and Exhibits P-7 through P-9 were overruled.

## II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is October 29, 2011.

## III. ISSUES AND REQUESTED RELIEF

The following issues were presented for determination at hearing:

- (1) **Procedural – Parent Participation in Placement.** – Did DCPS deny the Student a FAPE by failing to ensure meaningful parental participation and input into the 07/27/2011 educational placement decision? *See Complaint, pp. 5-7.*
- (2) **Failure to Provide Appropriate IEP and Placement (07/27/2011).** – Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP and educational placement on or about July 27, 2011? Specifically, Petitioner claims that: (a) the IEP/placement changes made by DCPS were not based on the individual needs of the Student; (b) the proposed High School Program is not suitable for the Student and cannot meet his unique needs; and (c) the proposed placement and/or location is unable to implement the Student's IEP. *See Complaint, pp. 8-9.*

Petitioner requests private placement relief, specifically that the Hearing Office order DCPS to fund the prospective placement and transportation of the Student to Private School B for the remainder of the 2011-12 school year. At hearing, Petitioner confirmed that no claim was being made for any denial of FAPE for the 2010-11 school year (or prior to 07/27/2011), and Petitioner therefore withdrew her request for compensatory education relief. Petitioner also withdrew her request for retroactive reimbursement for the costs of her parental placement at Private School B since 08/30/2011.<sup>3</sup>

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005).

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<sup>3</sup> Accordingly, the additional Issue specified in the Prehearing Order concerning Parental Placement – i.e., whether the unilateral parental placement was “proper under the Act” – has been omitted from the issues presented for determination.

#### IV. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. He has been determined to be eligible for special education and related services under the IDEA as a child with Multiple Disabilities ("MD"). *See R-4.*
2. Until the conclusion of the 2010-11 school year, the Student attended Private School A in the District of Columbia. His IEP at the time provided for full-time special education outside the general education setting. *See Pet. Test.; EA Test.*
3. In late April 2011, the OSSE announced its intention to revoke the certificate of approval of Private School A due to a series of alleged regulatory violations. DCPS then informed Petitioner and other parents of DCPS students at Private School A that the school may be closed due to the OSSE's action. *See Garcia Test.; Pet. Test.*
4. On May 6, 2011, DCPS convened an annual IEP meeting for the Student to review and update the Student's program. *See R-6; R-7; Garcia Test.* Petitioner did not attend this meeting. *Id.* The 05/06/2011 IEP is not in evidence.
5. On or about July 7, 2011, DCPS sent a letter of invitation ("LOI") to Petitioner for a meeting to be held July 27, 2011, primarily for the purpose of discussing placement/location in light of the OSSE action and pending closure of Private School A. The notice was sent by first-class and certified mail. *R-5; Garcia Test.* DCPS also telephoned Petitioner the same day, at the telephone number shown in DCPS' records. *Id.; see also R-1 (DCPS Response); R-8.*
6. On or about July 18, 2011, a DCPS representative visited Petitioner's home and left a copy of the LOI at her door. On or about July 21 and 27, 2011, DCPS telephoned Petitioner again at the same number. Petitioner failed to respond to any of DCPS' contacts concerning the 07/27/2011 meeting. *Garcia Test.; R-8; see also R-1.*
7. On July 27, 2011, DCPS convened a meeting of the Student's MDT/IEP team without Petitioner in attendance to review the Student's IEP. *See R-3, R-4.* At the 07/27/2011 meeting, the IEP team determined that the Student should continue to receive full-time special education and related counseling services in an Outside General Education setting. *R-3; Garcia Test.*
8. Petitioner did not attend the July 27, 2011 MDT/IEP meeting. Attendees of the meeting included: DCPS LEA Representatives; a representative of the independent firm ("Contractor") that has contracted with DCPS to provide special education programming

services within the High School Program; a DCPS Case Manager; and a DCPS School Psychologist. *R-3; Garcia Test.; Pet. Test.*

9. The 07/27/2011 IEP provides 26.5 hours per week of specialized instruction and one hour per week of behavioral support services in an Outside General Education setting. *R-4, p. 5.* In the Least Restrictive Environment (“LRE”) statement, the IEP provides that the Student “continues to need a small structured milieu that will address his academic challenges as well as his social emotional stressors.” *Id., p. 6.*
10. On July 27, 2011, DCPS also issued a Prior Written Notice (“PWN”) for the Student proposing to change his educational placement/location of services from Private School A to High School Program for the 2011-12 school year. *R-2.* The PWN states that the Student’s last day to be enrolled at Private School A would be 08/05/2011. *Id.* DCPS found that High School Program can implement the IEP and offers a small environment for the Student.<sup>4</sup>
11. The High School Program operates as physically separate, self-contained classrooms within the High School pursuant to a contract between DCPS and Contractor, which is a private firm that assists public schools in establishing and operating so-called “co-location classrooms” within the public school system. *See P-3; P-8.* The classrooms are called co-location classrooms because they are located on DCPS public school campuses and staffed by the Contractor’s teachers and other professionals, who then work with DCPS staff to design and implement each student’s IEP. *P-3.* DCPS and Contractor have established five such co-location classrooms on three DCPS campuses to provide special education services for middle and high school students with emotional disturbances. *See P-3; P-8; Garcia Test.*<sup>5</sup>
12. The High School Program is comprised of two classrooms. *See Garcia Test.; EA Test.* Each student has a personal workstation with a computer and other learning materials. *Id.; see also R-12.* The classrooms are located on the second floor of the High School in a separate wing or hallway of the building. *See EA Test.; R-13.* Each is staffed with a certified special

<sup>4</sup> *R-2; R-3, p. 2.* The PWN correctly identified High School Program under the first section of the notice, but mistakenly identified the location of the program under the next section of the notice. *R-2, p. 1.* DCPS’ Program Manager corrected this mistake at hearing, and there is no evidence that Petitioner was confused as a result. *See Garcia Test.* It is also clear from the meeting notes that the team intended to specify High School Program. *R-3, p. 2.*

<sup>5</sup> The idea of the program appears to be to provide special education and related services in a “least restrictive environment” at a DCPS neighborhood school, where the students have the opportunity to participate in other activities with typically developing peers. *P-3.* DCPS’ witness testified, however, that there is no interaction between special education and general education students in the High School Program. *See Garcia Test.*

education teacher, a teacher assistant, and a behavior technician. *Garcia Test*. The capacity of each classroom is 12 students. *Id. See also R-9* (daily class schedule).

13. On or about August 5, 2011, Petitioner filed a due process complaint requesting (*inter alia*) that the Student be allowed to remain at Private School A. On or about August 9, 2011, Petitioner withdrew that complaint because Private School A had closed.
14. Petitioner and the Student's educational advocate visited the High School during August and September, 2011, beginning with an open house session in early August. *See Pet. Test.; EA Test*. The Student did not enroll in or attend the High School Program, and Petitioner did not notify DCPS that she was rejecting that offer of placement. *Id.; Garcia Test*.
15. On August 29, 2011, Petitioner filed the instant Complaint; and on August 30, 2011, she enrolled the Student at Private School B. *See Pet. Test.; EA Test*.

## V. DISCUSSION AND CONCLUSIONS OF LAW

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see also* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

As noted above, Petitioner claims that DCPS denied the Student a FAPE by: (1) failing to ensure parental participation and input into the July 27, 2011 educational placement decision; and (2) failing to develop an appropriate individualized education program ("IEP") and educational placement for the Student as of July 27, 2011. For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on either issue.

### A. Parental Participation in Placement

The IDEA requires that parents have meaningful participation in the placement decisions involving their child. *See* 20 U.S.C. 1414(e); 34 CFR 300.116(a) (1), 300.327. Specifically, each public agency must "ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." *Id.*, 1414(e); 34

CFR 300.327. Meaningful participation generally includes being part of the discussion of appropriate and available schools, as well as the ultimate team placement determination.<sup>6</sup> The IDEA regulations further require that each public agency “must take steps to ensure that one or both parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate....” 34 CFR 300.322 (a). Such steps must include “(1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed on time and place.” *Id.*

The IDEA regulations permit a public agency to conduct an IEP Team meeting without a parent in attendance in limited circumstances, when the agency “is unable to convince the parents that they should attend.” 34 CFR 300.322 (d). In such case, “the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as –

- (1) **Detailed records of telephone calls** made or attempted and the results of those calls;
- (2) **Copies of correspondence sent** to the parents and any responses received; and
- (3) **Detailed records of visits made to the parent’s home** or place of employment and the results of those visits.” *Id.* (emphasis added).

On the basis of the documentary evidence and testimony in this case, the Hearing Officer concludes that DCPS complied with the requirements of 34 CFR § 300.322 (a) & (d) in conducting the 07/27/2011 IEP team meeting without the parent in attendance. DCPS notified Petitioner by LOI approximately three weeks before the meeting. DCPS presented detailed records of telephone calls, copies of correspondence (including a signed Return Receipt), and detailed records of a home visit. *See R-5; R-8.* DCPS also presented detailed testimony by the Progress Monitor who conducted or supervised these communications. *See Garcia Test.*<sup>7</sup>

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<sup>6</sup> *See, e.g., Paoella v. District of Columbia*, 210 F. Appx. 1 (D.C. Cir. 2006) (DCPS’ designation of a particular public school conformed with IDEA’s placement requirements where record showed that parents “had a meaningful opportunity to participate” and “placement suggested by DCPS was not predetermined”); *T.T. v. District of Columbia*, 48 IDELR 127 (D.D.C. 2007) (“The IDEA requires that the parents of a student with a disability be members of any group making a decision regarding the student’s placement....In [DCPS’] typical placement process, the [DCPS] placement recommendations are then “offer[ed] to the parent during an MDT placement meeting.”).

<sup>7</sup> *Cf. Shapiro v. Paradise Valley Unified School Dist.*, 317 F.3d 1072, 1078 (9th Cir. 2003) (no showing that school district had documented phone calls, correspondence and visits) (cited by Petitioner).

Even assuming *arguendo* that DCPS had failed to comply with all notice and detailed documentation requirements, the Hearing Officer would conclude that Petitioner failed to prove that such procedural error caused a deprivation of educational benefit or otherwise resulted in a substantive denial of FAPE. See 34 C.F.R. 300.513 (a) (2); *Lesesne v. District of Columbia*, 447 F. 3d 828 (D.C. Cir. 2006). While the July 27, 2011 meeting went forward without the parent's participation (and hence the resulting PWN can be characterized as essentially unilateral), DCPS did afford Petitioner and her representatives the opportunity to visit, obtain information, and provide input concerning the proposed High School Program for the Student, prior to the beginning of the 2010-11 school year. And the parties agree that the Student's IEP was not substantively altered at the 07/27/2011 meeting. Under the circumstances, any failure to attend the 07/27/2011 has not been shown to have significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student. See 34 C.F.R. 300.513 (a)(2)(ii).<sup>8</sup>

Accordingly, the Hearing Officer concludes that Petitioner failed to meet her burden of proof on Issue 1.

**B. Appropriateness of July 27, 2011 IEP and Placement**

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See also 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. To be sufficient to provide FAPE under the IDEA, an "IEP must be '*reasonably calculated*' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982) (emphasis added); see also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988).

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<sup>8</sup> See also *T.Y. v. New York City Dept. of Educ.*, 2009 U.S. App. LEXIS 22238 (Oct. 9, 2009), at \*5 (parents entitled to "input" into, not "veto" over, school choice); *Paoella v. District of Columbia, supra* (DCPS discussed why the designated public school could provide the services identified in IEP, and parents visited the suggested school and had the opportunity to express their disagreement with DCPS' decision prior to school year).

Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207). “One of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary.” *N.S. v. District of Columbia*, 709 F. Supp. 57, 73 (D.D.C. 2010); *Alfono v. District of Columbia*, 422 F. Supp. 2d 1, 6 (D.D.C. 2006). In the event of such challenge, the issue of whether an IEP is appropriate is generally a question of fact for hearing. *See, e.g., S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

The next critical IDEA requirement is educational placement, which must be “based on the child’s IEP.” 34 C.F.R. 300.116 (b) (2). Under the IDEA, “[d]esigning an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes *offering placement in a school that can fulfill the requirements set forth in the IEP.*” *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (emphasis added). Moreover, D.C. law mandates that DCPS place a student with a disability in “an *appropriate special education school or program*” in accordance with the IDEA. D.C. Code 38-2561.02 (emphasis added). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming “placement based on match between a student’s needs and the services *offered at a particular school*”) (emphasis added); *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) (“If no *suitable public school* is available, the District must pay the costs of sending the child to an appropriate private school.”). In addition, DCPS must ensure that its placement decision is in conformity with the Least Restrictive Environment (“LRE”) provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116.

As noted above, Petitioner claims (*inter alia*) that the proposed High School Program is not suitable for the Student and cannot meet his unique needs, and that the proposed placement is unable to implement the Student’s IEP. *See Complaint, pp. 8-9.*<sup>9</sup> The Hearing Officer concludes

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<sup>9</sup> Petitioner also claims that the change in placement made by DCPS on 07/27/2011 was not based on the individual needs of the Student because DCPS allegedly treated all Private School A students the same. However, the meeting notes and testimony reflect an individualized determination, which is not undercut by the fact that DCPS necessarily had to address many similarly situated students at the same time. *See R-3: Garcia Test.*

that Petitioner has failed to prove these claims by a preponderance of the evidence. The evidence demonstrates that the High School Program can implement the services and setting provided in the 07/27/2011 IEP, and that it can provide an appropriate educational environment reasonably calculated to provide educational benefit to the Student. More specifically:

(1) The undisputed testimony shows that the Student can receive 26.5 hours of specialized instruction and one hour of related behavioral support services in the High School Program. Both sets of services can be provided in an Outside General Education setting. *See R-4, p. 5; Garcia Test.*

(2) It is undisputed that High School Program can also provide the Student with all the classroom accommodations listed on his IEP. *R-4, p. 7; Garcia Test.*

(3) The High School Program can provide the Student with a "small, structured milieu that will address his academic challenges as well as his social emotional concerns," in conformity with his IEP. *R-4, p. 6.* The maximum capacity of each classroom is 12 students, which is essentially the same as the maximum classroom capacity at Private School B. *Garcia Test.; SEC Test. (cross examination).* Petitioner's EA testified that she observed only eight students in a class when she visited High School Program. *EA Test.* Each classroom provides a self-contained setting that is physically separate from the rest of the High School programs.

(4) While DCPS asserts that LRE considerations support the placement selection in this case,<sup>10</sup> High School Program does not appear to require materially greater interaction with non-disabled peers than did the Student's previous placement at Private School A, to the extent Petitioner has expressed concern with such interactions. The classrooms are located on a separate hallway or wing of High School; the special education students in the program are escorted by staff via a separate stairwell in the building upon entering the school in the morning; and they are dismissed and escorted out of the building separately prior to the regular education students at the end of the school day. *See Garcia Test.; R-12; R-13.*

(5) Petitioner has not challenged any of the goals or services contained in the July 27, 2011 IEP.

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<sup>10</sup> Regardless whether LRE considerations *per se* are of decisional significance here, D.C. Code §38-2561.02 (c) requires DCPS to prioritize DCPS schools over private facilities in selecting special education placements.

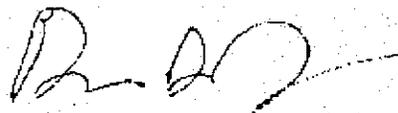
That the Student may be doing well at Private School B, and Petitioner may prefer that he attend such school, does not establish that DCPS has failed to provide an appropriate IEP and educational placement within the DCPS school system for the 2011-12 school year. DCPS must offer a program that is "reasonably calculated to confer educational benefits on the child"; but it need not "maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children."<sup>11</sup> Since DCPS has satisfied that standard in this case, it has not denied the Student a FAPE, and Petitioner has shown no justification for awarding any prospective private placement relief.

If the Student enrolls in the High School Program, DCPS has agreed to conduct a 30-day review meeting to discuss the IEP and placement. If Petitioner feels that High School Program is not appropriate at that time, DCPS has stated that other locations can be considered. *R-3, p. 2*. And if DCPS maintains such placement/location, but is not able to implement all material IEP requirements there during the 2011-12 school year, then Petitioner would be entitled to file a separate due process complaint on such issue. *See* 34 C.F.R. 300.513 (c).

#### VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Petitioner's requests for relief in her Due Process Complaint filed August 29, 2011 are hereby **DENIED**;
2. The Complaint is **DISMISSED, With Prejudice**; and
3. This case shall be, and hereby is, **CLOSED**.



Dated: October 29, 2011

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Impartial Hearing Officer

<sup>11</sup> *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982) (emphasis added); see also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988).

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).