

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹)
through the Parent,)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
Respondent.)
)

Date Issued: December 18, 2011

Hearing Officer: Virginia A. Dietrich

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

Background

Petitioner, the grandmother and caretaker of -year old Student, filed a due process complaint notice on October 18, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"). At the time of the alleged violations, Student was a child with Multiple Disabilities who was receiving special education services from the District of Columbia Public Schools ("DCPS").

Petitioner alleged that Student, who is dependent on others for 100% of all daily living activities and receives all nutrition and medicine through a gastrointestinal tube ("G-tube"), was denied a FAPE due to (1) DCPS' failure to provide Student's dedicated aide the necessary training in G-tube monitoring and maintenance during the 2009-2010 and 2010-2011 school years, and (2) DCPS' failure to continue providing Student with a dedicated aide during the 2011-2012 school year who could assure Student's health and safety by monitoring his G-tube; all of which resulted in health and safety problems for Student. Petitioner also alleged that Student was denied a FAPE when DCPS reduced both Student's occupational therapy ("OT") and physical therapy ("PT") services from 60 minutes/week to 30 minutes/week in September 2011, when there was no objective evaluative data that warranted the reduction in services.

¹ Personal identification information is provided in Appendix A.

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DCPS asserted that Petitioner failed to show that DCPS had violated any provision of the IDEA or shown educational harm by the removal of the dedicated aide in September 2011; that Petitioner failed to prove the type and amount of G-tube training that was necessary for the dedicated aide; and that not only did Petitioner fail to demonstrate why the reduction in OT and PT services was inappropriate, the two weeks of time that Student received half of the previously prescribed OT and PT services was too short a time to assess any impact on Student. DCPS asserted that Petitioner had failed to meet her burden of proof on all issues.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed on 10/18/11. This Hearing Officer was assigned to the case on 10/19/11. A resolution meeting took place on 11/01/11 at which time the parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 11/17/11, the 45-day timeline to issue a final decision began on 11/18/11, and the final decision was due on 01/01/12.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

Petitioner's disclosures dated 12/05/11, containing a witness list and Exhibits P-1 through P-12, were admitted into evidence without objection. DCPS' disclosures dated 12/05/11, containing a witness list and Exhibits R-01 through R-04, were admitted into evidence without objection.

Parties agreed to the following stipulated facts:

#1. Student, a resident of the District of Columbia, is a -year old special education student who attended School for the 2010-2011 and 2011-2012 school years.

#2. Student's current IEP, dated 09/14/11, classifies Student with a primary disability of Multiple Disabilities and prescribes 29.75 hours/week of specialized instruction outside of general education, 120 minutes/week of OT, 120 minutes/month of PT, 120 minutes/month of speech-language services and 30 minutes/month of audiology services. Student's IEP was amended on 10/13/11 to 120 minutes/month of OT. Student's IEP did not include the services of a dedicated aide.

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#3. Student's prior IEP, dated 10/19/10, classified Student with a primary disability of Multiple Disabilities and prescribed 29.5 hours/week of specialized instruction outside of general education, 120 minutes/month of OT, 120 minutes/month of PT, 120 minutes/month of speech-language services and 30 minutes/month of audiology consultation services. Student's IEP included the services of a dedicated aide.

#4. Student has multiple medical conditions, has prescribed medications for these conditions and is fed through a G-tube. Student is wheelchair bound and non-verbal.

#5. Student received a dedicated aide during the 2009-2010 and 2010-2011 school years by virtue of an executed Settlement Agreement dated 08/14/09.

Petitioner presented the following two witnesses and rested her case in chief: Petitioner; and Petitioner's educational advocate ("Advocate"). DCPS then moved for a directed finding, which the Hearing Officer reserved ruling on. Thereafter, DCPS elected not to present any witnesses and the due process hearing concluded after closing arguments.

The three issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate Individualized Education Program ("IEP") since the beginning of the 2011-2012 school year; specifically, by failing to continue providing Student with a dedicated aide who could assure Student's health and safety by monitoring his G-tube.

Whether DCPS denied Student a FAPE by failing to implement Student's IEP during the 2009-2010 and 2010-2011 school years; specifically, by failing to provide the dedicated aide with the necessary training on G-tube feeding and monitoring, which resulted in health and safety risks to Student.

Whether DCPS denied Student a FAPE by failing to provide Student with appropriate related services since September 2011; specifically, by reducing both Student's physical therapy and occupational therapy services from 1 hour/week to 30 minutes/week without any current evaluative data to support the reduction in services.

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented; that DCPS immediately provide Student with a dedicated aide; that DCPS provide the dedicated aide with appropriate training in G-tube monitoring and maintenance; that DCPS increase both Student's occupational therapy and physical therapy services to 1 hour/week; that DCPS fund an independent occupational therapy evaluation and an independent physical therapy evaluation to determine Student's current level of needs; and an award of compensatory education for missed occupational therapy and physical therapy services of 30 minutes/week each, since September 2011.

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Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

#1. The stipulated facts agreed to by Petitioner and Respondent are incorporated herein.

#2. Student, age [redacted] attended the same District of Columbia public school for the 2009-2010, 2010-2011 and 2011-2012 school years as a non-verbal and wheelchair bound child with a primary disability classification of Multiple Disabilities.² Student has multiple medical conditions, is completely dependent on others in all areas of adaptive living, has a cognitive score of 4-5 months with scattered skills, and has functional abilities that include responding to the sound of a bell or rattle, responding to a voice, giving a social smile in response to a situation, looking at the face and eyes of the person talking to him, looking longer at a human face than at objects, and vocalizing and smiling at a familiar person.³

#3. Student receives all nutrition and medication through a G-tube during the hours of 10:00 a.m. – 1:00 p.m. while at school.⁴ The G-tube is a medical device affixed to Student's stomach with two openings. One opening is plugged by a removal button (G-tube) that goes to Student's stomach and the other opening has a cord-like tube (J-tube) from Student's intestines that connects to a feeding source. The G-tube and J-tube ports must be opened to allow feeding. When Student is not feeding, the G-tube button must be plugged to prevent leakage from the stomach, and the J-tube must be closed at the opening to the intestines and the cord tucked underneath the net Student wears over his stomach to prevent the tube from dangling.⁵

#4. At the Multidisciplinary Team ("MDT") meeting on 09/14/11, DCPS removed the services of a dedicated aide from Student's IEP on the basis that there were enough adults in the classroom to handle the monitoring of the dressing around the G-tube; i.e., there were six students in the class, one teacher, one assistant and two aides (one aide was a dedicated aide for another student).⁶ The MDT included the school nurse and the G-tube nurse.⁷ Student's teacher, occupational therapist, physical therapist and speech-language therapist all felt that Student did not require a dedicated aide.⁸ A classroom observation also factored into DCPS' decision that Student did not require a dedicated aide.⁹ Parent disagreed with the removal of the dedicated aide.¹⁰ At the MDT meeting, DCPS developed a schedule whereas Student would be taken to the nurse at 10 a.m., 12:00 noon and 2:00 p.m. to check the dressing around the G-tube.¹¹ Since the

² Stipulation #1, Stipulation #4, P-2, P-3, Petitioner.

³ Stipulation #4, R-3-2.

⁴ Stipulation #4, P-3-2, Petitioner.

⁵ Petitioner..

⁶ R-4-2, Advocate.

⁷ R-4-1.

⁸ R-4-2.

⁹ Advocate.

¹⁰ R-4-3, Petitioner.

¹¹ R-4-3.

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removal of the dedicated aide, Student has only been in school for two weeks; having been hospitalized continuously since 10/01/11 for a hip replacement surgery.¹²

#5. Adjustments to the G-tube and J-tube can be made only by trained personnel, and adjustments to the G-tube and J-tube at school are made by the school nurse. The dedicated aide is not authorized or trained to make adjustments to the G-tube or J-tube, nor will the dedicated aide touch the G-tube or J-tube due to risk of health infection by the presence of blood around the G-tube and J-tube opening. If any problems with respect to the G-tube or J-tube arise, the dedicated aide takes Student to the nurse.¹³

#6. During the 2009-2010 school year, Student returned home from school with the G-tube button dislodged on 3-4 occasions and on 1-2 occasions Petitioner had to take him to the hospital to have the G-tube reinserted. During the 2010-2011 school year, Student returned home from school with the G-tube or J-tube dislodged on 1-2 occasions. During the 2011-2012 school year, Student returned home from school with the G-tube or J-tube dislodged several times, but only once after the removal of the dedicated aide. When the button or tube is popped out of place, Student arrives home wet and soiled due to leakage from the contents of his stomach or intestines. If the J-tube cord becomes dislodged from its attachment to Student's stomach, Petitioner must take Student to the hospital for reinsertion by a medical doctor. If the G-tube becomes unplugged, Petitioner has the training to insert a new, spare G-tube button. Petitioner clothes Student with a net and snugly fitting T-shirts that hold the G-tube and J-tube in place.¹⁴

#7. Whenever Student came home from school with the G-tube or J-tube dislodged, Petitioner called the school and spoke with school personnel who disavowed any knowledge of the dislodged G-tube or J-tube.¹⁵ The G-tube and J-tube may become dislodged by Student's involuntary movements in his wheelchair or by Student being moved from his wheelchair.¹⁶ Student takes a one-hour bus ride home from school every day without the services of a dedicated aide.¹⁷

#8. During the 2009-2010, 2010-2011 and 2011-2012 school years, Student missed a lot of school due to medical problems.¹⁸ Prior to 09/14/11, Student received one hour/week of OT services and one hour/week of PT services. At the MDT meeting on 09/14/11, DCPS reduced both OT and PT services to 30 minutes/week based on objective data that Student's progress had reached a plateau; i.e., the OT and PT providers both indicated that Student had reached the threshold where additional services would not be effective.¹⁹ From 09/14/11 until 10/01/11, Student received 30 minutes/week of both OT and PT services, and since that time, Student has not been in school due to a continuous hospitalization.²⁰ Petitioner did not notice any change or

¹² Petitioner.

¹³ All statements in Finding #5 by Advocate.

¹⁴ All statements in Finding #6 by Petitioner.

¹⁵ Petitioner.

¹⁶ Advocate.

¹⁷ Petitioner.

¹⁸ Petitioner, Advocate.

¹⁹ R-4-3, R-4-4, Advocate.

²⁰ Petitioner.

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impact on Student due to the reduction of OT and PT services because the time span of two weeks was too short.²¹

Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP since the beginning of the 2011-2012 school year; specifically, by failing to continue providing Student with a dedicated aide who could assure Student's health and safety by monitoring his G-tube.

Pursuant to 34 C.F.R. 300.320(a)(4), the IEP must include a statement of the special education and related services and supplementary aids and services...and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum. "Related services" includes any developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. 34 C.F.R. 300.34.

Safety concerns that could interfere with a disabled child's right to receive a free appropriate education solidly fall under the rights afforded to children with disabilities. Some infirmities will likely render disabled children more vulnerable to injury from certain conditions than their non-disabled peers, therefore requiring special accommodations to fulfill the statutory

²¹ Petitioner.

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preference for educating such children together to the maximum extent possible.” *Lillbask v. State of Connecticut Department of Education*, 42 IDELR 230 (2nd Cir. 2005).

DCPS is responsible for appropriately monitoring and maintaining medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school. 34 C.F.R. 300.34(b)(2)(ii). DCPS is also responsible for the routine checking of an external component of a surgically implanted device to make sure it is functioning properly. 34 300.34(b)(2)(iii), 300.113(b)(1).

DCPS discontinued the services of the dedicated aide on 09/14/11 because the school staff that worked closest with Student throughout the school day felt that current classroom staffing was sufficient to monitor Student’s G-tube/J-tube.²² Petitioner, with the burden of proof, failed to prove otherwise. The only person in the school who was trained and authorized to handle the G-tube/J-tube was the nurse, and upon discontinuation of the dedicated aide, DCPS set up a schedule for the nurse to check the dressing around the G-tube/J-tube, before, during and after the 10 a.m. – 1:00 p.m. daily feeding.²³ Petitioner failed to prove that the schedule was inappropriate or the services of a dedicated aide were required to monitor the G-tube/J-tube at all times. Petitioner also failed to prove that the staffing of the classroom was inadequate for the monitoring of the G-tube/J-tube.

The evidence presented by Petitioner was also insufficient to show that when Student returned home from school with leakage from his G-tube/J-tube, the cause of the problem was insufficient monitoring at school. The school disavowed knowledge of the dislodged G-tube/J-tube, Student rode the bus home from school without a dedicated aide, and it was possible that the G-tube/J-tube connection could have become dislodged during transport home due to Student’s writhing in his wheelchair.²⁴

Although Petitioner’s testimony was inconsistent, the number of times that Student arrived home with the G-tube or J-tube dislodged during the past three years was minimal²⁵ and could be expected due to the nature and extent of Student’s physical disabilities.²⁶ Although the dislodging of the G-tube or J-tube was an inconvenience for Petitioner who had to clean soiled clothing and make occasional trips to the hospital for the J-tube to be reinserted,²⁷ there was no evidence of educational harm to Student. Petitioner simply failed to offer any evidence that Student’s health and safety was jeopardized by the lack of a dedicated aide for the two-week period that Student attended school prior to his continued hospitalization since 10/01/11, or that a dedicated aide was necessary in order for Student to be able to benefit from special education services.

²² Finding #4.

²³ *Id.*

²⁴ Finding #7.

²⁵ Finding #6.

²⁶ Findings #2, #3.

²⁷ Finding #6.

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At the conclusion of Petitioner's case in chief, DCPS moved for a directed verdict on this issue, arguing that Petitioner failed to show that the removal of the dedicated aide was a violation of the IDEA and that there was educational harm. By analogy, Rule 50(a) of the Federal Rules of Civil Procedure allow the court to take a case away from the jury by entering a judgment if there is not sufficient evidence to raise a genuine factual controversy. *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 134 (2d Cir. 1999). The sufficiency of the evidence is an issue of law to be determined by the judge. *Lange v. Penn Mut. Life Ins. Co.*, 843 F.2d 1175, 1181 (9th Cir. 1988). The primary consideration is whether the evidence in the record could properly support a particular verdict. *Anderson v. Liberty Lobby, Inc.*, 377 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d (1986); *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 565 (1st Cir. 2003). The court must view all evidence in the light most favorable to the party opposing the motion without making credibility determinations or weighing the evidence. *Jackson v. State of Alabama State Tenure Com'n*, 405 F.3d 1276, 1281 (11th Cir. 2005); *This Is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2nd Cir. 1998); *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179, 1186 (1st Cir. 1996). And, a "mere scintilla" of evidence is not sufficient. *Filipovich v. K & R Exp. Systems, Inc.*, 391 F.3d 859, 863 (7th Cir. 2004); *DP Solutions, Inc. v. Rollins, Inc.*, 353 F.3d 421, 427 (5th Cir. 2003).

DCPS' motion for a directed verdict on this issue is denied because Petitioner did offer some evidence that a dedicated aide was necessary to monitor Student's G-tube/J-tube; i.e., that Student came home from school with the G-tube/S-tube dislodged after the dedicated aide was removed from Student's IEP and as a result, Student had to go to the hospital to have the G-tube/J-tube reinserted. Pursuant to 34 C.F.R. 300.34(b)(2)(ii), DCPS has a responsibility to monitor Student's G-tube/J-tube, and safety and health considerations fall squarely within the protections of the IDEA.

After weighing the evidence, the Hearing Officer determines that Petitioner failed to meet her burden of proof that the dedicated aide was essential to monitoring Student's G-tube/J-tube. The evidence revealed that after the removal of the dedicated aide, Student came home from school only once with the G-tube/J-tube dislodged. Although the incident resulted in a hospital trip,²⁸ there was no evidence of educational harm. One incident in a two week time period is not excessive given the nature and extent of Student's disabilities, the fact that Student rode the bus home without an aide, and the fact that the school disavowed all knowledge of the dislodged G-tube/J-tube.²⁹ Petitioner failed to show that DCPS had violated the IDEA by failing to include the services of a dedicated aide in Student's IEP.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's IEP during the 2009-2010 and 2010-2011 school years; specifically, by failing to provide the dedicated aide with the necessary training on G-tube feeding and monitoring, which resulted in health and safety risks to Student.

Petitioner offered credible evidence that G-tube/J-tube feeding and adjustments to the G-tube/J-tube were strictly within the purview of the nurse at school or other properly trained personnel, and that the dedicated aide was not one of those trained people. The dedicated aide refused to go near or touch anything associated with the G-tube/J-tube due to safety and health

²⁸ Finding #6.

²⁹ Findings #4, #7.

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risks to herself; she simply took Student to the nurse. Petitioner failed to offer any evidence that G-tube/J-tube feeding would be a task properly within the scope of the dedicated aide's duties. Petitioner also failed to offer any evidence on the type of training that would be necessary for a dedicated aide to perform G-tube/J-tube monitoring and/or maintenance and Petitioner failed to prove that the dedicated aide had not been properly trained.

DCPS' motion for a directed finding on this issue is GRANTED. Petitioner offered *no* evidence that would enable the Hearing Officer to conclude that DCPS had denied Student a FAPE by failing to provide the necessary G-tube/J-tube training to the dedicated aide during the previous two school years. Petitioner failed to meet her burden of proof.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with appropriate related services since September 2011; specifically, by reducing both Student's PT and OT services from 1 hour/week to 30 minutes/week without any current evaluative data³⁰ to support the reduction in services.

DCPS' motion for a directed finding on this issue is DENIED. In Petitioner's case in chief, Petitioner presented her own testimony that the impact of the reduction in OT and PT services was that Student had less physical mobility with the use of his legs, with rolling around and with hand over hand instruction. Petitioner testified that the more services that Student received, the more mobility tasks he was able to do and the better he was able to develop his skills.

There is no requirement under the IDEA that DCPS conduct a formal assessment prior to a reduction in related services. 34 C.F.R. 300.305 states that as part of a reevaluation, the IEP Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teacher and related service providers; and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine...in the case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; and in the case of a reevaluation of a child, whether the child continues to need special education and related services; and whether any additions or modifications to the special education and related services are needed to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

The evidence in the record was that the people who knew Student best in school; i.e., his teacher and his OT and PT providers, all believed that Student's progress had reached a plateau and that more services would not translate into more progress.³¹ The observations of the teacher and related service providers constituted reliable, informal evaluative data and served as the basis for the decision to reduce related services. Due to Student's multiple medical problems and disabilities, his non-verbal ability, his wheelchair bound status and his cognitive scores in the 4-5 month range, the observations of his service providers, rather than a formal assessment, would

³⁰The term "evaluative data" includes both formal and informal assessments.

³¹Finding #8.

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likely have been the most reliable indicators of Student's need for less or more services. Thus, Petitioner failed to prove that the decision to reduce services was made in the absence of objective evaluative data. Petitioner failed to prove that DCPS committed a procedural violation of the IDEA.

Not only did Petitioner fail to show that the reduction in OT and PT services was inappropriate, Petitioner by her own admission, stated that the two week time period from 09/14/11 to 10/01/11, when Student received 30 minutes/week of OT and PT services instead of 1 hour/week of each service, was too short a time frame to gauge the impact of the reduction in services.³² Thus, Petitioner also failed to show any evidence of educational harm.

After weighing the evidence, the Hearing Officer determines that Petitioner failed to meet her burden of proof on this issue. There was insufficient evidence in the record to support a finding that Student had been denied a FAPE due to the reduction of OT and PT services.

ORDER

The complaint is **DISMISSED** with prejudice. Petitioner failed to meet her burden of proof on all of the issues presented.

All relief requested by Petitioner is **DENIED**.

IT IS SO ORDERED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state 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 Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: December 18, 2011

/s/ Virginia A. Dietrich
Hearing Officer

³² Finding #8.