**DISTRICT OF COLUMBIA**
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

STUDENT HEARING OFFICE
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| PETITIONER, on behalf of [STUDENT],[1] | Date Issued: July 1, 2011 |
| Petitioner, | Hearing Officer: Peter B. Vaden |
| v | Case No: |
| DISTRICT OF COLUMBIA PUBLIC SCHOOLS, | Hearing Date: June 24, 2011 |
| Respondent. | Student Hearing Office, Room 2006 Washington, D.C. |

# HEARING OFFICER DETERMINATION

## INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENT (the "Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, Parent alleges that DCPS failed in its Child Find obligation to timely evaluate Student for special education eligibility, failed to develop an adequate Individualized Education Program ("IEP") and failed to implement Student's IEP.

[1] Personal identification information is provided in Appendix A.

Student, an AGE adolescent, is a resident of the District of Columbia. He is eligible for special education services under the primary disability, Specific Learning Disability ("SLD"). The Parent's Due Process Complaint, filed on May 2, 2011, named DCPS as respondent.[2] The undersigned Hearing Officer was appointed on May 4, 2011. The parties met for a resolution session on May 20, 2011 and agreed that no agreement was possible. On June 13, 2011, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day timeline for issuance of this HOD started on May 21, 2011.

The due process hearing was held before the undersigned Impartial Hearing Officer on June 24, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Parent and Student appeared in person and were represented by counsel. Respondent DCPS was represented by counsel.

The Parent testified and called as witness EDUCATIONAL ADVOCATE. DCPS called as witnesses PROGRAM DIRECTOR and SPED TEACHER. Parent's Exhibits P-1 through P-15 were admitted into evidence. DCPS's objections to Exhibits P-2, P-10 and P-12 were overruled. DCPS's Exhibits R-1 through R-4 and R-6 through R-13 were admitted without objection.[3]

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[2] Student attends District Charter, a public charter school which has elected to have DCPS serve as its local education agency (LEA) for purposes of the IDEA. *See* D.C. Regs. tit. 5-E, § 3019.2.

[3] No Exhibit R-5 was offered.

## JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

## ISSUES AND RELIEF SOUGHT

- Whether DCPS failed to timely identify Student as a child with a disability in violation of the Child Find requirements;
- Whether DCPS failed to evaluate Student in all areas of suspected disabilities;
- Whether DISTRICT CHARTER'S February 24, 2011 IEP fails to meet the requirements of the IDEA; and
- Whether DCPS failed to implement the February 24, 2011 IEP.

Parent requests that DCPS be ordered to update and revise Student's IEP and that Student be provided compensatory education relief.

## FINDINGS OF FACT

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

1. Student is an Age resident of the District of Columbia. Testimony of Parent.

2. Parent enrolled Student in District Charter at the beginning of the 2008-2009 school year. Testimony of Parent. Student is currently in the GRADE at District Charter. Exhibit R-2.

3. When Student was in 3rd Grade, Parent elected to hold Student back a year because she did not think he was prepared to advance to 4th Grade. At the time, she asked school staff whether Student should be tested. She was informed that maybe Student needed to work harder. Testimony of Parent.

4. When Student was in middle school, Parent became concerned by Student's "constant suspensions" and difficulties in math and reading. She asked school staff if Student had any issues and whether he could get special help. She was informed that Student needed to study and concentrate more. Testimony of Parent.

5. Student was retained in Grade at District Charter for the 2009-2010 and 2010-2011 school years. Testimony of Parent.

6. At the end of the 2008-2009 school year, Parent spoke to the District Charter DEAN OF STUDENTS about Student's behavior problems and low grades. The dean responded that District Charter would work more with Student. Testimony of Parent.

7. At the end of the 2009-2010 school year, Parent asked Dean of Students to see if Student needed to be tested for special classes. The dean responded that Parent needed to do that on her own. Testimony of Parent.

8. Since enrolling at District Charter, Student has been involved in numerous disciplinary incidents. The incidents involved a variety of misconduct, including tardiness, refusals to serve detention, inappropriate dress, disrupting class and other infractions. Exhibit P-7.

9. On October 8, 2010, Parent wrote District Charter's Director of Special Education Services to request that Student be evaluated for special education services. In her letter, Parent stated that she was worried "because [Student's] grades are very poor and he shows signs of poor academic success." Exhibit P-13.

10. In February 2011, DCPS conducted a Psychological Evaluation and an Educational Evaluation of Student. Exhibit P-4. The EVALUATOR, a DCPS school psychologist reported that the test findings provided support for an educational classification

under the IDEA of Specific Learning Disability ("SLD").

11. Student's Multidisciplinary Team ("MDT") met at District Charter on February 24, 2011. Parent participated in the meeting. The MDT team determined that Student was eligible to receive special education services as a student with a learning disability ("LD") in reading comprehension and math problem solving. Exhibit R-6.

12. Student's February 24, 2011 IEP provides 5 hours per week of Specialized Instruction in reading, in the general education setting, and 45 minutes per week of Behavioral Support Services (counseling). Exhibit R-2.

13. Parent signed the February 24, 2011 IEP to evince that she agreed with its content. Exhibit R-2.

14. In May 2011, following a resolution meeting between DCPS and Parent, DCPS declined to make a settlement offer. DCPS did issue authorizations for Parent to obtain Independent Educational Evaluations of Student, at DCPS expense, for a vocational assessment and an Attention Deficit Hyperactivity Disorder ("ADHD") assessment. Exhibit R-11. DCPS also authorized Student to obtain 78 hours of independent tutoring, at DCPS expense, as compensatory education services. Exhibit R-12.

## CONCLUSIONS OF LAW

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

## DISCUSSION

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Parent in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel.*

*Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

1. DID DCPS FAIL TO COMPLY WITH ITS CHILD FIND OBLIGATIONS?

Parent alleges that DCPS failed to comply with its "Child Find" obligations by not evaluating Student for special education eligibility until Parent submitted a written request in October 2010. The IDEA requires LEAs to have a comprehensive Child Find system to ensure that all children who are in need of early intervention or special education services are located, identified, and referred appropriately. *See* 20 U.S.C. § 1412(a)(3). Child Find is DCPS' affirmative obligation under the IDEA: "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process. Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008).

The Child Find issue in this case is <u>when</u> should Student have been identified as a potential candidate special education services. Child Find duty is triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability. *Dep't of Educ, State of Hawaii v. Cari Roe S.*, 158 F.Supp.2d 1190, 1194 (D.Haw.2001); *see C.G. v. Five Town Cmty. Sch. Dist, No. 05-237-P-S*, 2007 WL 494994, at *25 (D.Me. Feb.12, 2007); *Kanongata'a v. Washington Interscholastic Activities Ass'n, No. C05-1956C*, 2006 WL 1727891, at *20 (W.D.Wash. Jun.20, 2006). *El Paso Indep. School Dist. v. Richard R.*, 567 F.Supp.2d 918, 950 (W.D. Tex., 2008). Parent contends that DCPS was put on notice that Student was a potential candidate for services as early as the end of 2008-2009 school year, when Parent spoke to the District Charter Dean of Students about Student's behavior problems and low grades. I disagree. A parent's concern

about her child's behavior problems and low grades is not enough to cause the LEA to suspect an IDEA disability or that special education services may be needed to address that disability. Moreover, Student's frequent disciplinary incidents mostly involved relatively insignificant infractions which would not give rise to reason to suspect a disability. However, DCPS did not rebut Parent's testimony that at the end of the 2009-2010 school year, she asked Dean of Students to see if Student needed to be tested for special classes. Once the Parent has requested the initial evaluation, the IDEA mandates that the LEA conduct "a full and individual initial evaluation." 20 U.S.C. § 1414(a)(1). DCPS must conduct the initial evaluations "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." D.C. Code § 38-2561.02(a). *Long v. District of Columbia*, Civil Action No. 09-2130, (D.D.C. March 23, 2011). In this case, DCPS did not begin Student's evaluations until February 2011. I find that DCPS's failure to conduct an initial eligibility evaluation, when requested by Parent at the end of the 2009-2010 school year, was a denial of FAPE. *See, e.g. District of Columbia v. Abramson*, 493 F.Supp.2d 80, 86 (D.D.C. 2007). Parent prevails on this issue.

2. DID DCPS FAIL TO EVALUATE STUDENT IN ALL AREAS OF SUSPECTED DISABILITIES?

The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. Office of Special Education and Rehabilitative Services, U.S. Department of Education, Analysis of Comments and Changes, 71 Fed. Reg. 46643 (2006). In February 2010, after receiving Parent's written request, DCPS conducted an educational evaluation and a psychological evaluation of Student. In the psychological evaluation report, Evaluator reported, "there is insufficient

documented evidence to meet the [federal guidelines] criteria for the characteristics of children diagnosed with ADHD. Therefore, at this time based on the available documented data the test findings do not provide support for an educational classification under IDEA 2004 of Other Health Impairment [ADHD]." Exhibit R-5. Parent misreads this statement to be a call for additional ADHD testing. *See* Complaint for Due Process, ¶¶ 20-23. In fact, Evaluator clearly determined that the criteria for classifying Student with an OHI-ADHD disability were not met. Therefore, to the extent that OHI-ADHD was a suspected disability, DCPS complied with its obligation to assess Student for this condition. While Parent may request an Independent Educational Evaluation ("IEE") if she disagrees with the psychological evaluation,[4] her contention that DCPS was obligated to further evaluate Student for ADHD is incorrect.[5] DCPS prevails on this issue.

3. DID DISTRICT CHARTER'S FEBRUARY 24, 2011 IEP FAIL TO MEET THE REQUIREMENTS OF THE IDEA?

Parent contends that the February 24, 2011 IEP is inadequate because it provides Student insufficient hours and an inappropriate setting for specialized instruction, inappropriate Present Levels of Performance and Annual Goals and an inappropriate post-secondary transition plan. Under the U.S. Supreme Court's decision in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Hearing Officer must address two questions that are aimed at DCPS's paralleling responsibilities to comply with the procedural and substantive requirements of the IDEA: First, has the State complied with the

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[4] A parent may have a right to an independent education evaluation ("IEE") at public expenses if she disagrees with an evaluation obtained by the LEA. 34 CFR § 300.502(b)(1). If a parent requests an IEE, the LEA must either file a due process complaint to show that its evaluation is appropriate or ensure that an IEE is provided at public expense. 34 CFR § 300.502(b)(2).

[5] On May 19, 2011, DCPS authorized Parent to obtain, at DCPS expense, an independent ADHD assessment.

procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Rowley*, 458 U.S. at 206-07, 102 S.Ct. 3034. *See, also, e.g., Suggs v. District of Columbia*, 679 F. Supp.2d 43, 47-48 (D.D.C. 2010). For the reasons set forth below, I find that the February 24, 2011 IEP is wholly inadequate and must be redrafted.

Present Level of Performance and Annual Goals

The IDEA mandates that an IEP shall include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (*i.e.*, the same curriculum as for nondisabled children). 34 C.F.R. § 300.320(a) (1). Every IEP shall include a statement about both the child's "academic achievement" and "functional performance." Analysis of Comments and Changes, *supra,* 71 Fed. Reg. 46662. The statement of a child's present levels of performance shall directly correspond with the requirement that the IEP include measurable annual goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. *Id.*

Parent's Educational Advocate opined that the IEP's Present Level of Educational Performance ("PLEP") sections in mathematics and reading do not provide sufficient data to tell the reader "where child is." For mathematics, I agree. Student's IEP recites that he is currently in 3rd year of Algebra I and that "he has a very good grasp on the subject matter." For "Needs", the IEP states that Student "would benefit from a co-taught class in math." This statement sheds no light at all on how Student's SLD disability affects his involvement and progress in the general education curriculum and does not correspond with the IEP's very specific annual goals for math. (For reading, the PLEP statement recites that Student is a bright student who at times

rushes through his reading; reading for answers not comprehension. The Needs statement states that Student would benefit from basic reading strategies, focusing on ones that teach reading comprehension. I find that this information is sufficient to describe how Student's disability affects his involvement and progress in the general education curriculum.)

Educational Advocate also criticized the IEP baseline data for both mathematics and reading. However, the IDEA does not explicitly mandate such baseline data. *See* 20 U.S.C. § 1414(d)(1)(A); *Lathrop R-II Sch. Dist. v. Gray, 09-3428* (8th Cir. July 2, 2010) (Where IEP contained detailed present level statements and measurable goals, lack of baseline data not a procedural deficiency.)

Special Education and Related Services

For Special Education Services, the IEP states that Student will be provided 5 hours per week of "Reading" service in the General Education classroom. Neither the IEP nor the IEP meeting notes specify or describe what type of specialized instruction services that Student would be provided under the IEP. *See N.S. v. Dist. of Columbia*, 709 F. Supp. 2d 57, 70 (D.D.C. 2010) (IEP must be specific enough to allow parents to understand what services will be provided and make a determination about whether the proposed placement is adequate.) Not even SPED Teacher knew what services Student was supposed to receive under the IEP. (Student was on SPED Teacher's case load.) SPED Teacher testified that all five hours of instruction were to be provided in mathematics. His testimony is obviously inconsistent with the IEP, and if correct, Student would have received no special education services in reading, where Student also had a learning disorder. I find that the IEP Special Education Services section is insufficiently detailed to describe the type of specialized instruction that Student is to be provided, and that the specified services are inappropriate because they fail to address Student's

needs in mathematics.[6]

Setting for Special Education Services

Addressing the provision of services to Student in the general education setting at District Charter, Educational Advocate opined that Student would "do better" in a smaller class setting. The IEP Team is not required to provide a setting where Student would do better. The IDEA's guarantee of a FAPE is that of a "basic floor of opportunity . . . [that] consists of access to specialized instruction and related services which are individually designed to provide education benefit to the handicapped child." *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034. There is no requirement for a state to provide services to maximize each child's potential, *id.* at 198, 102 S.Ct. 3034, nor must the FAPE "be designed according to the parent's desires." *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 45 (D.D.C., 2006) (additional citations omitted.) In this case, even if Student might do better in a smaller class setting, Parent has not met her burden of establishing that Student could not receive educational benefit if his special education instruction is provided in the general education setting.

Transition Plan

An IEP transition plan must contain:

(1) Appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 CFR § 300.320(b). Educational Advocate opined that the Transition Plan in Student's IEP is

[6] Counsel for Parent represented in argument that Parent agreed fully with the February 24, 2011 IEP's Emotional, Social, and Behavioral Development Goals and Behavioral Support Services.

inadequate because the Independent Living goal deals with employment, not independent living, and contains no baseline. I agree. The Annual Goal for Independent Living in the IEP is, "[Student] will identify and research 3-5 jobs in the food service industry that he is interested in." As with the rest of the IEP, the adequacy of the transition plan is judged by whether the plan is reasonably calculated to enable the child to receive educational benefits. *Rowley*, *supra*, 458 U.S. at 206-07. A transition plan which substitutes an employment goal for Independent Living goals is inadequate and does not meet the requirements of 34 CFR § 300.320(b). (As stated above regarding the PLEP, the lack of baseline data is not necessarily a deficiency.)

The U.S. Department of Education holds that the IEP should be the "cornerstone" of a quality education for each child with a disability[7]. An IEP, with the many deficiencies of the District Charter IEP, is no cornerstone and it clearly is not reasonably calculated to provide the educational benefits which the IDEA envisions. This IEP must be rewritten. The Parent prevails on this issue.

4. DID DCPS FAIL TO IMPLEMENT THE FEBRUARY 24, 2011 IEP?

In her Complaint for Due Process, Parent alleges that since the IEP was developed, Student did not receive any specialized instruction and received only two counseling sessions. Unfortunately, the evidence in this case does not establish what services Student has, or has not, received under the IEP. At the due process hearing, Parent testified that she asked Student to keep a journal of the services he had received, but Student has not provided that to her. Student did not testify. SPED Teacher testified that he was providing special education services to Student in the World History class, both with in class support of reading and writing and pull-out

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[7] Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Guide to the Individualized Education Program*, July 2000

services. A March 31, 2011 service tracker, which covers only the month of March, Exhibit P-6, indicates that Student attended two 45 minute counseling sessions in March. One session was missed due to Student's unavailability. This document does not establish that DCPS provided only two counseling sessions after February 24, 2011. The Parent must carry the burden of proof to establish her failure to implement claim, and in this case she has not met her burden. DCPS prevails on this issue.

## REMEDY

In this determination, I have found that DCPS denied Student a FAPE by not conducting Student's eligibility evaluation, when requested by Parent at the end of the 2009-2010 school year, and that District Charter's February 24, 2011 IEP was not reasonably calculated to provide educational benefits to Student. DCPS will be required to promptly reconvene Student's IEP team to develop a new IEP that conforms to the requirements of the IDEA. In addition, Parent seeks an award of compensatory education. "Compensatory education is, as the term suggests, educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA." *Wilson v. District of Columbia*, 2011 WL 971503, (D.D.C. March 18, 2011) (*citing Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education is designed "to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid*, 401 F.3d at 518. Denial of a FAPE is a prerequisite to an award of compensatory services. *Id. Walker v. District of Columbia*, Civil Action No. 10-506 (D.D.C. May 20, 2011).

It is undisputed that Student is eligible for special education services. Therefore, If DCPS had evaluated Student when requested by Parent at the end of the 2009-2010 school year, Student's IEP should have been in place for the beginning of the fall 2010 school term -- some

six months before the February 24, 2011 IEP was developed. Educational Consultant opined that 200-225 hours of independent tutoring in Algebra and English would be a reasonable compensatory award to place Student where he would have been had he been evaluated earlier. However, her opinion assumed that Student missed 1 ½ school years of special education services, based upon Parent's contention that Student should have been found eligible at the end of the 2008-2009 school year. I have found that Student missed approximately six months of special education services due to DCPS's delay in conducting eligibility evaluations. I find therefore, that the tutoring award recommended by Educational Consultant should be reduced by two thirds resulting in an award of 75 hours of compensatory tutoring. Following the resolution session in this case, DCPS authorized 78 hours of independent tutoring as compensatory education services for Student. I find that the 78 hours of tutoring authorized by DCPS reasonably suffices to place Student in the position he would have been if he had been evaluated for special education services and found eligible before the beginning of the 2010-2011 school year. *Cf. Hogan v. Fairfax County School Bd.*, 645 F.Supp.2d 554, 575 (E.D. Va., 2009) (Consideration of LEA's efforts to strengthen instruction in the wake of loss of FAPE.) I therefore decline to order additional tutoring. Educational Consultant also recommended that DCPS be ordered to enroll Student in five after-school "Credit Recovery" courses, to make up credit for classes Student has failed at District Charter. The evidence does not establish a correlation between the classes which Student failed and DCPS's denial of FAPE. Moreover, Credit Recovery courses are only available to Students who attained grades of 60-69 in failed classes and are available to all grade-qualified DCPS high school students. If Student attained the requisite grades, he should be automatically eligible to enroll in the relevant Credit Recovery classes. If not, Student will have to retake the classes. Testimony of Program Director. Lastly,

Educational Consultant recommended that DCPS be ordered to provide a laptop computer to Student to enable him to take on-line Credit Recovery classes and to help him to keep track of his written school work. I find that the evidence does not establish that the Student needs a laptop computer as a compensatory remedy "to elevate him to the position he would have occupied absent the school district's failures" to provide FAPE in this case. *See Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (citations omitted.) The requested relief is denied.

## SUMMARY

In summary, I find that Parent has established that DCPS denied Student a FAPE by not evaluating him and finding him eligible for special education services before the beginning of the 2010-2011 school year and by not developing an IEP reasonably calculated to provide Student educational benefits. I find that DCPS's provision of 78 hours of independent tutoring, already authorized, is a reasonable and adequate measure to compensate Student for DCPS's denial of FAPE.

## ORDER

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

1. Within 10 business days of the date of this determination, DCPS shall reconvene Student's MDT/IEP Team to develop, *de novo,* a replacement IEP for Student, adhering fully to the requirements of the IDEA and 34 CFR §§ 320-328 and 300.43 (Transition services). Pursuant to 34 CFR § 300.321(a)(4), the MDT/IEP team shall include, *inter alia*, a representative of the public agency who--

   (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

   (ii) Is knowledgeable about the general education curriculum; and

(iii) Is knowledgeable about the availability of resources of the public agency.

The MDT/IEP Teams shall consider, in addition to other student records and evaluations, the June 13, 2011 Vocational Evaluation of Student and any other evaluations obtained by Parent since the February 28, 2011 IEP was developed.

2. All other relief requested by the Parent in her Due Process Complaint is denied.

Date: July 1, 2011

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

**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).