

**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,)	
)	
)	Date Issued: April 2, 2012
Petitioner,)	
)	Hearing Officer: Virginia A. Dietrich
v.)	
)	
District of Columbia Public Schools)	
)	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother ("Parent") of -year old Student, filed a due process complaint notice on January 24, 2012 alleging that the District of Columbia Public Schools ("DCPS") had denied Student a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that DCPS had changed Student's educational placement when it changed Student's location of services from a nonpublic school to a public school, that DCPS had predetermined Student's educational placement and changed it without involving any school personnel who were knowledgeable about Student, and that DCPS' failure to provide Petitioner with sufficient information about the new location of services denied Petitioner meaningful participation in the educational placement decision.

DCPS asserted that when it issued a Prior Written Notice indicating that Student would attend a new school, DCPS did not change Student's educational placement; it merely executed a change in location where the Individualized Education Plan ("IEP") would be implemented, which was an administrative decision strictly within its purview.

¹ Personal identification information is provided in Appendix A.

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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 01/24/12. This Hearing Officer was assigned to the case on 01/25/12.

Neither Petitioner nor DCPS waived the resolution meeting. A resolution meeting took place on 02/27/12 at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The resolution period ended on 02/23/12, the 45-day timeline to issue a final decision began on 02/24/12 and the final decision was due on 04/08/12.

The due process hearing was a closed hearing that took place on 03/28/12.

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

Petitioner presented five witnesses: Petitioner; Student; Founding President, CEO and Head of School at School; IEP Coordinator and Acting Head of School at School; and the counseling psychologist and director of the crisis center at School who qualified as an expert in counseling psychology. DCPS presented one witness: DCPS student progress monitor.

Petitioner's disclosures dated 03/21/12, contained a witness list and Exhibits P-1 through P-22. Exhibits P-9, P-22, P-17, P-18, P-19, and P-20 were not admitted into evidence. DCPS filed written objections to those exhibits and the Hearing Officer ruled that the exhibits were not probative of any fact relevant to the determination of any of the issues in the complaint. The remainder of Petitioner's exhibits were admitted into evidence without objection.

DCPS' disclosures dated 03/21/12, containing a witness list and Exhibits R-1 through R-13, were admitted into evidence without objection.

Parties agreed upon the following stipulation of fact:

#1. At the time the due process complaint was filed, Student was attending Monroe School, a nonpublic day school, at public expense.

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

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Whether DCPS changed Student's educational placement when DCPS changed the location of services to _____ in that (a) the location at _____ was inconsistent with Student's IEP because Student has a Learning Disability and no social/emotional problems, and _____ provides services only for students with an Emotional Disturbance, (b) Student might not be able to earn Carnegie credits towards his diploma at _____ (c) _____ offers computer based instruction instead of highly qualified instructors, and (d) the staff at _____ do not have the requisite qualifications to provide Student with special education services.

Whether DCPS predetermined the change of placement to _____ and issued a Prior Written Notice to _____ without a team decision that included persons who were knowledgeable about Student.

Whether DCPS denied Petitioner meaningful participation in the placement decision at the IEP Team meeting on 12/06/11, by not providing Petitioner with sufficient information about _____ as it related to Student's specific educational needs and the implementation of Student's IEP.

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, that DCPS revoke the Prior Written Notice to _____ and that DCPS continue to fund Student at _____ School.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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. Student, age _____ resides in the District of Columbia and receives special education services as a child with a disability. Since the beginning of the 2010-2011 school year, Student has attended _____ School, having been placed and funded there by DCPS.² _____ School is a separate, nonpublic day school that provides services to students with disability classifications of mild Emotional Disturbance, Multiple Disabilities, Other Health Impairment and Specific Learning Disabilities; however, most of the attending students have a Specific Learning Disability.³ _____ School utilizes computer-based instruction in all content areas for credit recovery.⁴ At _____ School, Student received instruction via a computer as part of his writing class, and instruction solely via a computer for the past several weeks in his French class because there was no French teacher on staff.⁵

² P-1.

³ Stipulation #1, CEO and former head of school at _____ School.

⁴ CEO and former head of school at _____ School.

⁵ Student, CEO and former head of school at _____ School.

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#2. At an annual IEP review meeting on 12/06/11, Student's IEP was reviewed and finalized to reflect a disability classification of Specific Learning Disability and 27.5 hours/week of specialized instruction in a full-time outside of general education setting, with specialized instruction in all academic areas. Classroom accommodations included the reading of test questions in specific academic areas, repetition of directions, simplification of oral directions, a location with minimal distractions, small group testing, testing administered over several days, writing in test books, and the use of calculators. The IEP indicated that Student was projected to graduate from high school with a diploma.⁶ Petitioner and the following staff from School participated in the meeting: principal, IEP coordinator, counseling director and two special education teachers. None of the IEP Team members disagreed with the type and level of services or that the Least Restrictive Environment ("LRE") for Student was a setting outside of general education.⁷

#3. On 12/06/11, DCPS came to the IEP Team meeting with the intent of changing Student's location of services and at the meeting, DCPS proposed _____ as the new location of services beginning on 01/23/12.⁸ No other location of services options were presented by DCPS.⁹ DCPS provided Petitioner with some information about _____ i.e., that _____ was co-located within _____ School, a public high school, and the composition of the staffing of each class; however, no specific information was provided about the particular classroom that Student would be placed in, or the disability classifications or cognitive levels of Student's proposed classmates. A representative from _____ did not attend the meeting.¹⁰ Petitioner's specific questions about _____ went unanswered by DCPS and Petitioner was invited to take a tour of _____ which she agreed to do. On that same day, DCPS issued a Prior Written Notice that (1) changed Student's location of services to _____ and (2) indicated that Student's IEP could be implemented at _____

#4. DCPS' rationale for the change in location of services was that DCPS wanted to make sure that Student received a FAPE and received the credits necessary for Student to be awarded a high school diploma. Through a course of investigation by the DCPS student progress monitor at _____ School, it became known to DCPS that _____ School could not implement Student's IEP. In fact, _____ School only had one teacher certified in the District of Columbia to teach special education and only one teacher certified in the District of Columbia to teach the content area in all academic areas, and classes were not co-taught such that the special education teacher and the content area teacher presented the academic lesson together.¹² Therefore, Student was not receiving the services as was required by his IEP since the District of Columbia required that teachers be dually certified both in special education and in the content area.

#5. The decision to relocate Student to _____ was based on the services and setting required by Student's IEP as well as three observations of Student's functional and behavioral performance in his classrooms at _____ School, where it was observed that Student was not a

⁶ P-2.

⁷ P-3, IEP Coordinator at _____ School.

⁸ P-3, DCPS student progress monitor.

⁹ DCPS Student progress monitor, Petitioner.

¹⁰ P-3, DCPS student progress monitor.

¹¹ R-4.

¹² DCPS student progress monitor, CEO and former head of school at _____ School.

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behavior problem, Student did not require a lot of support in the classroom, Student could work independently on a computer, Student could initiate tasks, and Student was focused and didn't need help every step of the way.¹³

#6. consists of classrooms co-located in the physical building of a public high school, where Student will receive all specialized instruction with disabled peers; essentially a school within a school.¹⁴ Even though was originally envisioned to service students with an Emotional Disturbance, ultimately, was set up with non-categorical classrooms; i.e., classrooms that could service students with various disability classifications.¹⁵ The student to teacher ratio in each classroom is 4:1, with adult staffing that consists of a behavior technician, an instructional aide and a special education teacher. Although the classrooms have the capacity for 12, only 5-6 students were observed in each class.¹⁶

#7. Student's IEP can be implemented at as follows: (1) a certified special education teacher will provide modified instructional materials and will provide an introduction to the material, (2) the actual course or curriculum content will be provided by a computer-based program that had been approved by the Office of the State Superintendent of Education ("OSSE"), (3) Student will be allowed extra time on tasks, can ask questions of the special education teacher at any time, will receive follow-up by the special education teacher about completed work, (4) the special education teacher will evaluate progress and provide reinforcement material, and (5) instruction will be provided with all disabled peers. At Student will be placed in a non-categorical classroom with students of various disabilities, i.e., Emotional Disturbance, Other Health Impairment, Specific Learning Disability and Speech Language Impairment, but the majority of Student's classmates will have Specific Learning Disabilities.¹⁷

#8. Petitioner toured on 12/13/11 and on that same day, sent correspondence to DCPS with specific questions about Student's classes and class schedule, the disability and achievement levels of Student's proposed classmates and about the credentials of the teachers assigned to the classroom that Student would be placed in.¹⁸ From that day forward, Petitioner continued to seek clarification and information from DCPS on the nature and scope of the program at ⁹ Petitioner opposed as the location of services.²⁰

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:

¹³ DCPS student progress monitor.

¹⁴ DCPS-8, P-7.

¹⁵ P-16, P-21, DCPS student progress monitor.

¹⁶ DCPS student progress monitor.

¹⁷ DCPS student progress monitor.

¹⁸ P-5.

¹⁹ P-6, P-7, P-9.

²⁰ Petitioner.

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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.

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).

"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).

The first issue to be determined is whether DCPS changed Student's educational placement when DCPS changed the location of services to _____ in that (a) the location at _____ was inconsistent with Student's IEP because Student has a Learning Disability and no social/emotional problems, and _____ provides services only for students with an Emotional Disturbance, (b) Student might not be able to earn Carnegie credits towards his diploma at _____ (c) _____ offers computer based instruction instead of highly qualified instructors, and (d) the staff at _____ do not have the requisite qualifications to provide Student with special education services.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; (2) is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA that mandate that to the maximum extent possible, disabled children are to be educated with their nondisabled peers and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; (3) is determined annually; (4) is based on the child's IEP; and (5) is as close as possible to the child's home. 34 C.F.R. 300.114, 34 C.F.R. 300.116.

As articulated in the Office of Special Education Programs ("OSEP") *Letter to Fisher*, 21 IDELR 992 (1994), the "educational placement" has three components: (1) the education program set out in the student's IEP, (2) the option on the continuum in which the student's IEP is to be implemented, and (3) the school or facility selected to implement the student's IEP. Once the placement team decides a student's educational placement, the assignment of a particular classroom or teacher can be an administrative determination, provided that the determination is consistent with the placement team's decision.

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Over the years, case law has clarified the meaning of "educational placement." A placement is not a physical location but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992). "Educational placement" means educational program, not the particular institution where that program is implemented." *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. A recent ruling in this jurisdiction firmly establishes that the educational placement is the child's IEP, and the school designated by the public agency to implement the child's IEP is the location of services. *Johnson v. District of Columbia*, 2012 L 883125 (D.C.C., March 16, 2012). While the IDEA requires parental participation in educational placement decisions, it does not mandate that parents be involved with site selection. See *White v. Ascension Parish School Board*. Therefore, a change in site location is an administrative decision within the discretion of DCPS.

The term "change in educational placement" is not defined in the IDEA. Whether new placements proposed for students as a result of the anticipated discontinuation of a school would constitute a "change in educational placement" for the students involved would have to be determined on a case-by-case basis. *Letter to Fisher*, 21 IDELR 992 (1994). A change in placement occurs when there is a substantial change in the student's educational program. 71 Fed. Reg. 46,588 (2006).

In determining whether a "change in educational placement" has occurred, the public agency responsible for educating the child must determine whether the proposed change would substantially or materially alter the child's educational program. In making such a determination, the effect of the change in location on the following factors must be examined: (1) whether the educational program set out in the child's IEP has been revised; (2) whether the child will be able to be educated with nondisabled children to the same extent; (3) whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and (4) whether the new placement option is the same option on the continuum of alternative placements. See *Letter to Fisher*.

"The inquiry becomes more complex when no changes from the prior year's IEP are proposed, and the option on the continuum remains the same, but the District proposes to change only the location, i.e., the school or facility located within the District in which the student's IEP and option on the continuum will be implemented. If the District determines, based on the student's individual needs, that the student should have the same educational program and opportunities for interaction with his or her nondisabled peers as he or she had during the placement at the previous school, the change in location alone would not constitute a change in educational placement. This is because under these circumstances, the change in location alone would not substantially or materially alter the child's educational program." *Id.*

Petitioner failed to meet her burden of proof on this issue. Student's educational program was determined to be the composite of 27.5 hours/week of full-time specialized instruction in all academic areas (the program) to be provided outside of general education (the setting). was the location of services. Parties stipulated that there were no substantive changes to Student's IEP at the 12/06/11 IEP Team meeting and there was no evidence in the record that Student's IEP changed after 12/06/11. Therefore, Student's educational program did not change.

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The placement option along the continuum also did not change, as Student was to be provided with all of his specialized instruction with nondisabled peers at [redacted]. What did change was the ability of Student to mingle with nondisabled peers. Unlike [redacted] School where Student did not interact on a daily basis with nondisabled peers in the physical school building, [redacted] afforded Student the daily opportunity to interact with nondisabled peers, but only to the extent of walking together in the school entrance doors or hallways, during which time no academic instruction would be taking place. The ability of Student to interact with nondisabled peers was not a material change in Student's educational program, as he would receive all specialized instruction with nondisabled peers. The interaction of Student with nondisabled peers at [redacted] would be the same level of interaction that Student would have with his friends or peers in the community when walking to school; a dual peer physical presence accompanied by the opportunity for social interaction.

There was no evidence in the record about the nonacademic or extracurricular activities that were available at [redacted] so no comparison was made on that element of analysis. Considering all of the factors enumerated in *Letter to Fisher*, the Hearing Officer determines that there was no material change in Student's educational program.

A free appropriate public education or FAPE means special education and related services that are provided in conformity with an IEP and includes an appropriate school. 34 C.F.R. 300.17. "A public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement." 71 Fed. Reg. 46,588 (2006). Thus, the only remaining question is whether [redacted] can implement Student's IEP?

Petitioner failed to prove that [redacted] was an inappropriate location of services because it catered to children with an Emotional Disturbance and Student had a Specific Learning Disability. Although it was originally envisioned that [redacted] would service students with an Emotional Disturbance, per their contract with DCPS, [redacted] was designed to service children with various disabilities. Moreover, neither Student's IEP nor the IDEA require Student to receive instruction with students with the same disability classification. Although there was testimony from a psychology expert that Student would not fare well in a classroom with children with Emotional Disturbances who exhibited severe behavior problems, Petitioner failed to prove that the classroom or school environment that Student would attend at [redacted] would be populated with such students. On the contrary, there was credible evidence in the record from the only person who knew anything about the program other than what was published on the internet, that Student's classroom at [redacted] would be comprised predominantly of students with a Specific Learning Disability, which was the same disability classification as Student. Besides, [redacted] School, where Student was currently attending, serviced several students with disability classifications different from Student. There was no material difference between the two school environments with respect to exposure to students with different disability classifications; both [redacted] School and [redacted] predominately serviced student with a Specific Learning Disability.

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Petitioner also opposed content area computer based instruction in conjunction with the services of a special education teacher, i.e., the classroom learning methodology offered at

However, the evidence revealed that the classroom would be staffed with a certified special education teacher who could provide specialized instruction in conjunction with an OSSE approved content area computer program that all students would use to obtain credits towards a high school diploma. There was no evidence in the record that the special education teacher at was not qualified to provide Student with special education services. In contrast, School could not implement Student's IEP and ensure that Student received high school credits because the staffing at School was inadequate to provide specialized instruction in all academic areas as was required by Student's IEP. Moreover, Student received computer-based instruction at School as part of his writing class and solely as the basis of instruction in his French class for a short period of time, and Student was able to complete the assignments independently when using the computer at School. There was no material difference between the use of computer based instruction at either school. If anything, the use of the computer program at was superior because it also provided for specialized instruction by a special education teacher.

The Hearing Officer determines that Student's educational placement did not change when DCPS issued a Prior Written Notice to because there was no substantial or material alteration in Student's educational program. Petitioner failed to prove that a change in educational placement occurred. Petitioner also failed to prove that could not implement Student's IEP.

DCPS, as a local education agency, is responsible for providing Student with a free appropriate public education. 34 C.F.R. 300.1, 34 C.F.R. 300.17, 34 C.F.R. 300.101, 5 D.C.M.R. E-3000.1. To that end, DCPS is required to provide Student with specially designed instruction to meet Student's unique needs as defined by an IEP that is developed by an IEP Team that includes Petitioner. 34 C.F.R. 300.320, 34 C.F.R. 300.321, 34 C.F.R. 300.324.

In implementing the LRE requirements, the overriding rule in placement is that each child's placement must be determined on an individual basis, and may not be based on factors such as the category of disability, configuration of the service delivery system, availability of staff, or administrative convenience. Unless a child's IEP requires some other arrangement, the child must attend the school that he or she would attend if not disabled. 34 CFR § 300.114. In this case, Student's IEP did not specify that Student required a separate school in order for his IEP to be implemented.

The second issue to be determined is whether DCPS predetermined the change of placement to and issued a Prior Written Notice to without a team decision that included persons who were knowledgeable about Student.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons that includes the parent and persons knowledgeable about the child. 34 C.F.R. 300.116(a)(1).

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Petitioner failed to meet her burden of proof that DCPS violated the IDEA by failing to have persons knowledgeable about Student participate in the educational placement meeting. Petitioner, two special education teachers from School, the IEP Coordinator from School, the counseling director from School and the principal of School all participated in the IEP meeting on 12/06/11.

DCPS only predetermined the location of services. No other location options were offered at the IEP Team meeting on 12/06/11, but it was not necessary because DCPS has the sole discretion in determining the location of services as long as the location of services can implement Student's IEP. *See White v. Ascension Parish School Board*. Petitioner failed to prove that could not implement Student's IEP. Petitioner failed to meet her burden of proof that predetermination of the location of services was a violation of the IDEA or resulted in Student being denied a FAPE.

The third issue to be determined is whether DCPS denied Petitioner meaningful participation in the placement decision at the IEP Team meeting on 12/06/11, by not providing Petitioner with sufficient information about as it related to Student's specific educational needs and the implementation of Student's IEP.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons that includes the parent. 34 C.F.R. 300.116(a)(1).

Petitioner attended the 12/06/11 IEP meeting and at that time, Petitioner was provided with some information about by the DCPS student progress monitor and encouraged to take a tour of the school, which Petitioner did. However, the information provided at the meeting was not specific enough to satisfy Petitioner's questions about the class composition, etc., which in essence pertained to the ability of the school to implement Student's IEP. After a tour of the school, Petitioner was dissatisfied with the program and voiced her continued objections to the lack of information about as well as to as the location of services.

Under the IDEA, the parent is afforded the right to provide input to the educational placement decision; however, the parent is not afforded the right to summarily determine a specific placement. *K.L.A. by B.L. and R.A. v. Windham Southeast Supervisory Union*, 54 IDELR 112 (2010). In *K.L.A.*, the 2nd Circuit held that the specific location of services was a matter for the district to decide. The court explained that "educational placement" only encompasses the student's placement on the LRE continuum. Under the state regulations in effect at that time, the district had the exclusive right to decide the specific location of the student's services.

Petitioner was at the IEP Team meeting on 02/06/11, offered her input and agreed with the finalized IEP with respect to services and setting. That is all that Petitioner is entitled to under the IDEA; i.e., to be present and voice her opinion. There was no representative from at the meeting on 12/06/11 who could provide specific information about and that was unfortunate; however, it did not interfere with Petitioner's ability to determine the type and setting of services that Student should receive. The selection of constituted a

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change in the location of services, which was an administrative decision solely within the discretion of DCPS. Petitioner does not have a say in site location as long as the location is consistent with the educational services and setting. Subsequent to the meeting, Petitioner toured the school and was dissatisfied with it as a location of services. On this record, Petitioner failed to prove that _____ was not consistent with the services and setting prescribed by Student's IEP; i.e., Petitioner failed to prove that _____ could not implement Student's IEP. Petitioner failed to meet her burden of proof on this issue.

ORDER

The complaint is **DISMISSED** with prejudice. Petitioner failed to meet her burden of proof on any 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: April 2, 2012

/s/ Virginia A. Dietrich
Hearing Officer