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

Student Hearing Office  
1150 5<sup>th</sup> Street, S.E.  
Washington, DC 20003

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Through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: September 4, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Dates: August 16 and 25, 2010

Room: 6A

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**HEARING OFFICER DETERMINATION**

**BACKGROUND**

Student is a \_\_\_\_\_ year-old male, who has failed the \_\_\_\_\_ grade twice and is scheduled to repeat the \_\_\_\_\_ grade for the third time during school year ("SY") 2010/11.

On June 22, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to timely locate, identify, evaluate and determine eligibility for Student pursuant to its obligations under Child Find. As relief for the alleged violation of Child Find, Petitioner primarily sought an order for an IEP meeting so that DCPS can develop an IEP for Student and an award of compensatory education.

On July 7, 2010, DCPS filed its Response to the Complaint, in which it asserted that Student's attendance history and criminal activity have made him unavailable for learning, and also suggested that Student may be socially maladjusted. DCPS stated that it takes no position on Student's eligibility for specialized instruction and related services in light of an evaluation suggesting that Student may have learning issues, but DCPS noted that Student was not enrolled in a DCPS school and needed to be enrolled so that the eligibility process could begin.

Also on July 7, 2010, DCPS waived its right to a resolution session. As Petitioner waived its right to a resolution session in the Complaint, the 45-day timeline for this case began on July 8, 2010.

On July 16, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner continued to assert its Child Find claim. DCPS asserted that Student is not eligible for special education services, that he has been unavailable for learning, and that he is socially maladjusted. With respect to Petitioner's requested relief of an order for an IEP meeting, the hearing officer explained that it was Petitioner's obligation to present at the hearing sufficient evidence to permit the hearing officer to craft an initial IEP, if one was necessary. The hearing officer issued the Prehearing Order on July 21, 2010.

On July 21, 2010, Petitioner filed a Letter Motion for Continuance. On July 27, 2010, the hearing officer issued an Interim Order on Continuance Motion, which continued the due process hearings in this case to August 16 and 25, 2010.

By disclosure letter dated August 8, 2010, DCPS disclosed four documents (DCPS-1 through DCPS-4). By disclosure letter dated August 9, 2010, Petitioner disclosed twenty-nine documents (Petitioner's Exhibits 1 through 29).

The hearing officer convened the initial due process hearing on August 16, 2010.<sup>1</sup> The parties' disclosed documents were admitted into the record without objection. Thereafter, opening statements were received, Petitioner presented the testimony of two of its witnesses, and the hearing officer adjourned the hearing.

The hearing officer reconvened the due process hearing on August 25, 2010. After Petitioner presented the testimony of two additional witnesses and rested its case, DCPS declined to present witness testimony and rested its case as well. Therefore, the hearing officer received closing statements and brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### ISSUES

The issue to be determined is as follows:

1. Did DCPS violate its Child Find Obligation by failing to locate, identify, and evaluate Student?

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<sup>1</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

## 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. Although Student exhibited sporadic behavior problems in middle school, his real problems began in high school. Once he got to high school, Student began repeatedly skipping classes, getting suspended, and failing his classes. Student initially attended high school in Prince Georges County, Maryland. That school called Parent every day about Student's behavior problems until the school ultimately expelled Student in October 2008.<sup>2</sup>
2. After Student was expelled from his high school in Prince George's County, Parent enrolled Student in      grade at a DCPS high school. At the time of enrollment, Parent submitted the papers from Student's Prince George's County high school stating that Student had been expelled.<sup>3</sup>
3. Student began behaving poorly at the DCPS high school right from the start. Initially, Parent received telephone calls from the school because Student was skipping classes, and Parent would go up to the school to meet with the teacher so that Student could return to class. The school staff told Parent that they would put Student in some programs, but to Parent's knowledge that never took place. Student ultimately received two Ds and two Fs as his final grades for SY 2009/10, and he was retained in the 9th grade.<sup>4</sup>
4. Student returned to the DCPS school to repeat      grade for SY 2009/10, and he got into even more trouble than the year before. Parent received calls concerning more types of behavior problems, such as smoking cigarettes. A DCPS Discipline Report reveals that between August 24, 2009 and March 20, 2010, Student was suspended 7 times for infractions such as smoking, walking the halls, cutting class and being intoxicated on school property. Student was also charged with committing 6 separate violent crimes such as assault, threatening to do bodily harm, and robbery during SY 2009/10 as a result of incidents that occurred on his way to and from school, and in the vicinity of his DCPS school. Student's January 22, 2010 progress Report indicates that he received grades of F in all 4 classes he took during the 1<sup>st</sup> semester of SY 2009/10. At the end of the school year, Student was retained in 9<sup>th</sup> grade for the second time.<sup>5</sup>
5. A DCPS daily attendance report for Student reveals that between August 24, 2009 and March 19, 2010, Student was frequently either absent from school or tardy arriving at school. Parent was well aware of Student's repeated absences at his DCPS high school. Parent and his family tried to do things to make Student go to school. Parent had his mother and sister going to the area surrounding the high school to look for Student.

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<sup>2</sup> Testimony of Parent; *see* Petitioner's Exhibits 12, 15, 16.

<sup>3</sup> Testimony of Parent.

<sup>4</sup> Testimony of Parent; *see* Petitioner's Exhibit 22.

<sup>5</sup> Testimony of Parent; Petitioner's Exhibits 20, 23, 25.

When Parent's mother and sister would catch Student skipping school and take him back to school, the DCPS high school would let Student leave right back out of the school.<sup>6</sup>

6. Despite Student's ongoing increasing behavioral problems at his DCPS high school, DCPS did not take any actions to help Student during SY 2008/9 or SY 2009/10. DCPS was aware of Student's problems in the community during SY 2009/10 because of his probation officer's visits to Student's DCPS high school. The probation officer spoke to the attendance counselor, the guidance counselor, and the SEC at Student's DCPS high school. The probation officer also reviewed Student's academic and attendance records. Student's probation was unsuccessful, in that he repeatedly violated probation by getting rearrested and he ultimately was committed to the Department of Youth Rehabilitation Services.<sup>7</sup>
7. In May 2010, the Child Guidance Clinic of the DC Superior Court conducted a psychological and psychoeducational evaluation with assessment of risk violence of Student, which included the administration of, *inter alia*, the Wechsler Adult Intelligence Scale – Fourth Edition (“WAIS-IV”), the Wechsler Individual Achievement Test – Second Edition (“WIAT-II”), and the Millon Adolescent Clinical Inventory (“MACI”).

Student's performance on the WAIS-IV revealed that his overall cognitive abilities lie in the Borderline to Low Average range. More specifically, Student received a Full Scale IQ score of 78, which is in the Borderline range, his score on the Processing Speed Index was also in the Borderline range, and his scores on the Verbal Comprehension, Perceptual Reasoning, Working Memory and General Ability Indices were in the Low Average range.

Student's performance on the WIAT-II resulted in scores in the Borderline range in Reading, Mathematics, and Written Language, with age equivalents ranging from 9:8 to 11:4 on the reading subtests, 10:8 to 11:8 on the mathematics subtests, 11:0 to <12:0 on the written language subtests, and 11:4 on the listening comprehension subtest, which was part of the oral language portion of the assessment.

Student's performance on the MACI, together with the evaluator's knowledge of Student's personal history, led the evaluator to determine that Student's functioning seems to be guided by an overarching need and desire for approval and attention from others. However, it appears that Student lacks an adequately developed identity and sense of self, and he seems to struggle with feelings of low self-esteem, hopelessness, apathy, and low self-worth.

The evaluator also made the following DSM-IV diagnoses on Axis I: Depressive Disorder NOS (Atypical Depression, manifested in acting out behaviors and rooted in feelings of deprivation and deeply suppressed anger); Cannabis Dependence, with Psychological Dependence, Early Partial Remission, In a Controlled Environment; Disruptive Behavior NOS; Learning Disorder NOS (significant challenges in reading comprehension, math, and written expression); Neglect of Child (victim); and Physical Abuse of Child (victim).<sup>8</sup>

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<sup>6</sup> Petitioner's Exhibit 19; Testimony of Parent.

<sup>7</sup> Testimony of Parent; testimony of probation officer; *see* Petitioner's Exhibits 4, 25.

<sup>8</sup> Petitioner's Exhibit 24.

8. The fact that Student has Borderline range processing skills means that it would take him longer than his same age peers to perform tasks such as writing, taking in and processing information, and expressing ideas. The Borderline range processing skills, together with his cognitive weaknesses in verbal comprehension and perceptual reasoning, would result in Student having a hard time keeping up with same-age peers in school. Moreover, Student's academic testing revealed that he is 5 or more years behind his same age peers, with the result that he would not have success in a traditional classroom. Student's academic difficulties would be apparent to a teacher because any assignments he turned in would be inaccurate at best, and it is more likely that Student would not complete and turn in the work because he would know it was wrong, or he would not want to go to school or be in class, or he would disrupt class to distract from his academic difficulties when he is in class. Hence, Student's cognitive weaknesses would impact his functioning and his desire to function in school. Finally, the low self-esteem and depression revealed by Student's emotional testing would also manifest in behaviors such as skipping class, being late to class, acting out in class, and doing things to distract because he knows his academic functioning is not up to standard. Thus, the basic origin of Student's emotional problems is his cognitive deficiencies. Student's discipline and suspension records and grade reports, which show absences, suspensions, disruptions in class, teacher reports of low effort and not coming to class demonstrate that Student's emotional and cognitive issues have manifested in the classroom.<sup>9</sup>
9. Student's self reported during his May 2010 psychological testing that he only has acquaintances and does not have friends. This indicates that Student lacks the ability to trust and form trusting relationships, which would definitely impact his relationships with teachers, staff and his peers in school. Moreover, Student's depressive disorder impacts his ability to be present and motivated in school in terms of emotional functioning. The results of Student's cognitive, academic and emotional testing indicate that he is in need of specialized instruction in the areas of reading, written expression, and math, he needs extra time in school to perform academic tasks because of his Borderline processing skills, and he needs individual therapy, anger management and peer resistance skills, as well as extracurricular activities to help boost his self esteem. Student also needs vocational support to help prepare him for employment and prevent him from engaging in inappropriate behaviors to support himself and gain independence.<sup>10</sup>
10. Student's May 2010 test results, together with his social history and academic records, tend to demonstrate that he has suffered from disruptive behavior disorder stemming from his low cognitive function and depression since 2006, and consequently that he has needed individual therapy and educational support since 2006. Student's anger management issues are more recent and have likely been a problem since 2009, because Student's behavior has progressively gotten worse over time. In fact, Student's level of anger and degree of acting out, including the apathy, lack of motivation, low self-esteem and related behaviors that stem from his falling farther behind academically over time, would not be so entrenched now if he had begun receiving special education and related services back in 2006. Moreover, had Student been receiving behavioral/psychological

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<sup>9</sup> Testimony of clinical psychologist.

<sup>10</sup> Testimony of clinical psychologist.

services for the past two years, he would not have deteriorated as much in terms of his depression, mood disorder, and destructive behavior in the community. Instead, he would have stabilized.<sup>11</sup>

11. On June 15, 2010, a board certified psychiatrist issued a Psychiatric Evaluation report based upon her psychiatric interview of Student and her review of Student's May 2010 psychological and psychoeducational evaluation with assessment of risk violence. Based on her evaluation, the psychiatrist rendered the following DSM IV diagnoses on Axis I: Mood Disorder, NOS; Disruptive Behavior Disorder, NOS; Rule Out Posttraumatic Stress Disorder; Cannabis Dependence; Learning Disorder, NOS; Neglect of Child (victim); and Physical Abuse (victim).

The psychiatric evaluator also opined that Student's primary diagnosis is Mood Disorder, NOS, which is supported by Student's history of irritability and poor anger management, the diagnosis of Depressive Disorder, NOS on his May 2010 psychological evaluation, his sad mood and constricted affect during the psychiatric interview, and his several legal charges of assault. The evaluator noted that Student has an extensive history of loss and trauma that exacerbates his underlying mood disorder, and that Student has used marijuana to help himself cope with his underlying mood disorder and to help him manage his history of losses and disappointments.

Indeed, Student's poor anger management, depression and acting out behaviors led the psychiatric evaluator to wonder whether Student may also be suffering from Bipolar Disorder, and the evaluator's Mood Disorder NOS encompasses that. Student's Mood Disorder disrupts and interferes with his ability to perform in school. His depression, anger and aggression make it hard for him to maintain relationships with peers and teachers. The fact that Student acts out his feeling through behavior makes it hard for him to stabilize.

The psychiatric evaluator recommends that Student receive, *inter alia*, individual therapy two times per week and group therapy approximately one time per week in a school setting. The group therapy should address social skills.<sup>12</sup>

12. Petitioner's August 9, 2010 proposed Compensatory Education Plan requests the following services as compensation for DCPS's failure to provide Student with specialized instruction or related services for the past year and a half: (i) two hour-long individual sessions per week with an independent academic tutor and vocational coach of Parent's choice for SY 2010/11; and (ii) funding for a specified therapeutic expedition program or a comparable program, including any funding needed for transportation and supplies, to be used by the end of the summer after SY 2010/11. The therapeutic program is a 22-day program that serves adolescents and young adults who are experiencing difficulties stemming from, *inter alia*, substance abuse, low self-esteem, bipolar disorder, depression, behavioral problems, lack of motivation, academic challenges, and poor social and coping skills. The therapeutic program focuses on building upon the participants' strengths without breaking down participants first and then rebuilding them,

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<sup>11</sup> Testimony of clinical psychologist; testimony of psychiatrist.

<sup>12</sup> Petitioner's Exhibit 26; testimony of psychiatrist.

and the program relies upon paddling, backpacking, and rock climbing as the three modes of transportation for its therapeutic expeditions.<sup>13</sup>

13. The requested therapeutic outdoor camp would help improve Student's self-esteem because it would provide him with an opportunity to be successful in a different environment, which ultimately would apply back to the educational environment.<sup>14</sup>
14. Extra academic tutoring outside of school during SY 2010/11, above and beyond whatever services Student receives in school, would help to put Student in the position he would have occupied had he begun receiving specialized instruction in 2006 when he needed it.

### 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:

#### 1. Child Find

IDEIA obligates DCPS to ensure that a free appropriate public education is available to all children with disabilities between the ages of 3 and 21 residing in the jurisdiction, including children with disabilities who have been suspended or expelled from school. 20 U.S.C. §1412(a)(1)(A). Hence, IDEIA requires DCPS to identify, locate and evaluate all children with disabilities residing in the District of Columbia who are in need of special education and related services. 20 U.S.C. § 1412(a)(3)(A).

In this case, Petitioner has alleged that Student's continued academic failures and progressively worsening behavioral and emotional problems should have led DCPS to identify, locate and evaluate Student and to determine his eligibility for special education and related services.

A review of the evidence in this case demonstrates that Student was retained in the grade at the end of SY 2008/9 and again at the end of SY 2009/10, with the result that he is scheduled to repeat the 9th grade for the third time during SY 2010/11. Moreover, from the start of his tenure at the DCPS high school near the beginning of SY 2008/9, Student began skipping classes. Then, once SY 2009/10 began, Student began exhibiting even more forms of problematic behavior, such as smoking in school and walking the halls. By this time, Student's behavioral and emotional difficulties were not only resulting in repeated suspensions from school, but they also led to his involvement in the criminal justice system due to a series of violent crimes he committed in the vicinity of his DCPS school during SY 2009/10. DCPS was aware of Student's involvement with the criminal justice system because his probation officer visited the school on numerous occasions and spoke with the attendance counselor, the guidance counselor, and the SEC. However, despite Student's ongoing academic problems and increasing behavioral and emotional problems during SY 2008/9 and SY 2009/10, DCPS never identified him as a child

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<sup>13</sup> Petitioner's Exhibit 29.

<sup>14</sup> Testimony of psychiatrist.

who might require special education services, and DCPS never attempted to evaluate Student and determine his eligibility for such services.

The evidence in this case further reveals that once Student became involved with the criminal justice system, the D.C. Superior Court ordered evaluations for him. The evaluations that were subsequently conducted revealed that Student has significant cognitive weaknesses and academic deficiencies that prevented him from being able to keep up with his same-age peers in school, as well as significant emotional problems that resulted in low self-esteem, depression, cannabis dependency, and disruptive/acting out behaviors. These cognitive, academic and emotional problems would have manifested in behaviors such as turning in incorrect work or not wanting to turn in assignments, skipping class, being late to class, and disrupting and acting out in class. Moreover, a review of Student's academic records reveals that his emotional and cognitive issues did indeed manifest in the educational environment in the form of repeated absences, suspensions, disruptions in class, and according to teacher reports, low effort and low motivation.

Based upon this evidence, the hearing officer concludes (1) that Student's ongoing academic failures in his DCPS high school, together with his repeated absences, tardiness, and acting out/disruptive behaviors which were manifestations of his significant cognitive, academic and emotional issues, were sufficient to trigger DCPS's Child Find obligations under IDEIA; and (2) that DCPS violated said Child Find obligations by failing to identify, locate, and evaluate Student to determine his eligibility for special education and related services. Hence, Petitioner has met its burden of proof on this claim.

## **2. Relief to be Awarded**

### **a. Eligibility**

Under IDEIA, a child with a disability is one who has been evaluated as having one or more of several specified disabilities, including emotional disturbance and specific learning disability. 34 C.F.R. § 300.8(a)(1). In this context, emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) an inability to maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8(c)(4)(i). Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. 34 C.F.R. § 300.8(c)(10)(i).

In this case, the evidence in the form of Student's evaluation results and the expert interpretation of same reveal that Student has suffered from disruptive behavior disorder stemming from his low cognitive functioning and depression since 2006, and that Student is unable to maintain relationships with teachers, staff and peers at school due to his depression, lack of ability to trust,

and anger and aggression issues. The evidence further proves that Student's Borderline range processing skills interfere with his ability to take in process and express information at the same speed as his same-age peers, which has interfered with his ability to learn in the educational environment to the extent that he is now functioning at a level that is 5 years or more behind his same-age peers in the areas of reading, mathematics, written language, and listening comprehension. Based on this evidence, the hearing officer concludes that Student's evaluation data reveals that he is both learning disabled and emotionally disturbed, within the meaning of IDEIA, and therefore, he is eligible for special education and related services as a multiply disabled student.

Upon making a finding of a student's eligibility, the hearing officer normally would develop an initial IEP to be used to provide Student with the special education and related services.<sup>15</sup> However, in this case, although there is evidence tending to prove that Student needs specialized instruction in the areas of reading, written expression, and math, the record is wholly devoid of evidence proving exactly how much specialized instruction Student requires in each area. As a result, the hearing officer lacks sufficient evidence to develop an initial IEP for Student, and the hearing officer will instead order DCPS to convene an IEP meeting to develop an initial IEP for Student.<sup>16</sup>

#### **b. Compensatory Education**

Under the theory of compensatory education, courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Id.* at 524.

In the instant case, Petitioner seeks compensatory education in the form and amount of (i) two hour-long individual sessions per week with an independent academic tutor and vocational coach of Parent's choice for SY 2010/11; and (ii) funding for a specified therapeutic expedition program or a comparable program, including any funding needed for transportation and supplies, to be used by the end of the summer after SY 2010/11.

The evidence in this case proves that the requested therapeutic outdoor camp would help improve Student's self esteem, which has been negatively impacted by DCPS's failure to provide Student with the special education and related services he needs. Therefore, the hearing officer will award Petitioner funding for the specific therapeutic expedition program requested in its compensatory education plan, including any funding needed for transportation and supplies.

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<sup>15</sup> See 34 C.F.R. § 300.306(c)(2) (if it is determined that a child has a disability and needs special education and related services, an IEP must be developed for the child).

<sup>16</sup> The hearing officer acknowledges the expert testimony recommending both individual and group therapy for Student. However, as Student requires specialized instruction as well and the hearing officer lacks sufficient evidence to determine exactly how much, the hearing officer has determined that the best course of action will be to refer the entire matter of the development of the initial IEP to an IEP team.

Although the evidence in this case also proves that Student should have been receiving individual therapy and educational support since 2006 but he has not received any to date, and that extra academic tutoring outside of school during SY 2010/11 would help put Student in the position he would have occupied had he begun receiving specialized instruction in 2006 when he needed it, the hearing officer has not been provided with the level of detail necessary to conduct the fact-specific inquiry required under *Reid* so as to be able to craft an award that is reasonably calculated to provide Student with the educational benefits he likely would have accrued from the special education services DCPS should have provided him since 2006. Therefore, the hearing officer will order DCPS to determine and award Student an appropriate level of compensatory education services in the form of extra academic tutoring outside of school when it convenes an IEP team to develop Student's initial IEP.

### **ORDER**

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

1. Within 10 school days of the issuance of this Order, DCPS shall convene an IEP team to develop an initial IEP for Student that classifies him as multiply disabled due to LD and ED, and that provides him with (i) an appropriate level of specialized instruction in the academic areas of reading, written expression and math, and (ii) psychological/behavioral support services in the form of both individual and group therapy.
2. DCPS shall supply the necessary funding for Student to attend the specific therapeutic expedition program requested in Petitioner's August 9, 2010 compensatory education plan, including any funding needed for transportation and supplies, and Student shall attend the 22-day therapeutic expedition program during or before the summer following SY 2010/11.
3. When DCPS convenes the IEP meeting ordered in Paragraph 1 above, DCPS shall ensure that the IEP team determines and awards Student an appropriate level of compensatory education services in the form of extra academic tutoring outside of school to place Student in the position he would have occupied had DCPS provided him with the special education and related services he has needed since 2006.

### **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 USC §1415(i).

Date: 9/4/2010

/s/ Kimm Massey  
Kimm Massey, Esq.  
Hearing Officer