

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

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Office of Dispute Resolution
October 22, 2014

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| STUDENT, ¹ |) | |
| through the PARENT, |) | Hearing Officer: NaKeisha Sylver Blount |
| |) | |
| <i>Petitioner,</i> |) | |
| |) | |
| v. |) | |
| |) | Date Issued: October 22, 2014 |
| District of Columbia Public Schools, |) | |
| |) | |
| <i>Respondent.</i> |) | |

Hearing Officer Determination

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; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on August 22, 2014 by Petitioner (Student’s mother), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On August 22, 2014, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”). The DPC contained a discipline related allegation and, thus, was to be heard on an expedited timeline with a hearing officer determination due October 1, 2014 – ten school days after the due process hearing (“DPH”), which was to have concluded by September 22, 2014.

The undersigned IHO held a Pre-hearing Conference (“PHC”) by telephone on September 8, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by September 10, 2014 and that the DPH would be held on September 17, 2014. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued September 8, 2014.

¹ Personal identification information is provided in Appendix A.

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Petitioner's and Respondent's disclosures were timely filed. At the DPH, Petitioner's exhibits P-1 through P-18; P-22; P-24 through P-41; and P-44 through P-45 were admitted without objection. Petitioner's exhibits P-19 through P-21, P-23 and P-42 through P-43 were admitted over Respondent's objection. Respondent's exhibits R-1 through R-2 and R-4 through R-7 were admitted without objection. Respondent's exhibits R-3 and R-5 were admitted over Petitioner's objection.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) Petitioner (Parent);
- (b) Parent's Audiologist;
- (c) Compensatory Education Specialist;
- (d) Director of Admissions – Vocational Program.

The following witnesses testified on behalf of Respondent at the DPH:

- (a) Special Education Compliance Coordinator at District Public Charter School;
- (b) Psychologist for District Public Charter School.

The parties gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied the student a free appropriate public education (FAPE) by failing to comply with the disciplinary procedures set forth in 34 CFR 300.530 by failing to convene a timely MDR and failing to provide the student with an alternate educational setting or services. The student had twenty-two days of suspensions throughout the 2013-2014 school year, and the MDR should have occurred after March 6, 2014. Additionally, an alternative setting should have been identified after the student's 10th day of suspension. The student had numerous days of suspensions in April and May 2014.
- (b) Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP or placement. While Petitioner does not contest the initial IEP developed in November 2013, the student's behavior continued to decline and the IEP did not sufficiently address the student's behaviors so as to help the student access his education. Parent requested a more restrictive IEP on April 22, 2014 and/or May 6, 2014 through end of the school year, and through the present.
- (c) Whether DCPS denied the student FAPE by refusing to authorize the parent to obtain an independent auditory processing evaluation ("IEE") recommended by a

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qualified evaluator of the parent's choice and requested by the parent pursuant to 34 CFR 300.502. The IEE issued on July 24, 2014 did not allow parent to choose evaluator of parent's choice.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that DCPS denied the student a FAPE based on each of the issues alleged;
- (b) an Order that DCPS shall revise the student's IEP and provide placement in a full time therapeutic day school.
- (c) an Order that DCPS shall provide transportation services for the student to and from the private placement requested in "(b)" above;
- (d) an Order that DCPS shall revise the funding letter authorizing the parent to obtain an independent auditory processing evaluation by the qualified provider of her choice at a cost not to exceed \$1,300;
- (e) an Order that, upon completion of the evaluation, DCPS shall schedule a meeting to review evaluations and revise the student's program as appropriate;
- (f) an Order that, pending the completion of the above referenced evaluation, the student receive compensatory education services in the form of: 144 hours of specialized tutoring (2 hours, three times weekly for 24 weeks); 36 hours of behavior support services (1.5 hours weekly); and authorization for Parent to obtain an independent auditory processing evaluation.

FINDINGS OF FACT

Background

1. Student resides with his mother ("Parent"/"Petitioner") in Washington, D.C.²
2. During the 2013-2014 school year, Student attended District Public Charter School and was in the eighth grade.³
3. Student was determined eligible for special education and related services on November 12, 2013 under the classification of multiple disabilities (Emotional Disturbance, Other Health Impairment).⁴ Student's November 26, 2013 IEP (his initial and current IEP) calls for him to receive 10 hours per week of specialized instruction inside the general education setting, 1 hour per week of behavioral support services outside the general education setting, and 30 minutes per week of consultative behavioral support services.⁵
4. Initially, Student responded well to the services in his IEP. However, his behavior subsequently declined when he learned what he "could get away with."⁶

² Testimony of Parent.

³ Testimony of Parent.

⁴ P-15-1.

⁵ P-15-12; R-1.

⁶ Testimony of Parent.

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5. District Public Charter School has its own school wide demerit/merit point system behavioral intervention plan for students. Under the District Public Charter School policy, if a student reaches 1000 demerit points or beyond, expulsion can be recommended for the student.⁷

6. Parent and District Public Charter School met on February 7, 2014 to discuss Student's behavior. As of that time, Student had over 2,000 demerit points.⁸

7. Student's third advisory report card for the period January 7 - March 14, 2014 reflected Student failing science.⁹

8. By April 9, 2014, Student received his ninth day of suspension for the 2013-2014 school year. Subsequent to that date (beginning with two days of suspension on April 30, 2014 and May 1, 2014), Student was suspended eleven more school days for during the 2013-2014 school year, for a total of twenty school days for the school year.¹⁰

9. A multi-disciplinary team ("MDT") meeting was held for Student on April 22, 2014. Student's team prepared a behavior intervention plan for Student that included behavioral goals; rewards; consequences; and positive support strategies to be implemented by teachers, the grade-level counselor, school psychologist, school social worker, Parent, school personnel, outside agencies/services, and the school administrator and/or behavior support providers.¹¹

10. On May 6, 2014, Parent and District Public Charter School met to discuss Student's behaviors. Parent was requesting a more restrictive, therapeutic school setting for Student as of that point.¹²

11. Student was detained through the juvenile justice system on May 26, 2014, and was placed at Youth Services Center ("YSC") and various shelter homes from that point through the DPH. At the time of the DPH, Student was detained at YSC and his release date was not known.¹³ DCPS has provided educational services to Student during his detention.¹⁴

12. On July 24, 2014, DCPS authorized Parent to obtain an independent auditory processing evaluation ("IEE") for Student. The IEE authorization letter included the following statement: "Please note: DCPS will not accept an audiological or speech and language assessment conducted by [Parent's Audiologist]."¹⁵

⁷ Testimony of Special Education Compliance Coordinator at District Public Charter School.

⁸ Testimony of Parent; P-11; P-26-4.

⁹ P-24.

¹⁰ P-1 through P-9.

¹¹ P-13.

¹² Testimony of Parent; P-26-4; P-30-1.

¹³ Testimony of Parent;

¹⁴ Testimony of Parent.

¹⁵ R-5 (DCPS000037).

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13. Parent's Audiologist's audiological methodology was called into question in a 2012 judicial decision issued by the U.S. District Court, Eastern District of Virginia. Parent's Audiologist had conducted an audiological IEE in that case.¹⁶

14. Students with disabilities can exhibit adverse behaviors that are either maladaptive or a manifestation of their disabilities. The team at District Public Charter School debated whether Student's disciplinary problems were related to his disability or were maladaptive. At times, Student could control his behaviors; yet, some of Student's behaviors kept him from being present at school.¹⁷

15. During the 2013-2014 school year, Student exhibited maladaptive behaviors in the community that were more severe than the behaviors Student exhibited at school.¹⁸

16. Student is bright and has the capacity to do well academically.¹⁹ Student's final 2013-2014 grades included a "B" in American History, a "C" in English, a "C" in science and an "F" in pre-algebra.²⁰

17. On July 24, 2014, Student's multi-disciplinary team held the first Manifestation Determination Review meeting for Student,²¹ and determined that Student's behaviors were not a manifestation of his disability.²²

18. On August 6, 2014, District Public Charter School issued a letter to Parent recommending Student's expulsion.²³

19. On August 20, 2014, Student was accepted by letter to Nonpublic Vocational School,²⁴ which provides an approximately 6-1 student-teacher ratio, speech and language services, occupational therapy, vocational programs/services, a behavioral team (including a behavioral coordinator and a therapist). All teachers are certified in their subject areas, as well as in special education. The cost of attendance is set by the District of Columbia Office of State Superintendent of Education, and is \$220 per day.²⁵

CONCLUSIONS OF LAW

"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

¹⁶ R-5 (DCPS000059-DCPS000076).

¹⁷ Testimony of Psychologist for District Public Charter School.

¹⁸ Testimony of Psychologist for District Public Charter School.

¹⁹ Testimony of Special Education Compliance Coordinator at District Public Charter School; Testimony of Psychologist for District Public Charter School.

²⁰ P-12.

²¹ R-5 (DCPS000034).

²² Testimony of Parent; Testimony of Psychologist for District Public Charter School.

²³ P-10.

²⁴ P-23.

²⁵ Testimony of Nonpublic Admissions Director.

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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*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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).

- 1. Whether DCPS denied the student a free appropriate public education (FAPE) by failing to comply with the disciplinary procedures set forth in 34 CFR 300.530 by failing to convene a timely MDR and failing to provide the student with an alternate educational setting or services. The student had twenty-two days of suspensions throughout the 2013-2014 school year, and the MDR should have occurred after March 6, 2014. Additionally, an alternative setting should have been identified after the student’s 10th day of suspension. The student had numerous days of suspensions in April and May 2014.**

A. Timeliness of the MDR

Pursuant to IDEA, within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the child’s IEP team, including the child’s parent, must review all relevant information in the child’s file, to determine if the child’s conduct was a manifestation of the child’s disability. *See* 34 CFR § 300.530(e). A disciplinary change of placement occurs under IDEA if a student is subjected to a series of removals that total more than ten school days in a school year. *See* 34 CFR § 300.536. Once an eligible student has been suspended for more than ten days in a school year, the local education agency (“LEA”) must conduct a Manifestation Determination Review (“MDR”) to determine whether the conduct in question was caused by, or had a direct relationship to, the student’s disability. 34 CFR § 300.530(e).

In this case, Petitioner’s tenth day of suspension was April 10, 2014. His eleventh day of suspension (bringing him to a total of more than ten days of suspension in one school year) was on April 30, 2014. This means that Student’s IEP team was required to conduct an MDR within 10 school days of April 30, 2014, which would have been by May 14, 2014. A MDR for Student was not convened until July 24, 2014, which was not timely. Not every procedural violation of IDEA, however, constitutes a denial of FAPE. Only those procedural violations of the IDEA that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), *citing C.M. v. Bd. of Educ.*, 128 Fed. Supp. 876, 881 (3d Cir.2005) (per curiam). Parent was not deprived of a right to participate in the MDR process; therefore, the relevant

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inquiry here turns on whether the delay in conducting the MDR resulted in a loss of educational opportunity for Student.

When an MDR was convened for Student, the team determined that Student's behavior was not a manifestation of his disability. Petitioner did not challenge the MDR determination in her DPC,²⁶ and no evidence was offered from which the hearing officer can conclude that, had the team met earlier it would have reached different determination. Therefore, Petitioner did not meet her burden of proof on this issue.

B. Educational Services

When a student with a disability has been suspended for more than 10 school days in one school year, the LEA is required to provide the student educational services to enable the child to "continue to participate in the general education curriculum, although in another setting." 34 CFR § 300.530(d)(1)(i). These educational services may be provided in an interim alternative educational setting, pursuant to 34 CFR 300.530(d)(2); however, the statute does not mandate interim alternative educational setting. Student's eleventh day of suspension was on April 30, 2014. Student was detained at through juvenile justice system starting on May 26, 2014, and received educational services from DCPS during his detention. Therefore, the relevant inquiry is whether Student received education services during the 7 school days he was suspended from April 30, 2014 and May 26, 2014.

Parent testified that Student received no educational services of any kind during any of his suspensions. However, each written "Notice of Suspension" for Student, included in the record as P-1 through P-9, states that "[a]n education package will be provided to the student" during his suspensions. In light of the fact that Student received a passing final grade in each of his core academic subjects except one, the fact that student was failing science during the third advisory, but received a "B" in science during the fourth advisory and received a final grade of "C" in science, and in light of the conflicting evidence on whether Student received education packets during his suspensions, the hearing officer is not able to conclude that Student did not receive educational services during the 7 school day period in question. Therefore, Petitioner did not meet her burden of proof on this issue.

II. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP or placement. While Petitioner does not contest the initial IEP developed in November 2013, the student's behavior continued to decline and the IEP did not sufficient address the student's behaviors so as to help the student access his education. Parent requested a more restrictive

²⁶ At the start of the DPH, prior to opening statements by counsel, the hearing officer offered Petitioner the opportunity to request a continuance to amend the DPC to include the issue of the validity of the MDR determination. Counsel declined to do so; therefore, the issue of the validity of the MDR is not before the hearing officer in this action. "Under the IDEA, the subject matter of a due process hearing is limited to those issues that were raised in the due process complaint by the party requesting the hearing." *District of Columbia v. Pearson*, 923 F. Supp. 2d 82 (D.D.C. 2013).

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IEP on April 22, 2014 and/or May 6, 2014 through end of the school year, and through the present.

An IEP's appropriateness must generally be reviewed prospectively, rather than in hindsight. "[T]he question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so. . . [T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student." *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008). Here, Petitioner is not challenging the appropriateness of the IEP when it was created; rather, Petitioner contends that DCPS had an obligation to revise Student's IEP in light of Student's repeated behavioral challenges and their impact on his education.

IDEA requires that a

public agency must ensure that . . . the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals. . .

34 C.F.R. §300.324(b)(i)-(ii)(A). In this case, while Student received a new behavior plan in April 2014 to address his behavior challenges, suspensions and missed class time, his IEP was not updated after his initial November 2013 IEP, nor was his school placement (the location where he received educational services) altered. Academic progress is one of the "yardsticks" used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012). In this case, it is undisputed that Student's behavior challenges and numerous suspensions prevented him from excelling academically at the level he otherwise might have. However, it is also the case that Student received a passing final grade in each of his core classes except for one under an IEP that provided 10 hours of specialized instruction inside the general education setting (no hours of specialized instruction outside the general education setting), along with behavioral support services. As determined by the Supreme Court, the minimum standard in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982). While Student's behavioral difficulty is concerning, the hearing officer is unable to conclude that Student was unable to derive educational benefit with the services and supports provided. For these reasons, Petitioner did not meet her burden on this issue.

III. Whether DCPS denied the student FAPE by refusing to authorize the parent to obtain an independent auditory processing evaluation ("IEE") recommended by a qualified evaluator of the parent's choice and requested by the parent pursuant to 34 CFR 300.502. The IEE issued on July 24, 2014 did not allow parent to choose evaluator of parent's choice.

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When an LEA authorizes a parent to obtain an independent educational evaluation (“IEE”), the Agency has a right to impose criteria applicable to the IEE, provided those criteria are the same as the criteria the public agency uses when it initiates an evaluation, and provided that the criteria are consistent with the parent’s right to an independent evaluation. *See* 34 C.F.R. §300.502(e)(1). Otherwise, “a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.” 34 C.F.R. §300.502(e)(2). The statute contemplates and fully permits criteria-based limitations. However, in this instance, the IEE authorization letter states that a specific evaluator is excluded, but did not specify what, if any, permissible criteria the evaluator did not meet.

During the DPH, Respondent argued that Parent’s Audiologist was restricted due to his having used evaluation methods in the past that DCPS finds questionable. DCPS is free to mandate that independent evaluators utilize the same methods it requires DCPS evaluators to use. However, restricting a potential evaluator by name rather than merely stating the criteria selected evaluators must meet leaves room for the LEA to pick and choose the evaluators it prefers and exclude those it does not prefer. It also would not allow for the possibility that an excluded evaluator who is otherwise qualified could have adjusted his/her methodological approach (in general or for purposes of a specific evaluation) to come in line with an approach the LEA finds acceptable. Specifying objective criteria applicable to all prospective evaluators in a particular category, on the other hand, would have been consistent with the parent’s right to an IEE. For these reasons, Petitioner met her burden of proof on this issue.

ORAL MOTIONS

During the DPH, Respondent made two oral motions, which the hearing officer took under advisement:

A. Respondent’s Oral Motion to Strike Two of Petitioner’s Witnesses

Parent’s Compensatory Education Specialist testified at the DPH that that she would not potentially benefit financially from results of the DPH. Parent’s Audiologist testified, however, that he works for the company Compensatory Education Specialist owns (“the Company”), and that if Parent’s Audiologist were permitted to conduct the IEE requested in the compensatory education plan Compensatory Education Specialist drafted, the Company would bill DCPS for Parent’s Audiologist’s services and pay Parent’s Audiologist a fee from the amount it collected for the evaluation from DCPS.

Respondent argued that the testimony of Parent’s Compensatory Education Specialist and Parent’s Audiologist should be stricken from the DPH record, citing DCMR tit. 5-E, § 3029.5, which reads as follows: “As a part of the five-day disclosure submitted before a due process hearing, the submitting attorney must disclose any financial interest, of which he or she is aware, of any participant in the proceeding in a non-public provider or service that may be at issue in that due process hearing.”

The instant case presents a situation in which a provider has drafted a plan requesting that a student receive compensatory education services which, if awarded, provider could offer to student for a fee to be paid by DCPS. DCMR tit. 5-E, § 3029.5 does not preclude such

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arrangements, but it does state that any financial interest a DPH participant has in a non-public provider or service must be disclosed in the five-day disclosure submitted by the attorney responsible for the person's participation. Here, Petitioner's five-day disclosure statement indicates that Compensatory Education Specialist owns the Company, that Parent's Audiologist works for the Company, and that Parent's Audiologist seeks to conduct an IEE for Student (also an issue in the DPC). The hearing officer finds this information sufficient to satisfy the requirements of DCMR tit. 5-E, § 3029.5; therefore, the motion to strike the testimony of the two witnesses is **DENIED**.

B. Respondent's Oral Motion for a Directed Finding as to Each Issue

At the close of Petitioner's case in chief, Respondent moved for a directed finding as to each issue, arguing that Petitioner had failed to meet her burden. A corollary to the directed finding Respondent seeks is found in Fed. R. Civ. P. 50 – "Judgment as a Matter of Law" – which is proper when "the court finds that reasonable jury would not have a legally sufficient evidentiary basis to find for' the nonmoving party." *Kapche v Holder*, 677 F.3d 454 (D.D.C. 2012). citing *Breeden v. Novartis Pharms. Corp.*, 646 F.3d 43, 53, 396 U.S. App. D.C. 170 (D.C. Cir. 2011) (quoting Fed. R. Civ. P. 50 (a)(1)). For the reasons stated in the "Conclusions of Law" section above, the motion is **GRANTED** as to Issue 1, **GRANTED** as to Issue 2 and **DENIED** as to Issue 3.

Order

- (1) Within five school days of this decision, DCPS shall issue a revised Independent Educational Evaluation Authorization Letter ("IEE") for Parent to receive an audiological processing assessment. The revised IEE shall remove the condition that an evaluation from any particular named potential evaluator will not be accepted. The revised IEE may specify any criteria a potential IEE evaluator must meet, provided that those criteria are the same as the criteria DCPS uses when it initiates an evaluation, and provided that the criteria are consistent with the parent's right to an independent evaluation. The revised IEE will supersede and render null and void the IEE for auditory processing assessment issued to Parent on July 24, 2014.

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: October 22, 2014

/s/ NaKeisha Sylvester Blount
Hearing Officer

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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).