

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

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

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Parent, on behalf of the [Student],

Petitioner,

Date Issued:

September 25, 2011

v.

Hearing Officer:

Ramona M. Justice

The District of Columbia Public  
Schools ("DCPS"),

Respondent.

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OSSE  
STUDENT HEARING OFFICE  
2011 SEP 26 AM 9:14

**HEARING OFFICER DETERMINATION**

**Jurisdiction**

This proceeding was invoked pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17; reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Public Law 108-446 and 20 U.S.C. Sections 1400, *et seq.*, Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; Title 38 of the D.C. Code, Subtitle VII, Chapter 25; and Chapter 30, Title 5-E of the District of Columbia Municipal Regulations ("DCMR").

**Background**

The student is \_\_\_\_\_ years of age; residing in the District of Columbia with his mother, the Petitioner, and a maternal aunt. The student is in the \_\_\_\_\_ grade at a private special education day school. The parent filed an amended due process complaint alleging that the student's placement at the private day school is inappropriate because the student requires residential placement to access the general education curriculum and receive educational benefit.

**Procedural History**

On June 27, 2011, Petitioner, through her Attorney, filed with the District of Columbia, Office of the State Superintendent of Education ("OSSE"), Student Hearing Office, an "Administrative Due Process Complaint Notice", alleging that during the 2010/2011 school year, the District of Columbia Public Schools denied the student a free appropriate public education ("FAPE") by failing to: (1) identify, locate, and evaluate the student to determine the student's eligibility for special education services; and (2) determine and provide the student an appropriate placement, in violation of the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs.").

On June 29, 2011, the Student Hearing Office assigned the due process complaint to this Hearing Officer. The parties met for a resolution session on August 1, 2011. No agreement was reached and the parties decided that the complaint should proceed to a due process hearing.

On July 11, 2011, the Respondent filed a response to the due process complaint notice contending that the IEP team considered the appropriateness of the student's placement at the May, 2011 IEP team meeting and determined that the student's current placement is the least restrictive environment for the student; and that the student was detained by the and once released the student could return to the school.

The initial prehearing conference was held with the Hearing Officer and counsel on July 12, 2011 to discuss the hearing date, issues to be determined and other matters. The Petitioner's Attorney was unable to state with any reasonable certainty facts supporting the allegations in the complaint; or specific dates that the alleged violations occurred. After discussion, the Petitioner's Attorney decided to amend the June 27, 2011 due process complaint, specifically identifying the time period in which it is alleged that the student's placement is inappropriate, and facts supporting the allegations in the complaint.

On July 18, 2011, the Petitioner, through her Attorney, filed with the District of Columbia, Office of the State Superintendent of Education ("OSSE"), Student Hearing Office, an "Amended Administrative Due Process Complaint Notice", alleging that the District of Columbia Public Schools failed to provide the student an appropriate placement from October 22, 2010 through the end of the 2010/2011 school year because the student requires residential placement which is not available at the student's current school.

The Petitioner requests that the Hearing Officer issue an Order requiring the Respondent to fund the student's tuition and transportation for the student to attend a residential facility located in Berryville, Virginia; and that the Respondent convene an Individualized Education Program (IEP) team meeting within ten (10) calendar days of the student's placement at the residential facility, to review and revise the student's May 10, 2011 IEP, as appropriate.

The Petitioner also requests that the Hearing Officer issue an Order requiring the Respondent to fund an independent compensatory education service plan, and once the plan is completed, grant the Petitioner the right to request a hearing to determine the nature and amount of compensatory education services the student should receive for the alleged violation. In the alternative, the Petitioner requests compensatory education services including tutoring and mentoring services for the alleged violation occurring from October 22, 2010 through the end of the 2010/11 school year.

On July 29, 2011, the Respondent filed a supplemental response to the amended complaint contending that the private day school can implement the student's IEP and was appropriate; the student does not require residential placement to derive meaningful academic benefit from the student's IEP; and the student's current placement is appropriate based on data available to the team during the 2010/2011 school year.

A second resolution meeting was held on August 1, 2011, with no agreement. The parties agreed that the 45 day timeline for convening a hearing and issuing a decision would begin on August 2, 2011, the date after the resolution meeting; and expire on October 1, 2011. A second prehearing conference was held on August 9, 2011 at 4:00 p.m.; and on this date a prehearing order issued setting forth the matters discussed and confirming the due process hearing for September 7, 2011 at 9:00 a. m...

The due process hearing was held on September 7, 2011, at 810 First Street, N.E., 2<sup>nd</sup> Floor, Washington, D.C... The hearing was closed to the public and recorded on an electronic audio recording device. The Petitioner appeared at the hearing; and each party was represented by an Attorney. The Petitioner presented six witnesses: Petitioner, the student's mother; student's Psychiatrist; student's Mentor; student's Education Advocate, admitted as an expert witness based upon the witnesses' experience in serving on IEP teams and working with special need students, including students requiring residential treatment; the Clinical Director at the proposed residential facility; and the student's Therapist. The Respondent presented one witness: the Special Education Coordinator at the private day school currently attended by the student.

The Petitioner's disclosures dated August 30, 2011, including a witness list and Exhibits P-1-14, were admitted into the record as evidence over Respondent's objection regarding failure to include Curriculum Vitae for the student's Psychiatrist. The Respondent's disclosures dated August 30, 2011, including a witness list and Exhibits R-1-9, were admitted into evidence over Petitioner's objection regarding failure to include Curriculum Vitae for the local education agency (LEA) representative, and a Program Manager. Hearing Officer's Exhibit 1, consisting of Curriculum Vitae for the student's Psychiatrist was also admitted into the record as evidence.

### ISSUE

The issue to be determined by the Hearing Officer is as follows:

Whether the District of Columbia Public Schools denied the student a free appropriate public education, by failing to provide the student an appropriate placement from October 22, 2010 through the end of the 2010/11 school year, because the nature of the student's learning disability is such that the student requires a full-time special education program at a residential facility, to access the general education curriculum, and receive educational benefit, which is not available at the student's current placement; in violation of the IDEA, at 34 C.F.R. §§300.320 and 300.324?

### FINDINGS OF FACT

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

1. The student is a \_\_\_\_\_ year old, \_\_\_\_\_ grade special education student at a private special education day school, located in Laurel Maryland.<sup>1</sup> The student resides in the District of Columbia with his mother, the Petitioner.
2. During the 2009/2010 school years, and the beginning of the 2010/2011 school years the student attended the \_\_\_\_\_ Services, a residential and educational facility located in Langhorne, Pennsylvania.<sup>2</sup> The student was placed at the \_\_\_\_\_ Services after being in June 2008 for \_\_\_\_\_ and \_\_\_\_\_ at the family residence, and \_\_\_\_\_

<sup>1</sup>The private special education day school attended by the student, serves the needs of students with emotional and behavioral problems and provides families education, family support services, community education, and advocacy.<sup>1</sup>

<sup>2</sup>Petitioner's Exhibit 3 and 3-2.

<sup>3</sup> Respondent's Exhibit 3-2.

3. In *August, 2010*, the student was discharged from \_\_\_\_\_ Services; returned to the care of his mother; and placed by the DCPS at the private special education day school.<sup>4</sup>
4. The student is identified as a child with a disability eligible to receive special education and related services under the disability classification of Multiple Disabilities (MD), including Intellectual Disability (ID), Emotional Disturbance (ED), and Other Health Impairment (OHI), specifically identified as Attention Deficit Hyperactivity Disorder (ADHD).<sup>5</sup>
5. The student has a prior diagnosis of Mild-Moderate Mental Retardation, Mood Disorder-NOS, Oppositional Defiant Disorder, Attention Deficit/Hyperactivity Disorder-Combined Type, Disruptive Behavior Disorder-NOS, Phonological Disorder, Mixed Receptive-Expressive Language Disorder, and Learning Disorder-NOS.<sup>1</sup>
6. The student has a history of suicidal and homicidal thoughts, and auditory hallucinations;<sup>1</sup> a long history of temper tantrums (early childhood), short attention span, poor self-control, impulsivity and hyperactivity, difficulties calming down and a tendency to overreact when faced with difficult situations, poor peer relationships, and learning problems.<sup>1</sup>
7. The student is currently under the care of Universal Healthcare Management Services, an independent mental health care agency contracted by the D.C. Department of Mental Health to provide the student and student's family psychiatric treatment, psychotherapy, and wrap around community support services.<sup>6</sup> The agency prescribes the student medication for ADHD and a mood stabilizer which appears successful in managing the student's oppositional behaviors, although the student is not always compliant in taking the medication.<sup>7</sup>
8. Academically the student is functioning below the norm cognitively; extremely low in verbal comprehension, perceptual reasoning, working memory, processing; and the student's FSIQ is 53 which is extremely low.<sup>8</sup> The student's academic functioning in all areas is in the very low range.<sup>9</sup> Although the student's cognitive scores have shown positive improvements, the student remains behind his peers.<sup>10</sup> However, as of May 10, 2011, although the student has difficulty staying focused the student had a "C" average in all academic areas and was passing all classes.<sup>11</sup>
9. Since attending the private day school the student has not displayed any aggressive or violent behavior at school, or any behavior the school has not successfully managed with behavioral interventions and supports.<sup>12</sup> The student's behavior in class is good, the student is respectful to teachers and peers, except for two (2) brief \_\_\_\_\_ other students, and the student is very productive, except in certain classes the student can be talkative.<sup>13</sup> The student's major issue at school is social skills.<sup>14</sup>

<sup>4</sup> Testimony of parent, Respondent's Exhibit 3-2, and Petitioner's Exhibit 6, page 14 of 16.

<sup>5</sup> Petitioner's Exhibit 3-14.

<sup>6</sup> Testimony of student's Psychiatrist at Universal Healthcare Management Services.

<sup>7</sup> Testimony of parent and students' Psychiatrist at Universal Healthcare Management Services.

<sup>8</sup> Petitioner's Exhibit 6, page 6 of 16.

<sup>9</sup> Petitioner's Exhibit 6, pages 6-16

<sup>10</sup> Respondent's Exhibit 3.

<sup>11</sup> Respondent's Exhibit 1-4, R-1-7, and Respondent's R-2.

<sup>12</sup> Testimony of SEC, Respondent's Exhibits 1, 2, 4, 6, 8, and 9.

<sup>13</sup> Respondent's Exhibit 8-7.

<sup>14</sup> Respondent's Exhibit 1-4.

10. The student displays some anxiousness and edginess, however, uses the support area to cool down, as needed, is compliant with weekly speech therapy, and meets with the school counselor regarding issues with peer relations, as needed.<sup>15</sup> The student spends an average of 1% of the day, at approximately 2 minutes each, in the support area, and 99% of the day is spent in class.<sup>16</sup> Fifty six (56%) percent of the visits to the support are for leaving class without permission.<sup>17</sup> According to school personnel there is no concern regarding the safety of the student or others at the student's school; or the schools' ability to manage the student's behavior.<sup>18</sup>
11. The student's recent placement at the \_\_\_\_\_ and National Children's Medical Center, Psychiatric Unit is attributed to the student's violent, threatening, defiant, and aggressive behavior at the student's residence towards his mother, and recently towards himself.<sup>19</sup> The student's recent \_\_\_\_\_ and placement under the care of the \_\_\_\_\_ Services is due to the student's aggressive and violent behavior in the community.<sup>20</sup>
12. On *October 25, 2010*, an IEP was developed for the student prescribing 27.5 hours of specialized instruction, 60 minutes of behavioral support services, 30 minutes of occupational therapy, and 60 minutes of speech language services, weekly.<sup>21</sup> The Petitioner signed the IEP, agreeing with decisions made regarding the student's education.<sup>22</sup>
13. An IEP team meeting was held on *March 4, 2011*.<sup>23</sup> The team discussed the student's behavior issues at the school, reporting that the student has been performing well, although struggling with change.<sup>24</sup> The parent expressed concern that the student may require a more restrictive environment due to concerns regarding the student's lack of respect and aggressive behavior at home; manipulative behavior; student running away from home; the student's safety in the community and concerns regarding possible police involvement.<sup>25</sup> The parent also reported to the team that the student comments to the parent that he was going to do everything he can to get out of his current placement.
14. During the *May 10, 2011* MDT/IEP team meeting the student's Education Advocate expressed concern that the student is involved in matters outside of the school environment and the student requires additional support in the community to help keep the student safe.<sup>26</sup> Parent and the Education Advocate requested residential placement for student due to an increase in the student's aggressive behaviors outside of school.<sup>27</sup> The parent and advocate agreed with the student's IEP.<sup>28</sup>

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<sup>15</sup> Respondent's Exhibit R-2.

<sup>16</sup> Respondent's Exhibit 9.

<sup>17</sup> Respondent's Exhibit 6-2.

<sup>18</sup> Testimony of Special Education Coordinator.

<sup>19</sup> Id.

<sup>20</sup> Testimony of parent

<sup>21</sup> Petitioner's Exhibit 3.

<sup>22</sup> Respondent's Exhibit 7-2 and 8-4.

<sup>23</sup> Respondent's Exhibit 6-2.

<sup>24</sup> Respondent's Exhibit 6-5.

<sup>25</sup> Respondent's Exhibit 6-3 and 6-5.

<sup>26</sup> Respondent's Exhibit 1-4 and 1-5.

<sup>27</sup> Respondent's Exhibit 1-8.

<sup>28</sup> Respondent's Exhibit 1-8.

15. On *August 3, 2011* after a prolonged period of aggression, out of control behavior at home and in the community culminating with the destruction of family property and instilled fear in the student's family, the student's Psychiatrist at Universal Healthcare Management Services<sup>29</sup> facilitated the student being escorted by police to the
16. In *September, 2011*, the student was placed at the Psychiatric Unit, due to the student's attempted

### CONCLUSIONS OF LAW

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

The Individuals with Disabilities Education Act ("IDEA") is the federal statute governing the education of students with disabilities, and its purpose is to ensure that all children with disabilities have available to them a free appropriate public education emphasizing special education and related services designed to meet their unique educational needs and prepare them for further education, employment, and independent living.<sup>32</sup> The IDEA defines a FAPE as:

[S]pecial education and related services provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA... include an appropriate preschool, elementary school or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...<sup>32</sup> 20 U.S.C. §1401(9); See, 34 C.F.R. §300.17(d) and DCMR 5-E3001.1.

The IDEA does not require that the local education agency (LEA) maximize the potential of the handicapped child, or secure the best education money can buy; however it calls upon government, more modestly, to provide an appropriate education for each child. *Rowley*, 458 U.S. at 189, 102 S.Ct. at 3042. See also *Lunceford v. District of Columbia Board of Education*, 745 F.2d 1577, 1583 (D.C.Cir.1984).

The issue before this Hearing Officer is whether the Respondent denied the student a FAPE by failing to provide the student an appropriate placement because the nature of the student's learning disability is such that the student requires a full-time special education program at a residential facility to access the general education curriculum, and receive educational benefit.

The burden of proof is properly placed on the Petitioner, the party seeking relief.<sup>33</sup> The Petitioner must prove the allegations in the due process complaint, by a preponderance of the evidence.<sup>34</sup> Based solely upon the evidence presented at the hearing, the Hearing Officer must determine whether the Petitioner 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 a FAPE.<sup>35</sup>

<sup>29</sup> The student is currently under the care of Universal Healthcare Management Services, an independent mental health agency contracted by the D.C. Department of Mental Health to provide psychiatric treatment, psychotherapy, and wrap around community support services to the student and the student's family.<sup>29</sup> The student is prescribed medication for ADHD and a mood stabilizer, although the student is not always compliant in taking medication.<sup>29</sup>

<sup>30</sup> Petitioner's Exhibit 11, page 3.

<sup>31</sup> Testimony of parent; and Petitioner's Exhibit 11.

<sup>32</sup> IDEA, 34 C.F.R. §300.1.

<sup>33</sup> *Shaffer v. Weast*, 546 U.S. 49, 56-057 (2005) and 5 D.C.M.R. §3030.3; and *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

<sup>34</sup> 20 U.S.C. §14115(i) (2) (c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir.2005) (standard of review)

<sup>35</sup> 5 D.C.M.R. E-3030.3.

“Placement” is defined as the setting and the location where the student’s IEP is implemented; and refers to points along the continuum of placement options available for a child with a disability, and “location” refers to the physical surrounding, such as the classroom in which a child with a disability receives special education and related services.

The placement decision must be made by an IEP team, including the parent; is made in conformity with the least restrictive environment (LRE) provisions; is determined at least annually; is based on the child’s IEP; is as close as possible to the child’s home; and unless the student’s IEP requires some other arrangement, the child must be educated in the school that he or she would attend if nondisabled.<sup>36</sup> Thus, the placement should not dictate the IEP, but rather the IEP determines the placement.

It is clear that the IDEA expressly provides that handicapped children should be placed in the least restrictive environment appropriate to their individual needs. See 20 U.S.C. Sec. 1412(5) (B); 34 C.F.R. §§ 300.550-556. In selecting the least restrictive environment consideration must also be given to any potential harmful effect on the child or on the quality of the services the student requires.<sup>37</sup>

It is equally clear, however, that the Act provides for residential placement and that such a placement may be necessary to meet the individual needs of a handicapped child. See 20 U.S.C. §§ 1401(16), 1413(a) (4) (B); 34 C.F.R. §§300.302, 551. To determine whether a residential placement is appropriate, a court must analyze "whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are separate from the learning process." *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir.1981).<sup>15</sup>

In this matter, the Petitioner’s claim of an inappropriate placement can only relate to the IEP developed for the student on October 25, 2010, as that is the IEP serving as the basis for the placement decision. However, the Petitioner does not challenge the appropriateness of the student’s IEP and in fact at each IEP team meeting, the Petitioner agreed with the student’s IEP and decisions made regarding the student’s education; although requesting residential placement to address issues occurring at the student’s residence and in the community.

The Petitioner has not demonstrated that the student’s October 25, 2010 IEP which serves as the basis for the placement decision is inappropriate because the IEP is not reasonably calculated to enable the student to receive educational benefit, or appropriately designed and implemented, emphasizing special education and related services specifically designed to meet the student’s unique needs, supported by such services, as are necessary to provide the student ‘meaningful’ educational benefit.

The Petitioner has not demonstrated that at the time that the October 25, 2010 IEP was developed through the end of the 2010/2011 school year, the nature of the student’s learning disability was such that the student required a more restrictive academic setting, or that the student’s IEP should have been revised to provide for placement of the student in a residential facility.

Moreover, the Petitioner has not established that the student’s current placement is inappropriate because the school is unable to implement the student’s October 25, 2010 IEP or provide the student educational benefit, supporting the need for a more restrictive academic environment.

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<sup>36</sup> IDEA, at 34 C.R. §300.116(a) (2) (b) (2).

<sup>37</sup> IDEA, 34 C.F.R. §300.166(d).

Nor has the Petitioner demonstrated that from October 22, 2011 through the end of the 2010/2011 school year, placement of the student in a residential facility was “necessary for educational purposes,” as opposed to being “a response to medical, social or emotional problems that are independent from the learning process”. McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985), quoting Kruelle v., New Castle Country School Dist., 642 F.2d 687, 693 (3<sup>rd</sup> Cir. 1981).

It is evident that the student continues to exhibit aggressive, oppositional, threatening and maladaptive behavior at home and in the community, and these behaviors have become unmanageable.<sup>38</sup> It is evident that the student refuses to attend school or maintain doctor’s appointments; refuses to take medication as prescribed, to manage his behavior; and poses a risk of serious harm to himself, his mother, and the community.<sup>39</sup> However, there is no evidence that the student exhibits violent behavior at school; aggressive behavior that is not effectively managed; or behavior that would cause concern for the student’s safety or safety of others at the student’s school.<sup>40</sup>

On the contrary, the record is replete with evidence that historically the student’s violent and aggressive behaviors have occurred in the family setting, have been targeted towards the student’s mother and other family members, and recently in the community.<sup>41</sup> This is further supported by school reports and the recent Comprehensive Psychological Evaluation which states that the student’s underlying anxiety is likely related, in some degree, to the student’s recent transition back to his mother’s home from the residential program; recent enrollment in a new school; and concerns of being returned to the residential program or hospitalized.<sup>42</sup>

The student’s Psychiatrist, Mentor, Advocate, and Therapist testified that placement of the student in a residential facility is a matter of ‘medical’ and ‘educational’ necessity due to concerns regarding the student’s behavior at home, and the student’s personal and community safety. However, the witnesses provided no testimony that the student requires residential placement because of concerns regarding the student’s behavior at school. Furthermore, the witnesses have no personal knowledge regarding the student’s academic, developmental, and functional performance or behavior at school, except information provided by the parent.<sup>43</sup> Therefore, the witnesses’ testimony and recommendations for residential placement of the student, as a matter of ‘educational’ necessity, are unsubstantiated and unreliable.

The Hearing Officer concludes that placement of this student in a full-time residential facility is not a matter of ‘educational’ necessity, however is a matter of ‘medical’ necessity because the student requires 24 hour supervision; and poses a risk of harm to himself, his mother, and the community. It is evident that the parent’s requests for residential placement are in response to medical, social and emotional problems of the student occurring at the student’s residence and in the community, which is separate from the learning process.

The Hearing Officer also concludes that the student’s needs are well beyond those required educationally, beyond the purview of the District of Columbia Public Schools, beyond those which the parent can provide the student, and apparently beyond the scope of services currently received by the mental health and community service providers.

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<sup>38</sup> Testimony of parent.

<sup>39</sup> Petitioner’s Exhibit 3-14, and 11-1-3

<sup>40</sup> Testimony of SEC.

<sup>41</sup> Petitioner’s Exhibit 2, page 1 of 3.

<sup>42</sup> Petitioner’s Exhibit 6, page 12 of 16.

<sup>43</sup> Testimony of student’s mentor, Psychiatrist, Therapist, and Education Advocate.

It is the Hearing Officer's decision that the Petitioner failed to satisfy its burden by proving that the District of Columbia Public Schools denied the student a free appropriate public education by failing to provide the student an appropriate placement from October 22, 2010 through the end of the 2010/11 school year because the nature of the student's learning disability is such that the student requires a full-time special education program at a residential facility to access the general education curriculum and receive educational benefit; in violation of the IDEA, at 34 C.F.R. §§300.320 and 300.324.

### ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that the Petitioner's request for relief in the amended due process complaint filed on August 18, 2011 is denied, and the due process complaint is dismissed "with" prejudice.

### 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: September 25, 2011

Ramona M. Justice  
Ramona M. Justice, Hearing Officer