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

[Parent], on behalf of
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: August 26, 2011

Hearing Officer: Jim Mortenson

Case No:

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on July 14, 2011. The Petitioner is represented by Donovan Anderson, Esq., and the Respondent is represented by Daniel McCall, Esq.

A resolution meeting was held July 27, 2011. No settlement was reached. While no written and signed agreement was reached, the Petitioner's Counsel confirmed at the prehearing that the parties agreed no agreement could be reached and that the hearing timeline should begin.

A prehearing conference was held on July 29, 2011, and a prehearing order issued on that date. Only the Petitioner's Counsel participated in the prehearing conference. No response to the complaint was filed or received by the Petitioner's Counsel by the due date for the response, July

[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

24, 2011, as required by 34 C.F.R. § 300.508(e) & (f). As a result, the complaint was determined to be undisputed (pursuant to the notice to the parties of July 20, 2011, ¶ 7) and the parties were notified that the hearing would focus on whether the Petitioner's proposed placement in a full-time therapeutic setting such as would be appropriate for the Student. The sanction included the prohibition of the Respondent presenting affirmative defenses to the complaint. The Respondent would be permitted to cross-examine the Petitioner's witnesses.

The hearing was convened on August 19, 2011, in room 2007 at 810 First Street NE, Washington, D.C. The Respondent moved that it be permitted to present its case-in-chief because, it argued, it was not required to respond to the complaint. The motion was denied because 34 C.F.R. § 300.508(e) and (f) clearly require a response. The IHO permitted the Respondent to make arguments at hearing and, because the Petitioner did not object, admitted the Respondent's disclosures as evidence in the record. The alleged facts in the complaint remained treated as undisputed as sanction for the failure to file a timely response to the complaint, however, and provide the basis for the findings of fact (thus the record) in this matter.

The Respondent demanded answers why an email to the IHO purportedly requesting to reconvene the prehearing conference, after the prehearing conference had been held and the prehearing ordered issued, was not responded to. The IHO advised Counsel for the Respondent that no motion had been made of the tribunal to respond to. Respondent's Counsel stated that he had also asked in the email that the IHO recuse himself and again wanted to know why there was no response. The IHO again advised that no motion had been made, to which Respondent's Counsel responded that no motion was required. Respondent's Counsel then advised that the IHO could not rule on a motion to recuse himself and the IHO again advised that no motion to

recuse had been filed. The Respondent then argued that no motion was filed because the IHO could not rule and a motion to recuse himself and that had the email been responded to, the Respondent could have filed a motion to recuse with the Chief Hearing Officer. The IHO pointed out to the Respondent that its arguments regarding recusal were making no sense. Respondent's Counsel stated the IHO had "thrown procedure out the window." The IHO advised the Respondent that it was properly sanctioned for its violations of the rules and the matter would not be discussed further. (The Respondent's arguments with IHO were entirely inappropriate at that point as Respondent's Counsel had stopped arguing to the IHO and was arguing with the IHO.) The Respondent was permitted to make another motion for the IHO to recuse himself based on its disagreements with the IHO's determinations thus far in the hearing and did so. The IHO denied the motion because the basis for the recusal was merely disagreement with the IHO, not demonstrated partiality or other valid reason for disqualification of the IHO.

The IHO then recited the undisputed facts and advised the parties that the primary questions for which evidence was necessary were: 1) What are the academic and behavioral supports the Student requires?; and 2) Where can the Student's program be delivered?

The Respondent moved that a settlement agreement between the parties precluded the Petitioner's case. This motion was denied as the settlement agreement in question was reached prior to the IEP revision in question for hearing. (The settlement was reached on April 1, 2011, and the IEP revision in question was made July 12, 2011.)

In the Petitioner's opening statement her Counsel argued that was not an appropriate placement for the Student because of the lack of academic success the Student experienced there, and that is appropriate because it is a "full-time" therapeutic placement. The Respondent, in its opening statement, in addition to the above,

argued that the Student's individualized education program (IEP) was appropriate as was the placement, in the least restrictive environment (LRE).

The due date for the hearing officer determination (HOD) is September 10, 2011. This HOD is issued on August 26, 2011.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is:

> Whether the Respondent failed to propose an individualized education program (IEP) reasonably calculated to provide educational benefit for the Student when the Student's IEP lacks "full time" special education in a therapeutic setting and the annual goals in the IEP were not revised at the IEP team meeting held July 12, 2011?

The substantive requested relief at the time of hearing was a "full-time" therapeutic placement at High Road Academy.

The Respondent failed to propose an IEP reasonably calculated to provide the Student with educational benefit. The Student requires a residential placement with an extensive therapeutic infrastructure.

IV. EVIDENCE

The following are undisputed facts in this case:[2]

1) The IEP developed July 12, 2011 identifies the Student with multiple disabilities and includes 21 hours per week of specialized instruction in the general education setting and 240 minutes per month of behavioral support services.[3]
2) The goals in the IEP were not changed from the prior year.
3) The hours of specialized instruction were not significantly changed from the prior year.
4) The Student failed all of her courses during the 2010-2011 school year, but for mathematics in which she obtained a grade of D. She was, however, promoted to the grade despite her grades.
5) The special education teacher at the IEP team meeting did not agree with the proposal to place the Student in the general education setting.
6) The Student attended for the last two years.
7) A comprehensive psychological assessment of the Student was completed May 24, 2011, and a Vineland Adaptive Behavior Scale was completed on July 7, 2011. As a result of these assessment reports the Student was identified as both intellectually disabled (mentally retarded under IDEA) and emotionally disturbed, meeting the definition of multiple disabilities under IDEA.
8) The psychologist who conducted the comprehensive psychological assessment recommended a highly structured therapeutic placement based on her academic and

[2] These are facts stated in the complaint which were not timely contested in compliance with 34 C.F.R. § 300.508. They were reviewed at the hearing. Respondent's disclosed documents were, however, entered into evidence as the Petitioner did not object to them believing they supported her claims.

[3] R 4, the IEP, shows that the Student was offered 20 hours of specialized instruction per week.

behavioral needs. She requires a small structured therapeutic setting to provide her with intensive academic and behavioral supports to meet her needs.

In addition to the undisputed facts, two witnesses testified at the hearing, both for the Petitioner.[4] The witnesses for the Petitioner were:

1) The Petitioner (P)

2) Admissions Director,

4 documents were disclosed by the Petitioner and 2 were admitted into evidence.[5] The Petitioner's exhibits are:

Ex. No.	Date	Document
P 2	July 7, 2011	Confidential Report of Vineland Adaptive Behavior Scale
P 4[6]	May 24, 2011	Confidential Comprehensive Psychological Evaluation

Five documents were disclosed by the Respondent and all were admitted into evidence because the Petitioner did not object to them. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	April 1, 2011	Proposed Settlement [signed April 1, 2011]
R 2	April 1, 2011	Authorization for Comp Ed Services
	April 1, 2011	[Letter from Case Manager to Petitioner]
R 3	June 16, 2011	MDT [IEP team] Meeting Notes
R 4	July 12, 2011	IEP
R 5	July 13, 2011	Multidisciplinary Team (MDT) [IEP team] Meeting Notes
	July 12, 2011	MDT [IEP team] Meeting Notes

[4] The Respondent was not permitted to present an affirmative defense as the complaint was not responded to in compliance with 34 C.F.R. § 300.508 and the material facts in the complaint were deemed undisputed.

[5] P 1 and P 3 were objected to at the start of the hearing and were not later offered.

[6] P 4 was inadvertently not included in the Petitioner's disclosures five days in advance of the hearing. The Respondent made an objection to this document on this ground *after* it had been admitted into evidence. The objection was overruled because the document was already in the record and the Respondent's objection was untimely. Furthermore, the document was in the Respondent's possession and is referred to in the IEP team meeting notes included in its disclosed documents as well as listed in the cover letter that accompanied the disclosures. Thus, there was no prejudice or surprise as a result of the inadvertent exclusion of the document in the electronically delivered disclosures to the Respondent.

V. 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 is a learner with a disability who has been unilaterally placed by the Petitioner at as of August 17, 2011.[7] The Student attended for the last two years.[8]
2. The Student is identified as having multiple disabilities including emotional disturbance and mental retardation (intellectually disabled).[9] She has been diagnosed with conduct disorder and attention deficit hyperactivity disorder.[10] She also has a provisional diagnosis of Childhood Bipolar Disorder (additional information was reported as needed by the Clinical Psychologist who evaluated her).[11]
3. Her disabilities result in significantly negative behaviors at school, home, and in the community.[12] The Student's disabilities impact her ability to be organized and be self-controlled.[13] She often disrupts the classroom impeding the learning of both herself and her peers.[14] She has been involved with multiple fights and incidents with teachers resulting in four to five suspensions, including an attempt by the Respondent to remove the Student from school for the remainder of the year in February 2011.[15] The Student relies on maladaptive interpersonal relations which include violence, chaos, and behavioral disinhibition.[16] She clings to her peer group despite being assaulted by them and also treats them, as well as her

[7] Testimony (T) of P, R 4.
[8] Undisputed Fact (UF), T of P.
[9] UF, R 3, R 4, R 5.
[10] P 4.
[11] P 4.
[12] T of P, R 3, P 4.
[13] R 3, R 4, P 4.
[14] UF, R 3, R 4, P 4,
[15] T of P, R 5.
[16] P 4.

family, in dishonest ways such as stealing from them.[17] The student has spent more time out of school over the past year than in, due to behaviors.[18]

4. The Student has severe deficits is all academic domains.[19] The Student's behavior impedes her ability to fully comprehend and produce grade level, quality work.[20] She failed all of her classes for the 2010-2011 school year, but for math in which she earned a grade of D.[21] The Student's reading ability is negligible and reading tasks above a third grade level are difficult for her to manage.[22] Her mathematics skills are not much better.[23] The Student's overall academic skills fall between the kindergarten and fourth grade levels.[24] Her 2010 DC-CAS scores were in the basic range in math and below basic in reading.[25]

5. The Student's IEP was revised and a proposal made on July 12, 2011.[26] The Student's IEP included three math goals, three reading goals, two writing goals, and three emotional, social, and behavioral development goals.[27] These goals were the same as the prior year's annual IEP goals.[28] The Student was offered a total of 20 hours of specialized instruction because the Special Education Coordinator for stated that was the maximum amount of hours that could be provided "for the school."[29] She was also offered 240 minutes per month of "behavioral support services."[30] Supplementary aids and services included:[31]

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[17] P 4, R 3.
[18] R 3.
[19] P 4.
[20] R 4.
[21] UF.
[22] P 4.
[23] P 4.
[24] P 4.
[25] R 4.
[26] R 4, R 5. (It is not clear how the IEP could be revised on July 12 and the start date for the new services be on the same date, given the requirement for the Parent to be provided prior written notice to any proposed changes pursuant to 34 C.F.R. § 300.503.)
[27] R 4.
[28] UF.
[29] R 4, R 5.
[30] UF, R 4.

- Repetition of directions
- Simplification of oral directions
- Reading of test questions (math, science, and composition only)
- Calculator
- Preferential seating
- Small group testing
- Location with minimal distractions
- Flexible scheduling
- Test administered over several days

The Student is assessed academically using the DC-CAS with accommodations.[32] The services in the IEP were not significantly different from the prior year's IEP.[33]

6. The Student does not like her current school and struggles to learn as a result of her academic delays as well as significant emotional distress.[34]
7. The Student requires an educational placement with supports for her academic, emotional, and social problems.[35] She requires a residential facility that can address all these areas on a consistent basis, given the maladaptive behaviors occurring not only at school but at home and in the community with her peer group and her need for consistent monitoring of her mental status.[36] She needs a school environment that provides a highly structured educational program using multiple presentation formats including: visual, auditory, kinesthetic, and

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[31] These "classroom accommodations" are identical to the Statewide assessment accommodations in the IEP.
[32] R 4.
[33] UF.
[34] T of P, P 4.
[35] P 4.
[36] P 2, P 4, R 3. (The Petitioner is seeking a day school, and the day school representative, T.S., testified that the day school can meet the Student's needs. However, the detailed information in the assessment reports and from the discussions at the IEP team meetings demonstrate otherwise. There is no evidence supporting continued placement in the general education setting because although that was the Respondent's proposal, no explanation to support that proposal is recorded and, in fact, the Respondent's assessment report, P 2, states that the "[r]ecommendations outlined in her current psychological assessment [P 4] are adequate to help her achieve skills that will give her some form of independent living." Furthermore, the Respondent effectively argued at hearing that the Student's placement at the day school was not appropriate because of her multiple disabilities and the recommendation of the Clinical Psychologist, which was for a residential placement.)

tactile modalities.[37] Psychotherapeutic intervention must be immediately available 24 hours per day.[38] The Student's classroom must be organized, highly controlled, and void of excessive external stimuli.[39] People working with the Student must avoid reinforcing negative and oppositional behavior and using punitive corrective measures.[40] She needs to be taught direction-following skills and provided with social skills training.[41] The learning environment must be safe and void of peer ridicule.[42] The Student needs to be provided designated breaks, additional time to complete assignments, and given warning prior to changing assignments in class or changes in routines.[43] The Student requires a behavior intervention plan, based on a functional behavior assessment, and developed with input from teachers, therapist, and parent.[44] In addition to as-needed psychotherapeutic intervention, the Student requires regular weekly individual therapy to address her ability to express emotions and boost her self-confidence.[45]

VI. 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. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* DCMR 5-E3030.14. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must

[37] P 2, P 4.
[38] P 2, P 4.
[39] P 2, P 4.
[40] P 2, P 4.
[41] P 2, P 4, R 4.
[42] P 2, P 4.
[43] P 2, P 4.
[44] P 2, P 4.
[45] P 2, P 4.

determine whether the party seeking relief presented sufficient evidence to meet their burden. DCMR 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

> special education and related services that –
> (a) Are provided at public expense, under public supervision and direction, and without charge;
> (b) Meet the standards of the SEA, including the requirements of this part;
> (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17.

3. Federal Regulations at 34 C.F.R. § 300.324 describe the basis for IEP development and revision:

> (a) Development of IEP — (1) General. In developing each child's IEP, the IEP Team must consider —
> (i) The strengths of the child;
> (ii) The concerns of the parents for enhancing the education of their child;
> (iii) The results of the initial or most recent evaluation of the child; and
> (iv) The academic, developmental, and functional needs of the child.
> (2) Consideration of special factors. The IEP Team must —
> (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

When revisions are made, the IEP team must:

> address —
> (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
> (B) The results of any reevaluation conducted under § 300.303;
> (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
> (D) The child's anticipated needs; or
> (E) Other matters.

4. When the IEP team makes a proposal to change the identification, evaluation, placement, or provision of a free appropriate public education of a child, the proposal must include prior written notice that includes:

(1) A description of the action proposed or refused by the agency;
(2) An explanation of why the agency proposes or refuses to take the action;
(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
(7) A description of other factors that are relevant to the agency's proposal or refusal.

5. Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See:* 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. "[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 Fed. Reg. 46662 (2006).

6. The Supreme Court has described the purpose of the IDEA as providing a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). When a child is mainstreamed:

> the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit.

Id. at 203. The Court held:

> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id. at 203-204. Thus, the "basic floor of opportunity" provided by the IDEA for this Student, and as described by the Supreme Court, consists of the opportunity for advancement in the grade level content for the grade in which the Student is enrolled.

7. "An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see* Reid v. District of Columbia, 401 F.3d at 519-20; the nature and effects of the child's disability have not been adequately monitored, *see* Harris v. District of Columbia, 561 F. Supp. 2d at 68; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See* Gellert v. District of Columbia Public Schools, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006)." Suggs v. District of Columbia, 679 F. Supp. 2d 43, 53 IDELR 321 ((D.D.C.2010).

8. The data upon which the IEP in this case is based does not support the proposal made by the Respondent. The school psychologist agreed upon the recommendations for assisting the Student made by the independent psychologist, and very few, if any, of these recommendations made it into the IEP. The data supports, as the Respondent argued at hearing, a much more restrictive education placement than the proposal by the Respondent at the IEP team meeting or the Petitioner's desired placement. There was no explanation why the IEP says what it says or why requests were rejected. The Student's disabilities are causing disruption and impacting her ability to access not only the general education curriculum but her education as a whole (both functional and academic skills). The proposal to keep her special education services essentially the same as they were the past year, with IEP goals that remained the same because they had not been met, in the general education setting where the Student failed nearly all of her classes is simply unsupported. The Special

Education Coordinator at the IEP meet admitted that the services to be provided to the Student were being driven by the school's needs, not the Student's needs. Thus, it is not surprising there is no other justification (an "explanation") for the Respondent's proposed IEP or placement.

9. While the Student is advancing to the next grade, all other indicators show she is not receiving an appropriate education. She failed nearly all of the classes for the last school year. She did not reach any of her IEP goals, her academic performance is roughly five years below her grade level, or more, and her behaviors continue to impede her academic and functional growth. She is difficult to handle at home, lacks appropriate relationships in the community, and engages in dishonest and destructive behaviors across all settings. These continues problems and in light of the failure to significantly revise the IEP, the IEP is not reasonably calculated to provide educational benefit to the Student.

VII. DECISON

The Petitioner prevails because the IEP is not reasonably calculated to provide educational benefit to the Student. However, the Student requires a highly therapeutic residential setting, not a day treatment placement, at this time.

VIII. ORDER

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

1. The Respondent will convene the IEP team, including representatives of two or more therapeutic residential educational settings, to revise the Student's IEP consistent with this HOD and the assessment reports of May and July 2011.

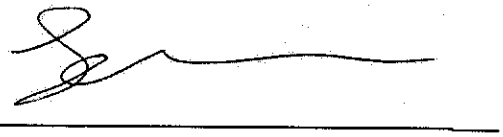
2. The IEP team must be convened no later than September 16, 2011. The Respondent must propose, in writing, at least three non-consecutive meeting times and inform the Petitioner of which time and date the team will meet if she fails to choose one of the proposed times.
3. The IEP will be reviewed and revisions made as appropriate and consistent with the findings and conclusions of this HOD, as well as the recommendations in the May and July 2011 assessment reports. The review will begin with the statement of the Student's present levels of academic achievement and functional performance, continuing with a review of the annual goals, then a review how the Student's progress toward meeting the annual goals will be measured. The team will then review the special education and related services and supplementary aids and services and program modifications, followed by the drafting of a statement of why, consistent with this order and the assessment reports (not because of this order) the Student will not participate with nondisabled children in the regular class and other activities. Then the team will review the appropriate accommodations necessary to measure her academic achievement and functional performance on State/District-wide assessments or, if the team determines it is necessary that the Student take an alternate assessment, write a statement why the Student cannot participate in the regular assessment and why the alternate assessment is appropriate for the Student. Finally, the team will review and revise the projected date for the beginning of the services and modifications as well as the anticipated frequency, location, and duration of the services and modifications.
4. The team will then determine which residential facility is appropriate to provide the services in the revised IEP, based on the input of the representatives of those facilities. (The facilities may be public or private.) The Student will remain in a residential placement for at least one year and until the IEP team agrees, based on assessments and observation data, a less

restrictive setting is appropriate. The Student's revised IEP and placement must begin no later than September 26, 2011.

5. All other requirements of 34 C.F.R. Part 300 and D.C. Mun. Regs. tit. 5, Chap. 30 must be followed and complied with, subject to the conditions set by this order.
6. Any failure on behalf of the Respondent to comply with this order may be enforced through the State Complaint process, pursuant to 34 C.F.R. §§ 300.151-300.153.

IT IS SO ORDERED.

Date: August 26, 2011



Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).