DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	Case No. E-07-003
by her parent	)	
	)	
	)	
Petitioner	)	

Appearances

For Petitioner, a Minor
Petitioner's parent,---------- *Pro Se*

For Respondents
Kathryn D. MacKinnon, Esq.
Deputy Chief Department Counsel

Braden M. Murphy, Esq.
Department Counsel

February 29, 2008

Decision

MARSHALL, Jr., Arthur E., Hearing Officer:

Petitioner (hereinafter "child" or "student") is a student eligible for attendance within the Department of Defense (DOD) Defense Education Activity (DoDEA), DoD Dependents Schools-Europe (DoDDS-Europe (DoDDS-E) by virtue of her father's position as a Department of Defense contractor. She was previously determined to be eligible for special education and related services. Her mother (hereinafter "Petitioner" or "mother") filed a request for due process on December 26, 2006, alleging certain irregularities in her child's former special education program at a DoDEA elementary

school ("Respondents"[1] or "the school"), in Germany.[2] The Director, Defense Office of Hearings and Appeals (DOHA), Defense Legal Services Agency, received that request for due process. Under the Individuals with Disabilities Education Improvement Act, as amended and reauthorized in 2004 (IDEA or IDEA 2004),[3] DoD Instruction 1342.12 (April 11, 2005)(DoDI), and 32 C.F.R. Part 57, Appendix G,[4] which implements IDEA within the U.S. Department of Defense (DoD) and controls due process within DoD,[5] the Director assigned me to serve as the impartial Hearing Officer on January 10, 2007.[6]

Respondents filed a Notice of Insufficiency and Motion for More Definite Statement on January 19, 2007. In addition to noting specific statutory insufficiencies, they argued that the existing due process request did not set forth Petitioner's complaints under IDEA with sufficient specificity or clarity to define the issues for due process or to enable the school to reasonably respond. By Order of January 24, 2007, it was found that the petition failed to meet the threshold requirements of IDEA. Consisting of several pages containing numerous complaints on a variety of often unrelated topics, it failed to provide either Respondents or the tribunal with reasonable notice of the justiciable issues. Consequently, it was returned. In the absence of objection by the school, Petitioner was permitted to file an amended petition that met the requirements of IDEA 2004 and DoDI 1342.12 and that connected her various factual allegations to reasonably identifiable IDEA-related issues.[7]

An amended petition was received on March 12, 2007, in which a lack of specificity still existed. Respondents voiced their intention to object to its acceptance unless issues were further clarified. Between March 20, 2007, and March 26, 2007, teleconferences were conducted with the parties to help clarify Petitioner's amended petition and remove complaints overlapping with issues in parallel proceedings involving the child's siblings.[8] Respondents and the tribunal became satisfied that the effort had helped formulate issues sufficiently identifiable and consolidated to proceed, although the precise remedy sought remained ill-defined. The teleconference transcript was

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[1] Respondents include the school, DoDEA, Defense Dependents Schools-Europe (DoDDS-E), and its School District. For ease of identification, Respondents will usually be termed "the school."

[2] The student was subsequently removed from the school system for home-schooling in September 2006.

[3] *See* Public Law (P.L.) 108-446; 20 U.S.C. 1400 *et. seq.* and 20 U.S.C. Chapter 33.

[4] *See also* 32 C.F.R. Part 80.

[5] Except as specifically modified by the content of the Reauthorized IDEA.

[6] *See also* DoDI 1342.12, Encl. 9, § E9.3 and § E9.4.7.

[7] Petitioner was also instructed to limit her allegations to those events occurring within the applicable two-year limitations period, absent specific exceptional circumstances.

[8] *See*, *e.g.*, March 22, 2007, Teleconference Transcript in E-007-001 at 5-18, 56-61; March 26, 2007, Teleconference Transcript in this proceeding, *generally*, and at 220, at which Department Counsel makes reference to prior questioning in the E-07-001 transcript regarding a state university assessment.

adopted as the clarified Amended Petition to accommodate the mother, who has a high school education, no experience in either litigation or special education prior to 2007, and is proceeding *pro se* from Germany with limited English language resources to help her with this process. That transcript was emailed to the parties on April 4, 2007.[9]

During an April 19, 2007, teleconference, Petitioner moved for a continuance that would schedule the hearing date after the summer break. During an April 20, 2007, teleconference, Petitioner waived her child's rights under the applicable statute and instructions to an expedited process and decision under the applicable time lines.[10] She also renewed her request for a continuance. Proceeding *pro se*, she felt unable to give this matter her full attention so close to the end of the school year while assisting her husband in a command directed permanent change of station, while trying to both find a new home and relocate to a new town before a June 2007 deadline, and while home-schooling two pre-teen children.[11] Consequently, she requested an extension in time to proceed. Against the school's objection, I found sufficient cause existed to grant Petitioner's motion on May 8, 2007, given her circumstances and noting that the petition was constructively her own. This matter was tentatively rescheduled from May 2007 to the week of September 3, 2007.

On April 20, 2007, Respondents filed an Answer to the Amended Petition and denied all allegations. During the April 20, 2006, teleconference, the parties agreed to Respondents' reorganization of Petitioner's factual allegations into categories. Her issues were further clarified, through discussions and various motions, until they took the form orally approved by the parties and stated in my order of August 30, 2007.

Communications between the parties were riddled with complications that worsened over time.[12] Consequently, minor motions and requests were routinely addressed informally, orally, or by email, on an *ad hoc* basis to keep the process moving despite communication difficulties and party unavailability. A final pre-hearing conference was scheduled to be held in Germany, on August 31, 2007, to finalize the issues, expedite agreement by Respondents to audio transcriptions being prepared by Petitioner, expedite completion of a stipulation of facts, and to discuss how the proceeding would be conducted. It was cancelled after DOHA management, on August

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[9] Email, from Hearing Officer to parties, *FW: 03/22. 03/26, 03/30 Hearings*, dated April 4, 2007, stating only: "Attached are the transcripts you accepted as your petitions," referring to the March 2007 teleconferences held to clarify issues and amend petitions in Petitioner's cases.

[10] Email, Petitioner Handwritten Waiver, undated.

[11] Additionally, Petitioner has two other actions currently pending concerning her other children.

[12] Such complications arose from coordinating conferences in differing time zones, erratic cell phone and internet coverage in Germany, secured e-mail server delivery issues, a paper shortage, excessively protracted and markedly irregular times for mailing materials internationally, a local telecommunications strike affecting telephone and internet service, and Petitioner's process of relocating from a mid-sized city to outside a small and remote town within the School District with poor telecom resources and mail service.

18, 2007, directed that video- or non-video-teleconferencing initiated in the U.S. should be used for the conference.[13] Given the short notice and limited resources at the German hearing site, the request for a video-teleconference could not be accommodated, and the parties agreed that teleconferencing would not be productive.

The due process hearing was conducted from September 4, 2007, through September 10, 2007, in German.[14] During the proceeding, the Mother developed laryngitis. Her vocal limitations were accommodated until her limitations affected the creation of a clear written record, at which point the proceeding was curtailed early on September 7, 2007, and completed on Monday, September 10, 2007. During the hearing, Petitioner introduced 1,942 whole, unsubdivided pages of exhibits, marked (Pet. Exs.) 1-1,942, and the school introduced 1,095 similar pages of exhibits, marked KJ 0001 - KJ 1,095.[15] Many such pages were subdivided into multi-page exhibits (*ie.* Ex. 142a, 142b, etc.). Both sets of exhibits have notable gaps in numeration, purposefully provided in the event supplementation might be needed at hearing. The bound exhibit files include all admitted exhibits not otherwise contained in the Hearing notebook.

In lieu of closing arguments, the parties elected to submit closing briefs after receipt of the transcript. The Army legal assistant assigned to transcribe the proceeding at the request of the Director, DOHA,[16] worked independently without additional support, so I required the parties to submit summaries after the September 2007 hearing which would reflect relevant testimony from each witness; such summaries were required to give the parties a basis upon which to start contemplating their respective closing arguments while the lengthy transcript was prepared. The transcript was ultimately received on December 20, 2007, and forwarded to the parties for their expedited review and use in preparing their post-hearing submissions.[17] Respecting various holidays and the parties' simultaneous work on multiple, related cases, post-hearing submission due dates were staggered and each side granted one extension of time. Closing briefs and other supplemental materials were received by hand from

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[13] *See* Email, Directive to Hearing Officer, dated August 18, 2007.

[14] To equalize matters of logistical convenience between the parties and their respective witnesses, hearing venues were split within the school district, with half being conducted in the town in which the child had previously lived and attended Respondents' school, the other half on a base near the child's new home. This decision was made without objection by Petitioner.

[15] All Petitioner's exhibits were accepted except those specifically excluded in the Order of August 15, 2007, and August 24, 2007, those pertaining to matters disposed of in the Summary Judgment Order of August 30, 2007, and those excluded during the due process hearing (Tr. 4-7, 14-22, 27-33, 673). Between March and September 2007, Petitioner was repeatedly advised untranscribed tape recordings would be excluded from evidence unless shown that aural hearing would affect interpretation of statements. The majority of cassettes were neither transcribed nor shown to need aural interpretation, and thus excluded.

[16] DoDI 1342.12, § E9.4.9; *see also* Emails of August 17, 2007, and August 30, 2007.

[17] The transcript ends with a referenced break, noted on page 1,003 at the conclusion of testimony in this case. The transcriber did not provide a certification page indicating the closing of the proceeding.

Respondents on January 16, 2008, and sent by mail by from Germany by Petitioner on January 11, 2008. Rebuttals followed, as did supplemental materials. After all such records were received, a seven- day grace period was extended to make sure hard copies of all foreign submissions had been received via the mail. The record was closed on February 6, 2008.[18]

Identification of Relevant Laws, Procedures, and Issues

Generally speaking, IDEA entitles every eligible child to receive individualized instruction along with sufficient related and supportive services to permit the child to benefit from the instruction.[19] P.L. 108-446 (2004); 20 U.S.C. 1412(a)(1); *Board of Education v. Rowley*, 458 U.S. 176 (1982). Under IDEA, an eligible child is deprived of a "free and appropriate education" (FAPE)[20] if the school system violates the IDEA's procedural requirements, thereby adversely impacting the child's education, or drafts an IEP that is not reasonably calculated to enable the child to receive educational benefits. *Rowley* at 207; *Hudson v. Wilson,* 828 F. 2d 1059, 1063 (4th Cir. 1987).

Essentially a funding statute impacting States, IDEA creates only a federal minimum with regard to its provisions and States may structure educational programs that exceed the federal floor. *See*, 20 U.S.C.A. Sec 1400-1485; *see also Brody v. Dare County Public Schools* (SEA N.C. 1997). IDEA was adopted by the DoD/DoDEA for application to it its school system and for its eligible students; DoDDS-E specifically holds itself out as being under the direction of "both Federal regulations, P.L. 105-17, Individuals with Disabilities Education Act (IDEA),[21] and DoD Instruction, DoDI 1342.12. . . .", adding "[t]hese documents ensure that DoDDS personnel and families know who is eligible and what they must do to provide a [FAPE]."[22]

IDEA also mandates procedural safeguards to ensure that parents are able to participate meaningfully in the development of an individualized education plan (IEP) for their child. 20 U.S.C. 1414(d); DoDI 1342.12, § E8.2; *Rowley, supra; Honig v. Doe*, 484 U.S. 305 (1988). Parents objecting to their child's IEP have the opportunity of pursuing

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[18] DoDI 1342.12, § E9.4.16.

[19] The determination of whether a child is eligible for special education and related services essentially provides the threshold of access to the entitlements afforded under IDEA in most cases. Eligibility is not determined on the basis of a diagnosed disability or defined by the presence of a medical condition, but on the determination that a disability affects the child's ability to learn and progress academically.

[20] FAPE is defined as "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with [an] individualized education program." 20 U.S.C. § 1401(18).

[21] Inasmuch as DoDDS has embraced IDEA, *in toto*, it may be assumed DoDDS-E intends its public pronouncement to refer to IDEA 2004, P.L. 108-446, not the IDEA of 1997, P.L. 105-17.

[22] *See* http://www.eu.dodea.edu/ed/special.htm (February 14, 2008).

a due process hearing. DoDI 1342.12, § E9.4.2. The purpose of that hearing is to establish the relevant facts necessary for a hearing officer to reach a fair and impartial determination of the case. DoDI 1342.12, § E9.4.10. Review of the procedures afforded by the school is by a hearing officer who shall preside with judicial powers to manage the proceeding and conduct the hearing, including the authority to order an independent evaluation of the child at the expense of the DoD school system and to call and question witnesses.[23] DoDI 1342.12, § E9.4.10.

The hearing officer, at a minimum, shall have knowledge of, and the ability to understand, the provisions of the revised IDEA, the applicable provisions, applicable regulations, and legal interpretations of both State and Federal cases interpreting IDEA; shall possess the knowledge and ability to conduct hearings and render decisions in accordance with appropriate standard legal practice shall not be an employee of the educational entity;[24] and shall not have a personal or professional interest that conflicts with the objective hearing of the case or special education.[25] Additionally, the designated hearing officer, appointed by the DOHA Director, must be a DOHA Administrative Judge and an attorney in good standing with the bar of a state, the District of Columbia, or a commonwealth, territory or possession of the United States.[26] It is through this procedural safeguard a parent can explore a denial of with regard to an IEP.

The issue in this case involves an IEP that the Petitioner challenges as not having been developed in compliance with IDEA. The federal judicial circuits have offered guidelines to gauge a school's and/or district's IDEA compliance in such areas. *See*, *e.g.*, *Rowley; Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997); *Doe ex rel. Doe v. Bd. of Educ. Of Tullahoma City*, F.3d 455, 459-460 (6th Cir. 1993). The majority of circuits agree that an eligible child's IEP must be designed specifically for the child's unique needs, must be individualized based on assessment and performance, and must be supported by services that permit the child to receive meaningful benefit from instruction. The IEP must be delivered in the least

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[23] The Director, DOHA, is responsible for arranging the time and place of the hearing, and shall provide the administrative support. DoDI 1342.12, § E9.9. In this matter, the Director arranged for the hearing to take place in the child's school district at a time and date suggested by the hearing officer and agreed to by the parties as a convenience to the Petitioner, who requested an extension of time and waived the time frames set forth in DoDI 1342.12, § E9.4.17. The Petitioner's request was granted for good cause shown based on her home schooling schedules, move to a new base, and obligations in three concurrent due process proceedings. DOHA management retained an Army legal assistant based in Germany to transcribe the proceeding. *See*, Hearing Officer's File, E-mails of August 17, 2007, and August 30, 2007.

[24] In the context of this proceeding, an employee of the Department of Defense school system or a concerned Military Medical Department.

[25] IDEA 2004, P.L. 108-446, § 615(f)(3)(A); *see also* 20 U.S.C. § 1415(f)(3)(A) (2004).

[26] The undersigned has a M.Ed (education/special education policy) and Ed.S. (curriculum and administration), experience and recent training in IDEA, and 19 years of legal experience in education. The undersigned is a state bar member and DOHA Administrative Judge with the required judicial knowledge and abilities, certified in administrative adjudication, and has no conflict of interest regarding the proceeding.

restrictive environment (LRE), and in a special-regular education collaborative manner. The educational program ultimately must produce some educational benefit. A school district's proposed IEP is presumed to be appropriate.

Concerning an IEP as a written document, it is generally accepted to be a comprehensive statement of the educational needs of an eligible child and the specially designed instruction and related services to be employed to meet those needs. P.L. 108-446 § 602(14). The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child. In several places, IDEA emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness. *See generally* P.L. 108-446 § 615. As noted by the U.S. Supreme Court in *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359 (1985) at 368:

> Apparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labeled "procedural safeguards" to insure the full participation of the parents and proper resolution of substantive disagreements. Section 1415(b) entitles the parents "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child," to obtain an independent educational evaluation of the child, to notice of any decision to initiate or change the identification, evaluation, or educational placement of the child, and to present complaints with respect to any of the above. The parents are further entitled to "an impartial due process hearing. . . ."

In reviewing the complaint, the hearing officer considers all evaluative tests and diagnostics presented. The review proceeds with the burden of persuasion on the parent challenging an IEP to show that the IEP was not developed according to procedural safeguards, or that the IEP failed or would fail to provide a free and appropriate public education in the least restrictive environment. *Schaeffer v. Weast*, 546 U.S. 49 (2005). The hearing officer thus reviews substantive issues (whether the child received FAPE) and procedural issues; in the latter, a child can only be found to have procedurally been denied FAPE if: a)procedural inadequacies denied the child's right to FAPE, b) such inadequacies significantly impeded the parents right to participate in the decision-making process regarding the provision of FAPE, or c) caused the child a deprivation of educational benefits. Through this process, a validation or violation of FAPE is determined.

Preliminary Considerations

As noted, this tribunal's powers and jurisdiction are the creation of IDEA, as administered by the Department of Defense through DoDI 1342.12, § E8 and §E9, generally. DOHA is assigned responsibility for IDEA-related proceedings authorized

under § E9.4 through § E9.8 of that instruction. These sections include the authority invested in a hearing officer.

In defining the purpose of special education, IDEA (2004) clarified Congress' intended outcome for each child with a disability: such students must be provided with a free and appropriate public education (FAPE) designed to prepare them for further education, employment, and independent living. IDEA is not a panacea for all school-based complaints. It does not cover claims that an eligible child was discriminated against or that a school neglected its duty of care to a child. It similarly does not cover issues between base military police and base employee families unless such issues are shown to have a nexus with action by the school, and any such issues resulted in a significant impediment to a parent's right to participate in the decision-making process regarding the provision of FAPE. Such claims may be actionable, but not here. Jurisdiction is limited to issues arising under IDEA, however, and I lack the authority to review many of Petitioner's initial complaints. I similarly lack jurisdiction over issues barred by the applicable statutes of limitations, as well as those barred because they were not specifically and timely pled or amended into the pleadings pursuant to DoDI 1342.12, § E9.4.8, such as a grievance raised at hearing concerning DoDI 1315.19 (Dec. 19, 2005) and a request for the services of a language therapist requested for the first time in Petitioner's written closing argument.[27]

Finally, at the end of the hearing, Petitioner confirmed her intent not to return her child to the school.[28] Instead, she requested what is tantamount to a private special education program taught by a specific type of instructor in the methods or methodologies of her choosing.[29] Respondents correctly noted in closing argument that IDEA does not provide for such relief when FAPE is otherwise available.[30] Respondents also cited to recent changes in IDEA 2004, since adopted by the U.S. Department of Education at 34 C.F.R. § 300.300. Those changes were explored in *Analysis of Comments and Changes to 2006 IDEA Part B Regulations,* 71 Fed. Reg. 46635 (August 14, 2006), in which the Department of Education stated: "the [2004 IDEA] does not require school districts to provide FAPE to children who are home-schooled or enrolled in private schools by their parents. Respondents noted that DoDI 1342.12, §

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[27] Petitioner's Closing Arguments, dated January 16, 2008, at 3. *See also* Respondent's Rebuttal to Petitioner's Closing Argument.

[28] *See*, *e.g.*, Tr. 907; *see also* Ex. KJ654.

[29] Tr. 908-912.

[30] *See N.R. by and through B.R. v. San Ramon Valley Unified Sch. Dist*, 2007 U.S. Dist. LEXIS 9135 at 21 (N.D. CA 2007), *citing Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 885 (D. Minn. 2003) (holding that the district's refusal to assign the service provider of plaintiff's choice did not constitute a denial of FAPE); *A.B. v. Lawson*, 354 F3d. 315, 330 (4th Cir. 2004) ("The issue is not whether the [parent's program or preferred provider] is better, or even appropriate, but whether [the school system] has offered an appropriate program for the child. . . ."); *see also County School Bd. Of Henrico Co., Virginia v. Z.P. ex rel. R.P.,* 399 F3d 298, 308 (4th Cir. 2005) (the hearing officer cannot reject a properly constructed IEP simply because the hearing officer believes a different methodology would be better for the child).

E4.4.1.2 requires only that the school develop and implement an IEP for each eligible child who is overseas, home schooled, eligible to enroll in DoDDS on a space-required, tuition-free basis and whose sponsors have completed all appropriate paperwork and procedures. Consequently, Respondents argued that this case presents neither an actionable violation of IDEA nor a prayer for relief the hearing officer is empowered to grant. Given its two months of active efforts to continue working on an IEP after the child was left school, however, there may be some argument that Respondents assumed some duty to provide FAPE. That question, however, need not be explored herein.

In light of the above, the two remaining justiciable issues are:

1) **Whether Respondents, through its IEP team, violated IDEA by not considering the Petitioner-parents' input, concerns and all relevant information regarding their child's education.** Petitioner's complaint here focuses on allegations that despite parental opposition, 1) Respondents did not change methodologies under the IEP when the parents concluded the methodology used was not working; 2) Respondents failed to implement the programs the parent requested; 3) Respondents failed to use Woodcock-Johnson III testing to assess the child's progress and performance under the IEP; 4) Respondents failed to address lack of growth, use informal assessment tools correctly, or use formal assessments to measure growth, and 5) Respondents failed to address the problems the child had in mastering goals and objectives,[31] and

2) **Whether Respondents failed to create a proper IEP under IDEA, including present levels of performance, services to be provided, identifying ways of measuring growth/progress, considering lack of progress, and consequently prevent the child from progressing.** In raising an issue regarding the substantive nature of the IEP(s) offered, Petitioner addressed specific areas of the IEP(s) it argues were deficient. In particular, Petitioner argues 1) Respondents did not properly use the DRA and DIBLES when monitoring the child's progress, and 2) Respondents' IEP(s) failed to address the child's need for assistance because she was not reading at grade level.[32]

Administrative Process

Before and during the hearing, the dictates of DoDI 1342,12, § E9.4, § E9.5, § E9.6 were followed. At the hearing, the Federal Rules of Evidence were relaxed and

[31] Petitioner also complained that math/arithmetic issues were not reflected in the IEP, as requested, but the facts and evidence clearly demonstrate that math goals and objectives were included in multiple IEP drafts as a courtesy to the parents, although LB assessors did not see an imminent need for such intervention and Respondents questioned their necessity. *See* Exs. KJ530; KJ 535; KJ578; KJ608; KJ629.

[32] To best refine Petitioner's phrasing to a concise form amenable to judicial consideration, this wording evolved over a series of emails consolidating the issues in justiciable terms until it was ultimately accepted by Petitioner.

resorted to only as a guide. DoDI 1342.12, § E9.4.10. All evaluations and assessments, written or oral, formal or anecdotal, presented by either party were considered. *See* DoDI 1342.12, § E8.2.9. All exhibits offered were reviewed and considered in relation to the pertinent issues. Conflicting evidence, written and oral, was resolved in favor of the most persuasive with due consideration of the issues as well as the credibility, training, and experience of the source. The undersigned was aided by expert testimony and print materials appropriate to special education.[33] All evidence accepted was available to both parties throughout this process. To maintain the integrity of the official record as a whole, the record was compiled as received, without reorganization and without supplemental annotation or indices. Any exhibits excluded are noted in the record.

Findings of Fact

The majority of chronological events were not disputed. Moreover, all case study committees (CSCs) were appropriately comprised as required under IDEA and all CSC meetings were properly conducted. As discussed below, all IEPs and draft IEPs met the dictates of IDEA and DoDI 1342.12. The evidence shows that the IEPs offered were reasonably tailored to meet the individualized special education needs of the child and designed to enable her to make progress in the general education curriculum.[34] Measurable objectives made progress quantifiable. The fundamental dispute between the parties is one of educational methodology and philosophy, each having decidedly different views regarding what kind of methodologies and programs would effectively provide the child with FAPE.[35]

Petitioner's child was born in May 1997. The child is the daughter of a DoD civilian employee who is the sponsor of both she and her mother. She attended a civilian public school for pre-kindergarten through 1st grade during the 2001–2004 school years. She was determined eligible for special education[36] and an appropriate IEP was drafted. The child was placed in the Herman Method program, an Orton-Gillingham multi-sensory approach to reading, on January 29, 2004. A January 30, 2004, Lindamood Bell (LB) Pre-Testing Summary reported that at mid-year first grade, the child performed at the 55th percentile (Grade Level 1) in Spelling and at the 90th percentile (Grade Level 1) in Arithmetic on the Wide Range Achievement Test-Revised/3. Based on this experience, Petitioner became an ardent proponent of both Orton-Gillingham-style methodology and LB programs. A February 19, 2004, report in German appears to indicate a diagnosis of dyslexia (*Legasthenie*) and dyscalcula

[33] Reference regarding definitions of or information on specific disabilities was in terms of special education and the affect of such disability on a child's ability to learn, not in terms of medical definition.

[34] *See*, *e.g.*, Tr. 82-139; 510-553; 602-604; 614-616.

[35] *See Rowley* and *Doe v. Honig*, generally.

[36] Exs. KJ 30-KJ32.

(*Dyskalkulie*).[37] On an IEP, dated May 18, 2004, Petitioner noted that her child was not yet at grade level and concluded that "not much progress" had been made under the public school's IEP.[38]

In the autumn of 2004, the child entered 2nd grade within the DoDDS-E school system in Germany.[39] DoDDS-E accepted the incoming non-DoDDS IEP. It began to serve the child under that IEP on September 29, 2004, but pre-referral indicated it insufficient under DoDDS eligibility criteria. Consequently, Petitioner signed informed consent for an evaluation on September 29, 2004. Between September 29, 2004, and September 22, 2006, approximately 15 CSC meetings were held, during which the child's individualized special education program was discussed.[40]

On January 19, 2005, the child was found eligible under DoDDS criteria, the prior IEP abandoned, and an initial DoDDS IEP was signed by the parties on January 19, 2005.[41] The school started a case file for monitoring progress that, over time, would use observation, rating scales, record reviews, criterion referenced testing, authentic assessment, and standardized testing, in conjunction with response to intervention (RTI) using multi-tired, research-based instruction with behavioral support in collaboration with the general education program.

During many of the CSC and other school meetings, school representatives and the designated school official (DSO), Dr. Barkmeier, recommended READ 180[42] as an appropriate program to address the child's reading difficulties and reenforce short-term memory skills, based on her STAR score, DRA results, and teacher recommendations.[43] READ 180 is a popular, scientific research-based reading intervention program shown effective in accelerating reading achievement in all students, including identified special education students. It was partially funded by a grant from the U.S. Department of Education's Office of Special Education Programs.[44] Generally used by 4th through 12th grade students, DoDDS developed an application for

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[37] PetEx. 77e.77l. Petitioner was repeatedly advised to obtain an English translation before the hearing, but she could not obtain one in Germany. Her representations as to content have been appropriately considered.

[38] Exs. KJ94-KJ97.

[39] Exs. KJ106-KJ114.

[40] Evidence in this matter, as well as in docket numbers E-07-001 and E-07-002 concerning Petitioner's siblings, indicates discussion regarding Petitioner's education and IEP provisions was often initiated by Petitioner's mother at CSC meetings regarding Petitioner's siblings. *See*, *e.g.*, Tr. 988.

[41] *See* Exs. KJ115-KJ178a.

[42] *See*, *generally*, http://teacher.scholastic.com/products/read180/.

[43] Tr. 425.

[44] Tr. 1,001.

READ 180 with its publishers for struggling 3rd through 12th graders.[45] It was concluded by the school and the DSO that addition of this program would be a positive complement to the child's IEP.[46]

During the intervening two-year period, the CSC met on February 17, 2005. On February 22, 2005, Petitioner requested that her child's DoDDS IEP be modified to increase special education Resource Room ("Pullout") time to 340 minutes per week, and reword the child's IEP objectives. The IEP was so modified.[47]

During a May 23, 2005, mediation regarding the child, DoDDS agreed to provide her with a summer program using LB programs, as requested, although the regression-recoupment analysis had not indicated[48] that she was in need of an extended school year (ESY). This accommodation was not made part of an IEP.[49] Service packets arrived late, however, and the summer program start date was delayed until about July 13, 2005. In September 2005, Petitioner complained that she had not received any instructions to inform her about the programs. She also opined that the child received less than the full amount of hourly instruction noted in the mediation agreement.

A CSC meeting was held on September 14, 2005, which included further discussion of READ 180.[50] The READ 180 teacher wrote to Petitioner. [51] On October 11, 2005, Petitioner responded to the suggestion that READ 180 was an appropriate program and she signed permission for the child to participate in that program.[52]

On October 19, 2005, Petitioner requested the IEP include two additional hours a day of one-on-one services in addition to READ 180, as well as two LB programs,

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[45] Tr. 1,003.

[46] Tr. 301-309.

[47] *See* Exs. KJ187a-187g.

[48] Exs. KJ191-KJ192.

[49] Exs. KJ 193-195.

[50] Exs. KJ197-KJ200.

[51] Exs. KJ224-KJ260.

[52] Exs. KJ201-KJ206.

LiPS[53] and "Visualizing and Verbalizing."[54] [55] At the October 21, 2005, CSC meeting, she unsuccessfully requested that a teacher trained to teach children with dyslexia be hired and that a tutor provide home instruction for two hours a day, four days a week, for at least six months.[56] These CSC deemed these requests unwarranted.

On October 24, 2005, CSC member and special education specialist Jan Osier responded to Petitioner's' concerns regarding various aspects of the student's special education program.[57] She explained the different measures of progress and explained why IEP goals are not measured in terms of grade levels; she addressed when ESY was generally found to be appropriate only when the child was not making progress.[58] She also explained why it was concluded that additional assessments were not then considered advisable, but she agreed to look into providing more one-on-one time. She also explained how teachers were deemed qualified by DoDDS.[59]

At a November 2, 2005, CSC meeting, the CSC granted Petitioner's request that the child be administered formal assessments, including assessment in mathematics. A new draft prepared by the school was presented and signed by the Petitioner on November 2, 2005.[60] That IEP indicated special factors the child required, including testing accommodations. Special education services were noted as appropriate in both the Resource Room and general education setting. In the mother's writing, it is noted that the child would receive 30 minutes one-on-one instruction from a Ms. Ochs and Ms. Mead daily, plus 1.5 hours of READ 180 daily, with 50 minutes of READ 180 with a special education teacher. Attached to the IEP is a proposed daily schedule, appended at Petitioner's request and showing both her signature and instruction to "see attached schedule." Services were thus typed in to provide two Resource Room sessions consisting of special one-on-one education of 30 minutes each with Ms. Mead and Ms. Ochs, respectively. Additionally, 15 minutes of language in the classroom was followed

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[53] Melissa Mead, M.Ed., is a DoDDS qualified special education teacher and her expertise was well demonstrated during the hearing with regard to special education techniques, assessment, and services. Tr. 296-299. During the school year, Ms. Mead used various LB approaches, including LiPS. She discontinued the approach, based on her expertise, surmising that the student "seemed way above what I was doing with these other kids [with LiPS]. . . . [s]he seemed to be past the later levels." Tr. 321-322.

[54] Melissa Mead also used the LB Visualizing and Verbalizing method on the student for some weeks, but concluded "I wasn't really seeing that it was really beneficial to her at that time. . . . " Tr. 323.

[55] LiPS, the "Lindamood-Bell Phonemic Sequencing Program," aims to stimulate phonemic awareness; Visualizing and Verbalizing aims to stimulate concept imagery to improve comprehension.

[56] Exs. KJ208-KJ213.

[57] Exs. KJ214-KJ217.

[58] *Id.*

[59] *Id.*

[60] Exs. KJ-266 through KJ 273; Tr. 43-69.

45 minutes of "specials" and 85 minutes of guided reading with literacy coach. Fifty minutes of one-on-one READ 180 time with Ms. Mead coaching, was followed by 40 minutes of READ 180 instruction. Modifications as to instruction were duly noted and the child would receive regular transportation and attend a regular physical education program. A date for annual review was noted.

In the category for Language Arts, spelling and written language are noted as areas designated for attention. The child's present level of performance and how her disability impacted her general education progress was noted: "[The student] has difficulty writing using correct spelling. . . . [because she] attempts to spell phonetically and has difficulty recalling spelling patterns." The annual goal was stated as one year's annual growth made in writing skills through utilizing the writing process. Mastery of specific objectives was to be measured by using the writing process of drafting, editing, revising, and publishing with minimum assistance in four out of five situations. The same criteria were set forth for spelling skills, but mastery was to be shown by passing certain informal tests with 80% or higher accuracy. Similar goal and mastery was dictated for language skills. Under the category for Reading, reflecting a need for work on fluency and Word Attack skills, similar goals were set forth, with objectives measured by similar displays of mastery at the 80% or 90% accuracy level.

Accompanying the IEP are copies of the applicable IEP Objective Check Sheets.[61] They provide areas to mark scores on various tests and assignments on an on-going basis for goals, objectives, and growth shown. Reading and language skills are additionally monitored through STAR(Standardized Testing and Reporting), DIBLES or Dibbles (Dynamic Indicators of Basic Early Literacy Skills, a standardized measure of literacy development), DRA (Developmental Reading Assessment, an assessment conducted during a one-on-one conference to help gauge reading level and assess need for further interventions), and READ 180 testing. Teacher comments can be elaborated on an accompanying progress report.[62]

In developing the IEP, the CSC took into consideration student records, past eligibility assessments, and parent history of academic difficulties. It took into consideration the student's strong Word Attack skills as well as her weaker skills in more advanced areas of reading, such as comprehension and fluency. Although her standard achievement scores did not show significant impact,[63] the child's RPIs (Relative Proficiency Indices) demonstrated areas where she had difficulty with learning to read. READ 180 was incorporated into the IEP, as were some math accommodations, as requested. That IEP also decreased to 270 minutes the time the child was restricted to the Resource Room in favor of increasing special education classroom support to 200 minutes per week, thus meeting recent rule revisions

[61] Exs. KJ274-KJ278.

[62] Exs. KJ281-KJ284.

[63] Despite standard scores in achievement testing achievement scores.

regarding co-teaching in the READ 180 program and better integrating that program into a student's whole curriculum.[64] During the meeting, Jan Osier expressed her opinion the student had dyslexia.[65]

On November 20, 2005, Petitioner sent the school an email requesting additional programs sought as "related services."[66] On November 23, 2005, she emailed specialist Jan Osier and requested a one-on-one administration of the Davis Dyslexia methodology and LB's "Visualizing and Verbalizing" program methodology.[67] She again emailed Ms. Osier regarding the Davis methodology program on December 5, 2005.

On December 15, 2005, Petitioner expressed both her conclusion that her child had not made measurable growth and her frustration with having agendas for CSC meetings. She requested that DoDDS provide a Davis Method program and/or the Wilson Reading System, an Orton-Gillingham-based method, as well as the Reading Recovery program.[68] This request was also made at a December 15, 2005, CSC meeting. During that meeting, she stated that READ 180's materials generally noted the program was for 4th grade students and older. She requested the scientific research basis for placing 3rd graders in READ 180. She was also advised by Ms. Osier that the school had no objection to the parents funding any programs of their choice.

During school year 2005-2006, Melissa Mead served the child as a special educator, instructing, observing, and assessing the child. She has experience in informal classroom assessment, which she performed on the child on an on-going basis, and which she also monitored through the child's general education and support activities.[69] She regularly monitored the child with regard to curriculum-referenced measures, such as STAR, DRA, DIBELS, Rigby (reading program specific) and SRA (Scientific Research Associates) tests and the resulting information.[70] The tests were administered by those trained in the area, such as a Ms. Nicholson, for the DRA and Rigby tests.[71] At mid-year, she provided Petitioner with testing data and the DRA protocol, and later gave her other requested information.[72] Some test results presented

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[64] Tr. 64.

[65] Tr. 183.

[66] Exs. KJ292-KJ293.

[67] Davis Dyslexia Association International offers several reading and math programs, including the Davis Dyslexia Correction Method.

[68] Exs. KJ302-KJ304.

[69] Tr. 299-300.

[70] Tr. 301; 338-357; 363-378; 405-415.

[71] Tr. 397.

[72] Tr. 340-342.

at the hearing have lines censoring information that referred to other students and was concealed for privacy reasons, but do not affect the portions dealing with the child.[73] Based on her experience in such areas, Ms. Mead acknowledged the child's fluctuating scores as not atypical, but showed how overall progress had been steadily maintained.[74] She also showed how the educational program provided worked toward the IEP goals and objectives.[75]

During December 2005, the child was administered the additional assessments previously requested. Reports were completed in early January 2006 by Ms. Dougherty, Ms. Carpenter, and Ms. Zeitler. On January 13, 2006, Ms. Osier wrote Petitioner and explained that Scholastic, the company providing READ 180, had previously worked with DoDEA in developing a READ 180 program for 3rd graders and that their program was designed for special education students.

In anticipation of a CSC meeting to be held on January 17, 2006, classroom monitoring data collected by both the general and special education teachers on multiple types of measures were reviewed and found to indicate that the child had made academic progress.[76] As he child's special education specialist, Ms. Mead's numerous assessments, comments on curriculum-referenced measures, and progress reports for the prior year were reviewed.[77] Where goals remained unchanged, it was because the child had not mastered all of the objectives under that goal.[78]

The January 17, 2006, CSC meeting was then held to discuss the child's progress and a draft annual review IEP was prepared.[79] The IEP reflected the strengths and weaknesses reflected in the December 2005 assessments and classroom monitoring.[80] Skills addressed through one-on-one training and in the Reading Room had improved, so the IEP redirected some instructional time back into the general education setting.[81] To better display the progress the child had made, different formats

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[73] Declaration of Mead, dated Sept. 19, 2007, (Respondent's Written Closing Argument, attachment) referring to PetEx. 31a-31e.

[74] Progress was noted using curriculum based measures with regard to grade equivalency, not national , standardized assessment such as the Woodcock-Johnson III. Tr. 365; *see also* Tr. 366-379.

[75] *See, e.g.*, Tr. 310-338.

[76] *See*, *e.g.*, Tr. 45-57, 67-76, 81-93, 145-151, 273-288, 328-373; Exs. KJ320-KJ367.

[77] In accordance with the IEP, regular progress reports were mailed home to Petitioner's mother. Petitioner's mother never contacted Ms. Mead to discuss the reports. Tr. 335.

[78] Tr. 298-300, 343-363, 399-415. 488-490.

[79] Tr. 94-98; Exs. KJ-372-KJ413.

[80] Tr. 82.

[81] Tr. 276-271.

were used in explaining her growth in the prior year.[82] It was explained that the child's achievement testing revealed scores in the average range.[83] READ 180 was concluded to be responsible in part for her strong auditory processing scores; its continued use was to recommended to reenforce weaknesses in short-term memory and strengthen her focus.[84] Ms. Mead was particularly pleased with the child's progress in the program because the program suited the child's needs for reenforcement of fluent reading, filling in gaps with phonics and spelling, and the opportunity for the child to self-correct with computerized prompts and with assistance from herself and the Read 180 teacher.[85]

Petitioner declined to sign that IEP at the January 17, 2006, CSC meeting.[86] She stated that there was inadequate information to develop an IEP. She was invited to take the draft home through January 27, 2006, and make comments on it to clarify what she felt was lacking.[87] On January 20, 2007, the school also extended an invitation to Petitioner to review school records.[88] Petitioner's various questions were answered in emails from both Ms. Osier and Dr. Barkmeier.[89] Petitioner then requested an independent educational evaluation (IEE) for her child. Against Ms. Mead's advice, Petitioner requested her child be removed from READ 180. Parent has no formal training or other tangible experience teaching or working with special reading programs. Armed only with what she had learned from the internet, groups, conversations, and specialty publications, she requested that the school provide her with appropriate special education training in dyslexia so as to enable her to teach her child at home. On that day or shortly thereafter, Petitioner reiterated her request for an IEE in a letter and READ 180 services were discontinued.

On January 26, 2006, Dr. Maria Barkmeier wrote to Petitioner, seeking clarification regarding the requested IEE and explaining DoD contracting rules for granting such requests. On that same day, Dr. Barkmeier provided Petitioner with READ 180 information, including an impact study and evaluation. In early February, notice of a February 21, 2006, CSC meeting was sent to Petitioner. On February 7, 2006, Petitioner wrote to the DSO, principal, and two special education teachers stating: "Please be aware of the fact that over 30 days is totally unacceptable from one meeting to the next," before proceeding to criticize the child's program, the school's

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[82] Tr. 83-95.

[83] Tr. 90.

[84] Tr. 90-96.

[85] Tr.307-378.

[86] The parent declined to fully accept any IEP from this point on that did not include all her comments. *See*, *e.g.*, Tr. 95-99; 113-139.

[87] Tr. 99.

[88] Ex. 428.

[89] Exs. KJ429-KJ433.

handling of assessments, and concluding: "that the school in my opinion does not take [the child's] education seriously nor do they put [her] educational needs as a priority."[90] Dr. Barkmeier sent an extensive response on February 17, 2006, which addressed the Petitioner's concerns.[91]

Petitioner did not return her comments regarding the school's January 17, 2006, draft, but her own suggested IEP was ultimately received by the school on February 21, 2006.[92] During a CSC meeting that day, Petitioner asked the CSC "if they could guarantee [the child's] growth. She stated that if the CSC could not make a guarantee then [she] has requested that a private tutor be hired or someone who could teach" a child with Dyslexia "successfully."[93] It was explained that: "[T]here was no way to guarantee a student's growth. They don't grow in a linear fashion. They may make a huge amount of growth at one time and slow down for a number of months so there's no way to say if a child is going to be at an exact grade level at an exact time of the month."[94] It concluded: "[O]ur goal is always to at least, at the minimum, make one's year's growth in one year's time."[95] During that same CSC meeting, Dr. Barkmeier reiterated that DoDDS would pay for the IEE and asked Petitioner to identify the entity to conduct the IEE. Petitioner eventually requested that the IEE to be conducted by LB.[96]

The CSC considered Petitioner's suggestions for the IEP, adopting some.[97] One request, that a Woodcock-Johnson be used as a measure of progress on the IEP, was denied because the Woodcock-Johnson can be misleading as a measure for IEP growth.[98] At hearing, a Ms. Read was presented as an expert witness. Read has approximately 30 years experience in the administration of Woodcock-Johnson testing, two decades as a trainer for various learning diagnostics, and many years of relevant experience as both a graduate school instructor and as a consultant on assessment and linking assessment intervention. Dr. Brewer similarly demonstrated significant expertise in test administration. They persuasively explained that Woodcock-Johnson is a standardized test providing a snapshot of how a child did on a particular day without regard to how the child has done over a period of time within a particular

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[90] Exs. KJ467-KJ468.

[91] Exs. KJ449-KJ450.

[92] Tr. 115.

[93] Tr. 116.

[94] Tr. 117; Tr. 281-286; Tr. 403-405, 488-489.

[95] *Id.*

[96] Exs. KJ 523-KJ535.

[97] Tr. 120-121.

[98] Tr. 118; 513-515, 536-599; 651.

program. It is predicated on national sampling from a wide spectrum of varying curriculum, generally giving only an overall sense of how one child compares to other national norm samples and general realms of grade equivalencies.[99] Its use of short sub-tests and computerized cluster scores sometimes renders incomplete assessments with regard to qualitative information about what a child knows, can do, and where the child needs continued work. Therefore, unlike curriculum-referenced measures such as DRA or DIBLES, which were repeatedly administered and synchronized with what the child was doing in the classroom, it is not a reliable measure of a student's personal progress through an individualized curriculum.[100] Also, a request for ESY services for one week after school and one week before the beginning of the new school year was not adopted because the regression-recoupment analysis did not indicate a need for ESY.[101] Additions to the IEP flatly stating that the child would be "up to a 4.5 grade level" and "will not be kept in at recess" were not adopted because they were just statements, not referenced in terms of measurable objectives."[102]

At the next CSC meeting, on March 9, 2006, the modified draft IEP was discussed and prepared as noted.[103] Ms. Osier mentioned this was the third attempt to finalize a new IEP, stating that the curriculum-based information provided by Ms. Mead was the basis for developing revised IEP goals and objectives; she also noted the school had been using kinesthetic, auditory and visual strategies.[104] This broad basis of review was in keeping with Ms. Osier's testimony as to why the Woodcock-Johnson manufacturer "doesn't recommend that it be used to measure progress."[105] Ms. Osier explained, however, that RPI scores from Woodcock-Johnson testing could be used to help identify areas of need and gauge proficiency. Ms. Osier urged Petitioner to consider signing the IEP, noting it could be amended after the IEE results were received.

Petitioner again declined to sign the IEP. She did, however, return the draft IEP with her edits to the school's proposals.[106] Although she had previously had the child removed from READ 180, Petitioner now requested, at the suggestion of READ 180

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[99] Tr. 515.

[100] *See*, *e.g.*, Tr. 560. This analysis underscores Ms. Osier's statement that the Woodcock-Johnson "test manufacturer doesn't recommend that it be used to measure progress." Tr. 70.

[101] Tr. 120.

[102] *Id.*

[103] Exs. KJ481-484.

[104] Exs. KJ492-KJ502.

[105] Tr. 70.

[106] Exs. KJ491a-KJ491f.

personnel, a 3rd grade level oral fluency assessment.[107] On March 13, 2007, Petitioner next requested, by email, a modification regarding behavior in the IEP regarding how "much time the child would be expected to sit and do work."[108] She also requested specific times and methods for multi-sensory instruction.[109] The latter request was denied, as had her prior request for Orton-Gillingham-like methods. The school explained the request was inappropriate because it would limit the special educator's flexibility in adjusting their programs to the immediate needs of the child.[110]

A March 24, 2006, modified draft IEP was prepared for the March 27, 2006, CSC meeting, then discussed at an April 3, 2006, CSC meeting.[111] Petitioner repeatedly renewed her prior requests.[112] She was emphatic that the IEP stipulate a particular methodology of instruction, specifically, Orton-Gillingham multi-sensory methodology.[113] Because "all of her draft comments were not included," she did not sign the IEP.[114]

On April 17, 2006, the requested IEE was conducted by LB in Germany. Shortly thereafter, DoDDS agreed to provide some testing supplemental to the LB IEE. Such testing was to be conducted by DoDDS' Dr. Valerie Brewer, a qualified specialist with a doctorate in learning disabilities with minors in assessment, reading, and linguistic anthropology; Dr. Brewer is fully qualified to diagnose a dyslexic child and her expertise as a witness was properly established.[115] A week later, on April 25, 2006, the child's parents obtained an evaluation in the United States from a state university. Neither the evaluation nor its results were initially disclosed to Respondents. Despite prior requests by Respondents, the evaluative report was not provided to DoDDS until it was produced in response to a Request for Production in this due process proceeding.[116] Although not without significance, Ms. Read's expert testimony demonstrated notable flaws in its composition affecting its weight and value regarding the basis of it recommendations

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[107] Tr. 122.

[108] Tr. 123.

[109] Tr. 124.

[110] Tr. 125.

[111] Ex. KJ506a.

[112] The Wilson Method is an Orton-Gillingham based methodology.

[113] Tr. 126; Ex. KJ507 - KJ 509.

[114] Tr. 127.

[115] Tr. 102.

[116] *See*, *e.g.*, Tr. 470.

regarding educational curriculum and development.[117] Furthermore, some of its diagnostic conclusions were demonstrated to be contradictory.[118]

Meanwhile, Dr. Brewer also administered supplemental testing, as requested by Petitioner, in the same 30-day period as the state university and LB testing.[119] The standardized testing included the full Woodcock-Johnson III Tests of Achievement Extended Battery and specific Detroit-4 sub-tests specifically requested, but not previously considered necessary by a prior assessor.[120] Dr. Brewer uses a broad definition for determining dyslexia, defining it as encompassing both neurologically based definitions and those defining it as the product of a language-based processing difficulty.[121] Dr. Brewer issued a thorough assessment report on May 19, 2006. In her report, Dr. Brewer concluded that, based on her meeting with the child and on the testing administered, the child did not have an information processing disorder and was not dyslexic.[122] She determined that the Woodcock-Johnson testing, when compared to prior testing, showed an improvement in the skills the child should possess at her age and grade in the areas addressed by the IEP, and revealed no additional weaknesses requiring specially designed instruction other than those already addressed by DoDDS.[123] Dr. Brewer also found that the Woodcock-Johnson testing indicated the child was "solidly in the average range on all of the achievement tests that were administered."[124] Indeed, all indications showed the child's scores within normal average ranges and percentiles.[125] A progress report was compiled on April 7, 2006.[126] Dr. Brewer's assessment report of April 7, 2006, was followed by an Assessment Report-Records Review on May 19, 2006.[127]

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[117] *See*, *e.g.*, Tr. 570-599; 622-648 (regarding Pet.Ex. 273a-273m).

[118] Tr. 587.

[119] Ex. KJ 520; Tr. 594.

[120] Tr. 100-112.

[121] Tr. 108-109.

[122] Tr. 101-103. This testing specifically included consideration of the Woodcock-Johnson Intra-cognitive Discrepancies, analysis of which allows for profiling relative strengths and weaknesses. It also included Detroit-4 sub-tests for word opposites, story construction, basic information, and story sequences. Tr. 102-105. Passage comprehension was examined through a series of different activities, scoring 96 on a scale where 100 is average. Tr. 105. All results were in the average range.

[123] Tr. 535-568.

[124] Tr. 104.

[125] Tr. 105-106.

[126] Exs. KJ 521-KJ522.

[127] Exs. KJ 539-KJ555d.

At a June 9, 2006, CSC meeting, Jan Osier introduced a draft IEP for the upcoming academic year that incorporated objectives requested by school staff after review of the child's past academic year and otherwise contained all required information.[128] It specifically included parental input.[129] The IEP was prepared through cut and paste, rather than the Excent computer based program usually used for the school's IEPs to highlight and compare both the school's input and the mother's input. Petitioner, however, noted that several accommodations regarding the use of multiple methodologies she had requested had not been incorporated into the IEP. The school explained that those multiple methodologies were inappropriate within an IEP as accommodations.[130] Petitioner also renewed her request that growth be measured by normed standardized tests, formally administered on specific dates as part of the IEP. It was again explained why such tests were misleading and inadequate gauges of progress within a specially tailored program. The CSC then focused on how the IEP otherwise met many of the child's needs and the mother's concerns.[131] Other test results were also discussed.[132] Petitioner, however, again declined to sign the offered IEP.

Instead, Petitioner countered with an IEP proposal of her own, increasingly more specific as to her preferred types of methodology and programs. Petitioner's IEP draft included related services, including one-on-one instruction in LB's Visualizing and Verbalizing, as well as LB's On Cloud Nine[133] and LB's Seeing Stars,[134] a multi-level, multi-sensory Orton-Gillingham-style method (Barton Reading Systems program), and a requirement that at least half of the child's educational program be taught using an Orton-Gillingham methodology. She also wanted an LB summer program. The CSC considered the parent's request in light of the student's needs and recent assessments, including Woodcock-Johnson scores showing average results.[135] As a courtesy to address parental concerns, it added more math goals than requested, although the standardized testing did not demonstrate an immediate need for those goals and objectives.[136] It did not, however, consider the other suggestions appropriate or

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[128] Exs. KJ574-KJ579.

[129] Exs. KJ580-KJ585; Tr. 128.

[130] Tr. 130.

[131] Tr. 132-140.

[132] Exs. KJ586-KJ592.

[133] A visualizing and verbalizing program for math.

[134] A symbol imagery for phonemic awareness program.

[135] Tr. 132-137; Ex. KJ586-KJ587.

[136] Tr. 515-516. LB also determined that there was no imminent need for math intervention. Exs. KJ530; KJ538; KJ578; KJ608; KJ629.

necessary.[137] The school offered to enter mediation regarding such issues as methodology, IEP wording, IEP goals and objectives, and other previously debated topics,[138] but Petitioner declined to participate.[139] On June 13, 2006, Petitioner emailed Dr. Barkmeier with a single sentence missive: "Is [my child's] IEP going to be accepted the way I wrote it. . . ?"[140]

DoDDS considered Petitioner's requests and also considered whether the child was in need of summer services. Although neither the child's progress nor a regression-recoupment analysis revealed that ESY was indicated,[141] Dr. Barkmeier wrote to Petitioner on June 23, 2006, indicating that DoDDS would provide a LB summer program for the child as Petitioner requested. The IEP draft was changed to note that LB training would be provided from July 9, 2006, through August 9, 2006.[142] Satisfied, Petitioner signed the IEP originally offered by the school at the CSC meeting of June 9, 2006, on June 26, 2006.[143] That IEP contained the same type of core IEP requirements regarding the child's academic problems necessitating special assistance to help her in a general education setting, present levels of performance, assessing mastery of objectives and goals, and thus determining progress as the November 2005 IEP.[144] Additional accommodations were provided explicitly, separate from the goals and objectives. Services to be provided were referenced in the goals and objectives section, and specifically set forth in terms of 450 minutes of Resource Room time per week, 300 minutes of general classroom with special education support per week, and 15 minutes per week of classroom consultation.

In signing the IEP on June 26, 2006, however, Petitioner attached a sheet to the IEP on which she wrote: "I am only giving consent to the IEP as trying to show good faith, and the IEP signature will not be any good after 90 calendar days. So an IEP meeting is requested within the month of September. . . ."[145] She indicated she was only signing "to avoid a Due Process Hearing, by allowing them more time to show measurable growth in the [LB ESY program]."[146] The wording subsequently caused

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[137] Tr. 271.

[138] Ex. KJ593.

[139] Ex. KJ594.

[140] Ex. KJ595.

[141] Ex. KJ563.

[142] Tr. 984; Exs. KJ904-KJ905.

[143] *See* Ex. KJ604.

[144] Exs. KJ603a-KJ609.

[145] Exs. KJ603, *see generally* KJ603-KJ609.

[146] *Id.*

confusion as to whether the school was now working under the June 2006 IEP, or whether the expressed reservation meant the November 2005 IEP was still in operation.[147] Regardless, the school was pleased an IEP had finally been agreed to and Dr. Barkmeier wrote to the child's parents on June 30, 2006, stating that they always had the option to seek a revision of the IEP based on progress made; she also emailed them regarding the summer bus schedule and the status of the June IEP.[148]

During the summer of 2006, the child attended the offered LB summer program staffed by LB personnel.[149] Dr. Barkmeier had discussions with LB regarding staff training around August 30, 2006. With the LB summer program at an end, Petitioner withdrew the child from the school on or about September 5, 2006. Among the mother's reasons for withdrawing the child were the school's refusals to use the methodologies and methods she requested, its refusal to guarantee growth under the IEP, and her personal assessment that staff was not qualified to teach her children.[150]

Dr. Barkmeier wrote Petitioner stating she was deferring student programming decisions to the CSC.[151] She also wrote to the parents concerning the availability of curriculum materials for home study.[152] The final reports from the LB summer services were forwarded to Dr. Barkmeier and the child's parents in mid-September 2006.[153] The school principal arranged for a September 22, 2006, CSC meeting to discuss the child's situation and program. Notice of the meeting was sent to her parents. On September 20, 2006, the principal personally wrote to the parents urging them to attend that CSC meeting, and asking them to reconsider the decision to withdraw the child.[154]

That same day, Petitioner wrote a lengthy letter to the principal and Dr. Barkmeier declining the invitation.[155] She wrote that the school was a hostile environment, claiming the school would not implement IEPs and stating "I have been told . . . that you can not guarantee growth to be made in my child's education. If a parent can not depend on an IEP then what is there to depend on for growth and to

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[147] Tr. 138. By definition, an IEP is considered in force for 12 months, unless otherwise indicated. This IEP was set for an annual review in March 2007. Petitioner, however, handwrote "IEP meeting to be held on Sept. 06" on the face of the IEP, reenforcing her intent to revoke after her child received the LB summer services.

[148] Ex. KJ613-616.

[149] Exs. KJ617a-634.

[150] Ex. KJ654; *see also* Tr. 907-912..

[151] Ex. KJ640.

[152] Exs. KJ641-KJ644.

[153] Exs. KJ647-651.

[154] Ex. KJ652.

[155] Exs. KJ653-KJ655.

establish grounds for education. I see no reason for us to meet."[156] After expressing her interpretation of the law and special education terminology, she noted that "[y]ou don't implement the methods that these children need. Lindamood Bell said they could get these children to learn. . . . Yet you verbally told me you will not continue these [LB] methods in any manner. You refuse to put methodology on an IEP because it doesn't work with your program for writing an IEP."[157] She concluded by stating she would not return the child to school and "now [she] will make sure her [children] get a FAPE," although she did not describe how.[158]

When the September 22, 2006, CSC meeting was convened, it was ready for the child to return to school. It had reviewed the new draft IEP, which included LB consideration. The draft IEP was in compliance with IDEA 2004 and DoDI 1342.12, and it took into account all appropriate information, assessments, and input, including the summer program.[159] The committee members signed the draft in anticipation of meeting with the mother. Petitioner attended the meeting, but declined to accept or sign the IEP. A notice of home-schooling was then received by the school on September 25, 2006.[160] and it was forwarded to the child's parents on October 11, 2006, by the principal.[161] The parents declined to sign the draft or submit alternative suggestions.[162]

To date, the child has not returned to school. She has been home-schooled using a the family's chosen curriculum.[163] Petitioner states she has made progress with the child. Petitioner filed due process in December 2006. At the conclusion of the hearing, Petitioner stated: "Basically, we don't see how [the child] can return to the schools. . . ."[164] Her expected remedy was stated as "[t]o have the teacher that can provide the type of program in a tutoring fashion, I would be willing to meet an outside source outside of the school," either a full-time tutor or one-on-one full-time support for the child.[165] Under this remedy, instruction would be by someone hired who is qualified in the Orton-Gillingham-style of teaching.[166]

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[156] *Id* at KJ654.

[157] *Id*.

[158] *Id*.

[159] Exs. KJ658-KJ663; Exs. KJ667-KJ674 Tr. 155-168.

[160] Ex. KJ675.

[161] Ex. KJ677.

[162] Ex. KJ678.

[163] Tr. 875-876886-897, 908-912.

[164] Tr. 907-908.

[165] Tr. 909-910.

[166] Tr. 908, 912.

Conclusions of Law

The exhibits and testimony were often in conflict. The record has ample documentary evidence presented by the school of the child's progress within her individualized program.[167] All witnesses except the Petitioner's family generally provided testimony echoing that progress. This includes the testimony of an expert witness whose testimony was instructive and generally balanced. Petitioner argued, however, that the child's scores on grade equivalency based tests from standardized assessments indicated that the child made no significant improvement while in school. As additional documentary evidence of a lack of growth by the student, Petitioner pointed to the state university and LB assessments from April 2006. Although she did not provide any professionally administered assessments indicating either grade equivalency progression after the child withdrew from school or progress in her current home-schooling program, she did offer homework and workbook testing that her family testified shows growth at home. She supported this documentation with anecdotal evidence by the parents and the child's highly credible aunt contrasting what they interpreted as the child's lack of growth at school with the growth they believe the child has made in home-schooling. Witnesses for both sides varied greatly in terms of expertise, education and training, and opportunity for observation of the child before and after her withdrawal. All testimony was sincere and credible, although often heated.

Central to the disagreement between the parties is how growth is measured. The school's evidence showed it used standard practices and testing to measure progress, as well as RTI. The school repeatedly demonstrated to Petitioner that progress was being made – within the program provided.[168] The mother's testimony displayed either a refusal or an inability to reconcile the standards required under IDEA, the obligation of the school under the statute, and the concept of progressing within a program, as opposed to necessarily showing advancement in terms of grade equivalency or normed, criterion-based standardized tests. Indeed, the record shows that Petitioner has consistently preferred to consider progress in terms of black and white test scores and grade equivalencies from standardized tests, an area in which she demonstrates comfort and understanding, rather than the more cumbersome and integrated curriculum-referenced measures. This is true despite the fact it was repeatedly shown that the latter is more accurately in tune with how a child is doing in a classroom with tailored curriculum materials and under curriculum monitoring techniques.[169] Consequently, the child's family was similarly skeptical of the school's conclusions regarding growth and progress because it was neither in sync with what they witnessed after intensive summer sessions and after the child began concentrated home-schooling, or with the materials culled through inquiry and internet research.[170]

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[167] Exs. KJ704-933.

[168] *See*, *e.g.*, Tr. 82-98.

[169] Tr. 560.

[170] Tr. 682-693; 702.

The majority of extraneous matters raised by Petitioner in her amended petition were fully considered, discussed, and addressed previously, and are no longer at issue.[171] In particular, one issue was repeatedly raised and ruled upon, involving an incident in which the mother was temporarily barred from base by the Army after an alleged threat was made against school staff.[172] Petitioner argued that this impeded her right to FAPE inasmuch as it was an obstacle to her attendance at a CSC meeting. Petitioner failed, however, to show a nexus between the actions of the Army under the circumstances and Respondents or an intent to frustrate her attendance. Indeed, she received notice of the CSC meeting, a personal invitation from the principal, and ultimately attended and participated in the meeting to the extent that there is no indication the event significantly impeded her right to participate in CSC meeting or caused the child a deprivation of educational benefits.[173]

Remaining are the two issues consolidating Petitioner's remaining claims. Argument regarding those issues was conducted after the parties were directed to consider both the IDEA and DoDI in light of the legal requirements as to what constitutes an appropriate IEP; the parties were also directed to consider what the IDEA provides with regard to a parent's choices of service[174] and of instructional methodology.[175] Consideration was also urged with regard to the not unlimited powers of a hearing officer in such cases.[176]

ISSUE ONE – Whether Respondents, through its IEP team, violated IDEA by not considering the child's parents' input, concerns, and all relevant information regarding their child's education. Petitioner's complaint here focuses on allegations that despite parental opposition, 1) Respondents did not change methodologies under

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[171] *See* Hearing Officer Orders (emails) of Aug. 13, 2007, Aug. 15, 2007, and of Aug. 30, 2007.

[172] Tr. 19-22.

[173] *See*, *e.g.*, Order: Issues and Procedures for Due Process Hearing (August 15, 2007) at 6-7; Written order Confirming Oral Rulings (August 19, 2007) at 3-4; Tr. 19-22.

[174] *See*, *e.g.*, *N.R. by and through B.R. v. San Ramon Valley United Sch. Dist.*, 2007 U.S. Dist LEXIS 9135 at 21 (N.D. CA 2007), *citing Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 885 (D. Minn 2003) (holding that a district's refusal to assign the service provider of plaintiff's choice did not constitute a denial of FAPE).

[175] *See*, *e.g.*, *A.B. v. Lawson*, 354 F.3d. 330 (4th Cir 2004) ("The issue is not whether [a parent's program or preferred provider] is better, or even appropriate, but whether [the school] has offered . . . an appropriate program for the Child. . . .").

[176] *See*, *e.g.*, *County Sch. Bd. Of Henrico County, Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 308 (4th Cir. 2005) (citing *Rowley*, 458 U.S. 192, 206-207) ("If an IEP is 'reasonably calculated to enable the child to receive educational benefits,' Rowley, 458 U.S. at 207, the hearing officer cannot reject it because the officer believes that another methodology would be better for the child. *See id.* at 208. ['O]nce a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.' *MM* 303 F.3rd at 526, ('The IDEA does not . . . .require a school district to provide a child with the best possible education')," referring to *MM ex rel. DM v. Sch. Dist. Of Greenville*, 303 F.3d 523 (2002).

the IEP when the parents concluded the methodology used was not working; 2) Respondents failed to implement the programs the parent requested; 3) Respondents failed to use Woodcock-Johnson III testing to assess progress and performance under the IEP; 4) Respondents failed to address lack of growth, use informal assessment tools correctly, or use formal assessments to measure growth; and 5) Respondents failed to address problems the child had in mastering goals and objectives.[177]

The allegations giving rise to the issue are all generally related to the parent(s)' role as part of the CSC developing and overseeing the child's IEP. IDEA grants parents of eligible students a set of procedural rights,[178] which include a right to participate in meetings that evaluate the child's performance, under 20 U.S.C. § 1415(b); to receive prior written notice whenever the school proposes a change to the IEP, 20 U.S.C. § 1415(b)(3); and to participate in due process hearings. 20 U.S.C. § 1415(f)(1). However, these procedural rights exist only to ensure that the *child's* substantive right to a FAPE is protected, and do not vicariously confer on the parents a substantive right to FAPE.[179] Ultimately, an IEP is the considered result of an appropriately comprised CSC[180] working within the dictates of the statute in the interests of the child; it is not a manifestation of the parents' dictates or a product limited within the parameters of what the parents deem more effective.[181]

Regarding allegation 1) (*Respondents did not change methodologies under the IEP when the parents concluded the methodology used was not working*), it is true that Respondents did not change methodologies under the IEP whenever the parents concluded the methodology then used by the school was not working. That is not to say, however, that Respondents discounted parental input, concerns, or opinions on the topic. Such input was actively solicited, considered, and discussed internally, at CSC meetings, in person, and through emails. It was specifically considered with regard

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[177] Petitioner also complained that math/arithmetic issues were not reflected in the IEP, as requested, but the facts and evidence clearly demonstrate that math goals and objectives were included in multiple IEP drafts as a courtesy to the parents, although LB assessors did not see an imminent need for such intervention. *See* Exs. KJ530; KJ 535; KJ578; KJ608; KJ629.

[178] *Wenger v. Canastota Central School District*, 146 F.3d 123, 126 (2d Cir. 1998) *(per curiam*);*Collinsgru v. Palmyra Board of Education*, 161 F.3d 225, 233 (3d Cir. 1998) (the right of the child to FAPE is that determined to be of the child, his or herself).

[179] *Rowley*, 458 U.S. at 206 ("adequate compliance with [the IDEA's procedures] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"); *see also Doe v. Board of Educ. of Baltimore County*, 165 F.3d 260, 263 (4th Cir. 1998).

[180] The CSC included administrative, special education, general education, and parental members.

[181] *Ariel B. V. Ft. Bend Indep. Sch. Dist.,* 428 F. Supp. 2d 640 (S.D. Texas 2006) (the parental right is participation, not dictation as to outcome).

to the child's methodology and progress within her individualized program.[182] Indeed, as a result of the numerous exchanges about methodologies, the school provided ESY in the summer of 2006 to permit summer study under LB programs, although ESY was not indicated as necessary.[183] Additionally, Ms. Mead incorporated Orton-Gillingham-style multi-sensory instruction into her program as well as LB methods, including LiPS and Visualizing and Verbalizing.[184] Further, the possibility of staff training in LB methods was being explored when the student was withdrawn from school.[185]

Respondents, however, were not obliged to change methodologies under the IEP based solely on a parental request or because a parent remained unpersuaded as to the efficacy of the methodology offered. IDEA guarantees equal opportunity, it does not guarantee a specific level of achievement, a particular type of educational program, or even guarantee a specified rate of progress. FAPE only implies that an eligible student will be afforded an "appropriate education," a basic floor of opportunity; it does not imply that the child will be afforded the best possible education or one designed within a parent's prescribed parameters.[186] The IEP(s) at issue provided such an "appropriate education" inasmuch as they were adequately tailored and reasonably calculated to address the student's reading and language skills needs and, at the parents' urging, math skills. The IEPs also demonstrated that progress within the prescribed curriculum resulted and was reflected whenever the child met an objective. When such an IEP is developed, in compliance with statutory requirements and with consideration of teacher observation, appropriate diagnostics, and parental opportunity to provide meaningful input, a school has no further statutory obligation to change the child's program or switch to a specific methodology solely because the parents conclude that a new methodology is warranted or because they decide the methodology employed is ineffective.[187]

Regarding allegation 2) (*Respondents failed to implement the programs the parent requested*), there is again no indication that Respondents ever perfunctorily dismissed or failed to consider the input, requests, or concerns of the parents. In addition to the efforts detailed above, over a dozen CSC meeting were held within two academic years during which discussion was had regarding the child and her progress. A near-constant flurry of emails were generated regarding such input and concerns.

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[182] *See*, *e.g.*, Exs. KJ203-206; KJ208-KJ210; KJ214-KJ216; KJ262-KJ265; KJ274-KJ278; KJ294; KJ317-KJ319; KJ449-KJ450; KJ478-KJ480; KJ492-KJ502; KJKJ507-KJ509; KJ586-KJ592; *see*, *generally*, Testimony of Osier and Mead.

[183] *See* Exs. KJ563-565; KJ600-601; KJ617a-KJ634.

[184] Tr. 323-328; *see also* Exs. KJ203-KJ206; KJ208-KJ210; KJ492-KJ502.

[185] Ex. KJ634.

[186] *See Doe v. Tullahoma*, *supra*, at p. 7.

[187] *A.B. v. Lawson*, *supra*, at note 175; *see*, *e.g.*, Tr. 476.

IDEA is very specific with regard to the participation of parents in the CSC process and the development of an IEP. Parental input is encouraged. A right to inclusion within a CSC provides an important procedural safeguard. Here, parental input and participation yielded many results, including LB or LB-style instruction. It also yielded both ESY and the addition of math into IEP drafts to meet Petitioner's concerns, although neither was indicated as necessary. Neither statute section, instruction, or case law, however, has been cited as authority to imply that the Respondents were bound in any way to implement any of the several method-based programs regularly requested by the parents when a proper, IDEA-compliant IEP was in place throughout.[188]

In arguing allegation 3) (*Respondents failed to use Woodcock-Johnson III testing to assess progress and performance under the IEP*), Petitioner argues that Respondent's failure to use Woodcock-Johnson III testing to assess the child's progress and performance under the IEP, as requested, was error. The argument is unfounded. It is true Respondents declined to use Woodcock-Johnson III testing as the gauge for progress and performance under the IEP. They did so, however, with sound reason.

Expert Barbara Reed's credentials, expertise, and long history working with Woodcock-Johnson was well established and demonstrated at the hearing. Respectful of Petitioner's comfort with and advocacy of Woodcock-Johnson as the measure of a student's progress, Read persuasively discussed what the Woodcock-Johnson is, how it is meant to be used, and the extensive problems it presents as a measure of student progress within an educational curriculum. She also addressed the nature of tests that determine a child's grade equivalency within a national or defined pool of subjects, as opposed to testing used to measure a specific child's achievements within a specific curriculum. Jan Osier's familiarity with Woodcock-Johnson's application was also aptly demonstrated. Both Reed's and Osier's highly credible testimony regarding Woodcock-Johnson testing[189] mirrored explanations previously given to the parents. Although it was conceded that RPIs may demonstrate a child's likely proficiency or show whether a child is acquiring skills needed for specific academic tasks,[190] Ms. Read persuasively explained that the Woodcock-Johnson testing, as a standardized test predicated on national sampling from a wide spectrum of varying curriculum, generally gives only an overall sense of how one child compares to other national norm samples.[191]

A nationally normed, criterion-referenced assessment of ability and achievement, such as the Woodcock-Johnson, can be a powerful tool for gauging educational

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[188] *Id., see also Henrico County* and *MM*, *supra*, note 176.

[189] Tr. 118; 513-515, 536-599.

[190] Tr. 513-515. Read noted that the RPI scores could identify a child's academic proficiency on a particular task measured by subtest relative to what is considered typical proficiency needed by that age in order to perform a task with what would be considered typical proficiency.

[191] Tr. 515.

achievement. It provides a telling snapshot of a child's performance at a given time and place, and can be used for comparison to snapshots of other children from a national or other closed-end pool. The photo taken, however, cannot reflect the various stimuli affecting the model on that day, or adjust its image to compensate for transient influences. The photo taken is isolated to the moment taken. Therefore, such a test is an unreliable instrument for assessing individual progress within a personalized program in progress and over time. Moreover, a tool like the Woodcock-Johnson III Tests of Achievement include two batteries, a standard battery and an extended battery. Sub-tests are organized into clusters. Because theses sub-tests are short, many do not render good qualitative information about what a child knows, can do, and where the child needs continued work. For example, it does not measure the child's ability to write a paragraph or an essay, but only examines the ability to formulate brief responses. Furthermore, it is generally computer scored, with results organized into cluster scores. Such scores must be particularly scrutinized and considered with caution when there is a significant difference between individual sub-test scores, or misguided educational decisions may result.[192]

In this case, Respondents were reluctant to rely on Woodcock-Johnson as the measure of the child's growth, mindful that its results can be misleading. Testimony showed that the school preferred a modified version of progress monitoring, a scientifically-based practice that is used both to assess a child's academic performance, and to evaluate the effectiveness of instruction. The school regularly measured academic performance over time, not through an isolated snapshot. Progress toward meeting the child's goals within her particularly tailored curriculum was measured through curriculum-based, short-term measures such as DIBELS, verified through regular quizzes, program-based tests, and on-going observation.[193] Such measures provided a basis upon which this particular child's actual rates of learning could be measured against expected rates of progress under her IEP. Personalized instructional techniques and methods were purposefully kept flexible to meet individual learning needs based on these results and measurements on a rolling basis as more information was determined. Thus, the program offered was specifically designed to provide a more complete basis for both better, time-sensitive instructional decisions and readily adaptable instruction more appropriate to the child's individual needs. It was not designed to help the child simply test better or gauge her growth against standardized

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[192] *See*, *e.g.*, Tr. 532-534.

[193] "[T]here's been an abundance of monitoring, whether its DRA or DIBLES. . . and each of those identified within them progress of an increasing grade level. And they are estimating the child's present level of progress on them. . . . Those measures are more curriculum referenced measures [as opposed to Woodcock-Johnson], so they are going to be more accurately synchronized to what the child is doing in the classroom as compared to a grade equivalency from a national standardized test, which may or may not be in synch with the curriculum materials or curriculum. . . . " Tr. 560.

norms, but against her own progress within her personalized curriculum.[194] Therefore, despite parental familiarity and comfort with Woodcock-Johnson scoring and grade equivalencies, the school properly declined to assess progress as requested.[195]

Concerning allegation 4) (*Respondents failed to address lack of growth, use informal assessment tools correctly, or use formal assessments to measure growth*), the record and transcript are replete with instances in which Respondents addressed Petitioner's characterization that the child was not making progress; it is similarly replete with evidence that the child was making discernable growth within her individualized program.[196] There is no indication that informal assessment tools were used incorrectly, only allegations that the assessments did not reflect a result consistent with the parent's own conclusions regarding the child's progress. Indeed, expert and teacher testimony repeatedly indicates all assessments were competently administered and reviewed. As discussed above, the reasons as to why Respondents did not rely on formal assessments as an exclusive method for measuring growth were logical, and Respondent's stated method for measuring growth is both logical and reflects appropriate trends.

Despite allegation 5) (*Respondents failed to address problems the child had in mastering goals and objectives*), the record contains ample evidence and testimony as to how Respondents addressed the child's program and progress toward stated goals and objectives, as well as its numerous attempts to explain such efforts and progress to the parent(s).[197] As for Petitioner's concerns that standardized Woodcock-Johnson and similar testing did not show significant reading growth, the school repeatedly explained why such tests are not reliably used to measure growth within a program, as discussed above.[198] Regardless, Petitioner remained resolute and unmoved. With her acknowledged distrust of the school, she failed to reconcile the school's explanations and the information she gathered from her sources with respect to what she viewed as the child's current level of performance and progress. Respondents actions regarding the child's growth toward mastery of stated goals and objectives, however, have not been shown by Petitioner to be inappropriate or a violation of FAPE.

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[194] *See Houston Indep. Sch. Dist. V. Bobby R*., 200 F.3d 341, 347-349(5th Cir. 2000) (progress should be measured with respect to the individual student, not in terms of others); *T.R. ex rel. N.R. v. Kingwood Twp. Bd. Of Educ*., 205 F.3d. 572, 578 (3rd Cir. 2000) (appropriate education is judged in light of *individual* needs and potential)(emphasis added); *see also Leighty v. Laurel Sch. Dist.*, 457 F.2d 546 (W.D. Pa. 2006).

[195] Ms. Mead, the special educator, was of a similar opinion. *See* Tr. 365.

[196] *See* note 142, *infra.*

[197] *See*, *e.g.*, Exs. KJ203-KJ206; KJ208-KJ210; KJ214-KJ223; KJ262-KJ265;KJ274-KJ284; KJ294-KJ304; KJ308-KJ312; KJ316-KJ363; KJ367-KJ371; KJ380-KJ413; KJ429-KJ430; KJ478-KJ484; KJ491a-KJ502; KJ507-KJ509; KJ520-KJ522; KJ539-KJ555d; KJ586-KJ592; KJ664-665; KJ704-KJ712cKJ833-KJ847; KJ887-KJ933; Testimony of Osier, Read, Brewer, and Mead, *generally*.

[198] *See also* Tr. 118; 513-515; 536-599.

Regarding Issue One, both in general and as comprised of the above-referenced allegations, Petitioner remains unsatisfied with the services and methodologies offered by the school. Her petition sets forth claims arguing that the school and CSC violated parental rights under IDEA by not considering parental input with regard to the child's education. Their testimony and exhibits go further at times, often implying their rights were especially violated whenever the school or CSC failed to conform the child's IEP with their express wishes and requests. They note that the child was denied a consistent application of Orton-Gillingham-style methodology. They allege fault for the IEP not measuring growth based on Woodcock-Johnson scores. They raise as suspicious the school's failure to guarantee growth and progress. Because the school would not provide the education it believed was the best or more effective method for the child, Petitioner concluded FAPE was being denied, repeatedly refused to sign properly developed IEPs, then eventually withdrew the child from school.

Respondents fully acknowledge those parental suggestions and requests it ultimately chose not to incorporate into the child's program. Respondents also point to relevant and controlling case law indicating that they were not under an obligation to incorporate such requests into the child's IEP on demand. The issue, however, is whether Respondents or the IEP team violated IDEA or the applicable DoDI sections with regard to the parents' participation. The answer is no.

The child's parents were made an integral part of the CSC. Petitioner's participation was regular, her input was continuous. and her advocacy for the child was markedly zealous, ardent, and often contentious. Neither the parents nor their ideas and suggestions, however, were ever barred by the CSC from participation, and the evidence amply demonstrates that the CSC and the school were responsive and, at times, indulgent to their requests. The school's efforts to explain its rationale regarding those areas where it disagreed with the parents' suggestions or demands are well documented. It is disappointing that the parties could not better compromise. The evidence shows that the program offered provided FAPE and that the draft IEPs recommended were provided in a spirit of cooperation.[199] There is no evidence, however, that Respondents violated IDEA or DoDI with regard to the parents' contribution of ideas about that program or participation in the CSC, or that their actions threatened the child's right to FAPE, significantly impeded the parents right to participate in the decision-making process regarding the provision of FAPE, or caused the child any deprivation of educational benefits.

ISSUE TWO – Whether Respondents failed to create a proper IEP under IDEA, including present levels of performance, services to be provided, identifying ways of measuring growth/progress, considering lack of progress, and consequently prevent the child from progressing. In raising an issue regarding the substantive nature of the IEP(s) offered, Petitioner addressed specific areas of the

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[199] As noted by the 4th Circuit in *M.M.* at 535: "it would be improper to hold [the] School District liable for either a denial of FAPE or the procedural violation of failing to have the IEP completed and signed when the failure was the result of [the parents'] lack of cooperation."

IEP(s) it argues were deficient. In particular, Petitioner argues 1) Respondents did not properly use the DRA and DIBLES when monitoring the child's progress; 2) Respondents' IEP(s) failed to address the child's need for assistance because she was not reading at grade level.

With regard to allegation 1) (*Respondents did not properly use the DRA and DIBLES when monitoring the child's progress*), Ms. Mead's testimony gives extensive evidence that those tests, and other tests she monitored, were applied and considered appropriately. Concerning allegation 2) (*Respondents' IEP(s) failed to address the child's need for assistance because she was not reading at grade level*), the IEP(s) leave little doubt that reading difficulty was the primary reason for the child's eligibility and its improvement was the objective and goal of the IEP(s); efforts to address her improvement in this area permeates the facts, the given testimony, and the documentary evidence offered.[200] As for Petitioner's claim regarding services to be provided, present levels of performance, identification of ways to measure growth/progress, and consideration of whether progress was made, the IEP(s) all clearly reflect that such issues were considered and incorporated.

The last effectively signed IEP was from November 2005; it was the last IEP signed without qualification or reservation by the Petitioner.[201] That IEP indicates special education services in both the Resource Room and general education setting. The types of services provided are broken down in terms of minutes of instruction per day with both general and special education instruction and one-on-one services. Approximately 200 minutes per day were to be devoted to special and targeted instruction. Attached to the IEP is a proposed daily schedule, appended at Petitioner's request. Transportation, physical education, accommodations, and all other required categories of information were appropriately addressed. A date for annual review was provided.

Furthermore, testimony and evidence show that the CSC was open to discussing the program and progress at any time. Present levels of performance were clearly set forth, with corresponding goals and objectives. Benchmarks were set forth indicating mastery of objectives based on a passing percentage of 80-90%. Accompanying the IEP were copies of the applicable IEP Objective Check Sheets,[202] providing areas to mark scores on various tests and assignments on an on-going basis in terms of goals, objectives, and growth shown. Reading and language skills were shown as additionally monitored through STAR, DIBLES or Dibbles, DRA, READ 180 testing. The IEP properly bore the signatures of an administrator, special education specialist, general

[200] *See*, *e.g.*, Tr. 310-338.

[201] Exs. KJ266-KJ278.

[202] Exs. KJ274-KJ278.

educator, the special education coordinator, and the parent.[203] Teacher comments about progress and trouble spots were noted on the accompanying Progress Report.[204]

In sum, the June 2006 IEP contained the same type of information regarding present levels of performance, assessing mastery of objectives and goals, and the determination of progress within the program as its predecessor.[205] Additional accommodations were provided, separate from the goals and objectives. Services provided were referenced in the goals and objectives section, and specifically set forth in terms of 450 minutes of Resource Room time per week, 300 minutes of general classroom with special education support per week, and 15 minutes per week of classroom consultation. Subsequent IEP drafts followed a similar model and likewise were composed to meet the same statutory and DoDI criteria met in November 2005.

Petitioner disagreed with the contents of the IEPs and IEP drafts, preferring instead to have them based on all or in significant part on a methodology with which she agreed, using programs of which she was most familiar, and with progress measured through tests she considered more appropriate (*ie.* the Woodcock-Johnson). From November 2005 through October 2006, she only signed one of at least six draft IEPs due, primarily, to the school's refusal to create an IEP substantially reflecting her criteria and wording. The one exception, from June 2006, was an anomaly. After much haggling over draft IEPs, the school offered her a LB summer program for the child even though it had been discussed that an ESY was not indicated after appropriate regression-recoupment analysis. Provision of that program was put in the offered IEP. She then agreed to sign the IEP draft. In doing so, however, she attempted to limit the IEP to only 90 days,[206] enough time for the child to complete the LB summer program before withdrawing her from school. Despite Petitioner's increasing distrust of the school and her genuine belief that only her ideas regarding programs and methodology could guarantee what she would consider to be progress, however, the facts demonstrate that Respondents' IEPs and IEP drafts all contained those required sections and criteria set forth in both IDEA and DoDI:[207]

I have noted the parents' regular participation in the development of the IEPs. I also have considered the nearly incessant exchanges between the parents' and the school regarding the child's educational program, the school's continuing incorporation of a significant number of Petitioner's suggestions, its efforts to explain its ultimate decisions, and its extension of instruction where not otherwise indicated (*eg.*, special

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[203] DoDI 1342.12, § E4.4.2.2.

[204] Exs. 281-KJ284.

[205] Exs. KJ603a-KJ609.

[206] "I am only giving consent to the IEP as trying to show good faith, and the IEP signature will not be any good after 90 calendar days. So an IEP meeting is requested within the month of September. . . ." Ex. KJ603.

[207] DoDI 1342.12, § E4.4.1. *Note:* The CSC never determined the child should be excluded from any system-wide assessments.

math study and reenforcement, ESY). I have also throughly examined the resultant IEPs, drafted in compliance of the statute and instruction, and the reasons why Petitioner refused to sign many of the drafts. Such review was done in light of the extensive testimony presented and evidence submitted, and the burden placed on Petitioner in such cases. It is clear that the deteriorating collegiality between the parties turned into a tug over words, if not a tug of war. This is genuinely unfortunate inasmuch as the ultimate casualty is the child. I am unpersuaded, however, that the child was denied FAPE or otherwise denied educational benefits, that her parents were significantly impeded in their acquisition of FAPE for the child, or that the resultant IEP(s)[208] and IEP drafts were substantively deficient under IDEA.

Decision

The child through her mother, the Petitioner, failed to meet her burden to show that parental participation in the development of IEPs was substantially impeded to the extent that FAPE was adversely impacted. Petitioner similarly failed to show that the resultant IEP(s) and draft IEPs were not in compliance with IDEA. Because Petitioner failed to establish a violation under IDEA or DoDI, Petitioner is not entitled to any relief.

SO ORDERED.

Arthur E. Marshall, Jr.
Hearing Officer

RIGHT TO APPEAL

Under DoDI 1342.12, § E9.9.1 (April 11, 2005), a party may appeal a hearing officer's findings of fact and decision by filing a written notice of appeal with the Director, DOHA, at P.O. Box 3656, Arlington, Virginia 22203, within 15 business days of receipt of the findings of fact and conclusions of law. The notice of appeal must contain the appellant's certification that a copy of the notice of appeal has been provided to all other parties. Filing is complete on mailing.

[208] Given the consideration of the evolution and contents of the June 2006 IEP noted herein, there is no reason to further address its validity in terms of the mother's 90 day revocation clause.