KEYWORD:

DIGEST: The Instruction states "The DOD school system, the CSC, and a hearing officer appointed under this instruction shall consider any evaluation report presented by a parent. The provision is broad and unambiguous. The Judge's exclusion of this document is clear error. Petitioner's current school shall hold a a CSC meeting which shall consider the parent obtained IEE, the school obtained evaluation, all evidence considered in the 2006 school evaluation and all current educational reports and assessments of Petitioner. The CSC meeting shall be convened within 15 school days. The Judge's order for a new IEE is vacated.

CASENO: E-07-001

DATE: 01/16/2008

DATE: January 16, 2008

In Re:	)	
----------, by her mother	)	Case No. E-07-001
Petitioner	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel
Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT
Pro Se

Administrative Judge Arthur Marshall, Jr., issued a decision, dated August 23, 2007, in which he: (a) rejected Petitioner's claim that the Respondent Department of Defense Dependent School had erred in determining, after conducting an eligibility evaluation, that Petitioner was not eligible for special education services; and (b) concluded that the Respondent school district erred in its execution of Petitioner's request for an Independent Educational Evaluation (IEE). Both Petitioner and Respondent have appealed the portions of the decision adverse to them. The Board has jurisdiction over this appeal. For reasons set forth below the Board orders corrective action.

Statement of the Case

Petitioner attends a DoD school in Europe.[1] On October 21, 2005, Petitioner's mother requested that Petitioner be referred to the Case Study Committee (CSC) for an assessment in accordance with DoD Instruction 1342.12, *Provision of Early Intervention and Special Education Service to Eligible DoD Dependents*, April 11, 2005 (Instruction).[2] Specifically, the mother requested that Petitioner be evaluated for learning disabilities, including dyslexia and dyscalculia (the latter being a condition which impairs a person's ability to perform mathematical operations)[3], and that Petitioner be afforded appropriate special education services.[4] On November 21, 2005, the CSC accepted the referral and arranged for a battery of tests and evaluations, including a records review, family/medical history, language assessment, academic achievement, and intellectual ability. On February 21, 2006, the CSC convened to review the results of the evaluation information, concluding that Petitioner was not eligible for special education services. Officials who performed the evaluations subsequently testified that their tests ruled out dyslexia and dyscalculia. Disagreeing with this result, Petitioner requested an IEE,[5] in accordance with Instruction ¶ E3.2.8.[6]

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[1]Petitioner is a minor. Her mother acted on her behalf throughout the evaluation process and subsequent due process hearing.

[2]See Instruction ¶ E2.1.10. The CSC is a "school-level team comprised of, among others, an administrator or designee who is qualified to supervise or provide special education, one or more of the child's regular education teachers, one or more special education teachers, parents, and related service providers . . ."

[3]Dorland's Illustrated Medical Dictionary (on-line).

[4]Petitioner has been previously evaluated for special education services in 2001 and 2003, both times in a state school district in the U.S. The reports of both evaluations conclude that Petitioner "does not appear to meet the specific eligibility criteria for special education services as learning disabled . . ." Petitioner Exhibits (PE) 7at 6 and 13 at 4.

[5]The right to an IEE is established in 20 U.S.C. § 1415(b)(1). It is an "evaluation conducted by a qualified examiner who is not employed by . . . the DoD school . . ." Instruction ¶ E2.1.36. The Supreme Court has held that this right ensures that parents are given access to an independent expert who can review the materials made available by the school and give an independent opinion. *Schaffer v. Weast*, 546 U.S. 49, 60-61 (2005). The Instruction provides that, if parents disagree with a school's special education evaluation, the school must either initiate a due process hearing to show that its evaluation is proper or provide an IEE at DoD expense. The IEE must conform to the requirements of the Instruction; be conducted in the area where the child resides, if possible; and be conducted by a person qualified to conduct educational evaluations according to DoD standards. Instruction E8.2.8.

[6]Petitioner had requested and received an IEE following the 2003 evaluation. *See* PE 14.

In response to this request, the Special Education Supervisory Branch Chief (SBC) for the Department of Defense Dependent Schools-Europe (DODDS-E) suggested three potential contractors to conduct the IEE. However, Petitioner advised that she wanted it performed by a different contractor, a named learning center (LC). SBC agreed to this request, and Petitioner's school entered into a contract with LC for a representative to conduct the relevant tests and evaluations. This testing was done on April 17, 2006.

When SBC received the results of the testing, she concluded that the tests were not sufficiently comprehensive to redetermine Petitioner's eligibility for special education services. The CSC did not reconvene to consider the results of the LC testing. Approximately a week after the LC testing, the mother arranged for separate evaluations to be performed in the United States by a "certified school psychologist/reading specialist" at a state university (SU). This official conducted a battery of tests of Petitioner's cognitive abilities, phonological processing, reading efficiency and mastery, and academic achievement, "specifically in the domains of lexical knowledge and mathematics." She concluded that Petitioner's scores "fit the profile . . . of dyslexia."[7] The evaluation report states that Petitioner "would benefit from intensive tutoring in reading comprehension, writing, and spelling."[8] Whether or when the CSC became aware of this evaluation is not clear from the record.

On December 18, 2006, Petitioner filed a request for due process hearing in accordance with Enclosure 9 of the Instruction. On January 10, 2007, the Director, Defense Office of Hearings and Appeals (DOHA), assigned the case to Administrative Judge Arthur Marshall, Jr, who conducted the hearing from May 21 to May 24, 2007. On August 23, 2007, the Judge issued a decision in which he concluded that the school had complied with the Instruction in executing Petitioner's eligibility determination but that Respondent had failed to comply with the Instruction in executing the IEE. He entered Formal Findings for Respondent on the first issue and for Petitioner on the second. Insofar as he found error in the processing of the IEE, the Judge ordered the school to conduct another IEE at government expense.

Both Petitioner and Respondent filed timely notices of appeal. We construe Petitioner's appeal as raising the following issues: whether the school erred in failing to assess for dyslexia and dyscalculia; whether the school erred in failing to present the LC IEE to the CSC for evaluation; whether the Judge erred in failing to consider the SU evaluation during the hearing; and whether Petitioner was denied due process of law in that she was not permitted to call witnesses on her behalf. Respondent's appeal averred that the Judge erred in ordering a new IEE.

Discussion

The Instruction implements policy, assigns responsibilities, and prescribes procedures under the Individuals with Disabilities Education Act (Act).[9] The Instruction mandates a Free Appropriate

[7]PE 69 at 4. The report does not specifically reference the term "dyscalculia," although it does describe various tests that were performed on Petitioner to assess her mathematical skills.

[8]PE at 8.

[9]20 U.S.C. § 1400 *et. seq*. and Instruction ¶ 1.1.

Public Education (FAPE) "including special education and related services for children with disabilities enrolled in the DoD school systems . . ."[10] The Instruction, and the companion DoDEA 2500.13-G, *Special Education Procedural Guide*, September 2005, as revised, set forth policies and procedures for evaluating students for potential learning impairment. It affords parents the right to participate in the evaluation process, as well as rights to obtain independent evaluations and to challenge adverse determinations through a due process hearing.[11] The Appeal Board is responsible for conducting appellate review of due process hearings.[12] The Board employs a *de novo* standard of review, giving due deference to the Judge's credibility determinations and resolution of conflicting evidence.[13]

As a threshold issue the Board will address the state of the record as it was presented to us for our review. Upon its initial presentation, the record was intermixed with exhibits from other cases, a number of relevant exhibits were not identified or bound, and the original signed edition of the Judge's decision was missing, at which point DOHA management was advised of the matter. DOHA conducted a wide search for the original signed edition of the Judge's decision. In the course of this search, the Board was advised that there were some other missing documents, namely the Judge's orders from the hearing process. (The signed decision was never found and the Board has made do with a copy.) The Judge then bound most of the loose papers in several binders, in some cases labeling them. He went on medical leave for surgery, at which point DOHA management instructed Department Counsel to provide the missing orders, which had with them various motions by the parties, other correspondence between the Judge and the parties, and an amendment to the Judge's signed decision. Many of Petitioner's exhibits are still not labeled or the labels are not sufficient.

Even after DOHA management instructed the Judge to take corrective action certain ambiguities remain. For example, there appear to be three missing Petitioner's Exhibits, numbered 166, 167, and 168. Although these documents were used to question a witness during the hearing, the record is silent as to whether they were ever admitted or rejected. They are not attached to the record; neither are their contents described with particularity. Whatever the specific contents of these exhibits, they do not appear to have caused the witness to change or qualify her testimony.[14] Furthermore, it is clear from the transcript that much of the important pre-hearing process was done off the record. For many exhibits there is no discussion of identification, objection, or admission. Additionally, while the Petitioner's and Respondent's exhibits are now in binders, there is no

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[10]Instruction ¶ 1.1.3. *See also Board of Education v. Rowley*, 458 U.S. 176, 201 (1982). "The statutory definition of 'free appropriate public education' . . . expressly requires the provision of 'such . . .supportive services . . . as may be required to assist a handicapped child *to benefit* from special education' . . . We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."

[11]*See* Instruction ¶ E9.4. *See also Schaffer* 546 U.S. at 58. "[T]he burden of persuasion lies . . . upon the party seeking relief."

[12]Instruction ¶ E9.9.

[13]DDESS Case No. E-03-001 at 4 (App. Bd. Jan. 20, 2004).

[14]These documents were used to challenge a psychologist's testimony as to the relative merits of computer scoring of cognitive evaluations versus hand scoring. *See* Tr. IV, at 25-34.

exhaustive list of which exhibits were accepted into evidence and which were not. Therefore, for purposes of this review, the Board will presume that all Petitioner's exhibits were admitted into evidence, except for those which the record clearly demonstrates were not admitted.

Additionally, the final volume of the transcript of the hearing ends with the Judge advising the persons present "Okay, this is what we're going to do. No one move. We're going off the record for five minutes." The Court Reporter then annotated as follows, "Whereupon, the foregoing matter recessed briefly at approximately 5:10 p.m."[15] Nothing follows, except the certification page signed by the transcriber and proofreader.

Considering all the circumstances, the Board has concluded that it is in the best interests of the parties and of judicial economy to proceed despite the deficiencies in the record. Petitioner was in the seventh grade when the contested evaluation was performed, and she is now in the ninth grade. Remanding the case to correct or amplify the record would likely result in considerable additional processing time. The Board has had to weigh the likely benefits of a putative remand against the cost to the parties of such a course of action.

Turning to the substantive issues raised by Petitioner, the Board will first consider the allegation that the Judge erred in not considering the SU evaluation, which, as stated above, Petitioner's mother obtained at SU approximately one week after the LC testing and which states that Petitioner's responses were consistent with dyslexia. This is inconsistent with the school's eligibility determination, school officials testifying that they had discovered no learning impairment, to include dyslexia and dyscalculia. The mother disagreed with that conclusion and sought to question the school psychologist on the SU report. The Judge denied the request on the grounds that he had previously ruled it to be irrelevant. He stated, "Okay, ma'am I'll just explain this one more time. We've done it before off the record. I'll keep the record open at this point . . . With regard to the other testing from [SU] . . . it doesn't help your case one way or the other . . . It's after the fact . . . with regards to the testing that we have here . . ."[16] Although the Board obviously cannot evaluate the legal sufficiency of rulings made off the record, it appears from this passage that the Judge had excluded the SU report on the ground that it had not been presented to the CSC for their review and, therefore, played no role in the decision to deny Petitioner's request for special education services. The Judge apparently concluded that it was not pertinent to the issues which he was to adjudicate.

Although school officials cannot be held accountable for failing to consider information that was not available to them at the time they were making their decision regarding eligibility, the SU report was not, as a consequence, irrelevant. Petitioner should have been permitted to question the school psychologist on a document from a qualified institution which appears to contradict the school's conclusion on an issue central to the hearing. In any event, the SU report is a matter which the Instruction requires to be considered at any stage of the evaluation process. Instruction ¶ E8.2.9 states, "The DoD school system, the CSC, and a hearing officer appointed under this Instruction *shall consider any evaluation report* presented by a parent." (emphasis added) This provision is broad and unambiguous, its language clearly extending to the SU report offered by Petitioner. Also,

[15]Tr. IV at 239.

[16]Tr. IV, at 103-105.

the record provides no basis to deny that the SU report satisfies the requirements of Instruction ¶ E8.2.8 for an IEE. Furthermore, it is in the best interest of the child to consider all qualified assessments at any point in the process. The Judge's exclusion of this document is clear error.

We have examined the other issues raised by Petitioner. Although the Judge held that the LC evaluation did not conform to the requirements of the Instruction so as to qualify as an IEE, Petitioner on appeal has complained only that this evaluation was not presented to the CSC for consideration. We agree with Petitioner, for reasons similar to those set forth above, that it was error for Respondent not to have done so. The LC evaluation was obtained at Petitioner's request and any perceived defects in it are attributable to Respondent not adequately policing its own contract with LC, thereby failing to ensure that it got the benefit of its bargain. We have examined the LC evaluation in light of the record as a whole and conclude that it falls within the broad scope of Instruction ¶ E8.2.9. Furthermore, its conclusions about Petitioner's verbal and mathematical weaknesses appear broadly congruent with the SU evaluation, despite the fact that it does not specifically address any possible learning impairment as defined by the Instruction. The Board has examined the remaining issues and concludes that, except as corrected in the following Conclusion and Order section, harmful error has not been established.

Conclusion and Order

As stated above, the Board is aware that the processing of special education cases can be time consuming, which works to the disadvantage of students whose needs may go unaddressed as the case makes its way through the system. Although we understand the reason for the Judge's directing that a new IEE be accomplished, we conclude that the best available resolution of the errors in this case is to instruct Petitioner's current school to hold a CSC meeting which shall consider at a minimum: (1) the SU evaluation; (2) the LC evaluation; (3) all evidence considered in the 2006 school evaluation; and (4) all current educational reports and assessments of Petitioner. The CSC meeting shall be convened within 15 school days of the date of this decision. The Judge's order for a new IEE is vacated.

This constitutes the final agency decision in this case. Accordingly, the Board hereby advises Petitioner that she has a right under 20 U.S.C. § 1415 (i)(2) to bring a civil action on the matters in dispute in a district court of the United States without regard to the amount in controversy.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board