DATE: February 8, 2000

In Re:	)	
	)	
----------, by her parents	)	DoDDS Case No. E-99-001
----------	)	
	)	
Petitioner	)	
	)	

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT
Matthew E. Malone, Esq., Department Counsel

FOR PETITIONER
Pro Se

Administrative Judge Joseph Testan (hereinafter "Hearing Officer") issued a decision, dated October 29, 1999, after conducting a due process hearing under Department of Defense Instruction 1342.12, "Provision of Early Intervention and Special Education Services to Eligible DoD Dependents in Overseas Areas," dated March 12, 1996 ("DoD Instruction").[1] The case is before the Board on an appeal by Department of Defense Dependent Schools (DoDDS) and a cross-appeal by Petitioner from the Hearing Officer's decision. For the reasons that follow, the Board affirms the Hearing Officer's decision in part and reverses it in part.

The Board has jurisdiction of this case on appeal under Section E8.6 of Enclosure 8 to the DoD Instruction.

[1] A copy of the DoD Instruction, Administrative Reissuance Incorporating Change 2, November 12, 1998, can be found at http://web7.whs.osd.mil/dodiss/instructions/ins2.html.

Procedural History

During 1997, the Petitioner's parents (hereinafter "Parents")[2] requested a due process hearing under the DoD Instruction. A hearing was held on May 20-22, 1997. A hearing officer issued a written decision on August 18, 1997. That decision was appealed by DoDDS and cross-appealed by the Parents.

On December 2, 1997, the Board issued a decision (DoDDS Case No. 97-E-001) affirming in part, and reversing in part, the hearing officer's August 18, 1997 decision. One part of the Board's decision is directly pertinent to the appeal in this case. Specifically, in connection with the denial of speech therapy for the Petitioner during the 1996-1997 school year, the Board ruled that "[a]n independent evaluation of the [Petitioner] should be arranged and conducted at DoDDS' expense as expeditiously as possible. The results of that independent evaluation must be provided to DoDDS and the parents so that the [Petitioner's] CSC can meet to develop an IEP that incorporates whatever compensatory education is specified by the independent evaluation."

On December 18, 1998, the Parents filed a request for a due process hearing (hereinafter "Request"). In the Request, the Parents alleged that: (1) Petitioner did not receive a free appropriate public education (FAPE) during the 1997-1998 school year; and (2) Petitioner did not receive compensatory speech therapy that she was awarded in DoDDS Case No. 97-E-001.

The Parents' Request was received by the Defense Office of Hearings and Appeals (DOHA) on January 11, 1999. By memorandum dated January 21, 1999, Chief Administrative Judge Robert R. Gales assigned Administrative Judge Joseph Testan to be the Hearing Officer to conduct a hearing in this case under the DoD Instruction.

On January 26, 1999, DoDDS submitted a response to the Parents' Request. By letter dated January 28, 1999, the Hearing Officer informed the Parents he had been assigned to conduct the hearing in their case. In that letter, the Hearing Officer also ordered the Parents to amend their Request to include a factual basis for each claim they were making. In response to the Hearing Officer's order, the Parents submitted an Amended Petition on February 10, 1999. The Hearing Officer then ordered DoDDS to file a response to the Parent's Amended Petition. DoDDS filed such a response on February 19, 1999.

On February 25, 1999, the Parents submitted an Additional Amended Petition for Relief, in which they specified additional relief they were seeking. On March 11, 1999, DoDDS submitted an answer to the Parents' Additional Amended Petition for Relief.

Four days of hearing were held on April 20-23, 1999. At the close of the hearing, the Hearing Officer and the parties agreed that written closing arguments could be filed by the parties after they had an opportunity to review the transcript of the hearing. The Hearing Officer received

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[2] During the proceedings below and on appeal, the Petitioner's Parents have made arguments that refer to other parents with disabled children in the DoDDS school. In this decision, all references to the Petitioner's Parents will be "Parents"(capitalized), and all references to the parents of other disabled children will be "parents" (lower case).

the hearing transcript on September 14, 1999 and sent a copy to each of the parties. Both parties submitted written closing arguments to the Hearing Officer.

The Hearing Officer issued a written decision, dated October 29, 1999. That decision is the subject of the appeal and cross-appeal in this case.

Statement of the Case

Petitioner is a 16-year-old female (hereinafter "Child") who suffers from chromosomal abnormalities and a metabolic disorder. The Child functions "between a two and three year old level" (TR at 210).[3] The Child attended a middle school from 1995 until June 1997 in a program for students with moderate to severe disabilities. The Child's last agreed upon Individualized Education Program (IEP)[4] was signed on December 3, 1996 (Petitioner's Exhibit 1).

In the proceedings below, the Parents contended: (1) DoDDS had failed to carry out its responsibility to provide a FAPE for their daughter during the 1997-1998 school year; and (2) DoDDS failed to provide their daughter with the compensatory speech therapy awarded in DoDDS Case No. 97-E-001. The Parents requested the following relief: (a) compensatory speech therapy for the Child as awarded in DoDDS Case No. 97-E-001; (b) compensatory education for the Child, to include reimbursement for a personal computer and software; (c) compensatory therapy (physical, occupational, and speech) for the Child for the 1997-1998 school year; (d) payment of all lawyer fees and all expenses incurred by the Parents during the 1997-1998 school year; and (e) an independent assessment of the Child by credentialed professionals, at public expense.

With respect to the Parents' contention that the Child was denied a FAPE during the 1997-1998 school year, the Hearing Officer concluded: (1) during the period August 26, 1997 through September 5, 1997, DoDDS had no intention of providing to the Child all the services required by the Child's IEP; (2) during the period August 26, 1997 through September 5, 1997, DoDDS denied the Child a FAPE by its failure to provide the Child with all the services required by the Child's IEP; (3) during the period September 8, 1997 through April 20, 1998, DoDDS offered a FAPE for the Child; (4) the Child did not receive a FAPE during the period September 8, 1997 through April 20, 1998 because the Parents did not send the Child to school on a regular basis; (5) the Parents' unilateral decision to keep the Child out of school cannot be held against DoDDS; (6) the Parents unilaterally enrolled the Child in a host country school on April 21, 1998; and (7) because DoDDS was offering a FAPE to the Child, the Parents' unilateral placement of the Child in the host country school ended DoDDS' obligations to the Child.

With respect to the Parents' contention that DoDDS failed to provide the compensatory speech therapy awarded in DoDDS Case No. 97-E-001, the Hearing Officer concluded: (1) the Child did not receive the compensatory speech therapy she was awarded as a result of DoDDS Case No. 97-E-001; (2) the primary reason the Child did not receive the compensatory speech therapy was DoDDS' failure to abide by the Board's order to obtain an independent evaluation of the Child; (3) the conduct of DoDDS personnel in setting up the evaluation of the Child was not done in bad faith

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[3] References to the hearing transcript will be cited as TR.

[4] The DoD Instruction defines an IEP at Enclosure 2, Section E2.1.25.

or in violation of the Board's order; (4) once the evaluation was completed, DoDDS knew or should have known that the evaluation was not an independent one because the military member who conducted it indicated she was "prohibited by the military legal department from making a statement regarding where [the Child's] language skills might be had [the Child] received regular, uninterrupted therapy"; and (5) DoDDS' failure to obtain another evaluation of the Child had the effect of ignoring the Board's order in DoDDS Case No. 97-E-001.

Although the Hearing Officer concluded the Child had been denied a FAPE during the period August 26, 1997 to September 5, 1997, the Hearing Officer declined to order any relief to remedy that denial. The Hearing Officer gave the following reasons for his decision on this point: (1) money damages are not available under the Individuals with Disabilities Education Act (IDEA); and (2) an award of compensatory education would not be appropriate because (a) the Parents offered no proof that the Child was harmed as a result of being denied a FAPE during the period August 26, 1997 to September 5, 1997, and (b) even if the Child suffered harm, the harm did not rise to the level that requires an award of compensatory education.

The Hearing Officer rejected the Parents' claim that DoDDS was under an obligation to provide some services to the Child even though the Parents would not send the Child to class to receive the remaining services. The Hearing Officer rejected the Parents' request for relief on this point because: (1) the Parents' failed to cite any authority for their position; and (2) the IDEA does not obligate DoDDS "to offer or provide a 'partial' FAPE."

The Hearing Officer denied the Parents' request for lawyer's fees and all expenses incurred by the Parents during the 1997-1998 school year because they did not offer any evidence of such fees and expenses.

The Hearing Officer ordered relief in connection with his finding that DoDDS failed to provide the compensatory speech therapy awarded as a result of DoDDS Case No. 97-E-001. Specifically, the Hearing Officer awarded the Child compensatory speech therapy based on a "one for one" rule because he concluded that ordering another evaluation "would simply be inviting another request for a due-process hearing by one or both parties, and would most likely result in the Child not receiving any compensatory education." The Hearing Officer then proceeded to direct DoDDS to provide the Child with compensatory speech therapy for a period of ten consecutive weeks, with various conditions.

DoDDS filed an appeal of the Hearing Officer's October 29, 1999 decision. The DoDDS appeal raises the following issues: (1) whether the Hearing Officer erred by finding that DoDDS had no intention of providing the Child with a FAPE during the period August 26, 1997 to September 5, 1997; (2) whether the Hearing Officer erred by finding that DoDDS failed to comply with the Board's order in DoDDS Case No. 97-E-001 to provide the Child with compensatory speech therapy; and (3) whether the Hearing Officer erred by ordering DoDDS to provide compensatory speech therapy different from that ordered by the Board in DoDDS Case No. 97-E-001.

The parent's filed a cross-appeal of the Hearing Officer's October 29, 1999 decision. The Parents' cross-appeal raises the following issues: (1) whether there were various procedural violations during the proceedings below that denied the Parents a fair and impartial due process hearing; (2) whether the Hearing Officer erred by finding that DoDDS was ready, willing and able

to provide the Child with a FAPE after September 5, 1997; (3) whether the Hearing Officer erred by finding that the Parents unilaterally placed the Child in a host country school; (4) whether the Hearing Officer erred by not complying with the Board's order in DoDDS Case No. 97-E-001 to provide the Child with compensatory speech therapy; and (5) whether the Child is entitled to receive relief because she was denied a FAPE for the 1997-1998 school year.

The Board will address the appeal issues raised by DoDDS, then address the cross-appeal issues raised by the Parents.

Before addressing the specific issues raised by the DoDDS' appeal and the Parents' cross-appeal, the Board will briefly note some pertinent legal principles governing appeals (and cross-appeals) in special education cases.

Burden on appeal. There is no presumption of error below and the appealing party bears the burden of raising claims of error and demonstrating that such errors were committed. DDESS Case No. 97-001 (March 24, 1998) at pp. 4-5.

Standard of review on appeal. In special education cases, the Board gives deference to the Hearing Officer's credibility determinations and resolution of conflicting evidence, provided they are based on a preponderance of the evidence. DDESS Case No. 97-001 (March 24, 1998) at p. 5. Whether DoDDS has provided a FAPE for a disabled child is a mixed question of law and fact, and a Hearing Officer's determination of that issue is reviewed by the Board *de novo*. DDESS Case No. 97-001 (March 24, 1998) at p. 5; DoDDS Case No. 97-E-001 (December 2, 1997) at p. 4. A Hearing Officer's interpretation of statutory authorities or DoD regulations is entitled to no deference on appeal and is subject to plenary or *de novo* review on appeal. DDESS Case No. 97-001 (March 24, 1998) at p. 5; DoDDS Case No. 97-E-001 (December 2, 1997) at p. 4.

Appeal Issues

1. Whether the Hearing Officer erred by finding that DoDDS had no intention of providing the Child with a FAPE during the period August 26, 1997 to September 5, 1997. DoDDS contends the preponderance of the evidence does not support the Hearing Officer's finding that DoDDS had no intention of providing the Child with a FAPE during the period August 26, 1997 to September 5, 1997. In support of this contention, Department Counsel argues: (a) the Hearing Officer mis-characterized the record evidence; (b) apart from physical therapy (PT) services, the Parents presented no evidence that DoDDS did not provide the Child with the services called for in her December 1996 IEP; and (c) the record shows that the Child did not receive occupational therapy (OT) services because the Child was absent from school for all but one of her scheduled OT sessions. Department Counsel also contends the Hearing Officer erred by finding that DoDDS did not, in fact, provide the Child a FAPE during the period August 26, 1997 to September 5, 1997 because the Hearing Officer incorrectly concluded that there is no situation in which DoDDS may be excused for not providing services contained in an IEP.

The party alleging a denial of FAPE or challenging the adequacy of an IEP bears the burden of proof at the hearing level. DDESS Case No. 97-001 (March 24, 1998) at p. 4 (citing federal cases). *See also Renner v. Board of Education of Public Schools of City of Ann Arbor*, 185 F.3d 635, 642 (6th Cir. 1999)(parents have burden of proving an IEP was inadequate). Accordingly, the

Hearing Officer had to consider whether the Parents satisfied their burden of proof with respect to their claim that DoDDS had failed to provide their Child with a FAPE during the 1997-1998 school year. In deciding whether the Parents met their burden of proof, the Hearing Officer had to consider the record evidence as a whole, not just the evidence specifically offered by the Parents. Accordingly, even assuming for the sake of argument that Department Counsel is correct that the Parents did not offer evidence on certain specific points, that would not preclude the Hearing Officer from concluding, based on consideration of the record evidence as a whole, that the Parents had satisfied their burden of proving a denial of a FAPE.

The Board does not find persuasive the arguments made by Department Counsel in support of its contention that the Hearing Officer mis-characterized the record evidence. The Board does not have to agree with the specific wording of the Hearing Officer's findings to conclude the Hearing Officer's challenged findings on this aspect of the case reflect a reasonable, plausible interpretation of the record evidence as a whole. Even focusing on the specific portions of the record evidence cited by Department Counsel in its brief, the Board is not persuaded that the Hearing Officer erred by finding that DoDDS failed to provide the Child with a FAPE during the period August 26, 1997 to September 5, 1997.

Department Counsel argues that DoDDS should not be held accountable for scheduled PT or OT sessions that the Child missed because she did not appear for the sessions. There is record evidence that the Parents failed to bring the Child to some therapy sessions, the Parents did not notify the therapists on those occasions, and as a result, the therapists wasted valuable time and efforts that could have been directed to providing therapy to other disabled children. With respect to those occasions, the Parents failed to present evidence showing that they acted reasonably. Even if the Parents had a reasonable basis for not bringing the Child to the scheduled therapy sessions, they had an obligation to notify the therapists as soon as practical that they were not bringing the Child for therapy. Whatever disagreements the Parents had with DoDDS, they had no right to take actions that a reasonable person would know or should have known could have an adverse impact on the educational or related services provided to other disabled children.

Department Counsel also contends the Hearing Officer erred in finding a denial of FAPE for the period August 26, 1997 to September 5, 1997 because: (a) the Board has recognized some delays in providing services under an IEP may be reasonable; (b) the Parents agreed to a delay in providing some services for the Child; and (c) the Hearing Officer's finding has the practical effect of micro-managing DoDDS' special education program. This contention is not persuasive.

Department Counsel's arguments fail to take into account the importance of the Child's IEP. The IEP is an important component of a FAPE. DoDDS Case No. 97-E-001 (December 2, 1997) at p. 7. *See also Kathleen H. v. Massachusetts Department of Education*, 154 F.3d 8, 11 (1st Cir. 1998)(development of IEP is primary safeguard under IDEA); *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10th Cir. 1998)(IEP is basic mechanism through which the goal of providing a FAPE is achieved). Compliance with a disabled child's IEP is an important measure of whether the child is receiving or has received a FAPE, and failure to provide the educational services specified by an IEP raises a serious question of whether there has been a denial of a FAPE. DoDDS Case No. 97-E-001 (December 2, 1997) at p. 7. Once there was record evidence that DoDDS did not provide the Child with some of the educational services specified in her IEP, the burden shifted to DoDDS to: (a) rebut or refute that evidence; (b) present evidence to

demonstrate the failure was explainable because of emergency, exigent circumstances, or some other reasonable basis;[5] or (c) present evidence to demonstrate how the failure did not deprive the Child of a FAPE. DoDDS did not present any evidence demonstrating any emergency or exigent circumstances existed (such as discussed in DoDDS Case No. 97-E-001) which prevented the delivery of services for the Child during the period August 26, 1997 to September 5, 1997. Administrative convenience and the need to plan schedules do not constitute emergency or exigent circumstances that justify or excuse delays in providing services under an IEP. A preponderance of the record evidence does not support Department Counsel's contention that the Parents agreed to a delay in providing some services for the Child. Furthermore, Department Counsel's conclusory argument fails to articulate any basis for the Board to conclude the Hearing Officer's finding on this point has the practical effect of "micro-managing" DoDDS.

2. Whether the Hearing Officer erred by finding that DoDDS failed to comply with the Board's order in DoDDS Case No. 97-E-001 to provide the Child with compensatory speech therapy. Department Counsel contends the Hearing Officer erred by finding that DoDDS failed to comply with the Board's order in DoDDS Case No. 97-E-001. In support of this contention, Department Counsel argues: (a) it was inconsistent for the Hearing Officer to find the Special Education Coordinator complied with the Board's order when she arranged an evaluation for the Child, yet find the evaluation that was obtained was not independent; (b) the evaluation of the Child was an independent evaluation under the terms of the DoD Instruction, Enclosure 2; (c) the Parents never challenged the qualifications of the therapist who performed the evaluation or the manner in which the evaluation was done; (d) the Parents never raised the issue of whether the evaluation itself was in compliance with the Board's order; (e) the Hearing Officer erred by relying on a statement in the evaluation in which the therapist indicated she had relied on legal advice not to render an opinion about a specific aspect of the Child's condition; (f) the record and briefs in DoDDS Case No. E-97-001 and the record in this case show that it is impossible to measure any regression of the Child's speech skills regardless of who conducts an evaluation of the Child; and (g) the Child's absences from school during the 1997-1998 school year precluded her from receiving the speech therapy services called for in her December 1996 IEP. For the reasons that follow, the Board concludes Department Counsel's arguments have mixed merit.

(a) Because the Board's order in DoDDS Case No. 97-E-001 did not specify how the independent evaluation was supposed to be arranged, it is not surprising that the Hearing Officer found that the Special Education Coordinator did not violate the Board's order when she arranged for the evaluation of the Child.[6] However, there is nothing factually or logically inconsistent between the Hearing Officer's finding that the Special Education Coordinator acted in compliance with the Board's order in DoDDS Case No. 97-E-001 when she arranged an evaluation for the Child, and the Hearing Officer's finding that the evaluation that was obtained was not independent.

The Board rejects Department Counsel's argument that DoDDS "was under no obligation to . . . actually expend funds in arranging for the evaluation." Department Counsel's argument is

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[5] DoDDS Case No. 97-E-001 (December 2, 1997) at p. 8.

[6] Even though the manner in which the Special Education Coordinator arranged the evaluation for the Child did not violate the Board's order in DoDDS Case No. 97-E-001, it has some bearing on issues raised in the cross-appeal, which will be discussed later in this decision.

untenable in the face of the plain language of DoD Instruction, Enclosure 8, Section E.8.4.4.3 and the plain language of the Board's ruling in DoDDS Case No. 97-E-001. DoDDS has no authority or discretion to refuse to comply with the rulings of Hearing Officers or this Board under the DoD Instruction.

Department Counsel also argues DoDDS offered the Parents the names of three qualified professionals to evaluate the Child with undue delay, and although the Child's mother was not provided with resumes on the three professionals after she asked for such resumes, there is no evidence that the three professionals were not qualified. Assuming only for the purpose of deciding this argument that the three persons were qualified professionals, this argument does not demonstrate the Hearing Officer erred. Since the Child was not evaluated by any of the three professionals whose names were offered to the Parents, their professional qualifications are irrelevant to the issue of whether the Child received an independent evaluation.[7]

(b) Department Counsel correctly notes that the DoD Instruction defines an independent evaluation as "[a]n evaluation conducted by a qualified examiner who is not employed by the DoDDS." However, that definition does not preclude a Hearing Officer from considering any record evidence that sheds light on whether an examiner who is not employed by DoDDS in fact conducted an independent evaluation.

(c) Department Counsel is correct in noting that, when the evaluation was set up and conducted, the Parents did not challenge the qualifications of the therapist who evaluated the Child or the manner in which the evaluation was done. Department Counsel's observation is irrelevant. The fact that a therapist is qualified to conduct an evaluation does not answer the question whether the evaluation is an independent one. Similarly, even if a therapist conducts an evaluation in a professionally acceptable manner, it does not necessarily follow that the evaluation is an independent one. Furthermore, Department Counsel's argument ignores the simple fact that it would be impossible for the Parents to anticipate that the therapist who evaluated the Child would later state that she was "prohibited by the military legal department" from giving an opinion on a key issue.

(d) Department Counsel goes too far in arguing that the Parents never raised the issue of whether the evaluation was in compliance with the Board's order. During the proceedings below, the Parents raised the issue of whether the Child was denied the benefit of the compensatory speech therapy that was ordered in DoDDS Case No. 97-E-001. An independent evaluation of the Child was a crucial, indispensable predicate of the relief to which the Child was entitled as a result of DoDDS Case No. 97-E-001. Accordingly, the Hearing Officer had the obligation to consider any record evidence that was relevant to making a decision on whether the Child was denied the relief she was awarded in DoDDS Case No. 97-E-001, including any evidence bearing on whether the Child, in fact, received an independent evaluation.

(e) It was not arbitrary or capricious for the Hearing Officer to take into consideration the following statement in the written evaluation of the Child: "I am prohibited by the military legal

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[7] As will be discussed later in this decision, the failure of the Special Education Coordinator to respond to the Child's mother's request for resumes is relevant to a portion of the Parents' cross-appeal issues.

department from making a statement regarding where [the Child's] language skills might be had she received regular, uninterrupted therapy" (Respondent Exhibit 16, fifth page). The objective of the evaluation was to obtain an independent opinion by a qualified professional as to what compensatory speech therapy the Child needed to make up for the speech therapy she was not given during the 1996-1997 school year. The evaluator's statement that she was "prohibited by the military legal department" from giving her professional opinion on a key issue of the evaluation provided the Hearing Officer with a rational basis to find the evaluation was not truly independent. Department Counsel's argument about the possible intentions of the therapist who evaluated the Child is mere speculation that is not supported by any record evidence.

It was not arbitrary or capricious for the Hearing Officer to find DoDDS knew or should have known the evaluation of the Child was not truly independent.[8] The Hearing Officer's finding reflects a reasonable interpretation of the record evidence. The Board finds no merit in Department Counsel's argument that the Hearing Officer's finding should not be sustained because the Parents did not present evidence on what DoDDS knew or should have known about the evaluation of the Child. As discussed earlier in this decision, the Hearing Officer must consider the record evidence as a whole, not just the evidence specifically offered by the Parents.

(f) Department Counsel also argues that the record and briefs in DoDDS Case No. 97-E-001 and the record in this case show that it is impossible to measure any regression of the Child's speech skills regardless of who conducts an evaluation of the Child. There is no indication in the record below that Department Counsel asked the Hearing Officer to make the record and briefs in DoDDS Case No. 97-E-001 part of the record in this case. The Board declines Department Counsel's invitation to go outside the record in this case to decide whether the Hearing Officer erred below.[9]

Furthermore, the portions of the record in this case cited by Department Counsel are not a substitute for the independent evaluation ordered in DoDDS Case No. 97-E-001.

(g) The Child's absences from school during the 1997-1998 school year do not cure the failure of DoDDS to obtain an independent evaluation of the Child as ordered in DoDDS Case No. 97-E-001. The absences of the Child from school were irrelevant to the issue of whether DoDDS obtained an independent evaluation of the Child. Furthermore, as will be discussed later in this decision, DoDDS' failure to obtain an independent evaluation of the Child is relevant to an evaluation of the Parent's conduct in this case.

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[8] The "knew or should have known" concept is one applicable in special education cases. *See* DDESS Case No. 97-001 (March 24, 1998) at p. 17 note 21.

[9] The Board does not need to consider the record or the briefs in DoDDS Case No. 97-E-001 to decide whether DoDDS complied with the Board's order in that case. Even if the Parents had not made the Board's decision in DoDDS Case No. 97-E-001 a part of the record in this case by submitting it as part of Exhibit P-24, the Hearing Officer could have taken administrative notice of the Board's decision because the Parents raised the issue of whether the Child was denied the benefit of the compensatory speech therapy that was ordered in DoDDS Case No. 97-E-001.

3. Whether the Hearing Officer erred by ordering DoDDS to provide compensatory speech therapy different from that ordered by the Board in DoDDS Case No. 97-E-001. Department Counsel contends: (a) the Hearing Officer acted in an arbitrary and capricious manner by concluding the evaluation of the Child was not an independent one, yet relying on that evaluation to order compensatory speech therapy for the Child; (b) the Hearing Officer's order to provide compensatory speech therapy exceeds his authority because it alters the relief ordered by the Board in DoDDS Case No. 97-E-001; (c) the Hearing Officer lacks authority to require DoDDS to provide the Child with speech therapy because she is not now attending a DoDDS school and there is no authority to order such relief; and (d) the Hearing Officer's order places a disproportionate burden on DoDDS.

(a/b) The Board's resolution of Department Counsel's second argument renders moot Department Counsel's first argument. The Board's order in DoDDS Case No. 97-E-001 was the law of the case on the issue of the Child's entitlement to compensatory speech therapy and binding on the Hearing Officer and the parties in this case. The Hearing Officer had no authority or discretion to fashion any relief that deviated from the Board's order in DoDDS Case No. 97-E-001.

(c) Department Counsel contends that the Hearing Officer lacked authority to require DoDDS to provide the Child with speech therapy because she is not now attending a DoDDS school and there is no authority to order such relief. For the reasons that follow, the Board concludes this contention lacks merit.

Normally, DoDDS is not responsible for providing special education and related services to disabled students who are not in the DoDDS school system. However, Department Counsel's argument ignores the crucial point that this aspect of the case pertains to compensatory education, not the routine provision of special education and related services. "The purpose of compensatory services is, as the term implies, to make the student whole insofar as possible for the failure to provide all or a portion of the student's special educational program as prescribed in the IEP." Final Administrative Decision No. 88-003-A (September 29, 1989) at p. 34. *Accord* DoDDS Case No. 97-E-001 (December 2, 1997) at pp. 9-10. Furthermore, the DoD appellate authority that preceded the Board in special education cases indicated that compensatory education can be ordered for a disabled child who has left the DoDDS school system. Final Administrative Decision No. 88-003-A (September 29, 1989) at p. 36. The Board sees no legitimate reason to hold otherwise in this case.

If DoDDS fails to provide a disabled student with a FAPE, in whole or in part, DoDDS cannot escape its responsibility for providing compensatory education merely because the student's parents, faced with a denial of a FAPE, take their disabled child elsewhere in an effort to get an appropriate education for their child. It would make no sense to leave a disabled child without a remedy for a denial of FAPE merely because the child's parents seek to mitigate the harm caused by the denial of FAPE.[10] Furthermore, acceptance of Department Counsel's argument would have the

[10] Implicit in the IDEA cases where federal courts have awarded reimbursement or compensatory education is the notion that where there is a denial of FAPE, a school cannot escape responsibility for its failure to provide a FAPE merely because the disabled child's parents took the child to a private school to get an appropriate special education. *See, e.g., Florence County School District Four v. Carter*, 510 U.S. 7, 12-14 (1993). *See also* Hall *v. Vance County Board of Education*, 774 F.2d 629, 633-634 n.4 (4th Cir. 1985)(unilateral placement of child is

practical effect of allowing DoDDS to escape responsibility for its failure to provide the compensatory education ordered in DoDDS Case No. 97-E-001. The Board sees no legitimate reason for it to accept an argument that would have the practical effect of rendering meaningless remedial orders issued by a Hearing Officer or this Board under the DoD Instruction.

(d) Department Counsel cites no legal authority to support its "disproportionate burden" argument. Nothing in the Defense Dependents Education Act of 1978, as amended, (20 U.S.C. 921 *et seq.*), provides any specific basis for a "disproportionate burden" argument. There is an apparent division of authority among federal courts on whether claims of "undue burden" can be raised as a defense by schools in special education cases. *See Morton Community Unit School District No. 709 v. J.M.*, 152 F.3d 583, 586-587 (7th Cir. 1998)(discussing federal cases), *cert denied*, 119 S.Ct. 1140 (1999). The Board need not decide in this appeal whether an "undue burden" defense can be recognized in special education cases. Even assuming solely for the purpose of deciding this appeal that an "undue burden" defense could be recognized in these cases, the burden of presenting evidence to support such an affirmative defense would rest with DoDDS. In this case, DoDDS has presented arguments in support of its "disproportionate burden" argument. Such arguments are not a substitute for record evidence.

Cross-Appeal Issues

1. Whether there were various procedural violations during the proceedings below that denied the Parents a fair due process hearing. On appeal, the Parents argue there were various procedural violations that occurred during the proceedings below: (a) The Director, DOHA violated DoD Instruction, Enclosure 8, Section 8.4.1.5 by not assigning this case to a Hearing Officer within 10 calendar days after the Parents' submitted their request for a due process hearing; (b) Department Counsel did not submit a timely answer to the Parents' Request, as required by the DoD Instruction, Enclosure 8, Section E8.4.1.4; (c) the Parents were wrongfully deprived of the opportunity to present the testimony of three persons; (d) Department Counsel falsely stated that the Parents had the burden of paying the expenses of witnesses, contrary to pertinent language in the DoD Instruction, Enclosure 8, Section E8.4.3.2.; (e) the Hearing Officer erred by denying the Parents' request that Family Advocacy records be subpoenaed; (f) the Hearing Officer did not properly handle the Parents' hearing motion concerning missing documents; (g) the Hearing Officer erred by rushing the Parents throughout the hearing; (h) the Hearing Officer erred by allowing the Special Education Coordinator to stay in the hearing after she testified and then permitting the her to testify again later in the hearing; (i) the Hearing Officer erred by denying the Parents' request for an electronic verbatim record of the hearing, in violation of the DoD Instruction, Enclosure 8, Section E8.4.1.11; (j) the hearing transcript was not signed or duly authenticated; (k) the court reporter was biased and did not

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not a waiver of reimbursement remedy where parents placed child elsewhere as a result of school's failure to comply with procedural safeguards under predecessor to IDEA). *Cf. Pihl v. Massachusetts Department of Education*, 9 F.3d 184, 189 (1st Cir. 1993)(rejecting argument that claim for compensatory education is moot because the time for modifying challenged IEPs has passed); *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990)(school cannot foreclose grant of relief for denial of FAPE on ground that the child no longer is eligible to receive protections and benefits under predecessor to IDEA because child is now over age 21), *cert. denied*, 499 U.S. 923 (1991).

record some of the hearing testimony; (l) the Hearing Officer failed to make a full and complete record, as required by the DoD Instruction, Enclosure 8, Section E.8.4.1.13; and (m) the Hearing Officer's decision was issued 315 days after the Parents filed their request for a due process hearing, in violation of DoD Instruction Enclosure 8, Section E.8.4.1.15. The Parents' procedural arguments raise the issue of whether they were denied a fair due process hearing.[11]

(a) As indicated in the Procedural History section of this decision, the Parents' Request was received by DOHA on January 11, 1999, and, by memorandum dated January 21, 1999, Chief Administrative Judge Robert R. Gales assigned Administrative Judge Joseph Testan to be the Hearing Officer to conduct a hearing in this case.[12] Accordingly, a Hearing Officer was assigned within 10 days. The fact that the Parents were not notified about the assignment until later does not render the assignment late under DoD Instruction, Enclosure 8, Section 8.4.1.5.

(b) As indicated in the Procedural History section of this decision, the Parents' Request was received by DOHA on January 11, 1999, and DoDDS submitted a response to the Parent's Request on January 26, 1999. Accordingly, DoDDS submitted its response in a timely manner under DoD Instruction, Enclosure 8, Section 8.4.1.4.

(c) The Parents argue that they were wrongfully deprived of the opportunity to present the testimony of three witnesses. This argument has mixed merit.

One of the witnesses in question was a former employee of DoDDS. On March 18, 1999, the Hearing Officer issued an order directing Department Counsel to ensure the presence of this witness. That order placed DoDDS under obligation to have that witness present at the hearing or provide a rational, legally sustainable explanation for the absence of that witness.[13] There is no indication in the hearing record that the Hearing Officer's March 18, 1999 order concerning this witness was addressed or otherwise resolved at the hearing. Therefore, it was arbitrary and capricious for the Hearing Officer to not enforce his own order.

Another of the witnesses was a current employee of DoDDS. The Parents made a sufficient proffer to put the Hearing Officer on notice that this witness' testimony would be relevant. Furthermore, as a current employee of DoDDS, this witness was under the control of DoDDS and

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[11] The Parents also claim some witnesses should be held accountable under 18 U.S.C. 1001 for willfully making false statements in their testimony. Neither the Hearing Officer nor the Board has jurisdiction in these proceedings to adjudicate guilt under 18 U.S.C. 1001.

[12] Nothing in the case file indicates that the Parents were provided a copy of the January 21, 1999 memorandum.

[13] The April 8, 1999 letter from Department Counsel to the Hearing Officer concerning this witness did not change the legal effect of the Hearing Officer's March 18, 1999 order. Only the Hearing Officer could modify or rescind that order. Furthermore, the fact that the Parents followed Department Counsel's suggestion to try to contact this witness (Parents' April 15, 1999 letter to Department Counsel with cc copy to Hearing Officer) did not relieve DoDDS of the obligation to comply with the March 18, 1999 order or formally ask the Hearing Officer to modify or rescind it.

failure of the government to have this witness testify without a legally adequate explanation could subject DoDDS to application of the adverse inference rule to the benefit of the Parents' case. However, the Parents' waived their right to have this witness testify or to ask the Hearing Officer to apply the adverse inference rule because they did not object to the absence of this witness until after the hearing.

The third witness was a parent of a disabled child in the DoDDS school. The Hearing Officer issued a March 22, 1999 order in which he denied the Parents' motion to compel the attendance of this witness "without prejudice" and indicated "[i]f, at the hearing, [the Parents] can show that [the witness'] testimony would be relevant, material, and non-cumulative, then at the hearing [the Parents] can renew their Motion to Compel [the witness'] attendance." At the hearing, the Parents wanted the testimony of the third witness to establish that the school was on notice of the complaints from other parents about the Child's teacher and to challenge the credibility of school witnesses who had denied the existence of such complaints. On the last day the Hearing Officer listened to a tape recording of a CSC meeting which, the Parents proffered, had the voice of the third witness complaining about the Child's teacher. Had the tape been audible, the third witness' presence might have been cumulative. However, the tape was inaudible. The Hearing Officer still admitted it as evidence even though he correctly determined it was inaudible. The Parents' proffer as to the testimony of this witness was sufficient to place the Hearing Officer on notice that her testimony would be relevant and not cumulative. Although this witness was not under DoDDS' control, the Hearing Officer could have exercised his authority (under DoD Instruction, Enclosure 8, Section E8.4.3.) to get this witness to appear or could have articulated a rational explanation for his denial of the Parents' motion concerning this witness. It was arbitrary and capricious for the Hearing Officer to fail to articulate a rational basis for denying the Parents' motion at the hearing once the Parents again raised the issue of this witness and he determined the tape recording was inaudible.

(d) During a telephone conference call held on March 12, 1999, Department Counsel argued that each party was responsible for paying the expenses of its witnesses. The Parents correctly note that DoD Instruction, Enclosure 8, Section E.8.4.3.2 provides for a significant exception to the general rule cited by Department Counsel: "The DoDDS or the Military Department concerned shall pay such expenses when a witness is called by the hearing officer." Although Department Counsel's failure to articulate that exception was a glaring error, standing alone, that error is not sufficient to demonstrate bad faith on the part of Department Counsel as alleged by the Parents on appeal.

(e) The Hearing Officer has the authority to issue an order compelling the production of evidence. DoD Instruction, Enclosure 8, Section E.8.4.3.3. In deciding whether to issue such an order, the Hearing Officer can consider whether the party's request for the production of documents is made in a timely manner. In this case, the Parents did not ask the Hearing Officer to order the production of the Family Advocacy records until fairly late in the proceedings below. Considering all the circumstances, it was not arbitrary or capricious for the Hearing Officer to not grant the Parents' request for those records.

(f) Even making allowance for the Parents' *pro se* status, they fail to raise this issue on appeal with sufficient specificity to enable the Board to address it.

(g) The Parents contend that the Hearing Officer rushed them throughout the hearing. A party's subjective belief that it was rushed during a hearing is not sufficient to demonstrate a Hearing

Officer erred. Rather, the Board must review the record as a whole to determine whether there are objective indications that a Hearing Officer rushed a party during a hearing. After reviewing the hearing transcript, the Board concludes the Parents' contention on this point lacks merit.

(h) The Special Education Coordinator testified on the first day of the hearing. On the second day of the hearing, the Parents objected to the presence of the Special Education Coordinator as an observer after she had completed her testimony. After a colloquy with the Parents and Department Counsel, the Hearing Officer ruled that the Special Education Coordinator could remain as an observer, but that she would not be allowed to testify again if she remained as an observer. On the fourth day of the hearing, the Hearing Officer called the Special Education Coordinator as a witness on his own initiative.

On appeal, the Parents contend the Hearing Officer erred by allowing the Special Education Coordinator to remain as an observer after she testified then permitting her to testify again.[14] The Parents' contention has mixed merit. The Parents are factually incorrect in arguing the error was caused when Department Counsel called the Special Education Coordinator as a witness late in the hearing. The error was caused when the Hearing Officer called the Special Education Coordinator as a witness. The Hearing Officer clearly has the authority to call witnesses in these proceedings. DoD Instruction, Enclosure 8, Sections E.8.4.1.9. However, that authority is not unfettered and must be exercised in a manner consistent with the obligation of the Hearing Officer to conduct a fair and impartial hearing. DoD Instruction, Enclosure 8, Sections E.8.3.2 and E. 8.4.1.8.[15] Having expressly ruled that the Special Education Coordinator could not testify again if she remained as an observer, the Hearing Officer could not simply call the Special Education Coordinator as a witness later without giving the parties a rational explanation for why he was changing his earlier ruling. A review of the hearing transcript shows the Hearing Officer gave no such explanation for his action in calling the Special Education Coordinator as a witness. Such unexplained action, contrary to an earlier ruling of the Hearing Officer, demonstrates arbitrary and capricious decision-making by the Hearing Officer.

(i) The Parents persuasively contend that the Hearing Officer erred by denying their request for a copy of the audiotapes of the hearing. The Parents are entitled to receive "[a] copy of the written transcript or electronic record of the hearing . . . on request and without cost." DoD Instruction, Enclosure 8, Section E8.4.1.11. Under the particular facts and circumstances of this case, the

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[14] The Parents also ask the Board to conclude the Special Education Coordinator was an unreliable witness based, in part, on their reliance on the record in DoDDS Case No. 97-E-001. There is no indication in the record that the Parents asked the Hearing Officer to make the record in DoDDS Case No. 97-E-001 part of the record in this case. The Board declines the Parents' invitation to go outside the record in this case to decide whether the Hearing Officer erred.

[15] Department Counsel is correct in noting that professional employees of DoDDS are authorized to attend hearings in these case. DoD Instruction, Enclosure 8, Section E.8.4.1.10. However, that provision does not exist in isolation from the rest of the DoD Instruction and it should not be construed or applied in a manner that nullifies or impairs the right of the parties to a fair hearing.

Hearing Officer acted in an arbitrary and capricious manner when he denied the Parents' request for an electronic verbatim record of the hearing.[16]

The hearing ended on April 23, 1999. On June 2, 1999, the Parents wrote to Department Counsel (with a cc copy to the Hearing Officer), asking about the status of the hearing transcript and expressing concern about their ability to prepare written closing arguments if the transcript were sent when they were out of the country. By letter dated June 2, 1999, the Hearing Officer informed the Parents that "the last word I received about the transcript was that I will probably receive it around the middle of June." On June 16, 1999, the Parents wrote to the Hearing Officer, indicating that they still had not received a copy of the hearing transcript, expressing concern about the delay, and asking that overtime pay be authorized for the court reporter to complete the hearing transcript. On September 1, 1999, the Parents again wrote to Department Counsel (with a cc copy to the Hearing Officer) about the lack of a hearing transcript, noting they had not received a response to their June 16, 1999 letter,[17] indicating they wanted to know when they would receive a copy of the hearing transcript and an explanation for the delay, and asking for a response by September 3, 1999.[18] On September 7, 1999, the Parents wrote to the Hearing Officer. In that letter, the Parents asked for a copy of the audiotapes of the hearing, asked whether the Hearing Officer had received the hearing transcript yet, and asked if it would be possible to get an approximate time frame when they might receive the hearing transcript. By letter dated September 14, 1999, the Hearing Officer transmitted to the Parents a copy of the hearing transcript and denied their request for a copy of the audiotapes of the hearing on the grounds "I do not have the authority to provide the tapes to either party." On October 4, 1999, the Parents renewed their request for a copy of the audiotapes of the hearing. The case file does not contain any document indicating a response to the October 4, 1999 letter was sent to the Parents. On October 29, 1999, the Hearing Officer issued his written decision. In the decision, the Hearing Officer ruled the Parents had a right to choose an electronic verbatim record of the hearing in lieu of a written transcript, but the Parents waived that right by failing to exercise the option at the hearing or within a reasonable time thereafter. The Hearing Officer then again denied the Parents' request for a copy of the audiotapes of the hearing.

The Hearing Officer's denial of the Parents' request for audiotapes of the hearing was arbitrary and capricious because: (a) the Hearing Officer gave the Parents two, inconsistent reasons

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[16] As a practical matter, the Parent's appeal argument on this point is moot because they have received a copy of the hearing transcript. Normally, the Board would not address such a moot issue. However, the issue is one capable of repetition in future special education cases, yet evading review. *Cf. Thomas R.W. v. Massachusetts Department of Education*, 130 F.3d 477, 480 (1st Cir. 1997)(noting possible applicability of "capable of repetition, yet evading review" standard in special education case); *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398, 1403 (9th Cir. 1994)(applying "capable of repetition, yet evading review" standard in special education case), *cert. denied*, 512 U.S. 1207 (1994). Accordingly, as a matter of judicial economy, the Board deems it appropriate to address this issue.

[17] The case file does not contain any document indicating a response to the June 16, 1999 letter was sent to the Parents.

[18] The case file does not contain any document indicating a response to the September 1, 1999 letter was sent to the Parents.

for his denial of their request; and (b) the procedural history of the case simply does not support the Hearing Officer's conclusion that the Parents did not ask for a copy of the audiotapes of the hearing within a reasonable time after the hearing.

The Hearing Officer's first denial of the Parents' request for audiotapes was based on a rationale that is not supported by the DoD Instruction and was contradicted by the reason the Hearing Officer gave in his second denial of their request. The Hearing Officer did not err by ruling that the Parents had to make an election between a verbatim electronic record and a written transcript.[19] However, the Hearing Officer erred when he ruled the Parents did not make a request for audiotapes of the hearing in a reasonable time. There was a significant delay between the end of the hearing (April 23, 1999) and the date the Hearing Officer received the hearing transcript (September 14, 1999). The Parents repeatedly expressed their concerns about the delay in production of a hearing transcript. Given the significant delay between the end of the hearing and the failure of the Hearing Officer to respond to the Parents' inquiries of June 1 and September 1, 1999, the Parents' September 7, 1999 request for a copy of audiotapes of the hearing was reasonable and not untimely. The earlier willingness of the Parents to be patient in the face of delays in production of the hearing transcript could not fairly be held against them by the Hearing Officer once they exhausted their patience and asked for a copy of audiotapes of the hearing.

(j) The Parents correctly note that the transcript was not signed or authenticated by anyone to indicate it is the official transcript of the hearing. Nothing in the DoD Instruction (*see* Enclosure 8, Sections E8.4.1.11 and E8.4.1.12) specifically requires the hearing transcript to be signed or authenticated.

(k) The Board does not find persuasive the Parents' contention that the court reporter was biased and did not record some of the hearing testimony.

(l) As discussed earlier in this decision, the Hearing Officer erred by not requiring the presence of some witnesses sought by the Parents. To the extent the Hearing Officer erred on this matter, he failed to make a full and complete record as required by DoD Instruction, Enclosure 8, Section 8.4.1.13.

(m) The Parents argue the Hearing Officer's decision was not issued with the time period set forth in DoD Instruction, Enclosure 8, Section 8.4.1.15. By letter dated February 23, 1999, the Hearing Officer asked the parties to waive the 50-day period mandated by DoD Instruction, Enclosure 8, Section E8.4.1.15. On February 24, 1999, the Child's mother executed the waiver. By letter dated June 16, 1999, the Parents stated "[i]t has been 177 days to date, since we first requested the Due Process Hearing and 54 days since the last day in court (April 23, 1999). This is far beyond the scope of the 1342.12 DoDI instruction of 50 days, even with a waiver of the requirement." That letter fairly placed the Hearing Officer on notice that the Parents felt their right to issuance of a timely decision as contemplated by the DoD Instruction was being infringed even with their February 24, 1999 waiver. The Hearing Officer received the hearing transcript on September 14, 1999. The

[19] The Board notes that, as a practical matter, it is less time-consuming to review a written transcript than to listen to a recording of a hearing. However, as currently written, the DoD Instruction allows parents to elect a verbatim electronic record in lieu of a written transcript.

Hearing Officer issued his decision on October 29, 1999. Considering all the circumstances, the Parents were denied a timely decision.

Normally, procedural errors that adversely affect a party's right to a fair due process hearing would warrant relief. However, in this case, the Board's resolution of the Parents' substantive cross-appeal issues renders such relief unnecessary.

2. Whether the Hearing Officer erred by finding that DoDDS was ready, willing and able to provide the Child with a FAPE after September 5, 1997. The Parents make a variety of arguments that raise the issue of whether the Hearing Officer erred by finding that DoDDS offered a FAPE for the Child after September 5, 1997. Those arguments are the following: (a) the Hearing Officer failed to consider all the record evidence; (b) the Hearing Officer erred by finding the teacher responsible for the Child's class was qualified; (c) the Hearing Officer erred by finding the Parents were equal participants in the determination of the Child's placement; (d) the Hearing Officer failed to take into account evidence that the Parents were having a difficult time getting the Child to go to the teacher's classroom; and (e) the Hearing Officer's findings about the adequacy of the proposed April 1998 IEP are not supported by the record evidence.

(a) There is a rebuttable presumption that a hearing officer considers all the record evidence unless the hearing officer specifically states otherwise. That rebuttable presumption is not overcome merely by an appealing (or cross-appealing) party has a disagreement with a hearing officer's findings. If an appealing (or cross-appealing) party persuasively challenges a hearing officer's findings, then that party may have a basis for asserting the hearing officer failed to consider all the record evidence. However, even if the Board concludes that a hearing officer's findings are not supported by a preponderance of the record evidence, the Board may reach that conclusion because (i) the hearing officer failed to consider relevant record evidence, or (ii) the hearing officer considered relevant record evidence, but weighed it in an arbitrary or capricious manner.

Elsewhere in this decision, the Board concludes some of the Hearing Officer's findings are not sustainable. When doing so, the Board articulates its reason(s) for concluding certain findings by the Hearing Officer cannot be sustained. There is no need to repeat those reasons in response to this appeal argument by the Parents.

(b) The Hearing Officer's finding that the teacher responsible for the Child's class was qualified is sustainable on the record evidence in this case. The IDEA does not require teachers providing special education to have the best credentials possible, nor does it authorize the Hearing Officer or this Board to set teaching certification requirements in the guise of applying the IDEA or the DoD Instruction. *See Hartmann v. Loudoun County Board of Education*, 118 F.3d 996, 1004 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 688 (1998). However, as will be discussed later in this decision, the Hearing Officer's finding on this point is not dispositive of the issue of whether the Child received a FAPE.

(c) The preponderance of the record evidence does not support the Hearing Officer's finding that the Parents were equal participants in the determination of the Child's placement. The Hearing Officer's finding is not sustainable because it fails to give due consideration to a variety of record evidence that significantly detracts from that finding.

The procedural safeguards of IDEA are very important because they provide parents with the means to ensure that school authorities are providing disabled children with a FAPE. *See, e.g., Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 187-189 (Court discussing procedural safeguards in statute); *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 368 (1985)(Court noting importance of procedural safeguards "to insure the full participation of the parents and proper resolution of substantive disagreements"); *Sellers v. School Board of City of Manassas, Virginia*, 141 F.3d 524, 527 (4th Cir. 1998)("To advance [the goal of providing a FAPE], IDEA provides a panoply of procedural rights to parents to ensure their involvement in decisions about their disabled child's education."), *cert. denied*, 119 S.Ct. 168 (1998). A school's failure to comply with applicable procedural requirements may be sufficient to support a finding that a child was denied a FAPE. However, not every procedural defect requires a finding that a child was denied a FAPE. Rather, it is necessary to look at the facts and circumstances of each case to determine whether the procedural defect or flaw: (a) compromised or interfered with a disabled child's right to a FAPE; (b) seriously hampered the parents' opportunity to participate in the decision-making process concerning their disabled child's education; or (c) caused a deprivation or loss of educational benefits for the disabled child. DDESS Case No. 97-001 (March 24, 1998) at p. 9 (citing federal cases). *See also Kathleen H. v. Massachusetts Department of Education*, 154 F.3d 8, 14 (1st Cir. 1998); *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998). Accordingly, meaningful parental participation in formulating and developing a disabled child's IEP in important under the IDEA.

There is record evidence that the Parents participated in the decision-making process concerning their Child's education. However, the Hearing Officer had to weigh that evidence in light of record evidence indicating there were circumstances that seriously hampered the Parents in their efforts to participate meaningfully in the decision-making process. A review of the record evidence shows a variety of circumstances that, viewed in their totality, seriously undercut the Hearing Officer's finding that the Parents were equal participants in the determination of the Child's placement. The Hearing Officer's finding reflects a piecemeal analysis of the record evidence that does not constitute a reasonable interpretation of the record evidence. There is record evidence that the Parents' ability to participate meaningfully in the decision-making process concerning their Child's education was adversely affected by several incidents.

(i) Child's evaluation. As discussed earlier in this decision, the manner in which the Special Education Coordinator arranged the evaluation of the Child did not violate the Board's order in DoDDS Case No. 97-E-001. However, that conclusion does not mean the manner in which the Special Education Coordinator arranged the evaluation of the Child is irrelevant to the question of whether it hampered the Parents' opportunity to participate in the decision-making process concerning the Child's education. Once the Special Education Coordinator provided the Parents with the names of three persons as candidates to evaluate the Child, it was entirely reasonable for the Child's mother to ask for resumes on those three persons. It would not be fair or reasonable for DoDDS to expect the Parents to make a choice from the three persons without relevant information. Parents are entitled to receive responses to reasonable inquiries to ensure they can participate in the decision-making process concerning their disabled children. *See Holland v. District of Columbia*,

71 F.3d 417, 424-425 (D.C. Cir. 1995).[20] Furthermore, apart from the failure of the Special Education Coordinator to provide the requested resumes to the Parents, the Special Education Coordinator's unilateral choice of a fourth person to evaluate the Child gave the Parents no meaningful opportunity to have an input in the process. Providing the Parents with a *de facto* "take it or leave it" option is not compatible with the important principle that schools and parents are supposed to cooperate to ensure that disabled children receive a FAPE. *See* DDESS Case No. 97-001 (March 24, 1998) at p. 15 ("The IDEA requires the cooperation of schools and parents.").

(ii) Union representative at CSC meeting. The Hearing Officer found the attendance of a union representative at a CSC meeting without prior notification to the Parents was a procedural irregularity, but concluded it did not prevent the Parents from fully participating in the development of a new IEP for the Child. The Hearing Officer's finding on this point fails to give due weight to significance of this irregularity.

Under the IDEA and the DoD Instruction, the CSC is an important component of the process to ensure that a disabled child receives a FAPE. The CSC performs this responsibility by developing, reviewing, and revising a disabled child's IEP. DoD Instruction, Enclosure 2, Section E2.1.7. *See also* DS 2500.13-M, "Special Education Procedural Manual," August 23, 1994, Chapter 1. As noted earlier in this decision, the IEP is a important component of a FAPE. Any action that interferes with the ability of the CSC members (including the parents of a disabled child) to participate in full, frank, and candid discussions about the individualized special education needs of the disabled child must be viewed as a serious impediment to the meaningful development, review or revision of the disabled child's IEP.

The presence of a union representative, who was not a member of the CSC, served no legitimate purpose in support of the CSC's responsibilities. The presence of a union representative, who was not a member of the CSC, served no legitimate purpose in advancing or supporting the ability of the CSC members to engage in a full, frank, and candid discussion of the individualized special education needs of the Child. The presence of a union representative, who was not a member of the CSC, was in clear derogation of the right of the Parents to expect that the CSC meeting would deal with the individualized special education needs of the Child. The presence of a union representative, who was not a member of the CSC, was not compatible with the privacy rights of the Parents and the Child. Whatever concerns the union representative had with the interests of a teacher, the CSC meeting was not a proper or lawful forum for raising those concerns. The presence of a union representative, who was not a member of the CSC, without prior notification to the Parents, was a clear, serious violation of their rights.

(iii) Conduct of teacher.[21] On or about October 22, 1997, the Child's teacher videotaped the Child after she had soiled her clothing. Such an action (however brief in duration) was a breach of

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[20] *See also Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir. 1996)("Congress intended the procedural protections to counteract the tendency of school districts to make decisions regarding the education of disabled children without consulting their parents, and to require school districts to respond adequately to parental concerns about their children.").

[21] As a DoDDS employee, the actions of the teacher are imputed to DoDDS under the doctrine of respondeat superior.

the teacher's fiduciary obligations to the disabled children left in her care, an affront to the dignity and privacy of the Child, and an action incompatible with the trust and confidence that must be reposed in teachers providing for the special education needs of disabled children. This egregious incident was aggravated when the teacher refused to help the Child change her soiled clothing. The record evidence clearly shows the Child needed assistance in toileting because of her condition. Even if the Board assumes the teacher had a rational basis for being concerned that she might be falsely accused of wrongdoing if she entered the bathroom to help the Child change her clothes, the teacher had a clear duty to promptly get someone else to help the Child change her soiled clothes. The record shows the teacher did no such thing.[22]

The Child's teacher secretly recorded at least one CSC meeting. Such surreptitious recording of a CSC meeting is incompatible with the frank and candid discussions that must occur if CSC meetings are to allow parents the ability to meaningfully participate in the decision-making process concerning their disabled children.

After the Child struck the teacher on one occasion, the teacher made threats to call the base security police if the Child ever struck her again. Even though there is no evidence that the teacher ever actually called the security police, her threats to do so were incompatible with the trust and confidence that must be reposed in teachers providing for the special education needs of disabled children. We conclude this because the record evidence concerning the Child's condition shows it was implausible that the Child posed a sufficient threat to warrant such serious action by the teacher.

(iv) Failure of communication. The Parents contend there were instances when they were not promptly informed by DoDDS about their Child's behavior in the classroom, or about the videotaping incident. The record evidence indicates that DoDDS was less than diligent in bringing these matters to the Parents' attention. DoDDS' failure to inform the Parents in a more timely manner interfered with their ability to meaningfully participate in the decision-making process concerning the Child's education. *See* DoDDS Case No. 97-E-001 (December 2, 1997) at p. 8 ("Without prompt and timely notice of matters affecting the education of a child, the child's parents are at a serious disadvantage in trying to pursue their rights and those of their child under IDEA.").

(v) Specter of retaliation. The person acting as liaison between the military community and the DoDDS school (whose many duties included working with the teachers and the teachers' union) looked into the records of the Child's father on at least two occasions. The liaison officer sought and received military information about the Child's father and medical information about the Child's mother. The record evidence does not provide a satisfactory explanation for why that information was obtained because there is no clear connection between the information and the ability of DoDDS to provide the Child with a FAPE.[23] Even assuming for the sake of deciding this appeal that there

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[22] The Hearing Officer concluded "this one-time incident, although certainly regrettable, did not deny the Child a FAPE." During the proceedings below, the Parents did not contend that this incident, standing alone, denied their Child a FAPE. The issue is whether, based on the record as a whole (not just any one incident), the Child was denied a FAPE.

[23] The Special Education Coordinator and the principal of the Child's school received cc:copies of at least one e-mail message concerning information being obtained about the Parents (Petitioner's Exhibit 55; TR at 490-491). The receipt of copies of that e-mail message by the

were legitimate reasons for the liaison officer to obtain that information, it would not be unreasonable for the Parents to wonder whether the information was being obtained in retaliation for pressing their concerns about the Child's education.

(vi) Absence of compensatory education from draft IEP. The record evidence indicates that the Parents attended several meetings with DoDDS representatives to discuss the contents of a new IEP for the Child. During these meetings the Parents requested that provision for the compensatory speech therapy ordered in DoDDS Case No. 97-E-001 be made in any future IEP promulgated for the Child. DoDDS did not place such language in the draft IEP.

Given the passage of time and the breakdown of the process of obtaining an independent evaluation, the Parents' request for incorporating in the IEP the language of the Board's order in DoDDS Case No. 97-E-001 was reasonable. The record evidence does not reveal that DoDDS ever communicated to the Parents any specific objections it had regarding placing the requested language in the draft IEP. Under the facts of this case, DoDDS' actions regarding the placement of the language in the draft IEP interfered with the Parents' ability to meaningfully participate in the development of an educational plan for their Child.

(d) The Board finds persuasive the Parents' contention that the Hearing Officer failed to take into account the evidence presented by the Parents in connection with their claim that they were having a difficult time getting the Child to go to the teacher's classroom. The Board reaches this conclusion because the Hearing Officer found the Parents acted without explanation or without reason when they did not bring the Child to school on various occasions. The Parents offered evidence about the reasons they did not bring the Child to school, including evidence about them having a difficult time getting the Child to go to the teacher's classroom. Even if the Hearing Officer found the reasons presented by the Parents to be insufficient to justify their action in not bringing the Child to the school, it does not follow that the record evidence shows the Parents acted without explanation or without reason.

(e) For the reasons discussed earlier in this decision, the Board cannot sustain the Hearing Officer's finding that the Parents were equal participants in the determination of the Child's placement. Those reasons apply with equal force to the preparation of the April 1998 IEP.

In conclusion, the Hearing Officer's finding that DoDDS was ready, willing, and able to provide the Child with a FAPE after September 5, 1997 is not sustainable because it is based on a piecemeal analysis of the record evidence and is not supported by a preponderance of the record evidence. The Parents were not totally blameless in their conduct toward DoDDS.[24] But, DoDDS had the obligation to work with the Parents to provide the Child with a FAPE, however irritating and frustrating it might have been for DoDDS to deal with the Parents. The totality of the record evidence shows DoDDS, through a combination of action and inaction, seriously hampered the Parents' opportunity to meaningfully participate in the decision-making process concerning the

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Special Education Coordinator and the school principal means that DoDDS was, at least, on notice that such information about the Parents was being gathered.

[24] The record evidence shows the Parents, on various occasions, were confrontational and used harsh, accusatory language in their dealings with DoDDS.

Child's education. Under the IDEA, such a result is a basis for concluding there has been a denial of a FAPE.

3. Whether the Hearing Officer erred by finding the Parents unilaterally placed the Child in a host country school. The Parents contend the Hearing Officer erred by finding they unilaterally placed the Child in a host country school. For the reasons that follow, the Hearing Officer's finding cannot be sustained.

The preponderance of the record evidence shows that the Parents had a reasonable basis for believing that DoDDS personnel had indicated a willingness to assist them in placing the Child in a non-DoDDS school. Even if the testimony of the Special Education Coordinator and the school principal were accepted as showing they did not mean to convey such an impression to the Parents, there is evidence[25] that would lead a reasonable person to believe that DoDDS was indicating it was affirmatively making the Child's placement in a non-DoDDS school an option. A parent cannot be expected to discern the mental processes of DoDDS personnel. When parents act in reasonable reliance on the written or spoken statements of DoDDS personnel with actual or apparent authority, it cannot be fairly said that they are acting in a purely unilateral way or that they are barred from equitable relief. *Cf. Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 387 (6th Cir. 1998)("There is a distinction, though, between parents who act unilaterally after consultation with the school system, and those who act unilaterally without any dialogue with the school."), *cert. denied*, 119 S.Ct. 47 (1998); *Angevine v. Smith*, 959 F.2d 292, 296 (D.C. Cir. 1992)(school would be required to fund private placement for child where parents acted in reliance on notice from school, even though school claimed notice was due to administrative error).

4. Whether the Hearing Officer erred by not complying with the Board's order in DoDDS Case No. 97-E-001 to provide the Child with compensatory speech therapy. The Parents do not challenge the Hearing Officer's conclusion that DoDDS did not comply with the Board's order in DoDDS Case No. 97-E-001. However, the Parents do argue the relief ordered by the Hearing Officer was improper because it did not comply with the Board's order in DoDDS Case No. 97-E-001.

For the reasons set forth in the Board's discussion of Department Counsel's third appeal issue, the Board concludes this cross-appeal issue has merit.

5. Whether the Child is entitled to receive relief because she was denied a FAPE for the 1997-1998 school year. As discussed earlier in this decision, the Board concludes the Child was denied the compensatory speech therapy ordered in DoDDS Case No. 97-E-001, and denied a FAPE

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[25] *See* March 17, 1998 letter from principal to parents (part of Petitioner's Exhibit 31) in which principal stated "... we are willing to offer you placement for [the Child] in a [host country] school with a program serving moderate-severely impaired students. Arrangements for this placement can be made through the [host country educational authority]. We are willing to assist with this placement in any way we can," and Respondent Exhibit 8 (minutes of March 13, 1998 CSC meeting) at page 11, where it reads "[Special Education Coordinator] says because the parents feel [the Child] cannot benefit from the [DoDDS school] program DoDDS is offering that [the Child] be placed in an appropriate [host country] school."

for the 1997-1998 school year. Accordingly, the Child is entitled to receive relief. However, the Parents are not entitled to all the relief they request.

The Parents are not entitled to receive lawyer's fees because they did not present evidence at the hearing that they paid legal fees. Their offer to present receipts, made on appeal, does not cure their failure to raise the issue before the Hearing Officer and present evidence in the proceedings below.

The Parents also requested reimbursement for "all expenses, to include postage and telephone bills incurred by [them] during the 1997-1998 school year." Because the Parents did not present evidence below in support of this claim, the Board need not decide whether such expenses may be reimbursable.

The Parents are entitled to receive the relief that was ordered by the Board in DoDDS Case No. 97-E-001 on December 2, 1997. Considering how long such relief has not been provided, it is imperative that DoDDS act immediately to implement the Board's December 2, 1997 order for an independent evaluation and compensatory speech therapy, at DoDDS' expense.

With respect to the denial of FAPE for the 1997-1997 school year, compensatory education for the Child is necessary. Accordingly, DoDDS must, at its expense, expeditiously arrange for independent evaluations of the Child by credentialed professionals to determine whatever educational and related services (including, but not limited to, physical therapy, occupational therapy, and speech therapy) are necessary to compensate the Child for the loss of FAPE during the 1997-1998 school year. DoDDS must expeditiously provide the results of these evaluations to the Parents and the Child's CSC so that they can promptly implement the compensatory education and related services for the Child that are determined by the independent evaluations.

This case is about the need to provide a FAPE for a disabled child, not deciding winners or losers. Special education cases often involve difficult situations that can easily evoke strong opinions and emotions. Cooperation and communication between parents and schools, based on civility and mutual respect, are needed to give a child's special education program a chance to work properly. *See* DDESS Case No. 97-001 (March 24, 1998) at pp. 3 and 16. Therefore, it is essential for the best interests of the Child that the Parents and DoDDS work together to implement this decision in an expeditious manner.

Conclusions

The Child was denied the independent evaluation and compensatory speech therapy ordered in DoDDS Case No. 97-E-001. The Child was denied a FAPE during school year 1997-1998. The Child is entitled to the relief set forth in the Board's discussion and resolution of the fifth cross-appeal issue.

This decision denies the Parents' appeal in part. Accordingly, pursuant to DoD Instruction, Enclosure 8, Section E8.6.4., the Board hereby advises the Parents that they have the right, under Section 921 *et seq*. and Section 1400 *et seq*. of Title 20 of the U.S. Code, 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: Emilio Jaksetic
Emilio Jaksetic
Administrative Judge
Chairman, Appeal Board

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

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