DATE: January 20, 2004

In the Matter of	)	
	)	
----------, by her parents	)	DDESS Case No. E-03-001
----------	)	
	)	
Petitioner	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR PETITIONER
Michael L. Goodwin, Esq.

FOR RESPONDENT
Kathryn D. MacKinnon, Esq., Department Counsel

Hearing Officer Michael H. Leonard issued a decision, dated October 3, 2003, in which he: (a) rejected Petitioner's claim that she had been denied a free appropriate public education for the 2002-2003 school year in violation of 32 C.F.R. Part 80; and (b) ordered the Parents of the Petitioner to allow the Fort Knox Community Schools to evaluate, test, and assess the Petitioner to determine if she is eligible for special education and related services, if the Parents decide to have the Petitioner attend the Fort Knox Community Schools. The case is before the Board on Petitioner's appeal from the Hearing Officer's decision.

The Board has jurisdiction over this appeal under 32 C.F.R. Part 80, Appendix C, Section F. For the reasons that follow, the Board affirms the Hearing Officer's decision.

Statement of the Case

This case involves the daughter (hereinafter "Child") of an Army Staff Sergeant and his wife (hereinafter "Parents"). The Child was born in March 1998 and was diagnosed with autism in March 2001. In May 2003, the Child was diagnosed with pervasive developmental disorder, moderate and attention deficit disorder, moderate. When the Child was initially diagnosed with autism in March 2001, she and her parents lived in New York State where her father was assigned. Because they were not assigned to a military installation, the parents obtained special education services for their daughter from a local New York public school.

In February 2002, the Child's father requested a compassionate reassignment to Fort Knox, Kentucky. The chain of command supported the request and it was approved in May 2002.

The Parents were not certain that the compassionate reassignment would be approved. While the request for compassionate reassignment was pending, the Parents requested the New York school conduct a program review. As a result of that review, the New York school changed the Child's Individualized Education Plan (hereinafter "New York IEP").

The Child's father reported for duty at Fort Knox on or about July 20, 2002. After the family moved into on-post housing at the beginning of September 2002, the Child became eligible to attend the Fort Knox Community Schools (hereinafter "Fort Knox School"). The Fort Knox School is part of the Domestic Dependent Elementary and Secondary Schools system (hereinafter "DDESS").

The Parents sought to have special education services provided to the Child at the Fort Knox School pursuant to the terms of the New York IEP. The Parents refused to give Fort Knox School consent to evaluate the Child to determine her eligibility for special education and related services. The Parents insisted that the New York IEP and other documentation they provided to Fort Knox School were sufficient to establish the Child's eligibility for special education and related services.

The Child did not receive special education or related services from the Fort Knox School during school year 2002-2003. The Parents requested a due process hearing, alleging that the Child had been denied a free appropriate public education (FAPE) for the 2002-2003 school year in violation of 32 C.F.R. Part 80.

For purposes of these proceedings, the Child (acting through her Parents) is the Petitioner and DDESS is the Respondent.

Procedural History

The procedural history of this case leading up to the hearing conducted on August 18-22, 2003 is discussed in detail in the Hearing Officer's decision. That procedural history need not be repeated fully here. The Board will summarize those portions of the procedural history that are pertinent to understanding how the case came to the Board.

On or about November 14, 2002, the Parents submitted to the Director, Defense Office of Hearings and Appeals (hereinafter "Director") a letter requesting a due process hearing.

Mediation took place during February 2003, but it was unsuccessful. In late March 2003, the Parents renewed their request for a due process hearing by sending a letter to the Director. In April 2003, the Hearing Officer was appointed by the Director to conduct the due process hearing.

Respondent submitted to the Hearing Officer a "Motion to Dismiss Petition, Or In the Alternative, For a More Definite Statement." Petitioner then submitted an "Amended Petition/Response to Defendant's Motion for a More Definite Statement."

On May 5, 2003, Respondent submitted "Respondents' Counter-Petition for Order Allowing School District to Evaluate [the Child] and Motion to Strike Claims for Damages" (hereinafter "Petition for Order to Evaluate Child").

On August 11, 2003, Petitioner submitted a Second Amended Petition.

The hearing was conducted on August 18 through August 22, 2003. The Hearing Officer issued a written decision on October 3, 2003. Petitioners notified the Director that they were appealing the Hearing Officer's decision.

After the parties submitted briefs, the Director forwarded the case to the Board for its consideration and disposition of the appeal.

Appeal Issues

Petitioner contends: (1) the Hearing Officer erred by determining that the Child was not denied a FAPE for school year 2002-2003; and (2) the Hearing Officer erred by entering an order that the Parents of the Petitioner must allow the Fort Knox School to evaluate, test, and assess the Petitioner to determine if she is eligible for special education and related services, if the Parents decide to have the Petitioner attend the Fort Knox School. Respondent contends: (i) the Petitioner has failed to demonstrate the Hearing Officer erred; and (ii) in the alternative, even if Petitioner has raised viable claims of procedural violations, such violations would not warrant a determination that Petitioner was denied a FAPE for school year 2002-2003.

The arguments made by the parties in their respective briefs raise several threshold legal issues that warrant discussion before the Board addresses their contentions as to whether the Hearing Officer erred by determining there was not a denial of a FAPE, and whether the Hearing Officer's order to evaluate, test and assess Petitioner is proper.

I. Threshold Legal Issues

A. 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. DoDDS Case No. E-99-01 (February 8, 2000) at p. 5; DDESS Case No. 97-001 (March 24, 1998) at pp. 4-5. Accordingly, when a Hearing Officer's findings, conclusions, or legal rulings are not challenged on appeal, the Board need not review them.

In this case, Petitioner has the burden of raising claims of error and demonstrating that the Hearing Officer committed errors that warrant remand or reversal.[1]

B. Standard of review. 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 record evidence. DoDDS Case No. E-99-01 (February 8, 2000) at p. 5; DDESS Case No. 97-001 (March 24, 1998) at p. 5; DoDDS Case No. 97-E-001 (December 2, 1997) at p. 4. A party challenging the Hearing Officer's credibility determinations has a heavy burden on appeal. A party challenging the Hearing Officer's resolution of conflicting evidence must do more than just identify the existence of conflicting evidence, or argue for a plausible alternate interpretation of the record evidence as a whole. The Board will not disturb a Hearing Officer's weighing of the record evidence unless the challenging party demonstrates the Hearing Officer acted in a manner that is arbitrary, capricious, or contrary to law.

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. DoDDS Case No. E-99-001 (February 8, 2000) at p. 5; DDESS Case No. 97-001 (March 24, 1998) at p. 5; DoDDS Case No. 97-E-001 (December 2, 1997) at p. 4. *See also Western Co. of North America v. United States*, 323 F.3d 1024, 1029 (Fed. Cir. 2003)(conclusions of law, such as statutory interpretation, are reviewed *de novo*); *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 383 (3d Cir. 2002)(review of the interpretation of a legal standard such as the Federal Rules of Evidence is plenary).

Whether a school operated by DDESS has provided a FAPE for a disabled child is a mixed question of fact and law, and a Hearing Officer's determination of that issue is reviewed by the Board *de novo*. DoDDS Case No. E-99-001 (February 8, 2000) at p. 5; DDESS Case No. 97-001 (March 24, 1998) at p. 5; DoDDS Case No. 97-E-001 (December 2, 1997) at p. 4.

On appeal, the parties do not challenge the legal principle that the Board conducts *de novo* review of a Hearing Officer's determination as to whether a FAPE has been provided for a disabled child. However, each party has taken a very different position as to what that standard of review means, and their different positions significantly shape and affect the appeal arguments they make. The Board understands Petitioner's appeal arguments as contending that *de novo* review of a Hearing Officer's determination as to whether a FAPE has been provided for a disabled child means that all the Hearing Officer's findings and conclusions are reviewed *de novo*. The Board understands Department Counsel's reply arguments as contending that: (a) Petitioner is not entitled to *de novo* review merely by claiming that there has been a denial of FAPE because an unsuccessful party is not entitled "to treat the appeal process as an automatic 'second bite at the apple' in virtually any instance"; (b) Petitioner must show that the Hearing Officer's fact findings are not supported by a preponderance of the evidence before Petitioner is entitled to *de novo* review of the Hearing Officer's determination as to whether a FAPE has been provided, and (c) Petitioner is not entitled to *de novo* review of the Hearing Officer's determination as to whether a FAPE has been provided because

[1] Even if a party demonstrates the Hearing Officer erred, the Board will consider whether the identified error is harmless under the particular facts and circumstances of the case.

Petitioner has not shown the Hearing Officer's fact findings are not supported by a preponderance of the evidence.

As noted earlier in this decision, whether a school operated by DDESS has provided a FAPE for a disabled child is a mixed question of fact and law, and a Hearing Officer's determination of that issue is reviewed by the Board *de novo*. There is a division of authority among the Federal Circuits as to how a mixed question of fact and law should be reviewed:

> (i) a mixed question of fact and law will be reviewed by the same standard as legal rulings or conclusions are reviewed;[2]
>
> (ii) a mixed question of fact and law will be reviewed by the same standard as factual findings are reviewed;[3]
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> (iii) a flexible or sliding approach will be use to review a mixed question of fact and law, depending on whether the appellate court concludes the mixed question is more factual in nature or more legal in nature;[4] or
>
> (iv) a variable approach will be used to review a mixed question of fact and law, depending on whether the appellate court concludes that there are important judicial or prudential reasons warranting *de novo* review.[5]

Accordingly, the case law on how a mixed question of fact and law should be reviewed does not provide a simple answer or solution to how the Board should review a mixed question of fact and law in special education cases.

As noted earlier in this decision, deference is owed to a Hearing Officer's credibility determinations and resolution of conflicting evidence, provided they are based on a preponderance of the record evidence. Such deference would be illusory if the Board were to construe *de novo* review of the Hearing Officer's determination as to whether a FAPE has been provided as including *de novo* review of the Hearing Officer's credibility determinations and *de novo* fact-finding by the Board. Therefore, the Board concludes the matter is best resolved by taking a bifurcated approach

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[2] *Gardenhire v. Schubert*, 205 F.3d 303, 312 (6th Cir. 2000).

[3] *Teamsters Local Unions v. Barry Trucking, Inc.*, 176 F.3d 1004, 1010 (7th Cir. 1999).

[4] *Amanda J. ex rel. Annette J. v. Clark County School District*, 267 F.3d 877, 887 (9th Cir. 2001); *Quint v. A.E. Staley Manufacturing Co*., 246 F.3d 11, 14 (1st Cir. 2001), *cert. denied*, 535 U.S. 1023 (2002); *Armstrong v. Commissioner of Internal Revenue*, 15 F.3d 970, 973 (10th Cir. 1994).

[5] *Barbour v. Browner*, 181 F.3d 1342, 1345 (D.C. Cir. 1999).

used by some Federal Circuits: when reviewing a mixed question of fact and law, the underlying factual determinations are reviewed under the standard normally used to review factual findings, and the application of the facts to the law is reviewed *de novo*.[6] Accordingly, when reviewing a Hearing Officer's determination as to whether a FAPE has been provided:

> (i) the Board will not review factual findings, legal rulings, or legal conclusions of the Hearing Officer that have not been specifically challenged on appeal;
>
> (ii) to the extent that a party's appeal of the Hearing Officer's FAPE determination raises specific challenges to the Hearing Officer's factual findings, the Board will give deference to the Hearing Officer's credibility determinations and resolution of conflicting evidence, provided they are based on a preponderance of the record evidence;
>
> (iii) to the extent that a party's appeal of the Hearing Officer's FAPE determination raises specific challenges to the Hearing Officer's legal rulings or legal conclusions, the Board will review *de novo* the Hearing Officer's legal rulings or legal conclusions; and
>
> (iv) the Board will review *de novo* the Hearing Officer's application of the facts to the law when the Hearing Officer made the FAPE determination.[7]

C. Applicability of U.S. Department of Education regulations pertaining to special education cases. In challenging the Hearing Officer's Decision, Petitioner's brief cites to various provisions of the U.S. Department of Education regulations pertaining to special education. The Board construes Petitioner's reliance on those provisions as raising the issue of whether the Hearing Officer was legally required to follow the U.S. Department of Education regulations pertaining to special education.

Petitioner cites no legal authority indicating that the U.S. Department of Education regulations concerning special education are binding on the Department of Defense. Absent express direction by federal statute, Presidential directive, or DoD regulation, the Department of Defense is

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[6] *Limited, Inc. v. Commissioner of Internal Revenue*, 286 F.3d 324, 331 (6th Cir. 2002); *Theriot v. United States*, 245 F.3d 388, 394 (5th Cir. 1998). *Cf. Adam J. ex rel. Robert J. v. Keller Independent School District*, 328 F.3d 804, 808 (5th Cir. 2003)("We review *de novo*, as a mixed question of law and fact, a district court's decision that an IEP was or was not appropriate. The district court's underlying findings of fact are reviewed for clear error.").

[7] There is no legal or logical basis for Department Counsel's contention that *de novo* review of the Hearing Officer's FAPE determination depends on a threshold showing that the Hearing Officer's factual findings are erroneous. The Hearing Officer's application of the facts to the law will be reviewed *de novo* even if: (a) the appealing party does not challenge the Hearing Officer's factual findings; or (b) the appealing party's challenge to the Hearing Officer's factual findings is not successful. An appealing party need not challenge the Hearing Officer's factual findings in order to challenge a FAPE determination based on a claim that the Hearing Officer misapplied the law to the facts.

not required to comply with regulations or guidance promulgated by the U.S. Department of Education. Significantly, the U.S. Department of Education regulations cited by Petitioner specifically indicate that they are applicable to state, local and private agencies. *See* 34 C.F.R. Section 300.2 (indicating that 34 C.F.R. Part 300 is applicable to "State, local, and private agencies"). *See also* 34 C.F.R. Section 300.27 (defining "State" for purposes of 34 C.F.R. Part 300) and 34 C.F.R. Section 77.1 ("Definitions that apply to all Department [of Education] programs")(especially definitions for "Local educational agency," "Nonpublic," "Private," "Public," "State," and "State educational agency"). The Department of Defense is not a State, local, nonpublic or private agency under the terms of the U.S. Department of Educations regulations concerning special education.

In view of the foregoing, the Board need not decide whether the Hearing Officer's Decision is consistent with the provisions of U.S. Department of Education regulations cited by Applicant on appeal. Whether the Hearing Officer's Decision is consistent with the provisions of the U.S. Department of Education regulations on special education is not relevant to determining whether the Hearing Officer's Decision is consistent with applicable provisions of 32 C.F.R. Part 80.

II. Appeal Issues

1. Whether the Hearing Officer erred by concluding that the Child was not denied a FAPE for school year 2002-2003. Petitioner contends the Hearing Officer erred by determining that the Child was not denied a FAPE for school year 2002-2003 because:

(a) the Fort Knox School did not comply with the "DDESS Procedural Guideline for Special Education" (hereinafter "DDESS Guide");

(b) the Fort Knox School failed to accept and implement the New York IEP;

(c) the Fort Knox School committed various procedural violations at an October 4, 2002 meeting that had the effect of denying the Parents a meaningful opportunity to participate in the formulation of an IEP for the Child;

(d) because of the procedural violations at the October 4, 2002 meeting, the Child neither received nor was offered special education services from October 4, 2002 through November 8, 2002;

(e) the Child was denied the opportunity to attend classes between October 4, 2002 and November 8, 2002;

(f) the Fort Knox School changed the Child's IEP without allowing the Parents to participate in the meetings that resulted in the changed IEP;

(g) the Fort Knox School fraudulently claimed that DoD Instruction 1342.12 applied to the Child;

(h) the Fort Knox School improperly tried to place the Child in a regular classroom without special education services, contrary to the New York IEP and despite the "substantial

evidence" which the Parents presented to the Fort Knox School that the special education services the Child was receiving under the New York IEP "were necessary to provide [the Child] with a FAPE"; and

(i) after a November 8, 2002 meeting, the Fort Knox School "never agreed to conduct an IEP meeting."

The Board will address these contentions in turn.

(a) Petitioner contends the Hearing Officer erred by dismissing those claims made based on the failure of the Fort Knox School to comply with the DDESS Guide. Petitioner argues: (i) that the DDESS Guide is mandatory and controlling legal authority; (ii) the Fort Knox School failed to conduct an IEP meeting concerning the Child in compliance with the terms of the DDESS Guide; (iii) under the terms of the DDESS Guide, the Fort Knox School was required to accept and implement the New York IEP; and (iv) under the DDESS Guide, the Child's eligibility for special education and related services was established by documentation pertaining to the New York IEP. Whether the Hearing Officer erred by dismissing Petitioner's claims that were based on the DDESS Guide is a legal issue that the Board reviews *de novo*.

Petitioner's reliance on the DDESS Guide is misplaced. Petitioner has not presented any relevant evidence or cited any legal authority that shows the DDESS Guide is legally binding on DDESS. Whether the DDESS Guide is legally binding on DDESS does not turn on whether it was issued by DDESS, whether any DDESS personnel think it is legally binding, or whether the Parents believe it is legally binding. There are many documents issued by federal officials or employees that do not impose legally binding duties or obligations on them, such as press releases and informational pamphlets or brochures. Furthermore, the legal status of a document issued by DDESS does not turn on the beliefs of DDESS personnel or third parties about the legal status of that document. Whether a document issued by DDESS is legally binding on DDESS depends on whether the document is legally binding under an applicable federal statute, Executive Order, or federal regulation. Petitioner has not shown that the DDESS Guide is legally binding under a federal statute, Executive Order, or federal regulation.

Even if the Board were to assume, solely for purposes of deciding this appeal, that the intentions of DDESS were somehow pertinent to a determination as to the legal effect of the DDESS Guide, Petitioner's claim still would fail. The language of the DDESS Guide indicates it was not intended to be legally binding on DDESS. Specifically, the preface of the DDESS Guide states: "This Guide does not invoke any rights or remedies, and may not be relied upon by any person, organization or other entity to allege or demand any rights or remedies." Apart from that qualifying language in the DDESS Guide, any DDESS-issued guide on special education would have to be consistent with applicable DoD regulations on special education.[8] It is axiomatic that DoD personnel cannot ignore, disregard, or fail to comply with applicable DoD regulations. Furthermore, the legal

[8] A manual may be issued to implement 32 C.F.R. Part 80. *See* 32 C.F.R. Section 80.1(d). However, any manual issued to implement 32 C.F.R. Part 80 does not give rise to legal rights or remedies beyond those available under the provisions of 32 C.F.R. Part 80.

force and effect of applicable DoD regulations are not negated or nullified by any mistake or misunderstanding by DoD personnel about what those DoD regulations are or mean. Even if the DDESS Guide was issued to implement 32 C.F.R. Part 80, the DDESS Guide would have to be consistent with 32 C.F.R. Part 80, and any inconsistency between the DDESS Guide and 32 C.F.R. Part 80 would have to be resolved in favor of applying the pertinent provisions of 32 C.F.R. Part 80. Therefore, to the extent that Petitioner is relying on the DDESS Guide to obtain relief that is not consistent with 32 C.F.R. Part 80, Petitioner is not entitled to receive such relief. The actions or inactions of DDESS personnel cannot confer on Petitioner legal rights or benefits inconsistent with applicable DoD regulations on special education. Even if the Board were to conclude that the Fort Knox School failed to comply with the DDESS Guide, it would not follow that such a failure resulted in the denial of Petitioner's legal rights under 32 C.F.R. Part 80.

In view of the foregoing, the Board concludes the Hearing Officer did not err by dismissing those claims made by Petitioner based on the DDESS Guide.

(b) The Hearing Officer correctly noted that 32 C.F.R. Part 80 requires DDESS to implement a current IEP when a child eligible to receive special education or related services transfers from a school operated by the Department of Defense,[9] but is silent on what DDESS must do when faced with a current IEP when the child transfers from a school not operated by the Department of Defense. During the proceedings below and on appeal, Petitioner contends that DDESS was required to implement the Child's New York IEP.

Petitioner has not cited any legal authority in support of the claim that the Fort Knox School was legally obligated to accept and implement the New York IEP. Indeed, Petitioner's claim that DDESS was required to accept and implement the New York IEP runs afoul of the doctrine of federal supremacy. Absent an express act of Congress to the contrary, federal officials are not legally required to comply with state standards or follow the directions of state or local officials when carrying out their federal duties. *Hancock v. Train*, 426 U.S. 167, 179 (1976); *EPA v California ex rel. State Water Resources Control Board*, 426 U.S. 200, 211 (1976). *See also G. ex rel SSGT R.G. and A.G. v. Fort Bragg Dependent Schools*, 343 F.3d 295, 304-306 (4th Cir. 2003)(holding DoD schools are not subject to state law on special education). Whatever legal effect the New York IEP might have on state or local educational officials within the State of New York, it is not legally binding on the DDESS. Under the doctrine of federal supremacy, the Department of Defense is not legally required to accept and be bound by a non-DoD IEP unless required by express act of Congress.

Moreover, apart from the doctrine of federal supremacy, the Hearing Officer correctly noted that it is the position of the U.S. Department of Education that a state or local educational authority

[9] 32 C.F.R. Part 80, Appendix B, Section C.7.

is not required to accept and implement an out-of-state IEP.[10] In addition, that position has been accepted as reasonable by various federal courts.[11]

In view of the foregoing, the Board concludes that the Hearing Officer did not err by concluding that DDESS was not legally required to implement the New York IEP for the Child.[12]

(c); (d); and (e) The Hearing Officer found that: (i) the October 4, 2002 meeting was not a CSC meeting to develop an IEP for the Child, but rather a information conference because the Child was not yet formally enrolled in the Fort Knox School; (ii) the Parents and their consultant were surprised that the October 4, 2002 meeting was not an IEP meeting but only an information conference. Those findings are supported by a preponderance of the evidence.

The Hearing Officer concluded that the Parents' mistaken belief about the purpose of the October 4, 2002 meeting was based on a sincere misunderstanding, but that their misunderstanding did not give rise to a procedural violation by the Fort Knox School that impaired their rights. That conclusion is reasonable in light of the record evidence in this case. Apart from the Parents' strong negative feelings about the facts and circumstances of the October 4, 2002 meeting, Petitioner offers no persuasive reason why the Hearing Officer's conclusion is arbitrary, capricious, or contrary to law. Moreover, since the Hearing Officer's finding that the October 4, 2002 meeting was not a Case Study Committee meeting to develop an IEP for the Child is sustainable, Petitioner fails to raise a cognizable claim that "procedural irregularities" during that meeting lead to the denial of the Parents' right to have a meaningful opportunity to participate in the formulation of an IEP for the Child.

Moreover, the Hearing Officer found that the Parents did not intend to enroll the Child in the Fort Knox School until November 12, 2002, and did not complete the last of the enrollment requirements (*i.e.*, obtaining an immunization certificate). Those findings are not challenged by Petitioner on appeal. Given the Hearing Officer's findings, it is untenable for Petitioner to claim that the Child was denied the opportunity to attend classes between October 4, 2002 and November 8,

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[10] As discussed earlier in this decision, the U.S. Department of Education regulations concerning special education are not binding on the Department of Defense. However, the Hearing Officer acted within the bounds of his discretion to rely on a U.S. Department of Education memorandum (OSEP Memorandum 96-5) as persuasive legal authority on the question of out-of-state IEPs, to the extent that the Hearing Officer's ruling was not inconsistent with 32 C.F.R. Part 80 and was consistent with the doctrine of federal supremacy.

[11] *Michael C. ex rel. Stephen C. v Radnor Township School District*, 202 F.3d 642, 649-650 (3d Cir. 2000), *cert. denied*, 531 U.S. 813 (2000); *Waller v. Board of Education of Prince George's County*, 234 F.Supp.2d 531, 538-539 (D. Md. 2002).

[12] Under 32 C.F.R. Part 80, if DDESS elects — as a practical matter — to accept and implement a non-DoD IEP as an interim measure pending an eligibility determination and development of a DDESS IEP, such a discretionary choice does not impose upon DDESS a legal obligation to accept and be bound by non-DoD IEPs in any or all cases.

2002. Until the Parents enrolled the Child in the Fort Knox School and brought the Child to the school, they had no reasonable basis to claim that the Child was being denied the opportunity to attend classes there. Moreover, an evaluation of the Child was required before an IEP could be developed for the Child, or before the Child could be placed in a special education program in the Fort Knox School. *See* 32 C.F.R. Part 80, Appendix B, Section B.1.

(f) The Hearing Officer found that: (i) the Fort Knox School did not try to change the Child's IEP without providing the Parents the opportunity to have meaningful input; (ii) neither a staff meeting by Fort Knox School personnel nor Exhibit 67 constitute persuasive evidence that Fort Knox School "personnel were working behind the parents' back in an effort to change [the Child's] IEP without parental notice and participation"; and (iii) the Fort Knox School's "consistent position [was] that the IEP would be addressed after the formal eligibility determination was made." The Hearing Officer's findings are supported by a preponderance of the evidence. Petitioner's claims to the contrary are not persuasive.

(g) The Hearing Officer found that Petitioner failed to show that the Fort Knox School fraudulently claimed that DoD Instruction 1342.12[13] applied to the Child. The Hearing Officer's finding is based, in part, on his assessment of the credibility of the testimony by a Fort Knox School Special Education Coordinator. The Hearing Officer's credibility determination is entitled to deference on appeal and Petitioner offers no persuasive reason why the Board should overturn that credibility determination on appeal. Considering the record as a whole, the Hearing Officer's finding on this point is supported by the preponderance of the evidence.

(h) As discussed earlier in this decision, DDESS is not legally required to accept and implement a State IEP. Because DDESS was not legally required to accept and implement the New York IEP, Petitioner is not entitled to get relief from any action taken by DDESS solely because such action was contrary to the New York IEP.

(i) Given the record evidence in this case, it is untenable for Petitioner to contend the Hearing Officer erred by failing to conclude that the Fort Knox School "never agreed to conduct an IEP meeting" after a November 8, 2002 meeting. The Hearing Officer reasonably concluded that Parents' demand for an IEP was premature in light of the impasse created by the Parents' refusal to consent to an evaluation of the Child to determine her eligibility for special education and related services under 32 C.F.R. Part 80.

For all the foregoing reasons, the Board concludes that the Hearing Officer's determination that the Child was not denied a FAPE by Fort Knox School for school year 2002-2003 is supported by a preponderance of the record evidence and applicable legal principles.

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[13] At that time, DoD Instruction 1342.12, "Provision of Early Intervention and Special Education Services to Eligible DoD Dependents in Overseas Areas," regulated the provision of special education services to DoD dependent children overseas, and was not applicable to the Child.

2. Whether the Hearing Officer erred by entering an order that permits the Fort Knox School to evaluate the Child without parental consent. Petitioner asks the Board to vacate the following ruling made in the decision below:

> "If the parents decide to have [the Child] attend the [Fort Knox School], the parents are ordered to allow the [Fort Knox School] to evaluate, test, and assess [the Child] to determine if she is eligible for special education and related services under DDESS standards. The formal evaluation will be conducted subject to the parents' due process rights. The evaluation will be conducted as expeditiously as possible." (Hearing Officer's Decision at p. 23)

Petitioner makes the following arguments in support of the contention that the Hearing Officer's order should be vacated:

> (a) the Fort Knox School should not be allowed to evaluate the Child to determine her eligibility for special education and related services because the Fort Knox School has not sought an evaluation in good faith;
>
> (b) there is no need for an evaluation of the Child because:
>
> > (i) the Fort Knox School received documentation from the Parents and incoming records that establish the Child's eligibility for special education and related services without the need for an evaluation of the Child;
> >
> > (ii) the record evidence shows that Fort Knox School employees know the Child is eligible for special education; and
> >
> > (iii) the Fort Knox School acted unreasonably in not accepting the documentation from the Parents and incoming records as sufficient to establish the Child's eligibility for special education; and
>
> (c) the school superintendent failed to initiate a due process hearing to obtain an order to evaluate the Child pursuant to 32 C.F.R. Part 80, Appendix B, Section F.3.

The Board need not agree with the Hearing Officer's evaluation order to conclude that Petitioner has failed to raise any factual or legal claim that would warrant vacating that order.

There is a rebuttable presumption that federal employees and officials act in good faith, and a party seeking to rebut or overcome that presumption has a heavy burden of persuasion. *See, e.g., Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 95 n.8 (3rd Cir. 1986); *Beverly Enterprises, Inc. v. Herman*, 130 F.Supp.2d 1, 8 (D.D.C. 2000). The Parents' strong disagreement with the Fort Knox School and their deep disappointment with how events unfolded in this case are insufficient to overcome that rebuttable presumption. The Hearing Officer did not find persuasive the Petitioner's claims of bad faith by the Fort Knox School. The Hearing Officer's conclusion on this aspect of the case is supported by a preponderance of the record evidence.

Petitioner's position is predicated on the implicit assumption that an evaluation is needed only to determine that the Child requires special education and related services, and once that threshold determination is made, there is no further need for an evaluation of the Child. That assumption is not well-founded. The DDESS must evaluate a child in order to determine (a) whether the child needs special education and related services; and (b) the nature and extent of special education and related services that the child needs. *See, e.g.*, 32 C.F.R. Section 80.3 (n)(definition of "evaluation"); 32 C.F.R. Part 80, Appendix B, Section B ("Evaluation Procedures"). Accordingly, even if there is no dispute that the Child needs some kind of special education and related services, the Fort Knox School still must be able to evaluate the Child to determine the nature and extent of special education and related services that the Child needs for a FAPE.

Nothing in 32 C.F.R. Part 80 precludes qualified DDESS personnel from exercising their professional judgment as to what constitutes a sufficient evaluation. Although DDESS personnel can and should consider documentation supplied by a child's parents and records from other schools when making an evaluation, nothing in 32 C.F.R. Part 80 requires them to be bound by such documentation and records. Although the Parents clearly have the right to submit documentation to DDESS for consideration in the evaluation of the Child, the Parents do not have a legal basis for insisting that: (a) DDESS must rely only on the documentation presented by the Parents (or other persons or entities acting on their behalf or at their request); or (b) DDESS must accept the documentation presented by the Parents (or other persons or entities acting on their behalf or at their request) as sufficient to make an evaluation of the Child.

Petitioner is technically correct in noting that the Superintendent of the Fort Knox School did not initiate a separate due processing hearing under 32 C.F.R. Part 80, Appendix B, Section F.3 after the Parents refused to consent to an evaluation of the Child. However, in the context of the proceedings below the Superintendent of the Fort Knox School did timely request the Hearing Officer issue an order directing that the Child be evaluated despite the Parents' refusal to give consent. *See* Petition for Order to Evaluate Child. Petitioner was on adequate notice of that request and had the opportunity to litigate the matter during the five-day hearing held before the Hearing Officer. The Board will not elevate form over substance and rule that the Hearing Officer's order must be vacated merely because the Superintendent of the Fort Knox School did not initiate a separate due process hearing to litigate the matter.

Conclusion

The Board affirms the Hearing Officer's determination that the Fort Knox School did not deny the Child a FAPE during school year 2002-2003, and concludes Petitioner has failed to raise any factual or legal claim that would warrant vacating the Hearing Officer's evaluation order.

This decision denies the Petitioner's appeal. Accordingly, pursuant to 32 C.F.R. Part 80, Appendix C, Section F.4, the Board hereby advises the Parents that they have a right, under Public Law 101-476, as amended, 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