KEYWORD: Eligibility Determination; IDEA, IEE, Independent Educational Evaluation; Individuals with Disabilities Education Act

DIGEST: Petitioner is a student attending a Department of Defense Education Activity (DoDEA) middle school. Her mother disagreed with Respondent's evaluation and determination that the child did not have a specific learning disability under the Individuals with Disabilities Education Act (IDEA) and requested an independent educational evaluation (IEE). She failed to show significant error in the eligibility determination, but demonstrated flaws in the provision of the IEE that violated her right to an IEE under the IDEA's procedural safeguards. The school is ordered to provide Petitioner with an IEE that can serve its proper function under IDEA.

CASENO: E-07-001

DATE: 08/23/2007

In the matter of ********** by her parent ********** Petitioner	Date: August 23, 2007 Case No. E-07-001

For Petitioner, a Minor
Petitioner's parent, **********

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

Braden M. Murphy, Esq.
Department Counsel

SUMMARY

Petitioner is a student attending a Department of Defense Education Activity (DoDEA) middle school. Her mother disagreed with Respondent's evaluation and determination that the child did not have a specific learning disability under the Individuals with Disabilities Act (IDEA) and requested an independent educational evaluation (IEE). She failed to show significant error in the

eligibility determination, but demonstrated flaws in the provision of the IEE that violated her right to an IEE under the IDEA's procedural safeguards. The school is ordered to provide Petitioner with an IEE that can serve its proper function under IDEA.

HISTORY OF THE PROCEEDING

Petitioner (Child) is a student within the DoDEA, Department of Defense Dependents Schools-Europe (DoDDS-Europe (DoDDS-E) by virtue of her father's position as a Department of Defense contractor. Child's mother (Mother) filed a request for due process on December 18, 2006, contesting certain actions related to her daughter's education and status at a DoDEA middle school (Respondents[1] or the school), located in Bavaria, Germany. On December 26, 2006, the Director, Defense Office of Hearings and Appeals, Defense Legal Services Agency, received that request for due process in the above-captioned matter. Pursuant to the Reauthorized Individuals with Disabilities Education Act (IDEA 2004 or IDEA),[2] Department of Defense Instruction 1342.12 (April 11, 2005)(DoDI), and 32 C.F.R. Part 57, Appendix G,[3] which interprets IDEA for the U.S. Department of Defense (DoD) and controls due process within DoD,[4] the Director assigned me to serve as the impartial Hearing Officer on January 10, 2007.[5] With that designation comes the judicial power to manage this due process proceeding and conduct a hearing to resolve this dispute.[6]

The school filed a Notice of Insufficiency and Motion for More Definite Statement on January 19, 2007. In addition to noting specific statutory insufficiencies, the school argued that the existing due process request did not set forth the Child's complaints under the IDEA with sufficient specificity or clarity to define the issues for due process or to enable the school to reasonably respond. A January 24, 2007, Order agreed that the petition failed to meet the threshold requirements of IDEA 2004 and failed to provide either the school or the tribunal with reasonable notice of the issues Mother wished to pursue. Consequently, the petition was returned. In the absence of objection by the school, Mother was granted the opportunity to file an amended complaint that met the requirements of IDEA 2004 and, in accordance with that Act and DoDI 1342.12, reasonably identified the issues raised under IDEA.[7]

An amended petition was received on March 12, 2007, in which a lack of specificity still existed and the school expressed their intention to object to its acceptance. A March 22, 2007,

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

[2] *See* 20 U.S.C. 1400 *et. seq.* and 20 U.S.C. Chapter 33.

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

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

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

[6] DoDI 1342.12, Encl. 9, § E9.4.11.

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

teleconference call was arranged and initiated. During the teleconference, the parties were charged with clarifying the issues raised in the amended petition and identifying any potentially justiciable issues for due process. The parties agreed to tentatively accept the transcription of this teleconference as Petitioner's Amended Petition. This was done to accommodate Mother, who has a high school education, no experience in either litigation or special education, and is proceeding *pro se* from a German town with limited English language resources to help her with this case.

On April 11, 2007, the school timely filed its Answer to the Amended Petition and denied all the allegations raised. As discussed during the March 22, 2007, teleconference, the school rephrased the justiciable issues raised by Mother in language more amenable to judicial consideration. On April 20, 2007, it was agreed by the parties that the rephrasing was a fair representation of Child's claims under the prevailing law and would subsequently serve as the final amendment to the petition.[8] With threshold matters settled, the school commenced discovery with its April 18, 2007, request for production of documents from Mother.

On April 20, 2007, the school moved to strike and dismiss improper claims with regard to the Amended Petition. That motion was returned to the school with instructions that it provide more specificity as to the underlying legal bases for their motion(s) on each individual claim cited.[9] The school's amended motions, accompanied by a motion for partial summary judgment on improper claims, was filed on May 5, 2007. Mother responded on May 13, 2007, in opposition to the school's motions. Motions were exchanged which eventually led to the matter being suitably defined for a hearing on the relevant issues. The final written orders in the case occurred on May 8, 2007 (concerning discovery issues and the identification of witness) and May 17, 2007 (identifying the relevant issues for consideration and addressing cross motions by Mother).

It should be specifically noted that during an April 20, 2007, teleconference, Mother waived her daughter's rights under the applicable statute and instructions to an expedited process and decision under the applicable time lines. Proceeding *pro se*, she felt unable to give this matter her full attention so close to the end of the school year, while assisting her husband in a command directed permanent change of station, while trying to both find a new home and relocate to a new town before a June 1, 2007, deadline, and while home-schooling her two youngest children.[10] Against the school's objection, I found that sufficient cause existed to grant Mother's motion, given her particular circumstances. As part of this request, this matter was given priority for a May 2007 hearing, prior to the family's June 1, 2007, relocation.

Due to the many informalities taken during the progress of this matter, it must be noted for the record that coordinating communications between the parties was riddled with complications which worsened over time.[11] Consequently, minor motions and requests were routinely addressed

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[8] This agreement was orally made during the teleconference, then later reduced to writing.

[9] On that same date, the scheduling order governing the remainder of the proceedings was issued, and the due process hearing was set to take place in Bavaria, Germany, between May 21 and 24, 2007.

[10] Additionally, Mother has two other actions currently pending concerning her other children.

[11] Such complications arose from coordinating conferences in differing time zones, erratic cell phone and internet coverage in Germany, secured e-mail server delivery issues, a paper shortage, excessively protracted and markedly irregular times for mailing materials internationally, a local telecommunications strike affecting telephone and

informally, orally or by e-mail, on an *ad hoc* basis to keep the process moving despite communication difficulties and party unavailability. The final pre-hearing conference held in Bavaria, Germany, on May 20, 2007, sought to address any outstanding motions and issues and to educate Mother as to how the proceeding would be conducted.

The due process proceeding was conducted from May 21, 2007, through May 24, 2007, in Bavaria. During the proceeding, Mother introduced 157 exhibits, marked (Pet. Exs.) 1-157, and the school introduced 358 exhibits, marked AC 0001 - AC 0358. In lieu of closing arguments, the parties were given until June 24, 2007 to review the transcripts, received on June 11, 2007,[12] and submit closing briefs.

On June 19, 2007, a teleconference was arranged to check on the status of the post-hearing submissions. During that conference, it was learned that Mother would be essentially without telephonic and internet access through mid-July. Consequently, it was urged that her submissions be mailed and post-marked by the dates previously discussed. Respondent's final submission was received on June 25, 2007. Mother's final submission was postmarked on June 24, 2007, and received on July 9, 2007. From July 10 through July 11, 2007, the school submitted errata sheets related to the extensive transcript from the hearing in Germany. All were accepted into the record.

After closing the record on July 15, 2007, it was determined a document to be prepared by the school was not part of the official record.[13] The school was requested to prepare and submit that document as soon as practicable. That exhibit was received on July 27, 2007, and the record opened for acceptance of what has been marked as Respondents' AC 0359. With no objections as to its inclusion, the record was again closed on July 30, 2007. The matter is now ready for decision.

IDENTIFICATION OF RELEVANT ISSUES, LAWS, AND PROCEDURES

Preliminary Considerations

This tribunal's powers and jurisdiction are the creation of IDEA, as administered by the Department of Defense through DoDI 1342.12 (April 11, 2005), § E8 and §E9, generally. The Defense Office of Hearings and Appeals (DOHA) is assigned responsibility for IDEA-related proceedings authorized under § E9.4 through § E9.8 of that instruction. These sections include the authority an appointed hearing officer receives as the authorized presiding officer, with judicial powers to manage proceedings and conduct hearings thereunder.

IDEA is a law ensuring services to children with recognized disabilities throughout the United States. It governs how schools provide early intervention, special education, and related

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internet service, and Mother's process of relocating from Würzburg to a smaller and more remote Bavarian town of about 40,000 citizens with worse telecom resources and mail service.

[12] The proceeding took place over four days, and there are four volumes of the transcript. For simplicity, citation to the transcript is by volume number and page – *e.g.*, Vol. 1, 150.

[13] *See* Vol. II, 10-11.

services to infants, toddlers, children, and youth with disabilities. In defining the purpose of special education, IDEA (2004) clarified Congress' intended outcome for each child with a disability: such students must be provided with a free and appropriate public education (FAPE) designed to prepare them for further education, employment, and independent living. Consequently, issues arising under IDEA start with the determination of eligibility of a child (*i.e.* that an appropriate body has followed specific procedures and thoughtfully determined that the child has a covered disability affecting the child's education) and run through the numerous outgrowths of that determination, ranging from assessments[14] and appropriate education to special disciplinary procedures applicable to certain circumstances.

IDEA is not a panacea for all school-based complaints. IDEA does not cover claims that an eligible child was discriminated against or that a school failed to follow No Child Left Behind. Moreover, IDEA does not cover allegations that a school neglected its duty of care to a child, regardless of the child's status. Such claims may be actionable, but not here. Even allegations regarding denials of FAPE, which strike to the core of the IDEA, are only entertained in this forum if the child already has been determined eligible for special education and related services.[15] It was Mother's initial aim to seek resolution of many such grievances through this tribunal. My jurisdiction is limited to those issues arising under IDEA, however, and I lack the authority to review or remedy the majority of her initial complaints.

Two of Child's complaints remain justiciable under IDEA. The school, through its Case Study Committee (CSC), determined Child was not eligible under IDEA or DoDI 1342.12, § E.4.3 (April 11, 2005) for special education and related services. The law explicitly provides for the review of this threshold special education decision. The same is true for allegations of irregularity in the granting or execution of an independent educational evaluation (IEE), a diagnostic tool available to a parent as a matter of right when there is disagreement with a school's evaluation, such as the one completed by a school in anticipation of an eligibility determination.

Issues Presented

I. Whether Respondents erred in the execution of Petitioner's eligibility determination.

II. Whether Respondents erred in their provision of Petitioner's IEE.

Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49 (2005), the U.S. Supreme Court concluded that the party commencing suit in an IDEA proceeding has the burden of proving the elements of its claim. This decision is consistent with prior DoDEA/DoDDS practice. In this matter, Mother went first in order of parties during the hearing and retained the appropriate burden throughout.

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[14] Such assessments include, but are not limited to the school's assessments, independent evaluations, and diagnostic tests bearing on the placement of the child.

[15] For introductory information on FAPE and the basics of modern special education, s*ee generally*, *Bd. Of Educ. of Hendrick Hudson Co. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

Controlling Authority

An eligibility determination is made at the culmination of a process of inquiry, set forth in IDEA at Chapter 20 of the U.S. Code and adopted for DoDEA application through DoDI 1342.12, § E4.1-3 (April 11, 2005).[16] Non-binding guidance is additionally provided under DoDEA 2500.13.G (Sept. 2005),[17] which describes the various steps for the school/district to follow. Those steps and the correlative actions by the school were as follows.

FINDINGS OF FACT

Pre-Referral

The process leading to the identification and evaluation of a student suspected of having a disability is called *pre-referral*. Mother telephoned the school system between mid-September and mid-October of 2005 and orally requested it assess Child for suspected learning problems.[18] Mother was urged to first speak directly with her daughter's teachers and wait for the distribution of first quarter report cards.[19] Wishing the matter to be addressed with more immediacy, Mother delivered a handwritten request to the school counselor on October 21, 2005. In that request, Mother specifically asked that Child be evaluated for "dyslexia or dyscalcula."[20] Mother and a school representative[21] completed a parental permission for assessment form that same day, indicating that cognitive screening would be conducted and acknowledging the parent' request. Pre-referral actions were thus triggered and continued through November 21, 2005. The case study committee (CSC) referral form was also completed on November 21, 2005, ending the pre-referral stage.[22] Mother's request for an assessment and evaluation did not obviate the need for a classroom teacher to conduct

[16] *See also*, 32 C.F.R. 57 *et seq* (concerning provision of early intervention and special education to eligible DoD dependents in overseas areas), 32 C.F.R. 80 *et seq* (concerning provision of early intervention and special education services in domestic DoD schools), and 46636 *et seq.* Fed. Reg., Vol. 7I, No.156, (Mon., Aug. 14, 2006)(IDEA "gives the States the authority to establish different time frames and imposes no restrictions on State exercise of that authority." DoD has declined to establish such time frames).

[17] *The Special Education Procedural Guide* (Guide). Because it is not legally binding, conflicts between The Guide/DoDEA 2500.23-G and DoDI are resolved by adherence to DoDI. *See* Foreword, DoDI 2500.13-G.

[18] VOL II, 15-16, 26, VOL I, 22.

[19] AC-0333a-b.

[20] Stipulated Fact 52; AC 0084. *Note*: Dyscalcula, like acalculia, is a common variant of dyscalculia.

[21] AC 0085 is the DoDDS-E Parent Permission for Assessment form. Mother's handwriting, similar to that shown on AC 0084, designates the date of October 21, 2005, and her signature is in the signature block. It is unclear whether Counselor Rowland or another person completed the rest of the form on her behalf.

[22] Although there is no established time frame for completion of the pre-referral stage, the process was concluded in exactly one month. Therefore, it can be said to have been in a reasonable and "timely" manner.

pre-referral activities.[23] Class grades and performance were examined for math and geography, but concluded no pre-referral interventions were deemed necessary.[24]

Referral

Immediately upon the closure of the pre-referral period on November 21, 2005, a formal referral was made and accepted that same day. The school then chose to have the assessment planning meeting convened that same day, between the parent(s) and the CSC.[25] Consequently, it by-passed the DoDEA guideline provision that would have permitted it ten days between acceptance of the referral and the assessment planning meeting.[26]

Also on November 21, 2005, Mother signed a parental permission form for evaluation[27] and vision and hearing screening results were pursued.[28] As a result, the suggested guideline that no more than 45 school days lapse between signed parental consent and completion of the assessment was triggered.[29] By the completion of its efforts, the assessment planning conference had met the DoDEA 2500.13-G at 3-3[30] and at 1-7[31] guidelines and satisfied DoDEA 2500.13-G at 3-6.[32] The assessment ordered by the school was then timely finished on February 2, 2006.[33]

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[23] DoDEA 2500.13-G at 3-3.

[24] AC 0082-0084. Completion of this period and this form met requirements under DoDEA 2500.13-G (Sept. 2005) at 3-2.

[25] Stipulated Facts 57-58; AC 0087.

[26] DoDEA 2500.13-G at 1-7. The school, in their July 27, 2007, Filing of Chart Addressed in Vol. II of Hearing, conclude, however, that this added an additional 10 days to the 45 days otherwise offered as guidance for completing the assessment after the acceptance of referral.

[27] AC 0089; pursuant to 20 U.S.C. § 1414(a)(1)(C)(i)(I), an initial evaluation of a child for a suspected disability is conducted within suggested amount of days of receiving parental consent for the evaluation or within such time a State so establishes. DoD, acting as a State for these purposes, chose the in a "timely manner" time frame to complete assessment after consent. By doing so, it availed itself of IDEA's deference to the States for better understanding their capabilities and for setting reasonable time frames under this section. DoD then interpreted a "timely manner" as being within a targeted period of 45 school days. *See* DoDEA 2500.13-G at 1-7. Such a method keeps with the spirit of IDEA and promotes expedition of the process, but with a necessary flexibility given the difficulties often encountered when evaluations and paperwork routinely exceed domestic borders, the geographic scattering of DoDDS schools and resources, and the transient nature of DoDDS parents and students.

[28] AC 0090.

[29] DoDEA 2500.13-G at 1-7.

[30] "The CSC will initiate a conference with the parents and teacher to discuss the parent's concerns."

[31] Up to ten school days are permitted from acceptance of referral to assessment planning meeting.

[32] "In cases where pre-referral activities are unsuccessful in addressing the student's difficulties, a Referral Form is completed." DoDEA 2500-13-G at 3-6.

[33] Stipulated Fact 59; pursuant to DoDEA 2500-13-G at 1.7, the school had the goal of finishing the assessments within 45 school days.

On or about February 7, 2006, Mother requested a copy of the Woodcock-Johnson Achievement and Language assessor's reports so she could review them prior to the February 21, 2006, eligibility meeting. Those reports were sent to Mother on February 8, 2006.[34] The next day, on February 9, 2006, Mother attended a meeting at the school. The facts concerning that meeting are unclear. However, Mother requested additional sub-tests of Woodcock-Johnson (WJ) and Detroit Tests of Learning Aptitude (DTLA) be administered to Child, including math sub-tests. Those tests, which were not administered before the eligibility meeting, included tests specifically addressing dyslexia and dyscalculia.[35]

Eligibility Determination

On February 21, 2006, the twelfth school day after the completion of the school's assessment, the CSC formally met for its eligibility meeting.[36] Before that meeting took place, Mother visited Dr.. B., DoDDS-Europe's Special Education and Student Services Chief and Respondent's client-representative at this due process hearing. Mother gave Dr. B. a letter[37] requesting Child get an IEE and requesting a response within five days regarding her request.[38] That letter also referenced her prior request for dyslexia and dyscalculia assessments, and then noted that Child had not been assessed for Math Reasoning, Reading, Auditory Discrimination, or word opposites.[39] It was forwarded by N.M. to a J.A., a special education coordinator, and Principal D.L. on February 21, 2006, with the message:

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[34] AC 0151.

[33] Vol. III, 211-212.

[36] Although DoDI 1342.12 only requires that the CSC "meet as soon as possible after a child has been assessed" to determine eligibility, DoDEA 2500.13-G at 1.7 suggests the meeting should take place within ten school days of the completion of the assessment. Here, the school exceeded this non-binding time frame, but to no adverse effect. Despite this fact, the school evaded mentioning this time frame and claimed it acted within a broader, 65-school-day time frame (between acceptance of the referral and the eligibility meeting, thus blending the 10-school-day period between referral acceptance and assessment planning meeting, 45-school-day period between signed parental consent and completion of the assessment, and 10-school-days from completion of the assessment to the eligibility meeting). This claim, while irrelevant, is also misleading. The time lines provided are to be used "as guidance to the CSC regarding maximum amount of time for *each* process." As such, *each* process within the referral processing spectrum has its own, free-standing and individual time frame. Here, the school voluntarily accepted the referral and conducted the assessment meeting on the same day, beating the guideline's suggested 10-school-day time frame. In doing so, the school acted expeditiously. It did not, however, "bank" an extra 10-school-days for later stages anymore than it banked the days by which it completed the assessment in less than 45 school days after obtaining parental consent. To state that DoDEA 2500.13-G reflects a 65- school-days deadline is an erroneous fiction. It is better to concede that the school failed to act within the 10-school-days, but find safety in the fact that time frame is not mandatory under DoDEA 2500.13-G at 1-7.

[37] When special educator coordinator J.O. received the note, she decided that the school should proceed with the request as it would "with any student who wasn't eligible for services" because "at this point [February 22, 2006], the student wasn't eligible for services." AC 0164. The e-mail which forwarded Mother's repeated request to Ms. O., however, noted that the request was "completed BEFORE we had the eligibility today." (emphasis in original). AC 0164.

[38] AC 0163.

[39] *Id.*

"I'm sending this officially...but I'm sure you are probably already privy to the letter. It was completed BEFORE we had the eligibility meeting today. :) [sic] Tell me our next step."[40]

In the interim, the eligibility determination meeting transpired. In attendance at that meeting were Child; Mother, as Child's representative; Principal D.L., Administrator; General Education Math Teacher R.P.; Special educator teacher/CSC chairperson N.M.; Counselor M.R.; Speech-language pathologist/assessor J.T., and School psychologist T.C.

Chapter 5 of DoDEA 2500.13-G sets forth certain criteria used in the determination of whether a student has a specific learning disability under Criterion D: Learning Impairment.[41] Under that Criterion, four blocks of criteria have corresponding blocks of required assessments. As noted below, the evidence presented shows that the required assessments were performed and considered:

CRITERION D: *SPECIFIC LEARNING DISABILITIES*

CRITERIA	***REQUIRED ASSESSMENTS***[42]
Background information.	Social/Family/Medical History or structured family interview (AC 0090-0091; 0093-0098; 0100-0101).
Presence of a disorder in processing and/or production of language and/or information that relates to an area of academic deficit.[43]	An individually administered assessment of one or more of the processing areas (WJ III Cognitive Ability at AC 0106-0116; Clinical Evaluation of Language Fundamentals 4/Peabody Picture Vocabulary Test III/B at AC 0124-0131).

[40] AC 0164.

[41] AC 0257.

[42] Additional testing included the Beery-Buktencia Visual Motor Integration Developmental Test and the Dyslexia Characteristics Checklist. *See,* AC 0104.

[43] Sub-criteria include: Significant differences among scaled or standard scores for clusters in a comprehensive battery OR Significant weaknesses identified across sub-tests or clusters of more than one assessment instrument OR Significant weakness identified in language processing on a comprehensive language battery with comparative strength identified in another processing area(s).

Adversely affecting educational performance on an academic achievement test: At or near the 10th percentile (+/– the standard error of measure for the assessment that is administered OR at or near the 35th percentile for students of above average intellectual functioning.[44]	Individually administered achievement tests in reading, math and/or language arts (WJ III Achievement, Form A at AC 0117-123) AND review of records (AC 0092, 0104) AND observation (AC 0099, 0105).
Evidence to rule out an intellectual deficit.	An intellectual screening OR an individually administered intelligence test (Wechsler Intelligence Scale for Children, 4th Ed. at AC 0104-0109) AND other documentation to rule out ESL, lack of opportunity, culture and health issues as causes of learning difficulties; AC 0092, 0099, 0104-0105).

Clinical Evaluation of Language Fundamentals-4 (CELF-4) Language Battery – (Administered by J.T., a qualified speech and language pathologist with the Respondent school system on January 9-10, 2006).[45] According to the publishers of this test, Child's overall language skills were in the average range.[46] She tested within the average range of functioning in receptive language skills, expressive language skills, language content, and language memory.[47] Child's sub-test scores were all within the average range.[48] In conjunction with the CELF-4, J.T. assessed Child's development of a receptive vocabulary core through the **Peabody Picture Vocabulary Test-III (Form B)**, on which Child's score fell "exactly at the mid-point of the average range of the test when compared against her peers."[49] These tests were further complemented with **Informal Language sampling**, which indicated Child was "a polite but reserved communicator in context."[50] After testing, Ms. J.T. noted that Child's fluency of speech and overall language abilities appeared within normal limits and were not a referral concern.[51]

[44] Above average mental ability is documented by a comprehensive intelligence test score of one and a half or more standard deviations above the mean, +/– the standard error of measurement.

[45] Vol. III, 73-128.

[46] AC 0124.

[47] *Id.*

[48] AC 0124-AC 0125.

[49] AC 0126.

[50] *Id.*

[51] *Id.* While conducting her assessment, J.T. looked at processing and production of language as addressing possible learning impairment. In so doing, she found no supportive language weakness that might explain difficulty with reading (*i.e.* dyslexia). *See* Vol. III, 126.

Woodcock-Johnson III (WJ-III), Tests of Cognitive Ability – (Administered by T.C., school psychologist, on November 29, 2005).[52] Given the DoDEA eligibility criteria for determining whether a child has a specific learning disability or impairment,[53] the school needed to investigate whether Child displayed a disorder "in processing and/or production of language and/or information that related to an area of academic deficit."[54] This WJ-III battery is appropriate for that determination as it tests Child's cognitive (mental) processing of information.

Ms. T.C. used 14 cognitive ability sub-tests of the WJ-III. Child's overall intellectual ability, as measured by the WJ-III General Intellectual Ability (GIA), Extended Battery, was found to be in the average range. Compared to others at the same age level, Child's performance is high average in auditory processing; average in comprehensive knowledge, long term retrieval, and visual-spatial thinking; and low average in fluid reasoning, processing speed, and short term memory.[55] In comparing Child's cognitive abilities, she showed a significant relative strength in auditory processing.[56] Although the test showed areas of weakness, it did not demonstrate any patterns of weakness. Therefore, the resultant data, as generated by the test manufacturer's computerized Compuscore methodology, did not support the identification of a specific learning disability or the need for special education.[57] Moreover, none of Child's cluster scores were significantly lower than they should have been based on her total cognitive profile, and not simply based on the sub-test scores comprising up each cluster.[58]

Although Mother noted that hand scoring could result in scores up to six points different than those generated by Compuscore,[59] T.C. explained that the manufacturer's literature supports the conclusion that this discrepancy is the result of error based on how the scores are weighted; for example, individual sub-tests are weighted in a certain way against a norm.[60] As well, all the numbers need to be read in conjunction with the rest of the scoring, which hand scoring cannot do.[61] The manufacturer prefers use of the Compuscore technology for scoring as it is more accurate.[62]

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[52] AC 0110; Vol. III, 186-239.

[53] DoDEA 2500.13-G at 5-18 through 5-23.

[54] AC 0257.

[55] AC 0111.

[56] *Id.*

[57] *See also,* Vol. III, 281-302..

[58] AC 0115; Vol. III, 261.

[59] *See* AC 0116.

[60] Vol. IV, 33-34.

[61] Vol. IV, 34.

[62] Vol. IC, 33.

Woodcock Johnson III, Tests of Achievement (WJ-III-TA), Form A – (Administered by R.F., Teacher LI, on February 2, 2006).[63] Mr. R. F. administered four tests: Broad Reading (sub-tests in Letter-Word Identification and Passage Comprehension providing a broad measure of reading achievement), Broad Written Language (sub-tests in Dictation and Writing Samples, comprising a cluster measuring written language achievement), Broad Math (sub-tests in Calculation and Applied Problems to show math achievement), and Total Achievement (clusters of sub-tests of Academic Skills, a combination of decoding calculation and spelling skills, Academic Fluency, a combination of Math, Reading, and Writing tests for speed and accuracy, and Academic Applications, a combination of passage comprehension, applied problems, and writing samples. These tests yield one general academic proficiency score. When compared to others at her grade level, Child's academic skills and fluency with academic tasks are both within the average range. Her ability to apply academic skills is low average. Her performance in math, math calculations skills, written language, and written expression is average and her performance in reading is low average.[64]

Wechsler Intelligence Scale for Children, 4th Ed. (WISC-IV) – (Administered by T.C., school psychologist, beginning on November 29, 2005).[65] The WISC-IV is given to assess global aspects of intelligence. It is comprised of scores representing intellectual functioning in verbal and performance areas. Child's Verbal IQ of 108 shows functioning at the 70th percentile. Her verbal reasoning and comprehension, acquired knowledge, and attention to verbal stimuli are in the high average range.[66] Her Performance IQ represents functioning at the 6th percentile, indicating low range scores in fluid reasoning, attentiveness to detail, visual-motor integration, and spatial reasoning. The Processing Speed Quotient Index of 85 represents functioning at the 16th percentile. The speed with which Child can correctly scan, sequence, or discriminate is in the low average range.[67] There is a significant discrepancy between her verbal abilities (high average range) and her nonverbal abilities (low range). However, these results do not show a pattern of results across testing instruments when compared with the WJ-II for cognitive abilities. Moreover, because learning in the school setting is typically more verbal/language than nonverbal/visual, Child should not experience great difficulty within the school setting.[68] Her weaknesses in short term memory and processing speed *may* be a reflection of her previously diagnosed attention deficit hyperactivity disorder (ADHD), and not a processing concern.[69]

Witnesses testified as to how the school takes the CSC eligibility process seriously. It is the CSC Chairperson's responsibility to make sure "there's no determinations made before the

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[63] AC 0117-0123; Vol. III, 135-167.

[64] AC 0118.

[65] AC 0104-0109.

[66] AC 0106.

[67] *Id*.

[68] AC 0109.

[69] *Id*.

meeting."[70] During the meeting, each participant has a vital role to play[71] and each member of the CSC is "an equal player."[72] This includes parents: "we need to hear from them in the CSC meeting, make sure they're informed."[73] The discussion preceding the ultimate determination of eligibility is "a tremendous informational-sharing time to share all of the information that we've gathered. And then at the conclusion, we talk about how that information might fit in with our questions about eligibility."[74] Because the meeting is a sharing of evaluation information, questions regarding Child's percentile and other sifting questions leading to an answer as to whether the child has an impairment impacting her education are summarized and disclosed near the end of the meeting, after this discussion.[75] The ultimate eligibility determination is the result of "collaboration and give and take" between all participants.[76]

Prior to the February 21, 2006, CSC meeting, the various assessors had put their information into a synthesis of all the assessment instruments, and appropriate paperwork was completed. At the CSC meeting, the committee reported on its eligibility findings and discussed those findings amongst themselves and with Child and Mother. By the time the ultimate determination was made, test results had been reviewed and discussed, and context as to student performance had been given through input from assessors, both the regular and special educators, and others who may have observed Child. To permit full participation and an equal exchange of information, the meeting lasted well over an hour, 35 to 40 minutes of which was spent considering the assessment.[77]

At the end of the meeting, each member of the CSC was referred to a questionnaire sheet, central to which were four questions. The primary question, whether the child is near or below the 10th percentile in math, reading, or language arts, is the pivotal issue. One's answer to that question rested in part on consideration of cluster scores in light of all the other considered evidence discussed throughout the meeting.[78] Answers to the remaining three questions rested on one's answer to the first question. "[T]hose questions are usually read by the team leader at the conclusion of the meeting. Further discussion goes on as we answer each question . . . after we've shared all that information."[79]

In the end, the CSC concluded that Child had no specific learning disability and was, therefore, ineligible for special education and related services. This tally included a questionnaire

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[70] Vol. IV, 200.

[71] *Id.*; *see also* Vol. III, 269.

[72] Vol. III, 270.

[73] Vol. IV, 201.

[74] Vol. III, 87.

[75] Vol. III, 86-87; AC 0158.

[76] *Id.*

[77] Vol. II, 6.

[78] Vol. III, 261-266.

[79] Vol. III, 88.

from Ms. R.P., who concluded the child did not have a specific learning disability. "If a child is not eligible at that point, we usually discuss some alternative ideas to assist the child, sort of a plan of action ideas and such."[80] There is no indication of what, if any, additional discussion took place. The child had already been placed into Read 180 for remedial reading assistance based on her Terra Nova scores.[81] Math tutoring or assistance was already available through the school during and after class.[82] There is no indication any new or significant interventions were introduced during this meeting.

Despite the witnesses' emphasis on the importance of full participation by the CSC members and the collegial give and take leading to the ultimate determination, the general education math teacher, R.P. left the meeting within 15 minutes.[83] Her input was limited to general education math. She did not participate in discussions on different placements or potential avenues for diagnostic investigation.[84] She does not know whether she was privy to all documents considered by the CSC[85] because: "I was there for some of the time, not all of the time. I was down during a break. . . I was there long enough for me to be able to give my input, or relevant input."[86] While there, she reported that Child was average and progressing.[87] She left so early because she "was dismissed basically" by the principal or one of the staff members,[88] and asked to exit the meeting to attend to her class.[89]

IEE Request

On February 22, 2006, the N.M. e-mail from the previous day was addressed. At 8:31 a.m., J.O. sent an e-mail to N.M., J.A., and Principal D.L. It stated: "At this point, the student wasn't eligible for services, so you should proceed as you would with any student who wasn't eligible for services."[90] Mother's request for an IEE was accepted by the school/district by February 24, 2006,[91] in response to the evaluation it had prepared for Child's eligibility determination. The school passed

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[80] Vol. III, 87.

[81] *See* Vol. I, 81-165.

[82] Tutoring is optional, incumbent upon the middle school Child to decide whether she needs remedial tutoring. Because tutors do not use calenders/journals, Mother has no way to passively monitor whether Child has sought tutoring services, nor, apparently, does the general education math teacher. *See*, *generally*, testimony of H.R. and R.P.

[83] *Id.* at 279.

[84] *Id.* at 295.

[85] R.P. never reviewed, for example, the Woodcock-Johnson test of achievement. Vol. I, 272.

[86] Vol. I, 274.

[87] *Id.* at 278, 280.

[88] *Id.* at 280.

[89] *Id.* at 279.

[90] *Id.*

[91] *See*, *e.g.*, AC 0165.

on its option of initiating an impartial due process hearing to show its evaluation was appropriate.[92] The school instead proceeded to ensure an IEE was provided without unnecessary delay.[93] Upon her receipt of the request for an IEE, Dr. B. quickly began researching available evaluators. In a letter dated March 3, 2006, she designated sites in Virginia, Massachusetts, and North Carolina for Mother's consideration[94], with offers to pay for transportation and testing.[95] Around this time, Dr. B. reviewed Child's eligibility paperwork.[96]

Mother expressed a preference for testing performed by Lindamood Bell (LMB). LMB administers its own "testing battery [that is] an extensive *compilation* of Standardized Tests," the result of which is a "diagnosis and instruction plan. . . ."[97] (emphasis added). Based on this battery, LMB can prescribe one or more of its programs, such as Cloud Nine® Math or Seeing Stars®.[98] From past experience, Dr. B. knew LMB's battery routinely consisted of using sub-tests in isolation from the full batteries in which they were originally integrated, and were often not the latest editions of those tests.[99] Dr. B. initially rejected this request because she "was concerned that it would not be a full comprehensive evaluation that might be used to determine eligibility for a student."[100]

Dr. B. spoke with LMB's D.M., however, and was told LMB could conduct comprehensive batteries of some of the tests she was requesting.[101] She was told LMB had the ability to conduct WJ-III Achievement and Cognitive exams in their entirety and a Detroit Aptitude Test IV (DTLA 4) in its entirety, sub-tests of which Mother had requested testing but which had not been provided previously.[102] Based on this representation, Dr. B. believed LMB could be contracted to go beyond

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[92] As provided by DoDI at § E8.2.8.1.1.

[93] *See* DoDI at § E8.2.8.1.2 and § E8.2.8.1, respectively.

[94] As noted, *supra*, the decision would ultimately be to test Child within Bavaria, to conform with the preferences of DoDI § E 8.2.8.3.2 and DoDEA 2500.13-G at 12.4. ("[IEE] be conducted, where possible, in the area where the child resides.") *See* Vol. IV, 136.

[95] Vol. IV, 127-129; Pet. Ex. 42a.

[96] Vol. IV, 198.

[97] *See* http://www.lindamoodbell.com/learningcenters/diagnostic-testing.html (available as of Aug. 5, 2007).

[98] Both were ultimately recommended for Child. In a public notice, LMB states: "We want children to achieve their full learning potential *through instruction in our programs*. That is why we exist. Unless you attend a workshop or clinic presented by us, we cannot guarantee the content, objectives, and quality of the workshop or clinic you might receive."(emphasis added) *See* http://www.lindamoodbell.com/public-notice.html (available as of Aug. 5, 2007).

[99] Vol. IV, 131-132; *see* DoDEA 2500.13-G at D-3 through D-4 for the DoDDS-preferred testing instruments and the preference that assessments in an area at issue should be "comprehensive."

[100] *Id.* at 131.

[101] *Id.* at 132.

[102] *Id.* at 133.

its usual practice in test administration and perform the DTLA-4 and the WJ-IIIs in full.[103] Their conversation was confirmed in an e-mail, dated March 17, 2006, which also contemplated costs.

Between March 17, 2006, and March 24, 2006, a contract for LMB's services was crafted by the school.[104] Dr. B. decided the tests would be conducted in Bavaria to conform with the DoDI and to avoid protracted travel that might make Child tired or jet-lagged before the testing.[105] The services contract with LMB thus required the evaluator, D.M., to travel to Bavaria from the United Kingdom for the evaluation; he was then to issue a written assessment report, then render a verbal interpretation of the findings to the parents and to DoDDS-Europe staff members.[106] The contract set forth the full scope of work to be performed.[107] The ultimate selection of tests was left to Mr. D.M.'s independent judgment.[108] This level of discretion was given to D.M./LMB because he was conducting an IEE for both Child and her sister, who had previously been determined to be eligible and was already under an IEP,[109] and Dr. B. wanted it clear to the parents that the evaluation was truly independent. Dr. B., at the due process hearing, stated: "I can't speak for Lindamood Bell and how they selected their assessments. In fact, it was part of the contract that I developed with them, that they independently work with [Child's mother], to determine which tests would be given."[110]

At the hearing, in response to Dr. B's testimony, Mother vehemently testified: "Work with me? Wait a minute. I have a document that you state – – I wasn't allowed to know the scope of work to be done. . . . I've got a letter right here, somewhere. . . Here we go."[111] She then quoted from Pet. Ex.. 52B: "'The government contract and scope of work are not education records' [Pet. Ex.] 52B from Dr. B. So I don't see how we could have known what kind of work they were doing. That was on you."[112] Mother did not know she had the ability to work with LMB on testing. She was not afforded the opportunity to review the contract as a matter of right or courtesy because the contract contained privileged information.[113] She was advised in a letter dated Saturday, April 15, 2006, that in order to access the full scope of work to be provided in Germany that Monday, April 17, 2006, she

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[103] *Id.*

[104] *Id.* at 135.

[105] *Id.* at 136.

[106] *Id.* at 141.

[107] *Id.* at 140-143; AC 0169.

[108] *Id.* at 141.

[109] *Id.* at 205-206.

[110] *Id.* at 206.

[111] Vol. IV, 206-207.

[112] *Id.*; *Note:* Pet. Ex. 52B is also AC 0169.

[113] *Id.* at 207.

"would need to place a Freedom of Information Act request through DoDEA Headquarters in Arlington, Virginia."[114]

Not having been permitted to see the service contract or been otherwise informed about the testing specifics, Mother did not know what tests would or could be administered. She also did not know that the tests selected could be considered inadequate by Dr. B. if the evaluation was not executed as Dr. B. had contemplated when she spoke with D.M.[115] Mother thought more tests were to be performed.[116] Dr. B. stated that she "did not ask [Mother] to work with [LMB] on the scope of work. [Dr. B.] already had that set up in the contract."[117]

Dr. B. later stated, however, that Mother should have requested the additional testing from her or from Mr. D.M., leaving it to Child's mother because "[Dr. B.] was trying not to control [LMB/D.M.'s assessment]."[118] It was Dr. B.'s official responsibility "to make sure that whoever [she] contract [sic], follows the contract."[119]

Throughout, Mother had no basis to know how these matters are done with IEE and follow-up testing.[120] When the additional tests Mother had requested were again mentioned by Dr. B. on March 30, 2006, both sides were confused as to which tests were at issue and for which child – Child or her sibling(s).[121] The exchange of redacted e-mails makes it apparent that communication was muddled.

Dr. B. later offered to have certain requested sub-tests of the Woodcock-Johnson and DTLA-4 administered by DoDEA or as part of the IEE (Lindamood Bell)[122] in an e-mail dated March 24, 2006.

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[114] AC 0169.

[115] *See*, *e.g.*, Vol. IV, 195. "I had cautioned the parents before they obtained – – before we obtained the Lindamood Bell evaluation, that it would not be a full and comprehensive evaluation, and therefore, we did not have enough information to re-determine eligibility." The record clearly shows that Mother was so warned prior to the creation of the LMB contract. *Compare* "I contacted D.M. and asked him if their organization was able to do complete and entire comprehensive batteries of some of the tests that [Child's mother] had been asking for. . . . He said they would be able to do a Woodcock Johnson achievement and cognitive in its entirety, that they would be able to do a [DLAT-4] in its entirety, which [the parent] had asked for some of the sub-tests to be administered." Vol. IV, 132-133. She further testified that she believed that the parent could get what she wanted out of the LMB IEE "based on how we wrote the contract and to be able to obtain comprehensive assessments, even though that wasn't within Lindamood Bell's *normal* routine or procedure." (emphasis added). Vol. IV, 133.

[116] Vol. IV, 214.

[117] Vol. IV, 212.

[118] *Id.* at 213; *compare* notes 109 and 110, *supra*.

[119] Vol. IV, 209.

[120] *Id.* at 220-221.

[121] *Id.* at 219.

[122] In offering "or we can agree to have them administered as part of the IEE," it is unclear how Dr. B. would attempt to have these so administered if the issue of what tests were to be administered was left to the discretion of LMB/D.M.. AC 0165.

Mother responded with a request that the school complete those assessments "next week."[123] Despite this answer, Dr. B., in an e-mail dated March 30, 2006, wrote: "it looks like you are also requesting additional DoDDS assessment . . . Please clarify your request . . . ."[124] The record does not reflect whether Mother again stated her desire to have the school conduct those sub-tests the following week. Those additional tests, however, were never administered by the school.[125]

That testing was passed on for LMB's D.M to consider at his discretion. Dr. B. stated Mother "was to either notify [her] or Mr. D.M., "because I asked for Mr. D.M. to use his independent judgment in evaluating . . . I was trying not to control it,"[126] but there is no evidence that such terms were ever communicated to Mother. Dr. B. further stated that Mother and Child could have had Lindamood Bell administer the additional tests by requesting D.M. to do so.[127]

On April 17, 2006, Mother and Child's aunt took Child and her sister to meet with LMB's Mr. D.M..[128] They arrived at the neighboring DoDDS elementary school to find nobody there to meet them or explain how the day would proceed. They sat on benches in reception for a long time waiting for something to happen.[129] It appeared as if the middle school principal had not informed the elementary school of their testing for that day. They learned that nobody from the school or the post had been assigned to meet D.M. at the post security entry and check Mr. D.M. through to the school; apparently the elementary school principal and personnel had meetings to attend.[130] That principal eventually emerged from the head office, mentioned his meeting, and left Mother, aunt, and the girls to continue their wait.[131] D.M. was eventually located and Mother was told to sign him in. Mother objected, stating that would require her to be there all day to check D.M. out and to escort him while at the Army post.[132] Someone from the school eventually went to sign D.M. in from where he had been waiting.[133] A sibling was tested in the morning and Child was tested in the afternoon.[134]

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[123] *See* AC 0166 ("Yes, the school can finish the assessment on [Child and her sister], that should of been finished a couple of months ago. So go ahead and set it up for next week.") and AC 0167 ("Yes, you can plan on the assessor for next week.").

[124] AC 0167.

[125] Vol. IV, 213. This would include those tests requested prior to February 2006.

[126] *Id.* at 213.

[127] *Id.* at 211.

[128] Vol. III, 17.

[129] *Id.* at 21.

[130] *Id.* at 20-21.

[131] *Id.*

[132] *Id.* at 22, 34.

[133] *Id.* at 22.

[134] *Id.* at 28.

Mother and aunt left the girls alone during the testing.[135] They did not know what tests were to be administered under the service contract or what was otherwise planned, so the day was something of a mystery.[136] None of the correspondence preceding D.M.'s visit indicate Child's parents had any control over which tests were to be conducted or how they were to be administered; nor is there any indication that they were advised they had the power to request that D.M. perform particular tests.[137] With nothing to do, Child's mother and aunt simply left for the afternoon.[138] Neither at lunch, when D.M. was left to eat with the children in the cafeteria,[139] nor later in the day did a representative of the school check on its visitor. Dr. B. conceded that the school "dropped the ball" on how it handled its guests and their support of the evaluation that day.[140]

Not knowing what exact tests were administered that day, Child's mother was unaware that LMB only performed its usual battery and not the fuller spectrum contemplated by Dr. B.. Mother was also unaware that the additional tests she had sought, those contemplated in Dr. B.'s March 24, 2006, letter, and which Child's mother had agreed could be done by the school the first week of April, were not being administered by LMB either.[141] To date, they never have been administered.

On April 18, 2006, at the DoDDS middle school, D.M. gave Child's mother, aunt, and a psychologist from the elementary school (J.D.) a brief review of the prior day's testing.[142] He

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[135] *Id.* at 27-28.

[136] *Id.* at 28; *see also* Vol. IV, 40.

[137] Two messages from Dr. B. are difficult to reconcile with the school's argument that Child's mother was to work, or could work, with [D.M.] as to what tests would be administered. AC 0168, an e-mail from April 15, 2006, states – "I need you either to bring [Child] about 12:30 in the afternoon to [the DoDDS elementary school] for testing or send her with a note to give permission for her to go to the test session. [D.M.] will provide you with preliminary interpretation of testing on Tuesday at 11:00 a.m." No mention is made of any potential participation by Child's mother between the child's arrival and the follow-up meeting the next day. AC 0169, a letter dated April 15, 2006, states – "". . . [D.M.] of the [LMB] Centre . . . will come . . . to conduct the [IEE] which you requested for [Child]. . . . He will assess [Child] at 12:30 p.m. We have arranged for both students to be assessed at [Child's sibling's elementary school], so I will need you to bring [Child] to [the elementary school] for the test session or write a note to give her permission to go there herself." Again, there is no mention of Child's mother having any other role but getting Child to her sibling's elementary school on time for [D.M.]'s testing.

[138] Given Mother's zealous activism on behalf of her daughter throughout this process and through the due process proceeding, it seems extremely unlikely that she would have left the premises if she had any inkling she could make requests regarding LMB's testing.

[139] Vol. III, 28.

[140] *Id.*, at 23. Dr. B. discussed evaluator D.M.'s need for access to the school with this school's principal and delegated the responsibility of getting D.M. onto the post and to the school to the principal. Vol. IV, 143. Dr. B thought it was DoDDS-Europe's responsibility to assist in making arrangements to get the evaluator on and off property smoothly. She acknowledges that "somebody locally dropped the ball, and in fact, proceeded as [Child's mother]" described. Vol. IV, 144.

[141] Vol. IV, 213.

[142] *Id.* at 23-25.

generally explained what had been done, offering some preliminary scores.[143] He further explained that a final report would be sent to the school. When Child's mother asked for a copy of the report, he told her that since the school was paying for the test, whether she got a copy of the test was up to the school.[144] The elementary school psychologist concurred, stating Mother had no right to a copy of the report unless the school decided to give her a copy.[145]

On Friday, April 28, 2006, D.M. indicated to Dr.B. that he would have a pre-testing summary with recommendations and test scores e-mailed by the following Tuesday.[146] A pre-testing summary was prepared on Wednesday, May 3, 2006.[147] It was forwarded to Dr. B. sometime before May 26, 2006. It noted the tests administered and the scores, although it failed to report a few sub-tests, and lacked a meaningful narrative. The content of the report made it clear that LMB had performed less than a full battery on the most recent DTLA-4 and MJIII exams; the summary indicated one Woodcock Reading Mastery Test-NU (Word Attack) and three Detroit Tests of Learning Aptitude tests (DTLA-4, Word Opposites; from the oldest edition of the DTLA, Verbal Absurdities, fom the out-dated DTLA-2, and Oral Directions) only. The balance included sub-tests from the Slosson Oral Reading Test - R3, two from the Wide Range Achievement Test (WRAT) - 3, Gray Oral Reading Test (GORT) and four from the Gray Reading Test - 4 (GORT-4),[148] Lindamood Auditory Conceptualization Test - 3, Symbol Imagery Test, and four Tests of Written Language - 3.[149] Percentile scores ranged from as low as the 13th to 84th. On May 26, 2006, Dr. B. explained the delay to Child's parents. She also noted that she was scheduling D.M. to discuss the assessment results at the next CSC meeting for Child.[150]

The final report was sent to Dr. B. by LMB's D.M. on June 9, 2006.[151] The scores in the former are substantially the same as in the latter, and the latter holds few surprises based on the preliminary version.[152] The final report, however, has the fuller narrative and was meant to serve as Mother's challenge to the school's evaluation, hence providing her with some final input in the decision-making process. In that report, Child's performance ranged from the 13th to the 84th

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[143] *See, e.g.*, Vol. II, 290/

[144] Vol. IV, 24.

[145] *Id.*

[146] AC 0187.

[147] AC 0170-0174.

[148] One of the original reasons Child's mother wanted an IEE was because she wanted a GORT administered for Child, but she had been told by several sources the school could not perform a GORT. Vol. II, 286 (Dougherty). Witness J. Dougherty testified, however, that she could administer that test. *Id.*

[149] Dr. B. Expressed particular criticism on some of these tests. See.Tr. 202-203.

[150] AC 0189; *see also* Vol. IV, 230. ("Yes, I had contracted for and planned to have a follow up telephone consultation with Mr. D.M.. I believe you expected that that was going to happen within a CSC meeting."

[151] AC 0195; AC 0175-0186.

[152] The added narrative in the final report consists of a few sentences each on each sub-test, on each exam from which a sub-test had been used, and on the precise meaning of the score and percentile Child earned on each sub-test.

percentile, demonstrating strengths in contextual language, following directions, word attack, word recognition, spelling, and overall story writing. Her scores on other tests were within either low-normal or below the normal range for her age.[153] Neither the terms dyslexia nor dyscalculia are used in the report, nor is the assessment medically diagnostic. LMB methods and programs, however, are suggested to remedially address weaknesses in concept imagery as it applies to language comprehension and expression, decoding, sight word recognition, spelling and reading fluency, and approaches to address oral and written language comprehension, higher order thinking skills, and both verbal and written expression. Of lesser concern to D.M. were "inconsistencies with mathematical processing," which it concluded could be addressed later.[154]

Rejection of the IEE

Dr. B. examined the report's results.[155] She took them into account to determine whether they altered the results of the school's eligibility determination.[156] She found that the evaluation was not sufficiently comprehensive; its structure was such that it could not be meaningfully compared to the school's evaluation.[157] As conducted by D.M., the standard LMB evaluation led to a report that "did not have enough information to re-determine eligibility."[158] Had D.M. administered a complete DTLA-4, for example, it could have been used in part for "determining or reconsidering the eligibility determination for Child. Given what she had, however, she simply treated the results as additional information, as opposed to an assessment.[159] She concluded the results did not offer any new information that would alter or overturn the eligibility determination.[160] In so doing, she acted "on behalf of the school."[161]

Dr. B. also decided not to reconvene the CSC because she "did not see anything in the report that would alter the eligibility determination. I had cautioned the parents . . that it would not be a full and comprehensive evaluation, and therefore, we did not have enough information to re-determine eligibility."[162] Later she noted: "However, I do think it would have been beneficial to have a meeting

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[153] AC 0183.

[154] AC 0186.

[155] Vol. IV, 194.

[156] Vol. IV, 194-196.

[157] Vol. IV, 195-196.

[158] Vol. IV, 195.

[159] Vol. IV, 196.

[160] Vol. IV, 197.

[161] Vol. IV, 194.

[162] *Id.* at 194-195. *See also* DoDEA 2500.13-G at D-3 ("Instruments selected need to address the referral concerns and strategically match the student's characteristics. . . . Nevertheless, assessment in the suspected area of concern should be comprehensive. The assessment must be reliable and valid for the purpose for which it is being used

with teachers, to share the report and talk about what general education interventions could be placed for [Child], and I think it's still not too late for that, I want to say. As [Child] gets ready to go to her new school, I think this information could be shared at the next school and specific regular program interventions be made available to [Child]."[163]

On June 12, 2006, Dr. B. wrote to Child's parents and included a copy of the final LMB report. She stated: "Mr. [D.M.] interpreted the results of the evaluation to you on April 18, when he came to [Bavaria] to evaluate [Child]. We do not need to set up an additional meeting.[164] We are not going to write an Individualized Education Program for [Child] because the [CSC] determined that she is not eligible for special education. You chose the [LMB] as your Independent Education Evaluation for [Child] and DoDDS-Europe funded it. We have no intention to pay for an additional evaluation for [Child]. . . . You may wish to share the [LMB] evaluation results with [Child's] teachers next year to determine if she needs the accommodations that you [sic] requesting.[165] Students may be considered for accommodations through the general education program."[166]

A year later, on May 10, 2007, Dr. B. revisited the issue of the CSC eligibility determination and the results of the LMB evaluation.[167] In her letter to Child's parents, Dr. B. wrote:

> [T]he CSC concluded in February 2006 that [Child] was not in need of or eligible for special education services. Similarly, the results of the [IEE] that you chose to have conducted by [LMB] in April 2006 were considered by DoDDS. . . . When you requested an IEE, our recommendation was that you obtain a comprehensive evaluation from any of a number of qualified evaluator. . . You, in turn, focused exclusively on [LMB] as the provider of your requested IEE. We specifically admonished you that the LMB evaluation was not comprehensive in nature and recommended that you pick another more comprehensive evaluator. You nonetheless chose LMB to provide your IEE and DoDDS agreed to pay for it at

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and appropriate for the age group of the child being assessed. This is especially important for making eligibility determinations") and DoDEA 2500.13-G at D-4 ("A single sub-test score is not sufficient to report the presence of a processing deficit. There should be two or more sub-tests or a cluster of the processing area to corroborate the deficit along with evidence of educational impact. Corroborating evidence from the classroom teacher and other evaluators is necessary to establish a pattern of findings in the comprehensive assessment").

[163] Vol. IV, 232. (There is no indication whether these results were shared with R.P.)

[164] Dr. B. knew, upon receipt of the preliminary report, that complete Detroit and WJ-IIIs had not been administered, but had not previously indicated an inclination to cancel the post-assessment conference with LMB contemplated under the contract until June 12, 2006. She had last referred to such a meeting in her May 26, 2006, message. When specifically asked why that conference call never occurred, however, Dr. B. stated: "you never really came back and asked me for that again." Vol. IV, 231.

[165] Under regular circumstances, a parent with a new test result meets with a counselor and a SST, a student support team. Together they would convene and talk about what the student needs and what kind of interventions are available. Vol. IV, 231.

[166] AC 0196.

[167] Pet. Ex. 155A-B.

> your request. The preliminary LMB results were reviewed with [Child's mom] and the school psychologist in April 2006. When the formal and final report arrived, I provided it to you and to the school principal, *and also reviewed it myself on behalf of DoDDS. While these results were taken into consideration by each of the reviewers,* nothing in the LMB evaluation altered the conclusions previously reached by the CSC when [Child] was found ineligible . . . . (emphasis added)[168]

DISCUSSION AND CONCLUSIONS OF LAW

As noted, Child's original complaint sought not only review of the determination that she was ineligible for special education and related services, but of a number of other adverse incidents and decisions that were either predicated on the basic concept of FAPE, issues that would first require a finding that the child was eligible for special education, or on other bases beyond the scope of IDEA and beyond the jurisdiction of this tribunal. Consequently, the parties were advised to focus on the primary issue presented: Whether the CSC's determination that Child was not eligible for special education and related services was procedurally or substantively erroneous. Considerations under that general inquiry concerned whether the CSC's determination that the child did not have a "specific learning disability" was appropriate and supported by the evidence, and whether the Child's parents were precluded from participation in the process to the extent that they could not play an important part in the eligibility determination.

Chapter 1 of DoDEA 2500.13-G, at 1-7, sets forth the suggested procedural timetable of events culminating in an eligibility determination. Additional guidelines for a CSC are found at Chapter 5 of DoDEA 2500.13-G, which sets forth certain criteria used in the determination of whether a student has a specific learning disability under Criterion D: Learning Impairment. Both chapters lay out procedures that are consistent with the word and policy of both IDEA (2004) and DoDI 1342.12 (April 11, 2005), and neither sets forth considerations inconsistent with IDEA or DoDI.[169]

Procedurally, the facts show that the school and the CSC, with one exception, followed the time frames suggested at DoDEA 2500.13-G at 1-7 for completing the eligibility determination process. Indeed, more often than not, the school and the CSC acted well within the time frames suggested. One time frame, limiting the time between completion of an assessment and the convening of an eligibility meeting to ten school days, was not met. Instead, the eligibility meeting took place twelve school days after the assessment was completed. Those two excess days, however, did not cause harm or anything more than a *de minimis* delay in a process that, overall, was running ahead of time. In light of those considerations, and since the time frames are non-binding and do not give rise to any rights or remedies,[170] this failure does not represent a significant procedural error.

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[168] Pet. Ex. 155A-B. *Note:* The emphasized language is in contrast to the earlier claim that Dr. B. had acted on behalf of the school and not reconvened the CSC. While not irreconcilable, it remains unclear whether any members of the CSC were permitted review of the LMB results and who "the reviewers" were.

[169] As noted by the school, DoDEA 2500.13-G provides the guidelines for DoDI implementation.

[170] *See* Foreword to DoDEA 2500.13-G.

Consequently, no error in the school's execution of its procedural duties meriting action was identified.

As shown on the specific learning disabilities assessments grid, above, appropriate tests, evaluations, and assessments were administered. Although Child has argued that there are better tests, evaluations, and assessments or measures more directly related to her suspected disabilities of dyslexia, dyscalculia, and processing impairment, she failed to provide any evidence that the established and nationally recognized diagnostic tools used by the assessors and considered by the CSC were inappropriate or inadequate for making an eligibility determination under IDEA, DoDI 1342.12, or DoDEA 2500.13-G.[171] She also failed to show that any of the pertinent cluster scores placed her near, at, or below the 10th percentile in any area of academic achievement. Failing in her burden, and in the absence of any evidence the tools utilized were misrepresented or otherwise misused, no error was shown regarding the CSC's evaluation, assessment, and determination that Child does not have a specific learning disability or impairment under the applicable authorities.

The sole substantive irregularity demonstrated by Child mother concerns the ultimate consensus among the CSC, a committee comprised of eight individuals: Child, Mother, an administrator, the special education teacher serving as CSC chairperson, a counselor, a speech-language pathologist, school psychologist, and the one teacher who had Child in her classroom – R.P., the general education math teacher. During the due process hearing, much testimony was offered regarding the collegial team effort and discussion that culminates in an eligibility determination. They described the important give-and-take among participants prior to the ultimate tallying of individual decisions as to whether a student should be deemed eligible for special education and related services. This free exchange is considered so important that the CSC Chairperson is to make sure "there's no determinations made before the meeting."[172] Indeed, of all the topics addressed during the proceeding, it may well have been the one issue on which all who spoke of it were in agreement.

All CSC attendees fulfilled their CSC function in this regard except R.P.[173] R.P. admitted that she only briefly attended the eligibility meeting while she "was down during a break. . . . I was there long enough for me to be able to give my input, or relevant input."[174] Such input was limited to math and she reported that Child was an average student who was making progress. R.P. did not participate in discussions on placements or further diagnostic investigation, and could not have heard all positions or presentations; indeed, she conceded that she had not reviewed all the pertinent tests and evaluations before the committee. She would have also missed the discussion involving alternative interventions that would occur at the end of the meeting. Despite the fact R.P. was dismissed to return

[171] The consideration here is not whether there are other tests of debatably equal or better value, but whether those administered were inappropriate given the circumstances.

[172] Vol. IV, 200.

[173] Moreover, there is no indication that during this meeting or during this process Mother was precluded from meaningful participation.

[174] Vol. 1, 274.

to her teaching after only about 15 minutes into a meeting that lasted over an hour,[175] she submitted her questionnaire regarding whether the child should be designated as eligible for special education. This conflicts with what witnesses expressed as the usual protocol, formal or informal.

Assuming for the sake of argument R.P. might have changed her mind, decided Child had a specific learning disability, and should be eligible for special education and related services, her voice would only have joined those of Child and Child's mother. It would be conjecture to assume her changed viewpoint and input might have swayed others on the committee. At most, therefore, the CSC would have had a minority of three against the remaining five CSC members. In the absence of some facts tending to indicate that R.P.s' absence was a determining factor in the denial of eligibility or some showing that her full participation might have altered the outcome, her premature dismissal cannot be found to be so egregious as to constitute harmful error.[176]

It was Child's burden to show that the CSC's eligibility decision was procedurally or substantively flawed. While she capably demonstrated that a non-binding time frame was surpassed and that one teacher voted on the issue of eligibility well before the conclusion of the debate on that matter, neither error is sufficiently egregious to overturn the determination or remand the matter back for reconsideration. Consequently, the eligibility determination for the Child was procedurally and substantively proper. Any errors by the school are not sufficient to cause a denial of Child's rights under IDEA. Moreover, there is no indication Mother was precluded from participation in the process.

Post Eligibility Determination Issue

The parties were admonished to limit testimony and evidence to the time frame during when the eligibility determination took place through the end of the summer of 2006, in order to consider limited matters related to the final IEE.[177] Both parties, however, introduced and litigated facts which widened this scope of inquiry to an examination of the IEE process in its entirety. Consideration of that process is now ripe for discussion.[178]

Mother disagreed with both the determination Child was ineligible for special education and the evaluation upon which that determination was made. As a result, she exercised her right to request one of the procedural safeguards provided under IDEA, an IEE. That request was made on February 21, 2006, the same day of the eligibility determination. The school honored that request. Within ten days, Dr. B. suggested three independent evaluators, but Mother expressed a clear preference for

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[175] Vol. 1, 279.

[176] It should, however, give sufficient pause to the school to reconcile its policies and protocols in this area with its actual practices.

[177] Much testimony went beyond this time frame, *e.g.*, Witness H.R., who met Child in 2007.

[178] The school initially moved to strike discussion regarding whether the IEE was provided without unnecessary delay, whether the results were handled appropriately, and whether Child had a claim with regard to logistical control of the IEE. The issue regarding Child's having control over the execution of an IEE was struck; the rest remained outstanding. *See* Order of May 17, 2007. Factual clarification at hearing necessarily opened these issues to full review.

LMB. Dr. B. voiced her concerns that, among other things, LMB's results would not be based on a comprehensive examination and would, therefore, be inadequate as a model for comparison with the school's evaluation. Mother was insistent on using LMB, so Dr. B. contacted LMB's D.M. He assured her that LMB could administer complete Woodcock-Johnsons and Detroit evaluations as part of a LMB evaluation. Assured that comprehensive versions could be so incorporated, she had a contract arranged for LMB to conduct Child's IEE. Based on these facts, it is logical to conclude that Dr. B. contemplated that the LMB assessment would be made using the comprehensive versions of those exams. Were that not the case, there would have been no reason for her to obligate funds for an IEE that could not effectively serve its statutory purpose or that met neither DoDEA/DoDDS guidelines nor her professional expectations.[179]

To assure the independence of the LMB evaluation, Dr. B. requested the contract give the LMB assessor the choice of which exams would be administered.[180] Exercising that discretion, D.M. consequently chose not to address Dr. B.'s concerns and only administered the standard LMB battery. As a result, Dr. B.'s original intent to provide a LMB evaluation for Child only if it could meet the school's minimum expectations for an IEE was thwarted; the envisioned comprehensive evaluation for which she had contracted was not administered.[181] This did not occur because of some inaction on the part of Child's mother. Mother did not know she had any ability to suggest or dictate what tests D.M. would administer; she only knew to have her daughters at the school at specific times. It occurred because of the actions of, and poor communication between, the contracting parties.[182]

The parties knew which tests LMB's D.M. had administered by the morning following the testing. There is no basis to conclude, however, that Mother understood that what was administered was the standard LMB battery and would not meet Dr. B.'s or the school's expectations. Apprised of the same information, Dr. B. continued with plans to schedule D.M. to visit and discuss the assessment results at a CSC meeting. A month later, in full knowledge of the LMB results, Dr. B. wrote Child's parents an e-mail on May 26, 2006, stating: "We are in the process of scheduling D.M. to discuss the assessment results at the next CSC meeting for [Child]."[183] She did not indicate any

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[179] Indeed, throughout her testimony, Dr. B. intimated that the customary LMB evaluation was virtually useless for use in, or incompatible with, a DoDDS eligibility determination. *See*, *e.g.*, Vol. IV, 130-132.

[180] Inasmuch as the services contract was not available for ready viewing by Mother, only potentially available through a FOIA request, it seems odd that such a clause would be so stipulated, especially in light of Dr. B.'s overriding concern that comprehensive, full battery administrations of the tests be used, and her efforts to allay her concerns.

[181] No individual was named as the representative who drafted the contract or identified as having responsibility for quality control, so it is unknown why some contractual effort was not made to make sure the results met some minimum of standards, such as those discussed by Dr. B. The only reference to that issue is Dr. B.'s comment that she has official responsibility to make sure that her contractors follow the contract. *See* Vol. 14, 209, *supra*, note 117. Similarly, no explanation was given as to why this issue was not pursued when the school first received the LMB results.

[182] As Dr. B. noted, someone clearly "dropped the ball" that day: the elementary and middle school principals for not having made the elementary school more accommodating and the school for not having informed Mother that she had any ability to work with D.M. or to request that specific tests be performed in certain ways.

[183] AC 0189.

change in her plans to reconvene a CSC meeting with D.M. in her May 30, 2006, e-mail,[184] or in response to subsequent e-mail from Mother.[185] Instead, on June 12, 2006, Dr. B. sent a bluntly worded e-mail in response to a June 7, 2006, message. In that e-mail, Dr. B. wrote that no further meeting with D.M. would be held because he had already met with Child's parents in April 2006.[186] She stated that an IEP would not be prepared because the CSC had already determined Child to be ineligible for special education, that Child's parents had chosen LMB for the IEE, and that DoDDS-Europe had paid for it. She closed by suggesting that the parents may wish to share the results with Child's teachers the following year.

The following year, on May 10, 2007, Dr. B. wrote a letter to Child's parents revisiting the LMB results. In that letter, she again put the responsibility for having chosen LMB on the parents, reminding them of her admonishments that the LMB "evaluation was not comprehensive in nature" and that they should consider "another more comprehensive evaluator."[187] She noted that she had personally reviewed the LMB results on behalf of DoDDS. She then remarked that "the results were taken into consideration *by the reviewers*, nothing in the LMB evaluation altered the conclusions previously reached by the CSC. . . ." (emphasis added).[188] This latter phrasing is at odds with her testimony, which can be interpreted to suggest that she alone had considered whether the LMB results altered the results of the eligibility determination – "acting on behalf of the school"[189] – and her June 12, 2006, e-mail, which can be read as suggesting that the CSC was no longer involved.

Although Dr. B.'s about-face with regard to both D.M.'s return visit and a formally reconvened CSC meeting are within her powers, her authority regarding a final IEE is not unqualified. The facts indicate she unilaterally decided that Child's LMB results did not warrant CSC consideration. Moreover, while case law has permitted CSC review in less formal ways than the reconvening of the entire team, the weight of the contemporaneous evidence and testimony rendered under advisement of 18 U.S.C. § 1001 suggests no CSC members considered the LMB results.

In its Summary Closing, the school argued that the CSC, *per se*, did not need to review the IEE. It cited to six cases, including *Evans v. Dist. No. 17 of Douglas Cty*, 841 F.2d 824, 830 (8th Cir. 1988) ("where the IEE was read by the public school's agent, the IEP team did 'consider' the IEE"). Those cases, however, are distinguishable on four particular grounds. First, those cases are not

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[184] AC 0191.

[185] AC 0192 and AC 0194.

[186] The contract provided: "A written assessment report and verbal interpretation of the findings, either telephonically or in person while on site, will be required to be delivered to parents and to DoDS (sic) Europe staff members." IV, 141. From this wording, it is hard to discern whether the verbal interpretation could be independently given with the initial oral findings, or was, as Dr. B.'s earlier correspondence and actions would indicate, to accompany the written assessment.

[187] Pet. Ex. 155A-B.

[188] Based on this language, it cannot be discerned whether "the reviewers" were the CSC, the assessors, the special education department, or some other group.

[189] Vol. IV, 194-196.

controlled by IDEA as administered by DoD's regulations. They are controlled by state regulations adopted consistent with the U.S. Department of Education's more expansive 34 C.F.R. Part 300. Second, they involve students who previously had been deemed eligible for special education and were studying under an existent IEP, not requesting an IEE for initial eligibility consideration. Taken together, these two facts are significant. Inasmuch as 34 C.F.R. § 533(b) explicitly provides that an IEP evaluative team[190] may conduct its review without a meeting,[191] the evolution of such regulations through case law is not surprising. This is particularly true in those cases where the initial IEP had already been in place for over a year and the case involved reevaluation. Third, how the evaluations at issue were handled after they were received by the school was not in debate in those cases; here, what was actually done with the LMB results and whether they even constituted an IEE remains unclear, as discussed *infra*. Fourth, and most importantly, 32 C.F.R. Part 57 is controlling in this matter, not 34 C.F.R. Part 300. The DoD regulations explicitly dictate that "the DoD school system, the CSC, and a hearing officer appointed under this part *shall* consider *any* evaluation report presented by a parent."[192] Barring language to the contrary, this would include consideration of a parentally requested IEE.[193] Consequently, a unilateral determination by an individual acting on behalf of the school, which barred or precluded the CSC from considering the LMB results, would be a clear procedural violation impeding Mother's statutory right to an IEE and a circumvention of the IDEA procedural safeguards. It would also be at odds with the clear language of 32 C.F.R. Part 57, Appendix F at § B(9) and DoDI § E8.2.9.

The issue of whether the CSC considered the LMB results is moot, however, if the LMB results do not truly constitute an IEE. LMB was contracted to perform the IEE after Dr. B. resolved her reservations as to LMB's capabilities. In executing the contract, LMB's D.M. chose to ignore her concerns and limited testing to the standard LMB battery. Consequently, the LMB results now constitute the purported IEE. The facts, Dr. B.'s testimony,[194] and the LMB reports, themselves, raise issues as to whether the LMB results are amenable to application as an effective procedural safeguard in the context of a DoDEA/DoDS eligibility determination. This begs the question of whether the LMB results report actually comprises an IEE as defined by IDEA and as envisioned by DoDI and DoDEA 2500.13-G, or whether it is merely an educational evaluation that was independently conducted.

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[190] 34 C.F.R. § 344.

[191] 34 C.F.R. § 533(b). For a similar incongruity compare DoDI 1342.12 (April 11, 2005) at § E4.3.1.2 ([shall] convene a meeting) with 34 C.F.R. § 300.534(a)(1).

[192] 32 C.F.R. Part 57, Appendix F at § B(9)(emphasis added).

[193] DoD through 32 C.F.R. explicitly provided for this mandatory language; 34 C.F.R. Part 300 did not.

[194] *E.g.*, A standard LMB evaluation simply does "not have enough information to re-determine eligibility." Vol. IV, 195.

IDEA specifically embraces the IEE as a procedural safeguard for parents.[195] It is the tool that parents can request when they disagree with a school's evaluation of their child.[196]As such, it is a way to assure that a parent's voice is made part of the final decision-making process. Upon request, the school must either initiate an impartial due process hearing to show that its evaluation is appropriate or ensure an IEE is provided at the school's expense.[197] If the request is honored, the administration of the IEE must meet DoD standards governing persons qualified to conduct an education evaluation.[198] Instruments selected need to address the referral concerns and strategically match the students characteristics.[199] "Assessment in the suspected area should be comprehensive. It must be reliable and valid for the purpose for which it is being used and appropriate for the age group of the child being assessed. This is especially important for making eligibility determinations."[200] Once developed, the independent results can be effectively compared to those derived by the school.

The evidence shows that the standard LMB evaluation is designed to identify student weaknesses. Based on those identified weaknesses, LMB's programs can be prescribed to help the student in those areas. This is consistent with LMB's stated purpose that it wants students to "achieve their full learning potential through instruction in [its own] programs. That is why we exist."[201] The purpose of the regular LMB assessment, therefore, has nothing to do with identifying specific learning disabilities in the context of an eligibility determination or as a tool to challenge or compare a school's evaluation performed within that context.[202] Indeed, many of the sub-tests chosen by LMB to comprise its battery of tests appear to have been understandably extracted from fuller evaluations in an attempt to best align their assessment with their programs. While useful for LMB's purposes, the standard LMB battery does not comply with DoDDS guidelines or fulfill the needs of an IEE. The piecemeal nature of the LMB exam leads to piecemeal results that make it nearly impossible to look for patterns within test results or clusters, as is the DoDDS practice. As a result, the standard LMB evaluation and results do not suitably provide Mother with a tool by which she can compare and measure the school's evaluation, which is the purpose and function of an IEE under IDEA.

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[195] The Supreme Court addressed these "procedural safeguards in" *Burlington Sch. Comm. V. Mass. Bd. of Ed.*, 471 U.S. 359, 364 (1985), in its discussion of the Education of the Handicapped Act, of which IDEA is the latest amendment. The court noted that Congress recognized that its intent that schools and parents work cooperatively under the Act would not always produce a consensus; it also recognized that in any disputes, school officials would have a natural advantage. Consequently, "Congress incorporated an elaborate set of 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." It also noted that the those procedural safeguards are "largely for the benefit of the parent and child."

[196] *Id.* at § B(8).

[197] *Id*. at § B(8)(i)(A) and B(8)(i)(B).

[198] *Id.* at § B(8)(iii)(C)

[199] DoDEA 2500.13-G at D-3 (Question 9).

[200] *Id.*

[201] *See* note 96, *supra*.

[202] The basic LMB evaluation does "not have enough information to re-determine eligibility." Vol. IV, 195.

In the end, the final LMB report even fails to specifically address Mother's two primary referral concerns by name. Granted, one could review the scores and argue that they do not indicate the presence of a specific learning disabilities, despite those sub-scores that fell below the normal range for her age and the one in which she was in the 13th percentile. To do so, however, would be conjecture, especially given the LMB tests' limited purpose and application, and DoDDS own guidelines. It would also be conjecture to conclude a reevaluation conducted as Dr. B. contemplated would necessarily fail to show error in the school's evaluation or reveal results that could sway the CSC.[203]

The ultimate points, however, are 1) this is not the test for which Dr. B. contracted and obligated school funds and 2) since the LMB evaluation cannot perform its function as a procedural safeguard – an independent evaluation through which Mother could participate in the decision-making process by providing a model for comparison to the school's evaluation – it does not comprise an IEE as contemplated by IDEA. As a result, the school failed to provide a timely IEE, Mother's request for an IEE has yet to be fulfilled, and Mother's ability to participate in the final decision-making process has been impeded.

Taken together, it is clear from Dr. B.'s actions and testimony that it was her sincere aim to have LMB provide an evaluation that met DoDDS minimum criteria and would lead to an effective IEE for Mother. It is disingenuous for the school to deflect fault on to Mother, arguing that Mother's inaction with D.M. is the reason why the tests were not comprehensively administered and cannot fulfill their function as an IDEA IEE. The root of the problem goes back to the original services contract, poor quality control by the school, and poor communication on the part of the school, its representatives, and LMB; that problem continued up to, and including, the time the school received less than that for which it contracted and paid.

Once Mother made her request, the school was legally bound to either initiate a due process hearing to show its evaluation was appropriate, or ensure an IEE was provided to the parents for free and in compliance with certain criteria.[204] Given what it received from LMB, the school, albeit unknowingly, did neither. In providing Child with less than the originally requested statutory tool, as provided under IDEA, the school denied Mother's right to an IEE; it also significantly impeded her opportunity to contest the school's evaluation and thereby fully participate in the decision-making process as to whether her daughter should be determined eligible for FAPE.[205] In doing so, the school violated IDEA and the applicable DoD regulations and instructions.

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[203] Given LMB's own statement that "We want children to achieve their full learning potential through instruction in our programs. That is why we exist" (note 98, *supra*), Dr. B. was understandably weary of Mother's choice. LMB's mission seems clear. In its regular course, LMB is not generally in the business of developing diagnostics for third party use. D.M., however, indicates LMB testing formats can be tailored to meet the school's particular needs.

[204] *See* 32 C.F.R. Part 57, Appendix F at § B(8)(i) – § B(8)(iii) and DoDI1342.12 (April 11, 2005) at §E8.2.8.

[205] *See* 20 U.S.C. 1415 § E(ii) as to procedural violations; as to a denial of right, see those sections and DoD regulations addressing the IEE as a procedural safeguard (*ie*. DoDI 1342.12 (April 11, 2005), Encl. 8, at § E8.2.8.1).

I have considered this matter fully, in light of all facts, documents, and testimony taken into evidence, whether or not specifically referenced herein. My decision of the case is based on the Petition and Amended Petition(s), the Answer, the written transcript of the hearings and exhibits admitted into evidence, pleadings, correspondence, and literature, comprising the record, as instructed by DoDI 1342.12 (April 12, 2005) at § E9.4.14. This includes due consideration of the Closing Briefs. With regards to the eligibility determination, I find for the school and against Child, for failure to demonstrate genuine substantive or procedural error. With regard to the IEE, and mindful of my authority in these matters, including, but not exclusively limited to, those noted at 32 C.F.R. Part 57, Appendix F, at § B(9) and DoDI 1342.12 (April 11, 2005), Encl. 8, at § E9.4.11, I find for Child for the aforementioned reasons.

The clearest remedy to this situation is for DoDDS to extend to Mother another opportunity for a free IEE,[206] contracted in such a way that Dr. B.'s initial reservations and all DoDDS and district criteria for what a meaningful and proper IEE should be are met.[207] This should include administration of those sub-tests which still have yet to be performed. Upon completion, that IEE should be reviewed by an appropriately designated CSC at Child's new school for consideration of eligibility for special education and related services, Should the child not be found so eligible, the results should be used for consideration of meaningful remedial intervention opportunities and reassessment of any such remedial interventions then currently in place.

FORMAL FINDINGS

Formal findings regarding the issues identified from Child's complaint, as amended and restated, and argued at a May 21, 2007, through May 24, 2007, due process hearing in Germany are:

Issue I (Eligibility Determination) FOR RESPONDENTS

Issue II (Independent Educational Evaluation) FOR PETITIONER

DECISION

Mother and Child failed in their burden to demonstrate the school erred, procedurally and substantively, in reaching Child's eligibility determination. By eliciting facts and evidence demonstrating error on the part of the school and its contractors, however, Mother demonstrated sufficient evidence that the school erred in its obligation to provide her with the requested independent educational evaluation. Consequently, Respondents are ordered to extend to Child the

[206] If Child subsequently had, or is having, another independent evaluation, the school may consider reimbursing Mother for that testing, adopting it in lieu of a new IEE, and using it for the consideration herein described.

[207] Mother is urged to consider an evaluator capable of an evaluation complementary to DoDEA 2500.13-G at D-3 standards and can provide results amenable to a comprehensive comparison with the school's evaluation.

opportunity to seek a free independent educational evaluation, the results of which are to be considered as noted above.

SO ORDERED.[208]

Arthur Marshall, Jr.
Hearing Officer