KEYWORD: Special Education

DIGEST: The Judge's findings and conclusion that Respondent properly identified the nature both of Petitioner's communication problem and his learning disability are supported by the record evidence. The record does not support Mother's contention that Petitioner had not made progress under his IEPs. The weight of the record evidence supports the holding of the Judge that Respondent did not deny Petitioner or his parents their procedural rights in developing his special education program. Furthermore, the weight of the record evidence supports the holding of the Judge that Respondent did not deny Petitioner a FAPE, in accordance with IDEA, *Rowley*, and the Instruction. There is a presumption that administrative decision makers, including Administrative Judges employed by DOHA, act with the appropriate degree of impartiality.

CASENO: E-07-002

DATE: 07/25/2008

DATE: July 25, 2008

In Re:	)	
-------------by his parent	)	Case No. E-07-002
Petitioner	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT
Pro Se

Administrative Judge Arthur E. Marshall, Jr., issued a decision in Petitioner's case on March 27, 2008, in which he held that the Respondent School District had not denied Petitioner, who is learning disabled, a Free Appropriate Public Education (FAPE) and had not denied Petitioner or his parents their procedural rights, in accordance with the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq*) and Department of Defense Instruction 1342.12, *Provision of Early Intervention and Special Education Services to Eligible DoD Dependents,* April 11, 2005, (Instruction). Petitioner appealed this decision, in accordance with Instruction ¶ E9.9.

Petitioner has submitted the following issues on appeal: whether the Judge erred in concluding that Respondent had provided Petitioner a FAPE; whether the Judge was biased against Petitioner; whether the Judge violated Petitioner's due process rights during the hearing; whether the Judge erred in his credibility determinations; and whether the Judge erred in his weighing of the evidence. Finding no error, we affirm the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact:

Petitioner is the son of a DoD civilian employee and was born in 1999.[1] He previously attended a civilian public pre-school in 2003-2004, where he was educated under an Individualized Education Program (IEP)[2] devised to address communication impairment. Tests had found that he had difficulty discriminating sounds and difficulty with the phonological aspects of language development. His articulation and communicative difficulties were readily apparent when he entered Department of Defense Dependents Schools (DoDDS).

Finding the child's incoming IEP inadequate, the DoD school modified his IEP on September 29, 2004, and Petitioner's mother (Mother) signed a consent for the school to conduct an initial eligibility assessment to determine the child's eligibility for special education under Department of Defense Education Activity (DODEA) criteria. It was determined that the child's difficulties with

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[1]Petitioner is a minor. His mother, and to a lesser extent his father, acted on his behalf throughout the evaluation process and subsequent due process hearing.

[2]*See* Instruction ¶ E2.1.37. An IEP is a "written document defining specially designed instruction for a student with a disability, ages 3 through 21 years, inclusive."

spoken language were the result of phonological issues and not a basic speech defect.[3] On November 17, 2004, a DoD IEP was developed setting forth a highly individualized special education program under Criterion C, Communication Impaired, Language Phonology eligibility.[4] Expert testimony showed that the school's determination that the child needed stronger oral language skills appropriately addressed his significant deficits at the basic stage of literacy. Expert testimony also established that the IEP goals and objectives were appropriate.

Shortly thereafter, Mother began to request modifications to the IEP, and expressed concerns about the child's progress, including his difficulty with the alphabet. A Case Study Committee (CSC)[5] met on February 2, 2005, wherein the school proposed new pre-academic goals and objectives for the IEP, as Mother had requested. Those modifications were drafted into the child's IEP. Mother also requested a written guarantee that the child would be completing his goals at a 90% success rate by the end of kindergarten. The school explained that it was inappropriate to guarantee a specific level of growth within a specific time frame. Mother initially declined to sign the IEP, but eventually did so on February 17, 2005, after subsequent CSC meetings where the school explained the child's progress and addressed the parents' concerns. At about this time, Mother requested that the child be formally evaluated for dyslexia.

As the 2004-2005 academic year continued, it became apparent that Mother's understanding of what was academically appropriate or common practice for addressing her son's learning disability was often at odds with the approaches developed by the school's general and special educators, leading her to conclude that the Respondents were offering IEPs that failed to provide what she considered a FAPE. Although the school did, in some situations, incorporate Mother's requests despite their own misgivings, disagreements persisted. The school explained its position that an evaluation for dyslexia was not necessary to provide the services the child needed at this pre-school level.[6] It did, however, agree to provide another comprehensive evaluation. Mother unilaterally obtained an independent evaluation from a renowned learning center (LC), and in a CSC meeting held on April 27, 2005, she requested her child be taught from her list of specific methodologies. The school's position was that the child's educational needs were being served

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[3]Phonology refers to the sound system of language. It includes speech sounds (*e.g.*, consonants and vowels) and rules to put sounds together into meaningful words. Respondent Exhibit P-6, Early Literacy Foundations, at 5.

[4]*See* DoDEA 2500.13-G, *Special Education Procedural Guide* (Guide), September 2005 as revised, at 5-12: "Language/phonological disorders are characterized by an impairment/delay in receptive and/or expressive language including semantics, morphology/syntax, phonology and/or pragmatics. This impairment does not include students whose language problems are due to English as a second language or dialect difference."

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

[6]An expert witness called by Respondent, referred to below as Witness C, testified that "an information processing disorder rooted in a phonological deficit," and dyslexia, are roughly similar in meaning. Tr. at 609.

through a program equal to or more comprehensive than the LC based methodologies Mother was now convinced her child required.

After an additional assessment, the school concluded that the child was eligible for special education and related services under not just Communication Impairment but also under Criterion D, Specific Learning Disability.[7] An IEP was developed based on the newly identified co-designations, and the Petitioner signed it for the upcoming 2005-2006 school year. During the summer of 2005, extended school year (ESY) services were provided using LC methods, in part. With slight revision, the IEP was implemented on September 14, 2005. The record, as confirmed by the expert witness, established that the execution and the content of the IEP were appropriate, that parental input was notably considered, and demonstrable progress was achieved under the IEP. In December 2005, the child's pediatrician reviewed the May 2005 IEP which had served as the basis for the September 14, 2005, IEP and confirmed that the plan was appropriate. Another professional who assessed the child in the spring of 2006 and reviewed his academic records concluded that the IEP contained appropriate goals and objectives that met the child's needs. If anything, she found parts of the plan to be too ambitious, not inadequate.

Mother continued to make numerous requests to revisit and change the IEP. One of the things she repeatedly requested was a referral to an audiologist for central auditory processing disorder (CAPD). The school concluded (and Respondent's expert witness subsequently concurred) that referral testing was unnecessary and premature, because the IEP was already addressing the child's auditory processing issues and because of his age (seven) he was still developing his language and auditory processes.[8] In February 2006, Mother continued her demands for numerous assessments of the child. She also requested that her child only be taught using the Orton-Gillingham methodology and that he be assigned a private tutor. The school found the additional assessments unnecessary but accommodated the parent by giving her a parental permission form for obtaining a requested auditory discrimination assessment. Mother rejected the proffered test and requested a phonological processing assessment and other supplemental assessments. In the meantime, without consultation with or notification to the school, Petitioner transported the child to a state university (SU) in the United States for testing and evaluation in April 2006.[9] Despite some testing and environmental flaws, that evaluation confirmed the child's improvement in several areas as well as the fact that the school's intervention strategies under the September 2005 IEP were

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[7]*See* Guide at 5-18. Also described as a "specific learning impairment," this refers to a "disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language that may manifest itself as an imperfect ability to listen, think, speak, read, write, spell, remember, or do mathematical calculations." Instruction ¶ E2.1.73.

[8]Witness C testified that audiologists prefer to wait until a child is nine or ten years old before testing for CAPD. Tr. at 618.

[9]Respondents were not provided this study until it was produced by Mother for the first time during the discovery process.

working. The school continued to negotiate as to what was appropriate and then conceded to Mother's requests and provided the assessments in May 2006.

A May 23, 2006, IEP meeting was convened primarily to discuss the completed assessments. Overall, the CSC was able to show that the child was demonstrating progress in the skills addressed in the September 14, 2005 IEP. The child's poor performance with regard to grade equivalents on some tests was noted as contrary to his overall in-class progress, but it was explained that assessment results can fluctuate from day to day and are not always good measures of progress (a proposition with which Respondent's expert witness concurred). The noted improvements led the speech language pathologist to move the child forward to an updated IEP comprised of new semantic skills goals, reduced use of imitation, and increased independence. Respondent's expert noted that this IEP contained all requirements for a proper IEP and concurred that the goals and objectives were appropriate. She echoed that the progress made at this point in time was demonstrable and stated that it fit the usual pattern of gradual skill building and periodic breakthroughs generally noted in children with similar disability profiles. At the May 23, 2006 IEP meeting, Mother was not convinced of the child's progress or the appropriateness of the IEP. She refused to sign it. During negotiations following the meeting, Mother set forth with specificity her own objectives and goals.

At a June 6, 2006 CSC meeting, a new draft IEP was presented which listed the school's and Mother's proposals side-by-side so Mother could readily see where her input had been adopted. Mother still declined to sign the proposed IEP, even though it included a number of her proposals, including a requirement that at least 50% of the child's instruction would be in the Orton-Gillingham methodology preferred by Mother. Instead, she submitted a lengthy request for services that now included a provision that six to eight hours a day would be devoted to simultaneous instruction under multiple methodologies of her selection. She also requested more evaluations and reimbursement for the SU evaluation. Additionally, she expected that measures of progress toward a specific grade level would be assessed through formal assessment by her selected "independent agent" in the U.S.

After the meeting, Mother inquired as to whether the school was going to adopt her IEP proposal. The school responded on June 21, 2006, and declined to reimburse Mother for her expenses in unilaterally obtaining the SU evaluation. The school also questioned the need for further testing and expressed reservations about the intensity of Mother's proposed program in terms of hours per day of reading instruction. It noted that the number of hours proposed by Mother were in excess of the normal school day. The school did agree to insert the LC program into the IEP as ESY. With the LC program now guaranteed within the IEP, Mother dropped her other demands and signed the IEP on June 26, 2006. In doing so, however, she stated the clear reservation that "the IEP signature will not be any good after 90 calendar days," thus attempting to nullify the IEP after the summer session was provided. The child received a summer LC session.

The school indicated that it was prepared to deliver LC services to the child in autumn 2006 if the CSC concluded it was appropriate. After inquiry, however, LC informed the school that it would not be consistent with its methodology to deliver LC and Barton Reading simultaneously. This guidance was clearly inconsistent with some of Mother's earlier requests for specific methods of instruction for the child.

On September 5, 2006, shortly after receiving an invitation to an IEP modification meeting, Mother wrote the school that she would remove, but not withdraw, the child from school in ten days. She wrote that the child was being removed, in part, for the school's failure to convince her the child had made measurable growth and for not using the programs Mother believed were the most effective. Respondents offered to provide Mother with materials to support home-schooling, which she later declined. They also encouraged Mother to return the child to school. The CSC prepared a draft IEP to be presented at a September 22, 2006 progress review. Like all the other offered IEP drafts, this draft met the core requirements of the IDEA and the Instruction. At the request of Mother, it also included recommendations made by LC's summer services provider. Mother attended the meeting and participated in the discussion, but ultimately declined to sign the IEP. To date, neither parent has signed the IEP and the child has not returned to school. He has been home-schooled by Mother with some outside educational support.

Mother filed a request for Due Process on December 26, 2006, and filed an amended petition on March 12, 2007. The hearing took place from September 10 to September 13, 2007.

Discussion

The Instruction implements policy, assigns responsibilities, and prescribes procedures under the IDEA.[10] The Instruction mandates a FAPE, "including special education and related services for children with disabilities enrolled in the DoD school systems . . ."[11] The Instruction sets forth policies and procedures for evaluating students for potential learning impairment.[12] It affords parents the right to participate in the evaluation process and in IEP development.[13] It also affords them rights to obtain independent evaluations and to challenge adverse determinations through a due process hearing.[14] The Appeal Board is responsible for conducting appellate review of due process

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[10]Instruction ¶ 1.1.

[11]Instruction ¶ 1.1.3. *See Board of Education v. Rowley*, 458 U.S. 176, 201 (1982). "The statutory definition of 'free appropriate public education' . . . expressly requires the provision of 'such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education' . . . .We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *See also Hjortness v. Neenah Joint School District*, 507 F.3d 1060, 1065 (7th Cir. 2007) (An IEP should provide a child with "some meaningful educational benefit"); *JSK v. Hendry Country School Board*, 941 F.2d. 1563 (11th Cir. 1991).

[12]*See* also Guide, *supra,* note 4. This document serves as "a reference manual to aid administrators, area and district personnel, and local [CSCs] in performing their assigned responsibilities." Guide at 1-1.

[13]Instruction ¶ E4.4.7. "The CSC shall afford the child's parents the opportunity to participate in every CSC meeting to determine their child's initial or continuing eligibility for special education and related services, or to prepare or change the child's IEP or to determine or change in the child's placement."

[14]*See* Instruction ¶ E9.4. *See also Schaffer v. Weast*, 546 U.S. 49, 58 (2005). In a due process hearing, "the burden of persuasion lies . . . upon the party seeking relief."

hearings.[15] The Board employs a *de novo* standard of review, giving due deference to the Judge's credibility determinations and resolution of conflicting evidence.[16]

A. Whether Respondent denied Petitioner a FAPE

In Petitioner's appeal submission,[17] Mother asserted that the Judge erred in holding that Respondent had provided Petitioner a FAPE. Among other things, she asserted that the school had not properly identified Petitioner's learning disorder, the IEP was not appropriate to his special education needs, and Petitioner's parents were not permitted to have meaningful input into his IEP. The Board finds that these assertions are not supported by a weight of the record evidence.

1. Sufficiency of Respondent's Assessment of Petitioner

As stated above, the Judge found that Respondent assessed Petitioner as having a communication impairment as well as a specific learning disability. The Judge's findings and conclusion that Respondent properly identified the nature both of Petitioner's communication problem and his learning disability are supported by the record evidence. For example, Witness A, an expert who performed assessments on Petitioner, testified that he had a "phonological processing deficit," which affected his communicative and his learning skills.[18] Witness B, a special education coordinator for the district in which Petitioner's school is located, testified that he had difficulty in speech intelligibility as well as a "language based learning disability, phonological awareness."[19] She stated that DoD testing established that Petitioner was eligible for special education services under the categories both of communication impairment and specific learning disability.[20] Witness C, an expert in special education who was not connected with the DoD,[21] agreed with Respondent's

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[15]Instruction ¶ E9.9.

[16]*See* Case No. E-07-003 at 5 (App. Bd. Jun. 26, 2008); DDESS Case No. E-03-001 at 4 (App. Bd. Jan. 20, 2004); DoDDS Case No. E-99-001 at 5 (App. Bd. Feb. 8, 2000).

[17]Petitioner's Mother, who is *pro se*, alleges various facts and propositions throughout her 37 paragraph brief, rarely citing to a transcript page number, an exhibit number, or a document date. The Board, making allowances for her *pro se* status, made substantial efforts to identify the referenced subjects or sources. We believe that we were successful considerably more often than not. Nonetheless, lack of specificity with regard to Petitioner's claims on appeal remains a significant problem (especially given that the record in this case is several thousand pages long and the Board has a responsibility to issue a timely decision) as does lack of sufficient specific citation to record evidence to support a claim.

[18]Tr. at 49.

[19]Tr. at 70, 80. This witness supervises special education in 23 schools in her assigned district. She became involved in Petitioner's CSC meetings and IEP discussions. Tr. at 65.

[20]Tr. at 80.

[21]Witness C hold a Master's degree in Speech Pathology and a Doctorate in Education. She is licensed as a speech and language pathologist by the American Speech Language Association. She runs a speech language clinic and has published in the area of speech, language, and literacy. Her expertise includes phonological awareness "and its effect

assessment that Petitioner suffered from communicative and learning disabilities rooted in phonology, in that he had difficulty in perceiving and manipulating "the speech sounds of our language."[22] She gave as an example Petitioner's habit of "fronting," that is, using sounds made at the front of the mouth for those that properly are made at the back, i. e., using a "t" instead of a "k" sound, thereby rendering the word "car" as "tar."[23] This expert had reviewed Petitioner's entire record prior to the hearing[24] and identified no error in Respondent's assessment of Petitioner's communication and learning impairments.[25] Her testimony does not support Petitioner's view that Respondent failed correctly to identify his problems. The weight of the record evidence supports a conclusion that the assessments Respondent performed on Petitioner were conducted properly.

2. Sufficiency of IEP Provided by Respondent

Likewise, the record does not support a conclusion that the Judge erred in holding that Petitioner's IEP met the requirements of the IDEA and of the Instruction. The Board has considered the Judge's decision in light of the entire record, paying special attention to the testimony of Witness C, whose professional expertise and knowledge of Petitioner's record were clearly established. This testimony included the following: "Q: When you look at [Petitioner's] initial IEP . . . and the IEPs that subsequently followed . . . did those IEPs address [Petitioner's] structure of language and language disability? A: Yes, they did. They had specific goals that were addressing his phonology, his speech intelligibility piece . . . specific goals to improve his understanding of words; word associations and categories, those kind of things."[26] "Q: . . . And in so doing were they addressing his phonological processing appropriately in your expert opinion? A: Yes."[27] "Q: . . . [W] were the IEPs that were developed and offered in September 2005, June 2006, and September 2006 . . . reasonably tailored to enable a child with [Petitioner's] specific type of learning disability to move forward in the general curriculum? A: Yes. They were addressing his speech language issues. They were addressing the early literacy and early reading issues, which were being compromised by the

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on developing literacy skills . . ." Tr. at 541 - 543.

[22]Tr. at 574.

[23]Tr. at 565.

[24]Witness C testified that, prior to the hearing, she reviewed Petitioner's records from his previous school, to include progress reports and written communications from the special education teacher; assessment reports and related documents for his DoD eligibility determinations; various achievement tests, including ones obtained by the parents; auditory assessments performed on Petitioner; assessments obtained by the parents at SU and in Europe; and the IEPs prepared by Respondent. Tr. at 546 - 548.

[25]Tr. at 550.

[26]Tr. at 562.

[27]Tr. at 563.

way that his brain was processing information."[28] The testimony of Witness C is consistent with the weight of the other record evidence, which supports a conclusion that Petitioner's IEPs[29] were reasonably calculated to provide Petitioner with the educational benefit contemplated by IDEA, *Rowley*, and the Instruction.

Mother contended that Petitioner had not made progress under the IEPs fashioned by Respondent. While progress is not an explicit criterion set forth in the law, it is relevant to the question of whether Petitioner has received meaningful educational benefit and, therefore, whether his IEPs met the requirements of the law. The record does not support Mother's contention that Petitioner had not made progress under his IEPs, including the one dated September 2005, which was the last one to be signed by his parents.[30] For example, Witness A testified as to the progress Petitioner made during his Kindergarten year.[31] Witness D, Petitioner's special education teacher, also provided credible evidence that Petitioner made progress during his years in the DoD school system.[32] Witness C stated that a review of assessments performed on Petitioner from the time he entered the DoD school system until his parents withdrew him at the beginning of his second grade year revealed significant progress, which might not have been the case had Respondent taken a different methodological approach to the one they actually employed.[33] Witness E, a speech pathologist, likewise testified that Petitioner made measurable progress in his communication skills.[34] Therefore, the weight of the record evidence supports the Judge's findings and conclusions that Petitioner had made progress in overcoming his communication difficulties and his learning

[28]Tr. at 610.

[29]Individualized Education Programs should be developed in accordance with Instruction, Enclosure 4. That document does not focus on the name of the child's disability but rather on the nature of the child's strengths and weaknesses, the services to be provided, the goals to be met, and the benchmarks to be employed. Petitioner's generalizations appear to go well beyond the record evidence regarding school practices.

[30]Respondent Exhibit 0422 - 0430. This document contained goals and objectives "carried over" from the previous May. Tr. at 313. This IEP was used during Petitioner's 2005 - 2006 school year, the last one before his parents withdrew him from school. Tr. 385.

[31]Tr. at 86.

[32]Tr. at 418. *See also* Respondent Exhibit 0556, Annual Review Progress Report, 5/23/06. Witness D testified that Petitioner's progress was not linear, that though he had "breakthroughs" he also struggled with various skills. However, she stated, this does not mean that he was not progressing. "[I]t wasn't a straight increasing line . . . [the program that she utilized] is not meant to do that. It's not meant for you to see that. It's meant for you to make a progression into learning the skills that are necessary in order for them to learn how to read." Tr. at 427.

[33]Tr. at 579 - 581.

[34]Tr. at 303.

disability, thereby buttressing the Judge's conclusion that Petitioner's IEP complied with the requirements of the law.[35]

3. Parents Rights of Participation

Petitioner alleged that Respondent denied his parents their right of participation in developing IEPs for him. However, the record is replete with testimony and other evidence which establish the contrary. For example, Witness A testified as to the CSC's efforts to take into account Mother's desires for LC methodology.[36] Witness F, the special education chief for DoD Schools, communicated with Petitioner's parents on several occasions, attempting to answer questions they had and to address their concerns.[37] This witness also testified as to Respondent's efforts to accommodate Mother's desires for further assessments on Petitioner.[38] Witness D testified concerning her efforts to explain the school's teaching program to the parents, as part of an attempted ongoing dialogue with them.[39] Respondent Exhibits 601a through 607 comprise a draft IEP produced by the CSC in June 2006, which includes numerous objectives explicitly identified as having been requested by the parents.[40] While Respondent did not accommodate all of Mother's requests, witnesses provided credible explanations as to why, for example that Mother's desired methodologies were not actually consistent with one another[41] or that the programs offered by

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[35]*See* Decision at 23. "The record has considerable documentary and testimonial evidence presented by the school of the child's progress within his individualized program and is replete with explanations as to why it progressed at the pace it did. All witnesses except Petitioner's family generally provided testimony echoing that progress. This includes the testimony of an expert witness whose balanced testimony was immensely instructive and insightful and which was so credibly and authoritatively rendered that it culminated in solicited advice [to Petitioner's parents]."

[36]Tr. at 89. Witness D, the special education teacher, described her efforts to utilize a certain LC method in instructing Petitioner. However, she discontinued it because it did not appear to hold Petitioner's interest. Tr. at 380-382. Petitioner ascribes the problems to the adequacy of training that Witness D received. Even if the Board could ascertain with confidence that inadequate training was the problem, that would not demonstrate that the Judge erred in his ultimate conclusion that Respondent adequately addressed Petitioner's needs.

[37]Tr. at 705, 706. *See also* Respondent Exhibits 501, 587, 619.

[38]Tr. at 705.

[39]Tr. at 369.

[40]This document includes the following representative examples of parent-requested objective: that Petitioner will learn "age/grade appropriate phonemic awareness and sequencing;" that "he will be able to discriminate similar sounding sounds and words at 2.7 grade level;" that "[a]t least 50% of [his] instruction will be in an Orton-Gillingham based method;" that he "will blend sounds to form words and read them accurately, in the resource room with no more than two prompts with 90% accuracy;" that he "will read at 2.7 grade level text across all school settings;" and that he will "be able to understand and solve math problems at grade level." These are only a few of the parent-requested objectives which were incorporated into the proposed IEP. Petitioner's mother eventually signed this IEP, though only conditionally. Respondent Exhibit 0623.

[41]Tr. at 726 - 727.

Respondent accomplished the same ends as the programs requested by Mother.[42] Witnesses also expressed the opinion that the amount of time which Mother was requesting to be devoted to special education services for Petitioner was excessive.[43] Although Petitioner alleged that the school erred in not providing specific methodologies in his IEPs, witnesses for Respondent provided credible testimony that to do so is not a normal practice in special education and that they had explained that fact to both parents.[44] The Board has considered the entire record, including the testimony of both parents and the documents submitted by them. The weight of the record evidence supports the holding of the Judge that Respondent did not deny Petitioner or his parents their procedural rights in developing his special education program. Furthermore, the weight of the record evidence supports the holding of the Judge that Respondent did not deny Petitioner a FAPE, in accordance with IDEA, *Rowley*, and the Instruction. Accordingly the Board resolves this assignment of error adversely to Petitioner.

B. Whether the Judge was biased against Petitioner

Mother argued that the Judge was biased against Petitioner. For example, she cited evidence purporting to show that the Judge engaged in *ex parte* communications with Respondent counsel, thereby evidencing a lack of impartiality. She also cited the fact that the Judge requested Respondent counsel to transport hearing documents to the Defense Office of Hearings and Appeals (DOHA), where each worked, and that the Judge works for DOHA as demonstrating that he was biased in favor of the Respondent and against Petitioner.

The IDEA grants parties the right to an "impartial due process hearing."[45] It sets forth requirements for a hearing officer, that he or she shall, at a minimum, not be an employee of the state education agency or local education agency, nor shall he or she have a personal or professional interest which conflicts with his or her objectivity. Furthermore, the hearing officer must have knowledge of the applicable law, be able to conduct an administrative hearing, and be able to render and write decisions.[46] Although the Instruction does not further elaborate on the qualifications of hearing officers in cases involving DoD schools, it does state that they will be selected by the

[42]Tr. at 225.

[43]Tr. at 133, 627, 631, 634.

[44]Tr. at 138 - 139.

[45]20 U.S.C. § 1415(f)(1)(A).

[46]20 U.S.C. 1415(f)(3)(A).

Director of DOHA.[47] There is a presumption that administrative decision makers, including Administrative Judges employed by DOHA, act with the appropriate degree of impartiality.[48] A party seeking to challenge the impartiality of a Judge bears the burden of persuasion.[49]

A review of the record does not support a conclusion that the Judge was biased against the Petitioner. To the extent that the Judge may have communicated *ex parte* with one party or the other, Petitioner has failed to demonstrate that such communications pertained to other than minor administrative details. Neither this allegation, nor the one that Respondent counsel may have transported hearing documents back to DOHA, reasonably evidence a lack of impartiality by the Judge.[50] Furthermore, while the Judge is employed by DOHA, which falls under the Department of Defense, he is not associated with the Department of Defense Education Activity, which administers the school system that is a party to this case. Therefore, he does not have a "personal or professional interest that would conflict with his or her objectivity at the hearing."[51] The Judge meets the criteria set forth in the law for hearing officer qualifications. The record does not support a conclusion that the Judge conducted himself in such a way as to cause a reasonable person to believe he lacked the requisite impartiality. The Board resolves this allegation of error adversely to Petitioner.[52]

C. Whether the Judge violated the Due Process rights of Petitioner

Petitioner claims numerous instances of alleged due process violations, including that he was not permitted to subpoena witnesses, that certain pieces of documentary evidence were "altered or

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[47]Instruction ¶ E9.4.7. DOHA Operating Instruction No. 34 ¶ 3(a)(4) states that the hearing officer will be a DOHA Administrative Judge.

[48]*Dell v. Board of Education*, 32 F.3d. 1053, 1065 - 1066 (7th Cir. 1994); *Baran v. Port of Beaumont*, 57 F.3d. 436 (5th Cir. 1995). *See also* Case No. E-07-003 at 9 (App. Bd. Jun. 26, 2008); ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008).

[49]Case No. E-07-003 at 9 (App. Bd. Jun. 26, 2008); DDESS Case No. E-03-001 at 12 (App. Bd. Jan. 20, 2004).

[50]Contrast Petitioner's case with *Murphy v. Commonwealth*, 74 Pa. Commw. 499, 460 A. 398 (1983), in which a hearing officer conducted an *ex parte* interview with a witness concerning an IEP, thereby denying the petitioner in that case his right to cross-examine. *See also Falmouth School Committee v. Mr. and Mrs. B*, 106 F. Supp. 2d 69 (D. Me. 2000). For a closely related discussion to the present case, *see also* Case No. E-07-003 at 8 - 10 (App. Bd. Jun. 26, 2008).

[51]*Dell*, 32 F.3d. at 1065, n. 27, quoting 34 C.F.R. § 300.507(a). *See also* 20 U.S.C. § 1415(f)(3)(A)(i).

[52]The Judge's credibility determinations are entitled to some deference on appeal and are not significantly undermined by the presence of a few discrepancies in a record of several thousand pages. Merely alleging that a witness lied does not overcome that deference. As a matter of common sense, most discrepancies encountered in life are the result simply of the fact that human beings make mistakes. Also, perspectives may just differ and the presence of two or more different perspectives of events is hardly indicative of deliberate falsification.

redacted," and that the Judge did not admit evidence which Petitioner believed to be favorable to his case.

The Instruction states that the purpose of the hearing "is to establish the relevant facts necessary for the hearing officer to reach a fair and impartial determination of the case."[53] Both sides in a hearing are entitled to "full discovery," with the Federal Rules of Civil Procedure serving as a guide.[54] Both parties are entitled to call persons to testify on the party's behalf. However, costs of witness travel must be born by the party calling the witness. If a witness fails to appear, the party seeking that witness's testimony must pursue enforcement through a court of competent jurisdiction.[55]

The record demonstrates that Petitioner was permitted to call witnesses on his behalf. His Parents testified as to perceived deficiencies in the special education services provided by Respondent, as did a relative. Furthermore, Witness A, the expert in performing special education needs assessments, testified as witness for Petitioner. We have examined the Judge's rulings on the production of witnesses and find no error therein.[56] Although Petitioner claims that the Judge erred in advising that he lacked subpoena power, the Judge's statement is legally correct. Additionally, any redactions of documents appear to have been for the purpose of protecting the privacy interests of persons not a party to this case.[57] The record consists of nearly 1,000 pages of transcript, and Petitioner was permitted to submit over 700 pieces of documentary evidence, comprising seven bound volumes. The record does not support a conclusion that Petitioner was denied his right under the IDEA and the Instruction to present matters in his own behalf. The Board resolves this allegation of error adversely to Petitioner.

D. Remaining Issues

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[53]Instruction ¶ E9.4.10.

[54]Instruction ¶ E9.5.1.

[55]Instruction ¶ E9.6.2-5.

[56]*See, e. g.*, the Judge's Final Order on issues and procedures for the hearing, August 24, 2007, found in Deskbook, Tab L. This order addresses evidence to be admitted, witnesses to be called, etc. The Judge also explains his reasoning for denying as untimely Petitioner's request for an expert witness other than the ones who eventually testified at the hearing. Although Petitioner complains that the Judge did not admit audiotapes of CSC meetings, the record demonstrates that the Judge did permit an audiotape to be played. Tr. at 860. Neither Petitioner's appeal brief nor the record provides a basis to conclude that any other such tapes were relevant. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007) for the proposition that a school's offer of special education services to a child and his parents should be judged by the IEP itself rather than by comments made during the development process.

[57]*See, e. g.*, Respondent Exhibits 0450 and 0501.

The record provides no basis to conclude that the Judge erred in his weighing of the evidence.[58] Furthermore, there is no basis to disturb the Judge's credibility determinations.[59]

Conclusion

The decision of the Judge is AFFIRMED. This constitutes the final agency decision in this case. Pursuant to Instruction ¶ E9.9.4, since this determination denies the parent's appeal in whole or in part the Board is obliged to state that the parent has the right "to bring a civil action on the matters in dispute in a district court of the United States of competent jurisdiction without regard to amount in controversy."

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

Signed: Jeffrey D. Billett

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[58] *See* Case No. E-07-003 at 11 (App. Bd. Jun. 26, 2008); DoDDS Case No. E-99-001 at 5 (App. Bd. Feb. 8, 2000) for the proposition that the Board will defer to a Hearing Officer's resolution of conflicting evidence, providing that it is based upon a preponderance of the evidence. *See also* DDESS Case No. E-03-001 at 4 (App. Bd. Jan. 20, 2004) ("A party challenging the Hearing Officer's resolution of conflicting evidence must do more than just identify the existence of conflicting evidence, or argue for a plausible alternate interpretation of the record evidence as a whole.")

[59] *See* DDESS Case No. E-03-001 at 4 (App. Bd. Jan. 20, 2004) ("A party challenging the Hearing Officer's credibility determinations has a heavy burden on appeal.") *See also Fieldcrest Cannon Inc. v. N.L.R.B.*, 97 F.3d. 65 at 69 - 70 (4th Cir. 1996), stating that a judge's credibility determination should be accepted unless "exceptional circumstances" apply, such as that the determination is contradicted by other findings of fact or is based "on an inadequate reason or no reason at all;" *Rutledge v. Sullivan*, 199 U.S. App. LEXIS 2878 (unpublished decision), holding that "reviewing courts generally uphold credibility judgements because the trier of fact has a unique opportunity to observe and evaluate the witness." Petitioner's attack on the Judge's credibility determinations consists principally in alleging that witnesses at the hearing lied. The Board has previously noted that "vitriolic rhetoric runs the risk of polarizing a situation to the detriment of the parties, one of whom is a disabled child." Case No. E-07-003 at 9, n. 29 (App. Bd. Jun. 26, 2008); DDESS Case No. 97-001 at 3, n. 3 (App. Bd. Mar. 24, 1998). In the case before us, Petitioner's mother makes repeated allegations that witnesses, Respondent Counsel, and the Judge not merely erred but engaged in deliberate falsifications and a subsequent "cover-up." The language and substance of these allegations is bound to be harmful to the best interests of the child. Hardball tactics and adversarial approaches can be counterproductive in the special education context. *See, e.g., Clyde K. v. Puyallup School District*, 35 F.3d 1396 at 1400, n. 5 and 1402, n. 10 (9th Cir. 1994).

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board