DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	Case No. E-07-002
by his parent	)	
	)	
	)	
Petitioner	)	

Appearances

For Petitioner, a Minor
Petitioner's parent, ----------, *Pro Se*

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

Braden M. Murphy, Esq.
Department Counsel

March 27, 2008

Decision

MARSHALL, Jr., Arthur E., Hearing Officer:

Petitioner (hereinafter "child" or "student") is a student eligible for attendance within the Department of Defense (DOD) Defense Education Activity (DoDEA), DoD Dependents Schools-Europe (DoDDS-E) by virtue of his father's position as a Department of Defense contractor. He has been determined to be eligible for special education and related services. His mother (hereinafter "Petitioner") filed a request for due process on December 26, 2006, alleging the special educational program offered

her child at a DoDEA elementary school ("Respondents"[1] or "the school") in Germany violated IDEA.[2] The Director, Defense Office of Hearings and Appeals (DOHA), Defense Legal Services Agency, received that request for due process. Under the Individuals with Disabilities Education Improvement Act, as amended and reauthorized in 2004 (IDEA or IDEA 2004),[3] DoD Instruction 1342.12 (April 11, 2005)(DoDI), and 32 C.F.R. Part 57, Appendix G,[4] which implements IDEA within the U.S. Department of Defense (DoD) and controls due process within DoD,[5] the Director assigned me to serve as the Impartial Hearing Officer (IHO) on January 10, 2007.[6]

Respondents filed a Notice of Insufficiency and Motion for More Definite Statement on January 19, 2007. In addition to noting specific statutory insufficiencies, they argued that the existing due process request did not set forth Petitioner's complaints under IDEA with sufficient specificity or clarity to define the issues for due process or to enable the school to reasonably respond. By Order of January 24, 2007, I found that the petition failed to meet the threshold requirements of IDEA 2004. Consisting of several pages containing numerous complaints on a variety of often unrelated topics, the due process petition failed to provide reasonable notice of the justiciable issues. Consequently, it was returned to Petitioner. In the absence of objection by the school, Petitioner was permitted to file an amended petition[7]

An amended petition was received on March 12, 2007, in which a lack of specificity still existed. Respondents voiced their intention to object to its acceptance unless issues were better clarified. On March 30, 2007, a teleconference was conducted during which the parties focused on the Petitioner's recital of numerous and often unrelated factual allegations and complaints she believed were justiciable under IDEA. As a result, those complaints that could not give rise to issues under IDEA were dismissed and those which could potentially provide a basis for an IDEA-based complaint were categorized under tentatively stated issues. Respondents and the tribunal became satisfied that the effort had helped formulate issues sufficiently identifiable and consolidated to proceed, although the proposed remedy for any violation(s) of IDEA remained unclear. The parties agreed to accept the March 12, 2007, petition, as supported and clarified by the March 30, 2007, teleconference, as the Amended Petition upon e-mail receipt of the teleconference transcript. This was done to

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[1] Respondents include the school, DoDEA, DoDDS-E, and its School District. For ease of identification, Respondents will usually be termed "the school."

[2] The student was subsequently removed from the school system for home-schooling in September 2006.

[3] *See* Public Law (P.L.) 108-446; 20 U.S.C. 1400 *et. seq.* and 20 U.S.C. Chapter 33.

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

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

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

[7] Petitioner was also advised to limit facts to those occurring within the applicable two-year limitations period.

accommodate Petitioner, who has a high school education, had minimal experience in special education due process proceedings before 2007, and was proceeding *pro se* from Germany with limited English language resources.[8] The teleconference transcript was received by DOHA and forwarded to the parties by e-mail on April 4, 2007.

Respondents promptly denied all allegations and requested discovery. Respondents served discovery requests on Petitioner on April 18, 2007. During an April 19, 2007, teleconference, Petitioner orally moved to have the due process hearing after the summer break as a matter of personal convenience. During an April 20, 2007, teleconference, Petitioner renewed her request and waived her child's rights to both an expedited hearing and process under the applicable statute and instructions.[9] Proceeding *pro se*, she felt unable to give the matter her full attention at the end of the school year, while assisting her husband in a command directed permanent change of station, and while trying to both find a new home and relocate to a new town before a June 2007 deadline. She also cited to her continuing obligations in parallel proceedings and in home-schooling two children, conditions she felt would impede her efforts here.[10] Based on these reasons and against the school's objection, I granted the motion on May 8, 2007. On July 12, 2007, the hearing was tentatively scheduled for early September 2007.

During a series of April 2007 teleconferences, the parties agreed to Respondents' suggested organization of Petitioner's factual allegations into categories. Issues were further clarified via discussions and various oral and written motions. The parties orally approved their final form, as set forth in my August 24, 2007, Order.[11]

Communications between and with the parties were riddled with complications that worsened over time.[12] Consequently, minor motions and requests were routinely addressed informally, orally, or by email, on an *ad hoc* basis to keep the process moving despite communication difficulties, party unavailability, and Petitioner's personal schedule. A final conference scheduled to be held in Germany, on August 31, 2007, to finalize the issues, address outstanding issues, and monitor discovery was cancelled by DOHA management on August 18, 2007, which directed that U.S. initiated video- or

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[8] E-mail, from Hearing Officer to parties, *FW: 03/22. 03/26, 03/30 Hearings*, dated April 4, 2007.

[9] E-mail, Petitioner Handwritten Waiver, undated.

[10] Additionally, Petitioner had two other actions currently pending concerning her other children.

[11] In order to ascertain Petitioner's agreement to a finite number of justiciable issues, her wording was substantially quoted in phrasing those issues set forth in the Order.

[12] Complications arose from the international nature of this proceeding which are not contemplated in IDEA.. Such complications included significant time zone differences, erratic phone and internet coverage in Germany, secured e-mail server issues, a military post paper shortage, protracted and undependable mail delivery, a German telecommunications strike, undependable international airline schedules, a foreign based Army court reporter with additional military reserve duty, and Petitioner's move to a small town with poor telecommunications and mail service.

teleconferencing should be used for the conference.[13] Given the short notice and limited resources at the German venue, the request for a video-teleconference could not be honored, and the parties agreed that further teleconferencing would not be productive.

Discovery concluded and the due process hearing commenced on September 10, 2007, in Germany.[14] . It ended on September 13, 2007. A local court reporter from a nearby U.S. Army post was provided by DOHA management. During the hearing, Petitioner introduced 1,942 whole, unsubdivided pages of exhibits, marked Pet. Exs. 1-1,942, and the school introduced 1,095 similar pages of exhibits, marked MJ 0001-MJ 1,095,[15] as well as demonstrative exhibits marked as Paulson 1-6 and Ellison/Pippin Affidavit BBB. Many such pages were subdivided into multi-page exhibits (*ie.* Ex. 142a, 142b, 143c, etc.). Both sets of exhibits have notable gaps in numeration, purposefully provided in the event supplementation might be needed at hearing. The bound exhibit files include all admitted exhibits not otherwise contained in the Hearing Officer's reference book. In lieu of closing arguments, the parties agreed to file written closing statements after their respective receipt of the hearing transcript.

Petitioner called herself and two witnesses and directed questions of all Respondents' witnesses. She did not timely call an independent expert witness for hearing or seek permission to call such a witness by teleconference,[16] although she submitted several evaluating physicians' reports that were accepted into evidence without objection. Respondents called four fact witnesses, all of whom had also been listed by the Petitioners, as well as Dr. Lucy Hart Paulson, a qualified expert witness. Dr. Paulson has a master's degree in speech language pathology and a doctoral degree in education. She demonstrated significant experience in the areas of oral language and writing, and is published in the areas of building literacy and language skills, language essentials, and phonologic disabilities. Dr. Paulson also has a balanced consulting practice providing advice to both parents and to school districts on early literacy issues.[17] Dr. Paulson was accepted as an expert witness qualified to provide expert opinions regarding the child's particular disability profile, educational needs as reflected by his records, including the reports submitted by the Petitioner, and the manner in which Respondents' educational programs addressed those needs.

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[13] *See* E-mail, Directive to Hearing Officer, dated August 18, 2007.

[14] As an accommodation to Petitioner and her family, the hearing was conducted within the school district near Petitioner's new home, not in the city where her child previously had attended a DoDDS school.

[15] All Petitioner's exhibits were accepted except those specifically excluded by order or those pertaining to issues not determined to be justiciable in the underlying proceeding. From March through September 2007, Petitioner was repeatedly advised untranscribed tape recordings would be excluded from evidence unless shown that aural hearing affected interpretation of statements; such untranscribed cassettes were excluded.

[16] Pre-hearing rulings explained to the parties that this tribunal did not have subpoena power over independent witnesses, or the judicial power to require overseas travel and attendance at a DoD hearing held in Germany, and that any party calling a witness was, under DoDI 1342.12, E9.6.2., responsible to bear the witness' travel and incidental expenses associated with testifying at the hearing.

[17] *See*, *e.g.*, Tr. at 540-545.

The Army legal assistant assigned to transcribe the proceeding at the request of the Director, DOHA,[18] worked independently on the 996-page transcript. Therefore, I required the parties to prepare post-hearing summaries of relevant testimony to give the parties an interim record upon which they could contemplate their written closing arguments. After a protracted period for transcription and difficulty with international mail service, the transcript was ultimately received on January 29, 2008. Hard copies were immediately made and forwarded to the parties on January 30, 2008, for expedited review and use in preparing post-hearing submissions. Respecting Petitioner's complaint that her family and home-schooling obligations had become more demanding, she was given leave to consider her supplemental submissions optional and advised that her decision to not submit certain items would not be held against her or her child.

Closing briefs and rebuttal materials were received by hand from Respondents on February 14, 2008, and February 21, 2008, respectively; Petitioner's closing brief and rebuttal materials were received on February 15, 2008, and February 22, 2008. Both parties were given the opportunity to submit a position statement regarding DoDI 1342.12, ¶ E8.2.9, and a proposed recommended decision. A March 1, 2008, email inquired whether the parties had submitted all supplemental material. Petitioner declined to answer, but Respondents submitted a position statement[19] and a recommended decision on March 4, 2008. A seven-day grace period was observed to assure I had received all outstanding foreign mailings and that Petitioner had received Respondents' March 4, 2008, materials. The record was closed on March 11, 2008.[20]

Identification of Relevant Laws, Procedures, and Issues

In general, IDEA entitles every eligible child to receive individualized instruction along with sufficient related and supportive services to permit the child to benefit from the instruction.[21] P.L. 108-446 (2004); 20 U.S.C. § 1412(a)(1); *Board of Education v. Rowley*, 458 U.S. 176 (1982). Under IDEA, an eligible child is deprived of a "free and

[18] DoDI 1342.12, § E9.4.9; *see also* E-mails of August 17, 2007, and August 30, 2007.

[19] Issues were previously raised by the parties regarding evaluations purposefully withheld and concealed from a school or not yet existent at the time a school made certain decisions regarding a child's FAPE. Respondents rationally argue that in considering all evaluations timely offered in a due process proceeding, the threshold question is one of relevance, not simply proffer. For example, an existent "evaluation or other document that was not made available to the school system could not be relevant to determining whether the school system properly reached a decision upon which that document might have had relevance." Respondent appropriately places the burden of proving such relevance on the moving party.

[20] DoDI 1342.12, ¶ E9.4.16.

[21] The determination of whether a child is eligible for special education and related services essentially provides the threshold of access to the entitlements afforded under IDEA in most cases. Eligibility is not determined on the basis of a diagnosed disability or defined by the presence of a medical condition, but on the determination that a disability affects the child's ability to learn and progress academically.

appropriate education" (FAPE)[22] if the school system violates the IDEA's procedural requirements, thereby adversely impacting the child's education, or drafts an IEP that is not reasonably calculated to enable the child to receive educational benefits. *Rowley* at 207; *Hudson v. Wilson,* 828 F. 2d 1059, 1063 (4th Cir. 1987).

Essentially a funding statute impacting States, IDEA creates only a federal minimum with regard to its provisions and States may structure educational programs that exceed the federal floor. *See*, 20 U.S.C.A.§§ 1400-1485; *see also Brody v. Dare County Public Schools* (SEA N.C. 1997). IDEA was adopted by the DoD/DoDEA for application to it its school system and for its eligible students; DoDDS-E specifically holds itself out as being under the direction of "both Federal regulations, P.L. 105-17, Individuals with Disabilities Education Act (IDEA),[23] and DoD Instruction, DoDI 1342.12. . . .", adding "[t]hese documents ensure that DoDDS personnel and families know who is eligible and what they must do to provide a [FAPE]."[24]

IDEA also mandates procedural safeguards to ensure that parents are able to participate meaningfully in the development of an individualized education plan (IEP) for their child. 20 U.S.C. § 1414(d); DoDI 1342.12, ¶ E8.2; *Rowley, supra; Honig v. Doe*, 484 U.S. 305 (1988). Parents objecting to their child's IEP have the opportunity of pursuing a due process hearing. DoDI 1342.12, ¶ E9.4.2. The purpose of that hearing is to establish the relevant facts necessary for a hearing officer to reach a fair and impartial determination of the case. DoDI 1342.12, ¶ E9.4.10. Review of the procedures afforded by a school is by a hearing officer who shall preside with judicial powers to manage the proceeding and conduct the hearing, including the authority to order an independent evaluation of the child at the expense of the DoD school system and to call and question witnesses.[25] DoDI 1342.12, ¶ E9.4.10.

The hearing officer, at a minimum, shall have knowledge of, and the ability to understand, the provisions of IDEA 2004 and the applicable provisions, regulations, and legal interpretations of both State and Federal cases interpreting it; shall possess the knowledge and ability to conduct hearings and render decisions in accordance with appropriate standard legal practice; shall not be an employee of the educational

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[22] FAPE is defined as "special education and related services which (a) have been provided at public expense, under public supervision and direction, and without charge, (b) meet the standards of the State educational agency, © include an appropriate preschool, elementary, and secondary school education in the State involved, and (d) are provided in conformity with [an] individualized education program." 20 U.S.C. § 1401(18).

[23] Inasmuch as DoDDS has embraced IDEA, *in toto*, it may be assumed DoDDS-E intends its public pronouncement to refer to IDEA 2004, P.L. 108-446, not the IDEA of 1997, P.L. 105-17.

[24] *See* http://www.eu.dodea.edu/ed/special.htm (February 14, 2008).

[25] The Director, DOHA, is responsible for arranging the time and place of the hearing, and shall provide the administrative support. DoDI 1342.12, ¶ E9.9.Here, the Director arranged for the hearing to take place in the child's school district at a time and date suggested by the hearing officer to accommodate Petitioner, who, as noted, had waived the time frames set forth in DoDI 1342.12, ¶ E9.4.17. DOHA management retained an Army legal assistant based in Germany to transcribe the proceeding. *See*, Hearing Officer's File, E-mails of August 17, 2007, and August 30, 2007.

entity;[26] and shall not have a personal or professional interest that conflicts with the objective hearing of the case or special education.[27] Also, the hearing officer must be a DOHA Administrative Judge and an attorney in good standing with the bar of a state, District of Columbia, or a commonwealth, territory or possession of the United States.[28]

Most issues in this case involve the provision of a special education program the Petitioner alleges violated IDEA, specifically with regard to what was – and what was not – eventually included in the child's IEP.[29] The federal judicial circuits have offered guidelines to gauge a school's and/or district's IDEA compliance in such areas. *See*, *e.g.*, *Rowley; Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247-48 (5th Cir. 1997); *Doe ex rel. Doe v. Bd. of Educ. Of Tullahoma City*, F.3d 455, 459-460 (6th Cir. 1993). The majority of circuits agree that an eligible child's IEP must be designed specifically for the child's unique needs, must be individualized based on assessment and performance, and must be supported by services that permit the child to receive meaningful benefit from instruction. The IEP must be delivered in the least restrictive environment (LRE) and in a special-regular education collaborative manner. The educational program ultimately must produce some educational benefit. A school district's proposed IEP is presumed to be appropriate.

Concerning an IEP as a written document, it is generally accepted to be a comprehensive statement of the educational needs of an eligible child and the specially designed instruction and related services to be employed to meet those needs. P.L. 108-446 § 602(14). The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child. In several places, IDEA emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness. *See generally* P.L. 108-446 § 615. As noted by the U.S. Supreme Court in *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359 (1985) at 368:

> Apparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labeled "procedural safeguards" to insure the full participation of the parents and proper resolution of substantive disagreements. Section 1415(b) entitles the parents "to examine all relevant records with respect to the identification,

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[26] In the context of this proceeding, an employee of the Department of Defense school system or a concerned Military Medical Department.

[27] IDEA 2004, P.L. 108-446, § 615(f)(3)(A); *see also* 20 U.S.C. § 1415(f)(3)(A) (2004).

[28] The undersigned has a M.Ed (education/special education policy) and Ed.S. (curriculum and administration), experience and recent training in IDEA, and 19 years of legal experience in education. The undersigned is a state bar member and DOHA Administrative Judge with the required judicial knowledge and abilities, certified in administrative adjudication, and has no conflict of interest regarding the proceeding.

[29] *See* Order of Aug. 24, 2007.

> evaluation, and educational placement of the child," to obtain an independent educational evaluation of the child, to notice of any decision to initiate or change the identification, evaluation, or educational placement of the child, and to present complaints with respect to any of the above. The parents are further entitled to "an impartial due process hearing. . . ."

In reviewing the petition, the hearing officer considers all evaluative tests and diagnostics presented. The burden is on the party challenging an IEP to show that the IEP was not developed according to procedural safeguards, or that the IEP failed or would fail to provide a free and appropriate public education in the least restrictive environment. *Schaeffer v. Weast*, 546 U.S. 49 (2005). The hearing officer thus reviews substantive issues (whether the child received FAPE) and procedural issues; in the latter, a child can only be found to have been denied FAPE if: (a) procedural inadequacies denied the child's right to FAPE, (b) such inadequacies significantly impeded the parents right to participate in the decision-making process regarding the provision of FAPE, or © caused the child a deprivation of educational benefits. Through this process, a validation or violation of FAPE is determined.

Preliminary Considerations

As noted, this tribunal's powers and jurisdiction are the creation of IDEA, as administered by the Department of Defense through DoDI 1342.12, ¶ E8 and ¶ E9, generally. DOHA is assigned responsibility for IDEA-related proceedings authorized under ¶ E9.4 through ¶ E9.8 of that instruction. These sections include the authority invested in a hearing officer.

In defining the purpose of special education, IDEA clarified Congress' intended outcome for each child with a disability: such students must be provided with a FAPE designed to prepare them for further education, employment, and independent living. IDEA is not a panacea for all school-based complaints. Jurisdiction is limited to issues arising under IDEA. Therefore, I lack the authority to review many of Petitioner's initial complaints that bore no direct nexus with IDEA. I also lack jurisdiction over issues barred by the applicable statutes of limitations, as well as those barred because they were not specifically and timely pled under DoDI 1342.12, ¶ E9.4.8.

Moreover, at the end of the hearing, Petitioner expressed her intent not to return the child to the DoDDS school and has declined to accept its academic assistance.[30] These developments constructively nullify her previously requested remedy that the child's IEP be consistent with her requests, including issues regarding methodology. Petitioner's insistence on particular programs and methodologies has persisted since her initial petition. It was permitted as an issue for argument at hearing,[31] despite significant case law indicating a parent does not have the right to dictate methodology

[30] Tr. 684, 986-987, 991.

[31] *See* Order of Aug. 24, 2007, at 3 (Issues 2 and 3).

when FAPE is available, in the event she could show that FAPE was not available at the school.[32]

Respondents also cited to recent changes in IDEA 2004, since adopted by the U.S. Department of Education at 34 C.F.R. § 300.300.[33] Those changes were explored in *Analysis of Comments and Changes to 2006 IDEA Part B Regulations,* 71 Fed. Reg. 46635 (August 14, 2006), in which the Department of Education stated: "the [2004 IDEA] does not require school districts to provide FAPE to children who are home-schooled or enrolled in private schools by their parents." Respondents noted that DoDI 1342.12, ¶ E4.4.1.2 requires only that the school develop and implement an IEP for each eligible child who is overseas, home schooled, eligible to enroll in DoDDS on a space-required, tuition-free basis and whose sponsors have completed all appropriate paperwork and procedures. Consequently, Respondents argued that this case presents neither an actionable violation of IDEA nor a prayer for relief the hearing officer is empowered to grant. Given its active efforts to continue working with Petitioner after the child left school, however, it is arguable that Respondents assumed some duty to provide FAPE. That question, however, need not be decided herein.

In light of all of the foregoing, the six issues presented by Petitioner are:

1) *Whether the school violated IDEA in withholding certain services;*

2) *Whether the school violated IDEA by failing to adopt Petitioner's request(s) for a specific methodology, program, or strategy;*

3) *Whether the school violated IDEA by changing its position on offering a specific methodology as the child progressed through an academic year;*

4) *Whether the school's use of an organized agenda in conducting meetings regarding the child's education violated IDEA;*

5) *Whether the school violated IDEA by not "making assurances" that its evaluations and determinations were all made correctly based on the needs of the child;*

6) *Whether the child's September 2005 IEP failed to provide FAPE.*

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[32] *See N.R. by and through B.R. v. San Ramon Valley Unified Sch. Dist*, 2007 U.S. Dist. LEXIS 9135 at 21 (N.D. CA 2007), *citing Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 885 (D. Minn. 2003) (holding that the district's refusal to assign the service provider of plaintiff's choice did not constitute a denial of FAPE); *A.B. v. Lawson*, 354 F3d. 315, 330 (4th Cir. 2004) ("The issue is not whether the [parent's program or preferred provider] is better, or even appropriate, but whether [the school system] has offered an appropriate program for the child. . . ."); *see also Sch. Bd. of Henrico Co., Virginia v. Z.P. ex rel. R.P.,* 399 F3d 298, 308 (4th Cir. 2005) (the hearing officer cannot reject a properly constructed IEP simply because the hearing officer believes a different methodology would be better for the child).

[33] *See* Respondent's Written Closing Argument, dated Feb. 14, 2008, at 8-9.

Administrative Process

Before and during the hearing, the dictates of DoDI 1342.12, ¶ E9.4, ¶ E9.5, ¶ E9.6 were followed. At the hearing, the Federal Rules of Evidence were relaxed and resorted to only as a guide. DoDI 1342.12, ¶ E9.4.10. All evaluations and assessments, written or oral, formal or anecdotal, presented by either party were considered. *See* DoDI 1342.12, ¶ E8.2.9. All exhibits offered were reviewed and considered in relation to the pertinent issues. Conflicting evidence, written and oral, was resolved in favor of the most persuasive with due consideration of the issues as well as the credibility, training, and experience of the source. The undersigned was aided by expert testimony and print materials appropriate to special education.[34] All evidence accepted was available to both parties throughout this process. To maintain the integrity of the official record as a whole, the record was compiled as received, without reorganization and without supplemental annotation or indices. Any exhibits excluded are noted in the record.

Findings of Fact

The majority of chronological events were not disputed. Moreover, all case study committees (CSCs) were appropriately comprised as required under IDEA and DoDI 1342.12, ¶ E2.1.10 with general and special educators, administrator or designee(s), and parent(s). At least 12 CSC meetings[35] were properly conducted over the two academic years at issue. Unless otherwise noted, all IEPs developed by Respondents were drafted on EXCENT® for system-wide consistency and to assure IDEA compliance.[36] As discussed below, all IEPs and draft IEPs met the dictates of IDEA and DoDI 1342.12. The evidence shows that the IEPs offered were reasonably tailored to meet the individualized special education needs of the child and designed to enable him to make progress in the general education curriculum.[37] Measurable objectives made progress quantifiable. The basic dispute is one of educational methodology and instruction, each side having different views as to what methodologies, programs, and related support were appropriate for providing the child with FAPE.[38]

Petitioner's child was born in August 1999. The child is the son of a DoD civilian employee who is the sponsor of both he and his mother. He previously attended a civilian public pre-school in 2003-2004, where he was educated under an IEP devised

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[34] Reference regarding definitions of or information on specific disabilities was in terms of special education and the affect of such disability on a child's ability to learn, not in terms of medical definition.

[35] Tr. 941. The precise nature and number of meetings concerning this child is inexact and often confused with meetings and facts regarding his sibling(s). *See*, *e.g.*, Tr. 444, 766-773, 935-936, 940-971.

[36] EXCENT® is a Global Education Technologies software suite widely used by DoDEA. It includes EXCENT ® ONLINE, a comprehensive special needs case management system that utilizes preformatted fillable forms on a secure network for completing IEPs that comply with federal IDEA and school system requirements.

[37] *See*, *e.g.*, Tr. 82-139; 510-553; 602-604; 614-616.

[38] *See generally, Bd. Of Educ. v. Rowley,* 458 U.S. 176 (1982) and *Doe v. Honig*, 484 U.S.305 (1988).

to address communication impairment.[39] Numerous incoming documents identified his educational needs.[40] He had been administered a test of auditory perception (TAPS) that found he had "difficulty discriminating sounds . . . difficulty with the phonological aspects of language development."[41] A Goldman Fristoe Test of Articulation (GFTA) administered during pre-school demonstrated specific sound errors.[42] His articulation and communicative difficulties were readily apparent when he entered DoDDS.[43] The degree of his communicative difficulties was frustrating to the child, his family, and staff, and caused considerable academic concern for the family and the school.[44]

Finding the child's incoming IEP inadequate, the DoDDS school modified his IEP on September 29, 2004, and Petitioner signed a consent for the school to conduct an initial eligibility assessment to determine the child's eligibility for special education under DoDEA/DoDDS criteria. The school found that the child had difficulties with rhyming, segmenting, discriminating, and sound blending, indicating his difficulties went beyond mere articulation errors and demonstrating his disability was affecting "all components of that phonological processing system."[45] His difficulty with phonological awareness aspects of reading readiness was confirmed through observation and language checklists, and an early Communication Evaluation emphasized his sound substitutions and omissions, grammatical and language structure difficulties, and weak vocabulary acquisition.[46] A Khan Lewis Phonological analysis was administered to confirm that the child's sound errors were the result of phonological issues, not a basic speech defect.[47]

Inasmuch as phonological processing affects not just speech, but reading and writing, the child's IEPs were subsequently written to address such fundamental deficits.[48] Specifically, on November 17, 2004, a DoDDS IEP was developed setting forth a highly individualized special education program under Category C, Communication Impaired, Language Phonology eligibility.[49] Expert testimony from Dr. Paulson shows that the school's identification that the child needed stronger oral

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[39] MJ 49-50; MJ 118-152; MJ 157.

[40] MJ 1-152.

[41] MJ 78.

[42] Tr. 553-554.

[43] Tr. 267-268.

[44] *See*, *e.g.*, MJ 167-173; MJ 183-186; MJ 192-201.

[45] MJ 182; Tr. 574.

[46] MJ 78; MJ 174-178; MJ 182; MJ 189-190.

[47] Tr. 554-555.

[48] Tr. 560-563, 570-572; *see also* Tr. 275, 281-282, 291-293.

[49] MJ 202-206.

language skills appropriately addressed his significant deficits at the basic stage of literacy and found the IEP goals and objectives appropriate.[50] About six weeks later, however, Petitioner requested modifications of the IEP to include not only occupational therapy goals, but also pre-academic goals.[51] The school agreed to modification of pre-academic goals and objectives in light of mid-year progress in the child's oral language.[52] On January 10, 2005, the school agreed to hold a CSC meeting and review progress. Nine days later, Petitioner repeated her request and expressed other concerns, including the child's difficulty with the alphabet.[53]

When the CSC meeting was held on February 2, 2005, the school proposed new pre-academic goals and objectives for the IEP, as Petitioner had requested.[54] Those modifications were drafted into the child's IEP. Petitioner 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 it was inappropriate to guarantee a specific level of growth within a specific time frame. Petitioner declined to sign the IEP.[55]

Two CSC meetings were subsequently held. In those meetings, the school explained the child's progress, addressed the parents' concerns, and showed that the new goals were developed consistent with kindergarten and first grade academic standards, including additional objectives for pre-academic skills that met the Petitioner's requests.[56] The school also entertained Petitioner's request for increased one-on-one pullout services delivery, but the school's educators concluded the request was academically inappropriate for the child's progress and declined to expand instruction within that more restrictive environment.[57] While the school continued to lobby for consensus with regard to the IEP, Petitioner requested that the child be formally evaluated for dyslexia.[58] On February 17, 2006, Petitioner signed the IEP that had been previously modified to add pre-academic goals and objectives, as well as the fluency and comprehension objective sought by the parents.[59]

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[50] MJ 202-206; Tr. 611.

[51] *See* MJ 215.

[52] MJ 215; Tr. 67-68.

[53] MJ 217.

[54] *See* MJ 218, MJ 221-222; MJ 223-225.

[55] MJ 221-222; MJ 226.

[56] MJ 232-235; MJ 238-239.

[57] MJ 221-222; MJ 226; *see also* MJ 274-277.

[58] MJ 237.

[59] MJ 240a-240f. *Note*: Expert Paulson confirmed that the additional goals and objectives appropriately addressed the child's difficulties with regard to the first building block of literacy (oral language) and the second building block of literacy (phonological awareness). Tr. 557-558.

Around this time, it first became apparent that Petitioner's understanding of what was academically appropriate or common practice was often at odds with that determined by the school's general and special educators, leading her to conclude that the Respondents were offering IEPs that failed to offer what she considered to constitute FAPE. Although the school did, in some situations, incorporate Petitioner's requests despite their own misgivings, such as the inclusion of an Early Reading Competency objective,[60] disagreements persisted. For example, Petitioner's insistence on simultaneous reading programs versus the school's approach using research-based program delivery and sequenced instruction designed to develop and retain reading skills.[61] Similarly, while Petitioner thought using prompts in instruction was tantamount to cheating, the school maintained that the incorporating prompts into the IEPs reenforced a successful method for eliciting responses from the child.[62]

As the child's kindergarten year progressed, the qualified special educator, Ms. Paniagua, provided intervention toward the child's pre-academic needs during specified times. Throughout his time at DoDDs, the child received daily services in terms of established minutes on regular school days. The schedule was occasionally adjusted due to holidays or events on a particular day or during a given week. For example, minutes were reduced during the three school days of Thanksgiving week.

The school initially addressed the child's phonemic awareness and phonics through a systemic and explicit program, including internal monitoring tools and incorporating both repetition and review to ensure lessons were learned before advancement was made.[63] On March 29, 2005, approximately six weeks after signing the new IEP, Petitioner requested a complete assessment for learning disability in reading she could forward to her son's pediatrician.[64] The CSC met on April 27, 2005. It explained that an evaluation for dyslexia was not necessary to provide the services the child needed at this pre-school level; it did agree, however, to provide another comprehensive evaluation.[65] On March 30, 2005, Petitioner signed her permission for the reassessment.[66] That reassessment began on April 18, 2005,[67] approximately four

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[60] Tr. 455-465; 469.

[61] Tr. 231-233.

[62] *See* Tr. 219-221; 245-247; 599-600; Pet. Ex. 335.

[63] Tr. 368-376; 395-397; *see also* Pet. Ex. 1000 at 1085-1092 (excerpt, *Overcoming Dyslexia*).

[64] MJ 269b; MJ 270.

[65] MJ 269a; MJ 274-277.

[66] MJ 282.

[67] MJ 300-301.

days after Petitioner unilaterally obtained an independent evaluation from Lindamood Bell (LB) in England.[68]

Following her experience with LB, Petitioner met with the CSC on April 27, 2005. During the meeting, she requested her child be taught from Petitioner's list of specific methodologies. She also shared the LB report with the CSC, but would not release a copy of the report to the committee at that time.[69] Special Educator Paniagua explained that the child's educational needs were already being served through her use of Saxon Phonics, a program equal to or more comprehensive than the LB-based methodologies Petitioner was now convinced her child required.[70]

The school's reassessment of the child was concluded in May 2005. The Comprehensive Test of Phonological Processing (CTOPP) showed the child's letter sound knowledge had improved, although it indicated he still had limited phonological awareness, limited ability to retrieve information, and had poor phonological memory.[71] The Young Child's Achievement Test (YCAT) confirmed that the child tended to lose focus and needed visual cues in arithmetic.[72] The Woodcock Johnson III, Cognitive Assessment, indicated the child had a weak auditory attention span, weak short term and working memory, weak categorical reasoning, and weak fluid reasoning, but showed his current intervention had yielded a relative strength in phonemic awareness.[73] The Test of Early Reading Ability (TERA-3) confirmed the link between spoken language difficulty and his challenges with both reading and writing.[74]

The assessments were discussed at a May 25, 2005, CSC meeting. Parental concerns regarding dyslexia were discussed in the terminology used by IDEA and DoDI 1342.12: "Specific Learning Disability." As a result of the assessment, the school concluded the child was eligible for special education and related services under not just Communication Impairment (Language Disorder, Phonology), but also under "Specific Learning Disability."[75] Consequently, an "initial" IEP was devised by the school based on the newly identified co-designations.[76] It considered the assessments, the child's progress, and observational information in adding new early reading objectives

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[68] MJ 303-309.

[69] MJ 325-327; *see also* MJ 316-318.

[70] MJ 310-311; MJ 316-381.

[71] MJ 399-342.

[72] MJ 344-345.

[73] MJ 354-356.

[74] MJ 345-346.

[75] MJ 381-390.

[76] MJ 1001-1009; Tr. 90-91, 956.

to many of the same goals and objectives not yet attained under the prior IEP.[77] Petitioner signed the IEP for the upcoming 2005-2006 school year.[78]

Although it was not considered necessary under an April 8, 2005, Regression Recoupment analysis, extended school year (ESY) services were provided using LB methods, in part. Petitioner was pleased with the summer program.[79] As well, Ms. Paniagua incorporated LB's "LiPS" method into the child's individualized program.[80]

At a September 14, 2005, CSC meeting, an IEP revision was proposed slightly reducing the total minutes the child would spend removed from the least restrictive, general education environment in one-on-one pullout time. All other goals and objectives essentially remained as agreed on May 25, 2005. It appropriately included the requisite present level of educational performance; statement of measurable annual goals including benchmarks and short term objectives; statement of special education, related services, and supplemental services; support and modifications; measures for annual progress; methods through which the child could progress toward annual goals; participation of the parent was indicated; services to be rendered were noted in terms of time; and a regular physical education program was indicated.[81]

Dr. Paulson and other witnesses noted that all services provided were notably aimed at addressing this child's specific needs in light of his educational difficulties.[82] and they agreed the IEP, as developed, was appropriate given this child's needs.[83] Further, the record, as confirmed by the expert witness, demonstrates that the execution and the content of the IEP was appropriate, that parental input was notably

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[77] MJ 394-402.

[78] *Id.*

[79] MJ 418-421.

[80] Special Educator Paniagua started the 2005-2006 school year incorporating LB methodologies in her instruction. MJ 431, MJ 433, MJ 434, MJ 436, MJ 442, MJ 433, MJ 452, MJ 453; MJ 458; MJ 465; MJ 467-474. Progress was slow and the child disliked "LiPS." In January 2006, she switched the child to a research-based core program (Reading Mastery), under which progress was made. Tr. 381-382; 398; 402-416; 474. Reading Mastery's science-based research show it is appropriate for addressing dyslexia/specific learning disabilities and it addresses the core components of a good reading program. Tr. 382-383; Ex. 1000 at 1091.

[81] MJ 422-430.

[82] *See*, *e.g.*, *A.B. v. Lawson*, *supra*, note 32 ("The issue is not whether [a parent's program or preferred provider] is better, or even appropriate, but whether [the school] has offered . . . an appropriate program for the Child. . . .").

[83] *See*, *e.g.*, *Henrico County*, *supra,* note 32*,* at 308 ("If an IEP is 'reasonably calculated to enable the child to receive educational benefits,' *Rowley*, 458 U.S. at 207, the hearing officer cannot reject it because the officer believes that another methodology would be better for the child. *See Id.* at 208. ['O]nce a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.' *MM* 303 F.3rd at 526, ('IDEA does not . . . .require a school district to provide a child with the best possible education')," referring to *MM ex rel. DM v. Sch. Dist. of Greenville*, 303 F.3d 523 (4th Cir. 2002).

considered, and demonstrable progress was achieved. The EXCENT® form of the IEP was agreed to and signed on September 25, 2005. It was the last annual IEP signed by Petitioner.[84]

In December 2005, Petitioner's 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.[85] Dr. Brewer, who assessed the child in April-May 2006[86] and also reviewed his academic records, concluded that the September 14, 2005, IEP included appropriate goals and objectives that met the child's needs and addressed his difficulties with attention and following instructions.[87] If anything, she found parts of the plan to be too ambitious, not inadequate.[88] The child's special educator and speech pathologist understood it was their role in executing the IEP to insure progress was made one step at a time.[89] When Expert Paulson reviewed the September 2005, IEP and the methods used to address the child's goals and objectives, she determined they were appropriate for addressing his phonological awareness and related fundamental literacy skills.[90] She similarly found the proposed June and September 2006 draft IEPs reasonably tailored to meet his individualized needs and enable him to make progress.[91]

Over the next seven months, Petitioner would make numerous requests to revisit and change the IEP. One of the things Petitioner repeatedly requested was a referral to an audiologist for central auditory processing disorder (CAPD). The school felt, and Dr. Paulson concurred, that referral testing was unnecessary, because the IEP already addressed his auditory processing issues, and premature, because he was not yet age seven and, therefore, was still developing his language and auditory processes.[92]

In November 2005, Petitioner sought to withdraw her child from the school and requested that the child be instructed at home in the Davis method, an approach for

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[84] MJ 422-430. The June 2006 IEP was signed, but limited to 90-days. Consequently, it did not constitute a year long individualized education program.

[85] MJ 414-416; Tr. 80-81, 192-197. (No reason was given as to why the doctor did not review the later IEP.)

[86] *See* MJ 524-540.

[87] Tr. 44-50.

[88] *See*, *e.g.*, Tr. 42-46.

[89] *See*, *e.g.*, Tr. 425-426; 262-264.

[90] Tr. 610-612; *see also* Tr. 560-563, 572.

[91] Tr. 610.

[92] *See* Tr. 613-617. *See, e.g.*, *Introduction to Auditory Processing Disorders*, MN Dept. Of Educ. at 5 (2003) http://education.state.mn.us/mdeprod/groups/SpecialEd/ documents/Instruction/001567.pdf.) (available as of Aug. 26, 2007; re-verified on Mar. 26, 2008).

addressing dyslexia that differs from that used under Orton-Gillingham.[93] In February 2006, Petitioner sought further amendment of the child's IEP and a CSC meeting was held on February 10, 2006. At the meeting, however, Petitioner focused on assessments of her child's auditory discrimination skills and formal assessments of his math reasoning and reading comprehension as measures to document his progress in school.[94] Petitioner, through special educator Osier, made a request for auditory therapy[95] with radium amplification[96] be included on the IEP.

The school found the additional assessments unnecessary, but accommodated the parent by giving her a parental permission form for obtaining the requested auditory discrimination assessment.[97] Petitioner declined to sign the form, requesting specifics with regard to the assessment.[98] She was told Respondents would provide the child with the previously requested TAPS-R test.[99] Petitioner then rejected the proffered test and requested a phonological processing assessment, the CTOPP, and other supplemental assessments.[100] As for the radium amplifier, the school was reluctant to include it on the IEP since such a stipulation of assisted technology denotes that it is expected for long term use.[101] Eventually, a February through May 2006 trial of the device did not indicate effective or long term application.[102] Petitioner would later claim that this denial was a maneuver to force the parent to sign a June 2006 IEP proposal.[103] In the interim, Respondents continued to negotiate as to what was appropriate, then Dr. Brewer conceded to Petitioner's requests and provided the assessments in May 2006.[104]

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[93] MJ 444-449.

[94] MJ 481-485.

[95] Tr. 115.

[96] A radium amplifier is a headset worn by the teacher which amplifies speech, usually used to aid students with hearing impairment, attention deficits, or difficulties following auditory steps. Tr. 114,

[97] MJ 515-517.

[98] MJ 486-488.

[99] MJ 502-503; 507-511.

[100] MJ 505-506.

[101] Tr. 115-116. ("For . . . the rest of their career. . . .")

[102] Ex. BBB (Declaration).

[103] *See* Order of Aug. 24, 2007, at 2; *see also*, *generally*, Petitioner's Amended Petition of Apr. 4, 2007.

[104] MJ 522-550.

Before that testing, in April 2006, Petitioner requested her child only be taught using the Orton-Gillingham methodology.[105] Shortly thereafter, she asked that her child's program also include Barton Reading, an Orton-Gillingham-based program.[106] Prior to a May 23, 2006, CSC meeting, Petitioner, in a May 17, 2006, email, requested that her son be instructed through a Barton Reading or other Orton-Gillingham-based methodology, along side LB's "LiPS" and "Visualizing and Verbalizing" programs, and that a private tutor be assigned to help facilitate these separate and distinct approaches.[107] Shortly thereafter, she also requested Fast ForWord, a software-based reading intervention program for simultaneous home use after school.[108]

The May 23, 2006, IEP meeting was convened primarily to discuss the completed assessments[109] and to conduct a formal annual IEP review. The results of objective monitoring of the child's progress toward his IEP goals and objectives were discussed and proposed updates to the IEP were presented. The child's poor performance with regard to grade equivalents on some tests was noted as contrary to his overall in-class progress. It was explained that assessment results can fluctuate from day to day and are not good measures of progress, a point stressed by Expert Paulson at the hearing.[110] It was explained that, given the child's very young age and immaturity, scoring by age was a more accurate measure of individual progress within an individualized program than standardized scoring through grade equivalents.[111]

Overall, the CSC was able to show that the child was demonstrating progress in the skills addressed in the September 14, 2005, IEP, mastering various oral language and also phonological goals and objectives in his work with the speech language teacher, and showing improvement with his self-monitoring.[112] Indeed, these 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.[113] In the Resource Room, special education specialist

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[105]MJ 505-506.

[106] MJ507-511.

[107] MJ552-555; MJ 562-567.

[108] MJ 582-583. The methodological basis for this program is unknown.

[109] MJ 562-567.

[110] Tr. 16-34; 647-649.

[111]Tr. 20-30; 39-40; 649-650. *See also Houston Indep. Sch. Dist. V. Bobby R*., 200 F.3d 341, 347-349(5th Cir. 2000) (progress should be measured with respect to the individual student, not in terms of others); *T.R. ex rel. N.R. v. Kingwood Twp. Bd. Of Educ*., 205 F.3d. 572, 578 (3rd Cir. 2000) (appropriate education is judged in light of *individual* needs and potential)(emphasis added); *Leighty v. Laurel Sch. Dist*., 457 F.Supp. 2d 546 (W.D. Pa. 2006) (an education that maximizes a child's potential is not mandated under IDEA).

[112] Tr. 297-304; 658.

[113] Tr. 306-320; MJ 572-573.

Paniagua reported that the child demonstrated progress in word attack skills and, in particular, had made significant gains over the year in blending sounds without stopping between sounds.[114] She also showed how he had mastered a number of objectives under the reading goals and objectives, and was able to identify rhyming words with 90% accuracy when given an informal list of 10 paired words.[115] She further explained that the child was progressing in a sequential, systematic order.[116] Such progress included his sight word vocabulary, an area previously identified as posing particular difficulty, as measured through DOLCH PrePrimer Sight Words monitoring.[117]

After reviewing the child's files in preparation for the hearing, Expert Paulson noted that the 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.[118] She further explained that such learning is not linear. Paulson stated that a level of overt progress is often not identified until the child makes a sudden breakthrough demonstrating that a foundation has been successfully established from which the child can proceed to another level.[119] In giving her testimony, Dr. Paulson's balanced explanations proved helpful to both parties.[120]

During discovery, Petitioner's produced for the first time an April 2006 state university (SU) evaluation of which Respondents had heard, but not previously seen[121] Despite some testing and environmental flaws,[122] that evaluation confirms the child's improvement in several areas. For example, measurable improvement can be noted between the time the school administered the May 2005 CTOPP and SU administered a CTOPP in April 2006. The child's CTOPP scaled scores either kept pace with the more advanced requirements of the older age-normed form of the test[123] or demonstrated even more significant improvement by moving from ranges of inability to

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[114] Tr. 418-421.

[115] Tr. 422-424.

[116] Tr. Tr. 480.

[117] Ex. 1076a.

[118] Tr. 698-690.

[119] *Id.*

[120] *See*, *e.g.*, Testimony of Petitioner's husband, Tr. 692.

[121] Pet. Ex. 4a-4f.

[122] Tr. 644-648.

[123] Ages 7-24, as opposed to age 7 and younger.

within an average range.[124] Petitioner's SU evaluation also reflected that the school's intervention strategies under the September 2005 IEP had helped the child achieve markedly increased percentile scores on both the composite measurements of phonological awareness and phonological memory, and the results show that progress was made despite the child's previously documented short-term memory deficit.[125] In noting the improvement in the child's rapid naming, the composite score of phonological awareness and word blending, Dr. Paulson stated such improvement is "a good indication that he is getting it. . . . He is at the age level of the expectation of where he should be for his age for that sub-test."[126] She later stated, "His blending of words is better, significantly better."[127] While noting the child's progress, the expert also noted that the child had faced very real obstacles in the forms of his disabilities, his phonological processing deficit, the fact some sounds are more difficult at an early age, and his immaturity.[128]

Children with this form of disability need to progress from imitation of sounds, to making sounds on their own, then to blend the sounds and move on to more difficult linguistic challenges. This demands self monitoring and self-correction, both of which require conscious effort.[129] Dr. Paulson thus noted the importance of teaching the child self monitoring so as to make it an unconscious habit.[130] Consequently, a measured but supportive and rigorous curriculum was built into the May 23, 2006, IEP proposal.

Despite the explanations given to Petitioner by the CSC on May 23, 2006, explanations corroborated by Expert Paulson at the hearing, Petitioner was not persuaded and declined to sign the proposed IEP. Following that meeting, Ms. Paniagua met with Petitoner to discuss the IEP proposal. Petitioner countered with her own objectives and goals and informed the school she wanted her son to be given a methodologically mixed program including LB's "LiPS," the Orton-Gillingham-based Barton Reading, and the computerized Fast ForWord software program, all within a total program committed to at least 50% of instruction in Orton-Gillingham methodology.[131]

At a June 5, 2006, CSC meeting, a new draft IEP was presented that was not in the school's usual EXCENT® format, but contained all the elements that program

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[124] Tr. 623-625.

[125] *Id. See also* MJ 351-356.

[126] Tr. 624-625.

[127] *Id.*

[128] *See* Tr. 276-278, 330-331, 334-335; *see also* Tr. 11-13, 30, 262-275, 289, 299-300.

[129] Tr. 297-304.

[130] Tr. 625-626.

[131] MJ 582-583.

requires for IDEA compliance. It presented the school's and Petitioner's proposals side-by-side so Petitioner could visually see where her input had been adopted.[132] As a showing of good faith, the school verbally offered a summer program through LB, despite the fact Regression Recoupment had not indicated ESY was necessary. Petitioner still declined to sign the proposed IEP, even though it now included entries such as the requirement that at least 50% of the child's instruction would be in an Orton-Gillingham-based methodology. Instead, she submitted a lengthy request for services that now included provision that six to eight hours per day would be devoted to simultaneous instruction under multiple methodologies of her selection. She also asked that the school would provide evaluations by a neurologist for an MRI and EEG, an audiologist referral for CAPD, and a March 2007 reevaluation of the child in the U.S. She also requested reimbursement for the SU evaluation. She wanted to weekly collaborate with the special education professional "about lessons and levels used . . . ."[133] 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.[134] As the school prepared to open the next morning, Petitioner emailed it regarding her IEP proffer: "Now that you have had a day to review the IEP is it going into effect? All of it? I am waiting; you and the school are hindering his educational needs."[135]

The school responded point-by-point in a three-page letter dated June 21, 2006.[136] It declined to reimburse Petitioner for her expenses in unilaterally obtaining the SU evaluation, which the school had not seen and that was conducted within the same brief time span as the assessment provided by DoDDS. The child, age six, was still not deemed ready for CAPD testing and the school did not understand the request for neurological testing. It expressed reservations about the intensity of the program in terms of hours per day of reading instruction and noted that, among other things, it was in excess of the normal school day. It declined to offer Barton Reading simultaneously with a LB program, stating it would dilute the LB methodology. It also was concerned about the research-basis for the programs requested, as well as potential academic conflicts between the various programs. With assurances from LB that its summer program would pose no obstacles to the child's efforts elsewhere, the LB program was inserted into the IEP as ESY. With the LB program now guaranteed within the IEP, Petitioner dropped her other demands and signed the IEP on June 26, 2006. In doing so, however, she signed with the clear reservations that "the IEP signature will not be

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[132] MJ 601a-607.

[133] MJ 609.

[134] MJ 608-609.

[135] MJ 618.

[136] MJ 619-621.

any good after 90 calendar days," thus attempting to nullify the IEP after the summer session was provided.[137] Consequently, the child received a summer LB session.[138]

The school indicated it was prepared to deliver LB services to the child in autumn 2006 if the CSC concluded it was appropriate.[139] Requesting guidance from LB about its programs, LB informed the school that it would not be consistent with it's methodology to deliver LB and Barton Reading simultaneously, guidance clearly inconsistent with some of Petitioner's earlier requests of what the child needed.[140] LB did state, however, that Barton Reading might be used after the child completed the LB program.

On September 5, 2006, shortly after receiving an invitation to an IEP modification meeting and the start of the 2006-2007 school year, Petitioner wrote the school that she would remove, but not withdraw, the child from school in 10 days[141] Without explaining how she interpreted this distinction; she wrote that he 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 Petitioner believed were the most effective. She set forth an appointment process "if [the school] would like to have access of [the child]," then removed the child that same day.[142]

Respondents offered to provide Petitioner with materials to support home-schooling, which she later declined.[143] They also encouraged Petitioner to return the child to school.[144] The CSC then prepared a draft IEP, to be offered at a September 22, 2006, progress review, which, like the September 2005 and all other offered IEP drafts, met the core requirements of IDEA and DoDI 1342.12.[145] Like the June 2006 IEP, a side-by-side comparative, non-EXCENT® draft was prepared for illustrative purposes. At the request of Petitioner, it also included recommendations made by LB's summer services provider. Overall, it was drafted after review of the child's progress, current needs, and appropriate goals. Petitioner attended the meeting and participated in discussion. In the end, however, Petitioner declined to sign the IEP.

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[137] MJ 623-632.

[138] MJ 632a.

[139] Tr. 160.

[140] Tr. 717-720, 726-728.

[141] MJ 640.

[142] Tr. 980.

[143] MJ 648-651.

[144] MJ 666, MJ 684-686.

[145] Tr. 129-145.

Petitioner was given an EXCENT® copy of the IEP to share with her husband,[146] who later requested another copy be emailed to him.[147] To date, neither parent has signed the IEP and the child has not returned to school. He has been home-schooled by Petitioner with some outside educational support.[148] Petitioner states progress has been made at home. At the hearing, Petitioner was asked "Would either direction of this proceeding lead the child back to school or is it your intention not to return the child to school?," to which Petitioner answered "I don't see how we can. . . ."[149]

Conclusions of Law

The exhibits and testimony were often in conflict. Both sides agree, however, that the child's language difficulties are truly significant. 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.[150] All witnesses except the 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 from Petitioner and her husband.[151] Petitioner argued, however, that the child's scores on grade equivalency based tests from standardized assessments indicated that the child made no significant improvement while in school. As additional documentary evidence of a lack of growth by the student, Petitioner pointed to the SU and LB assessments from April 2006, and contrasted what she concluded showed a lack of progress with the child's work product since leaving the school, which she asserts demonstrates significant progress. Petitioner supported her contentions with anecdotal evidence from her family, contrasting what they interpreted as the child's lack of growth at school with the growth they believe the child has made through home-schooling. Witnesses for both sides varied significantly in terms of expertise in the areas of education and special education, education and training, and opportunity for observation of the child before and after his withdrawal. All testimony was sincere and credible.

At hearing, the parties argued six issues encompassing Petitioner's complaints:

First, Petitioner claims that Respondents violated IDEA by manipulating the child's services (*Issue 1 – Whether the school violated IDEA in withholding certain services regardless of circumstances or inclusion on an IEP*), both in terms of what was

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[146] Tr. 163-165; Tr. 736-741.

[147] MJ 683-686.

[148] Tr. 875-876, 886-897, 908-912, 986.

[149] Tr. 987.

[150] Exs. MJ 704-933.

[151] *See*, *e.g.*, Tr. 692.

stipulated on the IEP and how the school controlled services Petitioner requested for inclusion on the child's IEP. Concerning the former, the IEP dictated some services in terms of actual minutes per week. Specifically, Petitioner argues that the child was denied Wednesday service minutes both when Wednesday was a holiday and on weeks when a non-Wednesday holiday impacted the amount of minutes received that week.

The loss of Wednesday services on a school holiday, such as a spring break or a floating holiday like Veteran's Day, is unavoidable. Unless some other written agreement so provides, however, there is no expectation that a school will provide any services when the school is closed. With regard to diminished minutes during a non-holiday Wednesday, Petitioner primarily cites to reduced services during a three-day Thanksgiving week. Inasmuch as the entire school week and all academic services would be compressed during that abbreviated time, it is not surprising that special services might also be compressed or reduced. Such a reduction does not indicate disorganization or pettiness on behalf of the school, but rather the practical result of the facts. Most importantly, although every minute in school may be characterized as invaluable, particularly for a special education student, Petitioner failed to show how these reduced minutes resulting from direct or indirect holiday interruptions denied the child's right to FAPE or otherwise constituted an active and discernable denial of educational benefits.

Finally, Petitioner alleges that the school withheld CAPD testing and the radium amplifier arbitrarily, and it withheld inclusion of the 2006 LB summer session on the June 2006 IEP in violation of IDEA and as a maneuver to "force" her to sign it. The allegations are unfounded. CAPD testing was considered premature based on the child's age. Evidence shows that Ms. Osier introduced the radium amplifier idea on Petitioner's behalf and that it was tested for several months. In keeping with school policy regarding assistive technology, however, it was not included on the IEP because it was not ultimately determined that the appliance was necessary as a long-term aid.

Recoupment Regression analysis never indicated ESY was merited, but it was twice offered. In 2006, the school orally offered to provide the requested LB summer service to the child as a discrete service, apparently in an effort to placate Petitioner. It then continued to plan for the session after Petitioner initially refused to sign the June 2006 IEP. It has not been shown that the school intended to withhold "services to force parent to sign June 2006 IEP before it would provide summer program services not noted in the prior IEP."[152] Indeed, the facts suggest that Petitioner withheld her signature on the June 2006 IEP to leverage inclusion of the LB summer program on the annual IEP, then undermined operation of the IEP by attempting to limit its effectiveness to 90 days. Regardless, none of the facts raised under this issue show that IDEA was violated or undermined through any untoward machinations by Respondents.

[152] Order of Aug. 24, 2007, quoting Petitioner.

Second and third, with regard to Petitioner's two issues regarding the school's refusal to adopt or adhere to those methodologies she requested (*Issue 2 – Whether the school violated IDEA by failing to adopt Petitioner's request for a specific methodology or strategy; Issue 3 – Whether the school violated IDEA by changing its position on offering a specific methodology as the child progressed through the academic year*), it is true that Respondents did not change methodologies under the IEP whenever Petitioner decided the school's methodology or program was not effective. It is also true that they abandoned at least one requested methodology-based program ("LiPS") and the radium amplifier when they proved ineffective. That is not to say, however, that the school discounted Petitioner's input, concerns, or opinions.

IDEA grants parents of eligible students a narrow set of procedural rights,[153] which include a parent's right to participate in meetings that evaluate the child's performance, under 20 U.S.C. § 1415(b); to receive prior written notice whenever the school proposes a change to the IEP, 20 U.S.C. § 1415(b)(3); and to participate in due process hearings, 20 U.S.C. § 1415(f)(1). However, such procedural rights exist only to ensure that the child's substantive right to a FAPE is protected. To that end, exercise of a right to parental participation is encouraged. Ultimately, however, an IEP is the considered result of a properly comprised CSC working within the dictates of the statute in the best interests of the child; it is not a manifestation of the parents' dictates or a product limited within the parameters of what the parents deem more effective.[154]

Here, Petitioner's recurring input in such matters was regularly considered. It was discussed internally and with Petitioner at CSC meetings, in person, and by email. The school's ultimate decisions were regularly justified and explained. In some instances, Petitioner's requests were honored. The facts show, for example, that an Orton-Gillingham-style multi-sensory instruction was offered and both LB's summer ESY programs and "LiPS" were provided solely at Petitioner's request. In other instances, her requests were adopted although they were professionally deemed superfluous or unnecessary. Testimony persuasively showed that when it seemed such an offering would not undermine the child's established educational program, the school would sometimes incorporate a requested program to placate the parent. In yet other instances, it denied Petitioner's requests as ill advised. Indeed, Respondents showed that they went so far as to seek LB's advice to confirm and fortify the school's opinion that the simultaneous use of some multiple methodologies requested was both inappropriate and educationally unwise.

Respondents, however, were not obliged to adopt specific methodologies or change methodologies under the IEP based solely on a parental request or because a

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[153] *Wenger v. Canastota Central Sch. Dist.*, 146 F.3d 123, 126 (2d Cir. 1998) *(per curiam*);*Collinsgru v. Palmyra Bd. Of Educ.*, 161 F.3d 225, 233 (3d Cir. 1998) (the right of the child to FAPE is that determined to be of the child, his or herself).

[154] *Ariel B. v. Ft. Bend Indep. Sch. Dist.,* 428 F. Supp. 2d 640 (S.D. Texas 2006) (the parental right is participation, not dictation as to outcome).

parent remained unpersuaded as to the efficacy of the methodology offered.[155] Nor were they required to adhere to a program professionally deemed ineffective. IDEA guarantees equal opportunity, it does not guarantee a specific level of achievement, a particular type of educational program, or even guarantee a specified rate of progress.[156] FAPE only implies that an eligible student will be afforded an "appropriate education," a floor of opportunity; it does not imply that the child will be afforded the best possible education or one designed within the parent's prescribed parameters.[157]

As discussed below, the IEP(s) at issue provided such an "appropriate education" inasmuch as they were adequately tailored and reasonably calculated to address this child's particular needs, and otherwise met the dictates of 20 U.S.C. § 1414(d). Indeed, the progression of IEPs, draft IEP drafts, and CSC minutes also demonstrated that progress within the prescribed curriculum resulted and was reflected whenever the child met an objective, as confirmed by highly credible expert and professional testimony. When such an IEP is developed, in compliance with statutory requirements and with consideration of teacher observation, appropriate diagnostics, and parental opportunity to provide meaningful input, a school has no further statutory obligation to change a child's program or embrace a specific methodology solely because a parent, no matter how well intentioned and regardless of credentials, concludes either that another methodology is warranted or that the methodology or program used is ineffective.[158]

Fourth, with regard to the school's adherence to an agenda during its meetings and CSC meetings with Petitioner (*Issue 4 – Whether the school's use of an organized agenda in conducting meetings regarding the child's education violated IDEA*), neither IDEA nor DoDI, in word or spirit, addresses how an academic or CSC meeting must be conducted, whether by agenda, spontaneously, or otherwise. A CSC meeting simply must be comprised of a specific sampling of individuals, including the parent(s). Consequently, the use of an agenda does not, in itself, violate IDEA.

Even if there was some statutory authority as to the conduct of such meetings, Petitioner failed to show how the use of an agenda, devised to provide order in meetings called for specific purposes, ever resulted in denying her child FAPE or significantly impeding her right to participate in the CSC decision-making process.[159]

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[155] Similarly, a school is not required to hire or assign a particular teacher to provide instruction in the presence of otherwise qualified staff. *See*, *e.g.*, *N.R. v. San Ramon citing Slama*, *supra*, note 32 (holding that a district's refusal to assign the service provider of plaintiff's choice did not constitute a denial of FAPE).

[156] For much the same reason, the CSC was correct in not providing "assurances" or "guarantees" of a certain rate of progress within a specific time frame on the child's IEP.

[157] *See Tullahoma City*, *supra*, p. 7 at 459-460.

[158] *A.B. v. Lawson*, *supra*, at note 32; *see also Henrico County* and *MM*, *supra*, notes 32 and 83.

[159] *See*, *e.g.*, *DiBuo v. Bd. of Educ. Of Worcester Co.*, 309 F.3d 184, 190 (4th Cir. 2002).

Indeed, the record is replete with evidence that Respondents met with Petitioner significantly more often than required and that most, if not all, meetings were followed-up with discussions, emails, and/or telephone contacts. The record demonstrates that an agenda was merely a method through which the school attempted to add coherence and organization to its meetings, in general, and with this Petitioner, in particular.[160]

Fifth, since the beginning of this process, Petitioner has expressed her dissatisfaction with Respondents for not making solid guaranties and fixed assurances on a number of prospective issues, from precise rates of educational progress to the delivery of non-obligatory, but orally assured services. Petitioner thus raises *Issue 5 – Whether the school violated IDEA and failed to provide FAPE for not making assurances that its evaluation and determinations were all made correctly based on the educational needs of the child, identified all areas of specific disabilities, and written an IEP to address all areas of disabilities*, a very broad claim, in the same vein.

Whether or not Respondents couched their discussions and emails in terms of "assurances" or "guaranties," the school regularly explained what evaluations and assessments it conducted, what those evaluations and assessments revealed, how they were interpreted, how the information culled from such diagnostics could be used in assessing and reassessing the child's special education needs, and related that those conducting the testing were sufficiently qualified to do so. All of the testing conducted was reasonably related to the child's two areas of identified disability and that all evaluations of which the school had knowledge were properly considered. The testing administered was appropriate, results were correctly interpreted, and the resultant information was properly applied in consideration of the child's progress and program.

In light of all the evidence and testimony of record, there is no persuasive indication that any evaluations or determinations were made incorrectly in light of the educational needs of the child. Nor is there persuasive evidence that the child's areas of specific disabilities and related educational needs were incorrectly assessed or left unaddressed. It is Petitioner's burden to show that Respondents denied FAPE or violated IDEA. Although she has shown that she expressed her disagreement with some of the testing conducted and some of the testing results, and proved that some tests she requested were not administered, she failed to show how the facts she alleges, even when taken in isolation from the record as a whole, caused a denial of educational benefit or violated IDEA.

Similarly, Petitioner failed to show that Respondents' identification of the child's disabilities was erroneously conducted or determined. Indeed, at the Petitioner's insistence, the child was tested for dyslexia. As a result, he was extended services under not one, but two categories. As a result, his individualized program was more far reaching, neither diminished nor watered down.

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[160] Indeed, Petitioner failed to show that there was ever a CSC meeting at which she was prohibited or significantly impeded from participation. The record indicates that she participated freely and without impediment from the school at varying levels at each and every CSC meeting she chose to attend.

The final aspect of that issue leads to the sixth and final issue raised, which is also the crux of the case: *Issue 6 –Whether the school failed to provide an appropriate IEP (09/05) under IDEA and provide FAPE.* The September 2005 IEP complied with both IDEA and DoDI 1342, ¶ E4.4.3, as did all draft IEPs and the tentative IEP from June 2006. The signed IEP was fully drafted in EXCENT®, thus assuring federal and school compliance with the applicable regulations.[161] Specifically, it appropriately included a statement of the child's then-present level of educational performance and a statement of measurable annual goals, including benchmarks and short-term objectives. It set forth a statement of special education, related services, and supplemental services, as well as mention of support and modifications. Measures for annual progress were explained, methods through which the child can appropriately progress toward annual goals were noted, and the active participation of the parent was indicated. Services to be rendered were noted in terms of time. A general physical education program was noted. All services provided were notably aimed at addressing this child's specific needs in light of his educational difficulties. The expert witness and qualified special educators all agreed the IEP was appropriate given this particular child's needs.[162] In all respects, the IEP appears appropriate, there is nothing visibly untoward in its content, no area of concern is overlooked, and it appears more than reasonably calculated to provide this child with a meaningful educational benefit.[163] Further, the record, as confirmed by Dr. Paulson, demonstrates that the content and execution of the IEP were appropriate, that parental input was considered, and demonstrable progress was achieved.

Despite the above, Petitioner argues that the IEP failed to provide FAPE because the "school stated that to use more than one program at a time would not ensure the fidelity of any program."[164] To emphasize her point, she directs attention to the IEP's presented in June 2006 and September 2006. Petitioner is substantially correct on this point, but it does not constitute a failure to provide FAPE.

For the June 2006 IEP, to which Petitioner ultimately agreed when LB summer services were eventually included, Petitioner challenged the proffered IEP for not offering the multiple methodologies of her choosing. Specifically, she simultaneously had called for LB programs, the computer-based Fast ForWord, Barton Reading, and a certain percentage of daily instruction in the Orton-Gillingham method. Respondents found the suggestion cumbersome and fraught with potential academic conflict. Respondents consulted LB personnel. Despite Petitioner's knowledge of LB programs,

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[161] *Rowley*, *supra*, note 38. at 206 ("adequate compliance with [the IDEA's procedures] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"); *see also Doe v. Bd. Of Educ. of Baltimore Co.*, *supra*, note 38.

[162] *See*, *e.g.*, *A.B. v. Lawson*, *supra*, note 32. ("The issue is not whether [a parent's program or preferred provider] is better, or even appropriate, but whether [the school] has offered . . . an appropriate program for the Child. . . .").

[163] *See*, *e.g.*, *Henrico County*, *supra*, notes 32 and 83 at 308 (quoting *Rowley* and *MM*).

[164] Order of Aug. 24, 2007, at 5, quoting Petitioner.

LB personnel confirmed the school's opinion that simultaneous use of a Barton Reading program could undermine progress in a LB program. Consequently, the school's decision not to simultaneously provide the multiple methodologies suggested was neither without reason nor misguided. As for the September 2006 IEP, which Petitioner chose to review after removing the child from the school system, it was substantially the same as the June 2006 IEP, but with due consideration of the progress made by the child during the 2006 summer session. Again, however, the CSC rationally resisted Petitioner's invitation to adopt multiple, simultaneous methodologies within the IEP.

As previously stated, FAPE implies that an eligible student will be afforded an "appropriate education," a basic floor of opportunity; it does not imply that the child will be afforded the best possible education or one designed within a parent's prescribed parameters.[165] IDEA does not permit a parent to dictate the terms of an otherwise valid IEP[166] or enable a parent to substitute personal judgment for that of the school.[167] Nor does it compel a child to remain in school under an IEP when a parent concludes they can receive a better education elsewhere. In the absence of substantive defect, a court generally must limit its consideration to the terms of the IEP itself in evaluating whether a school offered FAPE.[168] The IEP(s) at issue provided such an "appropriate education" inasmuch as they were adequately tailored and reasonably calculated to address the child's needs and yielded an educational benefit.

In conclusion, Petitioner's argument regarding the withholding of services is unfounded. There is no evidence that Respondent's refusal to include the radium amplifier in the child's IEP was anything more than an appropriate and considered decision. Moreover, there is little basis upon which to conclude it was Respondents that tried to leverage action by Petitioner for 2006 summer LB services that were not determined to be necessary. Moreover, neither statute, instruction, nor case has been cited to imply that the Respondents were bound in any way to implement any of the several methodologies or method-based programs, simultaneously or seriatim, regularly requested by Petitioner when a proper, IDEA-compliant IEP was in place throughout.[169] the school's use of an agenda constituted an actionable procedural violation of either IDEA or DoDI 1342.12 or otherwise substantially impeded Petitioner's ability to participate in the CSC's decision-making process. Further, Petitioner failed to show

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[165] *See Doe v. Tullahoma*, *supra*, note 157.

[166] *See*, *e.g.*, *A.B. v. Lawson*, *supra*, note 32.

[167] As noted in *Doe v. Tullahoma*, *supra* note 157, at 459-460, "[T]he Act requires that . . . schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the . . . school system provide a Cadillac. . . . We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average . . . student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with . . . the IDEA. *See also Ariel B*, *supra*, note 155.

[168] *See,* e.g.*, A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 679, 682 (4th Cir. 2007).

[169] *See Henrico County* and *MM*, *supra*, notes 32 and 83.

FAPE was denied because Respondents' would not make assurances or guaranties as to its testing, interpretation, or development of the child's IEP.

As for the IEPs and IEP drafts examined, particularly the signed September 2005 IEP at issue, there is no evidence that any of these documents violate either IDEA or DoDI 1342.12. Each was appropriately developed to provide meaningful educational benefit by a properly comprised CSC that included notable parental participation, addressed the child's individual needs in the appropriate manner, and contained all the prescribed elements of a proper IEP. Like the signed June 2006 IEP, which Petitioner tried to limit to 90 days, the signed September 2005 annual IEP was executed in accordance with the law and instructions. Although neither contained all of the methods or programs requested, such inclusion was not mandatory. Most importantly, they yielded measurable progress for the child.

Decision

Petitioner, on behalf of the child, failed to meet her burden with regard to the six issues agreed upon for hearing. Because Petitioner failed to establish a violation under IDEA or DoDI, Petitioner is not entitled to any relief.

SO ORDERED.

Arthur E. Marshall, Jr.
Hearing Officer

RIGHT TO APPEAL

Under DoDI 1342.12, § E9.9.1 (April 11, 2005), a party may appeal a hearing officer's findings of fact and decision by filing a written notice of appeal with the Director, DOHA, at P.O. Box 3656, Arlington, Virginia 22203, within 15 business days of receipt of the findings of fact and conclusions of law. The notice of appeal must contain the appellant's certification that a copy of the notice of appeal has been provided to all other parties. Filing is complete on mailing.