KEYWORD: Special Education

DIGEST: There is no basis to support Petitioner's claim that the parents were denied the opportunity to play a meaningful role in developing the child's IEP. The weight of the record supports a conclusion that Respondent provided Petitioner with educational benefit and a FAPE. The record does not support a conclusion that Judge acted in a way that would cause a reasonable person to believe he lacked impartiality. Petitioner has not demonstrated that she was denied due process rights. In special education cases the Board gives deference to the Hearing Officer's credibility determinations and resolutions of conflicting evidence so long as they are based on a preponderance of the evidence. Hearing Office decision affirmed.

CASENO: E-07-003

DATE: 06/25/2008

DATE: June 26, 2008

In Re:	)	
----------by her mother	)	Case No. E-07-003
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 February 29, 2008, in which he concluded that the Respondent School District (1) had not failed to consider the input, concerns, and relevant information from Petitioner's parents in developing an Individualized Education Program (IEP) for Petitioner under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA), and Department of Defense Instruction (DODI) 1342.12, *Provision of Early Intervention and Special Education Services to Eligible DoD Dependents,* April 11, 2005, (Instruction) ¶ E4.4; and (2) had not failed to create a proper IEP for Petitioner, in accordance with IDEA and the Instruction. Petitioner appealed this decision, in accordance with Instruction ¶ E9.9.

Petitioner has raised the following issues on appeal: whether the Judge's adverse decision is erroneous; whether the Judge was biased against Petitioner; whether the Judge violated Petitioner's due process rights during the course of the hearing; whether the Judge erred in his weighing of the evidence and did not consider contrary record evidence; whether the Judge denied Petitioner discovery of matters material to her case; whether the Judge's credibility determinations were erroneous; and whether certain of the Judge's evidentiary rulings were erroneous.[1] For reasons set forth below, the Board affirms the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact:

Petitioner is the daughter of a DoD civilian employee and was born in 1997. Prior to entering the DoD school system, she had been enrolled in a state public school, where she had been determined to be eligible for special education services. In May 2004, Petitioner's mother expressed concern that Petitioner was not making adequate progress under the school's IEP.

In the Fall of 2004, Petitioner entered the 2nd grade within the DoD system. The school served Petitioner under her state IEP pending evaluation for special education services in accordance with the Instruction. Petitioner's mother provided consent for Petitioner to be evaluated. In January 2005, Petitioner was found eligible for special education services under DoD criteria, and the parties signed an initial IEP.[2] Part of the services provided by the DoD was a program called Read 180, "a popular, scientific research-based reading intervention program shown effective in accelerating reading achievement in all students, including identified special education students."

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[1]Petitioner is a minor. Her mother acted on her 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."

In the months and years that followed, Petitioner's Case Study Committee (CSC)[3] met frequently to discuss her progress, to keep the parents informed, and to receive input from the parents as to the child's educational needs. The CSC modified Petitioner's IEP from time to time in response to the parents' desires. In May 2005, Respondent agreed to provide a summer program using materials supplied by a renowned learning center (LC), although there was no indication that Petitioner was in need of an extended school year (ESY).

In response to concerns expressed by Petitioner's mother, various officials—teachers, DoD special education specialists, etc.—provided information as to Petitioner's progress, the qualifications of special education teachers, and the possible disadvantages of too-frequent assessment testing. In November 2005, Petitioner's mother and Respondent signed a new IEP. This IEP included requirements desired by Petitioner's mother. In developing this IEP, the CSC took into consideration Petitioner's student records, her past eligibility assessments, and information supplied by the parents concerning a family history of academic difficulties. It also took into account her demonstrated strengths and weaknesses and incorporated the Read 180 program.

Subsequently, in December 2005, Petitioner's mother advised Respondent that, in the mother's view, Petitioner was not making satisfactory progress and requested that the IEP include certain teaching methodologies which she believed would be of benefit. In anticipation of an upcoming CSC meeting, Petitioner's teachers supplied classroom monitoring data, which indicated that Petitioner was making academic progress. In January 2006, the CSC met to address Petitioner's progress and to consider a draft annual IEP. Petitioner's mother did not sign the IEP due to her belief that it was not based upon sufficient information. In the months that followed, Respondent gave Petitioner's mother an opportunity to inspect Petitioner's school records and attempted to address her concerns and answer her questions. Petitioner's mother requested that a private tutor be hired at Respondent's expense. In January 2006, Petitioner's mother requested an Independent Educational Evaluation (IEE).[4]

She also made suggestions for additions to the IEP, some of which Respondent adopted, though some were denied. One denial was in regard to a request that Petitioner's progress would be measured through a methodology which Respondent's special education experts believed was not an effective means of determining growth under the IEP. A subsequent CSC meeting addressed

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[3]*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 . . ."

[4]The right to an IEE is established in 20 U.S.C. § 1415(b)(1). It is an "evaluation conducted by a qualified examiner who is not employed by . . . the DoD school . . ." Instruction ¶ E2.1.36. The Supreme Court has held that this right ensures that parents are given access to an independent "expert who can evaluate all the materials that the school must make available and who can give an independent opinion." *Schaffer v. Weast*, 546 U.S. 49, 60-61 (2005). The Instruction provides that, if parents disagree with a school's special education evaluation, the school must either initiate a due process hearing to show that its evaluation is proper or provide an IEE at DoD expense. The IEE must conform to the requirements of the Instruction; be conducted in the area where the child resides, if possible; and be conducted by a person qualified to conduct educational evaluations according to DoD standards. Instruction ¶ E8.2.8.

ongoing attempts to finalize a new IEP. Petitioner's mother declined to sign a modified draft, providing instead numerous changes to Respondent's proposal.

In April 2006, LC, which had provided the previous year's summer program to Petitioner, performed the IEE. This IEE was supplemented by testing done by a DoD official who specializes in learning disabilities and who was qualified, *inter alia*, to diagnose dyslexia.[5] A week later, Petitioner's parents obtained another evaluation from a state university (SU) in the United States.[6] The report by the DoD official stated her opinion that Petitioner was not dyslexic and that she had no weaknesses beyond those already addressed by Respondent. She concluded that Petitioner was "solidly in the average range on all of the achievement tests that were administered."

The following June, the CSC proposed yet another IEP for the upcoming academic year, including input from Petitioner's parents. Petitioner's mother declined to sign it, proposing instead a draft that included "increasingly more specific" programs and methodology, which included programs supplied by LC. Respondent offered to enter into mediation over the IEP, though Petitioner's mother declined to participate.

Respondent agreed to include in the draft that LC training would be provided from July until August 2006. Petitioner's mother signed the IEP, though she included the following caveat: "I am only giving consent to the IEP as trying to show good faith, and the IEP signature will not be any good after 90 calendar days." She stated that she was signing the IEP to avoid a due process hearing. After the completion of the LC summer program, Petitioner's mother withdrew Petitioner from school.

In September 2006, the CSC again met to discuss a draft IEP, which "was in compliance with IDEA 2004 and DoDI 1342.12, and [which] took into account all appropriate information, assessments, and input, including the summer program." Petitioner's mother did not sign the IEP. She provided a notice of home-schooling to Respondent. As of the close of the record, Petitioner had not been returned to school. Rather, she was instructed at home, utilizing a curriculum chosen by her parents.

Petitioner's mother filed for due process in December 2006, requesting in part the appointment of a tutor for Petitioner. Petitioner's mother waived her child's rights to an expedited process and decision under applicable time-lines in April 2007. The hearing took place from September 4, 2007, to September 10, 2007.

Discussion

[5]In the Discussion section of our decision the Board identifies this official as "Witness B."

[6]Petitioner Exhibit 273(a) - (m). This document stated that Petitioner's scores were consistent with dyslexia.

The Instruction implements policy, assigns responsibilities, and prescribes procedures under the IDEA.[7] The Instruction mandates a Free Appropriate Public Education (FAPE), "including special education and related services for children with disabilities enrolled in the DoD school systems . . ."[8] The Instruction, and the companion DoDEA 2500.13-G, *Special Education Procedural Guide*, September 2005, as revised, set forth policies and procedures for evaluating students for potential learning impairment. It affords parents the right to participate in the evaluation process and in IEP development.[9] It also affords them rights to obtain independent evaluations and to challenge adverse determinations through a due process hearing.[10] The Appeal Board is responsible for conducting appellate review of due process hearings.[11] The Board employs a *de novo* standard of review, giving due deference to the Judge's credibility determinations and resolution of conflicting evidence.[12]

A. Whether the Judge's adverse decision is erroneous.

Although Petitioner initially submitted a statement of 74 allegations of error, the Judge conducted a pre-hearing teleconference in which he distilled these allegations into two broad areas to be covered: whether Respondent failed to consider input from Petitioner's parents, as required by the Instruction; and whether Respondent failed to create a proper IEP. Having reviewed the entire record, the Board concludes that the Judge's framing of the essential issues is reasonable. The Board will discuss Petitioner's allegation of error in the overall context of whether Petitioner was denied a FAPE.

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[7]Instruction ¶ 1.1.

[8]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 County School Bd.*, 941 F.2d. 1563 (11th Cir. 1991).

[9]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 the child's placement."

[10]*See* Instruction ¶ E9.4. *See also Schaffer*, 546 U.S. at 58: "[T]he burden of persuasion lies . . . upon the party seeking relief."

[11]Instruction ¶ E9.9.

[12]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).

In her appeal submission,[13] Petitioner challenged the Judge's conclusion that the parents had been provided with their rights to participate in developing Petitioner's IEP. For example, the mother stated that "Parents did not have a meaningful part in this child's education, we were not taken seriously during meetings, we were told what we could talk about and what we could not[.]"[14] The essence of her argument on appeal, an argument woven throughout her multi-page submission, is that Respondent prevented the parents from meaningful participation in developing an educational program for Petitioner.

The Board has examined this argument in light of the record as a whole. The Board finds no basis in the record to support this allegation of error. To the contrary, the record is replete with instances in which Respondent explicitly sought the parents' views and attempted to incorporate those views into Petitioner's IEP. For example, the hearing included testimony from Witness A, a special education coordinator for the district in which Petitioner's school was located.[15] This official became involved in Petitioner's IEP process and was familiar with the facts and circumstances surrounding it. She testified as to Respondent's efforts to solicit parental input during a January 2006 CSC meeting: "[Petitioner's mother] felt there was inadequate information to develop an IEP; she felt that there needed to be another assessment . . . Q: Did [the CSC] give [her] more time to review the IEP draft that had been proposed? A: Yes. . . .Q: So you gave her time to provide input? A: Yes."[16] An exhibit submitted by Respondent, a later draft IEP, explicitly identifies among its various objectives several that were requested by the parents.[17] Other pertinent documentary evidence includes e-mail communications between various officials acting on behalf of Respondent and Petitioner's parents, addressing concerns which the parents expressed over various aspects of

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[13]Petitioner, who is *pro se*, alleges various facts and propositions throughout her 43 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.

[14]Petitioner's Brief at 5.

[15]Witness A testified that she supervises 24 schools. Her responsibilities include providing guidance to schools and the district on matters relating to special education. Tr. at 36.

[16]Tr. at 98-99.

[17]Respondent Exhibit 0589, Draft IEP for CSC Meeting, June 9, 2006. This document includes the following representative requirements: "Goal: the student will utilize the writing process. *Parent Requested Objective*: [Petitioner] will be able to write, sequence, edit a story across all school settings at a 5.3 grade level. *Parent Requested Objective*: [Petitioner] will be able to take a sentence and dissect and label it with noun, verb, adjective, adverb, prepositional phrases, helping verbs and other parts of sentences on a 4.7 grade level, 9 out of 10 situations, across all school settings." (emphasis added)

Petitioner's receipt of special education services.[18] These matters are consistent with other record evidence, both testimonial and documentary, the weight of which support the Judge's conclusion that Respondent did not deny Petitioner's parents their rights of participation in the IEP process.

Petitioner also challenged the Judge's conclusion that Respondent had met its responsibility to develop an IEP that complied with the requirements of the Instruction. Throughout her appeal submission, Petitioner asserted that the special education services provided by Respondent did not take into account the true nature of her learning disability nor did the services result in real, measurable progress. In evaluating this allegation of error the Board has considered testimony and other evidence by Petitioner's parents expressing the view that Respondent had failed to diagnose Petitioner with dyslexia and that Petitioner was not making progress in her schooling.[19] However, we have also noted the considerable body of evidence, in the form of expert testimony and documents of various types (e. g., progress reports, achievement test results, etc.), which point the other way. For example, Witness B, the specialist who had performed testing on Petitioner in conjunction with the LC IEE, stated that her tests did not confirm that Petitioner had dyslexia.[20] Another official, Witness C, a special education coordinator from a different geographical area,[21] testified concerning the appropriateness of Respondent's efforts to develop an IEP. This witness provided support for the reasonableness of the CSC's efforts to establish a meaningful IEP for Petitioner.[22] By the same token, Witness A gave her opinion that the draft IEP prepared in September 2006 met the "fundamental requirements of the IDEA," and that it embodied "measurable

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[18]*See* Respondent Exhibits 0214, 0215, 0216, E-mail Traffic form Witness A, dated January 21, 2006. This document includes an e-mail from Witness A to Petitioner's parents, addressing concerns raised by them. For example, the message explains, *inter alia*, the pitfalls in attempting to measure academic progress by means of grade-levels; the qualifications of the teachers at Petitioner's schools; and the criteria for determining if a student needs an extended school year. The message also promises the parents an opportunity to examine and copy Petitioner's special education records.

[19]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.

[20]Tr. at 102. This witness testified that she holds a doctorate in assessing learning disabilities. She also has received education in reading and linguistic anthropology.

[21]This witness testified that she holds a masters degree in special education, that she has knowledge of and experience with various assessment tools, and is an "endorsed trainer" in the Woodcock-Johnson assessment methodology. She is on the board of directors of a non-profit foundation "sponsoring research in the nature of intelligence and cognitive abilities." Tr. at 508-510.

[22]Tr. at 511-512. "Q: Did you reach an opinion in this case as to whether [the IEPs from November 2005 to September 2006] were reasonably tailored to serve this child given her individual DoDDS profile as reflected by formalized testing instruments in evaluating her strengths and weaknesses? A: In my review of the IEPs in conjunction with the assessments that were available at the time that the IEPs were written, the IEPs were completely appropriate for the identified strengths and weaknesses that were presented from evaluations both as incoming students in DoDDS and in the assessments subsequent to them."

goals and objectives" consistent with the Instruction.[23] This testimony is generally consistent with other record evidence concerning various attempts by Respondent to develop a meaningful IEP. Indeed, the weight of the record evidence supports a conclusion that Respondent properly evaluated Petitioner's learning disability and made reasonable efforts to construct an IEP sufficient to meet her needs.[24]

Furthermore, the Board notes considerable record evidence to the effect that Petitioner was making measurable progress under her November 2005 IEP. For example, Witness D, Petitioner's special education teacher, testified that, as of January 2006, Petitioner was showing mastery of a number of objectives, such as vowel sounds, consonant clusters, etc., and was on the "cusp" of being an "extended reader," which was an improvement over previous reports.[25] This is consistent with extensive testimony provided by Witness C to the effect that various assessments performed on Petitioner showed measurable progress in reading comprehension. Witness D stated that, while Petitioner has academic weaknesses, in a number of significant areas she is within the average range based on national norms.[26] Although Petitioner's mother repeatedly expressed the view that Petitioner had not made sufficient academic progress, this view was not supported by the witnesses possessing special education expertise and familiarity with Petitioner and her school record.

Petitioner's mother noted that Petitioner's performance on assessments was uneven. However, there was substantial testimony to the effect that fluctuation in test scores is not unusual and does not mean that, over all, the student is not succeeding. "Q: ". . . [I]s it typical or is it unusual for a child to learn and make breakthroughs and then hold steady and then make breakthroughs, so it takes a little while to lay a foundation before they make more progress? A: That's absolutely common. As well as the fact that depending on any moment in time there can be other issues

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[23]Tr. at 152. "Q: . . . [P]rior to this hearing, did you review this IEP to ensure that it met the fundamental requirements of the IDEA, the ones that we talked about at the beginning of this hearing . . . [p]resent levels of performance, reflection of the class, the effect on the classroom, measurable goals and objectives, *et cetera*? A: Yes. Q: Are you satisfied that it meets the criteria of the IDEA as the [Department of Defense Education Agency] interprets them? A: Yes."

[24]Petitioner's mother believed that Petitioner required a multi-sensory approach to learning but that she was not receiving one. However, Respondent Exhibit 0432 consists of a letter, dated January 26, 2006, from a special education official explaining to Petitioner's parents that the education services which Respondent was providing Petitioner were multi-sensory in nature. "Multi-sensory refers to the fact that the instruction appeals to as many of the child's senses as are appropriate to a task. For example, a child may be asked to employ manipulatives or to air write a letter, thus appealing to the child's motor functions and relating them to the structure of letters . . . If your concept of a multi-sensory approach [is] not encompassed by the above explanation, perhaps you would define for us, in writing, more precisely what your request for a multi-sensory approach means."

[25]Tr. at 347-348. Witness D holds a masters degree in special education and had extensive prior professional experience before becoming Petitioner's teacher. She testified as to her education and experience in assessing and monitoring students with learning disabilities and stated that she was qualified to teach students with specific learning disabilities, such as dyslexia. She stated that she had the "main role" in monitoring Petitioner's progress under the IEP and in coordinating Petitioner's special education program with the general education program. Tr. at 296-299.

[26]Tr. at 546.

[interfering] with the efficiency of learning."[27] The weight of the record evidence supports the Judge's conclusion that, on the whole, Petitioner's IEP enabled her to make measurable progress in her studies. The weight of the record evidence also supports a conclusion that Respondent has provided Petitioner the "educational benefit" contemplated by the IDEA and by *Rowley*. Accordingly, Respondent has not denied Petitioner her right to a FAPE.

B. Whether the Judge was biased against Petitioner

Petitioner alleges that the Judge was biased against her. She alleges that the Judge engaged in *ex parte* communications with Respondent's counsel. ("See email where Counsel was requesting extended time and petitioner was not aware of it until after the deadline was granted.")[28] She further alleges that it was improper for the hearing to have been conducted by a Judge from the Defense Office of Hearings and Appeals (DOHA), insofar as that is an agency of the Department of Defense, as is Respondent school district.[29]

The IDEA grants parties the right to an "impartial due process hearing."[30] 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.[31] 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 Director of DOHA.[32] There is a presumption that administrative decision makers, including

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[27]Tr. at 544-545. *See also* Tr. at 219-220. (Witness A testified that it is not unusual for children with disabilities to fluctuate in their test scores); Tr. at 405 (Witness C testified to similar effect.)

[28]Petitioner's Brief at 1.

[29]The Board has previously noted that "[v]itriolic rhetoric runs the risk of polarizing a situation to the detriment of the parties, one of whom is a disabled child." 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's 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).

[30]20 U.S.C. § 1415(f)(1)(A).

[31]20 U.S.C. 1415(f)(3)(A).

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

Administrative Judges employed by DOHA, act with the appropriate degree of impartiality.[33] A party seeking to challenge the impartiality of a Judge bears the burden of persuasion.[34]

The Board has examined Petitioner's allegations in light of the record as a whole. The Judge appears to have communicated *ex parte* with either side at one time or another, addressing such procedural matters as time extensions for submitting final argument, etc.[35] While *ex parte* communications even of this sort should be avoided if practicable, the Board finds no support for the proposition that the Judge's actions rose to the level of reversible error. Contrast this case with *Murphy v. Commonwealth of Pennsylvania*,[36] in which a hearing officer conducted an *ex parte* interview with a witness concerning an IEP, thereby denying the student/appellant his right of cross examination at the hearing. In the case under consideration here, however, the Judge's actions did not materially affect Petitioner's substantive rights under the IDEA or under the Instruction. The Judge's actions appear to have been directed at resolving issues that were administrative in nature rather than substantive and do not implicate Petitioner's due process interests in the sense that the actions of the *Murphy* hearing officer did. Furthermore, while the Judge is employed by the DOHA, which falls under the Department of Defense, he is not associated with the Department of Defense Education Agency, 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."[37] 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.[38]

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[33]*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* ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008).

[34]DDESS Case No. E-03-001 at 12 (App. Bd. Jan. 20, 2004).

[35]*See* Hearing Officer's Deskbook, Vol. II, Tab Y, e-mail from Respondent's Counsel, January 18, 2008.

[36]74 Pa. Commw. 499, 460 A.2d. 398 (1983).

[37]*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).

[38]During the course of the proceedings, Petitioner correctly identified a few discrepancies in the school records. There is no obvious explanation for them. However, the variances are not individually as significant as Petitioner alleges. Petitioner believes that taken cumulatively these discrepancies are proof of bad faith and dishonesty. Given the volume of the record, the nature of variances, and the Board's own experiences with large volumes of documents, we cannot conclude that Petitioner's theory is proven by the presence of a few scattered discrepancies in the record. Nor can we conclude that the general presumption of good faith and regularity of Federal employees' conduct in the course of their duties is rebutted by these occasional variances. 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 witnesses lied does not overcome that deference. As a matter of common sense, most discrepancies cannot be presumed to be the product of deliberate falsifications. Other explanations may be equally, or more, plausible. For example, it is simply a given that human beings are prone to make mistakes. Also, perspectives may just differ and the presence of two or more perspectives of events is hardly indicative of deliberate falsification.

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

Petitioner asserts that the Judge did not provide the parents with a sufficient opportunity to advocate for her. She also asserts that the Judge erred (1) in stating that he lacked subpoena power and (2) in considering documentary evidence from which some information had been redacted.

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."[39] Both sides in a hearing are entitled to "full discovery" in accordance with the Federal Rules of Civil Procedure.[40] 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.[41]

In the case at issue, Petitioner, through her parents, called witnesses on her behalf and cross examined witnesses called by Respondent, resulting in a hearing transcript exceeding a thousand pages in length. Petitioner correctly notes that the transcript was not delivered in a timely fashion, but the Board is not aware of any remedy that would address this issue, especially since Petitioner waived time deadlines. Petitioner's brief does not identify any potential witnesses whom the Judge prevented her from calling. Furthermore, Petitioner submitted almost 2,000 pieces of documentary evidence, which the Judge admitted. Any evidence which the Judge did not admit was excluded upon proper grounds, such as lack of relevance.[42] There is no basis in the record to conclude that any redactions of documentary evidence were done other than to guard the privacy of persons not a party to this hearing.[43] All in all, Petitioner has not demonstrated that she was denied the due process rights afforded by the Instruction.

D. Whether the Judge considered all the record evidence and whether he erred in his weighing of the evidence.

Petitioner alleges that the Judge did not consider contrary record evidence, for example that the services provided by LC were consistent with her IEP. Furthermore, she alleges that the Judge did not consider the June 2006 and September 2006 IEPs, and that he did not consider the evaluation performed by SU.

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[39]Instruction ¶ E9.4.10.

[40]Instruction ¶ E9.5.1.

[41]Instruction ¶ E9.6.2-5.

[42]*See* Decision at 4, n. 15.

[43]*See, e.g.*, Respondent Exhibit 0893, Student Record Report for Reporting Period January 30, 2006 to February 24, 2006.

"The hearing officer's decision of the case shall be based on the record, which shall include the petition, the answer, the written transcript . . . of the hearing, exhibits admitted into evidence, pleadings or correspondence properly filed and served on all parties, and such other matters as the hearing officer may include . . ."[44] A judge is presumed to have considered all the evidence in the record.[45] "In special education cases, the Board gives deference to the Hearing Officer's credibility determinations and resolutions of conflicting evidence, provided they are based on a preponderance of the evidence."[46]

Petitioner points to nothing in the record which would rebut the presumption that the Judge had considered all the evidence. Indeed, the Judge admitted the two IEPs in question, as well as documentation pertaining to both the LC and SU evaluations. He permitted testimony concerning these matters and addressed them in his decision, including testimony which pointed out certain inadequacies in the SU evaluation.[47] Furthermore, while Petitioner may disagree with the weight the Judge assigned to these and other matters, the Board finds no reason to disturb the Judge's exercise of discretion in weighing the evidence and resolving conflicts therein.[48] The Board resolves this allegation adversely to Petitioner.

E. Whether the Judge denied Petitioner discovery.

Petitioner asserts that the Judge denied her discovery of matters essential to her case, such as a videotape depicting a teacher interacting with Petitioner; tape recordings made of various interactions between Petitioner's mother and officials acting on behalf of Respondent, such as CSC meetings; and a list of teacher qualifications.

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[44]Instruction ¶ E9.4.14.

[45]*See Western Pacific Fisheries, Inc. v. SS President Grant,* 730 F.2d. 1280, 1285 (9th Cir. 1984) ("We presume that the judge considers all of the evidence, and relies on so much of it as supports the finding and rejects what does not support the finding, unless the judge states otherwise"); *Rice v. Barnhart*, 384 F.3d 363, 370 (7th Cir. 2004) ("We have long held that an [Administrative Law Judge] is not required to provide a 'complete written evaluation of every piece of testimony and evidence . . ."); *Cf.* ISCR Case No. 04-08623 at 4 (App. Bd. Jul. 29, 2005).

[46]*See* DoDDS Case No. E-99-001 at 5 (App. Bd Feb. 8, 2000). *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").

[47]Decision at 20-21.

[48]*See Parker v. Barnhart*, 431 F.Supp. 2d 665, 674, n. 12 (E.D. Tx. 2006). Contrast Petitioner's case with *Faulders v. Henrico County School Bd.*, 190 F.Supp. 2d 849 (E.D. Va. 2002), in which the District Court found error in an administrative law judge's weighing of evidence of a special education case. The Court held that the judge failed to give appropriate consideration to the testimony of those school officials with the greatest personal knowledge of the child and the child's record.

As stated above, the Instruction provides full discovery to parties involved in a hearing. There is no basis to conclude that the Judge failed to honor this requirement. Indeed, regarding the qualifications of teachers, the Judge admitted three documents setting forth these qualifications.[49] Additionally, other witnesses at the hearing testified as to their qualifications to work in special education.[50] Concerning the videotape, a witness called on behalf of Petitioner testified as to its content. In light of that testimony there is no reason to believe that it was relevant to matters properly before the Judge.[51] Furthermore, the Judge permitted Petitioner's mother to use a CSC meeting transcript in questioning a witness.[52] However, to the extent that the Judge did not admit evidence, it appears to be because he reasonably concluded that the evidence lacked relevance.[53] The Board resolves this assignment of error adversely to Petitioner.

F. Remaining Issues

A review of the record as a whole provides no basis to disturb the Judge's credibility determinations.[54] The sufficiency of the Judge's evidentiary determinations has already been adequately addressed.

Conclusion

The decision of the Judge is AFFIRMED. This constitutes the final agency decision in this case. Accordingly, the Board hereby advises Petitioner that she has a right under 20 U.S.C. § 1415 (i)(2) to bring a civil action on the matters in dispute in a district court of the United States without regard to the amount in controversy.

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[49]*See* Respondent Exhibits 1078, 1079, 1080.

[50]*See* notes 15, 20, 21, and 25 above.

[51]Tr. at 733-735. The witness describes the videotape as depicting Petitioner being instructed by a teacher ,who, at one point, left the room for about "five to ten minutes."

[52]Tr. at 496-498.

[53]The Judge addressed the CSC recordings in his decision, stating that he would admit transcriptions of them only to the extent relevant. Decision at 4, n. 15.

[54]*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*, 1993 U.S. App. LEXIS 2878 (unpublished decision), holding that "[r]eviewing courts generally uphold credibility judgements because the trier of fact has a unique opportunity to observe and evaluate the witnesses."

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

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

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