	)	March 28, 2001
In re:	)	
	)	
	)	DDESS Case No. 00-E-005
Eligible Dependent Attending DDESS	)	
	)	
By his mother,	)	
Petitioner	)	
	)	

DECISION OF ADMINISTRATIVE JUDGE
WILFORD H. ROSS

APPEARANCES

FOR THE DDESS
Erin Hogan, Esq.
Department Counsel, DOHA

Gary Bergosh, Esq.
Assistant General Counsel, DODEA

FOR THE PETITIONER

Pro se

STATEMENT OF THE CASE

On October 23, 2000, the Petitioner filed a "Request for Due Process Hearing" pursuant to 32 Code of Federal Regulations Part 80, "Provision of Early Intervention Services to Eligible Infants and Toddlers With Disabilities and Their Families, and Special Education and Related Services to Children With Disabilities Within the Section 6 School Arrangement,"[1] (Part 80), concerning the special education of her son, ("the Child"). Pursuant to §D.1.d, Appendix C to Part 80, on November 8, 2000, I was appointed the Hearing Officer. DDESS filed an "Answer to Petitioner's Request for Due Process" on November 15, 2000. The Petitioner submitted an

[1]The Section 6 School Arrangement has been renamed the Domestic Dependent Elementary and Secondary Schools.

"Amended Petition for Due Process" on November 18, 2000. DDESS filed its "Answer to Petitioner's Amended Request for Due Process" on December 4, 2000.

Pursuant to Orders of the Hearing Officer, and in accordance with §D.2., Appendix C to Part 80, discovery was conducted by both parties between December 8, 2000, and January 16, 2001. Accordingly, the 50 day time limit for issuance of this decision was waived under the provisions of §D.1.n., Appendix C to Part 80.

On January 10, 2001, the Petitioner submitted a "Motion of Petitioner for Determination Without a Hearing." Such a request is authorized under §E, Appendix C to Part 80 and Paragraph 3.e. of DOHA Operating Instruction No. 34 (OI 34). The DDESS opposed the request. On January 16, 2001, the Hearing Officer issued an "Order Granting Petition for Determination Without a Hearing," and set a briefing schedule.[2]

Pursuant to the above-mentioned briefing schedule, the parties submitted written evidence and arguments. The record in this case closed on February 16, 2001, in accordance with that briefing schedule. The parties also filed written objections to my considering specific pieces of evidence. On February 26, 2001, I issued an "Order Regarding Objections to Evidence," which sustained some objections and denied others.

As part of that Order, I denied a request from DDESS to depose the Child's pediatrician, who submitted a signed statement as part of the Petitioner's rebuttal presentation on February 16, 2001 (Petitioner's Exhibit G). In addition to the reasons set forth in my Order, particularly the fact that the statement was not being offered as an expert opinion, even though it was authored by a physician, I also considered when the request was made (February 23, 2001). Given that Part 80, and the case law, indicate that the Child's right to a speedy due process hearing is paramount, and the period of time which had already passed since the Petition was filed, I believe that the equities of the situation in this case militated against my granting the request for a deposition.

ISSUES AND PURPOSE OF THE HEARING

A due process hearing in this matter was requested by the Petitioner on behalf of the Child contending that the Child has been denied a free appropriate public education ("FAPE"), consistent with the requirements of the Individuals With Disabilities Education Act (the "IDEA"), its implementing regulations (20 U.S.C. §1400 *et seq.* and 34 C.F.R. §300 *et seq.*) and Part 80. The questions presented, and/or issues to be decided, are the following:

1. Were the Individualized Education Programs (IEP) prepared for the Child in1999 and 2000 designed to provide the Child with a FAPE?

2. Was the Child provided a FAPE at Elementary School (School A) during the 1998 and 1999 school years?

[2]Although no "Hearing" was held in this case, the term will be used instead of "Determination Without a Hearing."

3. Was the Child provided with a FAPE at Elementary School (School B) during the 2000 school year?

4. Did the Superintendent of the Fort Schools (Fort Schools) solicit the Petitioner to request a transfer of the Child from School A to School B before the beginning of the 2000 school year?

5. Did the transfer of the Child from School A to School B amount to a change in placement requiring that a new IEP be developed?

6. Does the Child require transportation in order to receive benefits from his IEP?

LEGAL CONSIDERATIONS

The Department of Defense Domestic Dependent Elementary and Secondary Schools are operated pursuant to the Defense Dependents' Education Act of 1978, as amended, Pub. L. 95-561, Nov. 1, 1978, 92 Stat 2365, §1401 *et seq.*; 20 USC §921 *et seq.*, Chap. 25A. That Act provided that:

> The provisions of the Education for All Handicapped Children Act of 1975 [Pub. L. 95-142, Nov. 29, 1975] shall apply with respect to all schools operated by the Department of Defense under this Act.[3]

The Education for the Handicapped Act, 20 USC 1400 *et seq.*, which encompassed the Education for All Handicapped Children Act of 1975, has since been retitled as the Individuals with Disabilities Education Act.[4] In 1991 §1409(c) of the Defense Dependents' Education Act of 1978, 20 USC §927(c), quoted *supra*, was amended to read:

> [T]he provisions of part B of the Individuals with Disabilities Education Act [20 USC §1411 *et seq.*], other than the funding and reporting provisions, shall apply to all schools operated by the Department of Defense under this title. . . .[5]

By referring to the IDEA, the current DDESS enabling statute has incorporated the specified provisions of the IDEA and made them applicable to the operations of DDESS.

Children with disabilities eligible to receive educational instruction from DDESS are entitled to receive a free appropriate public education.[6] The term "free appropriate public education," is

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[3] § 1409(c), Pub. L. 95-561, Nov. 1, 1978, 92 Stat 2369; 20 USC §927(c).

[4] Amendment by §901(a), Pub. L. 101-476, Oct. 30, 1990, 104 Stat. 1141; *see also* §25(b), Pub. L. 102-119, Oct. 7, 1991, 105 Stat. 607.

[5] Amendment by §24, Pub. L. 102-119, Oct. 7, 1991, 105 Stat. 605.

[6] 20 USC §1412(a)(1), §1415(a); § 80.4 of Part 80.

defined by the IDEA to include certain "special education" and "related services."[7] The term "special education" is defined also by the IDEA to mean specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability. In addition, the term "related services" is defined by the IDEA to include "transportation."[8]

The IDEA also establishes certain procedural safeguards. Applicable to the decision in this case is the following from 20 USC § 1415. "Procedural safeguards":

> (b) *Required procedures; hearing*
>
> (1) The procedures required by this section shall include, but shall not be limited to --
>
> . . . .
>
> (C) written prior notice to the parents or guardian of the child whenever such agency or unit--
>
> (i) proposes to initiate or change, or
>
> (ii) refuses to initiate or change,
>
> the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

In implementation of the requirement to apply part B of the IDEA to DDESS in the amended §1409(c) of the Defense Dependents' Education Act of 1978, 20 USC §927(c), quoted *supra*, the Department of Defense has issued regulations set forth in 32 CFR Part 80, "Provision of Early Intervention Services to Eligible Infants and Toddlers With Disabilities and Their Families, and Special Education and Related Services to Children With Disabilities Within the Section 6 School Arrangement."

DDESS has established its own procedural safeguards as set forth in § F, Appendix B to Part 80. In pertinent part it states the following:

> 2. The consent of a parent of a preschool child or child with a disability or suspected of having a disability shall be obtained before any:
>
> a. Initiation of formal evaluation procedures;
> b. Initial educational placement; or,
> c. Change in educational placement.

§80.3 of Part 80 provides "Definitions." Among the "Definitions" are the following:

> (c) *Attention deficit disorder (ADD).* As used to define students, encompasses attention-deficit hyperactivity disorder and attention deficit disorder

[7] 20 USC §1401(a)(18).

[8] 20 USC §1401(a)(16)(B)("special education"); 20 USC §1401(a)(17)("related services").

without hyperactivity. The essential features of this disorder are developmentally inappropriate degrees of inattention, impulsiveness, and hyperactivity.

(4) A diagnosis of ADD may be made only after the child is evaluated by appropriate medical personnel, and evaluation procedures set forth in this part (appendix B to this part) are followed.

(5) A diagnosis of ADD, in and of itself, does not mean that a child requires special education; it is possible that a child diagnosed with ADD, as the only finding, can have his or her educational needs met within the regular education setting.

(6) For a child with ADD to be eligible for special education, the Case Study Committee, with assistance from the medical personnel conducting the evaluation, must then make a determination that the ADD is a chronic or acute health problem that results in limited alertness, which adversely affects educational performance. Children with ADD who are eligible for special education and medically related services will qualify for services under "Other Health Impaired" as described in Criterion A, paragraph (h)(1) of this section.

(g) *Children with disabilities ages 5-21 (inclusive).* Those children ages 5-21 (inclusive), evaluated in accordance with this part, who are in need of special education as determined by a CSC and who have not been graduated from a high school or who have not completed the requirements for a General Education Diploma. The terms "child" and "student" may also be used to refer to this population. The student must be determined eligible under one of the following four categories:

(7) *Criterion A.* The educational performance of the student is adversely affected, as determined by the CSC, by a physical impairment; visual impairment including blindness; hearing impairment including deafness; orthopedic impairment; or other health impairment, including ADD, when the condition is a chronic or acute health problem that results in limited alertness; autism; and traumatic brain injury requiring environmental and/or academic modifications.

(8) *Criterion D.* The measured academic achievement of the student in math, reading or language is determined by the CSC to be adversely affected by underlying disabilities (including mental retardation and specific learning disability) including either an intellectual deficit or an information processing deficit.

(p) *Free Appropriate Public Education.* Special education and related services for children ages 3-21 years (inclusive) that:

(1) Are provided at no cost (except as provided in paragraph (xx)(1) of this section, to parents or child with a disability, and are under the general supervision and direction of a Section 6 School Arrangement.

(2) Are provided at an appropriate preschool, elementary or secondary school.

(3) Are provided in conformity with an Individualized Education Program.

(4) Meet the requirements of this Part.

(rr) *Related Services*. This includes transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education. . . The following list of related services is not exhaustive and may include other developmental, correction or supportive services . . ., if they are required to assist a child with a disability to benefit from special education, as determined by a CSC.

Transportation. This term includes transporting the individual with a disability and, when necessary, an attendant or family member or reimbursing the cost of travel ((e.g., mileage, or travel by taxi, common carrier or other means) and related costs (e.g., tolls and parking expenses)) when such travel is necessary to enable a preschool child or child to receive special education (including related services) . . .

Transportation services include:

(i) Travel to and from school and between schools, including travel necessary to permit participation in educational and recreational activities and related services.

(xx) *Special Education*. Specially designed instruction, at no cost to the parent, to meet the unique needs of a preschool child or child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. . .

FINDINGS OF FACT

The following Findings of Fact are based on the exhibits. The Child is 9 years old as of the date of this decision and is eligible for special education services under Criterion D - Learning Impaired, Information Processing Deficits. He is currently enrolled in School B in the third grade.

It is the IEPs, developed in coordination with the parents and the school administration, which decides what special education services the Child should get and how those services should be delivered. The Child first attended school at School A, which serves the housing area in which the Child lives.

During the fall of 1998, when the Child was in the first grade, his teacher became concerned by the Child's problems with attending, focusing and completing work. This was particularly evident in reading and the language arts. (Respondent's Exhibit 35.) This teacher referred the Child for evaluation by the School A Case Study Committee (CSC).

The child was evaluated and, based on various test results, was determined to be eligible for special education services under Criterion D. Testing showed that he has a form of dyslexia,

specifically that he is a dysphonetic reader. (Respondent's Exhibit 29.)[9] Subsequent to this determination, a CSC meeting was held on February 9, 1999, with the Petitioner as one of the participants. (Respondent's Exhibit 28.) As a result of this meeting, an IEP was developed for the Child. The "Annual Goal" of this IEP was that, "[The Child] with consultative, co-teach or resource pull-out, will improve the quality and quantity of his written expression." (Respondent's Exhibit 27.) This IEP was to be in force until February 8, 2000.

The Petitioner did not ask for transportation to be provided to the Child as a related service in this IEP. (Respondent's Exhibits 55 and 56 at question 8.) In fact, the mode of transportation for the Child is stated to be "Regular." Neither party submitted documentation to the Hearing Officer defining what "Regular" transportation is. School A is approximately one mile from the Child's home. Respondent's Exhibit 11, the Fort Schools transportation policy, shows that School A is not a school where students the Child's age are required to be transported by bus. During the time the Child attended School A, "[The Child] walked with me [Petitioner] or my friend on occasion, I drove him or we rode bikes, as well." (Respondent's Exhibits 55 and 56 at question 10.)

In Respondent's Exhibits 55 and 56 at question 4, the Petitioner denies taking part in the formulation of this IEP. Her signature as a participant is found on the CSC meeting minutes and on the IEP itself; she also signed a "Consent for Placement" on February 9, 1999. (Respondent's Exhibit 28.) The preponderance of the evidence shows, and I find, that she was a participant in the formulation of this IEP.

The Child received services in accordance with his IEP for the remainder of his first grade year. He achieved passing marks in the first grade and passed on to the second grade at School A in the fall of 1999. (Respondent's Exhibit 14.)

This IEP was modified at the request of the Petitioner on October 14, 1999. (Respondent's Exhibit 26.) Specifically, the IEP was changed to allow the Child to receive pull-out services five days a week.

The IEP was again modified on December 9, 1999. During a meeting held to discuss an occupational therapy evaluation of the Child, the Petitioner "requested that the reading lab be included in [the Child's] IEP. The reading lab was added under modify environment." (Respondent's Exhibit 23.)

A CSC meeting was held on February 10, 2000, to review and, if necessary, modify the Child's IEP. The Petitioner was present at, and participated in, this meeting. (Respondent's Exhibit 20. *See, also,* Respondent's Exhibits 55 and 56 at question 12.) A new IEP was designed at this meeting with new objectives for the Child. Once again, the type of transportation required by the Child was stated to be "Regular." The Petitioner signed this IEP as a participant. The "Annual Goal" of this IEP is that, "[The Child], given consult, co-teach, resource pull-out services will

[9]There is no evidence that the Child has ever been evaluated by a CSC for Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder.

increase sight word knowledge, comprehension, and written expression skills." (Respondent's Exhibit 19.) This IEP was to be in force until February 9, 2000.[10]

During the CSC meeting, above, the Petitioner requested that assistive technology (computers and software) be provided for the Child. The Petitioner was informed that additional information would be needed before that requirement could be added to the IEP. (Respondent's Exhibit 20.) Subsequently, apparently due to an administrative mix-up, the requested computer equipment was supplied to School A without the Child's IEP being modified to require it. (Respondent's Exhibits 3 and 22.) The IEP was modified on April 20, 2000, to include the requirement that assistive technology be available for the Child's use. This was done at the request of the Child's father. (Respondent's Exhibit 18.) The IEP was again modified on May 31, 2000, to include the names of the specific software being used by the Child. This was done at the request of the Petitioner. (Respondent's Exhibit 17.) The Petitioner wanted the computer equipment placed in the Child's regular education classroom. The principal decided that, to avoid disruption, the equipment would be placed in the classroom of the Child's special education teacher. The Child had access to the equipment whenever he needed it. (Respondent's Exhibit 4 at unnumbered page 2.)

The Child's Academic Record of Progress (Respondent's Exhibit 14) shows that he achieved passing marks and was passed on to the third grade in the fall of 2000. The Child's learning impaired teacher and regular second grade teacher submitted statements in which the teachers indicated how and why they felt the Child had shown educational progress during the second grade. (Respondent's Exhibit 5 at unnumbered pages 6-7 and Respondent's Exhibit 6 at unnumbered pages 2-3. *See, also,* Petitioner's Exhibit F.). The Child's IEP was annotated in May 2000 to show his mastery of various short term objectives. None of the objectives show "No progress," and most of them show that his evaluation was, "Progressing/consistent demonstration of skill without generalization across settings." (Respondent's Exhibit 15.)

The record also shows that the Child took several reading tests during the spring of 2000. (Respondent's Exhibits 39, 40, 41 and 43.) These tests indicate that the Child was progressing in his ability to read over the time period that they were given. The Petitioner argues that the results of these tests may be skewed because of the fact that they were given within a fairly close period of time, February to August 2000. Petitioner's Exhibit H contains the answers to interrogatories propounded by the Petitioner to a school psychologist for the Fort Schools. Even though he had no direct personal knowledge of the two specific reading batteries (STAR and WDRB) given to the Child, he did present information about testing in general which the Hearing Officer has considered in weighing the value of these reading tests.

In addition, the Child's reading teacher supplied a statement that discusses testing (Respondent's Exhibit 7). She states on page 3 of that exhibit:

> The STAR and WDRB test results are part of a number of considerations made when deciding a child's course for education. There are also teacher observations, daily work performance, eagerness and enthusiasm about learning plus many other considerations. A child's progress is never determined on the basis of

[10]Under the provisions of §F.7 to Appendix B of Part 80, this IEP remains in effect during the pendency of this due process hearing.

> one test. On a given day he may score higher or lower than he might another time. However, considering several tests, in class performance, plus [the Child's] growing ability to read independently and do well on Accelerated Reading tests indicated to us that he was making good progress with his reading.

The Petitioner expressed concerns with how the Child was being taught by his regular classroom second grade teacher. She presented excerpts from this teacher's grade book concerning the Child (Petitioner's Exhibit E) in an attempt to support these concerns. However, the Petitioner did not provide any key or other evidence, such as how this book is kept by the teacher, which would allow me to interpret the excerpts in any meaningful way. In addition, it appears that the Petitioner has written on some of the documents in Petitioner's Exhibit E. With the current state of the record, I cannot determine what was written by the Petitioner and what was written by the teacher. Accordingly, I have given Petitioner's Exhibit E no weight.

From all indications, during the Spring of 2000, relations between the Petitioner on one side and the Child's teachers and School A's principal on the other began to cool. Given the state of the record, I am unable to specifically state the causes of this conflict. The Petitioner submits that it was because she did not feel that her son's needs were being properly served by the teachers and the administration and that, accordingly, he was not receiving an appropriate education. (*See*, Petitioner's Opening Arguments and Closing Arguments.) The Respondent argues that it was because the Petitioner refused to follow rules concerning advance notice for visits by parents, and a growing personality conflict with the staff. (*See*, Respondent's Exhibits 3, 4, 5, 6, 7, 8, 47 and 48.)

This conflict resulted in a meeting in early May between the Petitioner, her husband, the principal of School A and the Fort Schools Special Education Director. No memorandums or notes of this meeting have been provided to me by either side. Evidently, as a result of this meeting, the Fort Schools Superintendent wrote a letter to the Petitioner on May 26, 2000, discussing how the Petitioner was to arrange visitation in class and about the placement of the computer for the Child's use. (Petitioner's Exhibit C.)

Sometime after this meeting, the Petitioner had a meeting with the Fort Schools Superintendent. The Superintendent described what occurred in this meeting as follows:

> During the above mentioned spring 2000 meeting, I asked [the Petitioner] if she had considered requesting a transfer to an out-of-district school. She stated that she had thought about that idea but felt I would not approve the request. I explained to her that, ". . . I had never turned down a parent's request to move their child." She said that she wanted a transfer but that she would let me know during the summer which school she desired. Before I could even mention that she would be responsible for her son's transportation, she stated that, "I know that I must provide the transportation for my son," or words to that effect. I agreed with her and told her that [the Fort Schools] has a policy that if a parent's request for out of district transfer is approved, the parent is responsible for providing transportation for their child to and from school. I suggested that [the Petitioner] visit some other schools before making her decision. [School B] was one of the schools I suggested she visit. (Respondent's Exhibit 1 at 1.) (*See, also,* Respondent's Exhibits 55 and 56 at question 28.)

The Fort Schools policy concerning "Out of District Placement/Cross Lines Attendance"is found at Exhibit 10. Paragraph 4 of this policy is the one of concern in this case. It states, "Parents, who are granted Out of District Placement for their student(s), are responsible for transportation to and from school each day (if required). There is no transportation provided for Out of District attendance. No exceptions will be authorized."

On June 9, 2000, the Petitioner sent a letter to the Fort Schools Superintendent (Petitioner's Exhibit A). She first of all discusses her search for a possible new school for the Child. The Petitioner then sets forth some of her concerns:

> I still have concerns about the assistive technology issues that I brought up previously and feel that it has not been addressed in full. While I did receive your letter and a copy of the CAP [Computer/Electronic Accommodations Program] paperwork, I was unable to make changes in [the Child's] IEP because [School A's principal] denied outright the placement of the programs in [the Child's] class. I inquired about this later with [School A's guidance counselor]. She informed me that [the Fort Schools Special Education Director] told [the School A principal] that the location of the computer was not to be added to the IEP. (A direct contradiction to what she told me.)
>
> It seems to me that [the Fort Schools Special Education Director] is trying to undermine my efforts to give [the Child] the assistance that she saw as a need (she had the programs ordered) and then make every effort not to provide the assistance she identified on the CAP order.

She further stated:

> While my son has benefited (*sic*) from the services received through the [Fort Schools], I must say that I was able to bring about at least some of the gain made through my efforts. I must also say that he would have gained a lot from having a teacher who followed his IEP and from an administration that made sure efforts were made to train the teachers on the importance of doing so regularly. Teachers make such an impact on children and it is so easy for that impact to be negative.
>
> I am asking <u>once more</u> that you address my concerns of the visitation/volunteering/observation and assistive technology. Your letters in the past only ask that I inform the administration or teacher if I want to visit or observe. That says nothing of my right to do so without prior consent or whether my assistance in the class [is] considered volunteering or visiting or where one crosses into the other. I found that my definition of volunteering differs from [School A's principal]. Her efforts to keep me out of the school have only deepened my concerns for my rights. (Emphasis in original.)

On August 1, 2000, the Petitioner requested that her son be transferred from School A to School B. (Respondent's Exhibit 9.) The request was approved and the Child began attending School B on August10, 2000, and continues to attend that school. (Respondent's Exhibit 2 at unnumbered page 2.) School B is approximately 4 miles from the Child's home.

The School B CSC met on August 16, 2000, at the Petitioner's request. The purpose of this meeting was for Petitioner to request transportation for the Child so that he could attend School B. The minutes of this meeting, found at Respondent's Exhibit 16, state:

> [The Petitioner] shared that she has a herniated disk which makes [it] difficult to transport [the Child] on her own. This is a chronic problem that creates severe pain for her. Driving is difficult. She does not feel that she can ask friends to drive [the Child] to school. In summary, she is requesting special transportation based on her physical needs at this time. Because this is not a need of the child, but of the parent, law does not require this service. [The Petitioner] states that even if [the Child] was attending [School A] she would ask for this service because she does not feel that a child under ten years of age should be walking to school unattended.

The Principal of School B, who was one of the attendees at the August 16, 2000, CSC meeting, submitted a statement wherein she states:

> At some point during the meeting, someone (I am not sure who) suggested that [the Child] could return to his home school, [School A], since it was an all walker school. That way, transportation would not be an issue.

The Principal went on to say:

> [The Child] is receiving special education services under Criterion D - Information Processing Deficit. His current Individualized Education Program (IEP) does not require transportation as a related-service. [The Child] has no physical, mental, or emotional impairment that would require him to have transportation to and from school. [The Child's] home school, [School A], would be able to provide special education services provided at [School B]. It is my understanding that [the Petitioner] submitted a request for [the Child] to attend [School B] pursuant to the Out of District Placement policy. As a result, the policy requires the parents to be responsible for transportation. (Respondent's Exhibit 2 at unnumbered pages 1-2.) (*See, also*, "Statement of the Fort Schools Director of Special Education Programs," Respondent's Exhibit 3 at unnumbered page 2.)

The Superintendent had an interview with the father of the Child subsequent to this meeting. Concerning this meeting he states, "I explained that in order for transportation to be included on an IEP, it had to be based on the child's handicapping need and not his wife's medical problem." (Respondent's Exhibit 1 at unnumbered page 2.)

The Petitioner submits that, in her opinion, the decision of the School B CSC was pre-ordained even before the meeting was held. She also believes that not all sides of the transportation issue were discussed at the meeting. (Respondent's Exhibits 12, 13 and 16.) In particular, the Petitioner indicated a concern with the Fort Schools's policies on transportation and supervision of students during transportation to and from school. (Memorandum dated August 22, 2000, in Respondent's Exhibit 16.)

The Petitioner also submitted a statement from a military doctor who is the Child's pediatrician. (Petitioner's Exhibit G.) He states:

> [The Child] is an eight and 11/12 year old male with diagnoses of learning disability and ADHD. He currently attends school at [School B]. [The Child's] mother is pleased with her son's progress at this school, and reports that he is making A's and B's. It is wonderful to see a child with a disability begin to flourish in the right educational environment. Recently there has come an issue of [the Child's] being able to attend classes at his current school and have school bus transportation to [School B]. It is my understanding that a bus comes thru [the Child's] neighborhood to take children to [School B], but that [the Child's] only diagnosis of ADHD and learning disability do not qualify him to ride the bus to attend that school.
>
> ADHD is a disorder in which it is difficult for a person to focus on a task for what would be a normal amount of time. Because of this difficulty focusing, children with ADHD often forget assignments, rush thru work and are easily distracted. These issues can be multiplied when combined with a learning disability. Children with ADHD need a structured environment. They may often sit near the front of the classroom; they may need rules posted at home and at school to have an easy and ready reminder of what they need to do; they may need one on one assistance in writing down homework assignments to ensure that the child takes them home. A stable, structured environment is the key for a child with ADHD. Moves to different schools should be avoided unless absolutely indicated. It is also not my recommendation that [the Child] walk to school. I think there are definite hazards and risks involved.

CONCLUSIONS

Hearing officers in this area do not write upon a clean slate. In addition to the statute and the applicable regulations, including Part 80, there is a considerable amount of case law in this area which informs the hearing officer of his responsibilities.

In reviewing the procedural history of a special education case, and the IEP itself, the standard was set by the Supreme Court in the case of *Hendrick Hudson School District v. Rowley*. 458 U.S. 176 (1982).

> [A] court's inquiry in suits brought under §1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. (*Id.* at 206-207.)

The standard of proof in these cases is a preponderance of the evidence. (See, 20 U.S.C. §1415.(*e*)(2), and DDESS Case No. 97-001 (March 24, 1998) at 5.) In particular, "The party alleging a denial of FAPE or challenging the adequacy of an IEP bears the burden of proof at the hearing level." (DoDDS Case No. E-99-001 (February 8, 2000) (citations omitted).)

The Supreme Court went on to say:

> Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. (458 U.S. at 203-204.)

A hearing officer is granted the authority to carry out the mandate of the IDEA and its regulations, including Part 80, with regard to impartial due process hearings. Hearing officers are generally granted broad authority to fashion whatever relief is appropriate, including equitable relief, with their ability to award relief being co-extensive with that of a Federal District Court. (See, *Cocores v. Portsmouth School District*, 779 F.Supp. 203 (D.N.H. 1991). Accord, *S-1 by and through P-1 v. Spangler*, 650 F.Supp. 1427 (M.D.N.C. 1986), vacated as moot, 832 F.2d 294 (4th Cir. 1987).)

I.

In looking at the IEPs, the analysis is two-fold. First, are the subject IEPs reasonably calculated to allow the Child to receive educational benefit? Secondly, did the school conduct the Child's education in accordance with the IEPs? If the answer to either question is no, the analysis then turns to whether the deficiency is sufficient to deny the Child a free, appropriate public education. The adequacy of any IEP must be determined on a case-by-case basis. In addition, the DOHA Appeal Board has stated that there are various legal principles which must also be considered. They are:

> First,. . . the party challenging the adequacy of an IEP has the burden of proof.
>
> Second, the Hearing Officer must give appropriate deference to the educational professionals who develop the IEP and are responsible for providing a FAPE.
>
> Third, the Hearing Officer must not impose on the parties his or her own notions of what educational methodology or educational policy is desirable.
>
> Fourth, the adequacy of an IEP should not be evaluated against any single criterion.
>
> Fifth, the adequacy of an IEP should not be measured by use of a retrospective analysis or "20/20 hindsight." Rather, the analysis must be based on a consideration of whether, given the facts and circumstances known when the IEP was being adopted, the IEP was "reasonably calculated" to enable the child to receive educational benefits.

> Sixth, the adequacy of an IEP should not be determined by comparing it with an alternative educational methodology or placement. Even if it is demonstrated that an alternative educational methodology or placement is or may be better than the one used by the challenged IEP, it does not follow that the challenged IEP is inadequate or will fail to provide a FAPE.
>
> Seventh, an IEP need not provide a child with maximum or optimum benefit. DoDDS Case No. 97-E-001 (December 2, 1997) at p.5 n.2 (citing federal cases). . . However, the IEP must be reasonably calculated to provide the child with more than trivial or meaningless benefit. (DDESS Case No. 97-001 (March 24, 1998) at 10-11 (internal citations omitted).) (*See*, *also*, *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 247-8 (5th Cir. 1997).)

(A)

Turning first to the IEP formulated in February 1999. The evidence shows that the Petitioner was involved in the designing of this, the first IEP involving the Child. I have reviewed the records of the CSC meetings where the IEP was designed and the IEP itself. I specifically find that the IEP of February 9, 1999 (Respondent's Exhibit 27), was reasonably calculated to allow the Child to receive educational benefit. Based on the totality of the evidence, I further find that School A provided educational services in accordance with this IEP during the Child's attendance in the first grade. The evidence also shows that the child made passing marks and passed on to the second grade. Accordingly, I find that the Child was provided with a free, appropriate public education for the 1998-1999 school year.

(B)

We now turn to the 1999-2000 school year. Until February 2000, the Child continued to be educated under the February 1999 IEP. That IEP was modified at the request of the Petitioner in October and December 1999, after CSC meetings. The records of those two meetings show that the concerns of the Petitioner were taken seriously, considered and added to the Child's IEP. The available evidence also shows, and I specifically find, that the provisions of this IEP were fulfilled until the time that it was superceded in February 2000.

The IEP which was developed in February 2000 differed from the earlier one. The Petitioner asked at this meeting that the Child be provided with specific assistive technology. The CSC decided that it was premature to add this requirement to the IEP. The Petitioner signed the completed IEP as a participant.

As has been discussed above, assistive technology was provided to the Child later in the spring. The IEP was amended to show that the technology was to be used, and even specified the names of the software. The Child had access to the equipment in the classroom of his special education teacher whenever he desired. The Petitioner alleges that the IEP was deficient, and partially for this reason the Child did not receive a FAPE, because the assistive technology was not placed in the Child's classroom as she requested.

The question of where to place educational equipment for use by a student in special education is obviously one of methodology. It has been repeatedly emphasized that these particular

questions are ones which Courts and Hearing Officers are not equipped to handle. (*Rowley*, 458 US at 207-08.) "*Rowley* and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the EAHCA [predecessor act to the IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child." (*Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir. 1988), *cert. denied* 488 US 925 (1988).)

In this case, the decision of where to place the assistive technology ordered for the Child was one for the school administration and the School A CSC to decide. The fact that the Petitioner is unhappy with the decision not to place the assistive technology in the Child's classroom does not make it wrong. She has failed to meet her burden. I find that the failure to specifically include the placement of the assistive technology in the IEP does not make the IEP deficient. After a review of the evidence, I further find that the IEP developed in February 2000, and subsequently amended, is reasonably calculated to allow the Child to receive educational benefit.

(C)

The Petitioner also alleges that the Child was not provided with a FAPE at School A during the 1999 school year because of deficiencies in the teachers providing educational services. I have carefully considered her specific objections to the way the Child was taught at School A. In addition, I have reviewed the documentary evidence provided by both sides concerning this school year. In her arguments the Petitioner concedes that the Child has made educational progress in the second grade. (Closing Argument of Petitioner dated February 16, 2001 at 2.) She also intimates that the Fort Schools must show that they provided the impetus for that progress and not her. This analysis is wrong because it attempts to transfer the burden of proof from the Petitioner to the Respondent. As the moving party, the Petitioner must show the Child has not received a FAPE.

From all indications, the Child progressed well in the second grade at School A. In addition to his success on reading tests, there are the contemporaneous records of his regular education teacher (Petitioner's Exhibit F) and the CSC meeting minutes (Exhibits 17 through 26). In addition, his teachers submitted statements which indicated how and why they believed the Child had progressed during the school year. (Respondent's Exhibits 5 through 7.) The Petitioner obviously had a major role in her Child's education. She also obviously began to feel that his needs were not being met. The evidence of record, however, does not support her contention that he was denied a FAPE.

In determining whether the Child has achieved FAPE it is telling that both sides agree that positive academic benefits have been achieved. I have considered, and rejected, the Petitioner's view that the classroom environment was inappropriate for the Child, and that his teachers did not work with the Child to achieve the goals in his IEP. Accordingly, I find that School A provided services to the Child in accordance with the February 1999 and February 2000 IEPs. After a review of the available evidence, I further find that the progress the Child made in the second grade at School A was meaningful, not minimal. In conclusion, I find that the Child was provided a free, appropriate public education during the 1999-2000 school years.

(D)

The Child transferred to School B for the third grade. The Petitioner alleges that the Child is not receiving a FAPE at this school primarily because he is not being provided transportation as part of his IEP. From all other indications, the Petitioner is satisfied with the educational opportunity being provided to the Child at School B. (*See*, "Amended Petition for Due Process.") Accordingly, reserving only the issue of transportation, I find that in all other respects that School B has provided services in accordance with the Child's February 2000 IEP, which I previously found was designed to provide educational benefit.

II

The next question is whether the Superintendent of the Fort Schools solicited the Petitioner to request a transfer of the Child from School A to School B. The parties were requested by the Hearing Officer to brief this question from two perspectives. First, did the actions of the Superintendent amount to a solicitation and, second, if it was a solicitation, does it have any impact on the placement of the Child or the provision of transportation services to the Child.

As set forth under Findings of Fact, above at 9, the relationship between the Petitioner and the administration of School A began to break down during the 1999-2000 school year. The Superintendent had an interview with the Petitioner in which he "asked [the Petitioner] if she had considered requesting a transfer to an out-of-district school. She stated that she had thought about that idea but felt that I would not approve the request. I explained to her that, '. . . I had never turned down a parent's request to move their child.' She said that she wanted a transfer but that she would let me know during the summer which school she desired." (Respondent's Exhibit 1 at unnumbered page 1.)

The requirements for Fort Schools Policy O-3, "Out of District Placement/Cross Lines Attendance" are found in Respondent's Exhibit 10. They are:

> 1. Prior to the start of the school year. A parent *may* request that his/her child(ren) attend a school other than the school which services his individual residence/district. Each school year, this *request* must be made in writing to the Superintendent of Schools stating the reason(s) for requesting Out of District Placement.
>
> 2. The Superintendent will examine each request, and depending on enrollments, on a case-by-case basis, *the Superintendent may approve* the attendance of a student at a school other than the school that services his individual residence, only for the current school year. (*Italics* supplied.)
>
> 3. Under no circumstances will permission be granted for Out of District Placement if over-crowding would occur in the receiving classroom or school.
>
> 4. Parents, who are granted Out of District Placement for their student(s), are responsible for transportation to and from school each day (if required). There is no transportation provided for Out of District attendance. No exceptions will be authorized.

The evidence is somewhat sketchy, but the most logical conclusion is that the Superintendent was attempting to find a solution to the situation involving the Petitioner and School A's staff. One way would be for the Child to no longer attend School A. Even though the rules required the Petitioner to request a transfer which the Superintendent could approve or disapprove, it is clear that both parties agreed that if the Petitioner requested a transfer for the Child, it would be approved. Whether it be called a solicitation or an offer is irrelevant. What the particular terms of this agreement are is a different question, which will be discussed below.

III

Did the approved transfer of the Child from School A to School B amount to a change in placement under the provisions of the IDEA and Part 80?

Changing the physical location where the special education and related services are delivered does not necessarily change the educational placement. In this case, Schools A and B are both located within the jurisdiction and supervision of Fort Schools. Both schools provided substantially similar classes and implemented the same IEP. In fact, the Petitioner states that, "Aside from the need for transportation, [the Child's needs], at [School B], have been accommodated for and he has not only benefited (*sic*), but flourished educationally, psychologically and personally." ("Amended Petition for Due Process," at unnumbered page 2.) (Accord, *Weil v. Board of Elementary and Secondary Education*, 931 F.2d 1069, 1072 (5th Cir. 1991).) Accordingly, I find that the transfer of the Child from School A to School B did not amount to a change in placement.

IV

The final question concerns whether the Child requires transportation in order to obtain benefits from his IEP. This discussion will only concern itself with the period when the Child was attending School B. During his attendance at School A the issue did not raise itself between the parties. The Petitioner raised the issue in the School B CSC meeting of August 2000 and in her pleadings. However, the transportation arrangements concerning students at School A is not a proper issue for this proceeding.

(A)

Turning first to the period between August 10, 2000, when the Child began attending School B, and August 16, 2000, when the CSC meeting was held between the parties. As discussed above, the Petitioner discussed with the Superintendent the Fort Schools policy which required her to be responsible for the Child's transportation to School B. The Government has argued that the Superintendent states in his declaration (Respondent's Exhibit 1) that ". . . he would approve her request on the condition that she and her husband provide transportation to and from school." ("Respondent's Brief Related to Solicitation Issue Raised by Hearing Officer" at 4.) My review of the Respondent's Exhibit 1 does not show such an explicit condition. However, it appears that the Petitioner accepted that requirement for the first week of school. Accordingly, she was bound by that agreement until the CSC meeting was held.

(B)

At the CSC meeting held on August 16, 2000, the administration of School B, in essence, told the Petitioner that her physical ailment was not relevant to whether the Child required transportation to fulfill his IEP, that under the Fort Schools Policy O-3, she was responsible for his transportation because she requested a transfer, and that the Child did not have a disability requiring transportation to fulfill his IEP.

The CSC was somewhat correct in stating to the Petitioner that her physical ailment was not relevant to deciding whether the Child received transportation. However, they were incorrect in the other two conclusions. Since they did not use the correct standards, the CSC did not give the Petitioner's request the proper consideration which would have created a complete record for review. The CSC must meet and consider the Child's individual situation with due regard for the legal requirements discussed below.

The CSC was incorrect in relying primarily on the Fort Schools Policy O-3 in stating that the Petitioner was still responsible for transportation because she had requested a transfer. Any agreement that the Petitioner may have made concerning her responsibility for transportation tolled when she requested a CSC meeting about the issue of transportation. The requirements of the IDEA and Part 80 trump any local school authority rules which may contradict the requirement of the school to provide a free, appropriate public education. (*See*, §80.4 of Part 80.) Once the transfer was approved, the Child became the responsibility of School B's administration. Stating that she could go back where she came from (School A) and take her child with her was not an appropriate answer to the Petitioner's request. Even if the Petitioner had requested the transfer with knowledge of the policy, as discussed above the transfer occurred within the context of an agreement with the Superintendent. "When parents act in reasonable reliance on the written or spoken statements of DoDDS personnel with actual or apparent authority, it cannot be fairly said that they are acting in a purely unilateral way *or that they are barred from equitable relief*." (DoDDS Case No. E-99-001, February 8, 2000 at 22.) (Emphasis supplied.) The CSC was required to look at the Child's situation without regard to the local rule, but rather what was necessary for him to obtain educational benefit under his IEP.

The CSC was also wrong in stating that, because the Child did not have a disability that required transportation, it was not necessary. In that respect they misunderstand the standard, which is based on whether transportation is required in order for the Child to participate in a special education program, and not whether the Child has a unique need that requires transportation. A recent United States Court of Appeals case discusses the standard as follows:

> Some language in the IDEA facially supports the view that a disabled child's right to related services attaches only when his or her impairment directly causes a unique need for a particular service. Specifically the Act's purpose subsection appears to link both "special education" and "related services" to a disabled child's "unique needs." *See* 20 U.S.C. §1400(c) (stating that purpose of IDEA is to provide disabled children access to "free appropriate public education which emphasizes special education and related services designed to meet their unique needs"). The Supreme Court, however, has noted that the definition section of the IDEA indicates only "special education" and not "related services", must correlate to the "unique needs" associated with a child's specific disability. [*See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 889 (1984).] In contrast, the Court recognized that the Act defines a "related service" as an aid that "'may be required to assist a handicapped

child to benefit from special education. . . .'" *Id*. At 889-90 [additional cite omitted] (quoting 20 U.S.C. §1401(a)(17)). *See also id.* at 891 [additional cite omitted] (noting that the IDEA "makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class").

Based on the foregoing analysis, we conclude that, read in context, the IDEA requires transportation if that service is necessary for a disabled child "to benefit from special education," 20 U.S.C. §1401(a)(17), even if that child has no ambulatory impairment that directly causes a "unique need" for some form of specialized transport. (Emphasis supplied.) (*Donald B. v. Board of School Commissioners of Mobile County, Alabama,* 117 F.3d 1371, 1374 (11th Cir. 1997), distinguishing *McNair v. Oak Hills Local School District,* 872 F. 2d 153 (6th Cir. 1989).

The *Donald B.* case concerned the transportation of a handicapped child between a public and parochial school. However, the part of the decision cited here has general applicability and is not limited to those situations. (*See, Malehorn v. Hill City School District*, 987 F. Supp. 772 (D.S.D. 1997).) It merely reinforces the requirement that the CSC needs to view every child's situation individually, on a case-by-case basis. In not looking at the Child's situation from this perspective during the August 16, 2000, CSC meeting, the CSC did not follow the requirements of the IDEA and Part 80.

The analysis does not end there. "The [Supreme] Court has emphasized that 'only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless [of] how easily a school [official] could furnish them.'" (*Donald B.* 117 F.3d at 1374-75, quoting *Irving Indep. Sch. Dist.*, 468 U.S. at 894.) Accordingly, the fact that School B already has a bus which picks up children in the housing area where the Child lives is not necessarily a decisive fact in determining whether transportation should be provided.

The District Court in *Malehorn* set forth the test:

In determining whether transportation as a related service was necessary, the [*Donald B.*] court considered:

> (1)[the disabled child's] age; (2) the distance he or she must travel; (3) the nature of the area through which the child must pass; (4) his or her access to private assistance in making the trip; and (5) the availability of other forms of public assistance in route, such as crossing guards or public transit.[11]

Donald B., 117 F.3d at 1375. *See also Simi Valley Unified Sch. Dist.*, 23 IDELR 760 (1995) (considered distance from disabled student's home to his school when determining that student was entitled to door-to-door transportation under the IDEA); *Fort Sage Unified Sch. Dist./Lassen County Office of Educ*., 23 IDELR 1078 (1995)

[11]In this particular case, the physical condition of the Petitioner, and the availability of a special education bus already going through the neighborhood, may be appropriate considerations.

(concluded student entitled to door-to-door transportation given the distance the disabled student lived from school and the dangers he might encounter while waiting at the bus stop). (*Malehorn*, 987 F. Supp. at 781.)

The Respondent's reliance on *Richland (WA) Sch. Dist. No. 400*, 22 IDELR 992 (April 21, 1995) and *Timothy H. and Brenda H. v. Cedar Rapids Community School District*, 178 F.3d 968 (8th Cir. 1999) is misplaced. These cases concern Section 504 of the Rehabilitation Act and are inapposite when, as here, there is case law directly on point concerning transportation issues under the IDEA. *Independent Sch. Dist. No. 11, Anoka-Hennepin*, 31 IDELR 174 (date not provided) is distinguishable on its facts. The present case does not concern a unilateral transfer of the child to a private school. In addition, other than the transportation issue, there is no argument that the Child is receiving a FAPE at School B. The *Simi Valley* case, on the other hand, is worthwhile because the parents in that case were able to obtain transportation from the school district even though they had previously agreed to provide it in exchange for their child being assigned to an out of district school.

In her pleadings, the Petitioner indicates that the Child may be suffering from Attention Deficit Hyperactivity Disorder, a Criterion B disability. There is no indication that the Petitioner has formally presented this information to the CSC or Fort Schools, allowing them to evaluate the diagnosis in accordance with §80.3(c) of Part 80. (*See*, page 5, above.) Accordingly, since DDESS procedures have not been followed, the record is incomplete on this issue and the Child's transportation needs cannot be based on this possible diagnosis at this time. (DoDDS Case No. 97-E-001, December 2, 1997 at 13-14.)

It is hereby ordered that School B's CSC be convened within 30 days of the date of this Decision. The CSC shall consider the Child's transportation requirements in light of the legal standards set forth in this Decision. The Petitioner shall present all the information she believes to be important in determining the transportation needs of the Child to the CSC, including the possible diagnosis of Attention Deficit Hyperactivity Disorder. Specifically, if she believes the possible diagnosis of Attention Deficit Hyperactivity Disorder is important, she is urged to formally present it to the CSC. A tape recording of this CSC meeting shall be made.

The fact that a CSC meeting is being ordered should not be taken as an indication that the Petitioner will, or will not, prevail there. However, she deserves a fair opportunity to make her case and have it properly considered.

ORDER

Based on the record in this case, including the Findings of Fact and Conclusions stated above, the Hearing Officer decides and orders as follows:

1. The School B CSC shall meet within 30 days of the date of this Order for proceedings consistent with this Decision.

2. Relief which is not specifically awarded in this Order is hereby denied.

APPEAL RIGHTS

Subsection D.4.d, Appendix C of Part 80, provides (1) that the findings of fact and decision of the hearing officer shall become final unless a notice of appeal is filed under §F.1, and (2) that DDESS shall implement a decision as soon as practicable after it becomes final.

A party may appeal the hearing officer's findings of fact and decision pursuant to §F.1, Appendix C of Part 80, by filing a written notice of appeal within five (5) calendar days of receipt, by certified mail, of the findings of fact and decision. The notice of appeal must contain the appealing party's certification that a copy of the notice of appeal has been provided to all other parties. Filing is complete upon mailing. A Notice of Appeal should be addressed to the Defense Office of Hearings and Appeals, Appeal Board, P. O. Box 3656, Arlington, Virginia 22203-1995. Other provisions pertaining to such appeals are contained in §F, Appendix C of Part 80, and should be consulted.

IT IS SO ORDERED.

Wilford H. Ross
Hearing Officer