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DATE: December 2, 1997

In Re:

Eligible Dependent

By ----------, Petitioner

DoDDS Case No. 97-E-001

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Robert P. Terzian, Esq., General Counsel, DoDDS

Teresa A. Kolb, Esq., Department Counsel

FOR APPLICANT

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----------, *pro se*

Administrative Judge Wilford H. Ross issued a decision, dated August 18, 1997, after conducting a due process hearing under Department of Defense Instruction 1342.12, "Provision of Early Intervention and Special Education Services to Eligible DoD Dependents in Overseas Areas," dated March 12, 1996 ("DoDDS Instruction"). The case is before the Board on DoDDS' appeal and Petitioner's cross-appeal from the Judge's decision. For the reasons that follow, the Board affirms the Judge's decision in part and reverses it in part.

The Board has jurisdiction of this case on appeal under Section F. of Enclosure 8 to the DoDDS Instruction.

Procedural History

The earlier procedural history of this case is discussed in the Administrative Judge's August 18, 1997 decision and need not be repeated in detail here. The parents of the Eligible Dependent requested a due process hearing under the DoDDS Instruction, the hearing was held on May 20-22, 1997, and the Administrative Judge issued the decision which is the subject of this appeal on August 18, 1997.

DoDDS filed a notice of appeal to the Administrative Judge's decision, dated August 22, 1997. DoDDS submitted a Statement of Issues and Argument, dated September 2, 1997. The parents submitted a document entitled Appeal of Administrative Judge's Decision, dated August 29, 1997, which was received by the Defense Office of Hearings and Appeals (DOHA) on September 8, 1997. DoDDS submitted a Reply to Petitioner's Statement of Issues and Argument, dated September 23, 1997. On October 2, 1997, DoDDS submitted a Notice of Receipt which indicated that the parents had received DoDDS' Statement of Issues and Argument on September 5, 1997.

By memorandum dated October 3, 1997, the Director, DOHA forwarded the appeal to the Chairman, Appeal Board.

The case file was received by the Board on October 7, 1997.

Statement of the Case

The Eligible Dependent is a 14-year old female (hereinafter "Child") who suffers from chromosomal abnormalities and a metabolic genetic disorder. Depending on the nature of the activity, the Child functions at the equivalent of a three to six year old.

In the proceedings below, the Child's parents contended DoDDS had failed to carry out its responsibility to provide a free appropriate public education (FAPE) for their daughter because: (a) the Child did not receive speech therapy as required by her Individualized Education Plan (IEP); (b) DoDDS failed to officially notify the parents in a timely manner that the Child was not receiving required speech therapy; (c) DoDDS failed to properly implement the IEP by hiring a personal aide for the Child; and (d) the Child's safety and well-being were placed in jeopardy during physical therapy sessions. The parents requested: (a) DoDDS immediately hire a personal aide for the Child; and (b) financial compensation of an unspecified amount.

The Administrative Judge found: (a) the parents did not object to how the Child's November 30, 1995 IEP and December 3, 1996 IEP were formulated; (b) the two IEPs required DoDDS to provide an individual aide assigned personally to the Child; (c) the Child was provided a FAPE for the 1995-1996 school year; (d) during the 1996-1997 school year, the Child did not receive speech therapy from a communications impaired teacher as required by her IEP; (e) the parents were not officially notified about the absence of speech therapy for the Child until a Case Study Committee (CSC) meeting on February 10, 1997; and (f) the Child was denied a FAPE during the periods August 27, 1996 through October 21, 1996 and January 27, 1997 through February 10, 1997.

The Administrative Judge concluded the Child was entitled to receive compensatory speech therapy to remedy the loss of speech therapy she missed during the 1996-1997 school year. However, the Judge rejected the parents' claim that the Child was entitled to receive compensatory speech therapy equal to the time of speech therapy she missed during the 1996-1997 school year. Accordingly, the Judge ordered an independent evaluation (at DoDDS' expense) of the Child's speech and language skills to determine the amount of compensatory speech therapy, if any, for which the Child was eligible to bring her education to the point where she would have been if she had been provided the speech therapy required by her IEP.

The Administrative Judge directed that the Child's CSC meet and develop a new IEP within two weeks of receipt of the independent evaluation. The Judge further directed the parties to submit the matter to him for resolution if they were unable to agree on a new IEP.

The Administrative Judge directed DoDDS to provide an individual aide on a full-time basis for the Child for the remainder of the current IEP period.

The Administrative Judge denied the parents' request for financial compensation on the grounds that although the actions of DoDDS resulted in a denial of a FAPE for the Child during the 1996-1997 school year, those actions "do not rise to the level where [the Judge] believe[s] monetary damages would be appropriate."

The Administrative Judge denied the parent's requests for the purchase of a computer, software, and educationally and medically related products for the Child. The Judge concluded those requests were not ripe for his consideration because they had not been presented to the CSC or Transition Meeting for consideration.

The Administrative Judge denied the parent's request to require DoDDS to hire a particular special education teacher to teach the Child. The Judge concluded this request would entail the grant of extraordinary relief not supported by the record.

Finally, the Administrative Judge indicated that he was retaining jurisdiction to ensure that his decision was carried out.

Appeal Issues

1. Whether this case is properly before the Board. Even if the parties do not raise the issue, a tribunal must consider whether it has jurisdiction of a case whenever there is anything in the record that suggests the case may not be properly before the tribunal. In this case, a question of jurisdiction arises because the Administrative Judge's August 18, 1997 decision contains a clear and unequivocal statement that the Judge intended to retain jurisdiction over the case. For the reasons that follow, the Board concludes it has jurisdiction over this appeal.

DOHA Administrative Judges have authority and jurisdiction over DoDDS cases by virtue of Enclosure 8 to the DoDDS Instruction. Under subsection D.1.i. of Enclosure 8, a Judge is authorized to conduct the due process hearing and issue orders to manage and conduct that proceeding. Moreover, under subsection D.1.o. of Enclosure 8, a Judge "shall issue findings of fact and render a decision in a case not later than 50 calendar days after being assigned to the case, unless a discovery request under subsection D.2., below, is pending." The Judge's authority to manage and conduct the proceeding cannot be invoked to issue orders that result in the delay of issuance of a decision beyond the time limits specified by subsection D.1.o. of Enclosure 8. Furthermore, nothing in the DoDDS Instruction expressly or implicitly authorizes a Judge to retain jurisdiction over a case to oversee implementation of the Judge's decision.(1) Moreover, any attempt by a Judge to retain continuing jurisdiction in a DoDDS case would be in derogation of the rights of the parties to have the case decided within the time limits specified by the DoDDS Instruction and to seek timely appeal of the Judge's decision.

Here, the Administrative Judge's August 18, 1997 Decision contains findings of fact and resolutions of the issues raised by the parties in the proceeding below. The parties had the right to appeal that Decision under subsection F.1. of the DoDDS Instruction. DoDDS filed a timely notice of appeal and, therefore, the Board has jurisdiction to decide this appeal.

2. Standard of review. Nothing in the DoDDS Instruction specifies the Board's standard of review on appeal. However, in earlier special education cases, the DoD appellate authority decided to follow federal judicial precedents concerning the standard of review on appeal. Specifically, the DoD appellate authority decided to apply the preponderance of the evidence standard for reviewing factual findings by the hearing official. Under that standard, the appellate authority gives deference to the hearing officer's credibility determinations and resolution of conflicting evidence, provided they are based on a preponderance of the evidence. *See* Final Administrative Decision No. 88-003-A (September 29, 1989) at p. 22; Final Administrative Decision No. 82-002-G (May 17, 1984) at pp. 9-14.

Whether DoDDS has provided a FAPE for an eligible dependent is a mixed question of fact and law, and an Administrative Judge's determination of that issue is reviewed *de novo*. *See Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 611 (8th Cir. 1997); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997); *Seattle School District v. B.S.*, 82 F.3d 1493, 1499 (9th Cir. 1996). Moreover, an Administrative Judge's interpretation of statutory authorities or the DoDDS Instruction is subject to plenary or *de novo* review on appeal. Final Administrative Decision No. 82-002-G (May 17, 1984) at p. 14.

3. Whether the Administrative Judge erred by ordering DoDDS to provide the Child with an individual aide based solely on his interpretation of the Child's IEP. The Administrative Judge found that the Child's November 30, 1995 IEP and December 3, 1996 IEP required an individual aide for the Child, and based on that finding, the Judge ordered DoDDS to provide the Child with an individual aide. DoDDS contends the Judge erred because the preponderance of the record evidence does not support his finding about those IEPs.

Although there is some record evidence that could support the Administrative Judge's challenged finding, that finding is not supported by the preponderance of the record evidence. Indeed, some of the reasoning used by the Judge to reach that finding was legally flawed. For example, the Judge stated "[t]he evidence is clear that, prior to January 1997, [the phrase 'Special education aide works in regular class under the supervision of the special education teacher"] was the only [SEDCOMM phrase] which discussed aides." That statement ignores the unequivocal testimony of the Special Education Coordinator that in November 1995 the SEDCOMM introduced a new code (45A) to cover the assignment of an individual aide, as opposed to code 45 which covered the assignment of an aide to work in the classroom under the supervision of a special education teacher. *See* Hearing Transcript at p. 346. Moreover, the fact that the section of the SEDCOMM (Exhibit 57) containing the code 45A was revised in January 1997 does not permit any reasonable inference about whether the code 45A was promulgated as part of the January 1997 revision or whether the code 45A

had been promulgated earlier.

Furthermore, the Judge erred by relying on testimony in which various witnesses expressed their opinion as to the desirability of an individual aide for the Child. The question was not whether the Child would have received a better education if an individual aide had been provided for by the IEP. *See Angevine v. Smith*, 959 F.2d 292, 295-96 (D.C. Cir. 1992)(when determining adequacy of special education received by child with disabilities, judge erred by comparing education child received at two different placements).[(2)] Rather, the question was whether the Child's IEPs required an individual aide be provided to the Child instead of the rotating aide coverage that was provided by DoDDS. The opinion testimony relied upon by the Judge was not relevant to making a finding whether the Child's IEPs required an individual aide for the Child.

Considering the record as a whole, the Board concludes that the preponderance of the evidence does not support the Administrative Judge's finding that the Child's November 30, 1995 IEP and December 3, 1996 IEP required an individual aide be provided. This ruling is not factually or legally dispositive of the question whether the Child can or should have individual aide services provided by future IEPs.

4. Whether the Administrative Judge erred by finding DoDDS provided a FAPE for the Child for the 1995-1996 school year, but failed to provide a FAPE for the Child for the 1996-1997 school year. The Administrative Judge found that DoDDS provided the child with a FAPE for the 1995-1996 school year, but failed to provide her with a FAPE for the 1996-1997 school year. DoDDS contends the Judge erred because the Child's IEP did not require an individual aide for the Child. DoDDS argues, in the alternative, that even if the Child's IEP did require an individual aide for her, the Judge failed to consider whether the Child still received a FAPE without an individual aide. The parents contend the Judge erred by finding that the Child received a FAPE for school year 1995-1996, arguing that if the Child's IEP required an individual aide (as the Judge found), then the Child was denied a FAPE for both the 1995-1996 and 1996-1997 school years.

As discussed earlier, the Administrative Judge erred by finding that the Child's IEPs required DoDDS provide her with an individual aide. Accordingly, the Judge could not conclude the Child was denied a FAPE for school year 1996-1997 based on the fact that DoDDS did not provide the Child with an individual aide. Therefore, the DoDDS argument is persuasive. It also follows that the parents' contention fails to demonstrate the Judge erred. Since the preponderance of the evidence did not support the finding that the Child's IEPs required an individual aide, the Judge could not reasonably find that the absence of an individual aide for the Child resulted in denial of a FAPE for the 1995-1996 school year. However, the fact that the IEP did not require an individual aide for the Child does not end the matter of whether the Child received a FAPE for the 1995-1996 and 1996-1997 school years.

There is a two-step analysis under IDEA: (a) has the education authority complied with the procedural requirements of the statute? and (b) is the IEP developed through the procedures reasonably calculated to enable the child to receive educational benefits? *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07 (1982). Each step of the analysis warrants some discussion.

IDEA is a largely procedural statute. The procedural safeguards are very important and must be taken seriously because they provide parents with the means to ensure that school authorities are providing disabled children with a FAPE. *See, e.g., Rowley, supra*, 458 U.S. at 187-89 (Court discussing procedural safeguards in statute); *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 368 (1985)(Court noting importance of procedural safeguards " to ensure full participation of the parents and proper resolution of substantive disagreements"). Failure to comply with the procedural safeguards could lead to a finding that a child was denied a FAPE. *See, e.g., Buser v. Corpus Christi Independent School*, 51 F.3d 490, 493 (5th Cir. 1995)("[A] school's failure to meet the IDEA's procedural requirements may alone warrant finding that, as a matter of law, the school has failed to provide a free appropriate public education."), *reh'g denied*, 56 F.3d 1387 (1995), *cert. denied*, 116 S.Ct. 305 (1995). However, not every procedural defect requires a finding that a child was denied a FAPE. *See, e.g., Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997)(failure to comply with IDEA's procedural requirements could be sufficient to support finding of denial of FAPE; but procedural violations that did not actually interfere with FAPE are not sufficient to support finding of denial of FAPE); *Murphy v. Timberlane Regional School District*, 22 F.3d 1186, 1196 (1st Cir. 1994)("[N]ot every procedural irregularity gives rise to liability under the IDEA. Nevertheless, 'procedural inadequacies [that have]

compromised the pupil's right to an appropriate education . . . or caused a deprivation of educational benefits' are the stuff of successful IDEA actions.")(citation omitted), *cert. denied*, 115 S.Ct. 484 (1994).

The IEP is an important component of a FAPE. *See, e.g., Board of Education of Community High School District v. Illinois State Board of Education*, 103 F.3d 545, 546 (7th Cir. 1996)("The IEP . . . is the governing document for all educational decisions concerning the child."); *Tennessee Department of Mental Health v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir. 1996)("The development and implementation of the IEP are cornerstones of the [IDEA]."); *Pihl v. Massachusetts Department of Education*, 9 F.3d 184, 187 (1st Cir. 1993)("The IEP is the primary safeguard and parents have a right to an 'impartial due process hearing' to resolve any complaints about a child's IEP."). Accordingly, compliance with a child's IEP is an important measure of whether a child is receiving or has received a FAPE, and failure to provide the educational services specified by an IEP raises a serious question of whether there has been a denial of a FAPE.

In this case, the parents did not challenge the manner in which the IEPs were developed. However, that did not bar the parents from contending their Child did not receive a FAPE. Moreover, the Board's conclusion that the Child's IEPs did not require an individual aide does not end the analysis. Even if the Child's IEPs did not require an individual aide for the Child, there remains the question of whether the Child was denied a FAPE because the IEPs were not reasonably calculated to provide an educational benefit for her.

There is ample record evidence to support the Administrative Judge's finding that the Child was denied speech therapy by a qualified teacher, as required by the IEPs, during portions of the 1996-1997 school year. Indeed, DoDDS essentially conceded that the Child did not receive all the speech therapy she was entitled to under the IEP for the 1996-1997 school year. However, DoDDS argues that its failure to provide all the required speech therapy did not rise to the level of denial of a FAPE because: (a) there was no change in placement for the Child that required DoDDS to provide written notice to the parents about the absence of speech therapy; (b) even if DoDDS failed to provide sufficient notice to the parents, the procedural defect did not result in denial of a FAPE for the Child; and (c) the lapses in speech therapy provided to the Child did not rise to the level of a denial of a FAPE for the Child.

Under IDEA, the meaning of an educational placement "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Board of Education of Community High School District v. Illinois State Board of Education*, 103 F.3d 545, 548 (7th Cir. 1996). The somewhat ambiguous nature of that concept spills over into deciding what constitutes a change in educational placement that triggers the notice requirement of subsection F.1. of Enclosure 4 to the DoDDS Instruction. DoDDS is correct in noting that neither IDEA nor the DoDDS Instruction define the term "change in placement." However, even DoDDS' appeal brief notes that "a significant change" in a child's education can constitute a change in placement. Since the IEP is an important measure of whether a child is receiving a FAPE, it follows that failure to provide educational services specifically required by a child's IEP gives rise to a rebuttable claim that there was a change in educational placement that requires written notice to the child's parents. In this case, there was sufficient record evidence to support the Administrative Judge's finding that the Child was denied required speech therapy during part of the 1996-1997 school year, and that finding supports the Judge's conclusion that there was a change in placement sufficient to require DoDDS to provide written notice to the Child's parents.[(3)]

The Board rejects as untenable DoDDS' argument that the parents received notice in fact sufficient to satisfy its obligations under the DoDDS Instruction. As noted earlier, the procedural protections under IDEA are extremely important to ensure that parents are given a full and meaningful opportunity to participate in the decision-making process to enable them to obtain a FAPE for their child. Without prompt and timely notice of matters affecting the education of a child, the child's parents are at a serious disadvantage in trying to pursue their rights and those of their child under IDEA.

Once the school officials became aware that the qualified communications impaired teacher would not be available, the officials knew or should have known that they might not be able to provide the Child with the speech therapy required by her IEP, and were obligated to take reasonable steps to rectify the situation. The Judge did not err by concluding that DoDDS was under the obligation to find a qualified replacement for the teacher, or notify the Child's parents in writing. With regard to this issue, the Judge acted reasonably by relying on the analysis of *M.C. v. Central Regional School District*, 81 F.3d 389, 396-97 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 176 (1996). It also was appropriate for the Judge to

take into consideration two common sense notions: (a) school officials might need a few days to obtain the services of a qualified substitute teacher; and (b) DoDDS should not be held responsible for providing speech therapy during a week the Child was not present in school due to illness. Overall, the Judge's reasoning on this matter was reasonable and consistent with applicable legal principles, and it is sustainable.

The Administrative Judge did not err by finding that it was not until the February 10, 1997 CSC meeting that the Child's parents received official notice from DoDDS that the Child had not been receiving the speech therapy required by her IEP. That finding is amply supported by the record evidence. Considering the school year began in August 1996, the Judge had ample basis for concluding it was not reasonable for DoDDS to wait until February 10, 1997 to officially notify the Child's parents about the speech therapy problem.

The fact that DoDDS failed to provide the Child with all the speech therapy required by the IEP does not automatically translate into a finding that the Child was denied a FAPE. However, as discussed earlier, the IEP is an important component of a FAPE and compliance with a child's IEP is an important measure of whether a child is receiving or has received a FAPE. Considering the record as a whole, the Administrative Judge had sufficient evidence to conclude that the Child was denied a FAPE to the extent she was not provided with all the speech therapy during the 1996-1997 school year that was specified in her IEP.

DoDDS also contends that the Administrative Judge could not find there had been a denial of a FAPE because there was no showing that the Child's parents' right to participate in her education was seriously infringed by the school's failure to notify them in writing about the loss of speech therapy during parts of the 1996-1997 school year. We reject this contention. As discussed earlier, the procedural protections afforded by IDEA and the DoDDS Instruction are very important in securing the rights of parents to participate in their child's education. Moreover, the failure of the school to provide educational services specifically required by an IEP is a serious matter that gives rise to a rebuttable claim that the affected child is not receiving a FAPE. Taken together, a school's failure to provide educational benefits specified by a child's IEP plus the absence of written notice to the child's parents of that fact provide an ample basis to conclude the child's parents were deprived of a meaningful opportunity to participate in the child's education during the period they did not receive official notice from the school.[(4)]

5. Whether the Administrative Judge erred by finding that the Child was entitled to receive compensatory education. The Administrative Judge found the Child was entitled to receive compensatory speech therapy to rectify her loss of speech therapy during portions of the 1996-1997 school year. DoDDS contends the Judge erred because there was no denial of the Child's FAPE and, therefore, there is no basis for the Judge to award compensatory education. DoDDS argues, in the alternative, that even if the Child was denied a FAPE, DoDDS did not commit "a gross violation substantiating an award of compensatory education." These contentions fail to demonstrate the Judge erred.

DoDDS' first contention lacks merit because the Administrative Judge made a sustainable finding that the Child was denied a FAPE to the extent she was not provided with all the speech therapy during school year 1996-1997 that was specified in her IEP.

DoDDS' second contention is unpersuasive. The Board rejects the contention that compensatory education is a remedy available only upon a showing of "egregious facts" or a "gross violation" of the IDEA or DoDDS Instruction. Once an Administrative Judge finds that there has been a denial of a FAPE, the Judge must consider what remedy would be appropriate. "The purpose of compensatory services is, as the term implies, to make the student whole insofar as possible for the failure to provide all or a portion of the student's special educational program as prescribed in the IEP." Final Administrative Decision No. 88-003-A (September 29, 1989) at p. 34. Such a purpose is not limited to a showing of "egregious facts" or a "gross violation" of the IDEA or DoDDS Instruction. It would be contrary to the remedial nature of the IDEA and the DoDDS Instruction to limit a child's entitlement to compensatory services to only situations where there has been a showing of "egregious facts" or a "gross violation" of the IDEA. *See M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 176 (1996).[(5)]

At one point in its brief, DoDDS notes that the DSO Special Education Coordinator contacted the Child's mother and indicated that additional services might be available if the Child had been harmed, but that the mother indicated that it was too little, too late, and she wanted monetary compensation (citing Transcript at p. 357). Even if it is shown that a

child's parents are asking DoDDS for relief they are not entitled to under IDEA or the DoDDS Instruction, such a showing is factually and legally irrelevant to the question of what remedy or relief is appropriate in a particular case to ensure the child is receiving a FAPE.

6. Whether the Administrative Judge erred by calculating the amount of compensatory education to which the Child is entitled. The Administrative Judge found that the Child was deprived of required speech therapy from August 27, 1996 to October 21, 1996 and from January 27, 1997 to February 10, 1997. The Judge rejected the parents' claim that the Child was entitled to receive the same number of minutes of speech therapy that she should have gotten under the IEP but missed. The Judge ordered an independent evaluation of the Child to determine the amount of compensatory speech therapy, if any, she is eligible for based on an "evaluation [of] the Child's current status, and where she reasonably could have been if she had received the full range of speech services required by her IEPs [sic] in the 1996-1997 school year."

DoDDS contends the Administrative Judge erred because: (1) the preponderance of the evidence does not support the Judge's findings about the amount of speech therapy the Child missed; and (2) the Judge does not have the authority to order an independent evaluation of the Child at DoDDS' expense unless the preponderance of the evidence shows that DoDDS is unable to conduct such an evaluation, or a DoDDS evaluation has been successfully challenged by parents at a due process hearing.

The Child's parents contend the Administrative Judge erred because: (1) they were not given notice of their right to obtain substitute speech therapy for the Child and bill DoDDS for such substitute therapy; (2) it is not fair to allow DoDDS to "save[] a considerable amount of money due to their negligence"; and (3) DoDDS must be held accountable for its failure to provide the Child with a FAPE.

Subsection D.4.c. of Enclosure 8 to the DoDDS Instruction authorizes an Administrative Judge to provide for compensatory education. *See also* Final Administrative Decision No. 88-003-A (September 29, 1989) at p. 33 (noting compensatory educational services are a permissible remedy). However, the DoDDS Instruction is silent on how a Judge should calculate the amount of compensatory education that is appropriate in a given case.

There is a division of authority in the federal courts concerning how to calculate the amount of compensatory education. Some courts apply a "one for one" rule that directs a school to provide compensatory education that equals the amount of appropriate educational services that were missed. *See, e.g., M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996)("[A] disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem."), *cert. denied*, 117 S.Ct. 176 (1996). Other courts do not apply the "one for one" rule and hold that the appropriate remedy is to provide such compensatory education that is designed to ensure the child is appropriated educated. *See, e.g., Parents of Student W. v. Puyallup School District*, 31 F.3d 1489, 1497 (9th Cir. 1994)(holding district court is not required to "provide a day-for day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.").

The *Puyallup* decision recognizes the equitable, remedial nature of compensatory education under IDEA. Moreover, the rationale of that decision closely resembles the reasoning used in Final Administrative Decision No. 88-003-A (September 29, 1989), in which the DoD appellate authority noted "[t]he purpose of compensatory services is, as the term implies, to make the student whole insofar as possible for the failure to provide all or a portion of the student's special educational program as prescribed in the IEP" (p. 34). The DoD appellate authority further held that such compensatory services must be provided "as are necessary to permit the progress that [the child] reasonably would have been expected to have made if she had received the occupational therapy listed in those IEPs. . . . [C]ompensatory services are only those services additional to the services in the student's current IEP that are required to rectify the omission to furnish required services." *Id.* at p. 35.

DoDDS' first argument is not persuasive. The Administrative Judge noted the conflicting evidence concerning the date the substitute teacher began to provide speech therapy for the Child in the 1996-1997 school year. The presence of conflicting record evidence on that point does not deprive the Judge of his responsibility to weigh the evidence and make factual findings. Considering the record as a whole, the Board concludes the Judge's challenged finding is sustainable under the preponderance of the evidence standard. And, in any event, even if the Board were to conclude the

Judge's finding was in error, it would not affect the outcome of this case because the amount of compensatory education to which the Child will be entitled is to be decided by the independent evaluation, not by application of a "one for one" rule.

DoDDS' second argument fails to demonstrate the Administrative Judge erred. Under subsection D.1.i. of Enclosure 8 to the DoDDS Instruction, "The hearing officer shall be the presiding officer, with judicial powers to manage the proceeding and conduct the hearing. Those powers *shall include the authority to order an independent evaluation of the child at the expense of the DoDDS or the Military Department concerned* and to call and question witnesses" (italics added). Moreover, under subsection D.4.c. of Enclosure 8, "The hearing officer *shall have the authority to impose financial responsibility for* early intervention services, educational placements, *evaluations*, and related services under his or her findings of fact and decision. Taken together, subsections D.1.i. and D.4.c. of Enclosure 8 to the DoDDS Instruction give the Judge authority to order an independent evaluation of the Child at DoDDS expense to determine what compensatory education the Child was entitled to remedy the denial of a FAPE to the extent the Child did not receive the speech therapy specified in her IEP for 1996-1997 school year.[(6)]

The parents' reliance on notions of negligence and accountability are misplaced. Proceedings under the IDEA and the DoDDS Instruction are not intended to assign blame or assess culpability for the purpose of imposing sanctions or other punitive measures. *See, e.g., Hoekstra v. Independent School District*, 103 F.3d 624, 625-26 (8th Cir. 1996)(general and punitive damages are not available under IDEA), *cert. denied*, 117 S.Ct. 1852 (1997). Nothing in the DoDDS Instruction authorizes an Administrative Judge to award monetary damages to an eligible dependent or the dependent's parents. Indeed, a Judge's authority to impose financial responsibility on DoDDS is limited to those purposes specified by the DoDDS Instruction, which do not include imposition of fines, penalties or other forms of money damages.

7. Whether the Administrative Judge erred by indicating that the Child's parents had the option of obtaining speech therapy for the Child and being reimbursed by DoDDS for those services. The Administrative Judge made comments about the issue of reimbursement in two passages in his decision:

"The Petitioners have the right to obtain placement services for those DoDDS cannot supply and have DoDDS pay for it. (See, *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Failure to provide the Petitioners of the situation regarding the absence of communications impaired teachers deprived them of that right." (Decision at p. 24)

""Once the Petitioners were put on proper notice that speech services were not being provided in accordance with the Child's IEP, they had the option of obtaining substitute services and billing DoDDS for them. They elected not to do so. Accordingly, DoDDS was fulfilling its responsibilities under the Instruction and the IDEA effective February 10, 1997." (Decision at pp. 26-27)

These two passages have drawn fire from both DoDDS and the parents. DoDDS contends the Administrative Judge erred because: (a) the parents did not ask for reimbursement; (b) the parents were not entitled to reimbursement because they did not expend any resources to secure educational services for the Child; (c) the Judge's statements contain an oversimplification of the law that, if left unaddressed, could mislead the Child's parents and any member of the public who might read the Judge's decision.[(7)] On appeal, the Child's parents indicate that the Judge's statements about reimbursement were the first time they knew about the possibility of reimbursement, and if they had known about the availability of reimbursement, they would have "pulled [the Child] out of school and placed her in a private school and billed DoDDS back in 1995 until they conformed to her IEP, and hire an individual aide." In view of the foregoing, the issue of reimbursement warrants some discussion.

Reimbursement is not as simple or automatic as the Administrative Judge's statements suggest. In 1985, the Supreme Court held that federal courts could grant reimbursement to parents under the IDEA. *School Committee of Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 369-70 (1985). However, the Supreme Court also cautioned that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." 471 U.S. at 373-74. In 1993, the Supreme Court reiterated its warning from *Burlington* that parents acting unilaterally do so at their own financial risk, and further stated "[t]hey are entitled to reimbursement *only* if a federal court concludes both that the public placement

violated IDEA, and that the private school placement was proper under the Act." *Florence County School District Four v. Carter*, --- U.S. ---, 114 S.Ct. 361, 366 (1993)(italics in original).[(8)]

Decisions by lower federal courts illustrate that reimbursement is not a simple or automatic option available to parents who decide to act unilaterally in obtaining alternative educational services for their children. *See, e.g., Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 614-15 (8th Cir. 1997)(parents not entitled to reimbursement for their placement of child in private school because child's IEP met IDEA requirements); *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997)(parents not entitled to reimbursement of portion of their expenses when there is no showing that school's failure to provide notice to parents resulted in interference with provision of FAPE to child). While parents are free to decide whether to expend their own money to obtain additional educational services or benefits for their children, they should not do so under any illusion that they can act unilaterally and receive reimbursement from DoDDS as a matter of right.

8. Whether the Administrative Judge erred by not granting the Child's parents other forms of relief. The Administrative Judge denied the parents' request to direct DoDDS to purchase a computer and computer-related educational and medical-related products for the Child. The Judge did so because the parents' requests had not been presented to the CSC or the Transition Meeting for consideration.[(9)]

The parents concede that the matter of a computer and computer-related products was not raised at any CSC meeting. However, they contend the General Counsel of DoDDS promised them that a computer would be obtained for the Child, then told them a day later that he had reconsidered the matter and would not offer a computer for the Child. The parents also contend a personal computer would enable them to provide the Child with an educational benefit that she did not receive from DoDDS, and ask that a precedent be set in this case by awarding a computer for the Child.

The Administrative Judge did not err by denying the parents' request for a computer and computer-related products on the grounds that it had not been raised at any CSC meeting or the Transition eeting. There was no record evidence to permit the Judge or this Board to conclude that the DoDDS General Counsel made a settlement offer that could be binding on DoDDS. Finally, the parents' desire to obtain a computer to provide educational benefit for their daughter is understandable. However, as discussed earlier, the Child is entitled to receive a FAPE, not every educational benefit that might maximize her education.

Conclusions

The Administrative Judge did not err by finding that the Child received a FAPE during the 1995-1996 school year. The Judge erred by finding that the Child's IEPs required that she be provided with an individual aide for the 1995-1996 and 1996-1997 school years. Therefore, the Judge erred by ordering DoDDS to provide the Child with an individual aide for the remainder of the IEP period. The Judge did not err by finding that the Child was denied speech therapy required by her IEP during portions of the 1996-1997 school year, and that the Child was entitled to receive compensatory education at DoDDS expense as a remedy. The Judge did not act in excess of his authority under the DoDDS Instruction by ordering an independent evaluation of the Child at DoDDS expense to determine the amount of compensatory education the Child should receive. The Judge erred and exceeded his authority by trying to retain jurisdiction over this case.

An independent evaluation of the Child should be arranged and conducted at DoDDS' expense as expeditiously as possible. The results of that independent evaluation must be provided to DoDDS and the parents so that the Child's CSC can meet to develop a new IEP that incorporates whatever compensatory education is specified by the independent evaluation.

Neither the Administrative Judge nor this Board retains any continuing jurisdiction to oversee the implementation of this decision. The Child's education should be managed by the parties pursuant to the provisions of the DoDDS Instruction.

This decision denies the parents' appeal in whole or in part. Accordingly, pursuant to subsection F.4. of Enclosure 8 to the DoDDS Instruction, the Board hereby advises the parents that they have the right, under Sections 921 *et seq.* and Section 1400 *et seq*. of Title 20 of the U.S. Code, 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.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See separate opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

While I concur with the bulk of the majority opinion, I disagree with my colleagues that there was not enough evidence to support the Administrative Judge's finding that the child's IEP required the school to provide an individual aide.

The child's parents believed an individual aide was necessary. They raised it at IEP meetings. The minutes reflect the school pointing to resource problems but not really objecting to the parents' interpretation. Teachers who participated in the CSC concurred with the parents in testimony before the Administrative Judge. On the other side of the issue, no less than the school system's District Special Education Coordinator acknowledged that she found the minutes of the CSC "very confusing." Thus the parents have themselves, and certain teachers (school employees) saying yes while even an important school official is countering with only an assertion that the record is confusing. As the majority notes, there is also record evidence that disagrees with the Administrative Judge's finding, however, the evidence I have noted above should be sufficient to sustain the Administrative Judge's finding according to the preponderance of the evidence standard.

I do not believe, however, that the Administrative Judge's finding on the individual aide/IEP issue, if sustained, necessarily proves the parents' contention that the school's failure to provide an individual aide constitutes a denial of a free and appropriate public education (FAPE). The Administrative Judge correctly concluded that the failure to implement this particular provision did not have sufficient educational impact, in and of itself, to rise to a denial of FAPE. However, the school should still be bound to implement its commitment.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. As will be discussed later, the Administrative Judge had the authority to order an evaluation of the Child to determine

what compensatory education was necessary to remedy the denial of her FAPE for the 1996-1997 school year. However, that authority does not extend to permit the Judge to retain jurisdiction over the case.

2. Under the Individuals with Disabilities Education Act (IDEA), a child is entitled to receive an adequate education, not the best possible education. *See, e.g., Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) ("IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense. The statute only requires that a public school provide sufficient specialized services so that the student benefits from his education."); *Hartmann v. Loudoun County Bd. of Education*, 118 F.3d 996, 1004 (4th Cir. 1997) ("[T]he IDEA does not guarantee the ideal educational opportunity for every disabled child."); *Urban v. Jefferson County School District*, 89 F.3d 720, 727 (10th Cir. 1996)(IDEA does not entitle child to more than special education program that permits child to benefit educationally); *Wise v. Ohio Department of Education*, 80 F.3d 177, 185 (6th Cir. 1996) ("IDEA only requires states to provide children with disabilities an appropriate education, not the very best possible special education services.").

3. DoDDS' reliance on *Honig v. Doe*, 484 U.S. 305 (1988) is misplaced. *Honig* involved the emergency suspension of a child because on violent and disruptive behavior, not a school's failure to provide educational services specifically required by a child's IEP. Moreover, in *Honig* the Supreme Court did not hold that a 10-day suspension was not a change in placement. Rather, the Supreme Court held that a suspension of up to 10 days did not constitute a "*prohibited* 'change in placement.'" *Honig, supra*, 484 U.S. at 326 n.8 (emphasis added).

4. Schools are not relieved of their obligations under IDEA merely because parents may not spot deficiencies. *See, e.g., M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996)("[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the [school's] behavior did not rise to the level of slothfulness or bad faith."), *cert. denied*, 117 S.Ct. 176 (1996); *Salley v. St. Tammany Parish School Board*, 57 F.3d 458, 464-65 (5th Cir. 1995)(noting parents are expected to oversee child's educational progress, but also noting IDEA places burden on school or agency to inform parents of their children's rights).

5. The 3d Circuit's decision in *M.C. v. Central Regional School District* persuades the Board that DoDDS' reliance on *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 1419 (1996) is misplaced.

6. However, as discussed earlier, an Administrative Judge's authority to order an independent evaluation cannot be exercised in a manner to allow the Judge to retain jurisdiction over the case.

7. Under section G of Enclosure 8 to the DoDDS Instruction, decisions in these cases are to be published in redacted form (to protect the privacy interests of the parents and their children) and made available to the public.

8. Nothing in the *Burlington* or *Carter* decisions addresses the issue of whether reimbursement can be awarded to parents by a tribunal or other authority other than a federal court.

9. The Administrative Judge also denied the parents' request that DoDDS be directed to hire a specific special education teacher for the Child. The Judge concluded this request for extraordinary relief was not supported by the record because there was no evidence that the specified special education teacher was the only person who could successfully teach the Child. The parents did not appeal this ruling.