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DATE: March 24, 1998

In Re:

----------, by his parents,

---------- and

Petitioner

DDESS Case No. 97-001

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Esq.

FOR PETITIONER

Ann M. Paradis, Esq.

Administrative Judge Jerome H. Silber (Hearing Officer) issued a decision, dated December 24, 1997, under 32 C.F.R. Part 80 (Provision of Early Intervention Services to Eligible Infants and Toddlers with Disabilities and Their Families, and Special Education Children with Disabilities Within the Section 6 School Arrangements). The case is before the Board on the appeal by the Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS) from the Hearing Officer's decision. For the reasons that follow, the Board affirms the Hearing Officer's decision in part and reverses it in part.

The Board has jurisdiction of this appeal under Appendix C, Section F. of 32 C.F.R. Part 80.

PROCEDURAL HISTORY

Petitioner is a 5-year-old boy (Child) with autism eligible for educational and related services provided by DDESS or at its expense.

The Child attended DDESS preschool programs during the period September 1994-May 1996, receiving special educational services. In August 1996, the parents unilaterally began to provide the Child with Lovaas therapy[(1)] in the home. The 1996-1997 school year began on August 19, 1996. The Child was present at school on August 29-30, 1996 and September 3 and 6, 1996, but has been absent from school since then. After making two attempts in October 1996 to get the Child's parents to come to the school, the school administratively withdrew the Child on October 16, 1996.

On November 18, 1996, the Child's parents wrote a letter to the local DDESS Director for Exceptional Children's Programs (Director), with a copy to the DDESS Superintendent. In that letter, the parents requested that DDESS provide funding for the Child to receive the Lovaas program at home. At the end of November 1996, the Child's mother called the Director to request an IEP meeting. By letter dated December 2, 1996, the Director replied to the Child's parents.

The Case Study Committee (CSC) met with the Child's mother in January 1997. Subsequently, the CSC and the Child's

mother met several times to collaborate in drafting new Individualized Education Program (IEP) goals and objectives and to consider placement issues.

On April 21, 1997, the CSC proposed an IEP for the Child which would cover an Extended School Year during June and July 1997 and the 1997-1998 school year. The parents rejected the proposed IEP because it did not provide the Child with a complete program of Lovaas therapy for 52 weeks a year.

The Child's mother requested mediation, which was attempted in May 1997. Mediation failed to achieve resolution of the disagreement between DDESS and the Child's parents.

On May 16, 1997, the Child's mother petitioned for a due process hearing. After resolution of various procedural matters, including discovery, a due process hearing was held on September 22-26, 1997 and October 15-16, 1997. The parties made post-hearing written submissions on the issue of reimbursement.

In the proceedings below, the Child's parents contended: (1) North Carolina special education law applied and required DDESS to provide a free appropriate public education (FAPE) for their son that maximized his full potential; (2) the educational gains achieved by their son from October 1994 to July 1996 were minimal and inadequate; (3) only implementation of full Lovaas therapy for the Child all year long would provide the Child with a FAPE; and (4) DDESS should reimburse the parents for expenses they incurred in providing Lovaas therapy for the Child at home.

The Hearing Officer issued a written decision, dated December 24, 1997. In the decision, the Hearing Officer concluded: (1) North Carolina law applied to the case; (2) the Child had been denied a FAPE; and (3) a complete program of Lovaas therapy would provide the Child with a FAPE. The Hearing Officer granted the parents relief, including reimbursement in the sum of $34,221.12 for various expenses incurred by the parents in connection with their efforts to provide Lovaas therapy for their Child. The Hearing Officer denied the parents some of the relief they requested, and denied them reimbursement for approximately $43,600 worth of other expenses for which they had requested reimbursement. The Hearing Officer also directed DDESS to pay for continuation of the Child's Lovaas therapy through the end of July 1999, with various detailed conditions attached.

DDESS appealed the Hearing Officer's decision. The Child's parents submitted reply briefs, but did not cross-appeal the Hearing Officer's decision. Rather, the Child's parents indicated that they wanted the Board to affirm the Hearing Officer's decision.[(2)]

APPEAL ISSUES[(3)]

The DDESS appeal raises the following issues: (1) whether the Hearing Officer erred by concluding that North Carolina law applies to this case; (2) whether the Hearing Officer erred by finding that the Child was denied a FAPE; and (3) whether the Hearing Officer erred by finding that the Child was entitled to reimbursement and other relief. Before addressing these issues, it would be helpful to review some legal principles applicable to this case.

Burden of proof at hearing. Nothing in the Individuals with Disabilities Education Act (IDEA) or 32 C.F.R. Part 80 specifically addresses the matter of who bears the burden of proof in special education cases at the hearing level. In the absence of a statutory or regulatory provision to the contrary, it is well-settled that the moving party has the burden of proof with respect to its claims (except to the extent the nonmoving party does not dispute those claims) and must show it is entitled to receive the relief sought.

Apart from the general principle stated in the preceding paragraph, there is a consensus that the party alleging a denial of FAPE or challenging the adequacy of an IEP bears the burden of proof. *Salley v. St. Tammany Parish School Board*, 57 F.3d 458, 467 (5th Cir. 1995); *Amann v. Stow School System*, 982 F.2d 644, 650 (1st Cir. 1992); *A.E. v. Independent School District*, 936 F.2d 472, 475 (10th Cir. 1991); *Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991). If the party alleging a denial of FAPE or challenging the adequacy of an IEP fails to meet that burden, then the party is not entitled to receive relief. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997); *Dreher v. Amphitheater Unified School District*, 22 F.3d 228, 234 (9th Cir. 1994); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455, 460-61 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 2104

(1994); *Hampton School District v. Dobrowolski*, 976 F.2d 48, 52 (1st Cir. 1992); *Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987).[(4)] Even if a party demonstrates an entitlement to relief, the relief granted must be reasonable and equitable under the particular facts and circumstances of the case. *Parents of Student W. v. Puyallup School District*, 31 F.3d 1489, 1496 (9th Cir. 1994).

Here, the Child's parents requested a due process hearing and sought relief under 32 C.F.R. Part 80, alleging that the Child was being denied a FAPE. Accordingly, the parents had the burden of proof in the proceedings below.[(5)] Specifically, the parents had the burden of demonstrating that the Child had been or was being denied a FAPE. If the parents failed to demonstrate that the Child had been or was being denied a FAPE, then they would not be entitled to any relief. If the parents met their burden of demonstrating a denial of FAPE, then they had the additional burden of demonstrating that the relief they were seeking was reasonable and equitable under the particular facts and circumstances of their case.

Burden on appeal. Nothing in IDEA or 32 C.F.R. Part 80 specifically addresses the matter of which party bears the burden on appeal. In the absence of a statutory or regulatory provision to the contrary, the Board concludes that it should follow the general principle that there is no presumption of error in the proceedings below. Accordingly, the appealing party bears the burden of raising claims of error and demonstrating that such errors were committed.

Standard of review on appeal. In special education cases, the Board gives deference to the Hearing Officer's credibility determinations and resolution of conflicting evidence, provided they are based on a preponderance of the evidence. DoDDS Case No. 97-E-001 (December 2, 1997) at p. 4 (citing earlier special education case decisions by predecessor DoD appellate authority). *See also Independent School District v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996); *Carlisle Area School v. Scott P.*, 62 F.3d 520, 527-29 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 1419 (1996).

Whether DDESS has provided a FAPE for an eligible dependent is a mixed question of law and fact, and a Hearing Officer's determination of that issue is reviewed *de novo*. DoDDS Case No. 97-E-001 (December 2, 1997) at p. 4 (citing federal cases). *See also Doe v. Board of Education of Oak Park & River Forest High School District*, 115 F.3d 1273, 1276 (7th Cir. 1997)(whether school district satisfied requirements of IDEA is mixed question of law and fact which is reviewed *de novo* on appeal), *cert. denied*, 118 S.Ct. 564 (1997); *Hampton School District v. Dobrowolski*, 976 F.2d 48, 52 (1st Cir. 1992)(determination whether IEP was appropriate is a mixed question of law and fact); *JSK v. Hendry County School Board*, 941 F.2d 1563, 1571 (11th Cir. 1991)(whether IEP provided a FAPE is mixed question of law and fact subject to *de novo* review).

A Hearing Officer's interpretation of statutory authorities or DoD regulations is entitled to no deference on appeal and is subject to plenary or *de novo* review on appeal. DoDDS Case No. 97-E-001 (December 2, 1997) at p. 4 (citing earlier special education decision by predecessor DOD appellate authority). *See also Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995)(appeals panel has plenary review over hearing officer's legal rulings), *cert. denied*, 116 S.Ct. 1419 (1996).

Applicability of 1997 IDEA Amendments. The 1997 IDEA Amendments do not have retroactive application to matters that occurred before their effective date. *Fowler v. Unified School District No. 259*, 128 F.3d 1431, 1434-36 (10th Cir. 1997); *K.R. v. Anderson Community School Corp.*, 125 F.3d 1017, 1019 * (7th Cir. 1997); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 247 n.1 (5th Cir. 1997). Although the Hearing Officer ruled that the 1997 IDEA Amendments were not applicable (Decision at p. 30), he referred to portions of that legislation to bolster his analysis. Having ruled the 1997 IDEA Amendments were inapplicable, the Hearing Officer could not rely on any of those amendments to support or bolster his analysis. The Board will not sustain or uphold any analysis or legal rulings based on such a selective application of the 1997 IDEA Amendments as persuasive authority.

Discussion of Appeal Issues

1. Whether the Hearing Officer erred by concluding that North Carolina law applies to this case. During the proceedings below, the Child's parents contended that DDESS failed to comply with North Carolina's special education law[(6)] when providing educational and related services to the Child in that State. Despite the arguments of DDESS to the contrary, the Hearing Officer concluded that North Carolina law applied and held that DDESS' actions with respect to the Child

had to be evaluated against the standard set by that state law. For the reasons that follow, the Board concludes that the Hearing Officer erred, as a matter of law, by holding that DDESS had to comply with North Carolina law.

Absent a clear, unequivocal federal statutory requirement to the contrary, the federal government is not required to comply with state law requirements. *Hancock v. Train*, 426 U.S. 167, 179 (1976); *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 211 (1976). Given the constitutional underpinnings of the doctrine of federal immunity from state law, nothing less than an act of Congress can require DDESS to comply with state law when carrying out its duties and responsibilities. Accordingly, the Hearing Officer erred, as a matter of law, by relying on policy arguments and various matters other than a federal statute to conclude that DDESS must comply with North Carolina special education law.[(7)]

During the proceedings below and on appeal, the Child's parents have not cited any federal statute that provides a clear, unequivocal requirement that DDESS comply with state special education law requirements. The parents' reply brief only cites to nonstatutory provisions in support of its contention that the Board should affirm the Hearing Officer's ruling on the applicability of North Carolina law.

In concluding that DDESS must comply with North Carolina law, the Hearing Officer did cite the following federal statutes: Section 6 of Public Law 81-874 (64 Statutes at Large 1100, 1107); Section 23 of Public Law 102-119 (105 Statutes at Large 587, 604); and Section 2164(f) of Title 10 of the U.S. Code. On appeal, DDESS contends the Hearing Officer's reliance on Section 6 of Public Law 81-874 is misplaced because Public Law 81-874 was repealed in 1994 by Section 331(b) of Public Law 103-382 (108 Statutes at Large 3518, 3965). For the reasons that follow, the Board concludes none of the federal statutes cited by the Hearing Officer sets forth a clear, unequivocal statutory requirement that DDESS must comply with state law.

Public Law 81-874 was enacted into law on September 30, 1950, more than 20 years before the federal special education statute that preceded the IDEA. Section 6 of Public Law 81-874 deals with the education of children who reside on federal property. The last sentence of Section 6 provides: "To the maximum extent practicable, such education shall be comparable to free public education provided for children in comparable communities in the State." The Board does not need to decide what constitutes a "comparable" education to conclude that Section 6 does not provide a clear, unequivocal statutory requirement that schools operated under the authority of Section 6 must comply with state law requirements.[(8)]

On October 7, 1991, the Individuals with Disabilities Education Act Amendments of 1991 (Public Law 102-119) became law. Section 23 of Public Law 102-119 (105 Statutes at Large at 604) amended Section 6(a) of Public Law 81-874, but it did not eliminate the comparability language in Section 6 that was quoted in the preceding paragraph. Nothing in Section 23 provides a clear, unequivocal statutory requirement that schools operated under authority of Section 6 must comply with state law requirements.

Section 2164 of Title 10 of the U.S. Code was enacted in October 5, 1994 as part of Public Law 103-337 (108 Statutes at Large 2727). Nothing in Section 2164 of Title 10 of the U.S. Code clearly or unequivocally directs or requires the Secretary of Defense to comply with state law in connection with domestic dependent elementary and secondary schools. However, Section 2164(f)(2) warrants further discussion in light of DDESS's appeal arguments. Section 2164(f)(2) reads: "Paragraph (1) may not be construed as diminishing for children with disabilities enrolled in day educational programs provided for under this section the extent of substantive rights, protections, and procedural safeguards that were available under section 6(a) of Public Law 81-874 (20 U.S.C. 241(a)) to children with disabilities as of October 7, 1991." As indicated in the preceding paragraph, October 7, 1991 was the date that the Individuals with Disabilities Education Act Amendments of 1991 (Public Law 102-119) became law. Reading the two statutes together, the Board concludes that Section 2164(f) (2) was intended to incorporate the comparability standard of Section 6 to the extent it was in existence with Section 23 of the IDEA Amendments of 1991. *See also* 10 U.S.C. Section 2164(b)(2) (using comparability language).

On October 20, 1994, Public Law 103-382 became law. Section 331(b) of Public Law 103-382 repealed Public Law 81-874. However that repeal does not have the legal significance attributed to it by DDESS. It would not be reasonable to conclude that Congress first enacted Section 2164(f)(2) --- including its incorporation of comparability through

reference to the IDEA Amendments of 1991 --- and then Congress performed an about face and turned Section 2164(f)(2) into a nullity by repealing Public Law 81-874. In light of Section 2164(f)(2)'s reference to the IDEA Amendments of 1991 and Section 2164(b)(2)'s comparability language, the Board concludes the repeal of Public Law 81-874 was merely an act of legislative housekeeping to eliminate a statutory provision rendered superfluous in light of the IDEA Amendments of 1991.

Although the repeal of Public Law 81-874 did not eliminate the comparability standard from Section 2164, it does not follow that DDESS must, as a matter of law, comply with state law requirements. As discussed earlier, Section 6 of Public Law 81-874 did not provide a clear, unequivocal statutory requirement that schools operated under the authority of Section 6 must comply with state law requirements. Its incorporation into subsequent federal statutes does not transform it into such a clear, unequivocal statutory requirement.

2. Whether the Hearing Officer erred by finding that the Child was denied a FAPE. Apart from evaluating DDESS' actions under North Carolina law, the Hearing Officer found, in the alternative, that DDESS failed to meet its statutory obligation to provide the Child with a FAPE under the standard enunciated in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The Hearing Officer made several findings that are relevant to this issue. Specifically, the Hearing Officer found: (A) DDESS did not provide the Child with a FAPE for the 1994-1995 and 1995-1996 school years; (B) the May 1996 IEP was inadequate because it essentially proposed a repetition of earlier IEPs; (C) DDESS failed to promptly evaluate the Child for deficits that require occupational therapy; (D) the April 21, 1997 IEP proposed by DDESS was not adequate, and (E) Lovaas therapy provided to the Child at home after August 1996 was a proper and appropriate placement.

(A) Denial of FAPE for school years 1994-1995 and 1995-1996. DDESS challenges the Hearing Officer's finding that it did not provide the Child with a FAPE during the 1994-1995 and 1995-1996 school years. For the reasons that follow, the Board concludes it need not address the various arguments made by DDESS in support of this contention.

The petition submitted by the Child's mother (Correspondence Volume I, Tab 1) made a general claim that the Child had not been provided a FAPE and that his "educational gains were minimal" during the period October 1994-July 1996. Significantly, during the proceedings below the parents did not seek any relief in connection with the alleged denial of a FAPE during the 1994-1995 and 1995-1996 school years. Rather, the parents sought reimbursement for expenses incurred beginning in August 1996, as well as a ruling that DDESS should either provide continued Lovaas therapy for the Child or be financially responsible for providing such therapy. Since the parents sought no relief in connection with the alleged denial of a FAPE during school years 1994-1995 and 1995-1996, no legally useful purpose was served by the Hearing Officer addressing the issue of whether the Child was denied a FAPE for those school years.

The authority "to manage the proceedings and conduct the hearing" (32 C.F.R. Part 80, Appendix C, Section D.1.h.), imposes on a Hearing Officer the obligation to ensure the prompt and timely resolution of the issues raised in a due process hearing. To satisfy that obligation, the Hearing Officer should endeavor to avoid distractions and diversions from matters relevant and material to the fair and expeditious resolution of the case. Therefore, even if the parties wish to litigate moot issues, the Hearing Officer should, as a matter of judicial economy and the prompt resolution of special education cases, decline to permit the parties to do so. *Cf. Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994)(trial court not required to conduct a trial when there is no genuine issue of material fact even though neither party notices absence of any triable issue), *cert. denied*, 115 S.Ct. 123 (1994).

(B) Adequacy of May 1996 IEP. Nothing in DDESS' appeal brief can be fairly construed as raising, expressly or by fair implication, a challenge to the Hearing Officer's finding that the May 1996 IEP was inadequate. As noted earlier, there is no presumption of error below. Accordingly, the Board will not disturb the Hearing Officer's unchallenged finding that the May 1996 IEP was inadequate.

(C) Evaluation of Child. The Hearing Officer found DDESS failed to promptly evaluate the Child for deficits that might require occupational therapy, in violation of 32 C.F.R. Part 80, Appendix B, Paragraph B.7. The Hearing Officer then apparently concluded this violation constituted a failure *per se* to provide the Child with a FAPE (Decision at p. 21). DDESS contends this finding is not supported by the record evidence and contends, in the alternative, that even if there was a violation by DDESS, there is no record evidence that it caused the Child any loss of educational opportunity.

The procedural safeguards of IDEA are very important because they provide parents with the means to ensure that school authorities are providing disabled children with a FAPE. *See, e.g. Rowley*, 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 insure the full participation of the parents and proper resolution of substantive disagreements"). Because of the important role of the procedural requirements under IDEA, a Hearing Officer should give close scrutiny to any colorable claim that the procedural safeguards of IDEA (including procedural safeguards provided by applicable DoD regulations) have not been complied with. *Amann v. Stow School System*, 982 F.2d 644, 652 (1st Cir. 1992); *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990).

A school's failure to comply with applicable procedural requirements may be sufficient to support a finding that a child was denied a FAPE. *Buser v. Corpus Christi Independent School*, 51 F.3d 490, 493 (5th Cir. 1995), *reh'g denied*, 56 F.3d 1387 (1995), *cert. denied*, 116 S.Ct. 305 (1995); *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1206-07 (4th Cir. 1990); *Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987). However, the Hearing Officer erred by ruling that procedural defects are *per se* proof of a denial of a FAPE (Decision at p. 21). Nothing in *Rowley* supports that ruling. Furthermore, the federal courts have declined to hold that every procedural defect requires a finding that a child was denied a FAPE. *See, e.g., Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990)(court should not find IEP inappropriate based on "technical deviations" or "exalt form over substance"). *Accord Urban v. Jefferson County School District*, 89 F.3d 720, 726 (10th Cir. 1996). Rather, courts have looked at the facts and circumstances of each case to determine whether the procedural defect or flaw compromised or interfered with the child's right to FAPE, seriously hampered the parents' opportunity to participate in the decision-making process concerning their child's education, or caused a deprivation or loss of educational benefits. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1059 (7th Cir. 1997); *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *Independent School District v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1474 (6th Cir. 1996); *Murphy v. Timberlane Regional School District*, 22 F.3d 1186, 1196 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 484 (1994); *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1484 (9th Cir. 1992). Indeed, the Board has accepted the reasoning of this line of decisions. DoDDS Case No. 97-E-001 (December 2, 1997) at pp. 6-7 (relying on federal cases to hold that "not every procedural defect requires a finding that a child was denied a FAPE"). In view of the foregoing legal authority, the Hearing Officer erred by using an impermissible *per se* rule in connection with evaluating whether a procedural violation constitutes a denial of FAPE for the Child.

Turning to the specifics of this case, the Board concludes that even if it were to affirm or sustain the Hearing Officer's findings and conclusions about the Spring 1997 evaluation of the Child, such a result would be legally irrelevant to both: (a) the Board's decision to let stand the Hearing Officer's unchallenged finding about the inadequacy of the May 1996 IEP; and (b) the Board's conclusion (to be discussed later) that the Hearing Officer erred by finding the April 21, 1997 IEP was inadequate. On the one hand, the Hearing Officer's findings and conclusions about the Spring 1997 evaluation are not necessary to sustain his unchallenged finding that the May 1996 IEP was inadequate. On the other hand, the timeliness *vel non* of the Spring 1997 evaluation was irrelevant to the issue of whether the April 21, 1997 IEP was adequate.

(D) Adequacy of April 21, 1997 IEP. As discussed earlier, the Hearing Officer erred by concluding that DDESS must comply with North Carolina law. Since DDESS is not required to comply with North Carolina law, it follows that the Hearing Officer erred by evaluating the adequacy of the education DDESS provided to the Child against the Hearing Officer's interpretation of North Carolina law.[(9)] However, this conclusion is not dispositive because the Board must consider whether it can sustain the Hearing Officer's alternative finding that DDESS failed to provide the Child with a FAPE under the standard enunciated in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

Under *Rowley*, there is a two-step analysis: (a) has the education authority complied with the procedural requirements of the IDEA? and (b) is the IEP developed through the procedures reasonably calculated to enable the child to receive educational benefit? 458 U.S. at 206-07. *Accord* DoDDS Case No. 97-E-001 (December 2, 1997) at p. 6.

As discussed earlier, because DDESS' appeal brief does not challenge the Hearing Officer's finding that the May 1996 IEP was inadequate, the Board will not disturb that finding. However, DDESS does contend that the April 21, 1997 IEP

was reasonably calculated to provide the Child with meaningful educational benefit. Accordingly, the Board must consider whether the Hearing Officer's finding that the April 21, 1997 IEP did not propose a FAPE is sustainable.

The Board reads the Hearing Officer's analysis of the adequacy of the April 21, 1997 IEP as being based on the substantive, not procedural, aspects of that IEP. That approach by the Hearing Officer is permissible because even if there has been compliance with the procedural safeguards (or a finding that any procedural defect was harmless in nature), the Hearing Officer must consider the second prong of the *Rowley* standard: whether the IEP developed through the procedures is reasonably calculated to enable the child to receive educational benefit.

The adequacy of an IEP must be determined on a case-by-case basis. *Lenn v. Portland School Committee*, 998 F.2d 1083, 1087 (1st Cir. 1993); *JSK v. Hendry County School Board*, 941 F.2d 1563, 1573 (11th Cir. 1991). Although the adequacy of an IEP must be determined after careful consideration of the particular facts and circumstances of each case, the Hearing Officer's analysis must take into account, and be consistent with, applicable legal principles. *Cf. Board of Education of Community High School District No. 218 v. Illinois State Board of Education*, 103 F.3d 545, 549 (7th Cir. 1996)("[W]hile the jurisprudence in this area has been driven by the facts of each case, our approach need not be unguided."). On review, the Board must consider whether the Hearing Officer's findings and conclusions about the April 21, 1997 IEP are supported by the preponderance of the evidence and are consistent with pertinent legal principles.

First, as discussed earlier in this decision, 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. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997); *Hartmann v. Loudon County Board of Education*, 118 F.3d 996, 1005 (4th Cir. 1997); *JSK v. Hendry County School Board*, 941 F.2d 1563, 1573 (11th Cir. 1991). As one court has noted, "[t]he primary responsibility for developing IEPs belongs to the state and local agencies in cooperation with the parents, not the courts." *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989).

Third, the Hearing Officer must not impose on the parties his or her own notions of what educational methodology or educational policy is desirable. *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 614 (8th Cir. 1997); *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996, 1001 (4th Cir. 1997); *Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1121 (2d Cir. 1997); *Union School District v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 428 (1994); *Lenn v. Portland School Committee*, 998 F.2d 1083, 1091 n.8 (1st Cir. 1993); *Todd D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991); *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990).

Fourth, the adequacy of an IEP should not be evaluated against any single criterion. *Johnson v. Independent School District*, 921 F.2d 1022, 1028 (10th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991). *See Lenn v. Portland School Committee*, 998 F.2d 1083, 1089-90 (1st Cir. 1993)(noting need to avoid taking a "one-dimensional view of an IEP").

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 benefit. *Carlisle Area School v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 1419 (1996); *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991).

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. *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 613 (8th Cir. 1997); *Angevine v. Smith*, 959 F.2d 292, 296 (D.C. Cir. 1992); *Roland M. v. Concord School Committee*, 910 F.2d 983, 993 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991); *Hessler v. State Board of Education of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983). *Accord* DoDDS Case No. 97-E-001 (December 2, 1997) at p. 5.

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). *See also Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997); *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1st Cir. 1993). However, the IEP must be reasonably

calculated to provide the child with more than trivial or meaningless benefit. *County of San Diego v. California Special Education Hearing Office*, 93 F.3d 1458, 1467 (9th Cir. 1996); *Carlisle Area School v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 1419 (1996); *Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985).

As the Hearing Officer noted (Decision at p. 23), the heart of the dispute over the April 21, 1997 IEP was the insistence of the parents that DDESS provide complete Lovaas therapy for the Child and the decision of the CSC that complete Lovaas therapy was not required for the Child.[(10)] The Hearing Officer's findings and conclusions about the adequacy of the April 21, 1997 cannot be sustained because they are based on several legal errors that fatally undermine those findings and conclusions.

The Hearing Officer erred by failing to give appropriate deference to the educational professionals who developed the April 21, 1997 IEP and would be responsible for providing the Child with a FAPE. When faced with a choosing between different educational methodologies, the CSC must evaluate the different methodologies and make often difficult decisions to select which methodology to use to provide an appropriate education for the child in question, relying on their judgment and experience in educational matters. In this case, the Hearing Officer failed to give due deference to the professional judgment and expertise of the CSC in deciding what educational methodology was appropriate for the Child. *See also Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988) (parents do not have right to compel school to provide specific program or use a specific methodology), *cert. denied*, 488 U.S. 925 (1988).

The Hearing Officer erred by comparing the April 21, 1997 IEP with the Lovaas therapy sought by the Child's parents and concluding the April 21, 1997 IEP was inadequate because he believed that Lovaas therapy would be a better educational methodology. As discussed earlier, such a comparative analysis is not the proper way to assess the adequacy of an IEP.

The Hearing Officer erred by finding the April 21, 1997 IEP inadequate because he believed it would not provide the Child with maximum or optimum benefit. As discussed earlier, the Hearing Officer erred by holding that DDESS must comply with North Carolina law. Accordingly, the Hearing Officer could not rely on his interpretation of North Carolina law to require DDESS to provide the Child with maximum or optimum benefit. In addition, the Hearing Officer erred by concluding the April 21, 1997 IEP was inadequate under the *Rowley* standard. *Rowley* does not require a school to provide a disabled child with the maximum or best possible education. *See* 458 U.S. at 200-01. *See also Hartmann v. Loudon County Board of Education*, 118 F.3d 996, 1004 (4th Cir. 1997)(*Rowley* "admoni[shes] that the IDEA does not guarantee the ideal educational opportunity for every disabled child").

Furthermore, the April 21, 1997 IEP was not merely a repetition of the May 1996 IEP, which the Hearing Officer had found to be inadequate.[(11)] Rather, the April 21, 1997 IEP (as understood in the context of the minutes of the CSC meetings and testimony about those meetings) reflected significant modifications and changes made to address concerns expressed by the Child's mother after submission of the November 18, 1996 letter. *See, e.g.*, Exhibits 67, 68, 70, 71 and 101; Hearing Transcript at pp. 371-74, 652-53, 666-68, 1042-45, 1116-17.

(E) Propriety of Lovaas therapy. The Hearing Officer found the Child made "remarkable progress" with Lovaas therapy, and concluded that Lovaas therapy at home was a proper placement for the Child and it was the least restrictive environment (LRE) for the Child "based upon his individual capabilities and needs." DDESS contends the Hearing Officer erred because: (1) the Hearing Officer used an incorrect standard in evaluating the adequacy of the education DDESS provided to the Child; (2) the Child made meaningful progress prior to the time he was unilaterally removed from the DDESS school; (3) the Child did not suffer significant regression during the 1994-1995 and 1995-1996 school years; and (4) the Hearing Officer disregarded the Child's right to be educated in the LRE.

Most of DDESS' arguments have been discussed earlier this decision or have been rendered moot by the Board's rulings. What remains is DDESS' argument that the Hearing Officer disregarded the Child's right to be educated in the LRE.

For the reasons discussed earlier, the Hearing Officer erred by ruling that DDESS was denying the Child a FAPE because it would not provide the Child with a complete Lovaas therapy program. However, it does not follow that the

Hearing Officer could not find, based on the preponderance of the evidence, that Lovaas therapy was an acknowledged methodology that could be appropriate for certain children, including the Child.[(12)] As the parents correctly note (Petitioners' Second Reply to Respondent's Statement of Issues and Arguments at p. 28), for purposes of reimbursement, an alternate placement need not be perfect. Even if DDESS can point to evidence that the Lovaas therapy has not been totally effective in achieving some of the goals set for the Child that does not mean reimbursement is barred. *See Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1161 (5th Cir. 1986)(parents do not have to show the interim placement was "the exact proper placement" before they can receive reimbursement). In this case, the Hearing Officer's decision addressed the LRE concerns raised by DDESS about the parents' provision of Lovaas therapy to the Child at home and found those concerns to be unpersuasive. Considering the record as a whole, the Board concludes DDESS has failed to demonstrate the Hearing Officer's findings and conclusions on this point were arbitrary, capricious, or contrary to law.

3. Whether the Hearing Officer erred by finding that the Child was entitled to reimbursement and other relief. The Hearing Officer granted the parents reimbursement in the sum of $34,221.12 for various expenses incurred by the parents in connection with their efforts to provide Lovaas therapy for their Child. The Hearing Officer denied the parents some of the relief they requested, and denied them reimbursement for approximately $43,600 worth of other expenses for which they had requested reimbursement. The Hearing Officer also directed DDESS to pay for continuation of the Child's Lovaas therapy through the end of July 1999, with various detailed conditions attached.

With respect to the reimbursement awarded by the Hearing Officer, DDESS contends the Hearing Officer erred because: (a) the Child was not denied a FAPE; (b) the award of reimbursement to the parents is not fair and equitable because they have not expended their personal funds to provide for the Child's in-house Lovaas therapy; and (c) the award of reimbursement is an attempt to impermissibly compensate the parents for their fundraising efforts. DDESS contends, in the alternative, that even if the parents are entitled to some reimbursement, the Hearing Officer erred in awarding relief to the parents because he abused his discretion and failed to take into account several relevant considerations. With respect to the other relief awarded to the parents, DDESS contends the Hearing Officer: (a) exceeded his authority; (b) fashioned relief that constitutes an impermissible micro management of DDESS; and (c) lacked authority to award the parents relief beyond the 1997-1998 school year. For the reasons that follow, the Board concludes that the relief granted by the Hearing Officer must be affirmed in part and reversed in part.[(13)]

The Supreme Court has held that federal courts could, under appropriate circumstances, 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, in doing so, the Supreme Court cautioned that parents who unilaterally change their child's placement without the consent of 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* about financial risk and further stated "[parents] are entitled to reimbursement *only* if a federal court concludes both that the public placement violated the IDEA, and that the private school placement was proper under the Act." *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993) (italics in original).[(14)] The Board has noted that "[d]ecisions 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. 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." DoDDS Case No. 97-E-001 (December 2, 1997) at p. 13 (citations omitted).[(15)]

On its face, the Hearing Officer's unchallenged finding that the May 1996 IEP was inadequate would support a finding that the Child was denied a FAPE for the 1996-1997 school year, thereby justifying consideration of the parent's claim for relief for the 1996-1997 school year.[(16)] However, the finding of a denial of a FAPE does not give rise to a right to open-ended relief. Once a denial of a FAPE has been remedied, then relief must be fashioned or adjusted accordingly. In this case, once DDESS offered the April 21, 1997 IEP (which was reasonably calculated to provide a FAPE for the Child), the parents' right to reimbursement and other relief stopped accruing. On this point, the argument by DDESS is persuasive. In short, the maximum period of time for which the parents were entitled to reimbursement was the period from the end of the 1995-1996 school year to April 21, 1997.

DDESS also contends the Hearing Officer erred by awarding the parents reimbursement for costs incurred before November 18, 1996, the date of the letter by which the parents informed DDESS of their dissatisfaction with the Child's education. This contention is well-founded.

The IDEA requires the cooperation of schools and parents. While the IDEA imposes many duties and obligations on schools, parents also have some obligations and could waive their right to relief if they fail to satisfy those obligations. *See, e.g., Wise v. Ohio Department of Education*, 80 F.3d 177, 182 (6th Cir. 1996)("Parents who neglect to follow the grievance procedures set forth in 20 U.S.C.A. §1415 may render their children ineligible for free appropriate public education."); *Salley v. St. Tammany Parish School Board*, 57 F.3d 458, 463 (5th Cir. 1995)(school cannot be found to have violated IDEA by not evaluating child when parents unilaterally remove child from school and severed all lines of communication with school officials); *Combs v. School Board of Rockingham County*, 15 F.3d 357, 363-64 (4th Cir. 1994)("School boards must be given adequate notice of problems if they are to remedy them, and must be given sufficient time to respond to those problems before they can be held liable for failure to act."); *Amann v. Stow School System*, 982 F.2d 644, 651 (1st Cir. 1992)(unilateral action by parents without making challenge to IEP may relieve school of obligation to develop and implement new IEP for child); *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990)(parental failure to operate within procedural framework of IDEA could result in waiver of right to procedurally correct IEP meeting), *cert. denied*, 499 U.S. 938 (1991); *Hudson v. Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987) (parental refusal to cooperate with a school may be considered in deciding whether they should be granted reimbursement).

Indeed, several courts have held that parents have the obligation to place a school on reasonable notice that they challenge the adequacy of an IEP or placement before they can expect to be reimbursed for unilaterally placing the child elsewhere. *Bernardsville Board of Education v. J.H.*, 42 F.3d 149, 159-60 (3d Cir. 1994); *Ash v. Lake Oswego School District*, 980 F.2d 585, 589 (9th Cir. 1992); *Evans v. District No. 17 of Douglas County*, 841 F.2d 824, 831-32 (8th Cir. 1988); *Garland Independent School District v. Wilks*, 657 F.Supp. 1163, 1167-68 (N.D. Tex. 1987). However, if the parents' failure to notify a school was a direct result of a school's failure to comply with procedural safeguards, then the lack of parental notice will not operate as a waiver of the right to reimbursement. *Hall v. Vance County Board of Education*, 774 F.2d 629, 633-34 n.4 (4th Cir. 1985). Of course, once parents place a school on notice of their objections to an IEP or placement, then the school has the obligation to address those objections in nondilatory manner. *Rapid City School District v. Vahle*, 922 F.2d 476, 478 (8th Cir. 1990). The reasoning of these cases is persuasive and is applicable in these proceedings.[(17)]

In this case, the parents were not satisfied that the May 1996 IEP would provide their son with a FAPE. Despite that dissatisfaction, it was not until November 18, 1996 (Exhibit 45 and Hearing Transcript at p. 1041) that they notified DDESS that they believed the May 1996 IEP was inadequate and would not provide their son with a FAPE. The Hearing Officer's finding that the parents did not act in bad faith is sustainable, but it is irrelevant. Even in the absence of bad faith, parents who believe an IEP or a placement is inadequate or inappropriate for their child have an obligation to give DDESS reasonable notice of their concerns. *Bernardsville Board of Education v. J.H.*, 42 F.3d 149, 159-60 (3d Cir. 1994). To hold otherwise would seriously undermine the cooperation and communication between schools and parents needed to give IDEA and the DoD special education regulation a chance to work.[(18)]

Nothing in the record indicates that the parents' delay in notifying DDESS was the direct result of any procedural failure by DDESS.[(19)] Moreover, the Child's mother was not a novice or newcomer to dealing with DDESS,[(20)] and the parents received notice of their procedural rights on various occasions. *See, e.g.*, Exhibits 9 and 22. The parents could not reasonably expect the school to be clairvoyant and able to discern their intention to challenge the adequacy of the May 1996 IEP. The Board cannot sustain the Hearing Officer's implicit finding that DDESS knew or should have known[(21)] about the parents' disagreement with the May 1996 IEP because the school knew the Child was absent from school (Decision at p. 30). Considering the multitude of reasons why a child may be absent from school, it was not reasonable for the Hearing Officer to conclude DDESS should somehow have known the Child's absence was due to the parents' intent to challenge the adequacy of the May 1996 IEP. oreover, the expressions of enthusiasm for Lovaas therapy made by the Child's mother in the presence of DDESS personnel fall short of giving DDESS reasonable notice of the parents' intent to challenge the May 1996 IEP and the placement of the Child. *See also* Hearing Transcript at p. 1040 (testimony of Child's mother on reasons why she waited before asking DDESS to implement Lovaas therapy for Child).

The Board rejects the suggestion by DDESS that the parents also are not entitled to reimbursement because it was not until July 7, 1997 that they put the school on notice that they were seeking reimbursement (Respondent's Statement of Issues and Arguments at pp. 106-07 n.94). The November 18, 1996 letter served its purpose of placing DDESS on reasonable notice that the parents were contending their son was not being provided with a FAPE. The purpose of such notice is to give DDESS an opportunity to communicate with the parents to discuss and try to resolve the matter in a cooperative manner, not to lock the parents into a litigating posture. The practical effect of the DDESS suggestion would be to discourage parents from communicating their concerns or problems to DDESS for fear that such communications could be become potential snares if not carefully worded and artfully drafted. The Board declines to accept the DDESS suggestion. *Cf. Combs v. School Board of Rockingham County*, 15 F.3d 357, 364 (4th Cir. 1994) (court should refrain from granting relief that would encourage potential litigants and their attorneys to pursue legal claims prior to attempting simpler resolution of problems under the "careful construct of the IDEA").

Once the parents notified DDESS, through the November 18, 1996 letter, that they felt their son was being denied a FAPE, DDESS was on fair notice that there was a claim of a denial of a FAPE. DDESS's responsibility to take reasonable steps to respond to the parents' concerns or face possible liability for denial of a FAPE began with that notice.

In view of the foregoing discussion, the Board concludes the period for which the parents were entitled to claim reimbursement covers the period November 18, 1996 through April 21, 1997. The Hearing Officer erred to the extent he granted the parents reimbursement for any expenses incurred outside that time period.

DDESS correctly notes that money damages are not an available form of relief in these proceedings. DoDDS Case No. 97-E-001 (December 2, 1997) at p. 12. *See also Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 615 (8th Cir. 1997); *Charlie F. v. Board of Education of Skokie School District*, 98 F.3d 989, 991 (7th Cir. 1996). However, the Board rejects the DDESS argument that the Hearing Officer's award of reimbursement is an attempt to impermissibly compensate the parents for their fundraising efforts. The Hearing Officer expressly stated that "[c]ompensation for the parental time expended in raising funds to pay for a unilateral private placement may not be awarded" (Decision at p. 33). There is a rebuttable presumption that administrative officials act in good faith. Absent strong evidence to the contrary, the Board will not accept an argument that the Hearing Officer does not mean what he expressly states in his decision. *See Lenn v. Portland School Committee*, 998 F.2d 1083, 1087-88 (1st Cir. 1993)(party has heavy burden of persuasion on appeal if it asserts the judge below "indulg[ed] in the adjudicatory equivalent of a shell game") . DDESS' argument falls far short of demonstrating the Hearing Officer's statement was a mere sham.

The Board rejects DDESS' assertion that the Hearing Officer erred by granting the Child's parents reimbursement because the parents did not have any out-of-pocket expenses. A review of the record evidence shows that the parents incurred expenses in excess of the $37,029.71 they obtained through fundraising. It follows that some of the expenses incurred were paid by the parents out of their own funds. It is untenable for DDESS to baldly assert, without any support in the record evidence, that the parents incurred no out-of-pocket expenses. The Board declines to attempt *sua sponte* any apportionment or proration of the expenses for which the parents may be reimbursed. *Cf. Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635, 642 n.3 (9th Cir. 1990)(appellate court declining to address possibility of apportioning costs in special education case when none of parties raised apportionment of costs as an issue).

As discussed earlier, the Hearing Officer erred to the extent that he granted the parents reimbursement for any expenses incurred outside the period of November 18, 1996 through April 21, 1997. A review of the record evidence shows the parents claimed expenses during that period which total $14, 258.79.[(22)] That amount must, of course be reduced by $2,702.75 for expenses during that period that were specifically disallowed by the Hearing Officer (Decision at pp. 32-34) that were not subject to any cross-appeal.[(23)] *See* footnote 2 of this decision.

There remains the issue whether the $11,556.04 balance must be reduced further based on other arguments raised by DDESS with respect to certain types or kinds of expenses. Specifically, DDESS contends the Hearing Officer erred by reimbursing the parents for expenses that exceeded the $19,000-$20,000 per year estimate made by the parents, excessive or unreasonable therapy costs, and excessive and unreasonable expenses for program materials and supplies. The Board will address each category in turn.

The record evidence shows that the parents told DDESS that Lovaas therapy would cost approximately $19,000-$20,000 a year. *See, e.g.,* Exhibit 45. At best, DDESS' appeal argument could be construed as suggesting that estimate should be a benchmark and any claimed expenses in excess of that estimated amount are unreasonable. However, the Board declines to rule that any expenses in excess of that estimate were unreasonable, as a matter of law, or that the Hearing Officer had no option but to disallow any expenses in excess of that estimate. While DDESS' concerns on this point are not frivolous, they are too generalized and not specific enough to demonstrate the Hearing Officer committed error by not restricting any reimbursement relief to amounts falling within the $19,000-$20,000 a year estimate.

DDESS makes several arguments to challenge the Hearing Officer's grant of reimbursement for therapy costs: (a) the therapy costs exceeded those that would be expected in light of the $19,000-$20,000 estimate the parents gave to DDESS concerning Lovaas therapy; (b) some of the monthly therapy costs listed by the parents were excessive in light of the number of hours of therapy the Child received and the hourly rate which the therapists were paid; and (c) after February 1997, the parents increased the amount of weekly therapy the Child received by 3 hours above the amount of therapy which the Lovaas consultant recommended.

The first argument is a variation of DDESS' general argument about the significance of the $19,000-$20,000 estimate concerning the anticipated costs of Lovaas therapy. The Board's earlier discussion of that estimate applies here with equal force.

The second argument is rendered partially moot for those months outside the period November 18, 1996-April 21, 1997. For the months of November 1996-February 1997, the monthly average of therapy costs claimed by the parents is $978, which is only $18 above the $960 monthly average DDESS claims would be reasonable for the period. For the months of March 1997-April 1997, the monthly average of therapy costs claimed by the parents is $1,672.13, which is about $296 above the $1,376 monthly average DDESS claims would be reasonable for the period. The difference of $664.25 for the November 1996-April 1997 period (about $110.70 a month) is not very significant.

The third argument is persuasive in part. The parents could not reasonably expect to be reimbursed for hours of therapy that exceeded the amount recommended by their Lovaas consultant. However, as discussed in the preceding paragraph, accepting for purposes of this appeal DDESS' calculations, the effect of this excess therapy for the time period March 1997-April 1997 translated into a difference of about $296 a month between the amount claimed by the parents and the amount DDESS asserts would be reasonable.

The record evidence is not sufficiently developed to enable to Board to conclude, as a matter of law, that the Hearing Officer erred by not reducing the award of reimbursed therapy costs to the amounts DDESS argues are reasonable. The Board could remand the case to the Hearing Officer for further proceedings to address that issue. However, such a course of action would serve little useful purpose at the expense of significant countervailing interests and considerations. Specifically, for the period November 1996-April 1997, there is a $664.25 difference between the amount of therapy costs claimed by the Child's parents and the amount that DDESS contends would be a reasonable amount. On remand, the Child's parents might be able to present evidence that could persuade the Hearing Officer to award them some or all of that $664.25 difference, or they might fail to offer evidence that proved persuasive. In either event, the administrative costs of a remand (with the possibility of yet another appeal) and the costs of legal representation by both sides would easily exceed the $664.25 in question. Neither the interest in the fair and prompt resolution of special education cases nor the interests of the Child would be served by the delay and expense such a remand would produce. Considering the particular facts of this case, applying the legal principle that there is no presumption of error below, and taking into account the equitable principle of considering the equities, the relative positions of the parties, and the relative potential hardships (27A Am. Jur. 2d *Equity* Section 102), the Board concludes the most equitable course of action on this matter would be decline to remand the case for further proceedings and not reduce the amount of reimbursement by the $664.25 difference in therapy costs.

DDESS also contends the Hearing Officer erred by finding that the parents were not entitled to be reimbursed for toys, personal hygiene materials, and other expenses related to the normal expenses of raising a child, but then reducing the amount of reimbursement requested for such items by 20%. DDESS argues the 20% figure used by the Hearing Officer is arbitrary and capricious. The Board agrees because the Hearing Officer gave no explanation or justification for the

20% figure he used. However, DDESS' contention is moot with respect to those expenses that fall outside the November 18, 1996-April 21, 1997 period. Moreover, the Board does not find persuasive the DDESS argument that the Hearing Officer should have limited reimbursement for supplies to the $500.00 a year estimate given by the Child's parents. The Board reaches this conclusion for reasons similar to those used to address DDESS' argument about the $19,000-$20,000 a year estimate.

The Board is therefore left with the dilemma of finding error by the Hearing Officer, but rejecting the DDESS position on the maximum amount of reimbursement the Child's parents should get for supplies and other materials. The Board could remand the case to the Hearing Officer for further proceedings on this matter. However, the total amount in question is not significant. Our review of Exhibit 148 and Correspondence Volume II, Tab 61 shows --- for the period November 18, 1996-April 21, 1997 --- several items that clearly are toys, personal hygiene and other expenses related to the normal expenses of raising a child, totaling $438.98.[(24)] Accordingly, the $11,556.04 figure should be reduced by this amount, leaving a balance of $11,117.06.

In view of all the foregoing, the Board affirms the Hearing Officer's award of reimbursement to the extent of $11,117.06. The Hearing Officer's reimbursement award in excess of that amount is reversed. DDESS persuasively argues that any non-consumable materials for which reimbursement is awarded become property of the school which should be turned over to DDESS.

The Board now turns to the nonreimbursement relief the Hearing Officer granted to the parents. Because the Hearing Officer erred by finding that the April 21, 1997 IEP was not reasonably calculated to provide the Child with a FAPE, the Hearing Officer erred by granting the parents relief for the period after that IEP was offered and rejected.

Moreover, the Hearing Officer exceeded his authority by ordering relief that extended through July 1999. Even where a party has demonstrated a denial of a FAPE that warrants relief, the Hearing Officer does not have the authority to fashion a remedy that ignores or violates statutory or regulatory requirements. *See Consarc Corp. v. U.S. Treasury Department, Office of Foreign Assets Control*, 71 F.3d 909, 915 (D.C. Cir. 1995)("Even a well-founded claim in equity would not suffice to override the plain effect of the law."); *Timken Co. v. United States*, 37 F.3d 1470, 1477 (Fed. Cir. 1994)(in fashioning equitable relief, court should not act in manner contrary to statutory provision dealing with same issue); *In re Shoreline Concrete Co., Inc. v. United States*, 831 F.2d 903, 905 (9th Cir. 1987)(in fashioning equitable relief, court cannot ignore express statutory language or seek to rewrite statute); *Seguros Banvenez S.A. v. S/S Oliver Drescher*, 761 F.2d 855, 863 (2d Cir. 1985) (plain mandate of law cannot be set aside because of referee's or judge's invocation of equitable principles). The relief granted by the Hearing Officer had the practical effect of usurping the authority and responsibility of the CSC to periodically develop and review the Child's IEP (32 C.F.R. Part 80, Appendix B, Section C) and disrupting the special education regulatory scheme.

Furthermore, the Hearing Officer's relief constituted an impermissible micro management of DDESS. Nothing in 32 C.F.R. Part 80, Appendix C, Section D authorizes a Hearing Officer to dictate to DDESS such matters as: which consultants or professionals it should retain or hire; whether DDESS should fund workshops (or how many workshops should be funded); how DDESS should handle travel and per diem expenses; or what particular classroom arrangements that DDESS should provide. Even if the Hearing Officer's order to DDESS to provide Lovaas therapy for the Child were sustainable, the proper course of action for the Hearing Officer would have been to order DDESS to provide Lovaas therapy for the Child and leave the details of implementation to the CSC in accordance with 32 C.F.R. Part 80. *See, e.g., Schuldt v. Mankato Independent School District*, 937 F.2d 1357, 1360 (8th Cir. 1991)(if court ordered a specific placement without remanding case for development of new IEP, it would be improperly imposing its view of preferable educational methods on school), *cert. denied*, 502 U.S. 1059 (1992); *Goodall v. Stafford County School Board*, 930 F.2d 363, 367-68 (4th Cir. 1991)(whether particular service or method can feasibly be applied in a specific special education setting is a matter for school officials to determine), *cert. denied*, 502 U.S. 864 (1992); *Doe v. Defendant I*, 898 F.2d 1186, 1192 (6th Cir. 1990)("[T]he choice of how services are to be provided rests initially with the school."). The Hearing Officer's effort to micro manage DDESS was *ultra vires* and a clear abuse of discretion.

Conclusions

The Hearing Officer's findings that the Child was denied a FAPE for school years 1994-1995 and 1995-1996 are

vacated as moot. The Hearing Officer's finding that the May 1996 IEP was inadequate was unchallenged and will not be disturbed by the Board. The Hearing Officer erred by granting the parents reimbursement for any expenses incurred by the parents outside the period November 18, 1996-April 21, 1997, and that relief is vacated. The Hearing Officer's grant of reimbursement to the parents for allowable expenses incurred during the period November 18, 1996-April 21, 1997 is affirmed in the amount of $11,117.06. The Hearing Officer erred by granting relief that covered the period after April 21, 1997, and that relief is vacated.

Neither the Hearing Officer nor this Board retains any continuing jurisdiction to oversee implementation of this decision. The Child's education should be managed by the parties pursuant to the provisions of 32 C.F.R. Part 80 and any other applicable legal requirements.

This decision results in denial of the parents' relief in whole or in part. Accordingly, pursuant to Paragraph F.4. of Appendix C to 32 C.F.R. Part 80, the Board hereby advises the parents that they have the right, under Sections 921 *et seq.* and Sections 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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The Lovaas therapy sought by the Child's parents is based on a program of behavioral therapy for autistic children developed by Dr. O. Ivar Lovaas of the University of California, Los Angeles. *See, e.g.*, Exhibit 118.

2. The parents have waived any claim of error with respect to those portions of the Hearing Officer's decision that denied them relief because: (a) they did not cross-appeal the Hearing Officer's decision; and (b) their reply briefs do not claim error with respect to any portion of the Hearing Officer's decision, including those portions denying them relief in part.

3. During the proceedings below and on appeal, there have been occasions when counsel for both sides have resorted to harsh language and angry rhetoric in their written submissions. Counsel are expected to zealously represent their client's interests within the bounds of the law. However, zealous advocacy does not justify failing to maintain the dignity and decorum of legal proceedings. Special education cases often involve difficult situations that can easily evoke strong opinions and emotions. As professionals without a personal stake in these cases, counsel have an obligation to assist the tribunals before which they appear in maintaining a basic level of civility and mutual respect. Vitriolic rhetoric runs the risk of polarizing a situation to the detriment of the parties, one of whom is a disabled child. *See also* footnote 18.

4. Based on these cases, the Board does not find merit in the premise of the parents' argument (Petitioner's Second Reply to Respondent's Statement of Issues and Arguments at p. 25) that DDESS had the burden of proving the adequacy of the April 21, 1997 IEP.

5. There is nothing in the record that explains why the Hearing Officer conducted the hearing by having DDESS present its case first. The Hearing Officer has the authority to manage the proceedings below and conduct the hearing. 32 C.F.R. Part 80, Appendix C, Paragraph D.1.h. However, that authority is not unfettered and does not explain or justify the Hearing Officer's unorthodox approach in having DDESS present its case before the parents presented their case.

6. North Carolina General Statutes, Chapter 115C, Section 115C-106. For reasons not apparent from the record or the Hearing Officer's decision, the Child's parents and the Hearing Officer relied solely on the section of the North Carolina law pertaining to state policy on special education, ignoring other sections of the North Carolina special education law.

7. For the same reasons, the Board rejects DDESS' nonstatutory and policy arguments for why it does not have to comply with North Carolina special education law.

8. The Board expresses no opinion as to the legal significance of the comparability standard in other contexts. The Board will address that issue when it is properly raised in a due process hearing and is relevant to an appeal.

9. Because the Board has concluded that the Hearing Officer erred by applying North Carolina law, the Board need not address DDESS' alternative argument that the Hearing Officer erred in his interpretation and application of North Carolina law.

10. The record evidence shows the parents did not object to the goals and objectives of the April 21, 1997 IEP, but merely contended it was inadequate because it did not provide for total Lovaas therapy. *See, e.g.*, Exhibit 70; Hearing Transcript at pp. 675-77, 1044-46, 1111-13, 1117, 1143-44. Even an expert witness for the parents testified that the goals and objectives of the April 21, 1997 IEP were reasonable. *See* Hearing Transcript at pp. 850-51, 854-55.

11. An IEP may be found to be inappropriate if it merely repeats or reiterates an earlier IEP that was inadequate. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

12. The Hearing Officer's finding about the appropriateness of Lovaas therapy has relevance to the issue of reimbursement, which will be discussed later in this decision.

13. For the reasons discussed in footnote 2 of this decision, the parents waived any claim of error with respect to those portions of the Hearing Officer's decision which denied them elements of the relief they sought.

14. In this case, DDESS does not challenge or question the authority of a Hearing Officer to grant reimbursement in an appropriate case.

15. DDESS takes exception with the Hearing Officer's suggestion (Decision at p. 31) that DDESS had a duty to inform the Child's parents that they might be eligible for reimbursement of expenses incurred for a unilateral private placement. DDESS's argument is well-taken. The obligation of DDESS to give parents notice of their rights does not extend to requiring DDESS to give them legal advice about the kinds of relief that *might* be available in a future litigation, including the risks associated with seeking such relief.

16. In this regard, the Board notes the parents did not claim any relief (*e.g.*, compensatory education) in connection with the 1994-1995 and 1995-1996 school years.

17. The Hearing Officer noted some of these decisions, but declined to apply them because no 4th Circuit decisions on point had been brought to his attention (Decision at pp. 29-30). The Hearing Officer relied on non-4th Circuit decision in other parts of his decision. Therefore, it was arbitrary for the Hearing Officer to decline to apply non-4th Circuit decisions on this point.

18. Hard-ball tactics and adversarial approaches can be counterproductive in the special education context. *See, e.g.,*

Clyde K. v. Puyallup School District, 35 F.3d 1396, 1400 n.5 and 1402 n.10 (9th Cir. 1994).

19. It was untenable for the Hearing Officer to conclude "[i]t would be inequitable to hold [the Child's] parents to a prior notice requirement and yet fail to hold DDESS to a requirement to have told them that they must give prior notice" (Decision at p. 31). As already discussed, courts have held that parents have an obligation to give reasonable notice to schools of their specific concerns and grievances. Such cases demonstrate it is not inconsistent with principles of equity or simple fairness to hold parents responsible for informing schools of their concerns and grievances.

20. The sophistication of the parents and their prior experience, or lack thereof, with special education procedures are relevant considerations in this area. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1061 (7th Cir. 1997); *Evans v. District No. 17 of Douglas County*, 841 F.2d 824, 829 (8th Cir. 1988).

21. It is frivolous for DDESS to argue that the "knew or should have known" standard is novel in special education law and without precedent. The standard has been applied by federal courts in special education cases. *Rodiriecus L. v. Waukegan School District*, 90 F.3d 249, 254 (7th Cir. 1996); *M.C. v. Central Regional School District*, 81 F.3d 389, 396-97 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 176 (1996); *Murphy v. Timberlane Regional School District*, 22 F.3d 1186, 1194 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 484 (1994); *Dreher v. Amphitheater Unified School District*, 22 F.3d 228, 232 (9th Cir. 1994). Moreover, the Board has recognized its applicability in these proceedings. DoDDS Case No. 97-E-001 (December 2, 1997) at p. 8. Of course, whether the standard reasonably can be applied will depend on the particular facts of each case.

22. This figure reflects: a reduction of $186.28 for duplicate items or excessive items acknowledged by the parents (Correspondence Volume II, Tab 61); a reduction of an additional $18.90 for an expense listed in the November 18, 1996-April 21, 1997 period which indicates it relates to expenses that were incurred outside that period; and the inclusion of two items (totaling $63.49) that straddle the beginning and end of the November 18, 1996-April 21, 1997 period for which an apportionment or proration is not practical. The Hearing Officer granted the parents reimbursement for a portion of expenses incurred in support of their fundraising (Decision at pp. 33-34). DDESS' appeal does not expressly or by fair implication challenge the reimbursement of those expenses. As discussed elsewhere in this decision, there is no presumption of error below. Accordingly, the Board declines to disturb the Hearing Officer's award of reimbursement for such expenses to the extent they fall within the period of November 18, 1996 through April 21, 1997.

23. This includes medical services and supplies for the Child's allergies, and materials for IEP meetings. The Hearing Officer's 20% reduction of expenses for program materials and supplies is not included in this figure and will be discussed later in this decision.

24. There remain a few items, not amounting to a large dollar figure, that may or may not be reasonable expenses for supplies and materials. Considering the particular facts of this case and taking into account the equitable principle of considering the equities, the relative positions of the parties, and the relative potential hardships (27A Am. Jur. 2d *Equity* Section 102), the Board concludes the most equitable course of action on this matter would be decline to remand the case for further proceedings before the Hearing Officer to address the reasonableness of the remaining items of supplies and materials.