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In re:	)	DATED: September 28, 2004
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Eligible Dependent Attending DoDDS	)	DoDDS Case No. E-03-005
	)	
By his mother, -----	)	
	)	
Petitioner	)	
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**DECISION OF ADMINISTRATIVE JUDGE  
WILFORD H. ROSS**

APPEARANCES

FOR THE PETITIONER

*Pro se*  
and  
-----, Personal Representative

FOR THE RESPONDENT DEPARTMENT OF DEFENSE  
DEPENDENT SCHOOLS PACIFIC

Kathryn MacKinnon, Esq.  
Department Counsel, DOHA

Jonathan A. Beyer, Esq.  
Assistant General Counsel, DODEA

STATEMENT OF THE CASE

On December 19, 2003, the Petitioner filed a "Request for Due Process Hearing" pursuant to Department of Defense Instruction 1342.12, dated May 28, 2003, "Provision of Early Intervention

and Special Education Services to Eligible DoD Dependents,” (“Instruction<sup>1</sup>) concerning the identification, evaluation and assessment of her son, identified hereafter as “the Child.”<sup>2</sup> Specifically, the Petitioner contested the validity of the educational evaluation conducted on the Child by DoDDS in Japan and requested an independent educational evaluation. The Respondent contends the evaluation conducted in Japan is sufficient, and they are prepared to develop an Individualized Education Plan (IEP) for the Child based on that evaluation.

Under subparagraphs E9.3.1, E9.3.3 and E9.4.7, Enclosure 9 to the Instruction, on January 12, 2004, I was appointed the Hearing Officer.

The Respondents filed “Respondent’s Counterclaim In Accordance with DODI 1342.12 (May 28, 2003), E8.2.8.1.1,” on January 16, 2004. Paragraph E8.2.8.1.1 of the instruction states DoDDS may, “Initiate a hearing and successfully challenge the [parent’s request for an independent educational] evaluation in an impartial due process hearing to show that its evaluation is appropriate.” Under my authority, and with the consent of the parties, on February 6, 2004, I ordered the Counterclaim converted into a Counter-Petition for Due Process. This Decision shall adjudicate the Counter-Petition as well.

DoDDS subsequently filed “Respondent’s Answer to Petition for Due Process” on January 23, 2004. The Petitioner submitted an “Amended Petition for Due Process” on February 9, 2004. DoDDS filed its “Respondent’s Answer to Petitioner’s Amended Request for Due Process and Motion to Strike Portions of the Amended Petition” on February 17, 2004.

Pursuant to Orders of the Hearing Officer, and under subparagraph E9.5, Enclosure 9 of the Instruction, discovery was conducted by both parties between February 18, 2004, and April 30, 2004. The parties expressly waived the 50 business day time limit for the decision effective April 15, 2004.

The parties filed various motions and other pleadings during the pendency of this case. The Hearing Officer issued seven Pre-Hearing Orders on various topics after telephonic conference calls. To the extent the pleadings and/or Orders are germane to the Decision, they will be discussed in the body of the Decision, below.

A hearing was held on May 19, 24, 25, 26, 27 and 28, 2004. During the hearing the Petitioner introduced 167 exhibits, of which 147 were admitted into evidence. The Respondent introduced 139 exhibits, of which 126 were admitted into evidence.<sup>3</sup> Sixteen witnesses, including

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<sup>1</sup>The Instruction was reissued on December 16, 2003. The applicable provisions of the Instruction did not change between the two iterations and for ease of discussion the May 28, 2003, issuance is the one that will be referred to herein.

<sup>2</sup>The Petitioner filed her original request on December 17, 2003. However, December 19, 2003, is the date which the Defense Office of Hearings and Appeals views as the date when a petition was filed in this case.

<sup>3</sup>All proposed exhibits were identified and numbered, even if not admitted. Accordingly, there are gaps in the exhibits. For example, there are no Petitioner Exhibits numbered 2, 3, or 5 in the record.

the Petitioner and the Child, testified. The last part of the 1,573 page transcript was received on July 12, 2004.

### **ISSUES AND PURPOSE OF THE HEARING**

A due process hearing in this matter was requested by the Petitioner on behalf of the Child contending that the Child has been denied a free appropriate public education (“FAPE”), consistent with the requirements of the Individuals With Disabilities Education Act (the “IDEA”), its implementing regulations (20 U.S.C. §1400 *et seq.* and 34 C.F.R. §300 *et seq.*) and the Instruction. During several pre-hearing conferences, the parties narrowed the specific issues to be determined at the hearing. They are set out in Pre-Hearing Orders dated February 26 and March 8, 2004. The questions presented, and/or issues to be decided, are the following:

1. Whether the Respondents failed to properly acknowledge German as the “native language” of the Petitioner Child. Specifically, whether the CSC (Case Study Committee) failed to properly assess the Petitioner Child’s German and English language skills.
2. Whether the Respondents and their evaluators acted with deliberate intent to ensure that all evaluations of the Petitioner Child resulted in placement in the Elementary School’s only available school-based program, even before assessment and evaluations fully determined all of the Petitioner Child’s educational and related service needs.
3. Whether the evaluator Dr. K was not qualified to conduct the evaluations she was assigned; whether Dr. K administered inappropriate testing; whether Dr. K did testing in English without the permission of the Petitioner Parent; and whether Dr. K improperly administered other testing and assessment, as well as interviews, in her evaluation of the Petitioner Child.
4. Whether the proposed evaluator Mr. W was not qualified culturally to conduct the evaluation of the Petitioner Child that he was assigned to do.
5. Whether the Bilingual Verbal Assessment Test (BVAT), in and of itself, is a sufficient instrument to determine whether the Petitioner Child has a learning disability as opposed to an English as a Second Language (ESL) issue.
6. Whether there was sufficient evidence presented to the Respondents’ staff in Japan to require them to evaluate, or refer the Petitioner Child for evaluation, for suspected dyslexia.
7. Whether there was sufficient evidence presented to the Respondents’ staff in Japan to require them to evaluate, or refer the Petitioner Child for evaluation, for suspected Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder (ADD/ADHD).
8. Whether the Eligibility Report issued by the Case Study Committee (CSC) in this case was defective and, as a result, denied the Petitioner Child a FAPE.

9. Whether the CSC Eligibility Determination meeting failed to include a regular education teacher for the Petitioner Child, and whether the absence of this person under these circumstances contributed to a denial, or amounted to a denial, of FAPE.

10. Whether the Petitioner Parent was denied an opportunity for meaningful participation in the process of evaluating the Petitioner Child for special education services at the Elementary School.

11. Whether the CSC made recommendations that were educationally improper or in violation of the IDEA because of the Petitioner Parent's inability to fulfill the recommendations based on geography, her duty position and military obligations.

12. Whether the evaluations were insufficient to show that the Petitioner Child needed to be taught in one language (English) over all settings.

13. Whether DoDDS violated the confidentiality of the Petitioner Child's educational records by releasing them to the German School in Japan (GSJ) primary school without the Petitioner Parent's permission. Particularly, whether this alleged conduct contributed to a denial, or amounted to a denial, of FAPE.

14. Whether the evaluation by DoDDS-Japan of the Petitioner Child, as a whole, was comprehensive, appropriate, and was conducted in accordance with the IDEA and the DoD Instruction.

### **LEGAL AND REGULATORY CONSIDERATIONS**

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

The provisions of the Education for All Handicapped Children Act of 1975 [Pub. L. 95-142, Nov. 29, 1975] shall apply with respect to all schools operated by the Department of Defense under this Act.<sup>4</sup>

The Education for the Handicapped Act, 20 USC 1400 *et seq.*, which encompassed the Education for All Handicapped Children Act of 1975, has since been retitled as the Individuals with Disabilities Education Act.<sup>5</sup> In 1991 §1409(c) of the Defense Dependents' Education Act of 1978, 20 USC §927(c), quoted *supra*, was amended to read:

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<sup>4</sup> § 1409(c), Pub. L. 95-561, Nov. 1, 1978, 92 Stat 2369; 20 USC §927(c).

<sup>5</sup> Amendment by §901(a), Pub. L. 101-476, Oct. 30, 1990, 104 Stat. 1141; *see also* §25(b), Pub. L. 102-119, Oct. 7, 1991, 105 Stat. 607.

[T]he provisions of part B of the Individuals with Disabilities Education Act [20 USC §1411 *et seq.*], other than the funding and reporting provisions, shall apply to all schools operated by the Department of Defense under this title. . . .<sup>6</sup>

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

Children with disabilities eligible to receive educational instruction from DoDDS are entitled to receive a free appropriate public education.<sup>7</sup> The term “free appropriate public education,” is defined by the IDEA to include certain “special education” and “related services.”<sup>8</sup> The term “special education” is defined also by the IDEA to mean specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability.

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

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

In implementation of the requirement to apply part B of the IDEA to DoDDS in the amended §1409(c) of the Defense Dependents’ Education Act of 1978, 20 USC §927(c), quoted *supra*, the Department of Defense has issued regulations set forth in the Instruction.

The provisions of the DoD Instruction most pertinent to this case are set forth as follows:

## ENCLOSURE 2

### DEFINITIONS

E2.1.7. Attention deficit disorder (ADD). As used in this Instruction, encompasses attention-deficit hyperactivity disorder (ADHD) and ADD without hyperactivity. The essential

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<sup>6</sup> Amendment by §24, Pub. L. 102-119, Oct. 7, 1991, 105 Stat. 605.

<sup>7</sup> 20 USC §1412(a)(1), §1415(a); § 80.4 of Part 80.

<sup>8</sup> 20 USC §1401(a)(18).

features of this disorder are developmentally inappropriate degrees of inattention, impulsiveness, and in some instances, hyperactivity.

E2.1.7.1. Either diagnosis must be made by appropriate medical personnel.

E2.1.7.2. ADD and ADHD are not specific disabling conditions under this Instruction, although a child with either may be eligible as “other health impaired” by reason of the disability if the child’s alertness or vitality is sufficiently compromised. *The majority of children with ADD/ADHD generally do not meet the eligibility criteria as outlined in this Instruction.* (Emphasis supplied.)

E2.1.10. Case Study Committee (CSC). A school-level team comprised of, among others, an administrator or designee who is qualified to supervise or provide for special education, one or more of the child’s regular education teachers, one or more special education teachers, parents, and related service providers (if appropriate) who do the following:

E2.1.10.1. Oversee screening and referral of children who may require special education.

E2.1.10.2. Oversee the multi-disciplinary evaluation of such children.

E2.1.10.3. Determine the eligibility of the child for special education and related services.

E2.1.10.4. Formulate individualized instruction as reflected in an IEP, in accordance with the Instruction.

E2.1.10.5. Monitor the development, review, and revision of IEPs.

E2.1.12. Children with Disabilities (Ages 3 through 21, Inclusive). Children, before graduation from high school or completion of the General Education Degree, who have one or more impairments, as determined by a CSC and who need and qualify for special education and related services.

E2.1.24. Educational and Developmental Intervention Services (EDIS). Programs operated by the Military Medical Departments to provide [Early Intervention Services] and related services in accordance with this Instruction.

E2.1.27. Evaluation. The synthesis of assessment information by the multi-disciplinary team used to determine whether a particular child has a disability, the type and extent of the disability, and the child’s eligibility to receive early intervention or special education and/or related services.

E2.1.29 Free Appropriate Public Education. Special education and related services that:

E.2.1.29.1. Are provided at no cost to parents of a child with, and under the general supervision and direction of the DoDDS or DDESS, including children with disabilities who have been suspended or expelled from school.

E.2.1.29.2. Are provided in the least restrictive environment at a preschool, elementary or secondary school.

E.2.1.29.3. Are provided in conformity with an IEP.

E.2.1.29.4. Meet the requirements of this Instruction.

E2.1.36. Independent Evaluation. An evaluation conducted by a qualified examiner who is not employed by either the DoD school or EDIS that conducted the initial evaluation.

E2.1.37. Individualized Education Program (IEP). A written document defining specifically designed instruction for a student with a disability, ages 3 through 21, inclusive. That document is developed and implemented in accordance with enclosure 4 of this Instruction.

E2.1.45. Native Language. When used with reference to an individual of limited English proficiency, the home language normally used by such individuals, or in the case of a child, the language normally used by the parents of the child.

E2.1.71. Special Education. Specially designed instruction, including physical education, which is provided at no cost to the parent or guardians to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.

E2.1.73. Specific Learning Impairment. A disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language that may manifest itself as an imperfect ability to listen, think, speak, read, write, spell, remember, or do mathematical calculations. That term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term, commonly called, "specific learning disability," does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; mental retardation; emotional disturbance; or environmental, cultural or economic differences.<sup>9</sup>

#### ENCLOSURE 4

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<sup>9</sup>See also page 5-18, Department of Defense Education Activity, "Special Education Procedural Manual, DSM 2500.13-M Revised," September 2003. (Respondent's Exhibit 4.)

PROCEDURES FOR THE PROVISION OF EDUCATIONAL PROGRAMS AND SERVICES  
FOR CHILDREN WITH DISABILITIES AGES 3 THROUGH 21, INCLUSIVE

E4.2. ASSESSMENT AND EVALUATION

E4.2.1. Every child eligible to attend a DoD school who is referred to a CSC shall receive a full and comprehensive diagnostic evaluation of educational needs. An evaluation shall be conducted before an IEP is developed or placement is made in a special education program.

E4.2.2. Procedures for Assessment and Evaluation. A CSC shall ensure that the following elements are included in a comprehensive assessment and evaluation of a child:

E4.2.2.1. Assessment of visual and auditory acuity.

E4.2.2.2. A plan to assess the type and extent of the disability. A child shall be assessed in all areas related to the suspected disability. When necessary, the assessment plan shall include the following:

E4.2.2.2.1. Assessment of the level of functioning academically, intellectually, emotionally, socially, and in the family.

E4.2.2.2.2. Observation in an educational environment.

E4.2.2.2.3. Assessment of physical status including perceptual and motor abilities.

E4.2.2.2.4. Assessment of the need for transition services for students 14 years and older, the acquisition of daily living skills, and functional vocational assessment.

E4.2.2.3. The involvement of parents.

E4.2.3. The CSC shall use all locally available community, medical, and school resources to accomplish the assessment. At least one specialist with knowledge in the area of the suspected disability shall be a member of the multidisciplinary assessment team.

E4.2.4. Each assessor shall prepare an individual assessment report that includes:

E4.2.4.1. Demographic information about the student and the assessor.

E4.2.4.2. The problem areas constituting the bases for a referral.

E4.2.4.3. A behavioral observation of the child during testing.

E4.2.4.4. The instruments and techniques used for the assessment.

E4.2.4.5. A description of the child's strengths and limitations.

E4.2.4.6. The results of the assessment; and

E4.2.4.7. The instructional implications of the findings for educational functioning.



E4.2.5. Standards for Assessment Selection and Procedures. All DoD elements, including the CSC and related services providers, shall ensure that assessment materials and evaluation procedures are in compliance with the following criteria:

E4.2.5.1. Selected and administered so as not to be racially or culturally discriminatory.

E4.2.5.2. Administered in the native language or mode of communication of the child, unless it clearly is not possible to do so.

E4.2.5.3. *Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.* (Emphasis supplied.)<sup>10</sup>

E4.2.5.4. Validated for the specific purpose for which they are used or intended to be used.

E4.2.5.5. Administered by trained personnel in compliance with the instructions of the testing instrument.

E4.2.5.6. Administered such that no single procedure is the sole criterion for determining eligibility or an appropriate educational program for a child with a disability.

E4.2.5.7. Selected to assess specific areas of educational needs and strengths and not merely to provide a single general intelligence quotient.

E4.2.5.8. Administered to a child with impaired sensory, motor, or communication skills so that the results reflect accurately a child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure.)

E4.2.6. Review of Existing Evaluation Data. As part of an initial evaluation (if appropriate) and as part of any reevaluation, the CSC shall review existing evaluation data on the child, including:

E4.2.6.1. Evaluations and information provided by the parents of the child;

E4.2.6.2. Current classroom-based assessments and observations;

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<sup>10</sup>See also Chapter 14, "Special Education/ESL Considerations," Department of Defense Education Activity, "Special Education Procedural Manual, DSM 2500.13-M Revised," September 2003. (Respondent's Exhibit 4.)

E4.2.6.3. Observations by teachers and related services providers; and

E4.2.6.4. On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine:

E4.2.6.4.1. Whether the child has a particular category of disability, or in the case of a reevaluation of a child, whether the child continues to have such a disability.

E4.2.6.4.2. The present levels of performance and educational needs of the child.

E4.2.6.4.3. Whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

E4.2.6.4.4. Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

E4.2.6.5. The CSC may conduct its review without a meeting.

E4.2.6.6. The CSC shall administer tests and other evaluation materials as may be needed to produce the data identified under paragraph E4.2.2.

### E4.3. ELIGIBILITY

E4.3.1. The CSC shall:

E4.3.1.1. Ensure that the full comprehensive evaluation of a child is accomplished by a multidisciplinary team. The team shall be comprised of teachers or other specialists with knowledge in the area of the suspected disability.

E4.3.1.2. Convene a meeting to determine the eligibility of a child for special education and related services.

E4.3.1.3. Meet as soon as possible after a child has been assessed to determine the eligibility of the child for services.

E4.3.1.4. Afford the child's parents the opportunity to participate in the CSC eligibility meeting.

E4.3.1.5. Issue a written eligibility report that contains the following:

E4.3.1.5.1. Identification of the child's disabling condition.

E4.3.1.5.2. A synthesis of the formal and informal findings of the multidisciplinary assessment team.

E4.3.1.5.3. A summary of information from the parents, the child, or other persons having significant contact with the child.

E4.3.1.5.4. A determination of eligibility statement.

E4.3.1.5.5. A list of the educational areas affected by the child's disability, a description of the child's educational needs, and a statement of the child's present level of performance.

E4.4.4. Consideration of Special Factors. The CSC shall consider:

E4.4.4.2. Language needs of the limited English proficient child.

## ENCLOSURE 5

### PROCEDURES FOR THE PROVISION OF RELATED SERVICES BY THE MILITARY MEDICAL DEPARTMENTS TO DoDDS STUDENTS ON IEPs

#### E5.1. EVALUATION PROCEDURES

E5.1.1. Upon request by a DoDDS CSC, the responsible EDIS shall ensure that a qualified medical authority conducts or verifies a medical evaluation for use by the CSC in determining the medically related disability that results in a child's need for special education and related services, and oversees an EDIS evaluation used in determining a child's need for related services.

E5.1.1.1. This medical or related services evaluation, including necessary consultation with other medical personnel, shall be supervised by a physician or other qualified healthcare provider.

E5.1.1.2. This medical evaluation shall include a review of general health history, current health assessment, systems evaluation to include growth and developmental assessment, and, if pertinent, detailed evaluation of gross motor and fine motor adaptive skills, psychological status, and visual and audiological capabilities, including details of present level of performance in each of these areas affecting the student's performance in school.

E5.1.1.3. The EDIS-related services evaluation shall be specific to the areas addressed in the referral by the CSC.

E5.1.2. EDIS shall provide a summary evaluation report to the CSC that responds to the questions posed in the original referral. The written report shall include:

E5.1.2.1. Demographic information about the child.

E5.1.2.2. Behavioral observation of the child during testing.

E5.1.2.3. Instruments and techniques used.

E5.1.2.4. Evaluation results.

E5.1.2.5. Descriptions of the child's strengths and limitations.

E5.1.2.6. Instructional implications of the findings; and

E5.1.2.7. The impact of the child's medical condition(s), if applicable, on his or her educational performance.

E5.1.3. If EDIS determines that in order to respond to the CSC referral the scope of its assessment and evaluation must be expanded beyond the areas specified in the initial parental permission, EDIS must:

E5.1.3.1. Obtain parental permission for the additional activities.

E5.1.3.2. Complete their initial evaluation by the original due date; and

E5.1.3.3. Notify the CSC of the additional evaluation activities.

E5.1.4. When additional evaluation information is submitted by EDIS, the CSC shall review all data and determine the need for program changes and/or the reconsideration of eligibility.

E5.1.5. An EDIS provider shall serve on the CSC when eligibility, placement, or requirements for related services that EDIS provides are to be determined.

E5.1.6. Related services provided by EDIS, pursuant to an IEP, are educational and not medical services.

## ENCLOSURE 8

### PARENT AND STUDENT RIGHTS

#### E8.1. PARENTAL CONSENT

E8.1.1. The consent of a parent of a child with a disability or suspected of having a disability shall be obtained before any of the following:

E8.1.1.1 Initiation of formal evaluation procedures or re-evaluation.

E8.1.1.2. Provision of EIS [Early Intervention Services or initial educational placement.

E8.1.1.3. Change in EIS or educational placement.

## FINDINGS OF FACT

The Child was born in the United States in August 1996. He lived in the United States, and learned English as his first language, until March 1999.<sup>11</sup> That was the month his mother, the Petitioner, a Command Master Sergeant in the United States Air Force, was transferred to Germany.

The Petitioner's duty responsibilities in Germany required that she be available for short notice, long term, TDY tours. Accordingly, as a single parent, child care was a necessity. Several months after arriving in Germany, the Petitioner became concerned about the Child's well-being at the base Child Development Center. She began searching for another long-term child care provider for the Child. She finally found a German House Mother (Tagesmutter) in the town where the Petitioner lived. The Child began permanent child care with the Tagesmutter in December 1999 and stayed in that arrangement until the Petitioner and the Child left for Japan in August 2003.

At the same time that he began care with the Tagesmutter, the Child began German kindergarten. In fact, the Child never attended a DoDDS school in Germany, and remained in German schools until moving to Japan. Therefore, the Child was receiving child care and schooling exclusively in the German language. In addition, the Petitioner began speaking predominately German to the Child at home, since it is her intent to return to Germany once she retires from the Air Force. In her April 9, 2004, "Petition" at page 25, she states:

For almost 5 years, [the Child's] entire social and academic life structure was cemented within and around the German community in which he lived. Due to the Petitioner's frequency of temporary duty and unpredictable work schedules, 90 percent of his time in Germany was spent with the [Tagesmutter's] family. He attended a German speaking before and after school program, which entailed one hour before and one and a half hour after school care. He participated in the local German speaking sports program, swimming, soccer and skiing for [his home town]. All his playmates were local German children; he also took piano lessons with a local German music school. [The Child] will state that he is half German and his grandparents are [the Tagesmutter's] parents.

The Petitioner indicates that she, and her son's German teachers, had concerns about his language development. The Petitioner began working with the local DoDDS school district (Bavaria District) in 2002. (Respondent's Exhibits 5 and 6.) She indicated on the Bavaria District Special Needs Program Form on April 16, 2002, Respondent's Exhibit 7, "To the best of my knowledge, my child does not need any special program outside the regular classroom."

In the Spring of 2003, concerned over what she viewed as continuing language problems by the Child, the Petitioner began the pre-referral process with the Bavaria District. (Petitioner's Exhibits 1, 4, 6, 7, 8, 9 and 10; Respondent's Exhibit 10.)<sup>12</sup> As part of the pre-referral process an

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<sup>11</sup>The Petitioner indicated that the Child suffered from recurrent ear infections during this time. There is little or no evidence in the record quantifying the impact, if any, of the infections on the Child's ability to learn languages.

<sup>12</sup>Many of the exhibits were admitted by both the Petitioner and the Respondent. For example, Petitioner's Exhibit 6 is also Respondent's Exhibit 13. For ease of discussion, such dual exhibits will be referred to using only the Petitioner's exhibit number.

English as a Second Language (ESL) evaluation was made of the Child on May 9, 2003. That evaluation concluded that the Child was a Limited English Speaker. (Respondent's Exhibit 12.) At this time the Child had never attended a DoDDS school.

A CSC meeting was held by the Bavaria District on May 29, 2003, to accept the pre-referral. (Petitioner's Exhibit 11.) The Petitioner attended the meeting. The meeting minutes also indicate:

Developmental concerns began in German Kindergarten. Writes letters and numbers backward. First grade teacher reports distractability, fluctuating levels of maturity. Parent started a tutor working with [the Child] Summer [through October or November 2002]. First grade teacher discouraged use of tutor, so discontinued tutor – 1 day/wk, 1 hour. Parent working with child - inability to sit still, wants to play.

. . . .

ESL evaluation – Level 3 – Limited English Speaker; evaluator interprets problem with learning dual language; he has difficulty with pronunciation reading German. If there is a shift to English, there is possibility for regression in learning basic skills. Team predicts that if [the Child] transitions to learning English reading prior to reading in his primary language (German) he will experience difficulty with reading acquisition in English. . . . CSC hypothesizes that primary language is German.

. . . .

Parent's plans tentatively to enroll [the Child] in German school in [Japan]. Other international schools are nearby but instruction is in English. Parent feels English basic skills are not strong enough for grade 2. Parent concerned about continuation learning problems with coming school year, difficulties with reading curriculum, even if [in] German language. Concern with attending DoDDS school, he would need first grade placement.

CSC recommends if he were to attend the DoDDS school, he continue grade placement; 2<sup>nd</sup> grade, with referral to ESL services, participate in ESL program as deemed appropriate with appropriate supports provided in the classroom.

Realistic focus - part of difficulties are language-based. Difficult presently to "tease out" problems that are learning based regardless of language and those problems that ESL-based. At this point it is difficult to determine a learning disability. We need to start with most obvious problem, language confusion, then address attention, focus difficulties. Developmental span is also important factor. Maturity may decrease problem.

. . . .

CSC recommends referral to Special Education for eligibility determination to remain open. Upon arrival in Japan, meet with special education personnel, review the referral packet to date, determine next steps, either continue pre-referral

process with appropriate interventions and documentation or prepare assessment plan. Also CSC recommends staying linked with school personnel where he is enrolled to monitor and assess language growth and proficiency. (*Ibid.* at 1-2.)

A month later, in June 2003, the Petitioner began a series of email communications with several DoDDS people in the Pacific Region and Japan District who she thought could help her. (Petitioner's Exhibits 12, 13, 14 and 15.) The basic tenor of her communication was that because of her son's language difficulties, the Child should be taught at the German School in Japan (GSJ) and DoDDS should pay for it. In her communication, the Petitioner mistakenly refers to the CSC minutes as an assessment. In fact, at this point in time the Child had *not yet* been found eligible for Special Education. The referral of the Child was not accepted by the Bavaria District. The only evidence of any learning disability at this time was the Petitioner stating that his German speaking teacher, and the Petitioner, thought he might have a learning disability.

At this point the Petitioner began pushing for an evaluation of her son by someone in DoDDS, in the German language, while she and the Child were still in Germany. (Petitioner's Exhibits 21, 22, 23 and 24.) On August 1, 2003, she was informed by the Bavaria District Special Education Office of what a full assessment would have included if there had been the time to prepare one.

[The] plan would have been to obtain a cognitive assessment, obtain a full comprehensive developmental history, and observe him in various literacy activities to ascertain some preliminary ideas about how he approaches reading and other early literacy tasks. Obtaining additional diagnostic information about his specific reading skills is a more lengthy process and would have to be done by the gaining DoDDS school in Japan. There appears to be evidence that he is in need of English as a Second Language intervention and you are aware of that, because he had an ESL assessment . . . As you know they identified that [the Child] had limited English proficiency (Level III) in early May. For now, however, you have expressed that you are more concerned about his reading skills. Language and literacy are very intimately linked and it would be difficult to assess reading without also assessing his language. (Petitioner's Exhibit 23 at 2.)

Eventually, a DoDDS German language immersion teacher (Mr. Z) conducted an assessment/observation of the Child. The limitations of his activities are set forth in Petitioner's Exhibit 25. Mr. Z's report, dated August 8, 2003, is Petitioner's Exhibit 26b. The teacher first began the session by having a conversation with the Child. After a few minutes Mr. Z reached the conclusion that:

His [the Child's] grammar, vocabulary, and pronunciation clearly mirrored those of any typical German six year-old. It is my opinion that [the Child's] oral abilities in German appear to be age appropriate.

I conversed with [the Child] in English briefly; it became obvious soon that he prefers to communicate in German, although he could certainly hold his own in English. . . . [The Child's] vocabulary in English is limited and I don't consider it to be age-appropriate. Several terms were unfamiliar to him and his expressive

language was very hesitant and insecure. If he were in my first grade class, I would definitely consider referring him for a speech/language evaluation or, given his background, for an ESL evaluation. (*Ibid* at 1.)

Mr. Z then had the Child attempt to read age appropriate books in German and in English. The German text he read only with great difficulty and with many mistakes. The English language text he could not read at all. Mr. Z states, “It appears that [the Child] is a total non-reader in English!” (*Ibid.* at 2.)

The teacher finally states in his report:

[The Child] is currently growing up between two languages, of which his German skills are definitely stronger than his English skills. In neither language, least of all in English, can he understand written communication, or engage in such himself, as would be appropriate for a child of his age and present grade level placement. His mom feels that placing [the Child] in the German school once they arrive in Japan would at least lessen the confusion that would surely arise if he were to start in an American school. She realizes that [the Child] needs support and attention from qualified staff and is worried that he may have a learning disability. She feels, however, that [the Child] might do better in a German school, since his skills are further developed in that language as opposed to English. . . . In any case, this little boy is currently not learning any reading or writing skills in English, and his oral language development is lagging behind. (*Ibid.*)

The Petitioner remained deeply concerned about the plans to evaluate her son and communicated her concerns to the Japan District and Pacific Region of DoDDS. (Petitioner’s Exhibits 27 and 28.) On August 19, 2004, the Petitioner sent a letter to the Japan District Special Education Coordinator (Coordinator) entitled “Unilateral Placement Intent Notification.” (Petitioner’s Exhibit 29.) This letter goes on to state:

At the present time, I am dissatisfied with the district school evaluation proposal plan in which to begin identification for eligibility for Special Education services.

The attempt to obtain a full and accurate assessment of my son’s educational needs began 2001/2002 school year and to date has never been properly completed. This jeopardized my son’s right to a free appropriate public education (FAPE) for the 2001/2002 and 2002/2003 school year as outlined in DoD Instruction 1342.12. I will not allow this trend to continue. DoDDS failed to provide an assessment in my son’s native language-German 2001/2002 and 2002/2003 school years. DoDDS failed to provide resources and obtain the expertise to evaluate my son for the suspected learning disability – dyslexia despite repeated requests.

Despite notification to DoDDS-P of my son’s educational concerns, I have been advised that the evaluation process could take some time in trying to locate the appropriate resources to conduct a full and accurate assessment. This timeline started two years ago and is not acceptable. It was also stated to me that DoDDS-P



is not currently equipped to diagnose or treat a child with suspected learning disability such as dyslexia.

The [GSJ] has agreed to place and provide my son an appropriate education in the 2<sup>nd</sup> class teacher. They will also supplement his learning skills with instruction in the English language.<sup>13</sup>

At that time the Child was not enrolled at the Elementary School (the first day the Child was on the roll of the Elementary School was August 25, 2003<sup>14</sup>), and no CSC meeting had been held at the Elementary School. In addition the referral from the Bavaria District had not yet been accepted, and no assessment plan had yet been proposed for the Child.

The Coordinator responded to her concerns in a letter dated August 20, 2003. In his letter the Coordinator assured the Petitioner that any evaluation would be completed within 45 school days, as specified in the Department of Defense Education Activity (DoDEA) *Special Education Procedural Manual*, DSM 2500.13-M Revised (September 2003), page 3-14 (Respondent's Exhibit 4). He further stated:

There does seem to be a question of what your son's native language is, German or English? I trust that you speak English with him at home, but understand that he did attend German kindergarten and first grade. Part of the CSC process will be to identify how "English as a second language" is impacting your son's educational progress; or whether there is a possible learning disability such as language, or reading (often referred to as "dyslexia" in some US school districts). DoDDS schools do not use the term "dyslexia" per se, but refer to a deficit in reading as a Learning Disability - Reading. DoDDS Japan can certainly evaluate for a possible learning disability in the area of reading, among other areas.

DoDDS Schools here at [the Air Base] are fully capable of evaluating and when eligible, servicing students eligible for special education with a learning disability, as well as other disability areas. DoD Instruction 1342.12, when referencing nonDoDDS placement, refers to locations overseas where there is not a DoDDS school located to address the needs of students with disabilities. For example, a student who is eligible for services in DoDDS (overseas), but requires residential placement in the continental US for emotional issues that are impacting upon educational performance would qualify for a nonDoDDS placement. A student, who is not a native speaker of English and also has a learning disability, would be considered an individual with "English as a second language along with a learning disability." This scenario does not qualify for a nonDoDDS placement since our DoDDS schools are appropriately staffed to address the needs of such students.

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<sup>13</sup>See also Transcript at 122-127.

<sup>14</sup>See Petitioner's Exhibit 93.

DoDDS schools are instructed in the English Language. DoDDS schools overseas do on occasion offer educational programs in other languages, i.e. German Immersion in Germany. However, [Air Base] schools do not offer German Immersion. In Fact, [Air Base] HS does not offer a German course, but Spanish and French. Instruction 1342.12 does not dictate that educational programs be instructed in the child's native language. Since we are part of the US Dept. Of Defense, as you well know, it is "assumed" that English is the primary language of educational instruction. (Petitioner's Exhibit 30.)

After the Child and Petitioner arrived in Japan, a CSC meeting was held on August 22, 2003 at the Elementary School. The Coordinator was in attendance, as well as the Elementary School Principal (the Principal) and others. The minutes indicate:

The CSC accepts the prereferral initiated in Germany. The CSC will evaluate for a possible learning disability to include communication (language and articulation), both in German and in English. This will be completed by [Mr. W] who is fluent in German and is certified in special education, along with other educators at [the Elementary School]. [The Petitioner] wants to know how the evaluation results will be interpreted and if eligibility will be determined based upon performance in German and/or English.

[The Petitioner] is planning on enrolling [the Child] in the [GSJ] on 1 SEP. She is still requesting a special education evaluation be completed at [the Elementary School].

The CSC encouraged [the Petitioner] to allow [the Child] to attend school at [the Elementary School] for the entire school year.

At this time, [the Child] will attend school only 5 days then attend [the GSJ] at parental expense. The CSC will coordinate assessment with [the Petitioner] within 45 school days - however this will be expedited and completed as soon as possible. (Exhibit 40.)

The Petitioner agreed to the evaluation and signed the various forms necessary for it to take place. (Petitioner's Exhibits 35, 37, 38 and 39.)

The Child began attending the Elementary School on August 25, 2003. His last day of attendance was September 17, 2003. He was present at school a total of 16 days. During this period of time several events were happening almost simultaneously.

First of all, the Child was attending the second grade class at the school. Work samples from that time are found at Petitioner's Exhibits 33, 46 and 62; and Respondent's Exhibit 61. On September 2, 2003, the Petitioner expressed concerns about her son's education to his classroom teacher (Ms. P) in Petitioner's Exhibit 42:

I have reviewed my son's school work and would like to express concern for the level and type of work he is being given. His English skill level for reading and

writing (other than copying what he sees) is zero. He is to be evaluated for a learning disability (particularly in reading). A focus in one language (German) while this takes place is very important in order not to confuse my son or skew the results.

I would prefer [the Child] not take part in or be given any reading or writing assignments in English until a determination is made about a learning disability. Please dismiss my son from the classroom during these periods of instruction. However, his ability to speak and comprehend spoken English is adequate enough to take part in other school activities.

The Petitioner and Ms. P had a discussion on this point the following day. Ms. P submitted a statement about that conversation (Petitioner's Exhibit 43):

I told [the Petitioner] I understood that [the Child's] level of reading and writing was very low and that I would modify any way I can to accommodate him here at [the Elementary School]. She made it clear that her goal was to send him to the German school but wanted to find out if he had any learning difficulties like dyslexia. If he is diagnosed with such learning problems she would not send him to the German school. She also said that he is already confused with German and would like it if he could continue to work on his German until the testing result came in. I told her that I understand the frustration but I can only help him by using the DODDS curriculum materials and will be willing to modify. I informed her that [the Child] is getting along great with others and seems to enjoy coming here.<sup>15</sup>

The Child was withdrawn from the Elementary School by the Petitioner on September 19, 2003. Ms. P prepared a statement on September 30, 1993, concerning the Child's time in her class (Petitioner's Exhibit 62).

[The Child] has been in my class at [the Elementary School] for about 3 weeks. For the short time he was with me, his progress was very slow. I feel that he was capable of a lot more. Unfortunately, there was very little attempts to complete homework, even though I had modified it to fit [the Child's] needs. The 2 times homework came back, it was done in German. [The Petitioner] had insisted from the beginning that [the Child] continue to learn German and that he was going to be transferred soon to the [GSJ]. [The Principal] has sent a letter to her regarding this issue.

During class time, I had to repeatedly tell [the Child] to at least try to do the work given to him. His response was always, "My mom says I can't do this, I can't write or do math if it is going this way (vertically)". He would take out his folder and show me some sheets and say that mom wants me to work on these". He would bring in various German worksheets, sometimes German books to work on. One day during his 2nd week, he was standing at the door. I invited him to come in but he said that his mom told him to stand in the hall when we did any writing activity. It

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<sup>15</sup>See also Petitioner's Exhibit 49.

was not until I told him he could read instead of doing the activity we were doing did he go to his seat.<sup>16</sup>

The Child also received a second English As A Second Language screening on August 29, 2003. (Petitioner's Exhibits 31 and 32.)<sup>17</sup> The result of the examination was that the Child was evaluated as a Non-English Speaker, Reader and Writer making him eligible for ESL services as a Level 2 student. (Petitioner's Exhibit 32 at 1, Respondent's Exhibit 36a.) The scores were much lower than those the Child received in May 2003. (Respondent's Exhibit 12.) The evaluator had the following specific remarks about the Child and the test:

During the oral test, [the Child] said he did not want to continue as he was doing the second part of the test (Item 24). There after, his responses to the five following items were to repeat the same word. This concluded the oral testing, placing him in the Non-English Speaker level.

During the reading test, he made little to no effort to try his best. He generally proceeded to just mark answers.

During the writing test, [the Child] did provide three samples. However, they are unintelligible. (Petitioner's Exhibit 32 at 1.)

The ESL teacher had a conversation with the Petitioner to discuss the results of the evaluation or about September 4, 2003. When informed that the Child during the oral portion of the test had just repeated responses, the Petitioner replied, "Oh, he was just playing with you." The ESL teacher goes on:

[The Petitioner] said that the purpose of enrolling her son in [the Elementary School] was to have him evaluated for a possible learning disability. She was not surprised by the results of the ESL screening and said she totally agreed with them. He has never been taught to read or write in English. His native language is German. She felt that the school is prolonging the evaluation process for a possible learning disability. Her son was getting confused and she felt this confusion may skew the results of any testing that may be conducted. (Respondent's Exhibit 36b.)

During this same period that the Child was at the Elementary School, he received a speech and language evaluation from Mr. Y. The report is Petitioner's Exhibit 44. All the tests for this evaluation were given in English. The pertinent part of the report is as follows:

The Receptive One-Word Picture Vocabulary Test assesses receptive (listening) vocabulary. The student must point to one of four pictures that best represent a given word. The words are presented in isolation, not sentences.

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<sup>16</sup>See also Petitioner's Exhibit 82 at 14; Transcript at 216.

<sup>17</sup>See also DoDEA Manual 2440.2, July 1998, "English as a Second Language Program Manual." Respondent's Exhibit 2a.

Raw Score: 68  
Standard Score: 91  
Percentile Rank: 27

[The Child's] receptive vocabulary skills, as measured by the ROWPVT, appear to be at the low end of the average range when comparing him to the English speaking population of the United States.

The Expressive One-Word Picture Vocabulary Test assesses expressive (speaking) vocabulary. The student is asked to name objects, actions, and concepts pictured in illustrations.

Raw Score: 49  
Standard Score: 76  
Percentile Rank: 5

[The Child's] expressive vocabulary abilities appear to be weaker than his receptive vocabulary skills. his standard score on the EOWPVT was 15 points lower than his standard score on the ROWPVT. On five different occasions during testing with the EOWPVT [the Child] answered with words that may have been German. When cued to name the pictured items in English he was unable to do so. (Petitioner's Exhibit 44 at 4.)

The report noted that the classroom teacher, Ms. P, had filled out a Language Checklist on August 29, 2003. (Petitioner's Exhibit 162.) The speech/language pathologist, Mr. Y, indicated in his report, "Some of the difficulties included - difficulty remembering and following directions, difficulty expressing himself orally, poor vocabulary skills, and poor grammar skills." (Petitioner's Exhibit 44 at 2-3.) Mr. Y concluded, "Additional language assessment in German is recommended." (*Ibid.* at 4.)

The Elementary School guidance counselor, Ms. U, performed an observation of the student in Ms. P's class on September 12, 2003. Her report is Petitioner's Exhibit 45. Her conclusions included, "[The Child] made attempts to complete his work as long as the teacher was there to assist him. He did show understanding of the concepts being discussed, however, it was apparent that he was unable to read the worksheet or choose the correct word without guidance. Once the information was explained to him, he was able to do the assignment. [The Child's] work habits were positive until he was unable to read the next question and he did not ask for assistance [from] his peers." (Petitioner's Exhibit 45 at 2.)

The Elementary School psychologist, Ms. R, was able to evaluate the Child before he was withdrawn from school. Her report is Petitioner's Exhibit 50. Ms. R first of all observed the Child in class, with results that were similar to those of Ms. U, set forth immediately above. Further comments included:

He [the Child] appeared to easily handle the routine of the classroom and simple instructions. He easily conversed with the students and his language was at a level where they easily understood him and he understood what they were talking

about. Teacher comments included that he volunteers to read and seems to want to learn to read. He is reading simple words such as “and” and “in.” He can remember character names, so when they appear in the text, he can read them. He is attempting to sound out words. He wrote sentences in German and copies sentences in English. He did a sequencing activity well. (Petitioner’s Exhibit 50 at 2.)

When Ms. R was testing the Child she found that, “He conversed easily in English and responded with understanding to both verbal and visual instruction.” (*Ibid.* at 3.) She also found, as did the ESL evaluator, that the Child could be a difficult test taker. “He was generally cooperative, but at times was distracted by objects or his own thoughts and at times became resistant to the testing requirements. . . . [The Child] would readily attack items, but as soon as they became difficult he would give up. . . . At times he was resistant to testing and would start to give ‘creative’ answers and try to change the parameters of the task before him.” (*Ibid.*)

Ms. R gave the Child four assessment instruments: the Test of Nonverbal Intelligence-2 (TONI-2),<sup>18</sup> the Woodcock-Johnson - 3 Tests of Cognitive Abilities (WJ-III),<sup>19</sup> the Developmental Test of Visual-Motor Integration,<sup>20</sup> and the Wide Range Achievement Test-3 (WRAT-3).<sup>21</sup> The results of these instruments are found on pages 3 through 5 of Petitioner’s Exhibit 50. All of these tests were given in English.

In giving the Child the WJ-III, Ms. R states, “Due to [the Child’s] bilingual background, emphasis in choosing subtests was based on visual and auditory skills, and not on language processing.” (*Ibid.* at 4.) The specific results of this testing are also found on page 4 of Exhibit 50.

Ms. R’s summary of the testing is as follows:

[The Child] is a 7-year-old student with a bilingual background. He has attended a German school and has begun his reading and math instruction in German. This assessment indicates [the Child] has nonverbal reasoning skills within the average range for his age. Processing testing indicated average skills as compared to others his age. This processing testing measured visual reasoning, spatial reasoning, problem solving, cognitive efficiency, short-term auditory memory, retrieval of information, working memory, and phonemic awareness. All scores were within the average range, except for short-term auditory memory. This score was in the low average range. This was measured using both numbers and words, and required [the Child] to reverse the items when repeating them back. This score was a weakness for [the Child], but the scores were not low enough to be

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<sup>18</sup>See Respondent’s Exhibit 115

<sup>19</sup>See Respondent’s Exhibits 116, 117, 118, 119, 120, 121 and 122.

<sup>20</sup>See Respondent’s Exhibit 123.

<sup>21</sup>See Respondent’s Exhibits 124, 125 and 126.

considered a processing deficit. Also the fact that [the Child's] English vocabulary is weaker than those, whom the tests were normed on, may have had a contributing factor to the score. Short-term auditory memory is a skill needed for acquisition of language, and listening and comprehending within the classroom.

It was noted that [the Child] reversed the letter "s" when in smaller case, but not the capital S. He also stated at one time that is a "b" not a "d." which indicates he is aware of his reversals and is attempting to learn the difference. Reversals in writing letters is developmentally common in children up to age 8 and do not directly correlate to reading deficits. Many adults continue to reverse numbers and letters, but this does not affect their ability to read and comprehend written material. It is more a problem in writing and transcribing.

Achievement screening was done in English as an indication of what skills [the Child] does possess in reading and math as a help to the staff working with [the Child] in an English speaking classroom. Since he has not had formal instruction in English these scores can not be used in determining the presence of learning disability.

In summary this part of the assessment did not identify any specific processing weakness in [the Child's] cognitive abilities that would be needed for identification of learning disability according to DODDS criteria. Weakness in speaking English, short-term auditory memory, distractibility, and confidence in his abilities were noted. As noted by the previous CSC team in Germany these may be related to acquisition of dual languages and maturity. According to enrollment ages in American schools, [the Child] is considered to be a young 2<sup>nd</sup> grade student having an August birthday and age as well as general cognitive ability is a contributing factor to learning to read. [The Petitioner] indicated the pediatrician suggested the growth delay might have an effect on general development thus the age [the Child] is ready to learn to read. It is unclear as to what the pediatrician meant as reported by [the Petitioner], but there is no documentation available to suggest he meant that a processing deficit would result from the growth delay. It is assumed that growth and maturity delays will be overcome in time, whereas processing deficits are usually inherent to the functioning of the brain and are more stable over time. In identifying learning disabilities, it is the processing deficits that we are trying to identify. It is required by law that cultural, environmental and bilingual issues be ruled out as the primary factor contributing to the learning difficulties. (Petitioner's Exhibit 50 at 5-6.)

When the Petitioner withdrew the Child from the Elementary School on September 19, 2003, the evaluation of the Child in German by Mr. W was scheduled for the same day. (Petitioner's Exhibits 48 and 49.) The ESL teacher had also been in contact with the Petitioner about starting ESL classes for the Child. (Petitioner's Exhibit 47.)

The Petitioner had a discussion with the Coordinator on September 23, 2003. The Petitioner prepared a Memorandum for Record of the conversation, Petitioner's Exhibit 51. In this document,

she sets forth not only her discussions with the Coordinator but some of the desires and motivations she has concerning her son's education. Concerning her request to Ms. P to not teach her son any reading or writing in English she writes:

I stated that he knew how important it was for a child with a learning disability to focus on one language and I would question the validity of any testing completed with my son having had no formal English tutoring, only German. [The Coordinator] stated that no one said my son had a disability yet. I replied that was correct, however how accurate could such an assessment be if [we] have just thrust him full force into another language-based system he has no knowledge of? . . . In my conversation with [the Coordinator], I told him that not only was my request not honored, my son was subject to a Japanese language culture program that introduced him to yet another language. I informed [the Coordinator] that at the present time, my son was so thoroughly confused of what was a German word, English or Japanese. I explained that this repeated failure of scholastic achievements in line with his class peers in that type of learning environment was having resulting in increased behavioral problems in class, childcare and at home. He had developed a deep reluctance to perform any school work and has experienced frequent severe headaches. (Petitioners' Exhibit 51 at 1-2.)

The Petitioner then set forth her argument that the Instruction requires that all the testing of the Child for a suspected disability be in his native language, and that his native language is German. When informed by the Coordinator that Mr. W would give all of the testing in German, the Petitioner stated that she did not believe Mr. W was qualified to evaluate the Child in all areas in German.

[The Coordinator] changed the subject and brought up the issue that he had been in contact with [the GSJ], school director who informed him that their school has no special education program. I recalled that I never said the school had such a program, what I did say was the school could provide him a more appropriate education because one, they were fluent in German and could assess his abilities within German in comparison-to his peers. Two, the school had profound experience in working with foreign students with language acquisition issues due to the large number of foreign students that attended the school every year. Three, my son would be placed completely mainstreamed with his peers without experiencing severe transgressions in trying to acquire a new language in the midst of his difficulties. And four, to alleviate their concern that my son would never learn English, I found the school begins offering formal English instruction in the 2<sup>nd</sup> grade, which my son is in. I took all these factors into consideration in deciding the most appropriate placement to educate my son. [The Coordinator] stated that it was my choice to choose what was more appropriate for my son at my own expense and they however would not recommend he attend a German school. (*Ibid.* at 2.)<sup>22</sup>

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<sup>22</sup>See also Petitioner's Exhibit 53a.



The Petitioner also wrote the Pacific Region Special Education Coordinator (Ms. M) (Petitioner's Exhibit 53b). In that letter, she expresses her concern that the Child is not being evaluated for dyslexia in German, what she views as her son's native language:

I believe, conducting the tests in both English and German, as noted in CSC's meeting minutes, would either dilute any meaningful results, or highlight areas that may simply be caused by lack of his English proficiency. To date, the school has notified me that my son qualifies for ESL. Quite frankly, his lack of English proficiency is a direct result of minimal exposure to the language and is of no surprise. It is just a current state of being due to circumstances and not a learning disability. **I am looking for test results for dyslexia that have been conducted in his native language.** Because of the two year time delay that resulted from previous attempts for an evaluation, I am not flexible to the idea of my son having to first become proficient in the English language before a specific diagnosis can be given as to whether he has this learning impairment. This delays the identification and treatment process significantly. All the recent research indicates - after age seven - the younger your child is tested the better: the sooner the diagnosis of dyslexia is made, the sooner the child starts to develop the appropriate learning strategies and can raise their level of achievement in school. (Emphasis in original.)

During this same period, continuing after the Child had been withdrawn from school, the Coordinator continued to try to contact the Child's last school teacher in Germany. (Petitioner's Exhibit 54b and 54c.) In addition, the staff at the Elementary School and the Coordinator continued through the month of September and into October to attempt to schedule the remaining testing necessary for the assessment of the Child. (Petitioner's Exhibits 55, 56, 57, 58, 59, 60, 64 and 65; Respondent's Exhibit 60.)

The Coordinator was able to have a telephone conversation with the Child's last teacher in Germany (Frau H-K).<sup>23</sup> He prepared a Memorandum for the Record (Petitioner's Exhibit 66) which stated:

On the morning of 2 October 2003, I received the correct phone number for Frau [H-K], from Mr. [Z], German Immersion teacher in Germany. I had been trying to reach [the Child's] previous teacher for several weeks. The following is a summary of my conversation with Frau [H-K].

Frau [H-K] stated the following regarding [the Child], a student of hers previously in Germany. . .

“[The Child] was too young to begin school, he was 1 year younger than his peers. He was immature, wanted to play all the time, couldn't concentrate, and often tired from headaches. [The Petitioner] said that he couldn't sleep at night. He was tired in the morning at school since he was up at 5am, to the Nanny's then to school.

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<sup>23</sup>See Transcript at 163-167, 872-877.

He liked science and playing with dinosaurs; could not sit longer than 10 minutes at one time.”

**Question:** What were some of the difficulties John had in the classroom? “[The Child] took long time to learn reading reversing the letters d/p/b, didn’t want to pay attention to learning, was taking longer time than peers to learn to read simple sentences. Reading ability was improving too, by the time he left. He could understand German more than English.”

**Question:** Did you ever have a concern that John had a learning disability? “No, no, I did not think [the Child] had dyslexia.”

**Question:** Did you ever recommend that [the Child] be evaluated for a possible learning disability? “No, I did not suggest at all that he be tested at all. . . I would have suggested services from a psychologist because he was always very sad. . . he was often daydreaming of his father in Hawaii and his elder brothers (sons of his father). [The Petitioner] say herself that a lot of playmates could already read. . . but [the Child] couldn’t. . . they [the Petitioner and the Child] had to do more to help [the Child]. . . but not that he had dyslexia. . . he started school [too] young. . . in school much earlier than other children.”<sup>24</sup>

**Question:** How did [the Child] perform in relation to his peers academically and behaviorally? “[The Child] took longer to learn to read, he was average to a little bit lower than average, expected to learn reading but not fluently at this age, he was able to do as requested but with extra help. When there were frustrations with his schoolmates, he sat under the table, I talked with him to get him to come out. . . but his behavior was getting better over time.”

**Question:** Did you mention to [the Petitioner] your concerns with [the Child’s] behavior? “I told her about the difficulty with his behavior. . . if he had stayed I would have told [her] to go to a psychologist. But she [the Petitioner] said very quickly “We have to go” And since therapy takes a little time & I didn’t want him not to benefit from therapy.”

**Question:** Would [the Child] have been retained in your school had he remained in Germany? “[The Child] would have been promoted to the 2<sup>nd</sup> grade, he was an average to low average student in relation to his peers. He would not have been retained.”<sup>25</sup> (Emphasis in original.)

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<sup>24</sup>See also Respondent’s Exhibit 31d.

<sup>25</sup>See also the Child’s report card from the school in Germany, Petitioner’s Exhibit 67.

During the first part of October 2003, the Petitioner requested mediation “surrounding the school’s accurate testing/evaluation procedures of my son for eligibility of special education and related services.”<sup>26</sup>

The Principal of the Elementary School continued to offer services to the Child. In an email to the Petitioner dated October 3, 2003, and in a follow-up letter dated October 6, 2003 (both in Petitioner’s Exhibit 68) he says:

I was hoping we could discuss the ESL program to see if you had considered allowing [the Child] to attend to help with his English language acquisition. This would also help with any stress or anxiety that he might be having in his classes or in play groups etc. while here at [the Air Base]. I know he has been disenrolled from [the Elementary School], but we will continue to offer any services that we can to help [the Child]. He has a standing invitation to attend the ESL classes and you may utilize any of our specials such as music, PE, etc. if you can work it into his schedule. You are also welcome to use our media center resources for any additional support on educational activities where it may apply. If these services are of interest we can put [the Child] back into our Winschool data base so that he is partially enrolled.

The Petitioner responded in an email to the Principal dated October 14, 2003 (Petitioner’s Exhibit 71.) She states, “Thank you for your offer of school services. I would like to receive an evaluation report of an educational assessment prior to making any commitments.”

Despite the above statement, beginning in mid-October, the Petitioner began asking the Principal if she could have the Child evaluated by Dr. B, who was the school psychologist at the other elementary school at the Air Base. (Petitioner’s Exhibit 75.) After some initial reluctance by the Principal, the decision was made to allow the Child to be seen by Dr. B. The initial report of Dr. B, prepared on December 12, 2003, is Petitioner’s Exhibit 104. Two of his “Recommendations” are “Rule Out ADHD (attentive type)” and “Rule Out Reading Disorder (CSC).” (*Ibid.* at 3.) His subsequent report entitled, “Social Skills Training Recommendations for [the Child]” is Petitioner’s Exhibit 108.

On October 29, 2003, the Coordinator sent an email to several Elementary School personnel. This message concerned how any additional evaluation of the Child should be done (Petitioner’s Exhibit 77). He says, “When I spoke with the Director of the German school . . . , he explained that they do not evaluate for possible learning impairments for children younger than 9 years of age. Until then, they give them extra help in the curricular area needed. *So, there is no norm-referenced test in German for us to give [the Child] other than the BVAT [Bilingual Verbal Abilities Test].*” (Emphasis supplied.) The message goes on to discuss his recommendations for testing, “1. BVAT. 2. Review the German Curriculum with [the Child], determine the proficiency as much as possible, from the [GSJ]. 3. Informal Q&A in German. 4. Brigance criterion referenced for his age/grade

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<sup>26</sup>In accordance with paragraphs E9.2.7 and E9.2.10 of the Instruction, no negative inference is drawn from the fact that mediation did not result in a settlement of the dispute in this case. Unless specifically stated, testimony or evidence that discusses the course of the mediation is not germane to this case, and has not been considered by me in this Decision.

level, asked in German. 5. A visit/observation/consultation with the [GSJ] . . . to see how he is doing.”

It should be noted that by this time the Child had already been withdrawn from the German school and was being home schooled. (Transcript at 62.) The Child was withdrawn from the German school because of his inability to keep up with the second grade work. The request was made by the school to return the Child to the first grade on October 23, 2003. (Petitioner’s Exhibit 96, Respondent’s Exhibit 90.<sup>27</sup>) The Petitioner refused to do this. This fact was evidently not known by DoDDS until approximately December 1, 2003 (Petitioner’s Exhibit 81 at 1).<sup>28</sup> The Child reportedly returned to the German School, in the 1<sup>st</sup> grade, in February 2004. (See Petitioner’s Exhibit 164 at 2.)

The parties came to an agreement about additional evaluations of the Child on October 31, 2003. As a result of that meeting a “Parent Permission for Evaluation” was completed by the Petitioner stating, “An assessment plan has been designed to evaluate educational performance in German by bilingual school psychologist.” (Petitioner’s Exhibit 79.) Plans were made to have the Child evaluated by Dr. K, a bilingual school psychologist from Germany, in December 2003. Earlier in the year, when the Petitioner and Child were still in Germany, there had been attempts to have Dr. K do an evaluation. Scheduling conflicts ensued at that time, so the evaluation had not been completed.

Before Dr. K arrived in Japan, she and the Petitioner engaged in an extensive email exchange. (Petitioner’s Exhibit 81.) On the psychologist’s part, she explained to the Petitioner what testing instruments she intended to give the Child and what she hoped to achieve with the results. Of particular interest is the following description of the Bilingual Verbal Ability Test, “[Intended] for measuring bilingual verbal ability, or the combination of cognitive/academic and language abilities possessed by bilingual individuals in English and another language (in this case German). Using this test is based on the reality that bilingual children know some things in one language, some things in another language, and some things in both languages.” (*Ibid.* at 3.) The Petitioner told Dr. K about various things she, and the people she had home schooling the Child, had seen during the two months of home schooling.

The Child was evaluated by Dr. K on December 9, 10 and 11, 2003. Her extensive, 21 page report is found at Petitioner’s Exhibit 82. While worth reading in its entirety, there are pertinent parts of it that will be discussed here. The testing instruments used by Dr. K were:

- Review of Records
- Parent Interview
- Daycare provider (Tagesmutter) Interview
- Teacher Interviews

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<sup>27</sup>The exhibits consist of the same cover page, along with translations from the Petitioner and from a Department Counsel.

<sup>28</sup>See also Petitioner’s Exhibit 130.

Hamburg Wechsler Intelligenztest fuer Kinder (HAWIK-III) - this instrument is the German equivalent of the Wechsler Intelligence Test for Children – 3<sup>rd</sup> Edition<sup>29</sup>

Allgemeiner Schulleistungster fuer 2. Klassen [ASK] (General School Achievement Tests for the 2<sup>nd</sup> grade)

Bilingual Verbal Abilities Test (BVAT)<sup>30</sup>

Expressive One-Word Vocabulary Test (EOWPT - administered in German)<sup>31</sup>  
(Petitioner’s Exhibit 82 at 4.)

Under the heading **Behavioral Observations**, the following portions of the report are most pertinent to this inquiry:

In general, [the Child’s] verbal responses were awkward and either terse or rambling. He supplemented his communication by acting out what he intended to say and providing sound effects. [The Child] spoke German and occasionally interjected English words. He spoke with a slight American accent and some of his German expressions tended to follow the rules of English expression, mixed English and German words, or simply used erroneous German grammatical form (e.g., “Wie er hat aufgemacht die Tuer” instead of “Wie er die Tuer aufgemacht hat;” “Du bist verlaufen” instead of “Du hast dich verlaufen;” “Das ist sehr hart” when referring to difficulty; “Wenn ich draussen geh” for to go outside; “Er hat nicht aufgeweckt” instead of “Er ist nicht aufgewacht;” “Mein Cousin ist em Chicken;” “Die Tuer ist closed;” “Wir haben gesprochen;” “Das war Spass;” “Wenn ich wieder zu Deutschland gehe;” “Der wollte ihn chasen.”). At times [the Child] was unable to provide a response when the question was posed in German, but could provide the correct answer when the question was translated to English (e.g., a question about seatbelts — Sicherheitsgurte; a question involving the word “prahlen” — to show off). [The Child] stated that he speaks English or German to his mother and that she speaks back in English. He also reported that he speaks German with his home schoolteacher and she speaks German to him. However, he speaks English with her two children, who speak no German. [The Child] claimed that he spoke 5 different languages, but could not remember what other languages he spoke besides German and “American.” During play segments when examiner did not participate with [the Child], [the Child] occasionally commentated his play in English and by using numerous sound effects.

. . .

[The Child] transitioned easily to the more structured portion of testing. On the first day of testing, he participated in the intellectual assessment and some drawings. He complied readily with examiner requests and was engaged and

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<sup>29</sup>See Respondent’s Exhibit 136.

<sup>30</sup>See Respondent’s Exhibits 131, 132, 133, 134 and 135.

<sup>31</sup>See Petitioner’s Exhibit 150, Respondent’s Exhibit 130.

motivated to do well during the initial hour of the assessment. After that, [the Child] rubbed his eyes frequently, yawned, and turned his attention to other things in the room. He would make shooting or fighting sound effects. However, he readily cooperated with the examiner to turn his attention to the task at hand. [The Child's] attention wandered particularly during verbal subtests, and most notably(*sic*) during the oral math portion of the assessment. He became focused and engaged during nonverbal items or visual-motor tasks, such as block design, object assembly, and symbol search. [The Child] was given several breaks during the assessment in which he chose to play with his Legos. He cooperated readily with the examiner's request to return to the testing procedures. However, he also complained that he was tired and wanted to go home. When asked why he was tired, [the Child] stated that he did not sleep much last night. He reported that he wanted to do things. When asked what he wanted to do, he responded TV and games. He also explained that he cannot sleep well because he has bad dreams. When asked what he dreams of, he responded: "the world breaks" ("Die Welt geht kaput.")

During the second day, achievement testing, bilingual verbal abilities, and expressive language screening measures were administered. [The Child] was relatively cooperative and motivated during the language assessments. However, he became more resistant during the achievement portion, which involved reading, writing, and arithmetic. He applied some effort to reading tasks, but with writing and arithmetic, he claimed that he did not know how to solve or address the tasks and that he was tired. He stated that he did not know how to do calculations involving double digits. When shown the assignments he had done during his home schooling, which involved numerous such calculations, [the Child] claimed that his home school teacher helps him. He attempted problems, but became easily discouraged and refused to go on without examiner assistance. His reading was very labored and hesitant. He tried to sound out words, but could not make sense of most of them. At times he made up a word based on the initial two or three sounds he was able to identify. He stated that he did not know all the words and concluded that the tasks were very hard ("Das ist sehr hart").

On the Bilingual Verbal Abilities Test (BVAT), [the Child] refused to respond [to] items in English, explaining that his mother did not want him to respond in English. He was encouraged to do so anyway with the reassurance that examiner would let mother know that the examiner requested him to do so. He insisted that his mother did not wish him to give answers in English and continued to refuse. Therefore, a valid score of [the Child's] responses in English spontaneously (i.e., when the examiner did not prompt him to do so) when he did not answer in English. He did the same on a number of items on the Expressive One Word Vocabulary Test (EOWPT). (*Ibid.* at 5-7.)

As part of the evaluation process, Dr. K interviewed the Petitioner (*Ibid.* at 7-11). Most of the information in this interview corresponded to other evidence in the record. However, the Petitioner did give information as to the Child's home school activities:

Currently [the Child's] schedule is such that he rises around 6:15 am and arrives at his home schoolteacher's home by 7:00 or 7:15 am. He continues to sleep there if he is tired. Then he is home schooled using the German 2<sup>nd</sup> grade curriculum, which mother provides for the teacher.<sup>32</sup> Mother reports that [the Child] is on a schedule that parallels the German school schedule with Mondays and Tuesdays being longer days, and having breaks every 45 minutes. The level of work done depends on [the Child's] level of concentration on any given day. Mother states that she adapts his schoolwork depending on what he has been able to accomplish on a given day. On Monday and Friday afternoons, [the Child] stays at the home of a friend, who has an 8-year and 5-year-old child with whom [the Child] apparently enjoys playing. (*Ibid.* at 8.)

Dr. K also interviewed the Day Care Provider (Tagesmutter) of the Child in Germany. The report states, "She [the Tagesmutter] reports that she did not believe [the Child] had learning difficulties. She believes that [the Child] was not mature enough to enter school when he did and that he entered the German school system about a half-year to a year earlier than the average German child. [The Tagesmutter] describes [the Child] as [having] very poor concentration and difficulty sitting still." (*Ibid.* at 11.)

Dr. K interviewed the Child's teacher in Germany. That interview did not differ materially from the interview the Coordinator had with Frau H-K. She also interviewed the Child's home school teacher in Japan. This person (Frau D) had been the Child's teacher for about six weeks as of the date of the interview, part of which is as follows:

[Frau D] reported that initially she did not have concerns regarding [the Child's] ability to read. However, she realized that [the Child] was memorizing books and not really reading them. He has great difficulty with sound symbol associations (esp. with the o and u sounds). According to [Frau D, the Child] needs constant one on [one] attention for him to remain on task. If teacher walks away or asks him to do work on his own, [the Child] becomes distracted and will start playing. Teacher states that he constantly seeks distractions from work. She describes him as having great difficulty concentrating and feels that he has a very busy schedule. He usually arrives at 7am and is picked up between 5 and 6. When mother has morning physical training, he arrives as early as 6am, and is reportedly extremely tired. He will often fall asleep again at [Frau D's] house. She indicated that his abilities are extremely variable. On some days, he is able to do his schoolwork and read very well and on other days, he is not able to solve the simplest of problems.

. . .

[Frau D] believes that his academic abilities are not comparable to other children his age. He is apparently not at the level of the second grade curriculum and would not survive the 2<sup>nd</sup> grade due to his social and emotional immaturity and his

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<sup>32</sup>See also Petitioner's Exhibit 34.

inability to work independently. However, [Frau D] does not believe he has a learning disorder. She feels that he would require consistency to catch up.

In terms of language, [Frau D] describes [the Child] as speaking “Genglish,” a mixture of German and English, with some words that are part German and part English. She speaks German to him and he to her. However, [the Child] speaks English with [the teacher’s son] and older sister. (*Ibid.* at 13-14.)<sup>33</sup>

Ms. P, the Child’s teacher at the Elementary School, was also interviewed. It corresponded greatly to the statements that she had previously given (Petitioner’s Exhibits 43 and 62.) In pertinent part, the report stated, “Teacher wished she had more time with him because he seemed to be ‘picking things up’ and showing initiative for the learning process. However, after the first week, ‘he kept saying my mom said I can’t do that.’” Later, “She [Ms. P] reported that his verbal communication was ‘fine’. His English grammar was ‘not 100%’, but he did well in communicating with the other children and herself. He could tell the kids what he liked and didn’t like and usually played very well with the other children.” (*Ibid.* at 14.)

Finally, Dr. K interviewed the teacher at the GSJ who taught the Child for about a month in September and October 2003. The report states:

[Frau B] describes him as ‘extremely different’ from his peers in terms of socio-emotional maturity. He was more child-like and not at all comparable to the typical 2<sup>nd</sup> grader. Teacher reports that he had great gaps in his learning. He was unable to make sound symbol associations at the level required for 2<sup>nd</sup> grade. In reading and writing he mixes up the sequence of letters. Other children in the class were reading long, more difficult texts while [the Child] still struggled with single words. Teacher noted that he was able to memorize texts and filled in words based on content.

. . . .

Teacher believes that [the Child’s] difficulties stem from the inconsistencies he has experienced with respect to exposure to many caregivers and inconsistencies in his educational programming. She feels that [the Child’s] having to cope with these factors took a lot of strength and energy that he [would] have needed for learning. She believes that mother’s ability to understand the language of [the Child’s] schooling would be critical to helping him make progress in his academic performance.

According to teacher, [the Child] does not speak like a native German speaker. He often lacked common words in his German vocabulary. Finally, she reported that the school recommended that [the Child] be placed back in the first grade, as they felt he could not master the 2<sup>nd</sup> grade. (*Ibid.* at 15.)

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<sup>33</sup>See also Respondent’s Exhibit 103.



At this point in her report, Dr. K describes in detail the results of the testing given to the Child. The numerical scoring for various tests and subtests are found in pages 16 through 18 of Petitioner's Exhibit 82. The discussion concerning the various tests is set forth below:

The HAWIK-III was administered to [the Child] to obtain a current measure of his intellectual potential. [The Child] obtained a Full Scale IQ Score of 99 (47<sup>th</sup> percentile), placing him within the Average range of intellectual functioning overall. Findings suggest that [the Child's] Nonverbal (PIQ=112; 79<sup>th</sup> percentile) reasoning skills are significantly higher than his Verbal (VIQ=89; 23<sup>rd</sup> percentile) abilities. This implies that [the Child's] ability to reason with words is less well developed than his visuo-spatial processing abilities.

Within the verbal area, [the Child] displayed a significant relative weakness on the Arithmetic (9<sup>th</sup> percentile) subtest. This subtest assesses the ability to do mental arithmetic and low scores can imply distractibility, poor concentration, or poor short-term auditory memory.

Within the Nonverbal area, [the Child's] performance was significantly better on the Coding (95<sup>th</sup> percentile) and the Symbol Search (95<sup>th</sup> percentile) than on any of the other nonverbal subtests. These two subtests comprise the Processing Speed Index. Processing visual material quickly is an ability that [the Child] performs very well as compared to his overall nonverbal reasoning ability. Processing speed is an indication of the rapidity with which a child can mentally process simple or routine information without making errors. High scores can imply good visual discrimination or visual short-term memory.

[The Child's] abilities to sustain attention, concentrate, and exert mental control are a weakness relative to his nonverbal reasoning abilities (Freedom from Distractibility Index=6<sup>th</sup> percentile). Mental control is the ability to attend to and hold information in short-term memory while performing some operation or manipulation with it. Low scores can imply difficulty sustaining attention and distractibility or short-term retention deficits.

. . .

The AST 2 consists of five subtests tapping the level of a student's of (sic) achievement in the German curriculum. The Vocabulary subtest required [the Child] match words that are meaningfully related. [The Child] was unable to identify numerous words in this subtest. When the words were read to him, his performance improved somewhat. The Spelling subtest required [the Child] to pick out words that were misspelled and to spell them correctly. [The Child] was unable to perform any of the items on this subtest. He picked one misspelled word correctly, but did not know how to correct its spelling. On the math subtest, [the Child] was required to solve math computations at varying levels of difficulty. He was able to complete only simple addition problems involving single digits. However, he could not perform subtraction or addition using double-digit numbers. When [the Child] was talked through the problem step by step, he was able to arrive at correct solutions for

some of the problems. However, he complained most vehemently about being tired and wanting to go home during this subtest. Reading comprehension involved [the Child's] reading of sentences and circling a word that best described the gist of the sentence. [The Child] was able to do this only with the help of the examiner reading all items to him. Therefore, he did not score any points on this subtest. In the Word Problems subtest, [the Child] was required to solve oral math problems. He insisted that he did not understand and could not do these problems. He obtained no points on this subtest. [The Child's] Total T-Score value on this test was 24 (1<sup>st</sup> percentile). He scored below the 5<sup>th</sup> percentile on all subtests, indicating deficits in all areas of achievement.

. . .

[The Child] was administered the BVAT to evaluate his verbal cognitive ability. [The Child] refused to respond to items in English, therefore the English Language Proficiency Score is invalid. Due to his refusal, individual subtests were not recorded here, as their scores are also invalid.

. . .

The Bilingual Verbal Ability score is an estimate of [the Child's] verbal cognitive ability in English and German combined. In [the Child's] case it is an estimate of his verbal ability in German, which is comparable to that of an average 5-7 year old individual. His standard score of 78 (7<sup>th</sup> percentile) falls in the low range of ability for his age. Findings suggest that verbal cognitive ability below the age of 4-9 would be easy for [the Child], while those above the age 6-7 would be quite difficulty for him.

. . .

The EOWPT required [the Child] to name a series of pictures. This test was administered in English during prior testing. Responses were requested in German at the current testing in order to provide some comparison of his vocabulary skills between languages. [The Child's] standard score of 82 (11<sup>th</sup> percentile) places him in the low average range of expressive skills in German. His expressive vocabulary is comparable to that of an average child age 5-5. Current scores with responses in German are relatively commensurate with findings on prior testing (SS 76, 5<sup>th</sup> percentile). (*Ibid.* at 16-18.)

After analyzing the above information, Dr. K arrived at her "Summary and Conclusions." The pertinent parts of that section of the report is as follows:

Achievement scores based on the AST (a German achievement instrument) were deficient (below the 10<sup>th</sup> percentile) in all areas, including reading, spelling and math. These deficits are vastly discrepant(*sic*) from the finding of average to superior cognitive abilities for [the Child]. Finally, language screening in German suggested language proficiency in the low range in terms of expressive skills and verbal cognition. These results are relatively commensurate with deficits found in expressive English language functioning during prior testing. Verbal comprehension

skills based on current testing were found to be average, with subtest scores varying between low average to average. This is commensurate with findings of receptive language skills in English at the time of prior testing. In general, findings based on standardized testing and anecdotal observation, suggest deficits in expressive language functioning across both languages.

[The Child's] combined weaknesses in auditory short-term memory, attention processes, and language processing can impact all areas of academic learning. This is particularly the case because the majority of educational instruction involves some form of verbal learning. The instructional tasks may be explicitly verbal (e.g., listening, presenting, explaining) or implicitly verbal (e.g., reading, writing, solving word problems).

[The Child's] mother has been highly concerned about confusing [the Child] by exposing him to two languages (i.e., English and German). She believes that [the Child] is particularly confused by English and has therefore directed efforts to keeping [the Child] exposed to the German language, environment, and educational curriculum as consistently as possible. However, these efforts could not be fully realized given that mother does not currently master the German language herself and lives and works within an American context (US Air Force). This means that [the Child] is consistently exposed to both English and German (e.g., at home, peer interactions, extracurricular activities, etc.). Current evidence suggests that mother's concerns regarding confusion stemming from the use of English language are likely to be unfounded, as [the Child] displays relatively equal potential to reason and communicate in both languages. In addition, in informal observations [the Child] currently transitions easily between German and English in a variety of situations. This may represent a development in [the Child's] English usage compared to past observations. Finally, [the Child] displays deficits in language expression, both in English and German. Expressive language deficits, as well as weaknesses in short-term memory processing, may contribute to findings of learning difficulties in all areas of achievement. In addition, findings suggest that premature school entry may be a contributing factor to [the Child's] struggles with the regular 2<sup>nd</sup> grade German curriculum. (*Ibid.* at 18-20.)

Dr. K completed her report by making 10 "Recommendations." Two of them are pertinent here:

2. Given limited proficiency in both languages, [the Child] is likely to benefit from intervention that stresses the development of language skills. In addition, given these difficulties in language processing, he would benefit from a focus on learning one language across all settings (i.e., school, home, family, extracurricular activities, care providers, etc.). Dual language exposure may overexert [the Child's] verbal cognitive capacities and contribute to potential anxiety and stress in the educational environment given deficits found in current testing. Parent/primary caregiver ability to communicate in the language of [the Child's] educational environment is likely

to be highly beneficial for [the Child]. This would allow clear parent/teacher communication and enhance parent ability to assist with and support curricular goals over the course of [the Child's] schooling.

6. If symptoms of distractibility and impulsivity or anxiety do not abate within three to five months of initiating educational interventions and reducing environmental stressors, further psychological/psychiatric assessment is recommended to address the potential presence of an attention deficit or anxiety disorder. (*Ibid.* at 20-21.)

A Case Study Committee (CSC) meeting was held on December 15, 2003. The minutes of this meeting are found at Petitioner's Exhibit 83. They clearly show that there were conflicts among the CSC members about the current situation of the Child's education, and how the Elementary School should respond. Concerning the testing conducted by Dr. K, the following discussion occurred:

Mom [the Petitioner] wanted clarification on a part of the assessment that asked [the Child] to pick out misspelled words.<sup>34</sup> Mom stated that he does spell well at home. Mom also stated that again on some days he does better than others. The team agreed it does suggest a learning disability. [Dr. K], Psychologist stated that he [the Child] really tries and complies but he struggles, that is the same thing that his teachers see. During one portion of the assessments [the Child] stated to [Dr. K] that Mom wanted him to speak German only with [Dr. K], Psychologist. Mom stated that she did not want to confuse [the Child] with the switching of German to English and vice versa and did not want to skew the tests that were to be in German. During observation [Dr. K] stated that when he could not respond in German he would fill in the blank with English. Mom stated that he does the same in German, if he doesn't know the word he will fill it in with the language that he does know the word in. (Petitioner's Exhibit 83 at 2.)

The minutes then went into an extensive discussion comparing and contrasting various test results. One of the Petitioner's primary concerns at this meeting concerned what language her son would be taught in, if he was found eligible. "Mom wanted to know how long it would take [the Child] to become a proficient reader and writer. The team stated that they could not give a determination for a time line. Mom stated that she felt he is proficient in German and take care of his Learning Disability in the German language instead of waiting to become proficient in English to take care of the Learning Disability." (*Ibid.* at 3.)

The CSC also discussed a referral to EDIS concerning various physical concerns that the assessments were concerned about. The Petitioner remained concerned that the CSC team was not adequately evaluating the Child for dyslexia. The areas of concern were stated in the minutes to be, "vision issues, chronic headaches (migraines), chronic tiredness, inattentiveness issues, physical

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<sup>34</sup>The test was the AST-2, see pages 33-34, above.

complaints (frequent) stomachaches, distractibility issues, and possible depression issues.” (*Ibid.* at 4.)

As a result of the CSC meeting, the Child was found eligible for special education services under Category D - Learning Impairment. (*See* “Case Study Committee Eligibility Report” (“Eligibility Report), Petitioner’s Exhibit 84 at 2-5 and Respondent’s Exhibit 82 at 1-4.)<sup>35</sup> The Report required that four questions be answered in the affirmative. The questions which were answered in the affirmative are as follows:

1. Is the student’s achievement in math, reading or language arts near or below the 10<sup>th</sup> percentile? (At or near the 35<sup>th</sup> percentile for students whose mental ability is one and a half or more standard deviations above the mean.)

2. Is the student’s adverse academic achievements due to one of the following deficits?

b) Specific Learning Disability - disorder in processing and/or production of language and/or information as measured by significant differences among scaled or standard scores, OR significant weaknesses across sub-tests or clusters of more than one test with comparative strength identified, OR significant weakness identified in language processing with comparative strength identified. (Capital letters in original.)

3. The identified learning problem is not due primarily to a visual, hearing, or motor disability.

4. The learning problem is not due primarily to emotional disturbance, environmental deprivation, cultural differences, or English as a Second Language. (Respondent’s Exhibit 82 at 1.)

The Eligibility Report also sets forth the “Present Level of Functioning, Achievement, and Performance” (“PLOP”) of the Child in several areas. For the area “Language Arts,” the PLOP states, “Inconsistencies with spelling and letter identification. He is printing at this time. Difficulty with spelling in either language.” In “Mathematics,” “[The Child] can add single digits but does need help with double digit addition.” Finally, in “Reading,” the report states, “[Dr. K] stated [that] he has great difficulty with sounding [out the] syllable. Mom stated that phonetically he has issues and his phonics skills need to be strengthened. Also he has letter reversals. ABPD’s he doesn’t remember the letters in the next line in the reading area.” (*Ibid.* at 2)<sup>36</sup>

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<sup>35</sup>*See also* Appendix D, “Questions and Answers, Criterion D,” Department of Defense Education Activity, “Special Education Procedural Manual, DSM 2500.13-M Revised,” September 2003. (Respondent’s Exhibit 4.)

<sup>36</sup>*See* Transcript at 195-198.

The CSC, including the Petitioner, agreed that her son did need to be evaluated for EDIS “to address chronic difficulties with sleep, headaches, distractibility, impulsiveness, and physical complaints.” The written request was made on December 15, 2003. (Petitioner’s Exhibits 88 and 89.) The Petitioner stated that her concerns were, “Attention deficit hyperactivity disorder (ADHD), affective disorders (anxiety, depression), central auditory processing dysfunction and physical or sensory impairments affecting educational achievement. Confirmation of dyslexia diagnosis. Adjustment disorder. Any behavior or physical factors affecting the learning process.” (Petitioner’s Exhibit 89 at 5.)<sup>37</sup>

The Petitioner was very disturbed by how the CSC meeting went. She believed that she did not have time to properly consider Dr. K’s report and that there were irreconcilable differences between the various assessments given to the Child. These concerns were set forth in a Memorandum that she prepared on December 16, 2003 (Petitioner’s Exhibit 87). At this point she stopped the mediation and proceeded to due process.<sup>38</sup>

Also on December 16, 2003, the Petitioner wrote an email to the person who was home schooling the Child. In that email she says, “I had the meeting with the American education people and they have said they believe [the Child] has dyslexia. Now I must decide what is the best learning environment for [the Child]. I feel his German linguistic skills are better developed than his English skills and his problems would best be addressed one on one until his confidence level goes up.” (Respondent’s Exhibit 93 at 2.)

The Principal attempted to schedule a meeting with the Petitioner to prepare an Individual Education Plan (IEP). He informed the Petitioner of this desire on January 21, 2004 (Petitioner’s Exhibit 111). The proposed date was February 5, 2004. The exhibit also included a preliminary list of goals and objectives for the Child. The Petitioner declined to attend the meeting (Petitioner’s Exhibit 112).

On January 14, 2004, the EDIS Division Head, Dr. SP, informed the CSC that a medical evaluation of the child in relation to his conditions must be made before a neuropsychological/psychological evaluation could be made. Dr. SP then referred the Child to the Pediatrics Department at the United States Naval Hospital in Japan (Petitioner’s Exhibit 107). After the medical evaluations were completed, a subsequent “Request for EDIS Evaluation” was prepared on March 23, 2004 (Petitioner’s Exhibits 109 and 110).<sup>39</sup> The evaluation was completed and the report submitted on May 19, 2004 (Petitioner’s Exhibit 164.) The relevant parts of this report are as follows:

### **Reason for Referral**

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<sup>37</sup>See also Petitioner’s Exhibit 92 at 2.

<sup>38</sup>See also Petitioner’s Exhibits 97 and 98.

<sup>39</sup>The Child received a Neurology evaluation for his history of headaches. The recommendations of the neurologist who examined the Child are found in Petitioner’s Exhibit 133.

[The Child] is an 8-year-old boy with a reported history of inattention, increased distractibility, fatigue, and frequent stomachaches and headaches. He was referred by the [Elementary School] CSC to assist in determining the need for related services with the following questions:

- “Does the student have a medical/emotional condition that affects the attention and focus for learning?”
- “Is there a medical/emotional reason for this student’s frequent headaches, stomachaches and chronic fatigue?”
- “Does this student have a visual impairment that would contribute to headaches or reading difficulties?”

. . . .

### **Assessment Procedures**

The Attention Deficit Disorders Evaluation Scale – Second Edition (ADDESS-II)

Home Version

School Version

Conners’ Continuous Performance Test-II (CPT-II)

Conners’ Parent Rating Scale-Revised: Long Version

Conners’ Teacher Rating Scale-Revised: Long Version

Achenbach Child Behavior Checklist (CBCL)

Parent Version

Teacher Version

Children’s Sentence Completion

Revised Children’s Manifest Anxiety Scale: “What I Think and Feel” (RCMAS)

Children’s Depression Inventory (CDI)

House Tree Person Projective Drawings

Kinetic Family Drawing

Record Review

Clinical interview

. . . .

### **Test Results and Interpretation<sup>40</sup>**

#### Attention Functions

Overall results indicate that this domain is a weakness for [the Child]. Qualitative findings (behavioral observations and reports from his parent and teacher) indicated that [the Child] has significant difficulty filtering out extraneous environmental stimuli and monitoring his attention. Although these symptoms are often seen in children with receptive and expressive language difficulties and academic weaknesses, [the Child’s] symptoms are more significant than what would typically be seen.

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<sup>40</sup>Behavioral observations and specific test scores are found at pages 4-5 of Petitioner’s Exhibit 164.

To assess this domain, [the Child] was administered the Conners' Continuous Performance Test-II (CPT-II). Results of the CPT-II identified sustained attention (poor vigilance) as a significant problem area, and to a lesser degree, inattention and impulsivity. This finding suggests that although [the Child] can initially attend to a stimulus, he has significant difficulty maintaining his attention. His overall profile on this measure indicated that the results better match a clinical ADHD profile than a non-clinical profile. Specifically, [the Child's] performance resulted in an ADHD Confidence Index of 68.8 %. The Confidence Index can be described in the following way: the chances are 68.8 out of 100 that a clinically significant attention problem exists. Specific results on the Vigilance Summary indicated that both of the areas assessed fell within the clinical range (Hit RT block Change, and Hit SE Block Change), while the Perseverations subtest of the Impulsivity Summary fell in the clinical range and the Variability subscale on the Inattention Summary fell within the clinical range.

### **Summary and Diagnostic Impressions:**

Results of significant observation, assessment, record review, and clinical interviews indicate that [the Child] exhibits numerous behaviors and traits consistent with Attention Deficit Hyperactivity Disorder - Predominantly Inattentive Type (ADHD). He is easily drawn to distracters in the environment and as a result has difficulty remaining focused on his teacher/parent, lectures, and instructions. [The Child] requires frequent cueing and redirection to remain on task and vigilant. It is difficult to determine the etiology of [the Child's] inattention and distractibility. These symptoms can be manifestations of ADHD as well as a receptive and expressive language disorder, learning delays, or a combination of all three, which is likely the case for [the Child]. Because [the Child] experienced difficulty on the CPT-II, a measure that attempts to control for language and academic difficulties, it is possible that his ADHD plays a significant role in his inattention and distractibility.

At the time of the initial referral, shortly after the family's arrival in [Japan, the Child] was complaining of frequent stomachaches, headaches, and fatigue. Evaluations by [the Child's Primary Care Manager] and neurologist indicated that [the Child's] headaches were likely a result of migraines, but no medical etiology could be found to explain his stomachaches and fatigue. [The Petitioner] appears to have found a way to successfully manage [the Child's] headaches by monitoring his diet instead of using the medication prescribed by the neurologist. At the time of this evaluation, [the Petitioner] reported that [the Child's] stomachaches and fatigue had resolved and were not a clinical concern. Furthermore, results of testing indicated that [the Child] is not experiencing clinical levels of anxiety, depression, or any other emotional issue at this time. Given his reported history, it is very likely that [the Child's] physical [symptomatology] was a manifestation of an adjustment reaction with depressed mood and anxiety. This reaction was likely a response to a multitude of issues including the move to Japan (a move he openly did not want to make),



which forced him to leave a place where he felt comfortable and accepted. Other adjustment issues likely included the changing and uncertainty of schools/educators, being retained in the 1<sup>st</sup> grade, and difficulties with initial peer relatedness. By self, teacher, and parent report, [the Child] was not initially accepted by his peers and had difficulty making friends. It is the opinion of this examiner that the frequent changes in his home and school environment negatively impacted his ability to adjust to his new surroundings. With a stabilization in his academic and social setting since his return to [the GSJ, the Child] has demonstrated improved adjustment to his school, peers, and community, and is responding both psychologically and physically. However, it is imperative, not only for his academic development, but more importantly for his emotional development, that changes in his environment be limited; [the Child] is a very sensitive and emotional young boy who is quite in tune with his surroundings and as such, manifests emotional and physical responses to environmental unrest and unexpected change.

### **Educational Implications**

[The Child's] current levels of inattention and distractibility, speech and language difficulties, and academic difficulties have and will continue to have a negative impact on his academic performance.

### **Diagnoses \***

Axis I: Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Type Adjustment Disorder with Mixed Anxiety and Depressed Mood (Resolving)  
 R/O Mixed Receptive and Expressive Language Disorder  
 Axis II: No Diagnosis  
 Axis III: Migraine headaches  
 Axis IV: Educational Difficulties, Adjusting to Social Environment  
 Axis V: Current Functioning: 61 — 70

\*Diagnostic and Statistical Manual of Mental Disorders: Fourth Edition

Axis I Clinical disorders and other conditions that may be a focus of clinical attention  
 Axis II Personality disorders and/or mental retardation  
 Axis III General medical conditions  
 Axis IV Psychosocial and environmental problems  
 Axis V Global Assessment of Functioning (0- 100 point scale. 100 = superior functioning)

Strengths: [The Child's] strengths include his willingness to learn, his pleasant personality, and supportive parent.

Weakness: [The Child's] weaknesses include significant inattention, distractibility, poor concentration, receptive and especially expressive language difficulties, and academic weaknesses.

## **Recommendations:**

- that the CSC meet with [the Child's] parent to consider these and other findings in order to determine if [the Child] qualifies for special education services and if so, to develop an appropriate educational program
- that [the Petitioner] consider a consultation with [the Child's] pediatrician to discuss the results of these findings and to discuss a trial of stimulant medication to assist with inattention and distractibility; however, it is the opinion of this examiner that a percentage of [the Child's] apparent inattention and poor follow through in verbal instruction is associated with his language disorder
- that [the Child] and his mother remain in counseling with Dr. [B] to continue the facilitation of [the Child's] adjustment to Japan
- that [the Child] be considered for further speech and language evaluation to determine if significant weaknesses in receptive and expressive language skills found during testing in English are noted in German
- that verbal and physical redirection and cueing be used to keep [the Child] on task; directions and use/introduction of abstract concepts should be limited in length and complexity and broken down into a series of short steps; directions and new concepts should also be demonstrated rather than just verbally described
- [the Child] will function best in a structured home and school setting, with clear expectations, predictable routines, and clear consequences
- [the Child] will benefit from accommodations for his attentional problems, such as sitting near the teacher, reduced distractions, repetition of instruction, and explicit training in organization and study skills
- [the Child] should be afforded adequate opportunity for any extracurricular activity in which he is interested and can excel; it is particularly important that he experience success, which is crucial to a child's self-esteem and overall emotional and social adjustment
- see attached recommendations and classroom accommodations for ADHD [symptomatology]<sup>41</sup> (Emphasis in original.)

Also in January 2004 the Petitioner took the Child to a civilian community counseling service for an evaluation for ADD/ADHD and emotional/social issues consult (Petitioner's Exhibit 123). The report of this evaluation is Petitioner's Exhibit 165.

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<sup>41</sup>Found on page 10 of Petitioner's Exhibit 164.

## Testimony of the Petitioner

The Petitioner began her testimony by stating that the attitude of the Coordinator at her initial CSC meeting in Japan was so negative that she felt there was no possibility of being able to work through her situation with him. She wanted the Child to be successful at the Elementary School, since, “The school is just across the street from my house.” (Transcript at 60.)<sup>42</sup>

After two weeks in the Elementary School, the Petitioner became disturbed at what she believed to be emotional changes in her son. She then removed him from the Elementary School and placed him the GSJ. After two weeks at the GSJ, they notified the Petitioner and recommended to her that the Child be placed back in the 1<sup>st</sup> grade at GSJ. She disagreed with this recommendation and removed her Child from that school and began home schooling the Child in the early part of November 2003. As stated earlier, the Petitioner prepared the curriculum each day for the Child while he was being home-schooled. (Transcript at 61-64.)

The Petitioner was also concerned by what she termed the “inconsistencies” in all of the evaluations of the Child, culminating in that by Dr. K in December 2003. She testified:

My disagreement was initially based on the few pages that I was able to review about the inconsistencies of the reports. You know, I had one report that said - - from Mrs. [R] that said, you know, the cognitive or processing test could not identify a processing deficit and ESL was not ruled out.<sup>43</sup> Then I had Dr. [B’s] report that said that, you know, this child needs to be looked at for ADD/ADHD and a reading disorder<sup>44</sup> and then I had Dr. [K’s] report said, you know, this child’s language and he can’t talk at all.<sup>45</sup> He can’t read. He can’t write and they were very inconsistent. I had reports from his teachers that said, you know, he was doing fine, communicating well. Then I have a checklist that says he’s doing just the opposite. You know, I want an explanation for that and no one can give me that. (Transcript at 68.)<sup>46</sup>

The Petitioner subsequently testified about the first CSC meeting. Under cross-examination, the Petitioner stated, “I never got the answers I wanted or needed about the German assessment plan and how that was going to compare any assessment they do in English for the simple fact that I knew

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<sup>42</sup>The May 19, 2004, hearing dealt exclusively with evidentiary and preliminary matters and its Transcript is separately numbered. Transcript cites in this Decision begin with the hearings held beginning May 24, 2004, and are consecutively numbered from page 1.

<sup>43</sup>*Supra* at 22-23.

<sup>44</sup>*Supra* at 27.

<sup>45</sup>*Supra* at 29-36.

<sup>46</sup>*See also* Transcript at 71-73, 1315-1316 for further discussion of what the Petitioner felt to be deficiencies and discrepancies in the evaluations.

he didn't know anything in English. So, how was that going to tell me if he had a learning disability." (Transcript at 86.)

In her rebuttal testimony, the Petitioner indicates that she does not believe that ESL has been ruled out as a primary cause for her son's inability to read. She made the point, "I don't believe that an English achievement score, used as a screening, can be also used in conjunction with academic scores in German, correlated together, identify a learning a disability for a, in a language that he was never taught in." (Transcript at 1314-1315.)<sup>47</sup>

Another concern of the Petitioner was the use of the AST-2 test, which was conducted in German. The gist of her argument was that these tests were used as "screeners" and were not sufficient to show that the Child had a learning disability. (Transcript at 1315.)

The Petitioner also expressed her concerns with how the December 15, 2003, meeting was conducted. She indicated that she felt rushed and that the meeting was antagonistic. (Transcript at 1316-1317.) The Petitioner signed the eligibility meeting minutes, but she was not in agreement with them. "There were still a lot of questions, particularly in the area of communications. (Transcript at 1318.)

The Petitioner stated that she did tell her son not to answer questions on the BVAT from Dr. K in English. She stated:

In my mind, the English portion testing was already done. In order to discover if there was a discrepancy, I needed to find out what his German abilities were.

That could tell me where the differences were. And so I cautioned him, only answer in German, so we know what you don't know and what you do know. (Transcript at 1319-1320.)

The witness did not believe that her conduct was improper or skewed the test in a different way. "My thought that the learning disability would only be discovered by testing him in German, because that's what he knew." (Transcript at 1322.)<sup>48</sup>

She went on to state:

Also what played a factor is my long-term goals for my child. I knew coming here that at the end of the three years, I was going to retire and we would return to Germany.

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<sup>47</sup>See Transcript at 1348.

<sup>48</sup>See Transcript at 1346.

And at that point in time, as a retiree working in Germany, I would not be eligible to have my son placed in a DoDDS school. So I had that in mind. If he had a learning disability and he needed ESL support, ESL is a long-term process.

. . .

My son's cultural identity is German. And I believe at this point that that's where the majority of disparity comes. Based on the fact that I'm an American, and my son is culturally identified as German. Nobody understood that.

. . .

You know, which language should he be educated in? And that would depend on what services he needed and what services were available at the school. I believe my son needed help in overcoming or at re-mediating his learning disability, not in trying to change his culture. (Transcript at 1326-1328.)

The Petitioner next discussed the assessments that were done, and how they were done. She argues that only formal testing is allowable under DoDDS procedures. (Transcript at 1328.)

She testified that she now believes that the Elementary School made a sincere attempt to assess her son, but that it was insufficient. She also states that he went back to GSJ in the first grade, and has done well. (Transcript at 1329-1330.)

The Petitioner testified that she did see an email at the GSJ from the Coordinator talking about the Child. (Transcript at 1343.)

The Petitioner introduced a video tape of her son reading two books, two pages of spelling in German, one math test and looked at two sets of flash cards (Petitioner's Exhibit 167). The witness then gave her interpretation of what the video showed. (Transcript at 1353-1356.)

Testimony of the Coordinator. This witness is the Special Education Coordinator for the Japan District Schools for DoDDS. His resume is found in Respondent's Exhibit 138.

The Coordinator testified concerning how the assessment plan set forth in Petitioner's Exhibit 39 would be fulfilled. "Our normal procedure is essentially to identify what is the minimum to be accomplished during the evaluation and then it's up to the assessors' responsibility to choose what instruments would be administered." (Transcript at 136.) He discussed how the CSC told the Petitioner the difficulties they would have in finishing the evaluations in the five day period the Child was initially going to attend the Elementary School. The witness also discussed the importance of observation in the educational setting and how they were unable to accomplish this in the home school setting or at GSJ, but one was conducted at the Elementary School. (Transcript at 151-152, 157.) The Coordinator agreed that Dr. K did not perform an observation of the Child in an educational setting.

In discussing the eligibility meeting of December 15, 2003, and its concluding that the Child was eligible under Criterion D over Criterion C, the witness stated, "We identified some concerns in language, but we were also looking at specific learning disability and what we as a team, and you

[the Petitioner] were a part of that team, as you recall, identified specific learning disability over language because our testing showed depressed skills in mathematic[s], short-term memory and those areas really lend themselves more to the learning disability area rather than solely language.” (Transcript at 193.) More specifically, the Coordinator testified that the Child had an information processing deficit, which is a specific learning disability. “It has to do with the child’s production and processing of - - of information auditorily, receptively. It also would include language, reading, mathematics.” (Transcript at 200-201. See Transcript at 851-860.)

The witness also discussed how the assessment would be conducted. He stated that in the course of assessing the Child for an information processing deficit, he would be analyzed for dyslexia. (Transcript at 203, 841-843 and Petitioner’s Exhibit 30.) In looking at the Assessment Plan itself (Petitioner’s Exhibit 39 at 2 and 4) the Coordinator stated, “[It’s] a planning document and essentially once the parent gives us signed parent permission, [Respondent’s] Exhibit 41 for example, that essentially gives us, the school, to use our professional discretion to identify which assessors will accomplish the tests which the parent is giving us permission for.” (Transcript at 860-861.)

During subsequent direct testimony to the Department Counsel, the witness discussed how it was not unusual to go beyond the Instruction’s requirements and obtain evaluators from outside the general area in cases where the student is bilingual. (Transcript at 827-829.) What was unusual was accepting the pre-referral without the Child attending the Elementary School for anywhere from three weeks to eight weeks. (Transcript at 830.) There followed a prolonged discussion of why the Coordinator and the Principal urged the Petitioner to leave the Child in the Elementary School for the duration of the school year, not just five days. (Transcript at 834-837.)

The witness also testified that he was surprised to get Petitioner’s Exhibits 28 and 29 in August 2003. In those documents the Petitioner complained about the assessment plan for the Child, but no meeting had been held and no plan had yet been proposed. (Transcript at 839-840.)

The Coordinator stated that he believed, and still believes, that the Elementary School had the ESL and special education resources to take care of the Child. He stated, “It’s very - - very common for children to our schools with questionable areas of needs or deficits, but also compounded with limited English proficiency. We do this all the time. It’s the nature of our business, servicing children with disabilities all over the world.” (Transcript at 849.)

The witness also discussed the eligibility meeting of December 15, 2003. (Transcript at 883-887.) The Coordinator next was asked by the Department Counsel, “There’s been some concern expressed by [the Petitioner] that her child may have been misclassified and he should have been a [criterion] C or maybe a D, and that he was frozen in time. Is this the last label this child is going to get in the DoDDS system?” (Transcript at 888-889.)

The witness responded:

Some parents are concerned with identification of a label, i.e., learning disabled, mentally retarded. But the program that is subsequently created, the IEP, really has to do with the instructional modification strategies that are appropriate for

that individual child. It has nothing to do with the label per se. Whether a child is identified in a specific learning disability or language, the areas of need, the PLOP, the goals and objective are appropriate for that individual child. An analogy would be the door is open, so to speak.

So even if they're identified for specific learning disability, we could add goals for social skills, for example, or we could add goals for language or for reading, for math. (Transcript at 889.)

Regarding the Petitioner's desire to have the Child's reading disability taken care of in German before transitioning to English, the Coordinator stated that the CSC team did not view that as educationally sound practice. (Transcript at 892-894.) He further stated that the CSC did not feel that the Child needed to be taught only in English or only in German to address his learning disability. The Coordinator also stated, "We [the CSC] came to this meeting to identify whether [the Child] had a disability and met our eligibility criteria. It was not to determine language of instruction." (Transcript at 894.)

The Coordinator discussed his communications with the headmaster of the GSJ. He denied ever identifying the Child or the Petitioner by name to the headmaster of the GSJ. (Transcript at 914-916.)

The Coordinator concluded this part of his testimony by stating an observation at the GSJ would have been helpful, but was not required. He also agreed that sufficient evaluations had been done to determine that the Child was eligible for special education services and what he was eligible for. (Transcript at 923-924.)

The witness was subsequently recalled by the Petitioner as a rebuttal witness. He discussed in detail how the assessment of the Child would take place, and that he believed that, in the December 15, 2003, meeting, that the Petitioner had agreed with that assessment. (Transcript at 1305-1308.) However, he did acknowledge that the parties from DoDDS could have "done a better job of explaining the eligibility meeting, the entire process." (Transcript at 1310.)

There was a discussion about what needs could be handled in the IEP. The witness made the point that the IEP is not a static process. (Transcript at 1311-1312.)

Testimony of Ms. U. This witness is the guidance counselor at the Elementary School.

In describing her observation, Petitioner's Exhibit 45, the witness stated that the Child was speaking English in the classroom at the Elementary School. (Transcript at 215.) The witness also discussed a conversation in English she had with the Child after an altercation on the playground at school. (Transcript at 215-216.)

Testimony of Ms. P. This witness is the 2<sup>nd</sup> grade teacher of the Child at the Elementary School. She has been a language immersion teacher in the past.

The witness first described how she filled out the Communication Impairment Checklist, Petitioner's Exhibit 162. She specifically noted, "Poor reading readiness skills, poor comprehension of written material, difficulty expressing self orally and in writing, watches other children to know what to do, limited amount of writing in journal." (Transcript at 224.) However, this form was filled out the first day the Child attended class. (Transcript at 237.)

She stated that, "[At] the beginning of the year, I was approached saying that this child was from a German school and that he might have some language difficulties. So, for - - for me [to] have heads up on that." (Transcript at 225.)

Ms. P then described how she would modify her curriculum for each student, depending on their abilities. (Transcript at 225-226.) Referring to her statement, Petitioner's Exhibit 62, she reiterated that she felt the Child had the ability to make more progress in her class than he did. She expanded on that comment:

Well, when he first came - - came into my room, I just - - I just felt the excitement of him. He got along very well with the kids. He asked them to come over to his house. He love Bey Blade and so, that was a common topic between him and the other boys and so, he would talk constantly excited about that and when we would do like our work, I know that he was having trouble with, you know, the writing and reading areas. So, I would help - - help him out in that area.

But, it just, - - that first few days after that week, it just seemed like the excitement kind of diminished. It wasn't quite there yet, you know, as it was at the beginning of the - - of the year. He was like ready to learn. Okay. I'm making new friends. I'm ready to - - to move on. It just seemed to diminish throughout the time he was with me. (Transcript at 231-232.)

Ms. P specifically stated that the Child had no problem understanding her verbally. She went on to describe how he did reading and writing exercises in class in English. (Transcript at 239-240.) She disagreed with the Petitioner that the Child had zero knowledge of English other than copying what he sees.<sup>49</sup>

For reading and writing. I don't think it was zero. I think he did come in with some skills, but for instance like I talked about the journal writing, I mean he was able to sound out. He didn't know the letters unless he looked at the alphabet and he could it write it down with assistance, you know. Okay. What other letter do you hear?

So, he did come in with I believe some English skills and for reading, he could read like just a simple the, a and he could kind of decipher some of the other words by looking at that pictures. (Transcript at 244-245.)

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<sup>49</sup>*Supra* at 19.



The witness also testified about the Petitioner's desire not to have her son taught any English, or "confused" by using the English language in class. (Transcript at 233-234.) Ms. P went on to describe her concerns with the Petitioner's request that her son not be taught in English and that he be excused from the room during those activities. (Transcript at 245-246.) She further described how her experience as an immersion teacher helps her in making accommodations for limited English students like the Child. She further testified that such modifications also work with special need students in the same program. (Transcript at 246-247.)

The Petitioner asked the witness why she thought the Child could identify words in English just a few weeks after Mr. Z stated the Child could not identify any English words. Ms. P stated, "I mean kids at that age are very - - I mean they absorb everything. They - - they're learning at a great pace. I'm - - I'm - - I'm not - - I'm speculating, but I'm thinking maybe he picked it up or just - - by just osmosis. Sometimes kids just pick up things and that's what's great about teaching because one day they know it. One day - - one day they don't know it and then the next day they get it." (Transcript at 262.)

Testimony of the Principal. The witness is the Principal of the Elementary School. His resume is found in Respondent's Exhibit 138. He is in his fifth year as Principal of the Elementary School.

The witness clarified that the Japanese Host Nation program at the Elementary School was not to teach students functional proficiency in Japanese. (Transcript at 277.) Regarding language confusion in general, and the fact that the Child may have problems moving from German to English as the primary education language, the Principal made the comment that, "anytime a child is transitioning from one language base to another language base, there's going to be some changes in that child's performance." (Transcript at 280-281.)

Regarding the Petitioner's desire to have the Child removed from class during periods of English instruction, the Principal also stated that the Elementary School:

[Had] actually developed a plan, an assessment plan - - to try and see how much involvement in the class he could participate in, what he could do, what his skill level was and that sort of thing and so, the only way we could do that was actually to have him in the class.

And one of the other things that worried me a little bit was that [the Child] was transitioning into a new school, new environment - - new friends, new classmates, teachers and that sort of thing and I didn't feel like it was a best practice to - - to isolate him away from that sort of thing instead of just being able to modify expectations within the class and help him to - - to be comfortable within that - - that environment. Taking him out of the class while they were doing instruction and so forth, I felt like was not a - - good practice to do. (Transcript at 282-283.)

The witness next discussed how the various assessments would be analyzed by the CSC in developing an eligibility determination for the Child. (Transcript at 284-292.) He later stated that the purpose of the CSC meeting on December 15, 2003, was that:

We - - when we take all of the assessment data that's provided by each of the assessors, the observations and all the information that we get from the medical history, background information coming in from other schools and that sort of thing, we take the data - - and literally synthesize it down to - - to impact statements. You know, how [the Child's] performance was at this - - on this particular assessment. How it correlated with other assessment data similar to that. What were some of the implications of those results? (Transcript at 305.)

When the Principal was called back for a second day of testimony, he and the Petitioner engaged in a long discussion of whether the Child's conduct at the Elementary School was evidence of ADD/ADHD or of his problems transitioning into a new environment. The Principal made the point that some of the symptoms for ADD/ADHD also can be seen in many youngsters who are not suffering from the disorder. (Transcript at 373-375.) He also made the point:

I think the primary factor in this would be that a period of longevity, when you observe a child over a period of time and the child has adapted to an environment, they've settled in, and they're into a routine of things.

And you watch that child in that environment and they actually have been instructed and taught a set of expected behaviors, then if that child continues to display those kinds of behaviors, those symptoms that you have just shown and that I read,<sup>50</sup> then that would put up a flag that there might be issues there concerning ADD. (Transcript at 376.)

On his third day of testimony, the Principal discussed his thoughts and reactions to the Petitioner's consistently expressed desire, even before arriving in Japan, to have the Child attend GJS. He testified that he fully believes his school has the personnel and the tools to teach the Child regardless of his ESL situation and learning disability. (Transcript at 929-933. *See* Transcript at 944.)

The Principal then testified concerning his perspective of the eligibility meeting held on December 15, 2003. His testimony comported with that of other witnesses on this point. (Transcript at 936-939.) He described the meeting as follows:

[It] was a fluid meeting. We started out talking, you know, about the assessments that substantiated the criteria that we would eventually be looking at. And so it was sort of an introduction to the test data. And most everyone would listen to the assessor's description or as the synthesis was being developed. [The Petitioner], she had a great knowledge of - - of things to ask about and she would address her things as they would come up and she would ask for terminology explanations. And, actually, a very active member of that committee. I was very impressed with her attention to detail. And a lot of things that were discussed were to kind of define, you know, what does this mean. Why does this mean this or why - - what does this imply.

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<sup>50</sup>See Transcript at 375, lines 13 to 19.

So I felt like it was a good meeting as far as a lot of dissemination of information. (Transcript at 940-941.)

The witness next goes on to discuss the Petitioner's concerns, expressed at the eligibility meeting, that the reports of Mr. Y and Ms. R show somewhat different results. He said, "[That] at any given time when a child is being assessed, especially for receptive and expressive language knowledge, there is - - there can be sometimes conflicting responses or results of that assessment." He goes on, "[We're] looking for a pattern across several bits of information or several assessments, observations, input from parents or teachers or past history notices." (Transcript at 941-942.)

The Principal described the process:

When we - - when we look at the eligibility data, it's very - - it's somewhat complicated in that it streamlines in from several directions, several assessments and we synthesize that so that we gather patterns across different testing to see if indeed we can say okay these - - these results are validated across several areas within several assessments and they fit within this category or this criteria for eligibility of this certain area. And that's how we determine eligibility, and that's what we did with [the Child].

So, whenever we - - we gather this data, we look at it, we define the eligibility, well that's just the first step. Because after we do that we - - we take a look at present level of performance and we see where the - - the weaknesses and the strengths correlate with assessment data. And then we hypothesize on what might become an individualized educational plan. And that's when we really take a look at how the impact of assessments and performance and observations and all of those things apply to an educational setting. So we brainstorm ways to - - to take a look at individual components of a child's educational program and then we look at how we can put that into an individualized educational prescription, so to speak. (Transcript at 950-951. See Transcript at 956-957.)

The Principal described in detail how the Child could be served, even outside of his criteria (specific learning disability), based on the information in the eligibility evaluation. (Transcript at 951-953.) He then gave his interpretation of the data received that, in his opinion, supported the findings of the CSC. (Transcript at 953-956.)

Under cross-examination, the Principal discussed the fact that the draft IEP, Petitioner's Exhibit 111, might have goals and objectives that could be easily attained by the Child. This allows the educator to obtain a basis of knowledge to work on further tasks. (Transcript at 957-960.)

Regarding the evaluation of the Child, the Principal reaffirmed that he was "very comfortable" in saying that the Child had a specific learning disability as opposed to being connected his bilingualism. (Transcript at 968-969.) Regarding the ability of his school to handle the Child's case the Principal stated:

Well, not only do I think that we've got a fantastic special education program there with the teacher, she's remarkable in actually teaching reading with children with learning disabilities, but we've also got a very good speech and language pathologist that would have assisted in helping both that - - the learning - - the learning impaired teacher or teacher that teaches learning impaired children, helping her identify strategies and techniques that would help [the Child] learn how to work on his short term issues, work on the expressive language issues, but also the teacher that [the Child] was enrolled in her class is also the mother of two bilingual children that is very familiar with the difficulties of a child having the extra time and patience, and sort of the nurturing environment that will help them understand be comfortable in an environment that - - so I think we had the combination to make it all work.

We have the expertise to deal with the learning disabilities. We have the speech and language person that could offer strategies and techniques that could support that. We had a great teacher in line for it. Yes, sir, we could.

And we would never would have tried to stifle the German, either. We would have encouraged [the Child] to use or demonstrate that at any opportunity, and we would have certainly have encouraged [the Petitioner] to have the tutors and the nannies and all of that thing to keep all of that flow. Because I'm very much of an advocate of bilingual capabilities. It's just that we would have also done everything we could to support the success in our environment. (Transcript at 969-970.)

Called as a rebuttal witness, the Principal discussed the contents of Petitioner's Exhibit 167, a videotape of the Child doing various academic subjects. He found points of comparison with the assessments by Ms. R and Dr. K. (Transcript at 1382-1383.)

Testimony of Ms. K.H. The witness is the wife of the Petitioner's Personal Representative and the parent of a special needs child. She testified about the Child's emotional state during his time at the Elementary School.

Testimony of Mr. Y. This witness is the Speech Language Pathologist Assessor who gave the Child a Speech and Language Evaluation (Petitioner's Exhibit 44). His resume is found in Respondent's Exhibit 138.

As part of the Evaluation, Mr. Y gave the Child the EOWPT. He testified that it could be translated to German, "If you were going to use it as a say criterion reference testing just to get a ballpark figure, that would be clinically applicable. . . . I actually recommended that to [Dr. K] when she was trying to determine, you know, another language assessment in German." (Transcript at 315.)

He also gave a brief description of how he conducts an assessment, such as that of the Child. (Transcript at 316.) Mr. Y then discussed how his testing could be used in deciding whether a child had a learning disability, as opposed to an English as a second language situation. Basically, similar tests are given in both languages:

[Then] what you will generally see is that the other language will be quite strong and then the English will be low. So, if you have that kind of pattern, then it's my opinion that it's not a language disorder or disability. It's more just English as a second language.

However, if you tested both - - both languages and you see a pattern of low scores in both, then you've got a pretty good footing just to - - to say that there is a language delay or language disorder. (Transcript at 318.)

The witness went on to describe how he had envisioned using the BVAT as the test to be able to help determine whether the Child had a learning disability instead of an English as a second language problem. He testified:

With the BVAT, you administer a three sub-tests in English and they're primarily vocabulary and one is analogies and they're similar to the sub-tests that are from the Woodcock Johnson 3 and after you finish with that, then you find - - there's 12 different languages that are secondary languages that the BVAT can accommodate and the one I usually use is the Japanese if we get a lot of kids that are English/Japanese, but it also has a German component.

And I know that we have a teacher at East Elementary that could speak German. So, that's sort of what I envisioned the testing would be.

I would do the English part and then [Mr. W] would do the German part of the BVAT and that would be the bases for determining whether or not [the Child] was weak in both languages or just one language. (Transcript at 319-320.)

Mr. Y testified at length about his experience as the father of two bilingual children. He basically describes the acquisition of any language as a dynamic process. (Transcript at 340-341.) He went on to give his opinion that a bilingual child being taught in English for a brief period of time would not dramatically alter the results of his evaluations. (Transcript at 351-357.)

Testimony of Ms. H. The witness is the ESL teacher at the Elementary School. Her resume is found at Respondent's Exhibit 138.

The witness clarified that ESL instruction is not classified as Special Education. "It's a program designed to supply services to those children who have another language in the home so whose academic English may not be quite on the same level of what would be expected for a child to meet with success in the school." (Transcript at 401.) Later in her testimony she discussed how she uses a child's native language in helping them learn English. She stated that she does not discourage children from continuing to use their native language. (Transcript at 447-448.) The witness also described how teaching a special needs child with ESL concerns differs from a student who only is ESL eligible. (Transcript at 448-450.)

Ms. H next went into an in depth discussion of the ESL testing that she did with the Child. (Transcript at 407-417.) She also discussed his behaviors during the verbal part of the examination,

when he just started repeating answers. (Transcript at 417-420, 439-441.) This testimony corresponded to her written reports discussed *supra* at page 20. She also discussed how the written part of the test was done. (Transcript at 420-426, 437-438.)

The witness also discussed the fact that the Child was evaluated as a Level 3 student in Germany as compared to Level 2 in Japan.<sup>51</sup> She stated that she did not feel there was a significant difference between the two tests, given the Child's age and the dynamic way children learn during that period of life. (Transcript at 429-430.)<sup>52</sup> She also described in a general way how she would provide services to students like the Child. (Transcript at 430-431.)

Testimony of Mr. W. This witness is the certified special education teacher, fluent in German, who was supposed to conduct the testing of the Child in German. His resume is found in Respondent's Exhibit 138.

The witness first discussed his background, then he described his preparations for giving the Child the BVAT, as well as the test in general. (Transcript at 475-477, 500-502.) Later in his testimony, Mr. W states that he and the Coordinator in October "had already been discussing possible dates for observation at the [GJS], looking at the German curriculum that's listed there." (Transcript at 489.)

Mr. W also described his contact with the Child at the August 22, 2003, CSC meeting and his background in the German language. (Transcript at 494-498.) He went on to discuss his planning with Mr. Y and the Coordinator to try and properly assess the Child in German. Mr. W also discussed his philosophy of evaluating dual language children.

Testimony of Ms. S. The witness is the CSC Chairperson at the Elementary School.

The CSC Chairperson is in her first year in DoDDS and first as the Chairperson. She testified that she was not familiar with the DoD Instruction, normally using the DoD Manual (Respondent's Exhibit 4). (Transcript at 524-525.)

There was a long discussion with the CSC Chairperson about the procedures used for the three eligibility meetings attended by the Petitioner. The witness testified that written notice was given to the Petitioner for only one of the three eligibility meetings for the Child. This was followed by a discussion of when the Petitioner was notified, in writing, that the Child had been found eligible under Category D. This part of the testimony also contained information on the problems of the Excent computer program used by DoDDS to document special education assessments and meetings. (Transcript at 551-578, Petitioner's Exhibits 83, 84a, 84b, 84c, and Respondent's Exhibit 82.) In this particular case, it meant that the Petitioner received the documents in Petitioner's Exhibit 84a in December 2003, but did not receive Respondent's Exhibit 82 until March 2004. (Transcript at 577-578.)

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<sup>51</sup>See Respondent's Exhibit 36c.

<sup>52</sup>See also Respondent's Exhibit 2a at 13.

There followed a discussion of how the Child's Present Level of Performance was transferred from Petitioner's Exhibit 83 (the CSC minutes) to Respondent's Exhibit 82 (CSC Eligibility Report). (Transcript at 589-594.) The witness indicated that the Present Levels of Performance, which are used to help develop an IEP, could be changed at the IEP meeting if necessary if they were wrong. (Transcript at 599-601.)

Testimony of Ms. R. The witness is the school psychologist for the Elementary School. Her resume is found in Respondent's Exhibit 138.

The witness first discussed the procedures she used in conducting the assessments set forth in Petitioner's Exhibit 50. (Transcript at 607-612.) Ms. R specifically stated that all the instructions were given in English to the Child and he appeared to understand them. (Transcript at 627.) She then testified in depth about the Child's results on the Wide Range Achievement Test III. (Transcript at 612-615. *See* Transcript at 976-980.) She later discussed her administration of the Test of Non-Verbal Intelligence. (Transcript at 974-975.) Ms. R also testified about administration of the Developmental Test of Visual Motor Integration. (Transcript at 995-997.)

The witness also testified about the Child's results on the Woodcock-Johnson Test of Cognitive Abilities. (Transcript at 980-985.) While most of the Child's scores on the clusters were in the average range, his short-term memory was low average. (Transcript at 985-988.) On the other hand, his working memory was in the average range. (Transcript at 988-989.) She then discussed subtests on phonemic awareness, or sound blending, where the Child scored in the high average range. (Transcript at 989-992.) The Child answered many questions in English and, in the opinion of the witness:

[The Child has] got a good basis for the English language because he had to answer me in English and he had to use English words on a lot of these. So he's got a good strong basis there that's there. He may not be able to thoroughly express it because he's not used to speaking in English, but the basis is there.

And from what I observed in the classroom, he can understand what was going on and so from there he could just go forward and build on his foundation that he had. (Transcript at 995.)

The witness was present at the CSC eligibility meeting of December 15, 2003. She was asked if she remembered language being discussed during the meeting. She stated, "My recollection is that his expressive language scores were weaker than his receptive language scores in both languages as far as we could tell. But we didn't have a real clear picture of the whole thing because of the difficulty we had in measuring his language because of different factors." (Transcript at 621.) The witness went on to describe some of the factors as the Child's being bilingual, his uncooperativeness during testing, which included giving no answers and giving knowingly false answers. (Transcript at 621-623.)

Ms. R stated that, based on the totality of the evidence, she saw some emotional and behavioral issues in the Child that needed to be looked at. She did not believe they amounted to a disability, but issues that would have to be dealt with to make sure the Child was receiving an

appropriate education. (Transcript at 628-631.) The witness next discussed that young children, children who were not familiar with the language, or children who had difficulty reading, would show signs of distractibility, immaturity, headaches and/or an inability to sit still. (Transcript at 631-632.) She further said that the Child's conduct during the time he was in the Elementary School was not such as to require an immediate referral for an emotional assessment. (Transcript at 632-633.)

The witness described the process of integration of information that resulted in the finding that the Child had a learning disability:

Because, we kept - - we saw the same thing coming up over and over and over again from the observations and from the data. It was all there. It was subtle in some areas, but it kept coming up, you know, the attention was coming up; the fact that he was stumbling over the words, that he didn't have the decoding skills, the motivation was sometimes not there but we didn't know why. And it could have been compounded by headaches, his sleep. You know, when you're tired you can't focus. But it was all there, it just kept coming up over and over and over again. So we just felt like we had enough to go with it.

The language plays into it as part of a learning disability because they kept saying - - people that knew him well kept saying that the expressive language was weak, but that's going to relate directly into his ability to read because that's an expressive language task. So we would often expect that to happen. (Transcript at 1000-1001.)

The next day, under questioning from the Administrative Judge, the witness explained in great detail her conclusion that the Child has a specific learning disability. She discussed how his scores in many tests were consistent with what the experience was with bilingual children. (Transcript at 1013-1017.) Her conclusion, "He didn't read fluently. He resisted spelling. His mother and others who made an observation that he could memorize the words, but when it got back to transferring and decoding, he'd break down and he couldn't do it. All of these symptoms just fell right into the pattern of - - of a student that would have a - - a learning disability in reading, whether he was bilingual or not bilingual." (Transcript at 1016-1017.)

Testimony of Dr. B. The witness is the school psychologist for the other DoDDS elementary school. His resume is found in Respondent's Exhibit 138.

The witness testified that he saw his contact with the Child and Petitioner as being a counselor for adjustment issues. (Transcript at 640.) He then went into a detailed description and exposition of his sessions with the Child and Petitioner, further set forth in Petitioner's Exhibits 104 and 108. (Transcript at 642-652.) He further stated that, at times, he would ask questions of the Child in English, the Petitioner would translate into German, and the Child would answer the question in English. (Transcript at 645-646.)

The witness testified that he felt that it would be worthwhile for the Child and Petitioner to take advantage of the Japanese/American cultural experience, while retaining the German culture. (Transcript at 654-655.) The witness gave his background as a teacher and counselor with bilingual



students in supporting his statement. (Transcript at 655-657.) Dr. B went on to describe his concerns with translating an English norm test into another language. (Transcript at 660-662.) He later testified that the Child's English has been improving. (Transcript at 694-695.)

There was a long discussion between the Department Counsel and the witness concerning his recommendations set forth in Petitioner's Exhibit 104 at pages 3-4. (Transcript at 681-693.) The testimony revolved around the clinical necessity for the witness to make certain recommendations.

Testimony of Dr. K. The witness is the German speaking DoDDS-Europe school psychologist who performed the second assessment of the Child. Her resume is found in Respondent's Exhibit 138. Her report, Petitioner's Exhibit 82, is found on pages 28 to 36, *supra*.

The witness began by explaining her specific duties. "My duties are to conduct assessments, to review assessments that others have conducted, to train, to consult [with] my colleagues including counselors and teachers, to provide inservice trainings(*sic*) on a variety of topics." (Transcript at 714-715.)

Dr. K described her contacts with the Tagesmutter. The witness testified how the Tagesmutter told her that the Child was often sad and appeared overtaxed and tired. There was a discussion about the fact that the distractibility and poor attention span the Tagesmutter saw was not necessarily evidence of ADD/ADHD or a learning disability. As well, she testified, they could be evidence of depression or a stress reaction. (Transcript at 719-723.)

The witness described why she was sent to Japan to evaluate the Child as follows:

The request that was extended to me was to evaluate [the Child] using German instrument(*sic*) in parallel to his English evaluation in order for us to get a fair assessment of his current cognitive and achievement ability so that we could make a determination about whether or not he would be eligible to receive services for a learning disability.

I was not told to do a language evaluation. I also in an email in response to a request from you to delineate which assessment tools I would be using, wrote the various tools including the German form of the WISC and the Bilingual Verbal Assessment Test. And in that email I also stated that I would attempt to do a German language test if it were available. And the one that I believed I would be able to get was the Marburger Sprachverst Aendnisstest. (Transcript at 727-728.)

Dr. K then discussed her administering the EOWPVT to the Child in German, a modification of the test.<sup>53</sup> Specifically, she gave the instructions in German and had the Child change the language of his response from English to German. The witness explained:

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<sup>53</sup>The results of the administration of this test in English to the Child is found at page 4 of Petitioner's Exhibit 44.

It is, however, under the discretion of psychologists to at times modify a test, and its not unusual to do so. So my modification of the test in terms of asking [the Child] to respond to the picture stimuli in German was an attempt to get some information that would parallel the information we had in English on his verbal abilities to see if there were any differences in his ability to identify pictures in terms of vocabulary words, if that differed in English versus German. (Transcript at 730.)

There followed a discussion of how translation of a test is different from the modifications done by the witness, and some examples of how she administered the modified test to the Child. (Transcript at 730-734.) The Petitioner enquired of the witness whether she believed that it was important to administer a test in strict compliance with the instructions or whether someone like the witness could modify the assessment if necessary. The witness responded:

[Tests] are meant to be administered in terms of their standardized procedures so that we have a basis of comparison when we're - - when we use norm reference tests, we want to make sure that when we're comparing a child age seven to other children age seven, we're really comparing that child on the constructs measured by the test. And if we don't follow standardized procedures, that is hard to do.

But, in assessments, we go also above and beyond norm referenced tests. There are four pillars of assessment. The one being the norm reference test, the other being informal and then there are observations and interviews. All of those pillars are extremely important in assessment.<sup>54</sup>

So there are times, for example, when you're dealing with a child who is bilingual, a child who is maybe deaf or can't communicate as in a child with autism who has severe language impairments, but you still want to gather information and you gather information in terms of less - - a more non-standardized procedure. And that's what you would do with - - by modifying a test.

So in [the Child's] case, for example, he did have norm reference procedures and also more informal procedures.

. . .

So [the Child] had a variety of tests administered in order to collect as much information as possible about his current abilities to learn to think, to reason. And so this was - - yes, it was - - in this case I felt it did take precedence to modify this test so that we had some information about his expressive capabilities in German, especially given that he already had the same test administered in English so that there was a basis of comparison. (Transcript at 738-739.)<sup>55</sup>

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<sup>54</sup>See also Transcript at 1025-1026, regarding the four pillars of assessment.

<sup>55</sup>See Department of Defense Education Activity, "Special Education Procedural Manual, DSM 2500.13-M Revised," September 2003, at page 14-4. (Respondent's Exhibit 4.)

Dr. K next testified about the Child's primary language and how that should be defined. She stated that his primary academic language was German, but she was uncertain if his primary overall language was German or English.<sup>56</sup> She also discussed the fact that it was important to evaluate the Child in German to see if the low scores on the English version of the EOWPVT were due to his bilingualism. (Transcript at 741-742.) In the opinion of the witness, the results of this test, both the score as well as the descriptive information that he responded to, was able to give her a workable result. (Transcript at 747-749.) "[What] this test shows basically is that he did not improve much when he was given the opportunity to respond to the items in German." (Transcript at 748.)<sup>57</sup>

Dr. K stated that she believed that his language issues were in both English and German. She testified, "On the basis of all of the evaluations they suggest that [the Child] has a difficulty in phonological processing, which suggests a learning disability in reading and written expression." (Transcript at 759.)

In making the determination that the Child had a learning disability, as opposed to an ESL problem, the witness testified:

The consensus among all teachers that he had extreme difficulty sounding out words, decoding, that his rate of reading was slow. That his rate of reading acquisition was very slow. That he lagged behind even students who also came from foreign backgrounds so that there was significant concern in terms of his - - his sound symbol association, so his phonological processing, his phoning recording basically.

Then the testing shed more light on that in terms of his difficulty with particularly verbal expression, and especially since he - - he appeared to have difficulty in both languages. In communicating with me, for example, he resorted a lot to nonverbal gesturing, to sound effects. He switched back and forth between English and German. Now, that could be a bilingual issue, but - -but his - - his - - his language didn't have the kind of organization that you would expect in either language. And what that leads one back to is a learning disability that involves phonological processing. . . . The basic thing that's affected is the phoning recording. So what that means is the child's ability to take sounds and translate them into written meaning or verbal meaning in short term [memory]. And that's what the testing on the HAWIK, the Hamburg Wechsler Intelligenztest fuer Kinder, which is the German version of the WISC gave us insight into that. There was some difficulty in verbal short term memory, and that also overlapped with what [Ms. R] found on her testing.

So there were different elements of information that indicated to us that [the Child] was struggling with the phonological processing part. (Transcript at 761-763.)

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<sup>56</sup>See also Transcript at 1024-1025, regarding acquisition of languages.

<sup>57</sup>See also Transcript at 1028-1030.

Concerning giving the HAWIK to the Child, Dr. K stated:

[One] of the issues that is of concern when we test bilingual children is that we unfairly assess their cognitive ability, that we're not assessing them in the language in their -- in their -- in the language that they dominantly use for cognitive and reasoning purposes. So we did not want an unfair lower estimate of this child's cognitive abilities, so the cognitive test was administered in German given that he had been learning academics and performing most of his reasoning and thinking in German at that time. (Transcript at 1028.)

Dr. K also discussed giving the Bilingual Verbal Abilities Test to the Child:

When I -- the BVAT is set up so that the child has to respond to verbal items first in English and then those items that are missed are then probed again in German. I asked [the Child] to respond in English and he stated to me that his mother doesn't allow -- wouldn't allow that and I told [the Child] that it would be fine because I would deal with mom and that it would be my fault and -- and that there wouldn't be any trouble for him because mom would definitely know that it was me who asked to do this and that it was completely my issue and responsibility. And then [the Child] said again, "No, my mom does not want me to."

. . . .

"My mom does not want me to speak in English." And at that point, I didn't encourage him further because he did seem stressed out by -- by the fact that mom wouldn't like this. (Transcript at 1030-1031.)

Because of the Child's refusal to answer in English, the witness was only able to use the German portion of the BVAT as "an estimate of his verbal cognition in German." (Transcript at 1032.) She later testified, based on her experience, that the Child's problems were not related to the fact that he was bilingual. (Transcript at 1042.) The witness also stated that 5 to 14 days in an English language classroom would not confuse, confound or invalidate testing. (Transcript at 1046-1047.)<sup>58</sup>

The witness testified that the conflict between reports concerning his abilities within a short period of time is evidence of a learning disability. (Transcript at 763-764.) There was an extended discussion of how the reports of the Child's language abilities should be viewed. (Transcript at 764-766.)

Dr. K then discussed how she administered the AST to the Child.<sup>59</sup> The witness interpreted not only the Child's score on the test, but how he took the test as well. (Transcript at 766-774.)

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<sup>58</sup>See also testimony of Ms. E, Transcript at 1088-1089.

<sup>59</sup>See pages 33-34 *supra*.

There later was testimony about specific parts of the AST (Petitioner's Exhibit 163). (Transcript at 788-789.)<sup>60</sup>

The Petitioner asked the witness if she would be surprised if, three weeks after testing, the Child was able to read with greater ability than had been shown. Dr. K stated that she would not be surprised by such a result. (Transcript at 778-779.) However, the witness stated that there were variables that could affect the Child's progress. (Transcript at 780-782.)

The witness also discussed her observations of the Child during testing. She states, "I did notice, you know, as I was watching for language samples that - - that he did struggle to - - to express himself verbally. He often resorted to non-verbal gesturing and mimicry and he loved using sound effects. . . . And he also interjected English terms at times. So spontaneously he seemed comfortable using English when not directed to do so." (Transcript at 1032-1033.)

Dr. K discussed the fact that the tests all seem to show that the Child had a problem with phonemic recoding, which is concerned with short-term memory. "[Translating] again a grapheme or a written symbol into a phoneme or a sound symbol and holding that in short-term memory long enough to be able to construct a word and a sentence, to be able to be fluid in reading." (Transcript at 1035.) She went on, "[There] was overlapping evidence, or data, that showed that in auditory short-term memory [the Child] showed weaknesses compared to his strengths in - - in other areas of cognition and reasoning. So, that suggests that the short - - the auditory short-term memory is playing the role for him." (Transcript at 1036.)

The witness testified about how knowledge of his weaknesses, and strengths, would be used to prepare an IEP. (Transcript at 1037-1038.) She also stated that the Child needed the specific support of special educators, that merely moving him back to the first grade, as recommended by the GSJ would not do it. (Transcript at 1040, 1053-1054.)

Regarding her recommendation that the Child focus on English, the witness stated that she thought such a decision would benefit both the Child and Petitioner. In particular, that the Child could be taught in English and his ability to learn and use German would not be affected. (Transcript at 1064-1066.)

The witness also discussed concerns with whether the Child had ADHD or was distracted by the fact he had a learning disability. (Transcript at 1066-1068, 1071-1072.)

Testimony of Ms. E. The witness is an assistant principal at an elementary school in DoDDS. She had a role in revising the "English as a Second Language Manual" for DoDDS.

The witness was asked general questions about the overlap of English as a second language instruction and special education. (Transcript at 1083-1085.) She discussed the fact that there are similar patterns to the way a person learns any language. "[Typically] children who have development in one language will be able to learn a secondary language because what you're

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<sup>60</sup>See also Transcript at 1073-1075.

looking for is the basic structure of language, the basic understanding of how it is put together and how sounds work and how sounds relate to words and words relate to writing.” (Transcript at 1086.)

Testimony of Dr. SP. The witness is a pediatric neuropsychologist for the United States Navy. His resume is found in Respondent’s Exhibit 138. He works with EDIS. His report on the Child is Petitioner’s Exhibit 164, pages 38-42, *supra*.

The witness described the differential diagnoses that he would want ruled out before any diagnosis of ADHD was made. (Transcript at 1147-1148.) Furthermore, he stated that ADHD most times coexists with other learning disorders. (Transcript at 1154.) The witness later discussed the impact of an undiagnosed hyperactive disorder on a student being treated for an information processing deficit. (Transcript at 1174-1175.)

He also agreed with the determination that the Child had a specific learning disability. (Transcript at 1155-1156.) Dr. SP testified about testing for information processing deficits and reading disorders. He discussed phonological awareness and rapid automatized naming. (Transcript at 1166-1168.) The doctor did have concerns about sufficient testing being done to determine if there was a language disorder, as opposed to a specific learning disorder. (Transcript at 1175-1177.)

Based on his experience, the doctor believes that the referral was done appropriately. (Transcript at 1184-1185.) He also believes the CSC was right to find that the Child was eligible for special education as learning impaired, information processing deficit. (Transcript at 1186.)

Testimony of Dr. D. The witness is the Coordinator of Psychological Services for a subdistrict of a major metropolitan school district in the United States. Her resume is in Respondent’s Exhibit 138.

The witness is fluent in English and German and is qualified to interpret psychological assessment tools in German and English. The subdistrict she works in has upwards of 70% of the students being bilingual or monolingual in a language other than English. Upwards of 60 to 100 foreign languages and dialects are used by the students. (Transcript at 1193-1196.)

The witness discussed procedures to make sure that an ESL problem was not improperly used to find that a child has a learning disability. (Transcript at 1205-1206.) There was a long discussion with the witness concerning how an assessment of a bilingual child like the Child should be conducted. (Transcript at 1209-1211.)

Dr. D next testified about the letter the Petitioner sent to Ms. P asking that the Child be dismissed from the class during English instruction. (Petitioner’s Exhibit 42, Transcript at 1213-1215.) The witness had never seen a letter like it before. Concerning the parent’s concern that being exposed to English in the classroom could skew the results the witness stated:

It’s not a valid concern for a variety of reasons. This youngster has been exposed to two languages, so to put one language on hold still doesn’t mean that you can erase that language. So, you still need to assess his ability in that language also.

Learning still continues, and for youngsters who have been exposed to two languages we have found that there is such a phenomena as common underlying language proficiency, which means that there is a benefit from learning two languages simultaneously. It's not that you learn one language here and another language there, it's more like the two languages are in one balloon and you blow up this particular balloon by expanding both.

So, you can't all of a sudden, you know, put one language on hold, and language learning, in addition, doesn't just take place in the classroom while you are doing reading or writing, it goes on, it goes on in your mind even without direct interactive instruction, there is such a thing as incidental learning that takes place.

The assessment, in addition, for a learning disability would not only have assessed his ability to read and write in English, it also would assess his ability to read and write in German, since he has been exposed to German, and we would need to assess both languages and the academic skills in both languages. (Transcript at 1216-1217.)

The witness also stated that it was not necessary to give an exactly parallel German evaluation in addition to the one that was done on the Child in English. She also pointed out the difficulties that other witnesses had noted, "The youngster has difficulty with sampling, he has difficulty with breaking the alphabet code. He has a difficulty translating letters into sounds, and blending sounds into words that he can write down. And its apparent in both languages. This has nothing to do with second language acquisition." She goes on to describe how these concerns were noticed in Germany as well as in Japan. (Transcript at 1218-1220. *See* Transcript at 1222.)

Dr. D agreed with the procedures and assessments done by the Elementary School to confirm whether the Child has a specific learning disability. (Transcript at 1224-1227.) She also stated that, in her opinion, no more testing needed to be done, "By looking at all the work samples, by looking at the information that teachers have given as to progress he has made, attempts that have been made to help him improve until the time of the testing was finished, I don't think that anything more could have been done, and that any other instrument would have been available to assess him." (Transcript at 1228.)

The witness discussed the video tape of the Child reading (Petitioner's Exhibit 161). She found evidence that supported the finding that he lacked word attack skills and sound blending. (Transcript at 1232.)

Dr. D next discussed the home school work samples and lesson plans (Respondent's Exhibit 38.) She had concerns with how the lesson plans were developed. (Transcript at 1234-1238, 1241-42.) In addition, the witness had concerns as to whether the Child was in a stabilized educational environment that would allow for additional evaluations to be worthwhile. (Transcript at 1242-1246.)

Based on her professional experience, the witness discussed the difficulties in assessing students who do not have English as their first language. In that respect, she believes that the testing

in German and English done in this case provided, “More substantial information that they still could weigh and argue with, you know, and manipulate but it gave them something to defend in addition to the observation and analysis of historical data. Gave them like a springboard.” (Transcript at 1279-1280.)

On rebuttal, the witness testified extensively about the videotape of the Child, Petitioner’s Exhibit 167. In the first reading, Dr. D found evidence that supports the assessments that had been conducted. (Transcript at 1366-1369) She states, “He really has a difficult sound with sound/symbol association. He has a difficult time retrieving sounds from his short term memory, on a consistent basis. What we see also is that he gives up when things get too difficult. That’s another observation that was made in several of the testing situations, Dr. [K’s] evaluation.” (Transcript at 1366-1367.)

She says later, about the Child’s using his finger to help him read:

We know that he is able to utilize some techniques, but he, he still needs to be prompted. Mom had to prompt him several times. Now, go and use your finger again. And then he would use his finger.

So, the technique is not one that he relies upon independently. He is not really fully aware, at all times, what helps him. So he needs that adult to assist him to experience the highest amount of benefit, which would indicate the need really for special education. (Transcript at 1371-1372.)

After viewing Petitioner’s Exhibit 167, the witness continues to believe that the Child suffers from a Specific Learning Disability. In other words, “He has difficulty translating what he hears into letters, or he has difficulty translating what he sees into an oral sound.” (Transcript at 1378.) She also reconfirmed that the Child has a deficit in short term auditory memory. (Transcript at 1379.)

Testimony of the Child. In addition to being seen on the videotape, Petitioner’s Exhibit 167, the Child testified.

## **RESOLUTION OF ISSUES AND CONCLUSIONS**

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

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



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

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

The Supreme Court went on to say:

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

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

Several manuals promulgated by DoDEA and DoDDS have been entered as exhibits in this case by both parties. For example, DSM 2500.13-M, "Special Education Procedure Manual, Revised," dated September 2003. While such manuals can be evidence, neither party has shown that they are legally binding on the Hearing Officer under a Federal statute, Executive Order, or Federal regulation. (DDESS Case No. E-03-001, January 20, 2004, at 8-9.)

With that legal background, we now move to a discussion of the 14 issues that were to be resolved during the due process. As stated above at pages 3-4, these issues were determined during pre-hearing conferences between the parties and the Hearing Officer.

1. Whether the Respondents failed to properly acknowledge German as the “native language” of the Petitioner Child. Specifically, whether the CSC (Case Study Committee) failed to properly assess the Petitioner Child’s German and English language skills.

When the Coordinator and the Elementary School administration were notified of the pending arrival of the Child in the Summer of 2003, they were faced with a challenging situation. The Petitioner had informed them that she believed the Child had a learning disability. The Child had attended only German school for several years, and evidently was bilingual in German and English.

In addition, for whatever reason, the Bavaria District had only been able to do one informal assessment, by Mr. Z. The Bavaria District had not accepted the referral for special education, and so left the process to be continued by the Japan District. (*Supra.* at 14-15.)

From all indications, the Petitioner had already determined the result she wished, even before she and her Child arrived in Japan. This is shown by the fact that, before the Coordinator, the Principal, and their staffs even had the opportunity to prepare an assessment plan for the arrival of the Child, the Petitioner had sent them a letter saying she was already unhappy with what they were doing and was going to register the Child at the GSJ (Petitioner’s Exhibit 29).

Once the Petitioner and Child arrived in Japan, the Coordinator and the Elementary School staff worked diligently to prepare an assessment plan for the Child. They realized that any assessment would have to determine whether the Child actually had a learning disability, or whether his deficits were caused by his insufficient command of English.

Based on all of the evidence available, I find that the CSC did properly assess the Child’s German and English language skills. Their assessment procedures were carefully thought out and conducted in a manner which, in accordance with the Instruction, measured “the extent to which a child has a disability and needs special education, rather than measuring the child’s English language skills.” (*Supra.* at 9.) This is true of the original assessment plan of August as well as that prepared in September 2003. (Petitioner’s Exhibits 37 and 79.)

The Japan District was required to determine the Child’s English language abilities, as well as those in German. To that end, at the first meeting in August 2003, they indicated to the Petitioner that the “Assessment will be conducted in English and German.” The CSC members worked hard to determine which assessment instruments could be used with the Child to determine whether he had a learning disability in both languages. The mere fact that the Petitioner stated that the Child had poor, or nonexistent, English language skills was not an opinion that the CSC was obligated to accept without testing. In addition, given the fact that the Petitioner indicated to the ESL teacher that the Child was “playing” with her during the testing,<sup>61</sup> it was even more important for them to get an accurate assessment of the Child’s language skills.

The Petitioner consistently has indicated that her son is culturally German, and she wants him to retain his German culture and language abilities because it is her desire to retire there in

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<sup>61</sup>*Supra.* at 20.

several years. Based on all of the information available, and as further discussed below, the only reasonable conclusion is that the Petitioner did not want her son educated in English, taught to read English or examined in English. To that end, the Petitioner continually attempted to interfere with, delay or diminish the results of English language testing and instruction. This is in direct contradiction to the requirement of cooperation by the parents with the school that is envisioned by the IDEA. The statute and regulations give the parent a voice in the proceedings, not a veto. When faced with a result she did not like, the Petitioner continually attempted to change the rules so as to get a result in her favor.<sup>62</sup>

2. Whether the Respondents and their evaluators acted with deliberate intent to ensure that all evaluations of the Petitioner Child resulted in placement in the Elementary School's only available school-based program, even before assessment and evaluations fully determined all of the Petitioner Child's educational and related service needs.

This allegation was unproven. The record is clear that the evaluators, and the staff of the Elementary School, attempted to determine the best placement for the Child. They did not try to "stuff" him in a pre-determined hole. As set forth at great length in the record of this case, and in this Decision, each evaluator took great care during examinations of the Child. The results described in depth in the exhibits and testimony at the hearing reflect accurately what results the Child achieved on the various instruments.

After the first phase of the assessments were done, it was obvious to the Coordinator and staff that they were going to have to evaluate the Child in German to determine whether the deficits they saw during the English language testing were also seen in German. To that end, they attempted to find German language instruments that would give them such information. At the beginning, Mr. W was going to use the BVAT to in order to measure the Child's language ability to give the CSC, including the Petitioner, a baseline to work from. After the Petitioner objected, removed her Child from the school, and asked for mediation, the decision was made to fly a native German speaker, Dr. K, in from DoDDS-Europe to do the additional assessments.

3. Whether the evaluator Dr. K was not qualified to conduct the evaluations she was assigned; whether Dr. K administered inappropriate testing; whether Dr. K did testing in English without the permission of the Petitioner Parent; and whether Dr. K improperly administered other testing and assessment, as well as interviews, in her evaluation of the Petitioner Child.

Dr. K was well qualified to do the evaluation of the Child that she was assigned. As her resume shows, she has a Doctorate in Child Clinical Psychology (Respondent's Exhibit 138). At the time she gave the evaluation to the Child, she had a been a school psychologist in DoDDS-Europe for four years. Part of her job position is to give "comprehensive psycho-educational assessments."

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<sup>62</sup>See, regarding the requirement for cooperation by parents in the analogous situation of unilateral placement and reimbursement for independent evaluations, *Patricia P. v. Bd. of Educ. of Oak Park*, 203 F3d. 462, 469 (7<sup>th</sup> Cir. 2000), *S.M. v. Weast*, 240 F. Supp.2d 426, 436-437 (D. Md. 2003), *In the Matter of D.P.*, 2004 U.S. Dist. LEXIS 4903 (W.D. Wis. March 16, 2004.), and *Great Valley Sch. Dist. v. Douglas and Barbara M.*, 807 A.2d 315, 322 (Pa. Cmwlth. 2002).

The evidence shows that Dr. K administered appropriate testing, consisting of a carefully thought out series of assessments in German and English designed to complement the English language testing that had already been done. As set forth above at pages 29-36, Dr. K's evaluations were extensive and almost exclusively in German. The Petitioner was fully informed by Dr. K of the assessments that would be given before the psychologist traveled to Japan (Petitioner's Exhibit 81). In response the Petitioner said, "The description sounds like a very comprehensive assessment." (*Ibid.* at 1.)

The Petitioner particularly was concerned about how Dr. K used the EOWPT. Dr. K explained in detail when, why and how she modified the various tests. Her modifications were appropriate and allowed her to obtain valid and useful information about the Child. The Petitioner failed to show that the modifications were improper. Based on the evidence submitted to me, I specifically find that Dr. K's modifications of the EOWPT from English to German were appropriate under the circumstances.

Dr. K did not inappropriately attempt to test the Child in English without the permission of the Petitioner. During the email exchange, Petitioner's Exhibit 81, the Petitioner was informed that Dr. K would be giving the Child the BVAT. Furthermore, she was specifically told that the BVAT measured the Child's "bilingual verbal ability, or the combination of cognitive/academic and language abilities possessed by bilingual individuals in English and another language (in this case German)." (*Supra.* at 28.)

Rather, it was the Petitioner who inappropriately interfered with the ability of Dr. K to properly assess the Child during the BVAT. She did this by telling the Child not to answer any questions in English. This would, of course, totally skew the results of the BVAT. The Petitioner indicated that she did not feel her actions skewed the test. (*Supra.* at 44.) That contention is rejected.

One conclusion is that the Petitioner did not want the CSC to know her son's true abilities in English. Based on the weight of the evidence, including his testimony, it appears that the Child is fairly fluent in the English language. Additional support for this finding is the Petitioner's attempt not to have her son taught in English during his short time at the Elementary School. Forcing her child to stand outside the school room until the teacher agrees that he doesn't have to do the usual schoolwork in English is not a path designed to help the Child. Additionally, even though she knew it was available, the Petitioner did not have her son attend any ESL classes, even during the period he was being home-schooled.

The Petitioner indicated that she believed sufficient testing had been done in English, and only German needed to be explored by Dr. K. (*Supra.* at 44.) This contention was rejected by every educator who testified. The Petitioner's burden is to show that the testing was inappropriate, she has not done so. Here, as elsewhere, the Petitioner attempted to substitute her own judgement, unilaterally and without notice, for that of the CSC. If the Petitioner had problems with the testing that was being given, or felt that sufficient testing had been given in English, her recourse was a discussion with Dr. K or the Coordinator, not to engage in this disruptive conduct, then complain because the assessment was, in her opinion, not proper.

Every aspect of Dr. K's involvement in this case - testing, assessments, interviews, observation and report - was properly and professionally conducted. Her conclusions are well thought out, and supported by the testing instruments. The fact that they do not comport with what the Petitioner wanted for the Child does not mean they are wrong.

4. Whether the proposed evaluator Mr. W was not qualified culturally to conduct the evaluation of the Petitioner Child that he was assigned to do.

Mr. W has a degree in German, lived many years in Germany, and speaks fluent German. He is a certified special education teacher (*Supra.* at 54). I find that he was very well qualified to conduct the testing that the Coordinator and the CSC were considering having him do. It is within the prerogative of the school to decide who the evaluators are going to be. The Petitioner indicated that the Child felt Mr. W did not speak German well enough to evaluate him. That is not the standard.

[It] is clear beyond reasonable contention to the contrary that under the IDEA a school district has a right to use its own staff to evaluate a student, even over objections that the testing would harm the child medically or psychologically. *Andress v. Cleveland Independent Sch. Dist.*, 64 F.3d 176, 178-79 (5<sup>th</sup> Cir. 1995). There is no exception to this rule. *Id.* at 179. The right of the school district to choose qualified professionals it finds satisfactory is unquestioned. (Citations omitted.) (*Great Valley Sch. Dist. v. Douglas and Barbara M.*, 807 A.2d 315, 322 (Pa. Cmwlth. 2002).)

Petitioner's claim to the contrary is unfounded.

5. Whether the Bilingual Verbal Assessment Test (BVAT), in and of itself, is a sufficient instrument to determine whether the Petitioner Child has a learning disability as opposed to an English as a Second Language (ESL) issue.

The use of the BVAT in this case was not designed, or used, as the sole instrument to determine whether the Child had a learning disability as opposed to an ESL issue. Because of the improper interference by the Petitioner, the test was not successfully completed. However, as discussed below, the failure of the Petitioner to allow the proper administration of the BVAT is not fatal to the overall evaluation of the Child.

6. Whether there was sufficient evidence presented to the Respondents' staff in Japan to require them to evaluate, or refer the Petitioner Child for evaluation, for suspected dyslexia.

The evidence is clear and convincing that the child does have a specific learning disability connected to reading. Several witnesses spoke at great length concerning this fact, and the evidence of the assessments confirms the testimony. However, the evidence does not show that the Child has dyslexia, or consistent signs that point to it. In my opinion, sufficient evidence was not submitted requiring DoDDS-Japan to evaluate the Child further at this point in time for dyslexia.

7. Whether there was sufficient evidence presented to the Respondents' staff in Japan to require them to evaluate, or refer the Petitioner Child for evaluation, for suspected Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder (ADD/ADHD).

The Child was appropriately referred to EDIS for consideration of symptoms consistent with ADD/ADHD. The report (Petitioner's Exhibit 164) indicates that the Child may be suffering from ADHD. This issue has been rendered moot by events. It is appropriate for the CSC to consider this report. However, the impact of ADHD on his education has not been quantified at this time and is not an issue in this case.

8. Whether the Eligibility Report issued by the Case Study Committee (CSC) in this case was defective and, as a result, denied the Petitioner Child a Free and Appropriate Public Education (FAPE).

I find that the Eligibility Report issued by the CSC was not defective. (*Supra.* at 37.) It was a reasonable and logical synthesis of all of the information that was available to it. As set forth at length in this Decision, the facts of the case support the conclusions which are shown on the Eligibility Report. The Child has not been denied a FAPE due to any alleged procedural failures in the preparation of this report.

9. Whether the CSC Eligibility Determination meeting failed to include a regular education teacher of the Petitioner Child, and whether the absence of this person under these circumstances contributed to a denial, or amounted to a denial, of FAPE.

It appears that the Child's teacher, Ms. P, did not attend the Eligibility Determination meeting. However, she had only had the Child in her class for a little over two weeks, and that was several months before the meeting. Under the particular circumstances of this case, given the involvement of many other professionals with intimate knowledge of the Child, including Dr. B, I find that her absence was not such a procedural flaw as to contribute to a denial, or alone constitute a denial, of FAPE. (*See, Ford v. Long Beach Unified School District*, 291 F.3d 1086, 1089 (9<sup>th</sup> Cir. 2002).)

10. Whether the Petitioner Parent was denied an opportunity for meaningful participation in the process of evaluating the Petitioner Child for special education services at the Elementary School.

The Petitioner was an active, intelligent and involved member of the CSC. As stated above, on occasion she was not as cooperative as she could have, and should have, been. Her very specific desires for the Child were not agreed to by the CSC, a conclusion which I support in this Decision. The fact that she is unhappy with the result does not mean she was not a meaningful participant. As stated earlier, the law and regulations give her a voice in this process, not a veto. Based on the totality of the evidence, I find that the Petitioner was not denied an opportunity for meaningful participation in the process.

11. Whether the CSC made recommendations that were educationally improper or in violation of the IDEA because of the Petitioner Parent's inability to fulfill the recommendations based on geography, her duty position and military obligations.

After a thorough evaluation of all the evidence of record, and in accordance with the conclusions reached regarding other issues, I specifically find that the CSC made recommendations that were educationally proper for the Child, and if fulfilled at the Elementary School, would provide him a FAPE. I further find that the staff of the Elementary School is fully capable of educating the Child in a way that is consistent with the IDEA and the Instruction. Specifically, that he could make educational progress at the Elementary School. The regulation and the law require no more.

The Petitioner alleged that the recommendations of the CSC were not capable of being executed by her due to her position in the Air Force. She did not support this allegation at all. The record shows that the staff was aware of her duty responsibilities and, to the best of their ability, worked with her concerning them.

12. Whether the evaluations were insufficient to show that the Petitioner Child needed to be taught in one language (English) over all settings.

There was considerable discussion concerning this proposition. However, I do not believe that the resolution of this question is material and relevant to a resolution of the case. To the extent that the argument is that the CSC attempted to force the Child into an English language program against the weight of the evaluations, that argument has no merit.

13. Whether DoDDS violated the confidentiality of the Petitioner Child's educational records by releasing them to the German School in Japan (GSJ) primary school without the Petitioner Parent's permission. Particularly, whether this alleged conduct contributed to a denial, or amounted to a denial, of FAPE.

The Coordinator flatly denied saying anything about the Child by name to the GSJ. The Petitioner stated that she saw the Child's name in an email, but was unable to provide the email or any other supporting evidence. I do not find that sufficient evidence has been shown to meet the Petitioner's burden under this issue.

14. Whether the evaluation by DoDDS-Japan of the Petitioner Child, as a whole, was comprehensive, appropriate, and was conducted in accordance with the IDEA and the DoD Instruction.

This contention is proven. The record of this case shows that the staff of the Elementary School and DoDDS-Japan followed the IDEA and the Instruction in evaluating the Child. The record of the tests, observations and evaluations are extensive and are set forth in this Decision. In my opinion, the record shows, and the testimony confirms, that the Child has a specific learning disability. This was shown by testing in both German and English. Such testing in both languages is required to make sure that the Child has a learning disability.

The record also shows that the Petitioner, on occasion, actively interfered with the education, testing and evaluation of her son. She particularly did this when the activities were to be conducted in English. Her desire to have her son taught only in German does not have any educational or other support. On the contrary, the record supports the proposition that the Child would make educational progress if he was allowed to attend the Elementary School on a full-time basis with ESL support. It would be inappropriate to grant the Petitioner an independent educational evaluation when her own conduct affected the evaluation that was done.

In addition, besides the Petitioner parent, no other witness had negative or critical opinions about the evaluations conducted by DoDDS. Petitioner did not produce evidence from a qualified expert witness who was of the opinion that the evaluation of the Child, in whole or in any part, was inadequate, contrary to educational standards, or was otherwise inappropriate.

The evaluations conducted in this case must follow the Instruction and be sufficient to allow the CSC to make educational decisions for the Child. In my opinion, both statements are true. Any procedural failures are not of a level to affect the provision of a Free and Appropriate Public Education for the Child. The file on this Child is extensive, containing the evaluations of several highly trained and regarded educators. The testing is wide-ranging and appropriate. The testimony of Ms. R (*Supra.* at 56-57) and Dr. K (*Supra.* at 60-61) sets forth at length the reasoning which the educators used in finding that the Child has a specific learning disability. I fully support and adopt that reasoning.

The Petitioner's request for an independent evaluation in German is denied. Her request for an evaluation of the Child for ADD/ADHD is denied as moot. Her request for monetary compensation is denied.

The Respondent's request for a finding that the evaluation of the Child conducted in this case is appropriate is granted.

## **ORDER**

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

1. The Petitioner has failed to meet her burden of proof and her request for an independent evaluation in German is **DENIED**.
2. The Respondents have met their burden of proof and their request that I find the evaluation of the Child conducted by the Respondent's is appropriate is **GRANTED**.



3. The Petitioner's request that the Child be evaluated for ADD/ADHD is **DENIED AS MOOT**.
4. The Petitioner's request that she be reimbursed for educational expenses is **DENIED**.
5. It is **ORDERED** that the Elementary School CSC shall meet within 30 days of the date of this Order for proceedings consistent with this Decision. This shall include considering the report of Dr. SP, Petitioner's Exhibit 167. This meeting shall be held with or without the attendance or participation of the Petitioner.
6. It is further **ORDERED** that the Elementary School IEP team shall meet within 30 days of the date of the CSC meeting and prepare an IEP for the Child. This meeting shall be held with or without the participation or attendance of the Petitioner.
7. Relief which is not specifically awarded in this Order is hereby **DENIED**.

### **APPEAL RIGHTS**

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

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

Wilford H. Ross  
Hearing Officer