

Indiana Board of Special Education Appeals



151 West Ohio Street • Indianapolis, IN 46204
Telephone: 317/232-6676
Facsimile: 317/232-0744

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of L.B., and)
Fort Wayne Community Schools,)
) **ART. 7 HEARING NO. HR-026-2009**
)
Appeal from the Decision of:) **Status: Closed to Public**
Terry R. Curry, J.D.)
Independent Hearing Officer)

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History¹

The Student initiated a request for a due process hearing in a letter dated October 16, 2008. The Indiana Department of Education, Division of Exceptional Learners (“Division”), received the letter on October 16, 2008. The Superintendent of Public Instruction appointed Terry R. Curry, J.D., as the Independent Hearing Officer (“IHO”) on October 16, 2008, with December 30, 2008 as the date for a final written decision. William L. Sweet, Jr., Esq., appeared on behalf of the School. The parent was proceeding *pro se*.

On October 30, 2008, the IHO conducted a telephonic pre-hearing conference. The IHO issued a pre-hearing order on October 30, 2008. In the agenda issued for the pre-hearing conference, the IHO identified the following issues:

- 1) Has the School provided a free and appropriate public education for Student?
- 2) Is the Student’s current level of special education services or placement appropriate for Student?

The Due Process Hearing occurred on December 4 and 5, 2008. The IHO published a final written decision on December 30, 2008. Based on the testimony at the hearing and in consideration of the documentary evidence submitted, the IHO determined the following Findings of Fact.

Findings of Fact

1. The Student is an 18-year-old male who was first determined to be eligible for special education services during elementary school. The Student’s primary diagnosis is mild mental disability, with a secondary disability of communication disorder. He has been

¹ The Procedural History is taken substantially from the Independent Hearing Officer’s final written decision. Neither party objected to the IHO’s recitation of the procedural history. Corrections and additions have been made where warranted.

enrolled in Respondent school system since September, 2007, and now attends Fort Wayne Snider High School as an 11th grade student.

2. Respondent Fort Wayne Community Schools (the "School") is a school corporation in Allen County, Indiana.

3. The Student has received special education services continuously by School from September, 2007, to the present. Such services have included speech services and one-on-one instruction.

4. The School and the Student's mother have engaged in a series of disagreements regarding the Student's education, with the genesis of the present dispute being implementation of an IEP dated August 15, 2008.

5. The Student was enrolled in the School in September, 2007, after moving from Worthington, Ohio. The School was provided with an unsigned copy of the Student's prior IEP from Ohio (the "Ohio IEP"). A case conference committee ("CCC") was convened on September 13, 2007, but the Student's mother declined to approve the resulting IEP. As a consequence, the School continued to implement the Ohio IEP. The Student's area of exceptionality was identified as moderate mental disability by the Ohio IEP.

6. A meeting of the CCC on November 6, 2007, resulted in a second proposed IEP, which the Student's mother again declined to approve. Because the Student's instructors believed that his performance was above the level of moderate mental disability, the School requested permission to undertake an educational evaluation, which was completed in December, 2007. A subsequent CCC convened on December 11, 2007, concluded that the evaluation and the Student's performance "indicate that [the Student] functions as a student with mild disabilities with discrepancies between what is expected from his ability and how he is actually functioning in his academics." The Student's mother again declined to approve the IEP of December, 2007. Notes of the CCC meeting state that "Mother is still frustrated about the lack of information being sent home in regards to what work [the Student] is doing in the classroom."

7. Mediation conducted on January 15, 2008, resulted in an agreement. Areas of agreement included an independent educational evaluation ("IEE") at School expense, compensatory speech services, classroom observations, and specific reading components. However, the agreement did not include an agreed-upon IEP, or implementation of the Ohio IEP.

8. The CCC met again on May 5 and May 29, 2008. However, the IEE to be conducted pursuant to the mediation agreement could not be completed until June, and the Student's mother declined to approve the May, 2008, IEP. It was agreed by the CCC that the Student would receive Extended School Year services in the areas of math and reading/comprehension.

9. An IEE by Dr. Peter Dodzik was completed by report dated July 17, 2008. Dr. Dodzik stated that his evaluation and testing of the Student was consistent with prior testing. Dr. Dodzik's observations included the following:

My overall impression is that this is a young man with mild mental deficits in cognitive abilities but whose general social interaction and common sense appear to be slightly above these scores. In fact, in speaking with him, he actually comes across as a relatively engaging young man who seems to comprehend social meaning quite easily. This is in stark contrast to his academic scores.....

My recommendation would be that his academic curriculum be augmented to a curriculum more consistent with third grade reading and fourth or fifth grade math level.

10. The CCC met again on August 15 and August 21, 2008. The resulting IEP for the period from September 9, 2008, to June 3, 2009, was again rejected by the Student's mother. The School implemented the IEP after providing Notice of Procedural Rights mailed to the Student's mother on August 27, 2008, and the Student's mother failed to initiate any of the procedures set forth in 511 IAC 7-42-7 and 511 IAC 7-42-8 to challenge the IEP.

11. It is significant to note that the August IEP was not only intended to continue to address the Student's academic needs in regard to math and reading, but to also incorporate job desire for the Student to obtain employment in the construction trades. The proposed 2008-09 school year curriculum for the Student is set forth below.

12. Lisa York ("York") is resource teacher for the School's department of special education. Her responsibilities include assistance with teachers and administrators to assure that special education students are receiving education in accordance with their particular IEP. York testified that an interim IEP was created for Student in September, 2007, which relied upon the Ohio IEP. However, it was determined early in the fall semester of 2007 that an educational evaluation should be completed for the Student because his teachers were reporting that he was doing well and the Student's mother stated that the Student had already achieved the math goals of the Ohio IEP. York testified that the Student's progress was tracked by a variety of techniques, including report cards, narratives, work samples, and quarterly written progress reports. York further testified that the Student possesses "splinter skills," in that he works at a relatively high level in some skills but lower level in other skills, even in a single subject such as math. Because the Student has such splinter skills, he is instructed with a variety of materials rather than a single grade level course book. Finally, York testified that the August, 2008, IEP is appropriate for the Student.

13. Sandra Eager ("Eager") was the Student's math teacher during the 2007-08 school year in an introductory pre-Algebra class. Eager testified the Student quickly achieved virtually all math goals set forth in the Ohio IEP and that the Student was working at sixth to seventh grade level during the time he was in her class. In order to complement the Student's stated desire to consider construction trades, Eager also worked with the Student and with other teachers to incorporate measurement skills into the Student's math curriculum.

14. Marcea Guthrie (“Guthrie”) became the Student’s teacher of record as of May, 2008, and remains so to the present. She confirmed that the Student has made progress pursuant to the August, 2008, IEP, and described the Student as a “great kid.”

15. The Student’s original teacher of record at the School was Betty McCroury² (“McCroury”). She was replaced by Guthrie as teacher of record in May, 2008, because Mother objected to McCroury. She observed within the first month that the Student was capable of doing more challenging work than that prescribed by the Ohio IEP. The subsequent educational evaluation completed by the School in December, 2007, confirmed that the Student functioned at a mild mental disability level rather than the moderate level set forth in the Ohio IEP.

16. Marsha Wagner (“Wagner”) is speech language pathologist for the School. She has worked with Student from September, 2007, to the present. Her work with the Student includes one-on-one individual speech services, as well as support and assistance to other teachers working with the Student. Wagner testified the Student has made “wonderful progress,” based both upon Wagner’s own observations and reports to her from the Student’s teachers.

17. Ann Barnes-Smith (“Smith”) is supervisor of special education for the School. As described below, the Student’s schedule and curriculum for the 2008-09 school year was devised in part to comply with the Student’s mother’s insistence that the Student required vocational training, according to Smith.

18. Theresa Oberly³ (“Oberly”) is director of special education for the School. She testified that the August, 2008,⁴ is appropriate for the Student, particularly in that it will allow the Student to learn application of academic skills to vocational training.

19. Mary Larson (“Larson”) is assistant principal at Anthis Career Center. The Center provides career and technical education for all high school students in Allen County. Larson testified that she would anticipate that the Student would participate this school year in a Community Work Skills program for special education students, as described below, with the possibility that the Student would then be recommended next year for placement in Anthis Career Center auto service or construction programs.

20. In accordance with the August, 2008, IEP, the Student’s schedule for the first semester of the 2008-09 school year was one-on-one instruction in math in the resource room during first period, developmental reading in second period, conditioning/physical education during third period, and writing and language skills in fourth period. In addition, the Student received speech services during first period on Tuesday and Thursday. The proposed class schedule for the Student in the second semester is one-half day at Snider High School with a reading class and a “Woods” wood-working class and one-half day at Anthis Community Works Skills Class, which would include math skills, resume preparation, job interviewing, and other skills to prepare the Student to seek employment.

² [Sic]. Teacher’s name should read “McCrouy.”

³ [Sic]. Director’s name should read “Oberley.”

⁴ [Sic]. Should read: “. . .that the August, 2008, IEP, is . . .”

21. The Student testified at and was present throughout hearing of this matter. The Student is clearly a delightful, polite young man with a well-developed and appropriate sense of humor. He is a member of the Snider High School bowling team and participates in other school activities. It appears that the Student has an excellent relationship with the School staff and teachers.

22. The mother's contentions in this due process hearing request are generalized allegations which revolve for the most part around her belief that she is not receiving sufficient information from the School. Both by way of her questions of witnesses and her own testimony, the Student's mother repeatedly suggested that she was receiving no information or inadequate reports regarding the Student's performance. By contrast, the School staff testified to their efforts to satisfy the Student's mother's requests for the Student's materials and progress, including but not limited to sending work samples to the Student's mother on a weekly basis and providing quarterly written progress reports. Indeed, the Student's mother's contentions are sometimes contradictory. By email dated March 25, 2008, the Student's mother complained to Eager that "it is unfortunate the IEP team advanced [the Student to Eager's Math 3-4 class] rather than allowing him to self-study math." However, the Student's mother now complains that the Student is in "study hall" rather than in class because the Student was in the resource room in first period for one-on-one math instruction. More to the point, the Student's mother's generalized contentions fail to satisfy Petitioners' burden of proof in support of the due process hearing request.

23. In spite of her contentions, the Student's mother presented no evidence to sustain her burden of proof that the School has failed to provide FAPE for the Student. No relevant evidence was presented to demonstrate that Student's current level of performance is not commensurate with his cognitive ability. The only evidence in this hearing was that the Student was performing commensurate with his cognitive ability and that the Student has made measurable and consistent progress toward IEP goals.

24. The Student's mother likewise failed to present any evidence to establish that the Student's current placement or program is inappropriate. On the contrary, the program created for the Student for the 2008-09 school year is undeniably intended to assist the Student in his stated desire to pursue employment in the construction trade and to prepare the Student for such transition to adult employment.

25. To the extent that any of the foregoing Findings of Fact might more properly be categorized as a conclusion of law, it shall be considered a Conclusion of Law.

Based on the foregoing Findings of Fact, the IHO made the following Conclusions of Law.

Conclusions of Law

A. Petitioners have the burden of proof in an action under IDEA and Article 7. Schaffer v. Weast, 126 S.Ct. 528 (2005). To meet the burden of proof on an issue, petitioners must present sufficient relevant evidence to outweigh respondents' evidence to the contrary.

B. A party's opinions, beliefs, suppositions, interpretations, characterizations, explanations, conclusions, or arguments relating to events or evidence are not evidence.

C. After an IEP is established, the School's obligations are prescribed in part by 511 IAC 7-42-8 and 511 IAC 7-42-9, which includes the express requirement that an IEP be implemented as written. The School in this matter has made a good faith effort to implement both the Ohio IEP, as incorporated into the September, 2007, IEP, and the August, 2008, IEP.

D. Legal analysis of this due process hearing request begins and ends with burden of proof. As set forth in the Findings of Fact, the Student's mother failed to present any evidence to demonstrate that the Student's current level of performance is not commensurate with his cognitive ability or to present any evidence to establish that the Student's current placement or program is inappropriate. The Student's mother has thus correspondingly failed to sustain her burden of proof to establish that the Student has been denied a free appropriate public education or that the Student's current placement or program is inappropriate.

E. To the extent that any of the foregoing Conclusions of Law might more properly be categorized as a finding of fact, it shall be considered a Finding of Fact.

Based on the foregoing, the IHO issued the following orders:

Orders

1. The School is directed to continue implementation of Student's current IEP dated August 15, 2008.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The Student timely filed a Petition for Review on February 2, 2009. On February 9, 2009, the School filed a Response to the Petition for Review.

Student's Petition for Review

The Student's Petition for Review raises a variety of issues with various Findings of Fact and a Conclusion of Law, and ultimately asks the Board of Special Education Appeals "for a ruling on whether [the School] violated the Student's IEP, [failed] to provide one-on-one reading 30 minutes a day, [and] violated the terms of the mediation by failing to provide agreed reading."

In support of his request, the Student asserts that the IHO erred in his conclusion that the School made a good faith effort to implement the Ohio IEP as incorporated into the September 2007 and August 2008 IEPs. The Student asserts that, contrary to the IHO's conclusion, the School failed to provide one-to-one reading services and 90 minutes of speech services as provided in the Ohio IEP.

The Student argues that the School failed to comply with the mediation agreement, asserting that the School failed to provide 30 minutes daily of reading in a small group. Also, the Student claims

that the School provided the Student with reading materials that were inadequate to the requirements set forth in the IEP.

In addition, the Student claims the School is not meeting the IEP writing requirements. He claims that no evidence exists to substantiate the reading progress reported by the School and that the School is not providing remedial reading for time lost during IEP implementation.

The Student claims that the IEP requires quarterly written progress reports for the entire school year and that the School has not adequately provided those reports. He claims the school did not provide a progress report during the 2007-2008 school year.

Moreover, the Student claims that these reporting inconsistencies, along with other contrasting evidence, indicate that the School did not make a good faith effort to implement the IEP. To further support this argument, the Student claims that the School placed the Student in classes that require skill levels that are higher than the Student's current level of performance, specifically that the School inconsistently reports that the Student is at a certain lower-level skill range, yet the School places the Student in classes well above the appropriate IEP requirements.

Finally, to illustrate the School's bad faith, the Student claims that the School has consistently circumvented the Student's input. By way of example, the Student asserts that, on August 27, 2008, the School placed the Student on notice that the Student would maintain the same classes as the previous year. Additionally, the School did not adequately record the Student's requests to be removed from the Job Skills program.

School's Response to Petition for Review

The School maintains that "everything that was found by the hearing officer is adequately supported by the record." The School requests that the Petition for Review be denied.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

On March 2, 2009, the Board of Special Education Appeals convened in Indianapolis for the purpose of conducting review in this matter. All three members were present and had reviewed the entire record. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A Student may file a timely Petition of Review of the IHO decision in a Due Process Hearing with the Board of Special Education Appeals (BSEA). The Petition for Review must be specific as to the reasons for the exceptions to the IHO's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken. 511 IAC 7-45-9(d)(4).
2. The IHO decision must contain separately stated findings of ultimate fact, conclusions of law, and, if applicable, orders. The conclusions of law must be based upon the findings of fact and the orders must be derived from the conclusions of law. I.C. 4-21.5-3-27(b).

3. In the conduct of such review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-45-7. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines that a Finding of Fact, Conclusion of Law, or Order made by the IHO is:
 - a. Arbitrary or capricious;
 - b. An abuse of discretion;
 - c. Contrary to law, contrary to a constitutional right, power, privilege, or immunity;
 - d. In excess of the IHO's jurisdiction;
 - e. Reached in violation of established procedure; or
 - f. Unsupported by substantial evidence.
511 IAC 7-45-9(j).

4. After considerable assessment of an imprecise Petition for Review, the Board interprets the Student's specific claims on appeal. Although the Student identifies several Findings of Fact and a Conclusion of Law with which he takes issue, the Student makes no specific claim that in reaching a specific Finding of Fact or Conclusion of Law the IHO abused his discretion, acted in excess of the IHO's jurisdiction, or made the determination in violation of established procedure. The Student makes no specific claim that the IHO made Findings of Fact or Conclusions of Law in an arbitrary or capricious manner or in a manner contrary to law. Id. Because the Student relies on variety of evidence when asserting the IHO erred on a specific Finding of Fact or Conclusion of Law, the BSEA reviews the Student's claims under the standard that the identified Findings of Fact and Conclusion of Law were unsupported by the evidence.

5. Finding of Fact #5 addresses the School's provision of special education services at the time the Student moved to Indiana from Ohio and is supported by substantial evidence. The record reflects that the School convened a move-in case conference committee meeting and developed an IEP. The Student did not agree with the case conference committee developed IEP. As a result, the School implemented appropriate services comparable to those identified in the Ohio IEP while continuing to work on a locally agreed-upon IEP.

6. Finding of Fact #7 addresses the terms of the mediation agreement and finds that the mediation agreement did not include an agreed-upon IEP. This Finding is supported by substantial evidence. The evidence demonstrates that the mediation agreement included provisions for an independent educational evaluation, speech services, classroom observation, and specific reading components, and that the School made accommodations congruent with the mediation agreement, including but not limited to, adequate developmental reading services in both individual learning, as well as adequate reading resource time throughout the school day.

7. Finding of Fact #11 addresses the Student's input regarding vocational programming in the development of the August 2008 IEP. The Finding is supported by substantial evidence that the Student's desire to obtain employment in the construction trades was considered when developing the August 2008 IEP.

8. Findings of Fact #12 through #20 address the appropriateness of the services and placement and are all supported by substantial evidence. The record contains significant information on

the school and independently conducted evaluations, the student's skill and achievement levels, the student's services and classes, and the student's progress in academic and vocational pursuits which support the Findings and Conclusion based thereon.

9. Findings of Fact #12 and #22 address, in part, the School's provision of progress reports to the Student's parent and are supported by substantial evidence. The record demonstrates that the School regularly provided the parent with documentation of Student progress. The record further reflects that any progress reporting deficiencies occurring in the 2007-2008 school year were resolved by the corrective action ordered and completed in Complaint #015-2009.
10. Conclusion of Law "B" is a vague characterization of evidentiary rules. Because the Conclusion is inconsequential to the outstanding Findings of Fact, Conclusions of Law, and Order, Conclusion of Law "B" is hereby rescinded.
11. Any claims not addressed in the record or in the IHO's Findings of Fact and Conclusions of Law are outside the scope of appellate review. 511 IAC 7-42-9. 511 IAC 7-45-7.

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals rules as follows:

1. With the rescission of Conclusion of Law "B", the IHO's Findings of Fact, Conclusions of Law, and Orders are upheld in their entirety.
2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: March 4, 2009

/s/ Cynthia Dewes
Cynthia Dewes, Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has the right to seek judicial review in a civil court with jurisdiction within thirty (30) calendar days from receipt of this written decision, as provided by I.C. 4- 21.5-5-5 and 511 IAC 7-45-9(n).