

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of L.N.,)	
the Greater Clark County Schools,)	Article 7 Hearing No. 1039.98
and the Greater Clark County Special)	
Education Cooperative)	
)	
Appeal from the Decision of)	
Jerry L. Colglazier, Esq.,)	
Independent Hearing Officer)	

Procedural History of the Hearing

The parents requested a due process hearing on April 29, 1998, on behalf of their child, L.N. (hereafter, the “Student”), to challenge the educational program offered by the Greater Clark County Schools and the Greater Clark County Special Education Cooperative (collectively, the “School”). The parents indicated their intent to enroll the Student in a summer program offered by a private school in Kentucky, as well as their intent to enroll him full-time in the private school for the 1998-1999 school year. The parents further asserted in their letter that the least restrictive environment for the Student would be with peers who have similar disabilities.

Jerry L. Colglazier, Esq., was appointed on May 1, 1998, as the Independent Hearing Officer (IHO) under 511 IAC 7-15-5. The parties were notified of the appointment on May 4, 1998. The IHO, by letter of May 5, 1998, notified the parties of his intent to conduct a prehearing conference on May 12, 1998, in order to clarify issues, inform the parties of their hearing rights, establish hearing dates, and address other procedural aspects regarding discovery, witnesses, subpoenas, whether the hearing should be closed or open to the public, and similar hearing and post-hearing procedures.

The prehearing conference was conducted on May 12, 1998. The IHO issued his prehearing order on May 15, 1998. The School and the parents agreed to an Independent Educational Evaluation (IEE) at the School’s expense. The IEE would address the areas of reading and neuropsychology. The parties

were to agree to the evaluators. Hearing dates were established for July 1, 2, and 3, 1998. The parents elected to have the hearing open to the public. Other prehearing, hearing, and post-hearing details were addressed. The parties also agreed to the following issues, restated as follows:

1. Has the School failed to provide the Student with a free appropriate public education (FAPE) in the least restrictive environment (LRE) wherein he failed to receive educational benefit?
2. If yes, does the denial of a FAPE to the Student require extended school year services or compensatory educational services?
3. Are the parents entitled to reimbursement for the expenses incurred for the 1998 summer program and/or the current placement at the private school?¹
4. What is the proper placement and related services and accommodations required to provide the Student with a FAPE in the LRE for the 1998-1999 school year?

The School advised the IHO on May 19, 1998, that it had contracted for a neuropsychological evaluation.

The parties requested an extension of time to conduct the hearing, which the IHO granted on May 22, 1998. He reset the hearing for July 15 and 16, 1998. On June 2, 1998, the IHO, by letter, advised the parties there may be conflict with these hearing dates, and established June 11, 1998, for a “status conference.”

On June 4, 1998, the parents wrote to the IHO, indicating that the neuropsychological evaluation had been concluded, but the parties were in some disagreement as to who should conduct the reading evaluation. The parents preferred a clinic in Ohio. The parents also indicated they were not contacted regarding the change in hearing dates, and that the new dates (July 15, 16, 1998) posed a conflict. The parents also formally requested reimbursement for “compensatory education” for the summer school program at the private school.

On June 11, 1998, a “status conference” was conducted by telephone. The IHO ordered the reading evaluation to be conducted by the Ohio clinic preferred by the parents. The parties again moved for an extension of time. The IHO granted the request on June 17, 1998, establishing hearing dates for September 16, 17, and 21, 1998.

¹This was not how the issue was originally framed by the IHO. It was later amended on October 12, 1998, to read in this fashion.

The parents requested a case conference committee meeting on August 12, 1998, to discuss the Student's 1998-1999 school year.

Another "status conference" was held on October 13, 1998. The parties agreed to a case conference committee meeting on October 26, 1998. Final hearing dates were rescheduled for November 9, 10, and 11, 1998.

The parties later agreed to a further extension of time. Final hearing was set for November 23, 24, and 25, 1998, with the written decision to be issued by January 11, 1999.

Hearing was conducted on November 23, 24, and 25, 1998, at a time and place convenient to the parties. Both parties were represented by legal counsel. The hearing was open to the public. The parties elected to prepare and file post-hearing briefs in lieu of closing arguments.²

The Decision of the Independent Hearing Officer

The Independent Hearing Officer, based upon the record of the hearing and the testimony, determined thirty (30) Findings of Fact and fourteen (14) Conclusions of Law. From these, he fashioned five (5) orders, followed by an appropriate notice advising the parties of their administrative appeal rights.

The IHO's Findings of Fact

The Student turned eleven years of age on December 15, 1998, and is eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA) and 511 IAC 7-3 *et seq.* ("Article 7") as a Student with a learning disability. The Student was initially referred for an educational evaluation in November of 1994, due to poor academic achievement. Prior to the evaluation and following same, the School provided adaptations in language arts and mathematics, provided tutoring assistance three (3) mornings a week for 15 minutes for reading, provided peer tutors twice a week, and provided a peer prompter daily. As a part of the educational evaluation, the Parent requested the School consider the possible presence of Attention Deficit Hyperactivity Disorder (ADHD).

The educational evaluation was conducted on March 7 and May 1, 1995, by the school psychologist and educational diagnostician. The Weschsler Intelligence Scale for Children (WISC-III) measured

²Following issuance of the final written decision on January 11, 1999, counsel for the parents moved on January 15, 1999, for an award of attorney fees. The IHO, by order dated February 1, 1999, advised counsel such a request was premature and beyond the authority of a hearing officer. See 511 IAC 7-15-6(q). Neither party has requested review of this order.

general intellectual ability, yielding a verbal score of 94, a performance score of 96, and a full-scale score of 95. According to the school psychologist, these scores do not reveal a significant discrepancy between verbal and performance scores. The scores indicate the Student had the ability to process information and to learn. The Developmental Test of Visual-Motor Integration (VMI) indicated a standard score of 99, which is in the average range of visual-motor integrative abilities. Behavioral and attention factors under the Diagnostical and Statistical Manual (DSM-IV) noted no difficulties in the areas of hyperactivity, social skills, or oppositional behavior. The Student's functioning in these areas was considered average to above average. Reading skills and comprehension results measured by the Woodcock-Johnson Tests of Achievement (Revised) indicated a broad reading cluster standard score of 68, with overall performance on reading measures suggesting skills significantly below the average range based on age-level comparisons. Written language performance scores were in the low-average range, while mathematical reasoning and calculation was considered average. In overall summary, the Student's intellectual functioning was considered to be average, although overall performance on reading measures fell significantly below the average range, written language skills fell in the low average range, and attentional factors appeared to be problematic and may be a contributing factor to the student's classroom performance.

The Student's grade level abilities were below that of other first grade students, and the Student struggled from the very beginning. His grade level ability at the start of the first grade was estimated to be "middle kindergarten." The Student's first grade teacher described the Student's learning disability as the most severe she had experienced. By the end of the first grade, the Student was reading at a beginning first grade level.

A triennial evaluation was conducted on February 9 and 19, 1998. At the time, the Student was approximately ten (10) years and one month old and in the fourth grade. Intellectual functioning was determined to be below the average range, with specific weaknesses in his range of general information, abstract reasoning, numerical reasoning ability, practical reasoning, short-term memory, visual motor speed, visual sequencing, and spatial visualization. Other test scores placed the student below average or significantly below the average range for achievement, comprehension and written expression based on age-level comparisons. He demonstrated reading and comprehension skills on a first grade level. Mathematical reasoning and calculations were in the below average to significantly below average range based on age-level comparisons. The summary report placed the student in the below average range with some qualifications. "Significant anxiety" that may be related to learning difficulties was also noted. More inattention had been noted in the classroom setting, along with anxiety, psychosomatic concerns, and elevated restlessness and impulsivity. According to the report, these conditions may be more directly related to the Student's frustration resulting from his learning disability than from "a true attention deficit." Although the Student's scores were significantly lower than the scores generated three years earlier, the school psychologist did not believe the scores supported a finding of a mild mental handicap. The school psychologist estimated that 97 to 98 percent of age-equivalent peers scored higher than the Student in reading.

The Student received special education services in the second, third, and fourth grades, with services increasing each year. He had the same special education teacher for each of these years. Reading instruction was provided through a program called “Milestones,” which is a visual program designed for students with learning disabilities. The Student was reported by his teacher to make six months’ progress each year. According to the IHO, the Student participated in the Indiana Statewide Testing for Educational Progress (ISTEP+) in the second, third, and fourth grades, although the second grade results were invalidated, the third grade test was read to him, and the fourth grade test instructions were read to a small group.³ The teacher noted the Student was a “non-reader” during the second grade administration, which resulted in frustration and crying through the first day. There was no evidence the Student’s progress in the Milestone reading program transferred to other academic or non-academic areas where reading to any degree would be required. School personnel appeared to be reluctant to consider “dyslexia” as anything but a learning disability. In addition, School personnel did not demonstrate any experience or “extended training” in teaching a Student with dyslexia. Although the Student received “considerable special education services” that were effective in certain areas, such services were “not very effective in reading, and not demonstrably transferable.” According to the IHO’s written decision, “[a] structured language program with reading remediation may take up to three years to get the Student to an independent reading situation.”

The Student’s school district is located on the Indiana-Kentucky border. The Student received academic and diagnostic testing at a private school in Louisville, Ky., in January of 1998. The private school offers its services specifically to students with a specific learning disability involving dyslexia. It offers its programs to students with average to above average intellect in the elementary and middle grades who demonstrate needs for organizational skills, attentiveness, and the ability to organize space and time. The program is intensive in language and math instruction. The parent unilaterally enrolled the Student in the private school for its summer program and then for the 1998-1999 school year. The parents did not advise the School in writing of their intention to reject the School’s Individualized Education Program (IEP) and enroll the Student in the private school. Although the School did present the parents with a notice of parental rights indicating that such notice is required, there is no testimony that such requirements were discussed with the parents or that the parents were actually aware of these provisions. The School was aware the parents had some interest in the private school. Initial testing results from the private school did not reveal any significant differences from the assessment results by the School, although the private school used different instruments. Mathematical scores were a bit higher, and possible fine motor coordination was noted as a problem. For the thirty (30) day summer program, the student, based on the private school’s assessments, showed modest gains in reading comprehension, vocabulary, concept of number, and math computation, and a notable gain in math applications.

³This section is summarizing the IHO’s written decision of January 11, 1999. The Board of Special Education Appeals takes official notice that the ISTEP+ is not administered during the second and fourth grades. See I.C. 20-10.1-16-8(a).

The 1998-1999 school year program developed for the Student by the private school included four (4) periods of language a day, a period of oral reading, two other periods of language arts focusing on writing and grammar skills, two periods of math, and one period in social values.

Based upon independent educational evaluations (IEEs) conducted at the School's expense, a neuropsychological evaluation indicated the Student's overall performance fell within the low average range of intellectual functioning with a full-scale ranking at the 29th percentile (Stanford-Binet Intelligence Scale). The Lurie-Nebraska Neuropsychological Battery suggested a possible organic impairment, in part because of sensory reception problems, poor grip strength, and reported developmental problems. The psychologist stated the Student does not have the ability to work at the developmental grade level for his age and may not necessarily improve. "He may not be teachable," he is reported to have stated. The psychologist reiterated that the Student's inability to read may be due to an organic reason, and discounted that "poor teaching or influence in the classroom" are the reasons for the Student's inability to progress.

The second IEE was conducted by an educational diagnostician and was conducted following the 1998 summer program at the private school. Based on the assessment results, the diagnostician reported the Student had overall average cognitive ability but had a learning disability in the areas of basic reading skills (dyslexia), reading comprehension, math calculation, and written language skills, with specific difficulties in phonological awareness, where his scores indicated kindergarten-level ability. The diagnostician recommended more direct teaching rather than "whole language" or "literature-based" approaches that had not been effective in the past. The Student's achievement was mid-first grade in basic reading skills, which placed him close to two standard deviations below his overall ability. His reading comprehension is slightly higher (beginning of second grade), while math calculation and problem-solving was in the third grade range. His math calculation skills are considered weak and would require "direct teaching to achieve mastery and retrieval of math facts." Written language skills were considered his weakest academic area (middle of first grade), and spelling is a significant handicap. Direct teaching using "multisensory, structured, sequential techniques" was recommended.

Although the School and the parents disagree regarding whether the Student has ADHD, the IHO stated such a determination would be unnecessary in that "deficits have been recognized and services and accommodations can be provided in the learning disabled program."

The IHO declined to find the Student entitled to extended school year (ESY) services during the summer of 1998. The IHO noted that parents are not entitled to reimbursement unless the School fails to provide a "free appropriate public education" (FAPE). There was insufficient evidence to indicate the Student required ESY services in order to avoid regression that could not be reasonably recouped at the beginning of the school year. However, because the Student was making some gains at the private school, the IHO found the private school was "appropriate and effective," even though the program utilized by the private school could be implemented by the School. Although the IHO did not find the School's IEP inadequate, the IHO did find there was "insufficient evidence of probative value"

to support that the School's proposed IEP "would adequately address the Student's disability, primarily in reading, nor redress the failure to provide meaningful educational gains." According to the IHO, "uncontroverted testimony of the experts on dyslexia clearly establishes that to benefit educationally[,] [the] Student requires an intensive program of individualized, integrated, multi-sensory sequential training," but the IHO does not cite to such expert testimony. Rather, he cites to a case from a foreign jurisdiction not applicable in this matter.

The IHO's Conclusions of Law

Briefly, the IHO's first nine (9) Conclusions of Law have little applicability to the matter at hand because they are recitations or interpretations of court cases, some from foreign jurisdictions. Conclusion of Law No. 10, however, does contain the provision from the amended Individuals with Disabilities Education Act (IDEA) that was in effect during the relevant time period. This section, 20 U.S.C. § 1412(a)(10)(C)(i)-(iv) addresses the circumstances where a School would be responsible for reimbursing a parent for the costs of a unilateral placement in a private school. Essentially, a School would not be financially responsible if the School made available a FAPE to the affected student but the parent elected to place the student in the private school. If, on the other hand, it was determined the School did not make a FAPE available "in a timely manner prior to that enrollment," the cost of reimbursement may be reduced or denied if the parents did not inform the School at the most recent case conference committee meeting they were rejecting the proposed placement with the intent to enroll the student in a private school or facility, or did not notify the public school within ten (10) business days prior to the removal of their intent to do so. The IHO concluded that "[t]he provision requiring rejection and notice is not mandatory. The court or hearing officer *may* consider reducing or denying the reimbursement, but failure to reject the [School's] placement or give written notice is not fatal." (Emphasis original.)

The IHO then concluded the School failed to provide the Student with a FAPE in the least restrictive environment (LRE) because, even though the Student demonstrated some educational gains in some areas, the progress was not transferable to other academic or non-academic areas where reading would be required. The IHO further concluded the Student was "for all intents and purposes...a non-reader during the ...first four grades within the [School's] educational environment." The IHO also determined that "[t]he ability to read is a fundamental ingredient in a free appropriate education that can be diminished only by a finding that the disabled child is clearly incapable of achieving reading skills transferable to life settings. The failure to use an approach that will provide [the] Student with the tools to become an independent reader is alone an important reason why the [School] did not provide an appropriate education."

The IHO found that compensatory education would be appropriate for the Student, but not ESY services. Due to the failure of the School to provide a FAPE to the Student, the parents are entitled to be reimbursed for the private school placement. The appropriate placement for the Student is the private school.

The IHO's Orders

The IHO ordered the student placed in the private school. He ordered compensatory educational services for two (2) years, with the service specially designed to educate a student with a learning disability of dyslexia. The compensatory educational services will be delivered at the private school “unless the [School] can demonstrate by clear and convincing evidence to the Indiana Division of Special Education that [the School] can successfully teach a dyslexic student within the [School] environment...” The “clear and convincing evidence” apparently includes “appropriate teacher training in the concepts of teaching dyslexic students.”

The IHO further ordered that should the Student return to the School, his teachers “shall have received in-service or specialized training in the teaching of learning disabled students with the learning disability of dyslexia.”

The parents were entitled to reimbursement for the summer school program and the 1998-1999 school year, as well as for transportation costs. This amount would be in excess of \$7,000. The IHO also ordered that a representative of the private school be included in case conference committees regarding the Student. The case conference committee was ordered to review the private school’s social studies and science offerings to determine whether separate tutorial services in these subject areas would be necessary.

Procedural History of the Appeal

The School, by counsel, on Friday, February 9, 1999, timely requested an extension of time from the Indiana Board of Special Education Appeals (BSEA) in order to prepare and file a Petition for Review under 511 IAC 7-15-6. The School represented that the issues for appeal were numerous, the transcript lengthy, and the exhibits likewise numerous. The BSEA, on February 10, 1999, granted the School an extension of time to and including February 24, 1999, to file its Petition for Review. The School timely filed its Petition for Review. See *infra*.

On February 26, 1999, the Student, by counsel, requested an extension of time to prepare a Response. The Student represented the Petition for Review was lengthy and raised numerous issues. The Student also indicated he did not have a copy of the transcript and would require same in order to respond appropriately. The BSEA, by order dated March 1, 1999, granted the request, giving the Student to and including March 26, 1999, to file his Response. The BSEA also extended the time frame for reviewing and issuing a decision to and including April 30, 1999. The Student’s counsel was provided a copy of the transcript by the Indiana Department of Education on February 26, 1999. The Student timely filed his Response. See *infra*.

The BSEA, by Notice of Review Without Oral Argument dated March 19, 1999, advised the parties the BSEA elected, pursuant to 511 IAC 7-15-6(k), to conduct its review without oral argument and

without the presence of the parties on April 27, 1999, in Indianapolis, beginning at 10:00 a.m.

All members of the BSEA were provided and received a complete copy of the record from the hearing, as well as the Petition for Review and the Response thereto.

The School's Petition for Review

The School filed its Petition for Review on February 24, 1999. It contested the IHO's Conclusion of Law #11 that found the School denied the Student a FAPE in the LRE. The School asserts that a FAPE includes personalized instruction and related services individually designed to provide educational benefit, citing to the oft-quoted standard established by Board of Education of Hudson Central School Dist. v. Rowley, 458 U.S. 176, 203 (1982). The law does not require a school district to provide a student with "tools to become an independent reader," nor does the law require an IEP to maximize each child's potential as a means of satisfying the FAPE requirement. The School asserts that the IEP must be "reasonably calculated to enable a child to receive educational benefits." Rowley, at 206-07. Citing to case law from other jurisdictions, the School represented that failure to improve a student's reading or writing abilities must be viewed within the limitations of the Student's disability when analyzing whether a FAPE was offered. The School represents the record demonstrates its efforts to accommodate the Student's educational needs through adaptations in language arts and mathematics along with tutoring support. The School adhered to the procedures for evaluation, program development, and placement. The opinion of the Ohio educational diagnostician preferred by the parents was that the Student exhibited the characteristics of a language-based disability, dyslexia, and is severely learning disabled. She rendered an opinion that the private school preferred by the parents was the appropriate placement. She also recommended intervention strategies that included direct teaching using multi-sensory, structured, sequential techniques. However, the educational diagnostician met the Student on only one occasion, did not visit his public school placement, did not speak directly with any of the Student's teachers, was not familiar with the reading program employed by the School, and did not visit the private school preferred by the parents. The educational diagnostician based her assessments of the Student's potential on test scores rather than demonstrable effort. Further, she acknowledged the Student demonstrated some growth, albeit limited growth in her estimation. She was unfamiliar with Indiana's guidelines for IEP development. She also acknowledged that her preferred methodology for instructing the Student could be implemented in either a public or private school setting.

The School further objected to the IHO's various characterizations of its teachers lacking in ability to teach a student with dyslexia and in need of intensive in-service training in this regard. All the School's teachers are properly licensed. The Student's primary teacher is a nine-year veteran of the School, holds a Bachelor's Degree in Elementary Education, and has a Master's Degree in Special Education with endorsements in Severe Disabilities, Mild Disabilities, and Emotional Disabilities. She also receives 18 hours of in-service training each year in addition to attending at least one special education-

related conference.

Indiana's rules and regulations for special education (Article 7) does not contain a separate category for service delivery to a student with dyslexia. An IEP developed for a student is to be based on individualized need and not disability category. Notwithstanding, "dyslexia" is included within Indiana's definition for learning disabilities. See 511 IAC 7-11-7.

The IHO made no findings that the School violated any procedural requirements, especially in the development and implementation of the Student's IEP, and the review and revision of the program on at least an annual basis. The School asserts that it has satisfied the requirements of 34 CFR §300.350 of the IDEA in that it has put forth good faith efforts to provide a FAPE in the LRE for the Student, and the IDEA does not guarantee any specific progress will occur for any student.

The School maintains that the direct teaching interventions described by the educational diagnostician were employed in the Student's educational program at the School. The testimony by the headmaster at the private school was consistent with the educational practices at the School.

Although the IHO states the private school is appropriate for the Student, there is no evidence to support such a conclusion. There was no evidence that the private school developed a program specifically to address the Student's needs. In fact, the School asserts, there was no testimony to indicate at what grade level the Student was working at in the private school. Notwithstanding, the School provided the Student with an appropriate program, precluding reimbursement to the parents.

The School notes the parents never requested extended school year (ESY) services in a case conference committee, and the IHO's Finding of Fact #27 contradicts his Conclusion of Law #12. The IHO initially stated the parents did not present sufficient evidence to warrant reimbursement for the 1998 summer program as ESY services, but then finds compensatory educational services are appropriate, and orders the School to pay for two years of compensatory education, including the 1998 summer program.

The School also believes the IHO failed to accord appropriate consideration of the testimony and experience of the school psychologist, the School's educational diagnostician, and the neuropsychologist who performed the IEE.

The IHO contradicts himself as to the Student's educational progress, the School maintains. At Finding of Fact #20, he found there was no evidence of probative value that the School's reading program transferred to other domains where reading would be required, yet at Conclusion of Law #11, the IHO acknowledges the Student did demonstrate educational gains, reportedly making six months' progress a year. This, the School represents, demonstrates the IEP was reasonably calculated to enable the Student to receive educational benefit. Testimony and evidence do not support the IHO's conclusions the Student's educational gains were not transferrable to other domains.

The School also objects to the IHO's inappropriate application and interpretation of case law. The School further objects to the IHO's apparent conclusion that the Student's inability to function at grade level was due to failure on the part of the School. Evidence and testimony indicated the Student's inability to perform at grade level is due to his severe learning disability.

Under state and federal law, a public agency, such as the School, is required to provide an "appropriate" program and not the "best." This the School has done, it believes. It has offered an appropriate program to the parents, which they have declined. Under federal law, the School is not obligated to reimburse the parents for the private school they prefer.

The School also cites the IHO's finding that a determination of the presence of ADHD is unnecessary since the Student's educational needs can be met through attention to his learning disabilities contradicts his other findings that dyslexia may or may not be addressed through the same manner. These inconsistencies, the School maintains, indicate the arbitrary and capricious manner employed by the IHO.

Although the School agrees the IHO correctly found the parents failed to advise the School of their intention to reject the School's program and enroll the Student in the private school, the School disagrees with the IHO's finding that providing the parents with numerous advisement of their rights was insufficient to show the parents understood their rights. The parents' failure to object to the Student's IEP or notify the School of its intentions to enroll the Student in the private school should have been fatal to the reimbursement claim, the School states.

The Student's Response to the Petition for Review

The Student acknowledged in his Response that, after initiating the hearing but before the hearing was held on the matter, the parents withdrew the Student from the School and placed him in the private school. The Student asserts the IHO based his decision upon testimony and evidence at the hearing. The fact the IHO found the Student's witnesses more credible than the School's witnesses is not grounds for reversal.

The Student represents the record supports a conclusion that the School's program conferred no educational benefit on him. This is supported by the precipitous drop in the Student's scores. The Student also disputes the School's representation that its reading program was an integrated, multi-sensory, sequential approach.

The IHO correctly found the Student was entitled to two years of compensatory educational services. Testimony indicated it would take three years before the Student could re-enter a general education classroom. This, coupled with the finding that the School is incapable of providing the remediation needed, justifies this order.

In addition, the IHO correctly determined that the rejection and notice requirements under IDEA (1997) are not mandatory but are discretionary on the part of the adjudicator. Failure to comply was not fatal to the reimbursement claim.

The Student also maintains the IHO's determinations are correct that no one within the School has the expertise or requisite training to teach a student with dyslexia. The only appropriate placement is the private school, the Student concludes.

Review by the Board of Special Education Appeals

The Board of Special Education Appeals convened on Tuesday, April 27, 1999, at 10:55 a.m. in Room 225, State House, Indianapolis. All three members of the BSEA were present. Kevin C. McDowell, General Counsel for the Indiana Department of Education, was present as legal counsel for the BSEA. The proceedings were tape recorded. A transcript will be prepared and, when available, will be mailed to the parties.

The BSEA, having reviewed the record in its entirety and in consideration of the Petition for Review and the Response thereto, now makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This matter is before the BSEA pursuant to a timely Petition for Review from the written decision of an IHO. Pursuant to 511 IAC 7-15-6, the BSEA has jurisdiction in this matter. Except where indicated, all decisions were unanimous.
2. At issue in this hearing is the interpretation and application of 20 U.S.C. §1412(a)(10)(C)(i)-(iv) regarding children placed in private schools by their parents. There is no dispute this provision was in effect at all time relevant to this matter. This provision reads as follows:
(C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY-
 - (i) IN GENERAL- Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
 - (ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT- If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that

the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) LIMITATION ON REIMBURSEMENT- The cost of reimbursement described in clause (ii) may be reduced or denied --

(I) if --

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(7), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents. ⁴

3. The IHO's Finding of Fact # 6 is factually correct. The school psychologist stated the WISC-III revealed there were no significant discrepancies between the verbal and performance scores, which resulted in a finding of average intelligence. The scores indicated the Student had the ability to process and to learn.
4. Finding of Fact #8 by the IHO is supported by the record. The school psychologist noted the standard score of 75 was significantly lower (20 points) than the score three years earlier, "which sends up a flag to me like what is going on with this kid." Tr. 127. The school psychologist concluded the scores were not indicative of a mild mental handicap because the Student "wasn't on top of his game that day when he was doing testing." Tr. 139.
5. The IHO's Finding of Fact #12 was consistent with the testimony. The private school program works with students with a specific learning disability of dyslexia. The program is offered to students in the elementary and middle school age range with average to above-average intellect

⁴No party has claimed the unilateral placement by the parents of the Student was necessitated by any health or safety emergency, or resulted with the lack of understanding on the parents' part that notice was required, or that the parents were prevented from providing notice. As a result, 20 U.S.C. §1412(a)(10)(C)(iv) is inapplicable to this dispute.

with specific deficits in organizational skills, attentiveness, and the ability to organize space and time. The private school program was described as intensive in language and math instruction, with a linguistics, multi-sensory, hands-on approach. The 1998-1999 school year program developed for the Student at the private school included four periods of language a day, a period of oral reading, two other periods of language arts focusing on writing and grammar skills, two periods of math, and one period in social values.

6. The IHO did not err by describing the Ohio educational diagnostician as an “Educational Specialist.” Her training and background indicate that she could be appropriately described as a “specialist.” (Finding of Fact #13)
7. The IHO’s summarization of the testimony of neuropsychologist in Finding of Fact #15 is supported by the record. The neuropsychologist stated the Student does not have the ability to work at the developmental grade level for his age, and probably will not get any better. Tr. 614. He also wondered whether the Student lacks “essential basic or fundamental tools of being able to learn” and further observed the Student “may not be teachable.” Tr. 615. The neuropsychologist stated that the Student’s progress of six months a year in reading and language arts “might be the very best of which he’s capable of doing.” Tr. 616. He did allow that the last observation was more conjecture than evidence. Tr. 627-28. When asked why the Student, at age ten (10) and in the fourth or fifth grade, still cannot read, the neuropsychologist responded that he was not certain, but there may be an organic reason for his lack of reading ability. He did not believe the lack of ability was due to “poor teaching or influence in the classroom in any manner,” and that the system employed by the School are likely similar to approaches used throughout the state. The Student “may not have the raw materials to be able to do it. So I can’t answer [why he isn’t reading], but it does happen to some people.” Tr. 641-42.
8. Finding of Fact #19 is supported by the record. Achievement test results indicate the second grade results were invalidated, the third grade test was read to him, and the fourth grade test instructions were read to a small group. There is a handwritten note at the right hand corner on Parents’ Exhibit 6, p. 14, indicating “second grade [Student] cried through 1st day of testing. He was a non-reader & totally frustrated by tests.” The notation of “non-reader” was made by the special education teacher. Tr. 344-45.
9. The IHO’s determination in Finding of Fact #20 that there was no evidence of probative value that the Student’s progress in the Milestones reading program transferred to other academic or non-academic areas where reading was required to any degree is supported by the record.
10. The IHO’s Finding of Fact #21, as written, is not supported by the record. The record does support the following: School personnel appeared to consider dyslexia within the context of a learning disability. In addition, School personnel did not demonstrate any expertise or extended training in teaching students defined as dyslexic.
11. The Student has received considerable special education services, and these have been effective in certain areas, but these services have not been very effective in reading and are not demonstrably transferable. Tr. 216, 219. Accordingly, the IHO’s Finding of Fact # 22 is upheld as written.

12. Finding of Fact #23 is a recitation of the testimony of the Ohio educational diagnostician, wherein she states the Student's reading "is still pretty much on a first-grade level" although there has "been some growth." He has learned some sight words, but he is not at a pre-primer level. She stated that his growth in the School's program over the three years was "extremely limited...for a child with average ability." More creative approaches may be necessary. A structured language program with reading remediation may take up to three years to get the Student to an independent reading situation. Tr. 251, 252, 253. Although the IHO adopted these testimonial assessments as Findings of Fact, these recitations do appear in the record.
13. Although it is accurate that the Parents did not advise the School in writing of their intention to reject the School's proposed IEP and enroll the Student in the private school, and that the School had some knowledge of the intentions of the parents in this regard, there was testimony to this effect and not "considerable testimony" as indicated by the IHO in Finding of Fact #25. The School's exhibits contain the notice of parent/student rights presented at various times throughout the Student's special education history, and the notice of parent/student rights does contain information regarding the responsibility of a parent where rejection of the School's program is contemplated in favor of a unilateral placement in a private school. There was no testimony that this requirement was discussed with the parents or whether the parents were aware of this provision in the notice.
14. The record, including the transcript of testimony, reports the history of the private school and its emphasis upon teaching students of average ability with the learning disability known as dyslexia. Although the Student has attended the private school setting for a short period of time, there was some testimony to suggest that he is beginning to make gains. Additionally, the School did not criticize or dispute the efficacy of the program other than to suggest that the recommendations of the Ohio clinic and the program of the private school "could" be implemented within the School setting. (Finding of Fact #28, as amended to reflect the record.)
15. Finding of Fact #29 was amended to indicate that "Testimony of the experts on dyslexia clearly establishes that to benefit educationally, the Student requires an intensive program of individualized, integrated, multi-sensory sequential training." The accompanying case law citation was stricken for lack of relevance to Indiana law.
16. Finding of Fact #30 was amended to read that "There is testimony in the record that the IEP proposed by the School for the 1998-1999 school year would adequately address the Student's disability, primarily in reading."
17. The IHO's Conclusion of Law #6 was stricken. This Conclusion of Law contained a case from a different jurisdiction interpreting the U.S. Supreme Court's decision in Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 , 102 S.Ct. 3034 (1982). The standard referred to in Conclusion of Law #6 is not a standard employed in Indiana.
18. Reimbursement under 20 U.S.C. §1412(a)(10)(C)(iii) may be reduced or denied by a hearing officer where the parent fails to provide the School the requisite notice, implying discretion on the part of the hearing officer in deciding whether there are circumstances where such

reimbursement should be denied or reduced. However, in this case, there is evidence the parents were given ample notification and were aware of the requirement for written notice of unilateral placement. Their failure to do this argues for denial of reimbursement. (Conclusion of Law #10).

19. The BSEA, by a 2-1 vote, struck the IHO's Conclusion of Law #11 as unsupported by the facts and the law. The Conclusion of Law, again by a 2-1 vote, now reads:

Has the School failed to provide the Student with a free appropriate public education in the least restrictive environment wherein he failed to receive an educational benefit?

No. Evidence indicates the IEP formulated by the School was reasonably designed for educational gain and is consistent with the requirements of IDEA, and therefore constitutes a FAPE.. See Rowley, *supra*, and 511 IAC 7-3-23, the latter defining a FAPE as those educational and related services (1) provided at public expense, under public supervision and direction, and at no cost to the parent; (2) that meet the standards of the State educational agency, including the requirements of Article 7; (3) that include all educational programs for students mandated or authorized under applicable federal and state laws; (4) that are provided in conformity with an IEP that meets the requirements of Article 7; and (5) that include equal opportunity for eligible students under Article 7 to participate in activities and services available to other students.

20. The BSEA, by a 2-1 vote, struck the IHO's Conclusion of Law #12, finding instead that the parents are not entitled to compensatory educational services because the School did not fail to provide a FAPE to the Student.
21. The BSEA, by a 2-1 vote, struck the IHO's Conclusion of Law #13, finding instead that the parents are not entitled to reimbursement for expenses incurred as a result of the private school services.
22. The BSEA, by a 2-1 vote, struck the IHO's Conclusion of Law #14, finding instead that the School is the appropriate placement for the Student to receive a FAPE in the LRE.

ORDERS

1. The BSEA, by a 2-1 vote, having determined the School provided a FAPE to the Student, orders that the current placement and services extended to the Student by the School shall remain in effect for the 1998-1999 school year.
2. The BSEA, by a 2-1 vote, find the Student is not entitled to compensatory education.
3. The BSEA, by a 2-1 vote, strikes all other relief ordered by the IHO for the parents, including reimbursement for the expenses incurred as a result of the unilateral placement.
4. Any other matters not specifically addressed above are hereby deemed denied.

Date: April 28, 1999

/s/ Cynthia Dewes

Cynthia Dewes, Chair,
Indiana Board of Special Education Appeals

Appeal Right

Any party aggrieved by the decision of the Indiana 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.