

Indiana Board of Special Education Appeals



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BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of S.M. and the)
MSD of Martinsville) **Article 7 Hearing No. 1198-01**

The parent's request for hearing was received by the Division of Special Education, Indiana Department of Education, on January 17, 2001. The Independent Hearing Officer (IHO) was appointed on January 18, 2001. A telephone prehearing conference was held on January 26, 2001. The school requested an extension of the decision deadline and requested the IHO order an independent evaluation of the child. Both parties submitted written arguments on the issue. The IHO determined that the school's request for an additional evaluation should be added as an issue for the hearing.

A prehearing order was issued on February 12, 2001. The issues for hearing were identified as :

- a) What educational program is appropriate to meet the child's educational needs;
- b) What services and supports, including but not limited to special staff and assistance with communication needs, are necessary for him to benefit from his special education;
- c) The least restrictive environment that will meet the child's identified needs; and
- d) What, if any, additional evaluation procedures are needed to fairly and adequately determine the foregoing issues.

The hearing was scheduled to begin on February 26, 2001, and continue through February 28, 2001, if necessary. Witness lists and exhibits were to be exchanged by February 16, 2001. The decision deadline was extended to March 16, 2001.

At the conclusion of the hearing, the IHO found that the independent evaluation should be performed. The school offered to withdraw the issue and rest on the evidence as presented at the hearing. The IHO declined to change her ruling, and reduced her order to writing on March 6, 2001. The hearing decision deadline was extended to April 30, 2001. The evaluation was subsequently performed and the parties held a case conference committee (CCC) meeting in early May to discuss the results of the evaluation. The IHO was contacted in mid-May and informed the CCC had not been able to resolve any differences based on the independent evaluation. A telephone conference was held on May 31, 2001 to discuss concerns regarding the evaluation and to make arrangements to conclude the hearing. The parents objected to admitting the independent evaluation into evidence

and both parties expressed the willingness to rest on the evidence presented at the hearing. Due to the positions of the parties, various procedural and evidentiary concerns, and the added delay attendant in reconvening the hearing, it was agreed that this hearing decision be made on the evidence admitted during the February hearing.

The IHO issued her written decision on June 13, 2001. From the testimony and evidence presented at the hearing, the IHO determined twenty (20)¹ Findings of Fact and reached eleven (11) Conclusions of Law from which she issued one (1) Order.

The IHO's Findings of Fact

1. The child needs special education services to address his cognitive and communication impairments. The parties agree that child needs direct services from an occupational therapist, physical therapist, and speech and language pathologist. They agree that an augmentative communication device is appropriate and necessary for this child. He also needs assistance in developing certain social skills (such as not taking other children's food), self-care skills (such as independent toileting), and in managing certain inappropriate behaviors (such as pulling jewelry, throwing objects and rolling on the floor)..
2. The child appears to understand and will usually respond to simple verbal communication of a routine nature. It is, however, more difficult for him to maintain attention to and process material when it is presented verbally.
3. The parties have attempted and continue to attempt a number of strategies to facilitate the child's ability to communicate. These include instruction in sign language, communication boards, Mayer-Johnson symbols and various augmentative communication devices. While each method has shown some success, the child's use of any particular strategy is unpredictable even when tangible rewards are offered to him..
4. The child knows about 35 signs (see IHO Exhibit 1) but does not use many of them spontaneously. Most of the signs that he uses spontaneously are those relating to personal desires, for example, "stop," "more," "eat," and "toilet."
5. The child's individualized education programs (IEPs) have contained the goal of learning 1-2 signs per week since May 1999. His acquisition of new signs has been at a much slower rate despite direct individual and small group instruction in sign language and reinforcement of signs at home and in the special education and general education settings. While occupational therapy

¹Finding of Fact number 19 is the last enumerated finding. However, there are two findings identified as number 16.

will improve his ability to correctly form the signs, there is no evidence to suggest that the child's slow acquisition of sign language is due solely to his fine motor difficulties.

6. The child is presently working on recognizing letters of the alphabet and numbers. The only letter that he independently identifies with any consistency is the letter "A". His ability to demonstrate an understanding of these symbols independently and consistently is severely limited even with the use of augmentative communication devices. There is no evidence to suggest that the child's slow acquisition of sign language is due solely to his fine motor difficulties.
7. The parties are in agreement as to appropriate IEP goals and objectives for the child. The nature of those goals and objectives, together with the testimony as to the child's actual classroom performance indicate that the child has mastered few, if any, of the standards of the Kindergarten curriculum. (See IHO Exhibit 2.)
8. The general education curriculum for Grade 1 presupposes that a child has mastered certain concepts of the Kindergarten curriculum including the ability to identify numbers and letters consistently and independently.
9. The general education curriculum utilizes a phonetic approach to teaching the language arts. The child's special education teacher emphasizes the use of "sight words" (the "Cove" program) in language art instruction. There is no evidence that immersing this nonverbal child in a largely verbal and phonetically-based language arts program will assist him in improving either his cognitive or his communication skills.
10. The child's special education teacher and general education teacher have attempted to modify general education lessons and activities so that the child can participate with his non-disabled peers. There is, however, little if any evidence that the child understands the underlying concepts being taught, and benefits educationally from this participation.
11. The child participates in music, art, and physical education with his non-disabled peers. The general education teachers have been made aware of the child's special needs and have attempted to make adaptations and modifications for the child. There is no evidence to suggest that the child is not receiving educational or social benefit from being included in these general education classes with non-disabled peers.
12. The child is easily distracted by the activities of others. He is taking medication (Paxil) to improve his ability to maintain attention.
13. The child has a repertoire of behaviors that he uses to indicate his unwillingness to continue the activity at hand. These behaviors occur at other times as well. At minimum, the child's behaviors indicate a lack of attention to, or involvement with the educational activity going on at

the time the behavior is being displayed. There is no pattern as to if, when, or where he will exhibit any particular behavior. There is little, if any, evidence to indicate that the child is influenced by either the appropriate or inappropriate behavior of others to any appreciable extent.

14. Certain simple behavior management techniques have been successful in addressing these behaviors and minimizing their disruption to the education of other students.
15. The child needs to have an aide available to address his inappropriate behaviors, to assist him with his toileting, to redirect his attention, and to help him transition from one activity to another.
16. The child's instructional needs differ substantially from the needs of his non-disabled peers. His needs include the following:
 - a. An environment that minimized activities and other stimuli, especially verbal, that will impair his concentration or distract him.
 - b. A predictable, but flexible, routine that can be adjusted to maintain his attention and address his interests and needs.
 - c. Instruction be at a flexible pace so as to be responsive to changes in the child's emotional state, his resistance to the activity, or his need for behavioral intervention.
 - d. Presentation of materials at a slower pace and in multiple modalities as appropriate (e.g., modeling, picture, sign language, communication device, voice).
 - e. Opportunity for frequent repetition of materials presented.
 - f. Opportunity for frequent review of material so that his educators can ascertain whether the child has, in fact, understood the material and has retained it before more complex material is presented.
 - g. Instruction that emphasizes the concrete or functional presentation of materials and de-emphasizes abstract concepts.
 - h. The regular and consistent use of communication strategies.
 - i. Frequent use of modeling, cuing, and redirection in the child's learning process.
 - j. Presentation of communication strategies at a flexible pace to maximize their usefulness to the child.
 - k. A predictable, but flexible, routine to accommodate changes in his toileting needs with minimum disruption to his learning process.
16. There is no evidence the school based its placement decision solely on the child's test scores or identified disabilities.
17. There is no evidence the school started with any arbitrary or particular percentage of time in determining the appropriate settings for delivering the child's educational and related services.

18. The case conference committee considered the child's needs and possible educational placements both more and less restrictive than the one identified as appropriate in the IEP of January 2001.
19. The case conference committee took into consideration the suggestions and opinions of the parents and the experts they consulted in formulating an appropriate program for the child in the least restrictive environment.

The IHO's Conclusions of Law

Based on the foregoing, the IHO made the following conclusions.

1. The school is responsible for providing the child with a free appropriate education in the least restrictive environment. An appropriate education is one from which the child will derive an educational benefit. It is appropriate to consider the degree to which the child will benefit in any particular educational environment.

Although the school has attempted to make various modifications to enable the child to participate with his non-disabled peers in the general education setting, there is no evidence that the child has received any significant educational benefit from being present in that environment during this school year. There is no evidence that there is any modification that the school could make or any supplemental services and aids that they could provide that would enable the child to meet the State's educational standards and allow him to advance from grade to grade.

2. Social Benefit to the child must also be considered when determining an appropriate placement. The evidence is clear that this child is not receiving any appreciable benefit from having his non-handicapped peers model appropriate behavior and language to him in the general education classroom. If there is, in fact, any social benefit to this child being educated with non-disabled peers, the child's participation in general education music, art, physical education, lunch and recess provide opportunity for him to receive that benefit to the maximum extent appropriate.
3. In offering a child an appropriate education in the least restrictive environment, the law does not mandate that a school provide the child with best education possible nor with any or every accommodation, modification, supplementary aid and service conceivable, or even feasible. Neither does the law require a school to modify the general education curriculum beyond recognition. It does not require the school to conform the structure, routine, pace, or methodology of the general education class to one that will provide educational benefit to the handicapped child.

In order to meet this child's needs, the curriculum of the general education classroom would have

to be modified beyond recognition.

The general education setting cannot be modified sufficiently to deal with the complex interplay of the child's cognitive and communication needs and his need for physical, occupational and speech and language therapies without significantly impacting the delivery of educational services to the non-disabled children in that setting.

4. Even were it possible for the school to structure the general education classroom to allow this child to work on his individual goals and objectives, the activities of the non-disabled children, which would be appreciably different from those of this child, would be a major distraction for the child. In light of the child's recognized difficulties in maintaining attention, such an environment would impair his ability to receive educational benefit and would not be appropriate to meet his needs.
5. The child is already receiving supplementary aids and services to assist him with his physical, cognitive, communication and behavioral needs in both the general education and special education settings. There is no evidence that other sorts of aids or services could be provided that would enable this child to receive educational benefit in the general education setting. The educational and related services offered to this child are appropriate to address his individual needs and provide him with education benefit.
6. Increased participation in the special education setting is reasonably calculated to improve the child's communication and basic academic skills. Such a placement is likely to improve the chance that he could, at some point, be included in the general education setting with the use of supplementary aids and services. The child's involvement in the general education setting for all academic instruction decreases his instruction time in the special education setting without providing him an appreciable educational or social benefit. The general education classroom is not the least restrictive environment appropriate to meet this child's needs.
7. The child's inclusion with non-handicapped peers in music, art and physical education mainstreams this child to the maximum extent appropriate.
8. The IEP of January 2001 is appropriate to meet the child's needs in the least restrictive environment to the extent that it offers the child academic instruction in the special education setting. The related services needed by the child are being offered in the least restrictive environment appropriate for the delivery of those services.
9. The IEP of January 2001 is not appropriate to the extent that it calls for academic instruction in the general education setting.
10. The school and parents agree that the child needs an augmentative communication device. The

school is entitled to choose which device is most appropriate for delivering educational services to the child.

11. A local education agency is required by law to offer a continuum of placement options in which special education services may be implemented. The case conference committee is required by law to consider those options in determining the appropriate placement. The law does not, however, mandate any particular process for the case conference committee to use in determining the least restrictive environment in which to implement a child's special education program.

This child's case conference committee considered the child's needs and reasonable placement options. It considered information from the parents and their experts and considered their opinions and preferences. The process by which placement was determined therefore satisfied the requirements of the law.

The IHO's Order

The IHO issued one order:

The school is ordered to conform the child's IEP to reflect that the child receive all academic instruction in a special education setting. Instruction for music, physical education and art shall continue to be provided in the general education setting.

Procedural History of the Appeal

On July 13, 2001, the parents filed their Petition for Review. On July 16, 2001, the school requested an extension of time in which to file its response. The extension was granted by order of the Indiana Board of Special Education Appeals (BSEA) on July 17, 2001, granting the school until August 20, 2001, in which to file its response. On July 18, 2001, the parents filed their objections to the school's request for an extension of time, and also requested the opportunity to file a reply to the school's response. By order dated July 20, 2001, the BSEA overruled the parents' objections. On July 25, 2001, a letter was received from the parents' attorney concerning the earlier request for an opportunity to reply to the school's response. The BSEA granted this request by order dated July 26, 2001, requiring that any reply be filed by August 30, 2001. The school's response to the petition for review was timely filed on August 16, 2001. The parent's reply was received on August 28, 2001.

Parent's Petition for Review

The parents generally claim the decision is unsupported by substantial evidence; arbitrary and capricious; an abuse of discretion; contrary to IDEA, Article 7 and IC 4-21.5-3 and a constitutional right to due process under the 14th Amendment. Specifically, the parents make the following

objections:

Errors of Fact

1. The IHO ruled on a non-existent IEP. There was no January 2001 IEP. (Conclusions of Law Nos. 8 and 9).
2. The parties did not agree prior to the hearing that the child needed the Gemini augmentative communication device; device not provided as of the hearing. (Findings of Fact Nos.1, 3, 4, 5, and 6).
3. The IHO misunderstood or ignored critical evidence about inclusion concluding that the child had received proper support in general education and a modified curriculum contrary to the evidence, and , MSD admitted that the child's educational program was "fragmented by necessity." (Findings of Fact Nos. 7, 8, 9, 10, 11, 16 (1st), 16 (2nd), 17, 18, and 19 and Conclusion of Law No. 5).
4. The IHO erred in finding that the MSD had provided the child proper support for communication and behavior needs. (Findings of Fact Nos. 12, 13, 14, and 15).

The parents further make the following arguments:

1. The IHO ignored the strong congressional preference for inclusive settings and ignored the fact the child had not been provided the necessary supplementary aids and services necessary to be more successful in the general education environment.
2. The IHO erred by ordering an independent educational evaluation (IEE) at the close of the hearing.
3. The IHO erred by focusing on the wrong IEP.
4. The IHO committed numerous procedural violations. The hearing was scheduled such that the last day of the hearing was the 42nd day of the 45 day timeline for decisions. Transcripts were not provided until June 10, 2001. The five day rule for the submission of witness lists was ignored. The IHO ordered an IEE and failed to provide notification of a decision date.
5. The IHO erred in each of the eleven conclusions of law.
6. The IHO's order is not a final decision and as such violates the IDEA.

School's Response to Petition for Review

In its Response, the school responded to each of the parents' allegations of error. The school argued that the claimed errors of fact were, in fact, supported by substantial evidence. The IHO's

reference to a January 2001 IEP was a typographical error, and the reference was instead to the January 2000 IEP. The IHO understood the requirements for placement in the least restrictive environment (LRE) and correctly applied the law. The IHO did not err in ordering an IEE. The IHO did not err procedurally. The parents did not object throughout the hearing to any perceived procedural errors. No objections were made to the formulation of the issues. The witness lists were ordered exchanged ten days prior to the hearing, while Article 7 only requires that the witness list be exchanged five days prior to the hearing. Each of the IHO's conclusions of law is supported by substantial evidence and complies with the law. Finally, the IHO's order is a final order.

Parent's Reply to School's Response

The parents restate most of the arguments raised in their Petition for Review.² Much emphasis is placed on arguing that the child's communication needs have not been met, and on LRE issues. The parents request the child be placed in the general education classroom with necessary supports and services.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on September 12, 2001, to conduct its review of the above-referenced matter without oral argument. Two members were present and had reviewed the record, the petition for review, and reply. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-30-4.
2. The BSEA is charged with reviewing the entire record of the due process hearing to ensure the procedures of the hearing were consistent with 511 IAC 7-30-3.

²The parents also allege, for the first time, that they have been denied a verbatim transcript of the post-hearing conference which occurred on May 31, 2001. The BSEA declines to address this issue in its decision, as the issue was not timely raised. The BSEA does note, however, that 34 CFR 509(a)(4) gives the parent the right to receive, at the parent's option, a written or electronic verbatim record of the hearing. There is no requirement to provide a verbatim record of conferences.

3. The BSEA shall not disturb the findings of fact, conclusions of law, or orders of the IHO unless the BSEA finds the IHO's decision to be:
 - 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 jurisdiction of the IHO.
 - e. reached in violation of an established procedure.
 - f. unsupported by substantial evidence.511 IAC 7-30-4(j).
4. The child is a student with disabilities as identified under IDEA and Article 7. He has a rare genetic disorder known as partial monosomy-16 and trisomy-20 and developmental delay
5. At the time of the hearing, the child was in the first grade and was included within a general education classroom for 35% of the school day for math meeting, story time, exchange time with the second grade, library, music, physical education, art, lunch and recess.
6. The last agreed upon IEP was January 7, 2000.
7. A CCC was conducted in August 2000. The parties agreed upon the child's goals and objectives but failed to reach agreement as to the child's placement.
8. The child requires special education and related services to address his cognitive and communication needs.
9. The IHO's Findings of Fact Nos. 1, 2, 4, 7, 8, 12, 13, 14, 15, 16 (first), 16 (second), 17, 18,³ and 19 are supported by the evidence.
10. Conclusion of Law No. 11 is upheld as written.
11. The child's communication limitations require more comprehensive services. The IHO's decision is arbitrary and capricious, an abuse of discretion, or unsupported by substantial evidence to the extent it fails to adequately address the issue of services and supports, including but not limited to special education staff and assistance with communication needs, necessary to enable the child to benefit from his special education. Without adequate communication skills, the benefit of the child's education will be limited. Findings of Fact Nos. 3, 5, 6, 9, 10 and 11 and Conclusions of Law Nos. 1, 2, 3, 4, 5, 6, and 7 require modification to correct these deficiencies.

³Finding of Fact No. 18 contains a typographical error which is corrected by the BSEA. (See Combined Finding of Fact and Conclusion of Law No. 14, and Order No. 2, *infra*.)

12. The selection of an appropriate alternative communication device that adequately addresses the child's needs is a case conference committee decision .
13. The IHO has the jurisdiction and authority to order an IEE at any time during the proceedings.
14. The IHO did not err by focusing on the wrong IEP. The IHO made a typographical error in referring to the January 2000 IEP as the January 2001 IEP. The reference to a January 2001 IEP in Finding of Fact No.18 and Conclusions of Law Nos. 8 and 9 should be changed to January 2000.
15. While the school did request one extension of time in which to conduct the hearing, there is no record of further requests for extension of time being made by either party beyond the March 16, 2001 hearing deadline. After the close of the hearing, the IHO issued an order for an IEE and extended the decision deadline to April 30, 2001. The decision was subsequently rendered on June 13, 2001. The IHO did not follow the time line set forth at 511 IAC 7-30-3(i).
16. The division of special education is required to make the transcript available, at no cost, to the parties at the conclusion of the hearing. The hearing is considered concluded after the IHO has rendered a decision. As the parents were provided a copy of the transcript prior to the IHO issuing her decision, there was no violation of 511 IAC 7-30-3(s).
17. The parents claim the five day rule for submission of witness lists was ignored, permitting the school to put forth witnesses that were not timely disclosed. The parents make no further argument on this issue and fail to show any prejudice if, in fact, the witnesses were not disclosed within five business days of the hearing. The parents did make the same objection on the morning of the first day of the hearing. No showing of prejudice was made at that time. In fact, the parents' attorney did not even respond to the IHO's question of whether she was contending there was some surprise. The parents' attorney admitted receiving the list at least six days prior to the hearing. As no claim of surprise or prejudice has been made, this objection is deemed waived.
18. The IHO's order is a final order. It does not require ratification by the case conference committee or other agreement of the parties.

ORDERS

1. Findings of Fact Nos. 3, 5, 6, 9, 10 and 11 and Conclusions of Law Nos. 1, 2, 3, 4, 5, 6, 7, and 10 are modified as follows:

- a. Finding of Fact No. 3 is modified by adding at the end:

However, evidence suggests that there has been insufficient follow through, i.e., selection of device, training of school personnel and parents, and a long enough time for evaluating effectiveness.

- b. The last sentence of Finding of Fact No. 5 should be struck and replaced with:

Occupational therapy has improved his ability to correctly form the signs.

- c. The last sentence of Finding of Fact No. 6 should be struck as contrary to the evidence and the word “severely” should be struck from the third sentence.

- d. The last sentence of Finding of Fact No. 9 is struck.

- e. “If any” is struck from Finding of Fact No. 10.

- f. The last sentence of Finding of Fact No. 11 is struck.

- g. The second paragraph of Conclusion of Law No. 1 is modified to read as follows:

The school has attempted to make various modifications to enable the child to participate with his non-disabled peers in the general education setting. In order for the child to benefit from being present in that setting, he must be provided supplemental services and aids, including augmentative and alternative communication (AAC), over a time period sufficient to allow effective evaluation.

- h. Conclusion of Law No. 2 is modified to read as follows:

Social benefit to the child must also be considered when determining an appropriate placement. The evidence is clear that this child is not receiving appreciable benefit from having his non-disabled peers model appropriate behavior and language to him in the general education classroom because of limited communications. If there is social benefit to this child being educated with his non-disabled peers, the child’s participation in general education music, art, physical education, lunch and recess provide opportunity for him to receive that benefit.

- i. The third paragraph of Conclusion of Law No. 3 is modified to read as follows:

At present, the general education setting cannot be modified sufficiently to deal with the complex interplay of the child's cognitive and communication needs and his need for physical, occupational and speech and language therapies without significantly impacting the delivery of educational services to the non-disabled children in that setting.

- j. Conclusion of Law No. 4 is modified to read as follows:

It is difficult for the school to structure the general education classroom to allow this child to work on his individual goals and objectives, as the activities of the non-disabled children, which would be appreciably different from those of this child, would be a major distraction for this child, particularly with his current communication limitations. In light of this, such an environment would impair his ability to receive educational benefit and would not be appropriate to meet his needs.

- k. Conclusion of Law No. 5 is modified to read as follows:

The child is already receiving supplementary aids and services to assist him with his physical, cognitive, communication and behavioral needs in both the general education and special education settings. There is evidence to suggest that a more concentrated follow through on AAC would enable this child to receive educational benefit in the general education setting.

- l. Conclusion of Law No. 6 is modified by adding "At present" to be beginning of the last sentence.

- m. Conclusion of Law No. 7 is modified by adding "at the present time" to the end of the sentence.

- n. Conclusion of Law No. 10 is modified to read as follows:

The school and parents agree that the child needs an augmentative communication device. The case conference committee chooses which device is most appropriate for delivering educational services to the child.

2. The reference to a January 2001 IEP in Finding of Fact No.18 and Conclusions of Law Nos. 8 and 9 is changed to January 2000.
3. The IHO's order is upheld as written.
4. Order No. 2 is added to the IHO's decision as follows:

In addition, the school is ordered to obtain an augmentative communication device such as the Gemini, about whose use the parties seem to be in agreement. Further, the school will provide intensive training in its use for the child, school personnel and the parents. This device will be used in conjunction with communication boards and other communication systems, to work toward a goal of more inclusion of the child in the general education setting.

All other Motions not specifically addressed herein are hereby deemed denied.

Date: September 14, 2001

/s/ Cynthia Dewes

Cynthia Dewes, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).