

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

<i>In the Matter of J. B. and</i>)	
<i>the MSD of Lawrence Township</i>)	Article 7 Hearing No. 1253.01-B
)	
Appeal from a Decision by)	
Curtis Leggett, Ph.D.,)	
Independent Hearing Officer)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

Procedural History

On November 5, 2001, the Metropolitan School District of Lawrence Township (hereafter, the "School") requested a due process hearing under 511 IAC 7-30-3 to resolve programming and placement issues with respect to J. B. (hereafter, the "Student"). Curtis Leggett, Ph.D., was appointed as the Independent Hearing Officer (IHO) that same date. A telephone pre-hearing conference was conducted with the parties on November 15, 2001, with a Pre-Hearing Order issued on November 29, 2001, establishing the following two issues for the hearing:

1. Is the current Individualized Education Program (IEP) appropriate to the Student's needs?
2. If so, what would constitute the Least Restrictive Environment (LRE) within which the IEP could be implemented?

The parties jointly requested an extension of the time lines, which the IHO granted. Hearing was originally set for January 16-18, 2002. This was incorporated into an order dated December 21, 2001. The Student later requested an extension of time, which was also granted by an order dated January 11, 2002. The hearing was reset for February 4, 5, and 6, 2002, with a written decision to be issued by February 25, 2002.

The IHO's Findings of Fact

The written decision was issued on February 24, 2002. The IHO determined thirty-nine (39) Findings of Fact. The Student is a 12-year-old female currently receiving services through a homebound arrangement. She is eligible for special education and related services as a student within the Autism Spectrum Disorder. She also has a communication disorder. Her intellectual functioning is within the borderline range. The Student has behavioral problems that interfere with her academic progress.

In the fall of 1999, the Student was placed on homebound due to a significant increase for behavioral management as well as potential psychiatric mood disorders. Her behaviors were manifested through high degrees of impulsivity, distractibility, and attentional and anxiety reactions to stress situations. Her lack of language and communication skills were significant factors.

Although placed on homebound in the fall of 1999, the Student's IEP was not reviewed or revised until May of 2001. Although 511 IAC 7-27-10(b) requires the Case Conference Committee (CCC) to convene and review every sixty (60) instructional days a Student's IEP who is on homebound instruction, this did not occur.

Both the School and the Student's Parents viewed the homebound placement as a temporary measure. It was never intended to be an alternative educational setting. Reintegration of the Student into the typical school environment had been intended from the inception of the homebound placement. During the initial stages of the homebound placement, school personnel worked with the Student. The School eventually contracted with a third-party provider to provide services approximately seven and one-half hours a day, five days a week. The Student shares the home with eleven (11) other siblings and her adoptive parents.

Beginning sometime in December of 1999, the Student's teacher of record (TOR) provided materials and academic suggestions to the third-party provider, who then implemented these within the homebound setting.¹ However, during this period of time, no "curriculum-based school personnel" visited the home to observe the Student or otherwise assist in the design of the Student's educational environment. The third-party provider did meet with School personnel during this extended homebound period, providing updates on the Student's progress.

Although at one time direct occupational therapy (OT) was provided the Student, this service was reduced to consultation by the time of the hearing. The Student also once received direct speech/language therapy, but that service was also reduced to consultation at the time of the hearing. The Student is still in need of OT and speech/language therapy services. Although there is disagreement as to the intensity of the OT services, the speech/language services are "of critical importance to the Student's educational program."

The Student requires a high degree of structure, consistency, and direct supervision in order to receive educational benefit. She has "a great deal of difficulty in responding to new people, new situations, or [to] changes in routine." The Student may engage in self-abusive behavior. She also engages in other self-stimulation behaviors. She can be oppositional when frustrated or stressed. Although the Student is highly distractible, she can be redirected to participation in and the completion of specific educational lessons or tasks. However, redirection has to be readily available.

¹As will be noted later, no licensed teacher was providing academic instruction to the Student during this period. The third-party provider did not employ a licensed teacher, and the School did not provide one.

This may require one-to-one supervision. The Student's present behaviors have been somewhat stable due to structure and consistency in the homebound placement as well as a medication regimen. She is presently seen by a number of professionals to address her medical and psychological needs.

The Student's behavioral intervention plan (BIP) needs to provide for a time-out area ("a de-escalation environment") for the student. The Student's most recent psychological evaluation was conducted in December of 2001 by an outside evaluator. The resulting report contains a number of suggested functional objectives, sensitivities, and strategies to be employed with the Student.

The curriculum for the Student should focus more on basic reading and math skills, functional daily living skills, and the acquisition of appropriate behaviors for participation in social situations. The parties want to integrate the Student into a school-based educational program. In her homebound placement, the Student had opportunities to interact with family members and caregivers. She also participated in various community outings.

Both parties agree that, with appropriate support, the Student can be integrated into the school setting. School personnel working with the Student will need to have specific knowledge of the Student's needs and the implications of her disability as this affects her educational programming. Integration into the school environment will need to be incremental due to the Student's difficulties in tolerating changes in structure and environment. The staff provided by the third-party contractor will need to be involved in the integration or transition of the Student to the school environment in order to maintain consistency.

The Student's proposed IEP does contain a BIP. However, it will need to consider other factors. Given her current needs, the Student will require close supervision, possibly one-to-one. She will also need a time-out area for use while in the school environment. The behavioral management program presently used in the home environment should be coordinated with the school program as much as possible. The School will involve the outside evaluator in the integration/transition process.

The current IEP for the Student resulted from a series of CCC meetings that began in May of 2001, extended through September of 2001, and concluded in October of 2001. The instant hearing was requested after the parties remained in disagreement after the October 2001 CCC meeting.

The IHO's Conclusions of Law

From the foregoing, the IHO determined eleven (11) Conclusions of Law. The Student is eligible for special education and related services due to Autism Spectrum Disorder and a Communication Disorder.

During the homebound placement that began during the 1999-2000 school year, the School failed to review the placement every sixty (60) instructional days, as required, and failed to review and revise the Student's IEP, as also required. Although the School did contract with a third-party provider to

provide services to the Student, the School provided little, if any, direct services from its own personnel. Beginning in May of 2001, the School initiated efforts to address the Student's needs and the appropriate educational setting; however, many more months passed with the School not complying with the requirements of State law.

The current full-time homebound setting is not an appropriate educational setting. Of specific concern was the lack of contact with other students, with and without disabilities, and a lack of clear data to substantiate the homebound setting in favor of a school-based program. The evidence and testimony supported a conclusion that an appropriate program, with the necessary supports, could be implemented in the school setting.

OT services can be provided in a school setting on a consultative basis in partnership with those providing direct services to the Student. However, the Student's speech/language needs are more profound. In addition, the Student will require additional related services, such as psychological services, transportation, and paraprofessional support. There is a need for consistency in routine, structure, and readily available supervision during and after the transition from the homebound setting to the school setting. A paraprofessional will be needed for the Student.

A major thrust of the Student's initial programming will need to address behaviors, especially her responses to environmental stimuli and other persons. The BIP will need to be reviewed and revised, as necessary. There is no justification to continue the Student's homebound placement. However, there is a need for a transition plan, and the transition plan should provide for incremental integration of the Student from her homebound placement to a school setting.

The IHO issued thirteen (13) orders. The Student is to be transitioned from her homebound setting to an age-appropriate school setting, which will be considered the LRE for the Student, recognizing the fact that the transition period will need to be incremental. The IEP developed on October 5, 2001, is appropriate to the Student's needs so far as the educational goals and objectives contained therein. OT, and speech/language therapy services are to be provided to the Student. The OT services are to be provided on a consultation basis, with consultation with appropriate personnel to occur on at least a monthly basis. Speech/language services shall be thirty (30) minutes a week, although these thirty (30) minutes can be divided between direct services and consultation services, at the discretion of the speech/language therapist. The Student requires two-way transportation as a related service.

The IHO's Orders

Initial transition for the Student shall include a minimum of sixty (60) minutes of instruction up to a maximum of 180 minutes of instruction. At the discretion of the TOR, any unused portion of the 180 minutes can be implemented in the Student's home setting, with appropriate supervision. The IHO noted that flexibility will be necessary and that it may (again, at the discretion of the TOR) be necessary for some initial school days to be less than 60 minutes in length.

The current paraprofessional provided by the third-party provider shall remain employed and assigned to the Student at least through the remainder of this school year (2001-2002 school year). The contracted services shall include 180 instructional minutes a day as well as a maximum of one additional hour before scheduled instruction (to include transportation time) and a maximum of one hour past scheduled instructional time (to include transportation time). Should the current paraprofessional not be available, the School is to obtain and appropriately train another adult to serve in this capacity. The training of such an individual shall encompass familiarization with the Student, her personal needs, and her educational program. Any third-party contracted service personnel shall be under the direct supervision of the TOR while assisting the Student in any school-related activity.

A BIP must be revised to include a time-out area for the Student to de-escalate. This must occur before the transition process is initiated. The BIP should be reviewed and revised as necessary to address behavioral management needs of the Student.

The School is to ensure that all School personnel assigned to the Student receive appropriate training in Autism Spectrum Disorder with particular emphasis on the Student's needs.

If the Student's needs indicate a need for extraordinary services, the School is to convene the CCC for the purpose of applying to the Division of Exceptional Learners (formerly, the Division of Special Education) for extraordinary funding under 511 IAC 7-27-12.²

A CCC will need to convene prior to June 3, 2002, to discuss extended school year (ESY) services as well as continued programming for the Student starting with the 2002-2003 school year. The IHO advised the parties of their right to seek administrative review of his decision.

APPEAL TO THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The Petition for Review

The Student filed on March 21, 2002, her Petition for Review with the Indiana Board of Special Education Appeals (BSEA). In her Petition, the Student challenges the determination by the IHO that the IEP developed at the October 5, 2001, CCC meeting contained appropriate instructional goals and objectives. The IEP was written prior to the outside evaluation, which contained a number of additional recommendations that the IHO deemed appropriate but are not included in the October 5, 2001, IEP. Further, the IHO did not order the recommendations of the outside evaluator to be included in the Student's IEP. The Student also asserts that School personnel are unfamiliar with the her needs and acknowledged they have not observed the Student in her current setting. The School

²The IHO characterized this application process as one for "services." 511 IAC 7-27-12 does not provide "services." It is a funding mechanism. This portion of his Order is amended to reflect the language and intent of the cited regulation.

has not conducted a functional behavioral assessment. The Student further asserts the IEP lacks goals and objectives regarding “functional behavioral skills,” although the IHO has deemed these a necessary component of the Student’s IEP. The IEP does not address functional behavioral skills, nor does the IEP provide for a consistent, structured environment and routine, which the IHO determined the Student needed. Although the IHO determined these were needs of the Student, he did not order them included in the IEP.

The Student likewise contends the School is not prepared to develop and implement an IEP that would contain all the necessary and ordered components, given the lack of knowledge regarding the Student’s needs and the lack of observation in her current setting. The Student also contends that the School lacks appropriately licensed or trained staff, and is ill-prepared to serve the Student’s needs. Although the School testified it has an autism expert on staff and that the School would work with the outside evaluator, how this will occur and to what extent these people will be involved are not detailed.

The School, the Student represented, has attempted to integrate the Student into the middle school in advance of developing the transition components ordered by the IHO or implementing the program requirements. There has been no CCC meeting; the parent’s input has not been sought; there has been no training of School personnel; and there are no definitive plans for incorporating the recommendations of the outside evaluator. This could cause harm to the Student. Without careful planning, the Student could be a danger to herself or others. The IHO noted her need for a structured, consistent environment. She has achieved these in her homebound placement. The School’s actions jeopardize these gains. There is a need to have advance planning and to develop an appropriate IEP prior to the transition from a stabilized environment to the school environment.

Although the Student’s witness testified the Student required direct speech and OT services, the IHO ordered monthly consultative services for OT, and weekly thirty (30) minute sessions of speech/language. The IHO’s order in this regard is unclear. In addition, the past denial of these services should be considered in determining how much service time would be appropriate. Also, given the Student’s pronounced communication needs, she requires more intensive, direct services than was ordered. The IHO stated that the Student’s speech needs are to be addressed as a part of her educational program, but her IEP does not address these needs and there is no order to this effect.

The Student also objects to the IHO leaving the decision as to ESY services to the discretion of the CCC. Testimony from the Student’s witnesses support the need for such services given her need for constant reinforcement and consistent input. There was no evidence presented to the contrary.

The Student also generally objects to the IHO’s determination the School could provide a free appropriate public education (FAPE) to the Student when it demonstrated it could not in the past and would not for the past two years. The Student urged the BSEA to maintain his current homebound

setting until these issues were resolved. The Student also requested oral argument.³

Complaint Issues

On March 14, 2002, the Parent, apart from the Student, filed a complaint pursuant to 511 IAC 7-30-2 with the Division of Exceptional Learners (DEL). The DEL, on March 22, 2002, and pursuant to 511 IAC 7-30-2(l) and 34 CFR §300.661(c), referred the letter of complaint to the BSEA for a determination as to whether the issues raised were related to the conduct of the review. The BSEA had jurisdiction once the Student initiated her Petition for Review, *supra*. The BSEA, after review, determined that the issues raised were related to the dispute over which it had jurisdiction. Accordingly, it accepted jurisdiction and notified the parties by memorandum of March 26, 2002, that the following complaint issues would be considered in the course of the review:

1. The public agency allegedly excluded the parent from case conference committee meetings regarding the implementation of the Student's IEP, specifically following the issuance of the Independent Hearing Officer's written decision. 511 IAC 7-30-3.
2. The public agency allegedly excluded the parent from case conference committee meetings since November of 2001. 511 IAC 7-27-3.
3. The public agency allegedly failed to implement the Student's IEP while she was on homebound through the lack of weekly contacts by the Teacher of Record and the Teacher of Service. 511 IAC 7-27-7.
4. The public agency allegedly failed to provide appropriate accommodations or modifications to the educational placement to meet the Student's needs. 511 IAC 7-27-9.

Although 511 IAC 7-30-2(m) indicates that a complaint issue that has been decided previously by a hearing decision in a due process hearing involving the same parties is binding, this would apply to investigations by the DEL and not to review by the BSEA. The BSEA will determine those complaint issues not addressed by the IHO, and will not disturb those decisions of an IHO unless such decisions are clearly erroneous.

On March 22, 2002, the School moved for an extension of time within which to Respond to the Petition for Review. The BSEA granted the Motion and issued an order to that effect that same date, permitting the School to file its Response by April 10, 2002.

³Although the BSEA did not directly respond to the Student's request for oral argument, its eventual order setting this matter for review without oral argument should be considered as a denial of the motion for oral argument.

Current Education Placement; Interim Order

At this same time, a dispute arose between the parties as to what the “current educational placement” is for the Student. General Counsel for the Indiana Department of Education advised the parties of their respective procedural recourse to address this issue to the BSEA. Pursuant to this advisement, the Student, by counsel, filed on March 25, 2002, an “Emergency Motion for Determination of Stay Put Placement” with the BSEA. In her Motion, the Student represented the School had unilaterally discontinued homebound services despite the Student’s initiating a Petition for Review with the BSEA. The Student asserts that she needs to remain in the homebound setting because of negative and destructive behavioral concerns as well as unresolved programmatic issues with the School. The Student asserts the homebound placement is the “current educational placement” of the Student, and the placement is required to be maintained until the completion of the administrative review. 511 IAC 7-30-3(j).

The School responded on March 26, 2002, asserting that the homebound placement was never an “educational placement” but was, rather, a temporary placement initiated to address specific concerns with the intent of resuming the Student’s school-based educational program. The IHO found this to be so (IHO’s Finding of Fact No. 28). The record amply supports the temporary nature of the homebound placement, which is also supported by case law. The Student does not challenge the IHO’s determinations in this respect. To maintain a temporary placement, one that the School acknowledges is inappropriate, would undermine the intent that a current placement be educational.

The Student supplemented her original Motion with additional case citations. This was received on March 27, 2002.

On March 28, 2002, the BSEA issued an interim order, establishing that the Student’s “current educational placement” could not be the homebound placement because of the temporary intent for the placement and the lack of properly licensed personnel. The Student was ordered placed pursuant to the IHO’s orders, with the proviso that any paraprofessionals working with the student on academic matters be under the direct supervision of a properly licensed teacher. This placement would constitute the Student’s “current educational placement.”

The School’s Response to the Petition for Review

The School filed on April 10, 2002, its Response to the Petition for Review. As a preliminary matter, the School represented that the Student does, indeed, have special needs. However, the Student can be served appropriately in a school setting. There is no justification to maintain the homebound placement, particularly as the BSEA, in its interim order, questioned whether the homebound placement was educational at all. Only the Parent and one of her witnesses supported such a setting. The School acknowledges the inappropriateness of the homebound placement, but asserts that is why it initiated the hearing.

The School takes exception to the Student’s representations that the October 5, 2001, IEP is devoid

of certain goals and objectives, or that School personnel were not aware of the Student's needs. The CCC meetings involved the Student's TOR of many years along with staff of the third-party contractor, who were working directly with the Student and providing progress reports. Although the Student's TOR for middle school does not know her, this would not be unusual for any TOR receiving students from other schools. The CCC contained members who were familiar with the Student and her needs.

Although the outside evaluator's recommendations are not contained in the Student's IEP, the Student's TOR has indicated that she has read the report and will implement the recommendations and strategies. An IEP does not have to be so detailed as to address every aspect of a program, the School asserts, including the methodology to be employed.

The School takes exception to the Student's criticism of a lack of a transition plan. The School states that it has developed a transition plan to integrate the Student into the school setting, and to do so on a gradual basis with support from the third-party contractor. Staff training has occurred. There is no legal requirement for the School to involve the Parent in the implementation of the IHO's orders in this case. The IHO's orders were clear and did not require the CCC to convene for this purpose.

OT and speech/language therapy services are included in the Student's current IEP. Also, the outside evaluator recommended these services be provided on a consultative basis.

The IHO's decision to leave the need for ESY services to the discretion of the CCC was appropriate, the School represents, due to the fact the IHO's decision was issued in February and there were more than three months of school remaining. The School has considered ESY services for the Student in the past, and would likely consider them again this year.

The School also responded to the four (4) complaint issues raised by the Parent and incorporated into the review of this matter.

The record demonstrates the Parent was not excluded from any CCC meetings during the time frame complained of. The IHO did not order the parties to reconvene as a CCC in order to implement his orders. His orders are specific enough. The record supports that past CCC meetings have not been successful. The IHO may have considered this when he wrote his decision. The School, once it received the IHO's decision, began the transition process. The School represents it has not been successful in this endeavor due to the Parent's objections. The BSEA, when it issued its interim order on "current educational placement," likewise did not order the CCC to convene.

The School acknowledges the TOR did not have weekly contacts with the Student, although the TOR did continue to work on a weekly basis with the staff from the third-party contractor. Beginning in May of 2001, the School began to address the shortcomings in the homebound setting, culminating in this hearing. It contracted for 7.5 hours a day services to assist in the expected transition. The School is prepared to provide compensatory educational services to the Student.

The School states that it is prepared to make the necessary accommodations in order to program for the Student at the middle school. It provided testimony to this effect at the hearing. These accommodations have not yet occurred, pending resolution of this administrative appeal.

The Appeal

On April 10, 2002, the BSEA notified the parties that it would review this matter on April 19, 2002, without oral argument and without the presence of the parties. Each member of the BSEA received a complete copy of the record from the hearing, as well as all supplemental pleadings and correspondence.

The BSEA convened on April 19, 2002. All members were present. In consideration of the written decision of the IHO, the record as a whole, the pleadings of the parties, and the requirements of 511 IAC 7-30-4, the BSEA now makes the following Findings of Fact, Conclusions of Law, and Orders.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is created by 511 IAC 7-30-4(a) and charged with the responsibility to review timely appealed final written decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. A Petition for Review from the final written decision of an IHO has been timely filed with the BSEA. The BSEA has jurisdiction in this matter.
2. The Student's Petition for Review is not specific as to Findings of Fact to which exception is taken, 511 IAC 7-30-4(d)(3). The BSEA accepts the Findings of Fact of the IHO, as recited above. This includes Finding of Fact No. 30 (the School will incorporate the recommendations and strategies of the outside evaluator) and Finding of Fact No. 36 (need for behavioral management, including consistency between home model in place while transition to a school setting is achieved).
3. The BSEA accepts the IHO's Conclusion of Law No. 3. The School did not provide a free appropriate public education (FAPE) to the Student while she was on homebound from the fall of 1999 until the hearing was requested in November of 2001. The School failed to follow the requirements of 511 IAC 7-17 *et seq.* ("Article 7"), especially the requirements of 511 IAC 7-27-10. The placement was not reviewed at least every sixty (60) instructional days, nor was the IEP reviewed and revised as necessary. No properly licensed school personnel provided academic instruction to the Student for the majority of the placement.
4. The BSEA accepts the IHO's Conclusion of Law No. 8. The primary emphasis of the Student's educational program as she transition to the school setting will need to address behavioral management, specifically regarding her responses to environmental stimuli and other persons. The BIP in the Student's current IEP will need to be reviewed to accommodate the Student's integration in a school setting. The BIP will need to provide for

a time-out area for the Student.

5. The BSEA accepts the IHO's Conclusion of Law No. 9. There is no compelling justification to continue daily 7.5 hours of one-to-one supervision in the homebound placement.
6. The BSEA accepts all remaining Conclusions of Law reached by the IHO and not otherwise addressed above.
7. With regard to the allegations (Complaint Issues Nos. 1 and 2) that the Parent was excluded from CCC meetings regarding the implementation of the Student's IEPs, in contravention of 511 IAC 7-27-3, the record indicates the Parent participated fully in all CCC meetings prior to the initiation of this hearing. There is no requirement to include the Parent in the implementation of the IHO's orders under 511 IAC 7-30-3, absent a specific order to that effect. No such order was issued. No violations occurred.
8. The School acknowledges it failed to implement the Student's IEP while on homebound when its TOR did not maintain weekly contacts (Complaint Issue No. 3). A violation of 511 IAC 7-27-7 occurred. However, the School has taken steps to address this, including the seeking of due process to resolve educational and placement issues. The IHO's Orders and the BSEA's Orders in this matter will serve as corrective action in this regard.
9. As to Complaint Issue No. 4, the BSEA finds no violation by the School of 511 IAC 7-27-9 regarding the alleged failure to provide appropriate accommodations or modifications to the educational placement in order to meet the needs of the Student.
10. The BSEA concludes, as did the IHO, that the appropriate placement for the Student is within an age-appropriate school setting, with the need for an incremental transition from the home setting to the school environment.

ORDERS

In consideration of the foregoing, the BSEA now issues the following Orders:

1. The BSEA upholds the Orders of the IHO as written, except Order No. 13.
2. In consideration of the Combined Findings of Fact and Conclusions of Law regarding the lack of academic instruction provided the Student during the extended homebound placement, the IHO's Order No. 13 is to be replaced with the following Order: The Student is entitled to

extended school year services (ESY) during the summer of 2002. The CCC will not be required to convene to discuss this. The ESY services will address, at a minimum, the academic needs of the Student. These ESY services are to be considered compensatory educational services.

3. The BSEA dissolves its interim order regarding "current educational placement." The Student's current educational placement will be in a typical school setting, pursuant to the IHO's Orders and consistent with this opinion.
4. Any other issue not specifically addressed above is hereby overruled or dismissed, as appropriate.

Date: April 22, 2002

/s/ Raymond W. Quist, Ph.D., Chair
Indiana 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 7-30-4(n).