

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

In the Matter of C.K.,)	
And)	
Vigo County School Corporation and)	Article 7 Hearing No. 1269.02
Covered Bridge Special Education District)	
)	
Appeal from a Decision by)	
Jerry L. Colglazier, Esq.,)	
Independent Hearing Officer)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

It should be noted from the outset that any references to the “Student” or the “Student’s representative” include the Parent or Parents of the Student. It should also be noted that Vigo County School Corporation and Covered Bridge Special Education will be referred to collectively as the “School.”

On February 13, 2002, the Student filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed on February 15, 2002. The IHO advised the parties of their rights on February 20, 2002, and also served notice on the parties that a pre-hearing conference would be conducted on February 27, 2002. On February 21, 2002, the Student filed an amended hearing request. A pre-hearing conference was conducted by telephone on February 27, 2002. On March 1, 2002, the IHO issued his pre-hearing order and also issued an order granting an extension of time requested jointly by the parties. The IHO also notified the parties on March 1, 2002, that a hearing would be conducted on April 25, 26, and 30, 2002. The hearing was conducted over those dates. At the hearing, the parties agreed to an extension of time to June 1, 2002, for the issuance of the IHO’s written order (Transcript, Vol. I, pp. 8-9). The parties defined the issues for determination as follows:

1. Did the School Provide, or Offer to Provide, an Appropriate Program of Special Education and Related Services?
Sub-issues were directed at what would constitute the “least restrictive environment” (LRE) for the Student:
 - a. Small class size and familiarity with other students;
 - b. Appropriate Behavior Modification Plan;
 - c. Stay in same class all day with some special help by aide;

- d. Training of staff on appropriate disciplines for RAD/ODD/EOD;
 - e. Appropriate annual testing for Student to keep up with needs as school work increases;
 - f. Provide psychologist in classroom weekly to help teach how to deal with stress;
 - g. 100% regular classes (not Learning Disability) with assistance of aide;
 - h. Extended School Year – full time needed with special tutoring as needed at Midwest or LRE.
 - i. Can a-f (LRE) be provided in the School or solely at the private school?
2. If Not, Was the Placement and Education of Student at the Private School Appropriate?
 3. If Yes, Are Parents of Student Entitled to Reimbursement for Any or All of the Costs of the Private School Placement?
 4. What Is an Appropriate Individualized Education Program (IEP) for Services, Accommodations, and Placement, Including Consideration of Extended School Year (ESY) Services to Provide Student a Free Appropriate Public Education (FAPE)?
 5. Did the School Appropriately Convene and Conduct Case Conference Committee Meetings to Consider and Develop an IEP Pursuant to the Individuals with Disabilities Education Act (IDEA) and 511 IAC 7-17 *et seq.* (Article 7)?
 6. Did the Parents Enroll the Student at the Private School as Private Enrollment under 511 IAC 7-19-1?
 - a. If So, Did the School Provide Student with Proportionate Share of Services?
 - b. If Not, Was Student Placed Unilaterally Pursuant to 511 IAC 7-19-2 with Proper Notice under 511 IAC 7-19-2(d) Given to the School?

The Written Decision of the IHO

The IHO's written decision was issued on June 1, 2002. The following information is gleaned from the thirty (30) Findings of Fact determined by the IHO.

The Student is seven years of age with a birth date of September 17, 1994. She is just completing the first grade at a private school. The Student's initial Case Conference Committee (CCC) was held on December 5, 1997, for consideration of a diagnostic placement in the Early Childhood program within the School. Testing indicated low average ability (IQ test), significant scores in aggression and destructive behavior, and low average skills in speech and language.

A CCC was held January 27, 1998, wherein the classroom teacher reported some oppositional behaviors. The teacher expressed concern that the Student required a structured preschool setting. Another CCC was held on February 24, 2002, wherein Student was determined eligible for services under the criteria for Early Childhood or Other Health Impairment (OHI) with services at an integrated preschool within the School, albeit not at her home school, with reimbursement to

the Parent for transportation. School staff reported the Student occasionally exhibited oppositional and defiant behaviors in the classroom, and that clear limits and boundaries were necessary as the Student routinely tests limits. She exhibited frustration with limits, compliance, attention to tasks, and transitioning from preferred tasks. The Student was receiving medication.

A CCC was held February 4, 1999. The school placement for early childhood services was noted as Terre Town Elementary School since August 1998. The report noted the Student exhibited markedly different behaviors, frustrations, anger, and noncompliance based upon the medication the Student was on. Various behavior modification techniques were used with limited success. The report noted a children's hospital had diagnosed Student as having Attention Deficit Hyperactivity Disorder (ADHD), with Oppositional/Defiant Disorder (ODD), and severe Reactive Attachment Disorder (RAD). The children's hospital therapist recommended placement in a community preschool program that would include an all-day summer program.

The CCC reconvened in May and June of 1999 to consider ESY services. The School noted the Student did not regress during Christmas and spring breaks; the Parent observed the Student did regress during breaks, notably by being louder, more noncompliant, and obnoxious. The CCC determined the Student was not eligible for ESY services. The Parents enrolled the Student in a private preschool/kindergarten program for three days a week (8 am - 3 pm) during the summer. The School was to monitor the Student once every two weeks during the summer program. The School's preschool teacher observed the Student at the private preschool program on at least four (4) occasions during the summer of 1999. The director of the private program acknowledged the Student had "serious problems" but also reported the Student did well in other areas.

On February 1, 2000, the CCC convened to discuss the Student's transition to kindergarten. The Parent expressed concerns and presented letters from the Student's psychiatrist and psychologist. The Parent also requested a full-day program with a small class size. The School offered several placement options, including kindergarten at the Student's home school (Terre Town Elementary School); a part-time kindergarten program at Terre Town; and a possible full-day program in another School building. If the Parent elected to enroll the Student in a private program, the School would make available services as it had when the Student was enrolled in the private preschool/kindergarten program. The Parent declined any public school placement and requested the Student be placed in a private school at the School's expense. The School indicated it would explore full-day kindergarten options.

A CCC was held on May 1, 2000, to discuss the Student's transition to kindergarten. The School offered a full-day kindergarten program at one of its elementary schools. The Parent rejected the public school placement, opting to place the Student in a private program. The Parent wanted the School to pay for the private placement, which the School declined to do. The IEP did not detail any program or transition planning for the Student to either the proposed full-day public school placement or to the Parent-preferred private placement. The CCC also discussed ESY services, which the School agreed were necessary. An IEP was developed for the summer program at the

private preschool/kindergarten program, with the School paying for three and one-half days a week with consultation services provided.

The Student's triennial evaluation was conducted on October 26, 2000. Academic and social progress were made while at the private preschool/kindergarten program. Additional testing in the spring of 2001 would be needed to update the Student's achievement in such areas as social, emotional, and behavioral domains. Evaluations were conducted in April of 2001. The Student was determined to be performing at or near the learning expectancy for all areas measured for a kindergarten student not exposed to a traditional academic setting. Achievement scores were in the average range. Behavioral assessments from both the teacher and the Parent indicate significant concerns regarding aggressive behaviors, conduct problems, learning problems, high anxiety, oppositional behaviors, inattentiveness, and difficulties in adapting.

A CCC was held on May 24, 2001. The CCC met at the private school where the Student is currently enrolled. Although the Student had made progress, this had been accomplished with difficulty. The Student's behavior continued to be a concern, especially in the prior month and one-half. Regression "in all areas" was noted since the beginning of April. The IEP indicated the Student was now considered to have an Emotional Handicap (EH), but why eligibility was changed to EH from OHI is not explained. Full-time general education setting was considered inappropriate for the Student. The Student would require special education and related services outside the general education classroom for at least 21 percent of the school day. The IEP does not contain a discussion of any placement or service options within the public school setting. Parents indicated they intended to enroll the Student in the private school. The School recommended consultation services by its personnel two (2) times a week for the first four weeks and one (1) time a month afterwards. The consultation services actually provided were less than those specified in the IEP.

The CCC reconvened on October 16, 2001, again at the private school. The School discussed a possible EH placement in its schools with a transition plan to accomplish this. The Parent expressed a preference to remain at the private school. The CCC met again on January 8, 2002, again at the private school. It was noted the Student had made significant gains socially and behaviorally, although the Student was academically behind where the class was and had difficulty staying on task. The CCC determined the Student's IEP could not be implemented in the Student's home school (Terre Town), but this is not explained. The School recommended a transition plan with a projected starting date of January 21, 2002, with special education services for reading, written expression, math, and behavior. The Parent rejected the School's proposals. An alternative service plan was prepared for implementation at the private school.

The School prepared a draft IEP on April 11, 2002, proposing transition to the Student's home school (Terre Town). The draft IEP proposed general education services for 68 percent of the school day with 90 minutes of resource services a day for reading, written expression, and math, and lesser services a month for behavior. The draft IEP included provisions for a transition plan of scheduled visits to the new school; a behavior plan that included teacher training, a functional

behavior assessment, and a behavior intervention plan; and a desensitization plan that would attempt to address the underlying causes of the Student's anxiety. Goals and objectives were written at the first-grade level. Reasons for proposing the Terre Town placement were provided. A CCC was never held and the draft IEP was never completed.

The children's hospital psychologist has provided general recommendations from at least April of 1999. These recommendations have generally included a full-day placement in a general classroom setting with typically developing peers from whom she could model behaviors; structure and predictability; firm rules with consequences for noncompliance with reinforcement for appropriate behavior; rule infractions are to be addressed immediately with a minimum of discussion as the Student does not respond to reasoning; negative behavior should not be discussed in front of the Student as she needs to begin to see herself as a good person; and a nurturing environment with support of compliant behavior. Until November of 2001, these recommendations were site/location neutral. On November 6, 2001, the psychologist wrote to the School and, based on recommendations prepared by the Parent, recommended placement and special education services at the private school.

The Student has transitioned successfully from the preschool/kindergarten private program to the private school without a formal written transition plan. She has gradually adapted. There is disagreement as to the amount of time the Student may require in order to transition. The School concedes the Student remains eligible for ESY services. The Student does require a teaching assistant for transition and academic assistance, but a full-time aide would not be appropriate. Although the parties disagree on many points, the IHO also determined the Parents did not inform the School they were rejecting the public school placement offered by the School to provide the Student a FAPE, nor did they inform the School of their intent to enroll the Student in the private school at the School's expense.

From these Findings of Fact, the IHO reached 14 Conclusions of Law. For ease of reference, the Conclusions of Law are associated with the issues as stated by the IHO and agreed to by the parties.

Issue #1: Did the School provide, or offer to provide, an appropriate program of special education and related services?

In Conclusion of Law #8, the IHO found that although the School did not make specific, detailed written placement and service proposals to the Parent, the services and placements available were appropriate.

Issue #2: If not, was the placement and education of Student at the Private School appropriate?

In Conclusion of Law #9, the IHO determined that this issue need not be addressed because Issue #1 was not answered in the negative. The IHO did find that: the Student did receive an educational benefit academically and socially at the private school; however, the services provided were not to the degree that such services would have been available to the Student in the public

school setting. The delivery of services were not the “most appropriate” [sic] to meet the needs of the Student. The additional services and accommodations at the private school setting that would be consistent with special education were requested or suggested by the Parent and the Student’s Psychologist.

Issue #3: If yes, are Parents of Student entitled to reimbursement for any or all of the cost of the private placement?

In Conclusions of Law # 3 and #4, the IHO found that the Parents did not meet the requirements of providing notice to the School as required by 511 IAC 7-19-2 and, as a consequence, are not entitled to reimbursement of the private school expenses.

Issue #4: What is an appropriate IEP for services, accommodations, and placement, including consideration of extended school year to provide Student a free appropriate public education?

In Conclusion of Law #10, the IHO found that ESY services are appropriate for the Student and can be a means to begin the transition process to public school; the draft IEP of April 1, 2002, provides an appropriate basis to convene a CCC to develop a final IEP; present levels of performance and goals and objectives need to be updated to consider Student’s status at the end of the private school year, and for a determination if Student will attend second grade (which appears to be appropriate) or first grade; resource services in reading, written expression, and math are appropriate but need review; placement at the home school of Terre Town or another public elementary school would be appropriate; transition plans for transition to public school, a behavior plan, and a desensitization plan for school bus transportation and staff training are appropriate but need to be detailed with continuing review; and the CCC must be reconvened to complete an appropriate IEP.

Issue #5: Did the LEA appropriately convene and conduct case conference committee meetings to consider and develop an IEP pursuant to IDEA and Article 7?

In Conclusion of Law #11, the IHO found that case conferences were timely and appropriate for the Student as required by IDEA and Article 7.

Issue #6: Did the Parents enroll Student at the private school as private enrollment under 511 IAC 7-19-1?

In Conclusion of Law #12, the IHO determined the placement at the private school was a unilateral placement by the Parents under 511 IAC 7-19-1.

Issue #6(a): If so, did the School provide Student with proportionate share of services?

In Conclusion of Law #13, the IHO found that this issue is not properly before the IHO and referred the issue to the Division of Exceptional Learners for consideration.

Issue #6(b): If not, was Student placed unilaterally pursuant to 511 IAC 7-19-2 with proper notice under 511 IAC 7-19-2(d) given to the School?

The IHO addressed the issue of unilateral placement in his Order #4, which is outlined below.

Based on the foregoing, the IHO issued five (5) Orders, which are reproduced below:

1. The [School] provided or offered to provide an appropriate program of special education and related services to enable the Student to receive a FAPE.
2. The private school placement at [the private school] was not appropriate to meet the unique educational needs of the Student.
3. Parents are not entitled to reimbursement for any or all of the cost of the [private school] placement.
4. The placement at [the private school] was a unilateral private school placement by the parents, and only a proportionate share of services was required. The Indiana Department of Education, Division of Exceptional Learners shall review this issue to determine if appropriate proportional services were provided at [the private school].
5. A case conference [committee] shall be immediately convened to consider public school placement, [determine] present levels of performance, goals and objectives, and special education services needed to provide a FAPE to Student. The IEP must include development of a transition plan, behavior plan, and desensitization plan that is fluid and ongoing. The committee shall also review the eligibility criteria for the Student. The [School] shall consider in[-]service [training] to [sic] [for] staff to meet [the] Student's disabilities.

The IHO provided all parties with the appropriate notice of their right to seek administrative review.

Appeal To The Board Of Special Education Appeals

At the core of this dispute is which provision of Article 7 will apply: 511 IAC 7-19-1 (which involves the unilateral placement of an eligible student into a private, nonpublic school and for whom a FAPE is not required but there is to be available some level of services) or 511 IAC 7-19-2 (which involves a unilateral placement also, but where it is alleged the public agency did not provide a FAPE and the private, nonpublic school placement was necessary to ensure a FAPE to the eligible student). The former does not typically involve reimbursement; the latter always involves reimbursement. The referenced Article 7 provisions are reproduced below.

511 IAC 7-19-1 Special education for students in private schools or facilities

Sec. 1. (a) This rule applies to students with disabilities who have been unilaterally enrolled by the parent in a private school or facility. This rule does not apply to students with disabilities who have been placed in or referred to a private school or facility by a public agency.

(b) The activities undertaken to carry out child find responsibilities for private school students with disabilities must be comparable to activities undertaken for students with disabilities in public schools. Each public agency shall, with regard to any private school or facility, including any religious school or home school, within its boundaries:

- (1) locate, identify, and evaluate all students with disabilities as specified in 511 IAC 7-25;
- (2) consult with appropriate representatives of private school students with disabilities on how to carry out the location, identification, and evaluation, and December 1 child count activities; and
- (3) make available special education and related services to any such student who is participating in any program assisted or carried out under this article.

(c) The December 1 child count shall be used to determine the amount of subgrant funds from 20 U.S.C. 1411(g) and 20 U.S.C. 1419(g) that the public agency must spend on providing special education and related services to students in private schools and facilities in the subsequent fiscal year.

(d) Each public agency shall consult, in a timely and meaningful way, but at least annually, with appropriate representatives of private school students to determine the following:

- (1) Which students require services from the public agency.
- (2) What services will be provided.
- (3) How and where the services will be provided.
- (4) How the services provided will be evaluated.

(e) The public agency shall afford the representatives of the private school students a genuine opportunity to express their views in the consultation required in subsection (d). The consultation shall occur before the public agency makes any decision that affects the opportunities of students with disabilities enrolled in private schools or facilities, and the consultation shall include consideration of the following:

- (1) The funding requirements.
- (2) The number of private school students with disabilities.
- (3) The needs of private school students with disabilities.
- (4) The location of the private school students with disabilities.

(f) The case conference committee, in accordance with 511 IAC 7-27-4, shall make decisions with respect to the special education and related services to be provided to students enrolled in private schools or facilities.

(g) For each student in a private school or facility that has been determined eligible to receive special education and related services from the public agency, the public agency shall do the following:

- (1) Initiate and conduct case conference committee meetings to develop, review, and revise an individualized education program in accordance with 511 IAC 7-27-4 and 511 IAC 7-27-6.
- (2) Ensure that a representative of the private school or facility attends each case conference committee meeting, either in person or by telephone.
- (3) Implement the individualized education program in accordance with 511 IAC 7-27-7.

(h) At the election of the public agency, services to students in private schools or facilities may be provided at:

- (1) the private school or facility, including a religious school;
- (2) the public school; or
- (3) a neutral site.

(i) If services are provided at the public school or a neutral site and transportation is necessary, the public agency must provide transportation from the private school or the student's home to a site other than the private school or facility and from the service site to the private school or the student's home, depending on the timing of the services. The public agency is not required, under this article, to transport the student from the student's home to the private school. The cost of transportation may be included in the calculation of the public agency's required expenditure described in subsections (j) and (k).

(j) For students who are three (3) years of age, but less than twenty-two (22) years of age, the public agency, in providing special education and related services to students in private schools and facilities, must expend at least an amount that is the same proportion of the public agency total subgrant under 20 U.S.C. 1411(g) as the number of private school students with

disabilities who are three (3) years of age, but less than twenty-two (22) years of age residing in its boundaries is to the total number of students with disabilities of the same age range.

(k) For students three (3) years of age through five (5) years of age, the public agency, in providing special education and related services to students in private schools and facilities, must expend at least an amount that is the same proportion of the public agency total subgrant under 20 U.S.C. 1419(g) as the number of private school students with disabilities three (3) years of age through five (5) years of age residing in its boundaries is to the total number of students with disabilities three (3) years of age through five (5) years of age.

(l) Expenditures for child find activities shall not be considered in determining whether the public agency has met the expenditure of federal funds requirement of this article.

(m) The public agency shall not use the funds described in subsections (j) and (k) to do the following:

(1) Fund existing levels of instruction currently provided by the private school or facility, or otherwise benefit the private school.

(2) Meet the needs of the private school or facility.

(3) Meet the general needs of the students enrolled in the private school or facility.

(4) Fund classes that are organized separately on the basis of school enrollment or religion of the students if the classes:

(A) are at the same site; and

(B) include students enrolled in public schools and students enrolled in private schools.

(n) The public agency may use the funds described in subsections (j) and (k) to make public school personnel available in the private school or facility to the extent necessary to provide special education and related services to students with disabilities in private schools or facilities, if those services are not normally provided by the private school or facility.

(o) The public agency may use funds described in subsections (j) and (k) to pay for the services of an employee of the private school or facility if the employee performs the services:

(1) outside of the employee's regular hours of duty; and

(2) under public supervision and control.

(p) The services provided to students in private schools or facilities must be provided by personnel meeting the same standards as personnel providing services in the public agency.

(q) A complaint that a public agency has failed to meet the requirements of this rule may be filed pursuant to the procedures described in 511 IAC 7-30-2.

(r) The procedures for mediation under 511 IAC 7-30-1 and for a due process hearing and appeal under 511 IAC 7-30-3 and 511 IAC 7-30-4 are not applicable to students under this rule, except to resolve disputes on the following issues:

(1) Child find.

(2) The appropriateness of an evaluation or reevaluation.

(3) The determination of eligibility for special education and related services.

511 IAC 7-19-2 Reimbursement for parent's unilateral enrollment of student in private schools or facilities when the public agency's provision of a free appropriate public education is in dispute

Sec. 2. (a) This section does not require the public agency to pay the cost of education, including special education and related services, of a student with a disability at a private school or facility if the public agency made a free appropriate public education available to the student, and the parent elected to place the student in a private school or facility. If, as a result of a disagreement between the parent and the public agency, regarding the availability of a free appropriate public education for a student who previously received special education and related services under the authority of the public agency, the parent of a student with a disability enrolls the student in a private preschool, elementary school, or secondary school without the consent or referral by the public agency, the parent may seek reimbursement for the costs of the private school or facility from the public agency.

(b) If the parent and the public agency cannot reach agreement on the issue of reimbursement, either may request a due process hearing pursuant to 511 IAC 7-30-3 to resolve the issue.

(c) The independent hearing officer or the court may require the public agency to reimburse the

parent for the cost of the private school enrollment if the hearing officer finds both of the following:

- (1) The public agency did not make a free appropriate public education available to the student in a timely manner prior to enrollment in the private school or facility.
- (2) The private placement is appropriate.

(d) The hearing officer or the court may reduce or deny reimbursement to the parents if the hearing officer or the court finds any of the following:

- (1) At the most recent case conference committee meeting that the parents attended prior to removal of the student from the public agency, the parents did not inform the case conference committee that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to the student, including stating their concerns and their intent to enroll the student in a private school at public expense.
- (2) The parent failed to provide written notice to the public agency, at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the student from the public agency, of the information required by subdivision (1).
- (3) Prior to the parent's removal of the student from the public agency, the public agency informed the parent, through the notice requirements of 511 IAC 7-22-2, of its intent to evaluate the student, including a statement of the purpose of the evaluation that was appropriate and reasonable, but the parent did not make the student available for evaluation.

(e) The hearing officer or the court may not reduce or deny the reimbursement if the parent failed to provide the written notice described in subsection (d)(2) if the hearing officer or the court finds any of the following:

- (1) The parent cannot read or write in English.
- (2) Compliance with subsection (d)(2) would likely result in physical or serious emotional harm to the student.
- (3) The public agency prevented the parent from providing the notice.
- (4) The parent had not received notice of procedural safeguards, pursuant to 511 IAC 7-22-1, containing the notice requirement of subsection (d)(2).

(f) The hearing officer or the court may find that the private placement made by the parent is appropriate even if the placement does not meet the state standards that apply to education provided by the state and local educational agencies.

(g) The cost of reimbursement may be reduced or denied upon a judicial finding of unreasonableness with respect to the actions taken by the parents.

Petition for Review

The Student filed on July 1, 2002, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). In essence, the Student objects to the IHO not restricting his decision to the actual content of the IEPs but allowing testimony regarding what the School could or would offer. The Student also objects to the IHO's determination that the Parents never intended to accept a public school placement but had already decided to place the Student in a private school. The Student argues that had an appropriate placement been offered, it would have been accepted. The Student also objected to the IHO's determinations with respect to Issue #2, asserting that the placement at the private school was appropriate to her needs. In support of this contention, the Student stated the private school was accredited, which indicates certain legal standards have been met, such as appropriately licensed teachers and administration of the Indiana Statewide Testing for Educational Progress (ISTEP+). She has made gains, socially, behaviorally, and emotionally.

The Student represents the private school program was reasonably calculated to provide educational benefit to her, and that the IHO's conclusion that reimbursement was not warranted for the 2001-2002 school year (Issue #3) was erroneous.

The Student states that appropriate services for her should include services provided at the private school, and that this placement constitutes the LRE for the Student. The IEP for the Student should address her emotional needs as well as her academic needs. She requires an instructional aide, although not necessarily on a full-time basis. The Student requires ESY services.

Exception is taken to the IHO's determinations that the School did appropriately convene CCC meetings to consider and develop IEPs for the Student (Issue #5). The Student asserts that no transition program was forthcoming, School personnel declined to consider recommendations from private providers, School personnel did not properly administer evaluations properly, School personnel did not advise the Parents' private providers of any inadequacies in the private evaluations of the Student, and School personnel failed to make specific proposals regarding educational programming or placement. As to Issue #6, the Student lodges a general objection with nothing further.

The Student's Petition for Review also contained several affidavits, notably of the Student's mother with copious attachments, along with a general affidavit signed by four individuals.

The Response to the Petition for Review

On July 9, 2002, the School timely requested an extension of time to prepare and file a Response to the Petition for Review. The BSEA, by an order dated July 9, 2002, granted an extension of time to August 9, 2002. The School also requested a copy of the transcript, which was provided to the School on July 10, 2002. A copy of the record was prepared and provided to each member of the BSEA on July 10, 2002. The School requested an additional extension of time to prepare and file its Response. The BSEA granted an extension to August 15, 2002, with August 30, 2002, established as the date by which a written decision must be issued. The School filed on August 15, 2002, its Response to the Petition for Review.

The School argued the Petition for Review failed to conform with the requirements of Article 7 because it did not identify "those portions of the findings, conclusions, and orders to which exceptions are taken." 511 IAC 7-30-4(d)(3). The School requested the BSEA dismiss the Petition for Review. Alternatively, the School asserted the IHO correctly applied the law under both 511 IAC 7-19-1 and 511 IAC 7-19-2. The School represents the IHO properly weighed the written evidence and testimony before him to decide that the Parents' enrollment of the Student at the private school was made as a private school placement under 511 IAC 7-19-1. The School claims that such placements entitle the Student to receive "only a proportionate share of services [as] required" and does not otherwise entitle the Student to a FAPE. The School also argues that "[o]nce the parents rejected the public school placement, then the School proposed services that

would be provided by the public school for a parochial school student. (Trans. Vol. II; p.72).” As a consequence, there are no due process hearing rights to challenge the services made available to the Student at the private school.

The School also argues that the IHO’s decision that the private school could not provide an appropriate program to address the Student’s many needs was supported by the record. This is one of the threshold issues for determining whether reimbursement is warranted under 511 IAC 7-19-2 where it is alleged the public agency did not provide a FAPE but the private school did. However, the Parents also failed to satisfy the other threshold requirements, notably failure to inform the CCC they were rejecting the proposed public school placement and they were placing the Student in a private school.

Although both parties agree that the issues for the hearing were to address the 2001-2002 school year, the School objects to the Parent raising new issues on appeal that involve IEPs discussed prior to the referenced school year. The IHO concluded, rather generally, that the School conducted CCC meetings in a timely fashion and appropriately. He did not note any procedural anomalies.

The IHO also identified the specific areas of need for the Student and addressed these through the nine sub-issues raised with respect to Issue #1. The Student has expressed mere disagreement with the IHO’s determinations without more.

The School also objects to the Student’s attempt to supplement the record without adherence to due process hearing rights.

The Student filed on August 21, 2002, a “Response to the School’s Reply.” In the Response, the Student repeats her previous position that the IHO incorrectly decided the issues before him, asserts the School has not offered a FAPE, the School has committed procedural violations, especially with regard to the CCC meeting regarding ESY services conducted after the hearing in this matter but before the issuance of the written decision.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by “Notice of Review Without Oral Argument,” dated July 24, 2002. Review was set for August 21, 2002, in Indianapolis, in the offices of the Indiana Department of Education. The BSEA had to reschedule the review for August 28, 2002. An Amended Notice was provided to the parties on August 21, 2002. All three members of the BSEA appeared on August 28, 2002. After review of the record as a whole and in consideration of the Petition for Review, the Response thereto, and the Parents’ Response to the School’s Response to the Petition for Review, the BSEA makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Student timely appeals from the decision of the IHO. The School timely responds. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-30-4(j).
1. Neither party asserts that the procedure employed by the IHO denied due process. Accordingly, the parties were provided their respective due process rights by the IHO in the conduct of this matter.
- 3.. Pursuant to 511 IAC 7-30-4(g), only matters raised in the initial due process hearing may be raised in a petition for review. To the extent that new issues have been raised, these will be considered only in the evaluation of the stated issues before the IHO and the due process procedures employed.
4. Neither party moved the BSEA to accept new evidence, which the BSEA, in its discretion, could do, necessitating supplemental hearing procedures with the hearing rights of 511 IAC 7-30-3 provided to the parties. Neither party asserted that there was newly discovered evidence. Accordingly, the BSEA will not reopen the record to entertain any new evidence. 511 IAC 7-30-4(l).
5. 511 IAC 7-30-4(d)(3) requires that any Petition for Review filed with the BSEA be “specific as to the reasons for the exceptions to the independent hearing officer’s decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken[.]” The Student’s Petition for Review is deficient in this regard. It does not identify any Findings of Fact, Conclusions of Law, or Orders of the IHO to which exception is taken, other than by context. The Petition for Review merely addresses the Issues as framed. Accordingly, the BSEA will review the Issues as framed and rule accordingly.
6. Issue #1 and its subparts all are concerned with whether the School provided or offered to provide a FAPE to the Student. The IEP process is not a guarantee that a Student will achieve certain goals, objectives, or benchmarks. The IEP itself is not a contract in the legal sense. The School did demonstrate a good faith effort to address and accommodate the Parents’ concerns, did consider the results of evaluations and recommendations from outside sources, and did offer to provide special education and related services to the Student that were calculated to provide her a FAPE. The IHO’s determinations with regard to Issue #1 are sustained.
7. Because it has been determined that the School offered the Student a FAPE, the second issue (Issue #2) as to whether the private school program was appropriate is moot. However, the BSEA does note that the IHO used a standard that is not recognized in federal or state law when he determined the public school program was “most appropriate” to the Student’s needs. There are no gradations of appropriateness. The question is

whether the School offered an appropriate program. The fact that it did moots the alternative inquiry into the private school's program. In addition, Issue #3 is decided against the Student. The Parents are not entitled to reimbursement for any costs associated with the private school placement.

8. Although much is made of the fact that CCC meetings were conducted at the private school site, it does not matter where CCC meetings are conducted. The BSEA does not read any particular legal effect into the decision to conduct CCC meetings at the private school. Because the IHO determined and the BSEA sustains the IHO's determination that the private school placement is a unilateral one as part of a Parent preference under 511 IAC 7-19-1, the School did take steps to ensure the participation of private school personnel by holding the CCC meetings at the private school, even though it was not obligated to do so. 511 IAC 7-19-1(g); 511 IAC 7-27-3(e)(7). However, the School should not permit private school personnel to chair CCC meetings. 511 IAC 7-27-1(b)(2) contemplates that public agency personnel will perform this function. The IHO's determinations as to Issue #5 are sustained.
9. The IHO, regarding Issue #4, made determinations as to the appropriate program for the Student in his Conclusion of Law #10. These determinations have not been challenged in the Petition for Review and are affirmed. The Student, in her Petition for Review, raises a number of issues arising from the CCC meeting conducted after the hearing regarding ESY services but before the IHO issued his written decision. The IHO, in his written decision, specifically advised the parties that he "maintains jurisdiction until the earlier of 30 days from the date of receipt of the IHO's written decision...or the filing of a request for review by the Board of Special Education Appeals." The IHO issued his written decision on June 1, 2002; the Student acknowledged receipt of the written decision on June 4, 2002. The Student never sought to raise the issues to the IHO during the period that he had jurisdiction. By not doing so, the issues cannot be raised on appeal to the BSEA. 511 IAC 7-30-4(g).
10. The placement of the Student at the private school by the Parents was unequivocally a unilateral placement based on Parent preference such that 511 IAC 7-19-1 would apply and not 511 IAC 7-19-2. The IHO's determinations with respect to Issue #6 and its subparts are sustained

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals now issues the following Orders:

1. The decision of the Independent Hearing Officer with regard to the six issues raised in this hearing are hereby affirmed.
2. Any additional issues or motions not specifically addressed herein are deemed denied or overruled, as appropriate.

Date: August 28, 2002

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

APPEAL STATEMENT

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