

Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of N.S.,)
and the)
East Allen County Schools) **Article 7 Hearing No. 1392.04**
)
Appeal from the Decision of)
Dennis D. Graft, Esq.)
Independent Hearing Officer)

Procedural History and Background

The Student's¹ request for a due process hearing was received by the Indiana Department of Education, Division of Exceptional Learners, on November 6, 2003. On November 7, 2003, Dennis D. Graft, Esq., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO).

A pre-hearing conference was held on November 18, 2003. The November 18, 2003 pre-hearing order indicated that by agreement of the parties the hearing and decision date was extended to January 5, 2004. The issue for hearing was identified as whether the Student's current IEP is appropriate to meet the Student's needs, including her basic caregiver needs: timely checking and changing of her diaper, protecting her from abusing herself, proper and needed accommodations and services while the Student is being transported to and from school. The hearing was held on December 16 and 18, 2003.

The IHO issued his written decision on January 5, 2004. The IHO determined twenty-seven (27) findings of fact.

1. The student is an eight (8) year old who was a 2nd grade student at a public school during the first semester of 2002-2003 school year who has been home schooled since October 10, 2003.
2. The student has numerous severe handicaps, including mental retardation, cerebral palsy, limited vision and hearing, requiring prescription glasses and a hearing aid, and physical handicaps requiring the use of a wheel chair.
3. The student was initially evaluated and determined eligible for special education services under

¹Student refers to both the Student and Parents as parties herein.

Article 7 in September, 1998 with a primary disability of severe mental handicap and numerous secondary handicaps, including vision impaired, hearing impaired, communication disorder, and orthopedic impairment.

4. The student attended a different local school from 1998 through March 18, 2003, when the student's parents moved into the local educational agency's (LEA) district.
5. The student's initial case conference with the LEA occurred on March 13, 2003. The student's IEP for the balance of the 2002-2003 was based upon the IEP developed on April 25, 2002 and revised on March 5, 2003 while the student attended her former LEA. Due to the severity of the student's handicaps and the location of the LEA's program for such handicaps, the least restrictive environment was a separate special education classroom not in the student's home school area.

The student began attending the LEA on March 19, 2003. Based upon the severity of the student's handicaps, the case conference determined the student's LRE continued to be a separate special education classroom for the majority of the school day. The LEA's separate special classroom for students who need more direct services and do not attend academic general education classes is not in the student's home school. It is approximately 10 miles from the student's residence, compared to 5-6 miles from her home school. The student was to participate in general education for music, physical education, recess and library. There was one special education teacher and three paraprofessionals in this classroom.

6. During the balance of the 2002-2003 school year, the LEA worked on the student's toileting goal with minimal, if any, progress. Further, the student orally ate some of her lunch with the remainder tube fed to her.
7. On May 29, 2003 the annual case conference was held to develop the student's IEP for the 2003-2004 school year. The student's current levels of performance were noted, goals and objectives were developed, including bring covered cup and/or loaded spoon to mouth with modified assistance, which was to be implemented by special education staff and the occupational therapist. The toileting goal from the prior IEP was eliminated. The remainder of the student's goals and objectives were similar to the prior IEP. The student's LRE remained as previously determined with the same location for direct services (not at her home school). General education participation included music, P.E., recess, library, field trips, assembly and special projects that are acceptable with accommodations thereto. Also, related services of occupational therapy, physical therapy, hearing impaired, and vision impaired were developed. The student's mother agreed with the determination of services.
8. The student started school in August, 2003. The student was in a separate special education class with 11 other students, all with substantial and varied special education needs. There was one special education teacher and three paraprofessionals in the classroom. There are usually at least

two adults in the classroom at any time (due to accompanying students, including the student herein, to regular education classes). Further, the student has never been left unattended by at least one adult, but the student does not have a one-on-one aide solely for herself.

9. Prior to the beginning of school the student's parents met with the student's bus driver and went over the way to properly harness the student in the bus, which had a 2 point harness system.
10. On August 29, 2003, the bus driver began driving a different (newer) bus. This bus had a 3 point harness system to secure the student's wheelchair. On this date, either the student was improperly harnessed or seat belted in, or the student unbuckled the harness and she and her wheelchair tipped over during the bus ride home. The student was not injured but for a possible scratch and possible bruises. The bus driver informed the student's personal assistant (provided by Medicaid waiver funds) of the incident. The next school day the student's mother contacted the LEA about this incident. The bus driver had not informed anyone at the LEA about this matter. Subsequently, an incident report was prepared.
11. The student's father again met with the bus driver and went over the proper way to secure the wheelchair, using the 3 point harness. There have been no other accidents on the bus. However, there have been incidents where the student did unbuckle the harness. Subsequently, a lock system (making the seat belt harness childproof) has been added, although when there was a substitute bus driver there were some days when the locking unit was not available nor used.
12. During the first semester of the 2003-2004 school year, there were two incidents when the student was either struck, rolled or scratched by another student, during neither of which the student was seriously injured. Further, the student's teacher and her paraprofessionals were present during these two incidents.
13. During this time period the LEA began observing random bruises on the student and noted these bruises but did not notify the parents of these observations.
14. Also, during this time period the student periodically had a diaper rash, with the student being very red and occasionally raw with slight bleeding. The student had a diaper rash ointment at the LEA to be used when her diaper was changed.
15. Early in this school year, based upon the student's dark-colored urine and concerns of adequate liquids, the student's mother and the LEA agreed to provide additional water to the student in the afternoon (approximately 2:00 p.m. each day).
16. The student frequently had wet her diaper when she arrived at school each morning and at home each afternoon. The LEA did not have a formal diaper changing or schedule, although the paraprofessionals apparently checked the student's diaper when she arrived, approximately every

2 hours thereafter, and shortly after the 2:00 p.m. snack, or whenever there were indicators of the need to check (odor or wetness felt). The student was not being periodically placed on the toilet during the school day as she had during the prior year. Toilet training had been removed as one of her goals, according to the student's teacher of record, due to no progress the prior year and it was not as important of a goal as other needs of the student.

17. The student has been fed lunch by tube each day. The school nurse does this in the student's classroom. This feeding takes approximately fifteen minutes of the student's 45-minute lunch break. The student remains in the classroom for the balance of her lunch break. The student's afternoon snack of water and cereal is usually orally fed to her. The student's mother believed the LEA was orally feeding the student her lunch, although the student's teacher of record indicated that it was agreed at the May 29, 2003 case conference that she would be tube fed her lunch due to the time required to orally feed her and the limited foods she could eat orally.
18. When the student arrived at school on October 3, 2003, numerous bruises were observed on the student. Based upon this observation, the school nurse was contacted and she also observed the bruises. The school nurse then contacted the building principal concerning whether to contact Child Protective Services (CPS), based upon the number of bruises. The building principal, after consultation with the executive director of special services, informed the nurse to contact CPS, which she did by telephone call to the CPS hot line and subsequently by written report. CPS subsequently had a child caseworker inspect the student. The case worker apparently knew the student's parents, who are licensed specialized foster parents. No one from the LEA notified the parents of this reporting to CPS.
19. On October 6, 2003 the student's mother met with the student's substitute teacher (the regular TOR and TOS² was on maternity leave from September 12, 2003 through October 27, 2003). The teacher did not inform the mother of the reporting to CPS on October 3, 2003.
20. On October 10, 2003 in the early afternoon, when one of the paraprofessionals was changing the student's diaper, blood was seen in the diaper. The school nurse, who was present, viewed the student. Based upon the amount of blood and apparent small scratches on the right side of the student's vagina wall. The building principal was contacted by the nurse. The principal, who was not at the school, was at a meeting at which the executive director of special services was also present. The principal authorized the nurse to report this matter to CPS, which she did. The student's diaper had been changed earlier in the day and no blood had been seen or noted.
21. CPS apparently contacted the student's mother and requested the student be taken to a physician to be examined. The student's parents took the student to her physician. The physician noted a

²TOR and TOS refer to teacher of record and teacher of service.

diaper rash but no indications of sexual abuse, not finding any scratches on the student's vagina wall.

22. The student has been home schooled by the parents since October 10, 2003.
23. Subsequently, on October 14, 2003, CPS, by letter, notified the parents that CPS did not substantiate abuse for either matter (10/3/03 bruises nor 10/10/03 bleeding) concerning the parents. See Petitioner's Exhibit 36.
24. On October 31, 2003 and on November 10, 2003, CPS, by letter, notified the LEA that the investigations of these two incidents were not yet completed. As of the dates of the hearing herein, the LEA had heard nothing further from CPS and the completion of its investigations. See Respondent's pages 120 and 133.
25. On October 12, 2003, a facilitated case conference was held. Matters discussed included:
 - (a) Current levels
 - (b) goals
 - (c) reevaluation and testing
 - (d) safety
 - (e) communication between the LEA and parents
 - (f) one-on-one assistance
 - (g) placement location and
 - (h) hearing aid checks

It was agreed:

- (a) that the student would be fully evaluated prior to the annual case review of April, 2004;
 - (b) peer tutoring would be addressed;
 - (c) to develop a communication form to be used between the parents and the LEA;
 - (d) to add that the student will increase the number of times she would eliminate in the toilet (toilet training);
 - (e) the LEA will not check the hearing aid but the parents will check it daily and the LEA will conduct a hearing impaired consultation once per month.
26. The student's bus ride from her home to school takes approximately one hour and the return trip approximately 45 minutes.
 27. The LEA has a policy for the reporting of possible child abuse. See Petitioner's Exhibit 1.

Based upon these findings of fact, this Hearing Officer made the following conclusions.

1. The LEA did provide a free, appropriate public education to the student. Under the Individuals With Disabilities Education Act (IDEA) and Article 7, a free appropriate public education (FAPE) is an educational program specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. *Board of Educ Of LaGrange School District vs. Illinois State Board of Education* 184 F3d 912, 915 (7th Cir. 1999). A FAPE, however, is not necessarily the best possible education or one that maximizes the potential of each child with disabilities or one that is in some sense equal to the education provided to children without disabilities. See *D.F. vs. Western School District*, 921 F. Supp. 559, 565 (S.D. Ind., 1996); *Board of Educ. Of Hendrick Hudson Cent Sch. Dist. vs. Rowley*, 458 U.S. 176 (1982). See also *Heather S. vs. Wisconsin*, 125 F. 3d 1045, 1058 (7th Cir. 1997) (school district not required to provide best possible education). Review of action under the IDEA is limited to two inquiries: (1) whether the LEA has complied with the IDEA's administrative procedures; and (2) whether the IEP is reasonably calculated to provide educational benefits to the child. *Rowley*, 458 U.S. at 206-07; *Johnson vs. Duneland Sch. Corp.*, 92 F.3d 554, 557 (7th Cir. 1996). If these requirements are met, an LEA has complied with the IDEA's obligations. Here there were no allegations of any procedural violations. Further, the IEP of May 29, 2003 and as amended and agreed by the parties on October 22, 2003 is reasonably calculated to provide educational benefit to the student.

The LEA did devise appropriate Individualized Education Programs (IEPs) for the student, which were reasonably calculated to provide educational benefit and the student did make educational progress. Under the IDEA and Article 7, an IEP must include statements regarding the child's present level of educational performance, the student's measurable annual goals, the special education services to be provided, the extent, if any, to which the child will not participate with non-disabled children in the regular class, and the projected date for the beginning of the services and duration of those services. 20 U.S.C. § 1414(d) (1)(A); and 511 IAC 7-17-44 and 511 IAC7-27-6.

Upon review of the student's IEPs, it is clear that each IEP satisfied these requirements. The IEPs detailed the student's history, present academic performance and her social and emotional skills. The IEPs included both goals and objectives and detailed the evaluation procedures to be used. The IEPs further detailed the services to be provided to the student and the extent to which she was able to participate in regular education programs. Specifically, the IEPs included the various services and accommodations needed in the general education setting. Finally, the IEPs included both the projected dates for initiation of services and the anticipated ending dates.

The Supreme Court has made clear that schools are required to provide personalized instruction

with sufficient support services to permit the student to “benefit educationally from that instruction.” *Rowley* 458 U.S. at 203. Maybe the student did not receive the best possible education, but neither IDEA nor Article 7 requires one that maximizes the child’s potential.

2. The LEA did provide a FAPE in the least restrictive environment (LRE) and the appropriate continuum of placements were considered by the case conference committees. A full time, separate special education classroom is needed due to the student’s severe and multiple handicaps. Further, the parents agreed to such placement. 511 IAC 7-21-36. Home schooling of the student is not a FAPE in the LRE, nor is placement at the student’s home school appropriate. It is for less severely handicapped students than this student.

The LEA can, and did, develop a continuum of placement services within its elementary school. The student’s home school’s separate special education class has been set up by the LEA for students who primarily attend regular education classes and receive predominantly only special education support services. The student needs direct special education services, which involves more self-help, not academic goals.

3. There was adequate direct care and supervision of the student while she was in the classroom. Although there were two incidents where other students slightly injured the student, such accidents could have occurred even if the student had a one-on-one paraprofessional 100% of the time. The student has been injured while at home solely with her assistant.
4. As to the numerous diaper rashes, it is clear the student is unable to inform anyone when she has a bowel movement or wets her diaper. Further, diaper rashes are common. However, the LEA should have a written procedure or guidelines to more regularly check the student’s diaper, including immediately prior to her bus ride home. The toileting goal agreed upon on October 22, 2003 appears appropriate and should be implemented.
5. The student does need to have supervision 100% of the time. Although the LEA indicated the student was never alone, records indicate that the student has individual supervision only 80 to 85% of the time. The student does not need a specific one-on-one supervisor or paraprofessional, but does need someone supervising her all the time. The LEA should develop a schedule to ensure someone is with and supervising the student 100% of her school day.
6. Based upon the one accident on the bus, the other instances where the student unbuckled the harness and possibly other students unbuckling their seat belts, there is a clear need to be sure the student is safe on the bus ride. Although accidents happen, a student’s wheelchair and the student should never tip over for any reason (driver’s negligence or student somehow unbuckling the seat belt or harness, especially since the student had previously unbuckled her seat belt). Therefore, the LEA should have an aide or another person besides the bus driver on the student’s

bus to ensure her safety. The bus driver's primary job is to drive the bus.

7. There is a need for more honest, direct and constant communication between the parents and the LEA's staff. A communication form for daily use should be developed by the parties for such communication. The form should inform the parties of any unusual happenings (ie. bruises, marks, scratches and complaints). The completion of this form may be time consuming, but based upon the apparent lack of trust between the LEA and the parents, it is needed to again develop such trust and to be sure each is aware of any happenings in the student's life.
8. There is no reason the student cannot participate, with other students in the areas indicated in her IEP, specifically lunch, recess and library. Further, the student should be fed orally for a part of her lunch period and then tube fed the remainder.
9. The testing and re-evaluation of the student should continue and be completed prior to the annual case review of April, 2004.
10. The LEA should either follow its guide (Petitioner's Exhibit I) concerning the need for parental notification when an LEA employee has made a report of suspected child abuse or neglect to CPS, unless an administrator/designee, in consultation with Student Services, determines such contact would be detrimental to the well being of the student or amend the same. Here the LEA did not notify the parents of either the October 3 or October 10, 2003 abuse reports to CPS. Further, there was no evidence presented by the LEA that an administration designee ever consulted with Student Services and then determined that such contact would be detrimental to the student. Clearly, I.C. 3 1-33-5 requires the LEA to report suspected child abuse. However, the LEA's own guide requires the parental notification unless the requisite steps and determinations are made.
11. A case conference should be held forthwith to develop an IEP for the student incorporating the Conclusions and Orders of this Hearing Officer into the final IEP for the balance of the 2003-2004 school year, unless the parents decide to continue to home school the student.

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

Based upon the findings of fact and conclusions of law, IT IS ORDERED THAT:

1. A case conference shall be held immediately to develop an IEP for the student, unless the parents decide to continue to home school the student
2. The case conference shall include in the student's goals and objectives the following:

1. toileting as agreed on October 22, 2003;
2. feeding the student orally in the lunchroom for 10-15 minutes of her lunch period (or whatever time the case conference committee deems appropriate, but to also allow the student to have recess during part of her lunch break) with the remainder of lunch to then be fed by food tube (outside the lunch room if the case conference committee deems such feeding inappropriate in the lunchroom).

Further, the IEP shall include:

- (a) obtain and implement a peer tutor for the student;
 - (b) the student shall be permitted to go to the library;
 - (c) the parents' wishes on the inspection of the student's hearing aid shall prevail and the LEA shall not check the student's hearing aid each day. The LEA's hearing consultation of each month shall continue;
 - (d) develop a diaper changing schedule for the student pursuant to Conclusion 4 herein above.
3. The LEA and parents, prior to the scheduling of the case conference set forth herein above, shall meet and prepare the daily communication form pursuant to Conclusion 7 herein above. Further, the LEA shall provide the parents with weekly progress reports on the student's goals and objectives.
 4. The LEA shall develop a schedule or procedure so that the student has adult supervision 100% of her school day. An LEA employee shall be within twenty feet of the student at all times to supervise, observe and protect the student. This adult supervision need not be one specific person.
 5. The LEA shall have an aide or another appropriate adult accompany the student on her bus rides. The LEA shall have a training session for all possible bus drivers of the student, her parents, the student's paraprofessionals, her teacher of record, and the adult that is to accompany her on the bus rides. Included in the training shall be the proper harnessing of the student and her wheel chair and the use of locking devices to be placed on the harness' buckle to insure the student does not unbuckle the harness. The LEA shall purchase or have available at least three such locking devices: one on the bus, one at the parent's residence, and one at the student's school. The LEA shall continue to film daily the student's bus ride each way and preserve and maintain these recordings for thirty days, making the tape available to the parents upon their request within this thirty day period. A parent or the student's assistant and the aide on the bus shall inspect the harness, buckle and locking device when the student is placed on the bus each day. One of the student's paraprofessionals or teacher and this bus aide shall do the same prior to the student's bus ride home.

This aide on the bus shall continue until the student's annual case review in April, 2004 and then cease, unless there have been any incidents or accidents on the bus involving the student or any other passengers.

The IHO properly notified the parties of their respective administrative appeal rights.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Student's Petition for Review

The Student filed a Petition for Review of the IHO's decision on January 28, 2004. The Student argues that there were Findings of Fact which were contrary to the evidence and Conclusions of Law which were not supported by the evidence and which are inconsistent with the Orders. The Student objects to Finding of Fact No. 8, arguing there was no special education teacher as of September 12, 2003, as there was a substitute teacher who had no special education training or credentials. The Student objects to Conclusion of Law No. 1 claiming the IHO relied solely on the services identified in the IEP, but didn't consider evidence that indicated some of the services set forth in the IEP were not provided, and further ignored his own conclusions that the Student needed additional services such as 100% supervision, an aide on the bus, oral feeding, and participation with general education students for lunch, recess and library. The Student also objects to Conclusion of Law No. 2, arguing the School should be required to provide a program to meet the Student's needs in her home school. The Student further argues that Orders 1 and 2 are inconsistent with the conclusions. The IHO orders the CCC to convene and develop an IEP, and further specifies items to be included in the IEP. The Student argues that these orders are not consistent with the Conclusions and show the School failed to provide a FAPE in the LRE.

School's Response to Petition for Review

On February 3, 2004, the School requested an extension of time in which to file its response to the Student's Petition for Review. By Order dated February 4, 2004, the Board of Special Education Appeals (BSEA) granted the School's request such that the School's Response would be due by February 19, 2004, and the final written decision of the BSEA would be rendered by March 8, 2004.

The School's Response was timely filed on February 19, 2004. In response to the objection to Finding of Fact No. 8, the School notes that there was no issue as to certification of the teacher. The issue addressed adult supervision and attention. The substitute teacher was a licensed teacher working under the plans and direction of the licensed special education teacher. There were three paraprofessionals in the room to provide additional adult supervision. The School argues that Conclusions of Law Nos. 1 and 2 are supported by the evidence. The School also notes that the IHO's ordering additional services or changes in Orders 1 and 2, some of which had been agreed to be the parties prior to the IHO's order, do not make inappropriate the IEP that was in place at the

time the hearing was requested.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

On March 5, 2004, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. There was no issue raised before the IHO concerning the certification of staff providing services to the Student. A school is not prohibited from utilizing appropriately credentialed substitute teachers. In this case, the substitute teacher was a licensed teacher working under the plans and direction of the licensed special education teacher.
3. Finding of Fact No. 8 is supported by the testimony and evidence.
4. The findings of fact support the IHO's conclusion that the School provided the Student with a FAPE. No violations of procedure were found in the development of the Student's IEP, which was developed to meet the Student's individual needs. The Student's parent was in agreement with the IEP. Conclusion of Law No. 1 is supported by the findings of fact and is not contrary to law.
5. The LRE mandate does not require that a School have the full continuum of services available within each individual school building. To the maximum extent appropriate, students with disabilities are to be educated with nondisabled students and placed as close as possible to the student's home school. In this case, the Student's significant needs require placement in a school other than her home school. Such is not a violation of the requirements of least restrictive environment.

6. Conclusion of Law No. 5 requiring the School to ensure that an adult is with and supervising the Student 100% of her school day is supported by the findings.
7. The Student had one accident on the bus, and was able to unbuckle her seat belt. The evidence supported the conclusion the Student required at least temporary supervision to address safety concerns. Conclusion of Law No. 6 is supported by the findings and evidence.
8. The IHO ordered the case conference committee to convene to develop an IEP for the Student that included specified goals, objectives, and services. The evidence did not support a determination that the Student's IEP, at the time it was developed, was not appropriate. Students needs often change over time. A decision to add goals or services does not render the previously agreed upon IEP inappropriate. The IHO's Orders 1 and 2 are appropriate based upon the findings of fact and conclusions of law.

ORDERS

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

1. The IHO's decision is affirmed in its entirety.
2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: March 5, 2004

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

APPEAL RIGHT

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