

Indiana Board of Special Education Appeals



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BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of A.D.,)
Franklin Township Community)
School Corporation, and RISE Special)
Services)
)
Appeal from a Decision by)
Dennis D. Graft, Esq.,)
Independent Hearing Officer)

Article 7 Hearing No. 1447.05

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History

A.D. (hereafter the "Student") is a twelve-year-old child (D/O/B November 13, 1992) old who was a 4th grade student in the Franklin Township (collectively with RISE Special Services referred hereafter as the School) during the 2003-2004 School year and now attends a private school for the 2004 –2005 school year. The Student requested on July 16, 2004 a due process hearing under 511 IAC 7-30-3 to challenge the appropriateness of the Student's current Individualized Education Program (IEP). Dennis Graft, Esq., was appointed as the Independent Hearing Officer (IHO) on July 19, 2004. The IHO conducted a pre-hearing conference on August 2, 2004, and issued a Pre-Hearing Order that same date, delineating the issues for the hearing. The IHO held a final pre-hearing conference on October 19, 2004, prior to the commencement of the hearing. The Hearing was held on October 19, 20, and 21, 2004. The issues for the hearing were:

1. Since 1999 did the School fail to provide a free appropriate public education (FAPE) to the Student by committing procedural and substantive due process violations such that he was harmed, including a drop of his IQ score by about 30 points and that he has made no meaningful progress for four years?
2. Since 1999 did the School fail to instruct the Student in the least restrictive environment (LRE) using appropriate and measurable goals and objectives?
3. Since 1999 did the School fail to devise an appropriate and timely functional behavior assessment (FBA) and behavior intervention plan (BIP), resulting in

inappropriate discipline and punishment of the Student for manifestations of his disabilities and reinforcement of maladaptive behaviors?

4. Since 1999 did the School fail to offer, devise and implement appropriate Extended School Year Services (ESY) for the Student?
5. Since 1999 did the School fail to properly train staff, paraprofessionals, and aides on the student's needs, resulting in faulty implementation of programming for the Student?
6. Is the proposed (IEP) for the 2004-2005 School year inappropriate and does it fail to offer the Student a FAPE in the LRE for the same reasons that the past IEPs have been inappropriate? Further, does the proposed IEP lack present levels of educational performance (PLEP) based on current and detailed data, measurable annual goals and objectives based on PLEP, a BIP, transition information and an analysis of the student's behaviors?
7. Since 1999 did the School commit a variety of procedural errors including that it failed to devise and implement IEPs on at least an annual basis, failed to devise goals that incorporated parental input (asked her to sign the IEP before goals were written, and the goals were added later, without her input), failed to properly implement the Student's IEPs, and failed to share evaluations with the parent at least five days before the case conference committee (CCC) meetings, in part because CCCs were held in which IEPs were devised without benefit of full reevaluation results, that the School failed to conduct evaluations on at least a three-year timeline, and failed to conduct appropriate hearing screenings?
8. Was the Student's placement changed to a self-contained class in October, 2003 without parental consent?
9. Since 1999 did the School deny a variety of requests by the parent and make its own suggested changes in programming, placement and services, without the provision of prior written notice to the parent?
10. During the 2003-2004 School year, was the Student's school day shorter than that of his peers, without justification for that written in his IEP, and that the Student's parent had to arrange for transportation in order to keep the Student's school day from being unilaterally shortened by the School, but was not reimbursed for these transportation costs?
11. If there were such violations, is the Student entitled to compensatory education and private placement at public expense?

During the October 19, 2004, hearing, A.D. added Issue 12, which states “Did the School provide copies of all of the Student’s educational records to the mother’s attorney?” The School did not object to the issue being added.

Prior to the hearing, the School, on or about September 30, 2004, filed a Motion for Summary Judgment, asserting the Student no longer had legal settlement within the School’s boundaries and, as a consequence, lacked standing to prosecute this action. The Student, by counsel, responded, although this document is not dated. The IHO issued an order on October 7, 2004, denying the School’s Motion for Summary Judgment. The School, by counsel, filed a supplemental Motion of October 8, 2004, with references to a deposition of the Student’s parent that was taken on October 6, 2004.. The IHO, by order of October 8, 2004, denied the supplemental Motion as well, noting that the Student has raised issues that are related to conduct of the School that could result in compensatory education as a remedy.

The hearing was conducted on October 19, 20, 21, 2004, at a time and place convenient and agreeable to the parties. Both parties were represented by counsel at the hearing. The hearing was opened to the public at the parent’s request. The Parent was notified of her right to have the Student present. The Student did not attend the hearing.

The IHO issued his written decision on November 8, 2004. From the testimony and evidence presented at the hearing, the IHO determined fifty-six (56) Findings of Fact and reached twelve (12) Conclusions of Law from which he issued five (5) Orders.

THE IHO’S WRITTEN DECISION

Statute of Limitations Applied to Issues

Prior to the actual delineation of his specific Findings of Fact, the IHO included a determination that would limit the impact of issues raised by the Student. These rhetorical paragraphs the IHO described as “Primary Findings of Fact and Conclusions of Law.” The following is a summary of the IHO’s narrative.

Neither the Individuals with Disabilities Education Act (IDEA) nor Article 7 contains a specific statute of limitations for requesting a due process hearing. In Wilson v. Garcia, 471 U.S. 261 105 S. Ct. 1938, 85 L.Ed 2d 254 (1985), the U.S. Supreme Court created guidelines to determine what the statute of limitations should be when the federal cause of action has no express limitation period. The Courts have recognized the need for promptness in settling educational disputes so the child does not fall too far behind.

The IHO adopts the Indiana two-year limitation for personal torts found in I.C. § 34-11-2-4, to commence from July 16, 2002, two years before the parents filed their request for a due process hearing. The adoption of the two-year statute of limitations is only effective if there were no continuing violations prior to July 16, 2002, and the parents were provided notice of their

procedural rights. Prior to July 16, 2002, the only errors made were procedural one, which were not continuing ones, and the parents had approved all IEPs for the Student. In addition, the parents received both verbal and written notice of their rights. As a consequence, all subsequent findings of fact and conclusions of law shall relate to and address all of the issues for the period commencing after July 16, 2002.

The IHO's Findings of Fact¹

1. The Student is eleven (11) years old and was a 4th grade student at a public school during the 2003-2004 school year but attended a private school for the first semester of the 2004-2005 school year.
2. The Student's IEP that was in place as of July 16, 2004, was the one dated February 8, 2002. This IEP was an extension of the IEP for the period of February 7, 2001 to February 7, 2002.
3. In this IEP, the annual goals for the Student in reading, written language and math were for the Student to maintain a passing grade in a 2-3 grade setting with assistance from an aide using attached modifications/accommodations. In social and communications skills, the Student's annual goal was to use appropriate social and communication skills in the School environment using the attached modifications/ accommodations. The annual goal in language was for the Student to improve language skills overall in amount of spontaneous speech. In content areas, the goal was for the Student to participate in 3rd grade content areas with assistance from an aide.
4. The Student had been determined eligible for special education services with a primary disability of Autism Spectrum Disorder and a secondary disability of Communication Disorder.
5. The Student's then-present levels were as follows: (a) Written Language: the student was maintaining passing grades with assistance in 2nd grade; (b) Math: maintaining good grades with an aide to assist him; (c) Reading: difficulty in communicating answers – modified grade of A in second grade; (d) Social & Communication skills: beginning to initiate conversations and social interactions. There were no criteria-referenced or standardized tests noted in any area.
6. The student's Least Restrictive Environment (LRE) was resource room for at least 21% but no more than 60% of the school day.

¹ The IHO's decision has been edited only for stylistic purposes.

7. Specialized instruction/related services required autistic services with help through Learning Disabilities (LD) for all school activities for the entire day, speech for two times each week for 30 minutes each, and Occupational Therapy (OT)(consultative) once per month of 30 minutes.
8. The Student was to continue to have a full-time aide. The Student's behavior was not deemed to be impeding learning so there was no FBA or BIP done.
9. The mother agreed to this IEP, as she did the extension from 2/8/02 until a new one was agreed upon.
10. The mother acknowledged receiving a copy of the procedural safeguards at the February 7, 2001, CCC meeting, but no such notification is noted for the extended IEP of February 7, 2002. The school psychologist, who is the autism consultant for the School, had observed the Student in his classroom for two full days in September and October, 2001, based upon concerns of his behavior. She did not keep data of her observations and the Student's specific behaviors. She did a written report, which did not reference a BIP. She did not intend for her report to be an FBA. She was of the opinion that an FBA needed to be done during the 2001-2002 school year, but she never did one nor was she aware whether one was done.
11. On October 4, 2001, there was an addendum to the Student's IEP, adding OT goals, but the mother apparently never signed this addendum (the copy of this addendum was an exhibit not signed by the mother).
12. On October 11, 2001, there was a CCC-purported addendum to the Student's IEP to revise the triennial evaluation date. A behavior plan was discussed with the Special Education Cooperative's autism consultation report accepted as an FBA. This was due to concern about the Student's behaviors. Further, the Student's OT goal was to be revised. However, there was no such goal attached to this addendum. The mother apparently did not sign this addendum. Further, the mother testified she requested an evaluation of the Student to check his progress.
13. On January 22, 2002, the director of a resource center for autism observed the Student and met with the School's staff involved with the student. In her report dated February 27, 2002, she noted the greatest issue being the training and support needs of the educational team. The School's principal had commented that staff needs mentoring or ongoing coaching in order to meet the Student's educational needs. Options discussed included the involvement of a clinical director of an autism treatment center, who is an expert in autism. It was noted that although the special education cooperative had provided training, the staff would benefit from more on-site, hand-on coaching. The director recommended that everyone involved with the Student (including the aide and general education teachers) needed to be involved in this mentoring.

A second concern was the Student's lack of progress. It was noted that as part of this coaching or training that there be training of staff to modify/adapt lessons so that the Student can more fully participate. Such modifications should be done by certified professionals, not by an aide. The need for collecting ongoing data and documenting progress was noted. A clear plan for the Student needed to be developed, with progress revisited. Further, strategies must be consistently and appropriately used.

14. On February 3, 2002, the student was administered the Peabody Picture Vocabulary Test: <40, age equivalent, 4-2; Expressive Vocabulary Test: standard score-48, age equivalency, 4-8; Auditory-DNT; Non-speech Test: Expressive Language- 42, age equivalency, 28-31, Receptive Language Score- 30, age equivalency, 29-31; Oral and Written Language Scales Auditory Comprehension: standard score <40, age equivalency, 2-7, Oral Expression, standard score <40, age equivalency, 2-10, Oral Composite, standard score <40, age equivalency, 2-9.
15. The clinical director of an autism treatment center affiliated with a local hospital privately evaluated the Student in 2000 and subsequently, on a number of occasions in 2001 and early in 2002, observed the Student in the classroom based upon the mother's concerns about the Student's education. Subsequently, the School contracted with this person to provide training of School staff in applied behavioral analysis (ABA) and then practice training of the staff with the Student in the classroom for the 2002-2003 school year. Prior to the start of this school year, the clinical director requested data on the Student's behaviors and the School's staff's responses to these behaviors. This was to develop a baseline from objectively based information so it could be objectively measured if the student was making progress in the future. At the beginning of the school year the clinical director or an associate gathered data from observations of the Student at School, but had not received any objective and regularly kept data from the School's staff, who were to also collect data.
16. The Student was administered the Wechsler Individual Achievement Test on September 19, 2002. The Student scored K.6 in Math operations and Math reasoning; Reading comprehension was 1st grade 9. This Reading comprehension appeared to be weaker than that demonstrated in February, 2002, which had been 2.3 and Reading recognition was 2.8, both of which used multiple-choice format, whereas the WIAT requires verbalizing of answers.
17. During the beginning of the 2002-2003 school year, the School's autism coach/lead teacher was to work with the Student's teachers to help develop/modify the Student's curriculum and the development of visuals for the classroom. She spent numerous days in the classroom at the start of this school year. This was to do the educational component to work with the behavioral training component of the contracted clinical director.

18. On October 4, 2002, the mother consented to an educational evaluation and requested a meeting to have the results explained to her within five school days prior to the scheduled case conference. Apparently, the reevaluation discussed on October 11, 2001, had never been completed.
19. A CCC was held on November 4, 2002. An IEP was developed, which the mother signed on November 8, 2002. Present levels were noted. Goals and benchmarks and/or objectives were developed. The Student continued to be eligible for special education services with the same primary and secondary disabilities. LRE was both regular class (outside <21%) and resource room (21-60%), both determined to meet needs.

This IEP was for the period of 11/4/02-5/3/03. Specialized instruction included: Autism Spectrum Disorder (ASD) accommodations for all academics and special area classes for each day. Pull out for Math and Language Arts for 45 and 75 minutes per day to resource room; participate in general education classes where more hands on. One-on-one assistant. Speech- 2 times per week for 30 minutes each session in the speech room. OT- 120 minutes per semester (30 minutes per month) consultation with teachers. Use parts of various strategies including ABA, Treatment and Education of Autistic and Related Communications and Handicapped Children (TEACCH), Social Stories, Visual Cues, Picture Exchange Communication System (PECS), and Script Communication, there were numerous accommodations. It was noted that the Student's behavior was impeding his learning or of others and a plan for an FBA was attached and a Behavior Intervention Plan (BIP) was to be attached later. However, no FBA was attached to the exhibits nor submitted into evidence at the due process hearing.

20. The educational evaluation was administered on three dates, October 9, October 16, and November 13, 2002, by the school psychologist. The evaluator deemed the test results to be an accurate estimation of the Student's current functioning levels under standardized conditions. The test results were: Leiter International Performance Scale, Revised: Full Scale IQ- 66. On a previous partially administered Leiter-Revised in January, 1999, the student scored an IQ of 83. In the most recent Leiter-R, the student demonstrated strengths in Paper Folding (9), Design analogies (8), and Repeated Patterns (7), with a very weak skill in Sequential Order (1); Peabody Picture Vocabulary Test III, standard score of 48 with age equivalent of 4-0; Beery-Buktenica Developmental Test of Visual-Motor Integration- standard score of 56 with age equivalent of 5-6; Vineland Classroom Behavior Scale Administered by the Student's teacher of record (TOR): age equivalent of 4-0 down to 1-7, with a composite of 2-11. Since the evaluation is not dated, it is unknown when the report was completed. Nor did the testimony or exhibits presented establish when the report was provided to the Student's mother, although she testified that she did not receive the report until March, 2003.
21. By December, 2002, the clinical director of the autism treatment center had collected data from observations of the Student in his classroom and school. The data showed that

the Student's behaviors and the School's staff's reactions thereto were inconsistent. The director had recommended numerous visual aids for the Student, which the School created, but there was an inconsistent use of the protocols.

22. At the end of the Student's 2002-2003 School year (the second 3rd grade year for the Student), the School was looking at placement in a moderate special education class. This consideration was contrary to the School's reports to the mother and testimony that he was doing well. The mother observed this proposed placement with the clinical director and observed students with IQs in the 30-50 point range. Neither she nor the clinical director viewed such a placement as appropriate.
23. The Student's Teacher of Record (TOR) and the resource room teacher for both of the Student's 3rd grade years believed the Student's needs required more than she could offer in the resource room. She also acknowledged that she lacked the undergraduate background to work with a student with such severe needs as those of this Student. The Student could function with more remote learning, as in the early school years, but once he moved into the 3rd grade with more abstract thinking needed, the Student had difficulties. Although this teacher developed a BIP for the Student, she never did an FBA of him.
24. On June 5, 2003, a CCC was held to develop Extended School Year (ESY) services for the Student. The goal was for the Student to participate with peers at the "Y" activities rather than doing parallel or solo activities. The special education cooperative provided an instructional assistant for 60 hours during the summer. There were no short-term objectives or benchmarks developed. The mother agreed to this ESY plan.
25. On various dates commencing May 7, 2003, through April 16, 2004, CCCs were held to develop an IEP for the Student for the 2003-2004 School year. A draft IEP was prepared with proposed goals, objectives and benchmarks. The proposed LRE was a separate class (outside regular classroom for more than 60% of the school day).
26. The clinical director of the autism center again contracted with the School to provide continued training/observations/data collection/feedback for the 2003-2004 School year. At the beginning of this school year, the clinical director, based on data, did not believe the Student was progressing.
27. The Student began the fourth grade (2003-2004) without an agreed-upon IEP. The Student's programming appeared to be the same as the last prior agreed-upon IEP (11/4/02-5/03).
28. In October, 2003 the Student was phased into a self-contained classroom, "Transition Class." The Student's programming was from the School's proposed IEP, to which the mother had not agreed to in writing.

29. In May, 2003 a speech/language pathologist at a local autism treatment center (the same one as where the clinical director was associated) did a speech therapy evaluation. Subsequently, she was contracted by the School to provide coaching services to the Student's teachers and staff, evaluate the Student's self-contained classroom, work with the Student's teacher and aide in setting up this classroom, and provide assistance and feed back to the teacher and aide in an appropriate communication and visual setups. She initially visited the classroom on October 13, 2003. She went to the classroom various times during the fall of 2003 and early 2004. During these subsequent visits, the teacher and aide were having difficulties following through with appropriate prompting of the Student, following the coaching materials provided and setting up the classroom for the Student. She observed a general lack of consistency between the teacher and aide working with the Student. There was a lack of follow-through on the protocols and a lack of visuals available to the Student. The teacher, on a number of occasions, did not let the Student know what was expected from him during an activity, although the Student needed clear expectations. In November, 2003 the teacher asked if she could work on only one thing at a time and was told she could pare down some things but that there needed to be several things in place for the protocols to work. Over time the teacher became less interested in working with the Student and stated that during the next school year she did not wish to work with children on the spectrum that had needs such as the Student herein. On May 20, 2004, the speech/language pathologist last visited the Student. She noted some improvement but, overall, the communication protocols were not being implemented to the levels expected or needed by the Student. The teacher did not follow through on the communication protocol upon which the clinical director had trained the teacher. The teacher appeared overwhelmed and was inconsistent in the use of the protocols. Also, she never observed the teachers taking any data on the Student's actions while she was present. She did not believe the program as implemented was ever appropriate for the Student.

Further, the required peer training never occurred, since the Student's initial goals were never met and the teacher and aide did not consistently follow through with protocols, and there was no benefit to do the peer training just to meet that goal, which was in the Student's IEP.

30. The Student's new TOR had a bachelor's degree in elementary education and was working on her master's in special education. The 2003-2004 School year was her 3rd year of teaching. She was licensed in LD and ED. When the Student was placed in her classroom, she was provided with a BIP from his previous teacher, which she stated was the one found on Exhibit 520, labeled "draft." She did not know if the BIP had been approved by a case conference, nor did she know what education, prior training or experience the student's one-on-one aide had in autism. The teacher attempted to implement the proposed IEP, even though it had never been approved by the case conference committee and she knew the law required the old approved IEP should still be implemented.

On occasion, based upon the Student's behaviors, she would place him in time out. She did not know if this may have reinforced such behaviors, such as if the student was trying to escape from the situation he was then experiencing. She did not know what is meant to reinforce mal-adaptive behaviors.

During the school year she drafted at least three BIPs and began using them with the Student, although she knew that neither the clinical director, the mother, nor a CCC had approved these draft BIPs. She had sent copies to the clinical director, but she never had a direct response. These BIPs were apparently developed without an FBA being done.

31. From the start of the 2003-2004 school year, the Student was picked up at the School at approximately 2:45 p.m., although the school day did not end until 3:00 p.m. This change in the Student's class day was changed without the mother's approval or a CCC's approval. The mother complained to the School about this change and, after a period of time, approximately March, 2004, the Student was picked up at 3:00 p.m. at the end of his school day. This shortened school day was never approved by a CCC.
32. During the spring of 2004, the number of the Student's behaviors increased. The behaviors included talking out, touching others, and taking off his shirt.
33. On April 8, 2004, the Student's mother requested an independent educational evaluation (IEE) to aid in determining the Student's present levels of performance, appropriate goals, services and placement.
34. At the April 16, 2004, CCC, the mother agreed to the Student's IEP. The mother believed this agreed-upon IEP was for the period 4/16/04 to the end of the school year. However, the IEP states the period was 10/3 to the end of the school year. The mother signed this IEP, believing it was needed for application to the Indiana Department Of Education (IDOE) for funding.
35. On this same date the Student's TOR prepared an FBA and a BIP. This BIP, however, was not approved by the clinical director nor approved by the Student's mother, who testified at the hearing that she had never seen this BIP until she received the records from the School. Apparently, this BIP was implemented by the TOR. The Student's behaviors had escalated substantially in March-April, 2004.
36. During the spring of 2004 the mother raised the issue of ESY programming for the Student for the summer of 2004. She proposed an autism school in Florida for the summer and possibly for at least the first semester of the 2004-2005 school year.
37. On April 28, 2004, a CCC was held. The mother requested that the clinical director do an FBA and proposed BIP. The mother raised a number of needs for the Student. See pages 14 & 15 of the May 13, 2004 CCC Report.

38. A private IEE was performed in May, 2004, by a psychologist. The Student's adaptive functioning was evaluated using the Assessment of Basic Language and Learning Skills (ABBLs), which is a criteria-based assessment designed for the evaluation of autistic and other language-delayed children. This was the first time the Student had been administered the ABBLs. The Student's cognitive functioning was assessed using the Leiter International Performance Scale-Revised. The Student obtained a Full Scale IQ of 52. Comparing the scaled scores from his prior Leiter in 1999 and the Leiter-R from 2002, there was a continual decrease in all areas but for sequential order, which increased from 1 in 2002 to 2 in 2004.

This psychologist opined that, based upon this continual and significant decline in the Student's IQ scores, in comparison to same-aged peers, that the Student is not progressing as would be expected and he is falling behind his norm peer group. The psychologist did not believe the Student was losing skills but that it appears he is not gaining any skills. The skills in 2004 appear to be the same as in 1999. The psychologist observed the Student in the classroom on two occasions and was of the opinion that the Student displayed many behaviors in the classroom which interfere with his academic learning. The Student's most significant area of deficit is in the area of "learning to learn" skills. The Student's attention to task and on-task skills are very limited. The Student has not learned to complete tasks independently and is very prompt-dependent. Further, there were also behaviors which interfere with academic tasks which were not being effectively addressed in the then present classroom setting (self-contained classroom).

This psychologist made various recommendations:

- A. Since it does appear that the Student's needs are currently being met in his classroom setting, there should be a trial placement in an environment that emphasizes applied behavior analysis and verbal behavior analysis training. An intensive program will be necessary to teach basic "learning to learn" skills, which the Student is currently lacking.
 - B. In such a setting it would then be possible to further evaluate his behavior issues. If a curriculum which is appropriate for his needs is implemented, then many of the behavioral issues will be resolved. The Student's self-stimulatory verbal behavior will probably need to be addressed separately.
 - C. Interventions, in both the academic and behavioral areas, should be carried out across environment to ensure the interventions are consistently implemented and to maximize generalization of skills
39. A case conference was held on May 13, 2004, to develop an IEP for the summer of 2004. On May 27, 2004, the mother approved this IEP. The placement was at a local applied behavior center. However, it appears the placement was decided upon prior to the development of the Student's goals, objectives and benchmarks. This applied behavior center was just starting up. The School contracted with an autism consultant for 80 hours

to set up a home program for the Student, evaluate the applied behavior center program (appropriateness to meeting the Student's needs) and report the same to the School.

40. An application for funding of this summer program was submitted to the IDOE. The IDOE granted partial funding of this application and it was noted on the application that a program of such intensity level as needed by the Student was not available locally.
41. The Student attended this applied behavior center for the summer, 2004. The autism consultant visited the applied behavior center 5 or 6 times. During these visits she noted a number of concerns as follows: (a) there was no evidence of visual supports; (b) inconsistencies in the expectancies communicated to the Student [poor planning and a lack of structure]; (c) follow through was inconsistent when the Student was unresponsive; and (d) the age level of some activities, which were a waste of time for the Student. She noted that the applied behavior center's staff asked her what they should be doing with the Student. The staff appeared to not be trained, not knowing how to respond to the Student's behaviors.
42. The home program set up by the autism consultant was for 2-3 days per week for 2 to 4 hours each day. The program included some work with the Student directly on academic tasks, teaching new skills, community outings and help to increase his independent functioning. She had 2 assistants who had some applied behavior analysis training and experience, but they even needed to work on improving their consistency with working with the Student.
43. In May, 2004 the speech/language pathologist at the local autism treatment center visited the special education classroom, which was subsequently proposed for placement of the Student at the July 15, 2004, case conference. She did not see any child receiving one-on-one applied behavior analysis therapy. She did not view this program as an appropriate placement for the Student because (a) it was not a structured classroom with a specific set-up of visual supports; (b) there were too many students-to-instructors and therefore impossible to get one-on-one assistance; and (c) no clearly defined expectations for the children, such as where to be at a certain time and what to be doing at all times, and there was a great deal of waiting time. Further, the teacher had limited knowledge of the autism spectrum disorder. Even if the Student had a one-on-one aide with extensive applied behavior analysis training, she did not believe such a placement was appropriate for the Student.
44. During the 3rd and 4th 9 weeks of the 2003-2004 School, the Student was administered the Indiana Standards Tools For Alternative Reporting (ISTAR). The Student had minimal gains in Math, Language Arts and Functional. See Exhibits pages 1424 and 1425. No other ISTAR scores were submitted into evidence.

45. On July 15, 2004, a CCC was held to attempt to develop programming for the Student for the 2004-2005 School year. A draft IEP was submitted by the School with proposed goals included, except in the Social Interaction (3F) area. There were two placement options: (a) the applied behavior center (same as the one for the summer, 2004 ESY); or (b) special education cooperative classroom.

The mother and the autism consultant questioned the possible placement at the applied behavior center, based upon the concerns previously raised about this program during the summer, 2004. The mother did not agree with either option. The case conference committee proposed the placement at the special education classroom.

It is unclear from the proposed IEP what exactly are the Student's present levels of educational performance (PLEP). All such PLEPs in the proposed IEP relate to the ABLSS from the IEE report. It is not clear what "non mastery to partial on all group instruction" means. Although the progress report of July 8, 2004, from the applied behavior center is attached to the IEP, it is unclear what are the Student's PLEP. Further, there is nothing stated how or when progress will be determined or when it may be reported to the parent.

There are numerous proposed goals but there was no corresponding letters in the progress report. There was no testimony presented as to what specifically the goals were citing such as A-7, A-10, C-42, C-43, C-44, and numerous other cites were not on the progress report. If one were reading just the cited goals without the ABLSS, one would not know what to work on.

Although referenced as "attached," there was no BIP attached to the proposed IEP. There is attached from the private clinic director of the autism treatment center a Behavioral Planning Document of June, 2004, which is a very detailed planning instrument. The clinic director specifically concludes with the following request: "please provide careful consideration to the above behavioral planning recommendations." This document is not a BIP, only a planning instrument to be considered in developing a BIP.

The description of participation with non-disabled peers states "activities with general education classes are arranged." This does not explain the extent, if any, to which the Student will not participate with non-disabled students in general education classes or settings and in extracurricular and other non-academic activities.

The statement of the Student's need for ESY states it will be reviewed at a later date.

The private autism consultant who attended this case conference expressed concerns about the various benchmarks and objectives, whether appropriate, measurable or what they meant.

Further, the School's psychologist questioned various parts of the IEE upon which this IEP was developed.

Five hours of weekly specialized training by the private autism consultant was to be part of the IEP.

There was no testimony as to whether the School had ever set up such a program, as set out in the proposed IEP. The School's personnel testified only that it could be done and that the IEP was appropriate.

The purported teacher and aide for the Student for this proposed IEP did not testify to their training or experience in working with autistic students or using applied behavior analysis (ABA), which was required in the IEP.

46. On August 19, 2004, the autism consultant contracted with the School to consult with the School for five (5) hours per week. The consultant believed she was to teach staff only a small aspect of a program on autism, specifically, ABA. She believed this was not adequate time to set up a program for the Student or other autistic students unless the School's staff had already been extensively trained and already knew what they were to be doing in teaching the Student. She noted that the Student enjoys others but does not know how to interact or failed to interact appropriately. Her recommendations for programming for the Student included:

- A. Anyone who works with the Student should employ behavioral techniques, understand the techniques and then implement the techniques with consistence;
- B. Visual prompts be faded quickly to help his independence;
- C. In academics, address his reading comprehension;
- D. Have a highly organized, structured program with little down time and have social opportunities for the Student; and
- E. A well written BIP, being both reactive and preventive, and then applied consistently.

47. The Student started the 2004-2005 School year on August 23, 2004 at a private autism school in Florida. During the first few weeks, the private school, using objective data collection, assessed the Student's specific skills and needs to have a baseline.

The private school is on a 180-school day calendar and must meet IDEA requirements, has a 39-day ESY program and an after-school program each day from 2:30 p.m. to 6:30 p.m., which includes community activities to use skills learned in the classroom. This private school uses ABA with discreet treat [sic] teaching using repetitive presentations of tasks so the child will learn what the child needs to learn.

An FBA was completed to determine the Student's needs in behavior looking at: (1) is the behavior harmful; (2) does the behavior restrict learning capability; and (3) does the behavior restrict access to the community. Then the behavior was identified and then objective data are collected to get baseline of behavior. Also, medical, environment curriculum issues are considered if they are the cause of the behavior.

It was determined that the Student has non-communication verbalization (talks all of the time, but not directed towards anyone), which primarily impacts his learning.

The tuition is \$276.04 per day for one-to-one applied behavior analysis, \$198.79 per day for two-to-one, the after-school program is \$35.00 per day or \$150.00 per week. Further, the director's consulting fee with public schools is \$100.00 per hour.

48. Prior to the Student's enrollment at the private autism school, the Student continued to be unable to wait, had attention problems, needed prompts and support to work on tasks, and needed to improve his communication, social and academic skills.
49. On October 8, 2004, an IEP was developed for the Student at this private school. This IEP notes the Student's levels of present performance; has very specific goals, objectives and benchmarks; and complies with all procedural components for an IEP.
50. The autism consultant reviewed the private school IEP and deemed it very appropriate for the Student. Further, during her consultation time with the School, in fall, 2004, she visited the proposed classroom at the special education cooperative and met the proposed teacher. This teacher expressed to her that the proposed IEP looked like a lot of work and she was not prepared to create individualized materials for the Student. Further, this teacher uses the TEACCH approach, which is not behavioral based and does not use behavior analysis. TEACCH is a structured teaching approach with many visuals and minimal distractions in the environment. The autism consultant did not believe the self-contained placement at the special education cooperative and the IEP were appropriate to meet the Student's needs. She noted that she has been to numerous public schools in Indiana and had never seen a public school staff appropriately deliver one-on-one applied behavior analysis, even school autism coordinators. She, herself, needed one year to be adequately trained to deliver ABA.
51. The Student's mother, who is his legal custodian, is currently living in Florida. Her husband owns the family home in Indiana and this home is not for sale. All of their furniture is in Indiana. They are currently renting a house in Florida through December 17, 2004. She has an Indiana driver's license. It is her intention to return to Indiana if and when she determines the School can propose and implement an appropriate IEP for the Student.
52. The director of the special education cooperative stated that the School's own autism leader was trained in doing one-on-one applied behavior analysis but that she would not

be involved in the Student's direct instruction in the proposed July 15, 2004, IEP for the 2004-2005 school year. He further stated that the teacher that had been selected to provide services to the Student for the IEP had never done applied behavior analysis with a Student one-on-one.

53. During the hearing there were numerous School records of the Student produced for the first time to the Student's mother. These records included ISTEP scores and other documents in his permanent file. These records are found at Exhibit pages 1803 to 1864.
54. During the time the Student has been at the private autism school, the Student has displayed some acting out and hitting, but it is believed these behaviors will cease given the structure of his school day and as the non-communication verbalization is addressed. Presently, he is redirected when he hits or acts out. Time-outs are not used since this is not viewed as an effective way to treat this behavior, as it may reinforce negative behaviors.
55. During the two years the clinical director worked with the School's staff, she viewed the staff wanting to move forward in the behavior analysis but continued to not know how, and then became defensive when there was negative feedback by the clinical director and then did not see the feedback applied by the teacher or aide to the Student.

As to the various School-proposed BIPs during the 2003-2004 School year, she deemed them unacceptable and so notified the School. She requested an in-person meeting to discuss the unacceptable areas but such a meeting never took place. These proposed BIPs failed to address the function of the Student's behaviors: how to intervene in different situations based upon the reason for the Student's behavior (i.e. escape, made the Student feel good, get attention, etc.).

Further, she frequently recommended the School staff collect more data on the Student's behavior and the staff's responses thereto, but such collection was sporadic. Based upon the data that was collected by her assistant at the School, the School was, at times, reinforcing the Student's maladaptive behaviors by inappropriate and inconsistent responses to the behaviors.

She opined that an appropriate BIP was needed for the Student so that the various School personnel involved with the Student were consistent in their behavior management, which was not occurring with the Student then not learning. Due to the School's failure to develop an appropriate BIP, she did draft a Behavioral Planning Document to assist in the development of the Student's BIP.

Based upon her observations, she was concerned that teachers involved with the Student's programming did not have the needed specific education or experience in autism. The Student's teacher in the self-contained class during the Spring, 2004 was not

even sure what she was supposed to be teaching the Student, whereas the clinical director was consulted on how to teach and how to adapt programming, but not on what to teach. Further, she expressed concerns about the 4th grade teacher's interest in learning aspects of autism and applying the training. The director believed the educational piece of the puzzle was lacking.

When the Student was placed in the self-contained classroom, there was no real plan. The 4th grade teacher and aide were very inconsistent in their use of the behavior strategies they were taught, nor did they appear to have a very good understanding of the Student and his needs.

The director opined that, based upon the Student's drops in IQ scores, the Student's educational programming was not keeping up with what the Student should have been learning. Further, she believed that the Student did not progress during these two years and the Student's readiness skills for learning will not be produced in the School's placements or programming until he learns such readiness skills.

She was also of the opinion that during his 4th grade year the Student was not placed in the LRE. He was separated from his peers and not provided the appropriate training and supports so that he could interact more with his peers.

She did not view the April 16, 2004, IEP as appropriate and after April 16, 2004, the School continued to fail to implement the behavior component as the staff had been trained. Based upon her two years of being involved with the School, she did not believe that they had the ability to develop an appropriate IEP for the Student nor would they be able to implement one.

She reviewed the Student's October 8, 2004, IEP that was developed at the private autism school for the 2004-2005 School year. She believed that this was appropriate and addressed what the Student needed. This IEP used a baseline assessment (where the Student was at educationally and behaviorally) and then used individual goals in pre-readiness, academics and social skills. This IEP was what she had hoped the School would have developed and implemented locally during the past two years.

56. The School psychologist/autism consultant, upon her review of the IEE of May, 2004, believed that the Student was not losing skills, but he was not developmentally progressing in relationship to same-aged peers. She acknowledged that there was evidence that the Student's behaviors were interfering with his academic learning. She agreed the Student had deficits in his "learning-to-learn skills." She questioned whether the Student's IQ had actually fallen, due to errors in this IEE.

Further, she agreed that the Student's needs were not being met in the self-contained classroom placement and that a placement in an environment emphasizing applied

behavior analysis training with an intensive program to teach basic learning to learn skills was needed for the Student.

She also acknowledged that the summer, 2004 ESY placement was decided upon before the Student's goals were developed.

The IHO's Conclusions of Law

Issue 1 (Formerly Issue 12). Based on the foregoing, the IHO concluded the School failed to provide copies of all of the Student's educational records to the mother's attorney, specifically Exhibit pages 1803 through 1864, which were admitted into evidence during the hearing.

Issue 2 (Formerly Issue 10). During the 2003-2004 school year, the Student's school day was shorter than his peers, specifically being picked up at the school by his bus at 2:45 p.m. rather than 3:00 p.m., as the other children were picked up. Further, there was no justification for this shortened school day written into his IEP. Although this may seem a minor point, it occurred for months. There was no evidence presented concerning transportation provided by the mother; therefore, she is not entitled to any reimbursement.

Issue 3 (Formerly Issue 9). The School did deny the mother's request in 2004 for the private autism placement in Florida without prior written notice as acknowledged by the special education cooperative director. There were numerous other requests by the mother, but the School did attempt to comply with these requests.

Issue 4 (Formerly Issue 8). The Student's placement was changed to a self-contained classroom in October, 2003, without parental consent. Although the mother was aware of this placement change, she did not approve of this change in writing, nor was it approved through a case conference as required. The IEP for this change was not agreed to nor signed by the mother until April 16, 2004.

Issue 5 (Formerly Issue 3). As of June 21, 2000, Article 7 has required that the behavioral intervention plan be linked to information gathered through an FBA. Pursuant to 511 IAC 7-17-38 an FBA is "a systematic collection and analysis of data that will vary in length and scope depending on the severity of the student's behavior. Results and analysis of the data collection are used in developing the student's behavioral intervention plan." There is no requirement of a specific form or format to use in such an assessment. 511 IAC 7-17-8 Behavioral Intervention Plan [provides as follows]:

Sec.8. "Behavioral intervention plan" is a plan, agreed upon by the case conference committee and incorporated into a Student's individualized education program, that describes how the student's environment will be altered, identifies positive behavioral intervention strategies, and specifies which skills will be taught in an effort to change a specific pattern of behavior of the student. The

plan shall be linked to information gathered through a functional behavioral assessment. To ensure transference, the behavioral intervention plan seeks to maximize consistency of implementation across people and settings in which the student is involved.

The school failed to meet the requirements of 511 IAC 7-17-8 and 511 IAC 7-17-38.

An FBA of the Student's behavior was not done until April 16, 2004, although there were various BIPs implemented by the School. In October, 2001 the school psychologist did observe the Student for two days but she did not systematically collect data. She did not believe this was an FBA, although the case conference committee on October 11, 2001 attempted to label her report as an FBA, but the mother never agreed to this in writing. During the 2003-2004 school year the Student's 4th grade teacher drafted three BIPs, all done without first doing an FBA, as required under 511 IAC 7-17-8. Although the Student's mother and the clinical director did not approve these BIPs, and neither did a CCC, this 4th grade teacher implemented these BIPs. During the use of these BIPs, the Student's behavior escalated in the spring of 2004. Further, this same 4th grade teacher prepared an FBA and BIP on April 16, 2004, and used this BIP, which the mother was not aware existed until she reviewed the Student's educational records supplied by the School. The School did not provide a timely and appropriate FBA pursuant to 511 IAC 7-17-38, and did not implement an appropriate BIP pursuant to 511 IAC 7-17-8.

Issue 6 (Formerly Issue 4). The ESY services for the summer, 2003, were for 60 hours by the Student's aide at a Y program. The goal was that the Student participate with peers in the Y activities rather than doing parallel or solo activities, but there were no objectives or benchmarks. By the end of the Student's 2002-2003 school year, the School had discussed placement at a moderate classroom, due to the Student's problems and educational concerns. To only offer 60 hours of an aide was inappropriate.

For the summer, 2004, the School did offer a newly developed applied behavior center program. However, as noted by the autism consultant, this center's staff was inadequately trained and did not appropriately implement the IEP.

Issue 7 (Formerly Issue 5). The School did provide substantial training of staff. They contracted with the private clinical director, a private autism consultant and the private speech/language pathologist to provide training and feedback. However, either this training was inadequate, the staff failed to learn [from] this training, or the staff did learn but then failed to implement the training. What is clear is that the School staff did not properly implement this training and failed to consistently use the training. Based upon the evidence presented, the School's teachers and staff were not adequately trained in the areas of the Student's needs and disabilities, pursuant to 511 IAC 7-21-2 and 511 IAC 7-20-3.

Issue 8 (Formerly Issue 7). The School committed a variety of procedural errors, specifically:

- A. They failed to devise and implement IEPs on at least an annual basis. The November 4, 2002, IEP ended on May 30, 2003. A new IEP was not signed until April 15, 2004. Therefore, the Student was without an IEP for many months.
- B. They failed to devise goals that incorporated parental input (asked her to sign the IEP before goals were written, and the goals were added later, without her input). The mother signed the wrap-around IEP of May 13, 2004 on May 27, 2004. There were no goals in this IEP when it was signed, due to the time constraints to get the application to IDOE.
- C. They failed to properly implement the child's IEPs. During the 2003-2004 school year, the School attempted to implement an unapproved IEP. Therefore, the School did not implement the last agreed-upon IEP of November 4, 2002. Further, the unapproved draft IEPs during 2003-2004 were not properly implemented.

Also, the summer ESY IEPs for 2003 and 2004 were not properly implemented, the 2003, by the School, and the 2004, by the applied behavior center. The April 16, 2004, IEP required peer training, which did not occur.

- D. They failed to share evaluations with the parent at least five days before the CCC meetings, in part because CCCs were held in which IEPs were devised without benefit of full reevaluation results.

The mother requested an evaluation on October 11, 2001, which evaluation was not completed until November 13, 2003. A CCC was held on November 4, 2003, prior to the completion of this evaluation. It is unknown when the written evaluation was completed, since it was not dated. The mother did not receive a copy of this evaluation until March, 2003 [Sic. The correct year would be 2004].

Further, on April 8, 2004, the mother requested an IEE, which was not completed until May, 2004. However, a CCC meeting was held on April 16, 2004.

- E. They failed to conduct evaluations on at least a three-year timeline. The Student was to have a tri-annual [sic] evaluation prior to February 9, 2002. On October 11, 2001, the case conference attempted to waive the need for an evaluation, but the mother never executed this addendum to the Student's IEP. Therefore, the tri-annual [sic] date remained February 9, 2002. However, the next evaluation was not completed until November 13, 2002.
- F. They failed to conduct appropriate hearing screenings. The School never tested the Student's hearing, or were unable to test him. Other procedural errors included the lack of prior written notice of the disapproval of the out-of-state private autism

placement and the change in placement to the self-contained classroom in October, 2003, without approval of the mother or by a case conference committee.

Issue 9 (Formerly Issue 2). Since July 16, 2002, the School failed to instruct the Student in the LRE using appropriate and measurable goals and objectives.

511 IAC 7-27-9 LRE and delivery of special education and related services, states:

- (a) Each public agency shall have in place written policies and procedures to ensure the following:
 - (1) To the maximum extent appropriate, students with disabilities, including those in public or private institutions and other care facilities in the public agency's jurisdiction, are educated with non-disabled students.
 - (2) Special classes, separate schooling, or other removal of students from the general education environment to special classes or separate facilities occurs only when it is documented that education in general education classes using supplementary aids and services cannot be satisfactorily achieved.
 - (3) Unless the individualized education program requires some other arrangement, a student with disabilities is educated in the school the student would attend if not disabled.
 - (4) The case conference committee determines the placement in which a student will receive services on the basis of the student's individualized education program, regardless of the identified disability, and the individualized education program shall be developed prior to the determination and reviewed at least annually.
 - (5) The services provided for each student are based on the goals and benchmarks or short term objectives in the student's individualized education program.
 - (6) A continuum of services is available to meet the individual needs of student with disabilities, including, but not limited to:
 - (A) instruction in general education classes;
 - (B) special classes;
 - (C) special schools;
 - (D) home instruction; and
 - (E) instruction in hospitals and institutions;

and makes provision for supplementary services to be provided in conjunction with general education placement.

- (7) In selecting the least restrictive environment, consideration is given to any potentially harmful effects of the suggested services on the student or on the quality of services needed.
 - (8) Each student with a disability has an equal opportunity to participate with non-disabled students in nonacademic and extracurricular services and activities to the maximum extent appropriate.
 - (9) Special education and related services are delivered in the least restrictive environment determined by the case conference committee, regardless of the identified disability.
 - (10) The provision of services to students with different disabilities at the same time and in the same classroom is permitted.
 - (11) Students with disabilities are in classes and buildings with their chronological peers unless an alternative is determined appropriate by the case conference committee and the reasons for that determination are documented in the written case conference committee report required by section 5 of this rule.
 - (12) Students with disabilities are not removed from education in age-appropriate general education classrooms solely because of needed modifications in the general curriculum.
- (b) The public agency shall make available to students with disabilities the variety of educational programs and services that are made available to non-disabled students served by the public agency, including vocational education, art, music, industrial arts, consumer and homemaking education, field trips, and convocations, as well as nonacademic and extracurricular activities, including meals and recess, athletics, clubs, employment assistance, and graduation ceremonies. Unless the student's individualized education program specifies otherwise, the student shall participate in these programs and activities with non-disabled student.
- (c) The public agency shall make physical education, specially designed if necessary, available to all students with disabilities. Physical education shall be provided by a general education teacher of physical education, or a teacher specially licensed in adapted physical education as applicable to the physical education appropriate for the student. Each student with a disability shall be afforded the opportunity to participate in the general physical education program available to non-disabled students unless:
- (1) the student is enrolled full time in a separate facility; or
 - (2) the student needs specially designed physical education, as prescribed in the student's individualized education program.

- (d) The public agency shall ensure the availability of a continuum of placement options, and shall include the following:
- (1) General education classroom with special education and related services provided during the instructional day.
 - (2) Resource room with special education and related services provided outside the general education classroom during the instructional day.
 - (3) Separate classroom in a general education school building with special education and related services provided outside the general education classroom during the instructional day.
 - (4) Separate public nonresidential school or facility with special education and related services provided.
 - (5) Private nonresidential school or facility with special education and related services provided at public expense.
 - (6) Public residential school or facility with special education and related services provided.
 - (7) Private residential school or facility with special education and related services provided.

Homebound or hospital settings with special education and related services provided at the student's home, a hospital, or other non-educational site selected by the public agency.

The placement in the self-contained classroom in October, 2003, was not the LRE for the Student. This placement removed the Student from peer interaction. The placement took place without a CCC determining this placement on the basis of an agreed-upon IEP. There was no consideration of the quality of the services needed. The School did not meet the requirements of 511 IAC 7-27-9.

Issue 10 (Formerly Issue 11). Since July 16, 2002, the School failed to provide a FAPE to the Student by committing procedural and substantive due process violations such that he was harmed, including a drop of his IQ score by about 30 points, and that he has made no meaningful progress for four years.

511 IAC 7-17-36 Free appropriate public education, states:

“Free appropriate public education” means special education and related services that:

- (1) are provided at public expense, under public supervision and direction, and at no cost to the parent;
- (2) meet the standards of the state educational agency, including the requirements of this article;
- (3) include early childhood education, elementary education, or secondary education;
- (4) are provided in conformity with an individualized education program that meets the requirements of this article;

- (5) are provided to ensure students identified as eligible for special education and related services under this article have an equal opportunity to participate in activities and services available to all other students;
- (6) are provided to the student during a period of removal subsequent to removal for ten (10) cumulative instructional days during the school year; and
- (7) include the award of credit and diploma for completion of academic requirements to the same extent such credit is awarded to students without disabilities.

511 IAC 7-27-8 Individualized education program; accountability

Sec.8. (a) The public agency shall:

- (1) provide special education and related services in accordance with a student's individualized education program; and
- (2) make a good faith effort to assist the student to achieve the goals and objectives or benchmarks listed in the student's individualized education program.

The School failed since July 16, 2002, to provide the Student with a FAPE in compliance with 511 IAC 7-17-36 and IDEA. Under IDEA and Article 7, 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 School 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). This FAPE requirement means more than simple [sic] to an education that confers minimal benefit to the student. FAPE must confer meaningful educational benefit on the student, and an education that confers minimal or trivial progress is insufficient. If these requirements are met, a school has complied with the IDEA's obligations. The School herein did not do so, as concluded hereinafter. As noted in Issue 8 herein, there were numerous procedural violations.

With respect to claims such as alleged procedural errors, cases under the IDEA have adopted what is known as the "harmless error doctrine." "[A] procedural violation of the IDEA is not a *per se* denial of FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents." *Knable ex rel Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir.) *cert. denied* 533 U.S. 950 (2001). See also *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990); *Deal v. Hamilton County Dept. of Educ.*, 259 F.Supp.

686, 695 (E.D.Tenn. 203); White v. School Board of Henrico County, 549 S.E.2d 16, 24 (Va.App. 2001). The evidence presented established these procedural violations “compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits.” Roland M., 910 F.2d at 994. The procedural violations, individually and in total, harmed and deprived the Student of a FAPE.

Since the 2002-2003 school year the School failed to provide an appropriate education. Although the education was free and public, it was not appropriate. The Student did not make any meaningful progress. Although the School staff received extensive training, the training was not properly implemented nor implemented consistently. The results of the IEE and the ISTAR results for 2004, when compared to the prior testing, show no or *de minimus* progress in the past two years. As noted by the IEE and the private autism consultant, clinical director and speech language pathologist, the Student made no progress. The School failed to comply with 511 IAC 7-17-36 and 511 IAC 7-27-8.

Issue 11 (Formerly Issue 4). The proposed IEP for the 2004-2005 school year is inappropriate and fails to offer the Student FAPE in the LRE for the same reasons that the past IEPs have been inappropriate. Further, the proposed IEP lacks present levels of educational performance (PLEP) based on current and detailed data, measurable annual goals and objectives based on PLEP, a BIP, transition information and an analysis of the Student’s behaviors.

511 IAC 7-27-6 states in pertinent parts: Sec. 6 (a) An individualized education program shall contain the following:

- (1) A statement of the student’s present levels of educational performance, including:
 - (A) how the student’s disability affects the student’s involvement and progress in the general education curriculum; or
 - (B) for early childhood education student, as appropriate, how the disability affects the student’s participation in appropriate activities.
- (2) A statement of measurable annual goals that describe what the student can be expected to accomplish within a twelve (12) month period, including benchmarks or short term objectives, related to:
 - (A) meeting the student’s needs that result from the student’s disability to enable the student to be involved in and progress in the general education curriculum;
 - (B) for early childhood education student, as appropriate, to participate in appropriate activities; and
 - (C) meeting each of the student’s other educational needs that result from the student’s disability.
- (3) A statement of the special education and related services and supplementary aids and services to be provided to the student, or on behalf of the student, and a statement of the program modifications or supports for school personnel that will be provided for the student:

- (A) to advance appropriately toward attaining the annual goals;
 - (B) to be involved in and progress in the general education curriculum in accordance with subdivision (1) and to participate in extracurricular and other nonacademic activities; and
 - (C) to be educated and participate with other students with disabilities and non-disabled students in the activities described in this article...
- (6) An explanation of the extent, if any, to which the student will not participate with non-disabled students in general education classes or settings and in extracurricular and other nonacademic activities.
- (7) A statement of:
- (A) how the student's progress toward annual goals, including benchmarks or short term objectives described in subdivision (2), will be measured; and
 - (B) how the student's parents will be regularly informed, at least as often as parents are informed of their non-disabled students' progress, of the student's progress toward the annual goals and the extent to which that progress is sufficient to enable the student to achieve the goals by the end of the twelve (12) month period.
- (8) A statement of the student's need for extended school year services.

The procedural requirements of an IEP involve assurances that the program developed was technically valid. A valid evaluation [20 U.S.C. § 1414(a)] must guide a properly constituted IEP team [20 U.S.C. § 1414(d)(1)(B)] in formulating the IEP that includes the required components [20 U.S.C. § 1414(d)(1)(A)] and in determining placement [34 C.F.R. § 300.552 (a)(1)]. An IEP may be deemed inappropriate if "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits" (*Roland M. v. The Concord School Committee*, 1990, 16 IDELR 1129).

Substantive requirements mean an IEP must be reasonably calculated to provide educational benefit. The benefits must be more than trivial or *de minimus* (*Polk v. Central Susquehanna Intermediate Unit 16*, 1988) but need not be optimal or maximum (*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 1982). The test of substantive appropriateness examines the IEP at its inception.

511 IAC 7-17-64 states "Special education" means specially designed instruction, at no cost to the parent, designed to meet the unique needs of a student eligible for special education and related services under this article. Special education may include, but is not limited to, the following:

- (1) Instruction conducted in:
 - (A) the classroom;
 - (B) the home;
 - (C) hospitals and institutions; and

- (D) other settings.
- (2) Instruction in physical education.
- (3) Travel training.
- (4) Transition services.
- (5) Vocational education.
- (6) Speech-language pathology services.

511 IAC 7-17-66 states: “Specially designed instruction” means adapting, as appropriate to the needs of a student who is eligible for special education and related services, the content, methodology, or delivery of instruction:

(1) to address the unique needs of the student that result from the student’s disability; and to ensure the student’s access to the general curriculum so that the student can meet the educational standards within the public agency that apply to all students.

Upon review of the proposed IEP, it is clear that it did not satisfy these requirements.

The proposed IEP for the 2004-2005 school year is inappropriate for all of the various procedural and substantive points discussed in Finding [of Fact] No. 45, which will not be repeated herein. This IEP was not based upon the recommendations of the autism experts, some of whom have been involved with this Student for a number of years. Two of the independent experts, the speech language pathologist and the autism consultant, felt that this proposed IEP and placement were inappropriate. The School presented no independent expert witnesses to contradict these opinions, resting on the general opinion of School personnel that the IEP and placement were appropriate, without any specific testimony as to why it was appropriate, especially considering the School’s past failures to develop and implement prior IEPs for the Student.

There was no testimony presented as to necessary experience or expertise of the proposed teachers and other special education staff responsible for implementing the proposed IEP and using ABA as required in the proposed IEP. Further, the private autism consultant who had contracted with the School to provide five (5) hours of specialized training to the Student’s teachers and aide did not believe this was adequate to set up and train School personnel. If the School had previously set up such a program, had the teachers and aide already experienced and trained in ABA and an environment heretofore specifically set up as needed by the Student, five hours may have been adequate. However, here a program with too many unknowns was proposed and such an IEP was not reasonably calculated to provide educational benefit to the Student. The IEP appeared to be too much like the one approved on April 16, 2004: a placement without prior visual setups and School personnel without adequate experience and expertise in such behavior-based programming to properly educate the Student so that he received more than trivial or *de minimus* benefit.

Finally, the School psychologist/autism consultant, during the hearing, appeared to question the validity of the IEE, raising various concerns of the testing and the evaluator's opinion of the Student's primary problem. If this IEE was [sic] invalid, then the IEP derived principally therefrom could be inappropriate.

Issue 12 (Formerly Issue 11). The Student is entitled to compensatory education and private placement at public expense.

Having concluded the proposed July 15, 2004, IEP was inappropriate, the next inquiry is whether the out-of-state private school IEP of October 8, 2004, is appropriate. Based upon the testimony, specifically the clinical director, the autism consultant, the speech language pathologist and a review of this IEP, it is concluded that this IEP is appropriate.

Having so concluded that the Student's IEPs since the 2002-2003 school year were inappropriate and the Student was denied FAPE, and the School's proposed 2004-2005 IEP was inappropriate, and the appropriateness of the out-of-state private autism school's IEP, the Student is entitled to compensatory education. The Student was without an IEP for nearly a full school year (2003-2004). Also, the summer program for 2004 was not beneficial. Compensatory education of one school year (2004-2005), plus the summer of 2005 at the out-of-state private autism school is appropriate and necessary for the Student. Compensatory educational services are an equitable remedy to cure violations of a Student's right to a FAPE. Timms v. Metropolitan School District of Wabash County, Indiana, 722 F.Supp 1310 (7th Cir. 1983). Further, the after-school program at the private autism school with the interaction with others in the community is needed.

The IHO's Orders

The IHO issued five (5) Orders.

1. The Student is entitled to compensatory education for one school year at the private autism School (180 days) plus the 2005 summer program at the private autism school (39 days) plus the after-school program during the private autism school's school year.
2. The School shall pay the tuition for the Student's program at the private autism school for 180 days at the two-to-one instruction rate of \$198.79 per day, the 2005 summer school program at the private autism school for 39 days at the same daily rate of \$198.79, and the after-school program at the private autism school at the rate of \$150.00 per week, commencing August 23, 2004.
3. The School shall reimburse the mother for any payments she has made on the tuition and after-care program. Said reimbursement is to be made in full within forty-five (45) days of this order. The mother shall submit canceled checks or other proof of such payments within fifteen (15) days of the date of this Order.

4. If the mother intends to continue to maintain Indiana as her residence and, more specifically, continue to reside in the legal settlement of the School district, she shall notify the School by March 1, 2005 and a CCC shall then be held by April 1, 2005, to develop an appropriate IEP for the Student. This IEP shall be as specific and as detailed as the private autism school's IEP for the 2004-2005 school year, and the School shall have a qualified, fully trained and experienced in ABA school personnel, specifically the Student's proposed teacher of record and service and one-to-one aide.

Further, occupational and speech therapy evaluations shall be completed by private evaluators by March 15, 2005. Further, an independent educational evaluation shall be completed by March 20, 2005, with written reports of the evaluations to be provided to the mother at least five days prior to the CCC. These evaluations are to ascertain the present levels of performance with recommendations for programming for the 2005-2006 school year.

5. All other requests by the mother for reimbursement from the School are denied based upon the limited evidence or documents presented or because the same is deemed inappropriate.

The IHO appropriately notified the parties of their appeal rights.

After issuance of his written decision but before the expiration of thirty (30) calendar days or the filing of a Petition for Review with the Board of Special Education Appeals, both the Student and the School filed with the IHO separate requests for clarification of the IHO's written decision of November 8, 2004. On November 20, 2004, the IHO issued an Order Correcting Hearing Decision. This Order corrected or otherwise clarified the IHO's written decision as with regard to Finding of Fact No. 1, Finding of Fact No. 45, and Conclusion of Law No. 5 (Issue No. 5). The IHO's corrections and clarifications have been included in the recitation of his decision, *supra*.

On December 10, 2004, the IHO issued an Order on Respondent's Motions, clarifying that the Student's current legal settlement remains within the boundaries of the School. The IHO amended Order No. 4, *supra*, requiring the CCC meeting to be conducted by May 1, 2005, with the OT and speech/language evaluations to be completed by March 30, 2005. The IEE is to be completed by April 15, 2005, with all evaluations to be provided to the mother at least five (5) days prior to the meeting of the case conference committee.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The School, by counsel, requested from the Board of Special Education Appeals (BSEA) on November 24, 2004, an extension of time within which to prepare and file a Petition for Review. The BSEA granted its request and issued an Order to that effect on November 24, 2004, giving the School until January 11, 2005, to prepare and file its Petition for Review.

The School's Petition for Review

The School timely filed its Petition for Review on January 11, 2005. The School's focus in its Petition for Review is whether the Student has legal settlement within its boundaries. To this end, its exceptions are directed at the IHO's Finding of Fact No. 51, Order No. 4, and the IHO's subsequent determination by his Order of December 10, 2004, that the Student's legal settlement remains within the boundaries of the School.

The School argues that the Parent enrolled the Student in the private school in Florida (hereafter, the "Florida School") and then moved there. The Florida School is not a residential school, so the Student returns to the Parent's Florida home each day after school. The School argues that it timely raised this issue prior to the commencement of the hearing in this matter through its Motion for Summary Judgment. The IHO denied the Motion for Summary Judgment but did not address the issue of legal settlement.

The IHO's Finding of Fact No. 51 contained certain determinations, including that the Student's mother is his legal guardian but is currently living in Florida. Her husband continues to reside in their Indiana home, where their furniture remains and to where she intends to return. The mother also continues to maintain her Indiana driver's license.

The School takes exception to Order No. 4, which requires the mother to notify the School by March 1, 2005, of her intentions: Whether she will be returning to Indiana. The Order inherently assumes the mother has and will continue to maintain legal settlement within the School's boundaries.

As noted *supra*, the School sought clarification of the IHO's final written decision, specifically with regard to the issue of legal settlement. The IHO was specific in his response: The Student has legal settlement within the School's boundaries.

The School argues that the mother has enrolled other of her children in Florida schools, removed herself to a Florida residence on August 20, 2004, and planned to stay there at least through December 17, 2004. Although the mother's husband continues to reside here, he is not the Student's father. The Student's father lives in Florida, purportedly within three-to-five miles from the Florida School. The School asserts that mere ownership of property in a school district with an intent to return at some indefinite time is insufficient to establish legal settlement. The School cites to I.C. 20-8.1-6.1-1(b) for its support. This statutory provisions reads as follows:

IC 20-8.1-6.1-1 Legal settlement

* * *

(b) The words "residence", "resides", or other comparable language when used in this chapter with respect to legal settlement, transfers, and the payment of tuition, means a permanent and principal habitation which a person uses for a home for a fixed or indefinite

period, at which the person remains when not called elsewhere for work, studies, recreation, or other temporary or special purpose. These terms are not synonymous with legal domicile. Where a court order grants a person custody of a student, the residence of the student is where that person resides.

* * *

The School acknowledges that legal settlement is not a viable issue for the 2004-2005 school year, as the IHO's award of compensatory educational services is based upon the determinations the School failed to provide a FAPE to the Student when he did have legal settlement within the School. Rather, the School is asserting that the IHO's Orders will require the School to obligate itself past the compensatory school year to the 2005-2006 school year when it is not clear the mother will have established legal settlement within the School by that time. The School argues the IHO's Orders would make it financially responsible for a student who may very well have established residency in another State, with that State now obligated to make available a FAPE to the Student.

The School further argues that even should the mother return to the School but with the Student remaining enrolled in Florida, the School would have no further obligation to the Student after the 2004-2005 school year. The Student could reside with his father at his father's Florida residence. If this should occur, then the Student's legal settlement would be in Florida, not Indiana.

By analogy, the School opines that should the mother have moved into any other Indiana school district, that school district would be responsible because the mother would have established legal settlement.

The School requests the BSEA to either amend or vacate Finding of Fact No. 51 or amend Order No. 4 insofar as it relates to the 2005-2006 school year. The School also seeks a determination from the BSEA that it determine the Student's legal settlement was in Florida for the 2004-2005 school year.

The Student's Response to the Petition for Review

The Student, by counsel, filed on January 19, 2005, his Response to the Petition for Review. The Student asserts that his reason for enrolling in the Florida School was directly related to the School's failure to provide him with a FAPE. The Student notes the School is not contesting the IHO's determination that the School failed to provide him with a FAPE. The mother testified that she sought an appropriate school in Indiana, but was not satisfied in this regard. She located one in Florida and did lease a residence there. She returns with the Student and another sibling to the Indiana residence, which is maintained by her husband, for family gatherings. The mother represents that the lease expired of its own terms in December and that she has moved back to

Indiana. The Student will stay with his biological father in Florida after his school day is over at the Florida School.

The Student also argues that his legal settlement is not determined by where he lives. Rather, under Indiana law, his legal settlement is determined by where his Parent lives. The biological father is not the “parent” of the Student as the father has no custodial rights. The Student’s Parent is his mother, and she resides within the boundaries of the School. The Student is not considered a resident of Florida.² The Student also represents the School accepted State and Federal funds for the Student for this school year, and are thus estopped from challenging his legal settlement for the 2003-2004 school year.

The Student also appears to make a jurisdictional argument. He represents that the State Board of Education has jurisdiction to determine a student’s legal settlement. I.C. § 20-8.1-6.1-10(a)(3)(A). The School never sought such a determination from the State Board, nor did the School ever appeal the IHO’s decision to the State Board.³ The Student also argued that the IHO has not ordered services beyond the 2004-2005 school year. In fact, the Student represents the IHO has given the school an “out” by establishing deadlines for when the parent is to notify the School of her intentions, for the conduct of certain evaluations, and for the development of an appropriate IEP. “Payment for 2005-06 is not automatic,” the Student acknowledged in his response. Rather, payment would be contingent on the School’s ability to offer an appropriate IEP for the 2005-2006 school year. If the School does so, the Student states, then the School would be “off the hook” for the 2005-2006 school year.

Review by the BSEA

The complete record was photocopied and transmitted to the members of the BSEA on January 24, 2005. On January 19, 2005, the BSEA notified the parties that the matter would be reviewed on January 31, 2005, without oral argument and without the presence of the parties. On that date, all three members of the BSEA met in the offices of the Indiana Department of Education

²The BSEA noted that counsel for the Student uses a number of outdated regulatory references. There is no apparent reason for doing so (i.e., these were the regulatory citations in effect when certain matters occurred). Counsel is advised to get a current copy of the Indiana State Board of Education’s rules and regulations for special education, 511 IAC 7-17 et seq., more commonly referred to as “Article 7.”

³ Although legal settlement will be discussed more fully in the BSEA’s Combined Findings of Fact and Conclusions of Law, the BSEA wishes to note at the outset that an IHO’s decision can never be appealed to the State Board of Education. That would be inconsistent with both Indiana and Federal law. The Student also cites to the Commission on General Education, which has not existed since 1984, and statutory provisions regarding transfer tuition that were repealed at about the same time. The current version of I.C. § 20-8.1-6.1-2 does not refer to travel time or transportation. Transfer tuition is not really applicable in this case, in any event.

to review this matter. Based on this review, the following Combined Findings of Fact and Conclusions of Law with Orders are determined.

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. At the outset, the BSEA notes that the School did not raise the issue of legal settlement as one for adjudication at the hearing. The School did raise it by Motion for Summary Judgment on September 30, 2004; again, as a supplemental matter on October 8, 2005; and then again after the IHO's written decision was issued. Although the BSEA will not review matters not raised at the hearing, 511 IAC 7-30-4(g), "matters" is not restricted to delineated issues. It cannot be said that the School did not raise legal settlement of the Student as "matter," and preserved this matter for review. Legal settlement was not an issue at the time the hearing was originally requested, nor was it an issue when the initial pre-hearing conference was conducted. It became an issue several weeks later. Although not raised formally as an issue for the hearing, the School did raise it as a contested matter. The BSEA will address the issue insofar as the record below and Indiana law will permit.
3. Although much has been made of the legal settlement of the Student, the Student's actual legal settlement for the 2004-2005 school year does not appear to be a bona fide matter of concern. The IHO has ordered compensatory educational services to the Student for this school year based on the unchallenged determinations by the IHO that the School failed to provide a FAPE to the Student but the Florida School is providing one. The IHO did not, as the Student represents, order the Student into the Florida School, which is a private school and not a public one.⁴ This is a straight-forward dispute covered by the provisions of 511

⁴ The Student's argument that the IHO's Order is the same as a "Court Order" under I.C. § 20-8.1-6.1-5(a) is without merit. Such an argument runs counter to the better interests of the Student. An Indiana public school corporation is not responsible for court-ordered placements that are out-of-state. See I.C. § 20-8.1-6.1-7(b). In any event, the Student was not placed at the Florida School by the IHO's order, by a court order, or under the provisions of I.C. § 20-8.1-6.1 et seq. as these provisions relate to transfer tuition.

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). A student's legal settlement is determined primarily by where the student's parent resides and not where the student is enrolled. Although it is true that under Indiana law, a student may not reside with another "primarily for the purpose of attending a particular school," I.C. § 20-8.1-6.1-1(a)(3), this provision militating against guardianships primarily or solely for educational reasons is not relevant to this dispute. The IHO's determination was based on facts that occurred when the Student, without question, had legal settlement within the School as this term is defined at I.C. § 20-8.1-1-7.1. Accordingly, the IHO's determinations regarding the School's Motion for Summary Judgment are sustained.

4. The School's request for a determination of legal settlement for the 2005-2006 school year is premature. First, the record is insufficient to make such a determination. Second, the IHO has established a time table that is contemplated by the 2004-2005 school year, a time table that requires the Parent to notify the School of her intentions by March 1, 2005, with the additional requirements to present the Student for certain evaluations. A Case Conference Committee meeting is to be held by May 1, 2005, under the revised Order from the IHO on December 10, 2005. If the Parent fails to present the Student for evaluations or should it be determined the School offered an appropriate IEP and placement arising from the CCC meeting, these factors will likely have an effect should the parties remain in dispute. This would be an application of 511 IAC 7-19-2.
5. Legal settlement is, under ordinary circumstances, determined on an annual basis, although this can certainly be more frequent. The Indiana State Board of Education does have a regulation that refers certain disputes under I.C. § 20-8.1-6.1 *et seq.* to IHOs with jurisdiction under 511 IAC 7-17 *et seq.* ("Article 7"). However, this regulation—511 IAC 1-6-4—only applies to disputes over whether a student can be "better accommodated" in a different Indiana public school corporation for such reasons as academic or vocational aspiration, overcrowding, medical, and accreditation status. See 511 IAC 1-6-3 and I.C. § 20-8.1-6.1-2. The State Board of Education has not deferred legal settlement disputes to Article 7 due process procedures. A public school corporation continues to have the right to expel a student for lack of legal settlement. See I.C. § 20-8.1-5.1-11 ("A student may be expelled from school if the student's legal settlement is not in the attendance area of the school corporation where the student is enrolled"). There is an administrative appeal to the Indiana State Board of Education under I.C. § 20-8.1-6.1-10(a)(1) ("The Indiana State Board of Education shall hearing the following:...All appeals from an order expelling a child under IC 20-8.1-5.1-11"). In addition, the State Board of Education can entertain jurisdiction over "legal settlement" without reference to the expulsion process as well as a student's "right to attend school." I.C. § 20-8.1-6.1-10(a)(3)(A),(C). At this time, the record is insufficient to make such a determination for the 2005-2006 school year. In any event, the School does have an avenue available to contest the Student's legal settlement. In like manner, the Parent and Student also has an avenue available to determine the Student's legal settlement or right to attend school. This can be accomplished through the

aforementioned procedures, but likely would be related more to an Article 7 dispute under 511 IAC 7-19-2, where the additional protections of Article 7 would apply. Under either process, however, this issue—legal settlement for the 2005-2006 school year—is premature. The Combined Finding of Fact and Conclusion of Law should not be construed as favoring one procedure over another, or recourse to either procedure. That is a matter for determination by the parties.

6. The challenged Finding of Fact No. 51 and Order No. 4, as amended by the IHO, do not preclude any challenge to the Student’s legal settlement for the 2005-2006 school year. The IHO did not make such an Order, nor could he given the framing of the issues and the time frame at issue. Accordingly, the BSEA, by unanimous consent, finds no fault with the IHO’s Finding of Fact No. 51 and Order No. 4, as amended by the IHO. The legal effect of the IHO’s decision does not reach past the ordered Case Conference Committee by May 1, 2005. When the School offers a proposed IEP and placement arising from this Case Conference Committee, and the Parent rejects the proposals, the parties will likely be involved in a hearing under 511 IAC 7-19-2, during which the issue of legal settlement can be raised and a record made.

ORDERS

1. The IHO’s Finding of Fact No. 51 and Order No. 4, as amended by the IHO, are sustained.
2. The BSEA will not determine the Student’s legal settlement for the 2005-2006 school year, as such a determination, based on the record below and Indiana law, would be premature.
3. Any allegation of error in the Petition for Review or Motion raised by either party not specifically addressed above is deemed denied

DATE: January 31, 2005

/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).