



hearing dates and an extension of the hearing decision deadline. On February 1, 2005 the IHO issued a Pre-Hearing Order. The IHO ordered the School to provide the Student with a copy of the requested documents on or before February 8, 2005. The IHO extended the deadline for the hearing decision to Monday March 28, 2005 and identified the issue for hearing as whether the individualized education program (IEP) proposed by the School at the case conference committee meeting on October 8, 2004 provided the child with a free appropriate public education (FAPE), including related services, scheduling of services and accommodations for the child.

On February 15, 2005, counsel for the Student, withdrew and new counsel was substituted.

On February 15, 2005, the Student submitted a Request for Continuance to submit the parent's issues. On February 18, 2005, the Student submitted a Motion to Compel the School to produce documentation, a Motion to Dismiss the allegations contained in the School's request for due process hearing as well as other issues that the Parent wanted to include in the due process hearing.

On February 8, 2005, the Parent requested that the IHO vacate the March 7 hearing date because she was unable to re-schedule a mid-term exam. On February 17, 2005, the IHO vacated the March 7, 2005 hearing date.

The parties participated in mediation but were unsuccessful in resolving their issues.

On Tuesday March 1, 2005, a second pre-hearing conference was held by telephone to address the Student's Motion to Compel, Motion to Dismiss and additional issues the Student wished to raise at the hearing. The Student's Motion to Dismiss was denied. The IHO identified the following issue for hearing as the School's issue:

1. **Whether the IEP proposed by the LEA in October 2004 is appropriate to meet the identified needs of the child.**

The IHO rephrased the parent's issues as follows:

2. **Whether the LEA failed to allow the parent to function as an equal participant in the child's educational process by**
  - a. **repeatedly ignoring parental requests for information regarding the child's IEP services, curriculum, performance assessments and measurement data.**
  - b. **repeatedly refusing to respond to the parent's request to meet with the child's teachers and service providers to discuss the child's program, progress, accommodations and teaching methodology.**
3. **Whether the LEA wrongfully failed or refused to convene a case conference committee meeting with the complete IEP team in attendance and whether it**

**wrongfully denied the parent's request for the child's instructional aide to attend CCC meetings.**

- 4. Whether the LEA wrongfully failed to provide the parent with adequate prior written notice when denying parental requests.**
- 5. Whether the LEA wrongfully failed to consult or inform the parent in a timely manner of their intent to remove or reduce IEP services believed by the parent to be critical in the areas of vision, assistive technology, activities of daily living, math, speech, reading and language arts.**
- 6. Whether the LEA wrongfully cut off discussions with the parent when the parent objected to the proposed removal of services at the October 2004 case conference committee meeting.**
- 7. Whether the LEA failed to deliver services in Language Arts/Reading, Math Resource, Assistive Technology, Occupational Therapy, Physical Therapy, Speech, Vision and Activities of Daily Living as required in the child's IEP.**
- 8. Whether the LEA failed to develop and implement appropriate Assistive Technology (AT) services for the child by**
  - a. unilaterally and materially changing the delivery of those services from the 90 minutes per week set out in the child's IEP.**
  - b. wrongfully deleting AT as an independent service, eliminating short term AT objectives.**
  - c. failing to identify, investigate or attempt technology access tools that would benefit the child.**
  - d. failing to respond to the parent's request for information and to consider parental input regarding the child's AT program.**
- 9. Whether the LEA failed to implement IEP-mandated vision services and accommodations throughout the child's educational program by**
  - a. failing to properly train all staff regarding the vision accommodations needed by the child.**
  - b. failing to consistently apply vision accommodations.**
  - c. failing to properly adapt all educational materials to meet the child's vision needs.**
  - d. failing to use alternative formats in presenting educational materials to the child.**

- e. **refusing to properly implement and document the child's vision exercises.**
10. **Whether the LEA wrongfully modified the content of the child's math curriculum.**
  11. **Whether the IEP proposal to remove the child from the general education class for math violates her right to education in the least restrictive environment.**
  12. **Whether the LEA has failed to develop and implement an appropriate toileting routine for the child.**
  13. **Whether the LEA has failed to properly train its staff regarding the child's functional limitations and needs and the use of her equipment**
  14. **Whether the LEA has failed to appropriately implement full inclusion and socialization opportunities for the child.**
  15. **Whether the LEA has failed to provide the child with opportunities comparable to her non-disabled peers for physical and mental exertion by unnecessarily confining her to her wheelchair during recess and physical education.**
  16. **Whether the LEA has failed to implement the child's IEP directives regarding her time to be spent in a stander and the time and distance she is to walk.**
  17. **Whether the child has been denied a free appropriate public education by the actions or inactions of the LEA.**

At the end of the March 1 conference the parent, a "certified legal intern," requested that she be allowed to act as co-counsel and question witnesses. That request was granted and later reconsidered upon the objection of counsel for the LEA. Orders were issued reaffirming this IHO's decision on March 4, 2005. The request was granted to her as a parent, rather than as a legal intern and only by reason of her special knowledge regarding the complexities of this case and the difficulty of thoroughly and effectively communicating the same to her new attorney. The parent was admonished that preservation of a clear record was essential and that she would be allowed to question witnesses only so long as she maintained an appropriate demeanor and her questions did not drift into commentary, argument or explanation.

The School requested an extension of the decision deadline so that the parties could submit briefs. After taking the matter under advisement, an extension was granted until May 2, 2005. Counsel for the School put on the record his continuing objection to allowing the parent to question the witnesses. An order for the separation of witnesses was put on record.

The hearing was conducted on March 8, 10, 11 and 15. Both parties were represented by counsel. The hearing was open to the public at the Parent's request. On March 25, 2005, the IHO issued an Order Extending Decision Deadline to reconvene and finish the hearing on Thursday, April 14, 2005 and to extend the decision deadline to Monday, May 2, 2005.

On April 21, 2005, the School submitted a Motion to Extend Decision Deadline. On April 22, 2005, the IHO issued an Order Extending Time to file Closing Briefs and Extending Decision Deadline to Thursday, May 5, 2005. On May 5, 2005, at the request of the Parent, the IHO issued an Order Extending Decision Deadline, ordering that the hearing decision deadline in the matter be extended until Monday, May 9, 2005. The IHO issued her written decision on May 9, 2005.

### **The IHO's Written Decision**

For ease of reference, the IHO's Findings of Fact, Conclusions of Law, and Orders are reproduced below, with corrections as necessary for grammatical and stylistic reasons.

### **The IHO's Findings of Fact**

The Petitioner's issue is presented last in order to present facts relating to specific issues before those relating only to the broader issues of denial of FAPE and appropriate educational programming.

2. *Whether the LEA failed to allow the parent to function as an equal participant in the child's educational process by*

a. *repeatedly ignoring parental requests for information regarding the child's IEP services, curriculum, performance assessments and measurement data.*

**(F 2.a.1)**

Each 9-week grading period the LEA has provided the parent a narrative from each of the child's teachers addressing every goal area of the child's IEP. This is in addition to a copy of her IEP goal pages and the Report Card received by all children.

The classroom teacher sent home an assignment notebook each day giving the parent feedback on the child's activities and progress. She also sent home a newsletter with information regarding the activities of the general education class each week.

**(F 2.a.2)**

The parties exchanged a daily log filled out by the child's instructional assistant (IA). The IA consistently sent that log home. The log exchanged information about the child's general attitude, effort, health, medication, urological functioning, personal care concerns and equipment issues. In addition, the IA would note in a "check box" whether various educational and related services were provided.<sup>1</sup> Other information such as doctor appointments and school events was shared as the IA and parent saw fit.

---

<sup>1</sup> It is of some concern to this hearing office that apparent unexplained alterations of the child's Daily Log are ubiquitous. Numerous boxes which the Instructional Assistant is supposed to mark when the child receives services show clear evidence that a mark has been covered by "White-Out." One would hope that such alterations reflected the desire of the aide to be accurate. If, in fact, that was the case, the aide should be instructed not to anticipate what services will be delivered on any given day. In the alternative, the

**(F 2.a.3)**

A substantial part of the IA's duties was attending to the child's physical needs. The educational services she provided were designed by professional service providers who were responsible for training and supervising the aide in the delivery of those services.

**(F 2.a.4)**

The child's Daily Log indicates that, almost daily, the parent sought information on such things as:

- Who provided a particular service to the child
- What that service consisted of
- How that service was delivered
- When the service was provided
- How long the service lasted
- Where the service was provided
- How the child performed (e.g., the distance she walked)
- or
- Why a particular service was not provided on a particular day

Frequently such questions would be asked regarding more than one service.

**(F 2.a.5)**

The parent frequently used the log to make comments about the child's services, educational and otherwise. While there were occasionally constructive suggestions (many of which the LEA staff implemented), the parent's comments were usually negative. The parent would then inform school staff exactly (and sometimes repeatedly) how she believed the service should be provided.

**(F 2.a.6)**

There is a substantial body of letters and e-mail communication between the parties. The parent, however, informed the school that she did not generally access her e-mail on a daily basis. The communications sent by the parent to LEA staff were frequently lengthy<sup>2</sup> and requested detailed information about several of the child's services. Many requests involved administrative policy and practice.

**(F 2.a.8)**

LEA staff responded to the parent's concerns, albeit not always with the speed and detail the parent would have preferred. There is no credible evidence in the record indicating the LEA did not attempt to respond to the parent.

***b. repeatedly refusing to respond to the parent's request to meet with the child's teachers and service providers to discuss the child's program, progress, accommodations and teaching methodology.***

---

mark should be initialed as an error to protect the integrity of the record.

<sup>2</sup> Two to three pages, singly spaced.

**(F 2.b.1)**

The parent made numerous requests for meetings with LEA staff. The parent believed that it was important that as many staff members as possible be at the various meetings so that the parties could coordinate the delivery of their various services in a manner acceptable to the parent. It was often unclear to LEA staff whether the parent did or did not want meetings to occur when certain staff members could not attend, or when the LEA staff felt the need to set a time limit to the meetings.

**(F 2.b.2)**

The parent has repeatedly made it known to LEA staff that she works full-time, attends law school full-time, and has significant family responsibilities that limit her availability for meetings. LEA staff also has significant responsibilities for planning and providing services for the other children in their charge, be they “exceptional” or “typical.”

**(F 2.b.3)**

Numerous meetings were, in fact, scheduled. On occasion, some of the parties anticipated to be at the meeting (including the parent) were unable to attend. On occasion, there was miscommunication regarding the date, time or place or purpose of the intended meeting. Both the parent and LEA staff, however, made a good faith effort to schedule, prepare for, and attend meetings.

**(F 2.b.4)**

On occasion, LEA staff was unable to present the parent with the totality of the documents she expected or was not able to get them to her in time for her thorough review before a meeting. The parent was, however, accorded time during the meeting to go through documents “line by line” with LEA staff members. The parent’s comments were considered and frequently resulted in revisions to the documents.

**(F 2.b.5)**

After a number of meetings<sup>3</sup> failed to resolve the numerous matters at issue between the parent and the LEA, the LEA sought to establish specific agenda and time limits for the various meetings. The purpose of the limits was to try to resolve a few issues and make effective use of the parent’s and staff time. The parent was allowed, however, to pursue whatever was of concern to her, even if the matter had been discussed on prior occasions during which LEA staff suggested that they “agree to disagree.”

**(F 2.b.6)**

There was substantial communication between LEA staff and the parent about I-STEP accommodations for the child. The parent expressed her concern over the child’s I-STEP results to a staff member at a Parent/School function. There is no substantial evidence that LEA refused to discuss any of the parent’s concerns expressed through the ordinary channels of communication. The child’s general education teacher did, in fact, specifically agree to discuss the child’s failure of the I-STEP exam with the child’s team of service providers.<sup>4</sup>

---

<sup>3</sup> The parties began meeting before the start of the 2003-2004 school year.

<sup>4</sup> Petitioner’s Evidence, page 472.

**(F 2.b.7)**

There has been a significant amount of discussion between the parent and LEA staff regarding accommodations for the child's visual and other challenges. The parent's assertion that the child cannot benefit from her educational program unless the parent and the LEA staff always use the exact same accommodations, both during the school day and at home, is unfounded. LEA staff believed there should be some discretion accorded them in the application of the child's accommodations because the child is going to have to adjust to a world where not all written material is enlarged, spaced, and presented according to her IEP accommodations. The parent testified that the child's math tutor has been successful with "touch point" presentation of math problems, a method she asserts is not being used by the LEA.

3. *Whether the LEA wrongfully failed or refused to convene a case conference committee meeting with the complete IEP team in attendance and whether it wrongfully denied the parent's request for the child's instructional aide to attend CCC meetings.*

**(F 3.1)**

One of the parent's experts has advocated a "trans-disciplinary" approach to the case conference process rather than a "multi-disciplinary" process. The parent has interpreted this to mean that every provider must attend the entirety of every CCC meeting to insure that the child is instructed by the "proper" methodology and "proper" accommodations in all situations.

**(F 3.2)**

The staff members providing services to the child meet on a regular basis to discuss the program and accommodations needed by the child. The parent was invited and did attend one such "collaboration" meeting. Staff members have been in frequent contact with the parent regarding the child's program, services and accommodations. The presence of each of the child's service providers for the entirety of each case conference committee meeting duplicates the efforts already made to share information and coordinate services for the child.

**(F 3.3)**

The case conference process for this child has required several lengthy meetings. The parent has found it difficult to "agree to disagree" on an issue and then move on to other case conference concerns. Service providers cannot plan or implement the programs for other children needing services while they are attending case conference committee meetings for one particular child. Such services must be rescheduled in order to comply with the IEPs of these other children.

**(F 3.4)**

The child's instructional aides are trained and supervised by staff who are in attendance at case conference committee meetings. The IA communicates with the parent via a daily log book and the child regularly reports to the parent about her interactions with the IA. The child has also attended and given input at CCC meetings as to what the IA does and does not do with her.

**4. *Whether the LEA wrongfully failed to provide the parent with adequate prior written notice when denying parental requests.***

**(F 4.1)**

LEA staff presented a draft of a partial IEP to the parent at a “working meeting” on 9/10/04. LEA staff were unable to fulfill their agreement to prepare a completed draft or to get the 17 pages that were prepared to the parent until shortly before the meeting. The parties proceeded to go over what had been prepared, however, and the parties discussed making certain changes to the “working draft.”

**(F 4.2)**

That “working draft” did not list separate vision services under the section pertaining to the child’s needs. That was noted by the parent on her copy of the draft.<sup>5</sup> That draft did contain a page of goals and objectives relating to various articulation skills.

**(F 4.3)**

LEA staff agreed to present the parent with a draft of a full IEP sufficiently prior to the October 2004 case conference committee meeting to allow her time to review the document before the conference. The LEA did not provide the completed draft IEP (approximately 40 pages) until shortly before the case conference committee meeting. The IEP proposed by the LEA at the CCC meeting in October 2004 reflected numerous changes requested by the parent during their September “working meeting” but it omitted the goals and objectives relating to articulation skills presented to the parent in September. The specific goals relating to “Visual Perceptual Skills” in the May 2003 “move-in” IEP were eliminated. Of the goals for “Vision” (visual efficiency) only those relating to “scanning” were carried over to the proposed IEP. Specific “Assistive Technology” goals were eliminated.

**(F 4.4)**

The parent has always clearly informed the LEA of the numerous educational and related services she deems essential for the child and what she believes to be “best practices” for the implementation of each of those services. The LEA has never been in complete agreement with the totality of what the parent has requested and had good reason to know that the parent would object to the changes proposed in the draft IEP.

---

<sup>5</sup>A document identified as the draft copy of the IEP presented to the parent on 9/10/04 was admitted into evidence on the last day of the hearing as Respondent’s Binder 2, pages. 488 — 505. The parent has made notations on the document regarding the areas for which no IEP goals had been provided. It cannot be ascertained whether the notations on that document reflected an understanding between the parties as to specific parental expectations for the final proposed IEP or whether the notations have been made to enlighten the parent’s attorney or this hearing officer. This hearing officer ruled at hearing that notations not clearly contemporaneous with the document would not be considered as evidence.

5. *Whether the LEA wrongfully failed to consult or inform the parent in a timely manner of their intent to remove or reduce IEP services believed by the parent to be critical in the areas of vision, assistive technology, activities of daily living, speech, math, reading and language arts.*

**(F 5.1)**

The LEA and the parent had numerous lengthy discussions over a year's time that dealt at some point or other with each of the services believed by the parent to be critical. The LEA considered the parent's position and many of the parent's proposals were contained in the proposed IEP.

**(F 5.2)**

The parent was aware that the LEA did not agree with her on numerous "critical" issues. The record documents several instances where the LEA suggested to her that they "agree to disagree." The parent had no expectation that the IEP proposed on October 8, 2004 would totally conform to her desires and stated at the CCC meeting that the IEP would need to be discussed "line by line."

**(F 5.3)**

The "move-in" IEP had goals for Activities of Daily Living (relating to eating and dressing) which were set out under the Occupational Therapy goals. The proposed IEP contained Activities of Daily Living as a separate goal area and proposed goals for feeding, verbalizing directions, preparing for homework and making appropriate use of her reading glasses. The proposed IEP provided that the child would continue to receive both direct and consultation services. The LEA did not propose to eliminate or reduce those services.

**(F 5.4)**

The "move-in" IEP provided the child with 90 minutes per week assistive technology services. The LEA did not propose to reduce or eliminate these services. The October 2004 IEP merely changed the method of delivering those services.

**(F 5.5)**

The "move-in" IEP provided the child with 60 minutes special education Language Arts/Reading instruction in the general education classroom each day. The proposed IEP continued to offer 60 minutes each day.

**(F 5.6)**

The "move-in" IEP provided the child with 60 minutes special education Mathematics instruction in the general education classroom each day. The proposed IEP provided for the same instruction in a special education classroom (SEC). The child has been receiving special education math services in the SEC the entire time she has been with the LEA.

**(F 5.7)**

LEA proposed to change certain goals for math, reading and language arts to those they felt were more appropriate for the child. The LEA did not, however, propose to reduce or eliminate those services.

**(F 5.8)**

The “move-in” IEP provided the child with 60 minutes per week direct “Vision Skills” services in addition to 10 minutes daily of “Visual Perceptual” training. The proposed IEP offered 30 minutes per week “Vision Consultation” and proposed goals to improve the child’s “Visual Efficiency.” The LEA proposed to address visual perception skills in the context of the child’s other educational activities.

**(F 5.9)**

The “move-in” IEP provided the child with 90 minutes per week group and individual Speech services. The proposed IEP offered 60 minutes “pull-out” group speech services in a special education classroom. The parent agreed to a 30-minute reduction in services to allow the child more time in the general education classroom. The LEA proposed to eliminate goals relating to articulation based on the belief that the peers and teachers were able to understand most of her speech.

**(F 5.10)**

Although the LEA proposed changes to the IEP that the parent interpreted as a denial or reduction of services, the record and prior course of dealing between the parties indicate that the LEA had always considered a proposed IEP as a “work in progress,” subject to revision as parties saw fit. The IEP proposed at the October 2004 CCC meeting reflects numerous changes negotiated by the parties during their September “working meeting.” There was no credible evidence to support the proposition that the LEA had any fixed intent to remove or reduce any of the child’s services and or that they would not be willing to renegotiate their proposals with the parent.

6. *Whether the LEA wrongfully cut off discussions with the parent when the parent objected to the proposed removal of services at the October 2004 case conference committee meeting.*

**(F 6.1)**

The parent terminated the October 2004 CCC meeting upon concluding that the LEA had, in her opinion, eliminated services for the child’s vision and assistive technology needs. The tape of the October 8, 2004 case conference committee meeting (HIO Exhibit 4, Tape 3, Side B) indicates that the parent became extremely upset and stated she would be filing for a due process hearing. Case conference committee members remained and listened for approximately 15 minutes without interruption while the parent expressed her opinions about LEA staff and their proposals.

**(F 6.2)**

The LEA filed for a due process hearing approximately 10 days after the October 2004 case conference committee meeting was terminated by the parent.

7. *Whether the LEA failed to deliver services in Language Arts and Math Resource, Speech, Assistive Technology, Occupational Therapy, Physical Therapy, Vision and Activities of Daily Living as required in the child’s IEP.*

*The following Findings of Fact were made after comparing the dates the child allegedly missed services as set out in Respondent's Closing Brief, pages 91-93 with the child's daily schedule, her daily log of services, her attendance records (Petitioner's Exhibit Page 959), a calendar of the school year (Petitioner's Exhibit Page 996), and where available, service provider records. The information gleaned is set out in Appendix C to this hearing decision. Notes made on the school calendar pertaining to the child were not considered.*

*Respondent's brief alleges various dates in March and April 2005 on which the child did not receive services. No ruling is made regarding services after March 1, 2005 because the supporting documents for those dates (Appendix B to Respondent's Closing Brief) were not admitted into evidence at hearing.*

**(F 7.1)**

The parties have designated the "stay-put" IEP to be the one developed in May 2003 before the child moved into this LEA's district.<sup>6</sup>

**(F 7.2)**

At the beginning of the 2004-2005 school year the parent agreed to a temporary "schedule of services." That schedule was developed so that the child would receive related services in the general education classroom whenever possible and so that the child would be able to predict when her various educational services would occur. School was in full session for approximately 123 days during the 6-1/2 month time period being considered (August 16, 2004 - February 28, 2005). I-STEP testing took up 5 days and an additional 5 days were shortened for conferences and "professional" days. School attendance records document that the child was absent an additional 14 days that school was in session and "tardy" on 22 mornings.

**(F 7.3)**

Attention is an issue of concern for this child even when she is feeling well. Her special services require she exert a great deal of mental and physical effort and concentration. There were numerous occasions when the child was feeling malaise ("headache", sick or fatigued) to the point that the IA thought that the parent should be informed. Such a level of malaise would likely prevent the child from receiving significant educational benefit from her special services at those times.

**(F 7.4)**

The child's Daily Log expressly notes on certain occasions that the child did not receive services on those dates due to illness.

**(F 7.5)**

In addition to the frequent and unpredictable absences, late arrivals, sick/headache days, and the need for the child to receive hygiene care, a number of other factors hamper the LEA in rescheduling missed services for this child. The child does not attend school approximately one morning per month for horseback riding (hippotherapy). The parent has

---

<sup>6</sup> Neither party submitted any evidence indicating that the parent actually signed that IEP. Those documents note, "[The parent] may submit a written opinion in June or July."

insisted that the child not miss general education classroom activities (especially “Writer’s Workshop”) and that the LEA not vary the child’s daily schedule because such changes make the child anxious and upset. The child’s service providers must continue in their duty to deliver services scheduled for other children and this child must continue to receive her other services as well.

**(F 7.6)**

The child’s IEP requires that she receive 60 minutes per day of **Language Arts Resource**. She is scheduled to receive those services in the morning. The parent alleges that the child received no services on 11 dates<sup>7</sup> during the 6-1/2 month period from the beginning of the school year through February 2005.

Correlation of the information from the available records indicates that the teacher was absent one day and the aide that filled out the Daily Log sheets was absent on another. On all other dates the record notes one of the following: a partial school day, I-STEP testing, the child was tardy and sick at school, or the child spent an unusual amount of time with restroom and hygiene concerns.

**(F 7.7)**

The child’s IEP requires that she receive 60 minutes per day of **Math Resource** services. The child is scheduled to receive those services in the afternoon. The parent alleges that the child received no services on 13 dates during the 6-1/2 month period from the beginning of the school year through February 2005.

Correlation of the information from the available records indicates the aide who filled out the Daily Log sheets was absent on one date. There is no documentation of services for 2 dates. On all other dates, the records note one of the following: special class or school events, the child was sick at school, the child left school early, or the date in question was a Saturday.

**(F 7.8)**

The child’s IEP requires that she receive direct **Occupational Therapy** services during 2 30-minute sessions per week. The parent alleges that she missed a total of 3 sessions during the 6-1/2 month period from the beginning of school through February 2005.

Correlation of the information from the available records indicates there is no documentation for one date. On all other dates, the records note one of the following: a partial school day, or the child was ill. (The date the child was ill, 4 trips to the restroom were also noted.)

**(F 7.9)**

The child’s IEP requires that she be present during 2 30-minute sessions per month of consultation regarding her **Activities of Daily Living**. The parent contends that she missed

---

<sup>7</sup> An additional 4 dates were listed twice.

a total of 3 sessions<sup>8</sup> during the 6-1/2 month period from the beginning of school through February 2005.

Correlation of the information from the available records indicates that on each date the records note one of the following: a partial school day, the child was sick at school, or the child spent an unusual amount of time at the restroom during normal service delivery time.

**(F 7.10)**

The child's IEP requires that she receive 3 30-minute sessions of **Speech** per week. In August 2004 the parent approved a reduction to 2 sessions because she wanted to reduce the time the child would be "pulled-out" of the general education classroom. Speech is scheduled as a "pull-out" in the morning. The parent has alleged that the child has missed 14 Speech sessions during the 6-1/2 month period from the beginning of the school year through the end of February 2005.

Correlation of the information from the available records indicates that 1 30-minute session was missed during the week of September 13, 2004.<sup>9</sup> The Speech teacher was absent 2 days and the aide who fills out the log was absent another. On another date, the records note that the child was in the restroom when services were to begin and may or may not have returned to class in time for services. On all other dates, the records note one of the following: the services were in fact provided (the week of August 25, 2004), I-STEP testing, a partial day of school, special class or school events, the child was out for a private riding lesson or otherwise not at school during normal service time, or the child was tardy and sick at school. At most, 5 missed sessions could not be accounted for.

**(F 7.11)**

The child's IEP requires that she receive two 30-minute sessions per week to work on **Vision** skills. She is scheduled to receive these services in the morning. The parent contends that the child missed services on 11 occasions during the 6-1/2 month period from the beginning of the school year through the end of February 2005.

Correlation of the information from the available records indicates that on one of those occasions the service provider (who was also the Teacher of Record) did spend 40 minutes with the child providing direct AT instruction, but not separate Vision services.<sup>10</sup> On all other dates, the records note one of the following: the services were, in fact, documented, a partial school day, special class or school events, the child was sick at school, the child left school early, the child was in the restroom during at least part of the time scheduled for the service, or the date in question was a Saturday.

---

<sup>8</sup> One date was listed twice.

<sup>9</sup> The child was tardy to school on September 13, 2004 but it is not clear whether that would have affected a scheduled Speech session.

<sup>10</sup> October 7, 2004 was a date that the parent alleges the child missed Vision services. The records of the Teacher of Record who provided both Vision and Assistive Technology services indicate she spent 40 minutes in direct AT services with the child that day. Virtually all of the remainder of the school day was devoted to meetings with the parent and her AT expert who were observing that date.

**(F 7.12)**

The child's IEP requires that she receive two 30-minute periods per week of Assistive Technology services. It requires an additional 30-minute session of direct instruction in the use of assistive technology each week.<sup>11</sup> The parent contends that the child did not receive direct services on 7 occasions during the 6-1/2 month period from the start of the school year through the end of February 2005.

Correlation of the information from the available records indicates there was no documentation for one date.<sup>12</sup> For the remainder of those dates the records note one of the following: services were, in fact, provided, I-STEP testing, a partial school day, the child was in the restroom twice during the time services were scheduled, the child was absent, or the child was sick at school (with 4 trips to the restroom).

The child has assistive technology devices available in every educational setting. The child must receive training or assistance with every device. As a result, the child receives far more than 90 minutes per week being trained on or assisted with the various devices.

**(F 7.13)**

The child's IEP requires that she receive 60 minutes of Physical Therapy services each week, 45 minutes to be delivered during the child's physical education class. The parent did not allege the child missed any sessions of physical therapy.

8. *Whether the LEA failed to develop and implement appropriate Assistive Technology (AT) services for the child by*
- a. *unilaterally and materially changing the delivery of those services from the 90 minutes per week set out in the child's IEP.*
  - b. *wrongfully deleting AT as an independent service, eliminating short term AT objectives.*
  - c. *failing to identify, investigate or attempt technology access tools that would benefit the child.*
  - d. *failing to respond to the parent's request for information and to consider parental input regarding the child's AT program.*

**(F 8.1)**

The child's Teacher of Record (TOR) is also a Technology Integration Specialist and coach. She is licensed to teach children with orthopedic impairment for grades K through

---

<sup>11</sup> The exact wording and configuration of the IEP is as follows:

Assistive Tech.	2x/wk. 30 min.
Instruc.	1x/wk. 30 min.

<sup>12</sup> The parent submitted the records of the service provider into evidence. Pages were removed, without explanation, prior to hearing. Provider notes for 9/16/04, the date in question, would have been on one of the missing pages.

12. She has had substantial training and is familiar with a wide variety of assistive technology devices.

**(F 8.2)**

The child's TOR spent virtually an entire day conferring with the parent, her assistive technology expert, the child and her other service providers. She has spent a substantial amount of time on other occasions in determining appropriate services for the child and preparing the staff to implement them. She testified at length regarding the assistive technology available in every setting throughout the child's instructional day. The child must receive assistance with and/or instruction on the use of each device or computer program. Her testimony that the child receives well in excess of 90 minutes per week direct Assistive Technology services is logical and credible.

**(F 8.3)**

The LEA's assistive technology specialist believes it is appropriate to "imbed" instruction regarding assistive technology devices in the context in which they are used rather than to teach their use as a discrete skill with separate goals and objectives. There is no credible evidence that the LEA would persist in the use of a device if, in fact, the child was not developing the skills (i.e., meeting goals and objectives) necessary for its use. The parent's expert testified that "imbedding" instruction is appropriate depending on the proficiency of the user and the novelty of the educational materials.<sup>13</sup>

**(F 8.4)**

The parent has objected to instruction and services delivered in a way that removes the child from the general education setting or that prevents the child from fully participating in class activities. "Pull-out" instruction on the use of devices would increase her time out of the general education classroom. Unless the entire class is receiving instruction in the use of a device (such as a computer "lab") the child would not be fully participating in class activities during "push-in" training.

**(F 8.5)**

The parent's expert has recommended the use of a "recessed switch" rather than the "jelly bean" switch device currently being used by the child to access the computer. The LEA has tried various types of switches with the child including the recessed switch. The child is growing progressively more skilled at using the "jelly bean" switch.

**(F 8.6)**

The child has had prior experience with an "eye gaze" system of computer access which the parent claims was successful. The LEA did investigate an "eye gaze" system. The information provided to the LEA indicated that "eye gaze systems" work best with adults and require that the user have good head and eye control. Although the child's head could be immobilized, she does not have good eye control. The LEA has told the parent that they would consider future use of an "eye gaze" system. There is no credible evidence that the LEA staff has refused to consider any particular technology systems for the child. There is

---

<sup>13</sup> The expert felt it was appropriate to learn the use of AT devices on material that is being reviewed, but that training on an unfamiliar device should not be paired with unfamiliar educational materials.

no credible evidence that the LEA is not open to considering this or other technological options for use in the future.

**(F 8.7)**

Although the child has improved with practice, the switch device is a challenge for the child because her cerebral palsy has diminished her control over her motor functioning.

**(F 8.8)**

The parent has objected to the LEA's decision to combine the child's Math Resource time with instruction and practice on the switch-accessed computer math programs because she must struggle with both the math concepts and motor control skills at the same time.

**(F 8.9)**

The child receives an hour Math Resource services every day because she is below grade level on certain math skills and has difficulty with certain math concepts. The time and effort the child uses in learning to manipulate the switches and operate the computer program significantly limits the time and energy she has to concentrate on improving her math skills.

**(F 8.10)**

There has been an on-going dialogue between the parent and LEA staff regarding the various equipment, computer programs and services available for the child. The parent has frequently requested that LEA staff explain to her how LEA staff members are training the child on the various assistive technology devices. LEA staff have made good faith efforts to explain their procedures but have not been able to provide the parent with details she deems sufficient.

**9. *Whether the LEA failed to implement IEP-mandated vision services and accommodations throughout the child's educational program by a***

***a. failure to properly train all staff regarding the vision accommodations needed by the child.***

**(F 9. a.1)**

The notes of the Teacher of Record/Assistive Technology Specialist indicate that she met with the child's team of service providers and the parent for 6-1/2 hours on August 16, 2004. The parties discussed, among other things, accommodations that would be appropriate for the child. Numerous other meetings covering assistive technology and accommodations for the child are documented in the TOR's records.

***b. failure to consistently apply vision accommodations.***

**(F 9. b.1)**

There is a great deal of evidence in the record to indicate that LEA staff have adapted the child's instructional materials and technology to be consistent with her visual needs.

**(F 9. b.2)**

The child is bright, articulate, and well-trained in self-advocacy skills. She has a good relationship with the people on her service team. She is anxious to learn and knows what she's supposed to be learning.<sup>14</sup> It is not credible that the child would not give feedback to the staff were she having difficulty seeing her instructional material.

**(F 9. b.3)**

Although there has been a significant amount of conflict between LEA staff and the parent, the child's service providers evidence genuine concern and affection for the child. There are numerous staff comments throughout the written evidence, tapes and transcript that her service providers find her "a joy to work with" and are concerned about her educational progress. It is not credible that service providers would knowingly ignore the child's needs, visual or otherwise, or allow her to struggle unnecessarily during instruction.<sup>15</sup> The parent's allegations of staff indifference to the child's needs are unfounded.

***c. failure to properly adapt all educational materials to meet the child's vision needs.***

**(F 9.c.1)**

There is a great deal of evidence in the record that LEA staff have gone to great effort to adapt educational materials for the child. On occasion, these adaptations have not met with parental approval. The LEA staff has not ignored parental input regarding adaptation of materials for the child's visual needs. As stated above, it is not credible that the child would not inform staff if she were having difficulty seeing those materials or that the staff would ignore the child or not notice if she were struggling unnecessarily with educational materials.

***d. failure to use alternative formats in presenting educational materials to the child.***

**(F 9. d.1)**

There are a number of accommodations listed in the "stay-put" IEP that indicate that service providers should accompany visually-presented material with verbal description and explanation and that directions should be reinforced by verbal prompts. There is no credible evidence in the record to suggest that the child's service providers are not verbally interacting with the child at all times they are presenting her with written materials.

**(F 9.d.2)**

There was testimony by the parent that the child was not receiving CDs to accompany her text books and homework or audio tapes of other books. These are not listed on the Program Accommodations in the "stay-put" IEP. The LEA has provided text material on CDs but believes that it duplicates the verbal input she is already receiving.

---

<sup>14</sup> There are several references in the record where the child has alleged to the parent that she (the child) wasn't able to see the materials or that the LEA staff was not providing services in the "correct" manner. If she can relate such information to her parent, there is no reason to believe she could not relate it to LEA staff.

<sup>15</sup> The child's orthopedic and visual impairments are such that she will necessarily find a number of tasks difficult.

**(F 9.d.3)**

There is no credible evidence that the child has been unable to complete her homework or other assignments because she has not been provided with CDs. The child has made educational progress without this particular accommodation.

**e. *refusal to properly implement and document the child's vision exercises.***

**(F 9.e.1)**

The child's "stay-put" IEP requires that the child receive 10 minutes per day of "Visual Perceptual training." It contains goals relating to 7 visual perceptual skills: Visual Discrimination (matching), Visual Figure-Ground (identifying words), Visual Closure (identifying letters omitted from familiar words), Visual Form Constancy (selecting a particular shape from an array of other shapes of differing size, color or orientation), Visual Memory (describing details of pictures after the picture has been removed) and Visual Sequential Memory (identifying from an array a short sequence of numbers formerly presented to the child).

**(F 9. e.2)**

The child's daily schedule indicates that she is to receive 5 minutes of visual perceptual training during her "push-in" Reading services and 5 minutes during her Math Resource "pull-out" services. There are references in the record that the child did not enjoy these exercises. The records relating to the reading and math services indicate that there were very few times where those services were not documented or otherwise explained.

**(F 9.e.3)**

The child's IEP required that the professional staff person in charge of services for visually impaired children consult with the child's team once per month. There was no requirement that the staff professional actually provide these services. The child's daily schedule designates that a certain staff member set up those exercises.

**(F 9. e.4)**

The parent had significant communications with LEA staff expressing concern about the visual perceptual (VP) services during the 2003-2004 school year. There is no significant evidence in the record that the parent believed that the VP exercises were not being done at that time. The focus of the parent's concern was whether the exercises were being done "properly." After a significant period of contentious negotiations between the LEA and the parent, the parent's expert<sup>16</sup> observed the implementation of the vision exercises. The LEA staff implemented certain of her suggestions.

**(F 9. e.5)**

There was no place on the child's Daily Log for the 2004-2005 school year to document whether the child received 5 minutes of visual perceptual training during her daily Reading and Math Resource instruction. There is no evidence in the record that the parent requested and was refused a "check box" on the log sheets for that service. Contemporaneous

---

<sup>16</sup> The expert was a certified Occupational Therapy Assistant who worked for a COT who claimed a specialty in vision services.

parental communications on the child's Daily Log regarding the VP exercises are noticeably absent.

**(F 9.e.6)**

There is nothing in the written record, notably the section of the parent's evidence binder relating to "Vision" to indicate that the documentation and implementation of the vision exercises were a concern that was brought to the attention of the LEA during the 2004-2005 school year.

**(F 9.e.7)**

LEA staff testified that the seven Visual Perceptual Skills to be practiced during the 10 minutes of daily exercises can be and are adequately addressed in the context of the child's other educational activities.<sup>17</sup> The record indicates the child enjoys playing games of "Memory" with her peers. That game involves ascertaining figure-ground relationships (differentiating the cards from the table) visual discrimination (noting the differences between the cards), form constancy (knowing which cards "match") and visual sequencing, visual spatial relationships and visual memory (remembering the card's position in the array).

**10. *Whether the LEA wrongfully modified the content of the child's math curriculum.***

**(F 10.1)**

The annual measurable Mathematics goal in the "move-in" IEP developed in May 2003 was: "To continue to demonstrate progress on Standards and Benchmarks in mathematics for Grades K, 1 & 2 in the areas of number sense, computation, geometry and measurement." Despite the failure to develop an IEP satisfactory to the parent, the parties were in agreement that it was not appropriate to limit the child to the goals of the "move-in" IEP.

**(F 10.2)**

At the beginning of the 2004-2005 school year the child's Math Resource teacher gave her informal assessments to ascertain what math skills she had learned and retained. The child's math skills were not yet to 3<sup>rd</sup> grade levels<sup>18</sup> but the 3<sup>rd</sup> grade general education math textbook contained materials appropriate to address the skills she needed to learn and the Math Resource teacher used that text in that context.

**(F 10.3)**

The LEA teacher believed that math skills need to be presented and mastered in a certain order. Her opinion was that the child should have reasonable mastery over addition and subtraction skills before beginning work on multiplication. The parent had consulted experts in Europe who are of the opinion that it was not always necessary to teach various

---

<sup>17</sup> During rebuttal, the LEA presented an e-mail from the child's VI teacher in her prior school district. That e-mail also stated that visual perceptual skills can be taught in the classroom. She could not, however, remember how the case conference committee came to the decision to make visual perceptual skills a separate service in the child's IEP.

<sup>18</sup> The child did not pass the 3<sup>rd</sup> grade I-STEP test which calls for mastery of 2<sup>nd</sup> grade skills.

skills in a particular sequence. (For example, a child may not need to learn to crawl before walking.)

**(F 10.4)**

The parent was concerned that the child's math skills were not on par with those of her same-age peers. The parent believed the LEA's goals would "hold her back" from catching up to her peers.

**11. *Whether the IEP proposal to remove the child from the general education class for math violates her right to education in the least restrictive environment.***

**(F 11.1)**

The parties agree that the child is achieving below grade level in math and needs individualized instructional support in that area. The type of math instruction she needs would be different from that being taught in the classroom.

**(F 11.2)**

The child has difficulty maintaining attention during tasks that are physically or mentally challenging for her. She is interested in and wants to be apart of general education class activities and would be distracted by their activities were she to receive her Math Resouce in the general education classroom.

**12. *Whether the LEA has failed to develop and implement an appropriate toileting routine for the child.***

**(F 12.1)**

The child has significant urological challenges that make it difficult for her to anticipate the need to use the restroom and to delay taking a restroom break. It is also difficult for her to void on a set schedule. She has significant anxiety about whether or not she will get to the restroom "in time" and experiences significant social embarrassment if she does not.

**(F 12.2)**

The LEA has experimented with toileting schedules that factor in the class break times and patterns of child's prior requests. The LEA also takes the child to the restroom "on demand." They have also tried to be responsive to the parent's concern that the child might be unnecessarily missing an excessive amount of instructional time by using a timer. That practice was discontinued upon the objection of the parent.

**(F 12.3)**

The LEA's current practice is for the child's aide to contact an assistant on a walkie-talkie to meet them in the restroom so that they can effect a "two-person" transfer. That practice has been based upon the LEA's concern for staff safety and possible legal repercussions if either the child or staff member is injured in attempting a "one-person transfer." This practice has sometimes caused a delay in getting the child on the toilet with resulting "accidents."<sup>19</sup>

---

<sup>19</sup> The frequency of these "accidents" significantly decreased toward the end of the 1<sup>st</sup> semester.

**(F 12.4)**

The LEA has sought guidance from outside agencies dealing with patient care and attendant safety. That information did not provide recommendations that would specifically apply to a person of this child's age, weight and ability to bear weight and cooperate with the transfer process.

**(F 12.5)**

The evidence indicates that the child can support her weight during a transfer process. A "one-person transfer" is used in every area of the child's life except school.

**13. *Whether the LEA has failed to properly train its staff regarding the child's functional limitations and needs and the use of her equipment.***

**(F 13.1)**

The parent has had extensive contact with each of the child's service providers. She has thoroughly expressed to them her assessment of the child's strengths, challenges, functional limitations and needs. LEA staff has regularly communicated with the parent through a Daily Log and an assignment notebook that has been sent between home and school regarding matters relating to the child's physical, emotional, and educational functioning.

**(F 13.2)**

Although the LEA has been willing to purchase equipment for the child, the parent has requested that the LEA use the child's personal equipment to ensure that the equipment and its adjustment are appropriate for the child.

**(F 13.3)**

The parent has provided detailed instructions to LEA staff on the use and adjustment of the child's equipment. She has given them immediate feedback when she has concerns about the child's equipment.

**(F 13.4)**

The child's physical and occupational therapy notes indicate that the LEA's occupational and physical therapy professional has independently discussed the use of the child's equipment with the various service providers. There is no evidence that the LEA has countermanded any of the parent's instructions or failed to share them with all appropriate staff.

**(F 13.5)**

The child's equipment has, on occasion, been found to be improperly adjusted or damaged. The parent has communicated this to LEA staff. They have noted her concerns. The LEA has agreed to pay for the repair of equipment that has been damaged while under their control.

**14. *Whether the LEA has failed to appropriately implement full inclusion and socialization opportunities for the child.***

**(F 14.1)**

The parent has requested that the child receive most of her educational and related services in her general education classroom. The LEA and the parent have collaborated on a “schedule of services” that leaves her with her general education classmates for most of the school day.

**(F 14.2)**

The LEA has attempted to minimize the child’s absence from the general education classroom by “imbedding” or combining the child’s “pull-out” math with her “pull-out” assistive technology services.

**(F 14.3)**

The child’s IEP and “schedule of services” call for the child to receive her physical therapy services in the gym at the same time her peers are having physical education. Those services last for the majority of the class. There is no evidence that the child is systematically excluded from physical education activities that can reasonably be adapted for her.

**(F 14.4)**

The LEA has acceded to the parent’s requests that special classroom activities take precedence over related services normally scheduled for those times.

**(F 14.5)**

The LEA has re-configured and re-routed a “regular” school bus so that the child could interact with “typical” peers rather than other children with disabilities on the “special ed” bus.

**(F 14.6)**

The child needs some assistance with appropriate social interactions with her peers and meets weekly with peers of her choice and in a “lunch bunch” facilitated by the school psychologist. The LEA has responded to the parent’s request that the child be allowed to choose which peers she would like to invite to this group and to determine with whom she would sit on other days.

**(F 14.7)**

The child is encouraged to interact with peers at recess while she is in her wheelchair. One of her teacher’s testified that a group of girls in her class “flock” around her wheelchair. An LEA professional has trained peers in the appropriate way to push the child’s wheelchair, but the child’s safety when the wheelchair is on the playground surface has been an issue.

**(F 14.8)**

Because of the child’s mobility challenges, both the child and her assistant must specifically focus on motor sequencing when the child is out of her chair and moving around. It is likely that typical social interactions would be difficult at this time.

15. *Whether the LEA has failed to provide the child with opportunities comparable to her non-disabled peers for physical and mental exertion by unnecessarily confining her to her wheelchair during recess and physical education.*

**(F 15.1)**

The child's level of fatigue significantly affects her educational and motor performance. It may be appropriate to leave her in her wheelchair if she is already fatigued or if she needs to conserve her energy for upcoming school activities. The child frequently does not feel well at school. Physical exertion may not be appropriate on those occasions.

**(F 15.2)**

The child is capable of expressing an opinion about what activities she would like to do. The child has a good relationship with LEA staff and there is no credible evidence that they ignore her input and leave her in her chair for their own convenience.

**(F 15.3)**

The child receives her physical therapy in the gym during physical education. The child's PT goals and her physical condition on any given day may not be consonant with the activities of her peers. The record reflects that LEA staff work together to find ways to adapt physical education activities for the child and include the child in appropriate physical education activities.

16. *Whether the LEA has failed to implement the child's IEP directives regarding her time to be spent in a stander and the time and distance she is to walk.*

**(F 16.1)**

The child's "move-in" IEP prepared in May 2003 requires the child to be in a stander for 30 minutes per day. The child's stander is in the general education classroom and she is normally in her stander for a 30-minute period between 1:35 p.m. and 2:15 p.m.

**(F 16.2)**

The classroom teacher testified that the child is in the stander unless she needs to be taken to the restroom. Depending on the timing of such a request and the length of time needed for toileting, there may not be time to put her in her stander before she needs to leave the general ed classroom for her pull-out math instruction.

**(F 16.3)**

The parent alleges that the child did not receive stander time on 11 days in a 6-1/2 month period. Correlation of the information from the available records indicates that the LEA has not documented services and the records do not otherwise explain why the child did not receive stander time on 2 dates. For the remainder of those dates the records note one of the following: a shortened school day, or that the child was sick at school.

**(F 16.4)**

The child's "move-in" IEP requires the child "to ambulate daily throughout the school environment with adult assistance..." There is no express requirement as to when, where, how long, or how far she should be walking or that she ambulate every day in every environment.

**(F 16.5)**

The child's daily schedule, approved by the parent, indicates that the child is to walk from her "Specials" classes to the general education classroom daily. She is also taken out of her wheelchair during recess, physical therapy and physical education, as well as during restroom time and transfer in and out of the stander.

**(F 16.6)**

The parent alleges that the child was not taken out of her wheelchair and walked on 10 days during a 6-1/2 month period. For the remainder of those dates the records note one of the following: a shortened school day or that the child was sick at school.

**17. *Whether the child has been denied a free appropriate public education by the actions or inactions of the LEA.***

**(F 17.1)**

The LEA made significant efforts to try to resolve parental concerns and develop an appropriate educational program for the child for well over a year. They considered at length the input of the parent and her experts<sup>20</sup> and have honored their requests or suggestions on numerous occasions.

**(F 17.2)**

The LEA has met both formally and informally with the parent regarding the child's educational program and services. There is no credible evidence that LEA staff sought to cut off opportunities for input from the parent or child even when it meant that the agenda planned for the meeting could not be addressed.<sup>21</sup>

**(F 17.3)**

The child has shown progress in all areas of her "working IEP," to wit,

**Oral Reading and Comprehension:** She has advanced from a Level 6 (Kindergarten level) in the Diagnostic Reading Assessment system to a Level 16.

**Written Expression:** She is progressing according to her timetable of objectives.

**Spelling:** She consistently scores above 90% on her Spelling tests.

---

<sup>20</sup> The parent has refused to give the LEA consent to speak directly and candidly with these experts.

<sup>21</sup> The child was regularly present at the CCC meetings to share her concerns, whether or not they pertained to issues on the agenda. The audio tapes of the case conference committee meetings clearly illustrate that very little, if any, of the proposed agenda could be addressed. The typical course of events was that LEA staff would acknowledge the child's concerns and try to reassure her that they (the parent and LEA) would try to figure out a way to address those concerns. The parent would then begin to argue at length for a particular resolution to the problem(s).

**Math:** She has reached one goal and is showing progress towards the others.

**Peer Social Skills:** She is progressing according to her timetable of objectives.

**Communication/Social Skills:** She has met 3 objectives and is showing progress towards her other objectives.

**Oral Motor Communication:** She has met 2 objectives and is showing progress towards her other objectives.

**Gross Motor:** She has met 4 objectives. There was insufficient data on a third goal related to a "gait trainer."

**Activities of Daily Living:** She is progressing according to her timetable of objectives in most areas and is showing progress in the others.

**Attention to Task:** She has made progress on the objectives for which there is adequate data.

**Visual Efficiency:** She has met one objective and has shown progress towards 3 others.

***1. Whether the IEP proposed by the LEA in October 2004 was appropriate to meet the identified needs of the child.***

**(F 1.1)**

The LEA considered the child's present level of performance in proposing objectives for each of her goal areas. The parent had input in drafting the IEP proposed in October 2004. Further input from the parent is reflected by the revisions written on the proposed IEP.

**(F 1.2)**

The child has been receiving instruction according to the objectives set out in the proposed IEP of October 2004 and the revisions made to that document by the case conference committee. She has met objectives or made progress in every area.

**(F 1.3)**

The October 2004 IEP proposed to delete articulation objectives under her Speech services. This hearing officer listened to the child speak in person and on various audio tapes. While the volume of her voice and her breath control certainly do affect her intelligibility, articulation problems also make it difficult to follow her speech. Although the people she interacts with on a daily basis may find her speech reasonably intelligible, the general public, like this hearing officer,<sup>22</sup> are likely to have a great deal more difficulty.

**(F 1.4)**

The LEA's data shows that the child's success on various visual perceptual tasks fluctuates and has shown no consistent improvement over time. Despite her fluctuating performance on the VP tasks the child has shown progress in each of her goal areas.

**(F 1.5)**

The parent believes that the child's fluctuating performance on the visual perceptual tasks is due to the LEA's failure to properly perform those exercises. There is, however, disagreement among experts as to whether such exercises are, in fact, effective.

---

<sup>22</sup> This hearing officer has admitted being somewhat "hard of hearing." Generally, the volume of the child's voice was not a factor contributing to her inability to understand the child clearly.

**(F 1.6)**

The LEA's assertion that the child continually practices various visual perceptual skills during the normal course of her school day is logical and credible. Addressing those skills in the context of normal school activities, rather than providing exercises as a separate service allows the child to spend more time in the general education environment. In fact, certain activities, such as the "Memory" card game, also increase the child's opportunities to interact with peers and improve her social skills.

**(F 1.7)**

The LEA has proposed goals to help the child improve her scanning skills. The child has made progress in these skills since the beginning of the school year.

**(F 1.8)**

"Imbedding" the child's instruction in using her various assistive technology devices as a part of her other educational activities where appropriate, allows the child to spend more time in the general education environment.

**The IHO's Conclusions of Law**

**2. *Whether the LEA failed to allow the parent to function as an equal participant in the child's educational process by***

***a. repeatedly ignoring parental requests for information regarding the child's IEP services, curriculum, performance assessments and measurement data.***

**(C 2.a.1)**

The bulk of the parent's request for information regarding the child's day-to-day educational services were communicated through the Instructional Assistant via the child's Daily Log. It is not reasonable or appropriate for a paraprofessional to answer or find answers to questions regarding services that are provided by others, especially professionals. Neither is it reasonable or appropriate for the aide to explain services she performs under the direction and supervision of a professional.

**(C 2.a.2)**

It is not reasonable or appropriate to address comments, questions or argument regarding administrative decisions (such as the toileting procedures) to or through a paraprofessional.

**(C 2.a.3)**

A parent has the right to information that reasonably explains the child's program content and implementation and the progress that the child is making. The parent's right to information does not include the right to require the LEA to continually respond to parental concerns that are repetitive and argumentative.

**(C 2.a.4)**

The parent's communications frequently request detail regarding a number of the child's services. Much of the information the parent seeks regards the methodology of the LEA staff and its exact implementation. The LEA has a right to determine the methodology by which the child receives her educational services, even if it is arguably not the "best." They are not legally required to engage in protracted discussions or arguments over matters that are legally within their discretion.<sup>23</sup> The LEA professionals have responded in appropriate detail and in a reasonably timely manner to parental questions about the child's program and its implementation.

**(C 2.a.5)**

An LEA is not required to accede to every parental request in order for the parent to be an equal partner. The LEA has discussed and considered the information and preferences of the parent. They have on numerous occasions made changes to the child's educational services based on parental preference. The LEA has done at least as much as the law requires.

- b. repeatedly refusing to respond to the parent's request to meet with the child's teachers and service providers to discuss the child's progress, specific instructional accommodations, the implementation of her program, and teaching methodology.***

**(C 2.b.1)**

The LEA held numerous formal and informal meetings with the parent during the 2003-2004 and 2004-2005 school years. Those meetings often involved coordinating the schedules of numerous participants and may not always have been scheduled as soon as the parent would have liked. In addition, there is considerable documentation in the record of communication between LEA staff and the parent. There is no credible evidence in the record that LEA staff has refused to meet with the parent or address her concerns within a reasonable period of time.

- 3. Whether the LEA wrongfully failed or refused to convene a case conference committee meeting with the complete IEP team in attendance and whether it wrongfully denied the parent's request for the child's instructional aide to attend CCC meetings.***

**(C 3.1)**

511 IAC 7-27-3 (f) states "At the discretion of the parent or the public agency other individuals who have knowledge or special expertise regarding the child, including special education teachers, general education teachers and related services personnel as appropriate, may participate in the case conference committee meeting." That regulation does not state that persons other than those mandatory under 511 IAC 7-27-3 (e) must attend for either part or the entirety of the CCC process.

---

<sup>23</sup> If a parent believes that the methodology used by the school will not result in a satisfactory amount of educational benefit, the parent has the right to file for a due process hearing.

**(C 3.2)**

An LEA is not required to conduct case conference committee meetings in the parent's preferred "trans-disciplinary" format, even though it is arguably more beneficial for the child. The LEA staff collaboration meetings are reasonably calculated to coordinate services and accommodations for the child. A "multi-disciplinary" approach to the case conference process is not per se unreasonable nor is it unreasonable for this child.

**(C 3.3)**

Given the history of the case conference process for these parties, the LEA's decision to deny the parent's request for full attendance during the entirety of the case conference process is no mere matter of "administrative convenience." The LEA has a duty to provide services for numerous other children. These children cannot receive services while their providers are participating in CCC meetings. The decision to release participants after they have given their particular input reasonably balances the LEA's duties to this child with their duties to the numerous other children that need services.

**4. *Whether the LEA wrongfully failed to provide the parent with adequate prior written notice when denying parental requests.***

**(C 4.1)**

The LEA made it known to the parent on several occasions that the various draft IEPs presented to the parent were "works in progress" subject to change as the parties saw fit. The LEA, in fact, made numerous revisions to documents reflecting changes proposed by the parent. Other than as regards the toileting procedures,<sup>24</sup> the LEA has never evidenced an intent or practice to lead a reasonable person to believe that various issues regarding the child's educational services were not open for reconsideration. The LEA has not, in fact, denied any of the parent's requests.

**(C 4.2)**

The LEA had reason to know that the parent believed it was essential for the child to have specific goals and objectives for visual perception skills and daily vision training as set out in the "move-in" IEP. They also had reason to know that the parent considered articulation skills very important for the child and would object to their omission. Although the October 2004 IEP did not propose to discontinue Assistive Technology services, the LEA had reason to know that the parent would object to their being "imbedded" within curriculum areas.

**(C 4.3)**

A proposed IEP is a sufficient writing to convey an LEA's intent to change services that a parent has requested. Parents, however, must be accorded sufficient time to review the IEP and consider their options in responding to an LEA's proposal. The LEA had reason to know that this parent would consider the changes proposed to the "move-in" and September "draft" IEPs to be a denial of services. The LEA did not provide the parent with

---

<sup>24</sup> The dispute between the parties regarding observations by the parent and her experts was not over the outright denial of those observations, but rather, what terms and conditions were appropriate.

adequate prior notice of those proposed changes. The LEA has committed a violation of 511 IAC7-22-2.

**(C 4.4)**

The parent was well-aware that LEA staff did not believe the separate Vision and Assistive Technology services to be necessary for the child. She also was aware that the LEA believed it appropriate to “imbed” instruction on assistive technology devices in the context they were to be used. These matters had been in dispute for well over a year. Her surprise at the case conference committee meeting of October 2004 was due to the timing, not the content, of the LEA’s proposals. The LEA’s failure to give adequate prior written notice did not in any way affect her ability to respond in a meaningful way to the changes proposed.

5. ***Whether the LEA wrongfully failed to consult or inform the parent in a timely manner of their intent to remove or reduce IEP services believed by the parent to be critical in the areas of vision, assistive technology, activities of daily living, math, speech, reading and language arts.***

**(C 5.1)**

Although the parent perceived the LEA’s proposal to “imbed” instruction on assistive technology devices as a denial of services, the proposed IEP did not reduce or remove those services but merely changed how the services were to be delivered. Their choice to “imbed” training in the child’s other educational services is one of methodology which is at the discretion of the LEA and is not a parental or case conference committee decision.

**(C 5.2)**

The LEA has proposed changes to the child’s goals for improving her skills dealing with her Activities of Daily Living, but has not proposed to remove or reduce them. Similarly, the LEA has proposed changes to certain other IEP goals in the areas of reading, language arts and math. There has been no proposal to reduce or eliminate these services.

**(C 5.3)**

The LEA has proposed to “imbed” the child’s visual perceptual training in the context of her other educational services. The LEA has continued to propose goals for Visual Efficiency and Speech but has proposed to discontinue Speech services in the area of articulation.

**(C 5.4)**

An LEA’s proposal to change a child’s IEP cannot fairly be interpreted as evidence of its intent to deny or reduce services when that IEP remains open for discussion and modification by the parties. Although the parent interpreted various proposals made by the LEA in the October 2004 IEP as a denial or reduction of services, the evidence in no way supports the conclusion that this document was presented to the parent on a “take it or leave it” basis. Quite to the contrary, numerous changes were made on the proposed IEP during the case conference committee meeting in October 2004. The LEA has reiterated to the parent on a number of occasions that the child’s IEP was a “work in progress” and that

their proposals for services were subject to being modified as the parties saw fit. The record shows that the LEA did, in fact, agree to certain services and accommodations they did not believe were necessary for the child. Although the LEA proposed certain changes in the IEP, the LEA had not made any final decisions regarding that IEP, nor did they have a fixed intention to deny or reduce any services for the child.

6. ***Whether the LEA wrongfully cut off discussions with the parent when the parent objected to the proposed removal of services at the October 2004 case conference committee meeting.***

**(C 6.1)**

Article 7 and IDEA require that the parent be a part of the CCC team and that the other members of the committee consider parental input. It is not reasonable to interpret this to mean the LEA must continue discussions when the parent's input becomes repetitive. Repetitive communications do not provide the committee any additional information and take up time that is needed to plan and deliver services to other children. Similarly, parental communications that are angry, argumentative, emotionally distraught or disrespectful convey only the parent's state of mind and provide no input useful in planning for the child's needs. The LEA did not cut off any meaningful discussion with the parent during the October 8, 2004 case conference committee meeting.

**(C 6.2)**

The LEA has a duty to see that an appropriate IEP is developed and implemented for all eligible children. It is not reasonable to interpret this to mean the LEA must continue a protracted course of unproductive discussions and negotiations with a parent. The parties had been discussing and negotiating for over a year and still had not agreed upon an IEP for this child. Given the level of disagreement the parent expressed regarding the IEP proposed by the LEA in October 2004 and her stated intention to file for a due process hearing, the LEA did not wrongfully cut off discussions with the parent by filing for a due process hearing.

7. ***Whether the LEA failed to deliver services in Language Arts and Math Resource, Speech, Assistive Technology, Occupational Therapy, Physical Therapy, Vision and Activities of Daily Living as required in the child's IEP.***

**(C 7.1)**

It is not reasonable, efficacious or humane to require an LEA to force services on a child who is not physically or mentally up to the challenges those services present for her. Neither should an LEA be faulted for giving the child's physical and emotional needs precedence over an educational regimen. LEA staff must be given discretion to determine whether certain educational services, even those required by the IEP, are appropriate for the child on any given occasion.

**(C 7.2)**

It is expressly noted in the child's Daily Log that the child did not receive services on certain days due to illness. It is not reasonable to conclude that on all other occasions the

synchronicity of “sick” days with “no service” days is merely coincidental.

**(C 7.3)**

LEA staff who provide special education and related services have a duty to deliver those services to all the handicapped children on their caseload. The LEA must be able to schedule and deliver those services in a predictable manner. It is not reasonable to require an LEA to reschedule services a child misses because the child is absent, sick or otherwise not available for those scheduled services. Neither is it reasonable to require an LEA to reschedule services that are missed on days when the normal school schedule of the entire student body is disrupted.

**(C 7.4)**

The parent has alleged the child did not receive 11 sessions of Language Arts services during a 6-1/2-month period. The LEA has not documented and the evidence does not otherwise show acceptable reasons for lack of services on 2 dates. The failure to provide 2 sessions of Language Arts services in a 6-1/2-month period is not a significant breach of the mandates of the child’s IEP, especially in light of the difficulties that would be attendant in trying to successfully reschedule missed sessions for this child.

**(C 7.5)**

The parent has alleged the child did not receive 13 sessions of Math Resource services during a 6-1/2 month period. The LEA has not documented and the evidence does not otherwise show acceptable reasons for lack of services on 3 dates. The failure to provide 3 sessions of Math Resource services in a 6-1/2-month period is not a significant breach of the mandates of the child’s IEP, especially in light of the difficulties that would be attendant in trying to successfully reschedule missed sessions for this child.

**(C 7.6)**

The parent has alleged the child did not receive 3 sessions of Occupational Therapy services during a 6-1/2 month period. The LEA has not documented and the evidence does not otherwise show acceptable reasons for lack of services on 1 date. The failure to provide 1 session of Occupational Therapy services in a 6-1/2-month period is not a significant breach of the mandates of the child’s IEP, especially in light of the difficulties that would be attendant in trying to successfully reschedule missed sessions for this child.

**(C 7.7)**

The parent has alleged that the child missed 3 sessions of consultation services in the presence of the child relating to the child’s Activities of Daily Living during a 6-1/2 month period. The LEA has not documented and the evidence does not otherwise show acceptable reasons for lack of services on at most, 2 of those dates. The failure to provide 1 or 2 sessions of ADL consultation services during a 6-1/2 month period is not a significant breath of the mandates of the child’s IEP, especially in light of the difficulties that would be attendant in trying to successfully reschedule missed sessions for this child.

**(C 7.8)**

The parent has alleged that the child missed 14 sessions of Speech services during a 6-1/2 month period. The LEA has not documented and the evidence does not otherwise show acceptable reasons for the lack of services on 5 days. The failure to provide 5 sessions of Speech services during a 6-1/2 month period is not a significant breach of the mandates of the child's IEP, especially in light of the difficulties that would be attendant in trying to successfully reschedule missed sessions for this child.

**(C 7.9)**

The parent has alleged that the child missed 11 sessions of Vision services during a 6-1/2 month period. The LEA has not documented and the evidence does not otherwise show acceptable reasons for the lack of services on (at most) 2 days. The failure to provide 2 sessions of Vision services during a 6-1/2 month period is not a significant breach of the mandates of the child's IEP, especially in light of the difficulties that would be attendant in trying to successfully reschedule missed sessions for this child.

**(C 7.10)**

The parent has alleged that the child missed 7 sessions of Assistive Technology direct services. The LEA has not documented and the evidence does not otherwise show acceptable reasons for the lack of services on 4 dates. The LEA has, however, provided far in excess of the IEP requirements whether the child's IEP is interpreted to mean that the child is to receive 90 minutes per week direct training or instruction on using assistive technology devices (which would make the IEP notation for "Instruc. 1x/wk 30 min." redundant) or whether the child requires only 30 minutes weekly of such training. The LEA has not failed to deliver the Assistive Technology services required in the child's IEP.

**(C 7.11)**

The parent has not alleged that the child did not receive the requisite Physical Therapy sessions. The LEA has not failed to deliver those services.

**8. *Whether the LEA failed to develop and implement appropriate Assistive Technology (AT) services for the child.***

**(C 8.1)**

Article Seven defines "related services" as those services that are supplementary to the child's instructional program and are required for the child to benefit from special education. "Assistive technology services" means any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device.

The choice of assistive technology devices is a matter of methodology. The parent has given significant input to the LEA regarding the technology she prefers and the devices she has provided for use at school. This child, however, does not require the use of "eye gaze" computer access to benefit from her special education. Although there may arguably be advantages to a particular device or method, the law does not require an LEA to determine and provide "the best" or "most effective" technology available.

**(C 8.2)**

The LEA utilizes assistive technology for the child throughout the school day. The LEA's decision to "imbed" the training on various devices, i.e., to teach the child to use the devices in the context of their educational program, is a matter of methodology which is not a CCC/parental decision.

**(C 8.3)**

An LEA's choice of methodology is appropriate if (a) the LEA can articulate the rationale for the methodology or explain the specific benefits of using an approach in light of the particular disabilities of the child; (b) the LEA staff involved in implementing that approach have the necessary experience and expertise to do so successfully; and (c) there are qualified experts in the educational community who consider the LEA's approach to be at least adequate under the circumstances.

The LEA's Assistive Technology Specialist has had extensive training and evidences expertise in the selection and use of AT devices<sup>25</sup>. The concept of "imbedding" a child's AT instruction with the child's educational instruction is not novel in the educational community or per se unreasonable with this child. Combining these services will allow this child to spend less time out of the general education classroom. This is what the parent has consistently demanded. With assistance, the child can access devices and software programs at all times. To insist that this child not be able to use assistive technology devices in the classroom until she becomes proficient in their use, would likely deprive her of the use of those devices for an unnecessarily long time.

**(C 8.4)**

The child uses various assistive technology devices throughout her entire day. She receives instruction on and assistance with these devices in the context of her other educational activities. There is no evidence that she is unable to learn how to use these devices through that process. There is no credible evidence that the LEA would persist in the use of a device if the child could not learn to operate it, i.e., meet goals and objectives relative to its use. She does not, therefore, need to receive these services in isolation, with separate goals and objectives, to receive an appropriate education.

**(C 8.5)**

The evidence indicates that the LEA's decision to use the switch-accessed computer math program during the child's Math Resource hinders rather than facilitates her math instruction. Although she has become somewhat more proficient in accessing her computer math program with the "jelly bean" switch, it has not resulted in reasonable benefit to her special education in math. Given the visual and motor challenges the child faces, the LEA's decision to combine math remediation with training and practice on the computer is not appropriate.

---

<sup>25</sup> The parent's observation that staff has, on occasion, experienced difficulty in operating certain devices and software programs does not lead this hearing officer to the conclusion that they do not meet acceptable levels of training or expertise.

9. ***Whether the LEA failed to implement IEP-mandated vision services and accommodations throughout the child's educational program by a***

- a. ***failure to properly train all staff regarding the vision accommodations needed by the child.***

**(C 9.a.1)**

An LEA has a duty to properly train staff. Proper training is not synonymous with following every directive of the parent (or parental experts). The record documents that the child's TOR, met at length with the parent and child's service providers regarding accommodations needed by the child. In addition to working directly with the child, the TOR has continued to meet with service providers regarding the implementation of the child's IEP. The fact that a staff member may on occasion fail to implement an accommodation is not probative of whether the staff has been properly trained. There is no credible evidence that LEA staff had not been trained or were otherwise unfamiliar with the child's needs and the accommodations that address those needs. The LEA has not failed to properly train all staff regarding the vision accommodations needed by the child.

- b. ***failure to consistently apply vision accommodations.***

**(C 9.b.1)**

It is not reasonable to expect that every one of the child's service providers will implement each accommodation on every occasion. The law does not require perfect implementation of the "best" IEP (including accommodations). An IEP is appropriate and the implementation satisfactory if the child is making educational progress. This child is making steady educational progress.<sup>26</sup> Although the parent reports what she believes to be lapses in the application of vision accommodations, there is no credible evidence that LEA staff is unaware of or purposefully is ignoring the visual accommodations needed by this child. There is no credible evidence that LEA staff is failing to apply vision accommodations in any significant way. The LEA has not failed to consistently apply vision accommodations.

- c. ***failure to properly adapt all educational materials to meet the child's vision needs.***

**(C 9.c.1)**

The record documents reasonable and significant efforts by LEA staff to provide visual accommodations for the child's educational materials. There is no credible evidence that the child is unable to see her educational materials and benefit from them or that she is struggling unnecessarily in using them. The LEA has not failed to properly adapt all educational materials to meet the child's vision needs.

- d. ***failure to use alternative formats in presenting educational materials to the child.***

---

<sup>26</sup> The parent understandably wants the child to make accelerated progress so that she can "catch up" to her same-age peers. This is more than the law requires of a local educational agency.

**(C 9.d.1)**

If the parent is referring to the verbal presentation of written materials as an “alternative format” there is no question that the LEA has complied. Although there may have been some discussion between LEA staff and the parent regarding obtaining CDs of the child’s textbooks or homework assignments or being provided “Books on Tape,”<sup>27</sup> there is no IEP provision that can fairly be interpreted to require that of the LEA nor is there credible evidence that the child must be provided CDs or audio tapes to make educational progress. The LEA has not failed in any duty to use alternative formats in presenting educational materials to the child.

*e. refusal to properly implement and document the child’s vision exercises.*

**(C 9.e.1)**

The evidence in the record and reasonable inferences therefrom support the conclusion that the parent did not expect the LEA to document the 10 minutes of vision exercises that the LEA was supposed to be providing each day. There is no substantial evidence that the LEA was not, in fact, providing them. Although the record evidences a great deal of dispute regarding the vision exercises during the 2003-2004 school year, there was no substantial evidence in the record that the parent believed that those services were not being provided or provided in a satisfactory manner during the 2004-2005 school year. Neither did the record reflect that she communicated any such dissatisfaction to appropriate LEA staff during the 2004-2005 school year. The LEA has not refused to properly implement and document the child’s vision exercises.

**10. Whether the LEA wrongfully modified the content of the child’s math curriculum.**

**(C 10.1)**

The parties agreed that Math goals from the “move-in” IEP were not appropriate but parties were not able to reach an agreement as to what goals would be appropriate. An LEA has a duty to educate special needs children and cannot be faulted for developing and implementing goals while the parties are still in the process of trying to negotiate an IEP.

**(C 10.2)**

Although the parties seem to disagree on the present level of the child’s performance, the child’s teacher has made reasonable efforts to ascertain what the child can and can’t do.<sup>28</sup> Her assessments (and I-STEP test results) indicate the child has not mastered certain 2<sup>nd</sup> grade mathematic standards. The “working” math IEP (Petitioner’s Exhibits, Page 965-994) sets out the child’s present levels of performance as is required by Article 7.

---

<sup>27</sup> The parent did not sign the paperwork required for participation in the “Books on Tape” program through the Indiana School for the Blind. The parent is able to and does participate in that program pursuant to her own application for services.

<sup>28</sup> The parent’s refusal to allow the LEA to evaluate the child has required that the LEA propose goals based on informal assessments.

**(C 10.3)**

Article 7 requires an IEP to state goals that the child can reasonably be expected to achieve in a 12-month period. It does not require goals that the case conference committee would like to see the child to achieve, nor goals that “close the gap” between the child and her typical peers. Those types of goals are not necessarily ones that the child can be reasonably expected to achieve in a 12-month period. The goals and objectives in the “working” IEP address to the child’s current educational needs and are appropriate.

**(C 10.4)**

Parties are always free to set new goals and objectives or eliminate those no longer considered appropriate to pursue. The child is anxious to learn and there is no credible evidence that LEA staff would not gladly let the child move on after reasonable mastery of her present objectives. The parent’s belief that an IEP would limit the child’s progress is not a reasonable interpretation of the law or the facts.

**(C 10.5)**

The law grants each LEA discretion in formulating its own educational philosophy and methodology as long as it does not run afoul of IDEA/Article requirements and is providing an appropriate education for the child. The educational philosophy and methodology of prior LEAs serving the child is not determinative. An LEA is not obligated to follow the recommendations of experts arguing “better” alternatives or “best practices” no matter how impressive the expert’s credentials are.

- 11. *Whether the IEP proposal to remove the child from the general education class for math violates her right to education in the least restrictive environment.***

**(C 11.1)**

The law requires that children with disabilities be educated with their non-disabled peers to the maximum extent appropriate. While it would certainly be possible for the LEA to provide remedial math instruction to this child in the general education classroom, the distractions present in the general education class together with the child’s understandable desire to be a part of class activities make “pull-out” math instruction the least restrictive environment appropriate for the child’s individualized math instruction. At other times, however, the general education classroom is an appropriate environment for the child to participate in general math activities such as class review of the concepts the child is working on. The LEA’s proposal to remove the child from the general education class for her specialized math instruction is reasonable and does not violate her right to education in the least restrictive environment.

- 12. *Whether the LEA has failed to develop and implement an appropriate toileting routine for the child.***

**(C 12.1)**

The child qualifies for special education services by reason of an Orthopedic Impairment. The type of cerebral palsy which underlies her orthopedic impairment also underlies her

urological difficulties. An appropriate toileting procedure is a necessary component of her IEP services.

**(C 12.2)**

The LEA has made good faith attempts to develop an appropriate toileting procedure taking into consideration staff safety and liability issues. The evidence shows that at this time a “one-person transfer” would be safe for both the child and a suitable staff member. The LEA would have no liability for complying with a lawful order from this hearing officer. This immunity together with that available under the 11<sup>th</sup> Amendment would only be abrogated by the willful, wanton negligence of a staff person.

**13. *Whether the LEA has failed to properly train its staff regarding the child’s functional limitations and needs and the use of her equipment.***

**(C 13.1)**

The record indicates that the parent’s allegation that the LEA staff has not properly trained its staff is based on her observations that the child’s equipment has not always been fastened correctly and that damage has sometimes occurred. The law does not require the LEA to guarantee that staff will never be confused by, inept with, or inattentive to the intricacies of every piece of equipment it must utilize or service it must provide. The LEA’s efforts to utilize parental input, educate its staff and respond to parental concerns regarding the child’s functional limitations, needs and the use of her equipment is more than adequate and is well-documented. The LEA has not failed in any duty to properly train its staff regarding the child’s functional limitations, needs or the use of her equipment.

**14. *Whether the LEA has failed to appropriately implement full inclusion and socialization opportunities for the child.***

**(C 14.1)**

511 IAC 7-29-9 (a)(1) requires that children with disabilities be educated to the maximum extent *appropriate* (emphasis added) with nondisabled children. At times, the need to provide an appropriate education for a child may conflict with the child’s desire to participate in every activity and opportunity available to nondisabled children. The LEA is providing services in the least restrictive environment appropriate for this child. Nearly all of her services are delivered in a general education environment. LEA decisions to provide “pull-out” services are grounded in the needs of the child and have not been made arbitrarily.

**(C 14.2)**

The LEA has acceded to parental requests that special school and class activities take precedence over IEP services. They have done this even though it puts the LEA at risk for parental claims that they are not providing services as directed by the IEP.<sup>29</sup>

---

<sup>29</sup> It also conflicts with the parent’s assertion that schedule changes confuse and upset the child and should only be made if absolutely necessary and with prior notice the parent and child.

**(C 14.3)**

There may be occasions where, in the LEA's discretion, activities cannot be appropriately adapted to allow "full inclusion." There may also be occasions when opportunities for "full inclusion" are missed either due to inadvertence or lapse in imagination. The law, however, does not require perfection, on even the "best" possible inclusion strategies. There is no credible evidence that the LEA is purposefully or systematically denying this child opportunities for meaningful inclusion or socialization. The evidence is quite to the contrary. The LEA has not, therefore, failed in any duty to provide full inclusion and socialization opportunities for the child.

- 15. *Whether the LEA has failed to provide the child with opportunities comparable to her non-disabled peers for physical and mental exertion by unnecessarily confining her to her wheelchair during recess and physical education.***

**(C 15.1)**

There is a substantial connection between the child's level of fatigue and her ability to perform her educational activities in a meaningful way. The wide and unpredictable fluctuations in the child's energy level and sense of wellness require that her service providers be given discretion to determine what type and level of mental or physical exertion is appropriate on any given occasion.

**(C 15.2)**

The LEA has an obligation to provide physical therapy services for the child even though the child would rather be in class activities. They must be accorded the discretion to determine the most appropriate way to work on the child's goals and objectives. There may be occasions when opportunities for appropriate mental and physical exertion with her peers are missed either due to inadvertence or lapse in imagination. There is no credible evidence, however, that the LEA staff makes a practice of unnecessarily confining the child to her wheelchair during recess or physical education.

- 16. *Whether the LEA has failed to implement the child's IEP directives regarding her time to be spent in a stander and the time and distance she is to walk.***

**(C 16.1)**

The LEA has scheduled regular times for the child to be in her stander and walking. The LEA should be accorded the discretion to determine what is appropriate for the child on any given day, however the LEA has not documented and the evidence does not otherwise show an acceptable reason why the child was not in her stander on two occasions. If, in fact, no services were delivered on those dates, such a failure is negligible.

**(C 16.2)**

The LEA has not documented and the evidence does not otherwise show an acceptable reason why the child was not "walked" on one occasion (the 2<sup>nd</sup> day of school). If, in fact, no services were delivered on that date, such a failure is negligible.

**17. *Whether the child has been denied a free appropriate public education by the actions or inactions of the LEA.***

**(C 17.1)**

A parent certainly has the right to be informed about the child's educational program and its implementation. The right to be informed about a child's educational program cannot reasonably be interpreted to mean that an LEA must provide a parent with every detail about the implementation of the child's educational program and services. Neither is it reasonable to require an LEA to justify every decision about the delivery of services and methodology to a parent's satisfaction. There is no aspect of the child's program and its delivery that has not been discussed on numerous occasions with the parent.

**(C 17.2)**

There is substantial documentation in the record that LEA staff have considered the input of the parent and her experts. There is also substantial documentation that the LEA has, in fact, incorporated suggestions of the parent and her experts in the child's educational program. The parent, however, has apparently confused the notion of "equal partnership" with "having the last word." In fact, as far as the child's vision needs are concerned, the parent has insisted on having the only word. The parent's vision experts are undoubtedly fine clinicians. The LEA, however, has good reason to doubt whether the child is as functionally challenged in the educational environment as the reports of the parent's experts suggest. The parent has also refused to allow the LEA to speak directly and candidly with her experts.

**(C 17.3)**

An LEA has a duty to evaluate each child suspected of having special needs. Although an LEA, in its discretion, may decide to accept the findings of a clinician or the decisions of another LEA, it is not legally required to do so. This parent has unreasonably refused to allow the LEA to do an evaluation, which is their right and duty, by dictating what tests should or should not be done and by requiring that the evaluator meet with her approval. A parent who believes that an LEA's evaluation is not appropriate has the right to request an independent evaluation. If the experts of the parent and those of the LEA disagree, the parties have recourse to a due process hearing.

**(C 17.4)**

The LEA has spent an enormous amount of time trying to address the parent's demands for detailed information on every aspect of the child's educational program and services. In addition to insisting on an unreasonable amount of detail, the parent has demanded that the LEA justify virtually every action it takes or does not take with regard to the child. The time the LEA must spend in addressing the demands of this parent is time that they cannot spend planning and providing services for all children to whom they are responsible. This not only puts an unfair burden on LEA staff, but deprives other children of their fair share of staff assistance.

**(C 17.5)**

The LEA has substantially complied with the mandates of the child's "move-in" IEP. A substantial number of dates when various services were apparently not provided were on occasions when the LEA has notified the parent that the child was ill at school. An LEA should not have to force services on a child who is not likely to benefit from them in order to avoid allegations that they are remiss in their duty to provide those services. Indeed, the mandates of IDEA and Article 7 are premised on what is appropriate for the child. A certain amount of discretion must be accorded LEA staff so that the immediate physical and emotional needs of the child are not ignored.

**(C 17.6)**

Those occasions when services cannot be documented are insignificant in relation to the services that have been provided this child. The LEA's efforts to honor the parent's numerous requests as to when and how services should be delivered to this child, have significantly limited the LEA's opportunities to reschedule missed services for this child and at the same time continue to deliver services scheduled for the other children to whom they are responsible.

**(C 17.7)**

The child has made far more than trivial educational progress during the period that she has attended the LEA's schools. While it may be argued that she could have made more progress had the LEA used different methodology, children are entitled to an appropriate education, not the "best" that could conceivably be provided.

**(C 17.8)**

While the law allows an LEA its choice of methodology in delivering services, this LEA's decision to use assistive technology devices requiring a good deal of physical and visual coordination from the child to deliver instruction in her most challenging academic subject was not well-reasoned. The child has received sufficient educational benefit from her Math Resource services to meet the minimum requirements of the law, but the LEA should have considered whether "low-tech" accommodations would have allowed the child to progress significantly faster. Case law that has allowed LEAs to choose, for example, between "cued speech" and sign language, can be distinguished. In those cases, the methodology preferred by the parent would have required the expenditure of LEA resources to the detriment of the other children in the LEA's charge. Providing this child with "lower tech" accommodations that would have been less physically and visually taxing for her, would have put absolutely no burden on the LEA nor would it have affected their ability to deliver services to their other special needs children.

The LEA should have provided approximately 90 hours<sup>30</sup> of Math Resource services to this child during the period between the beginning of the 2004-2005 school year through the end of February 2005. During that period the child did enjoy and benefit from certain computer activities such as "Shop 'Til You Drop." The amount of progress that the child

---

<sup>30</sup> This figure is derived subtracting the number of days that the child was absent or sick at school (and not likely to have received educational benefit) from the number of days the LEA should reasonably be required to have provided those specific services.

might have made had “high-tech” accommodations not been used to deliver her math instruction cannot be determined. Compensatory math instruction for 50% of her Math Resource time seems warranted, however.

**(C 17.9)**

IDEA and Article 7 require that children with disabilities be educated with nondisabled children to the maximum time appropriate. It does not require that the child be in the general education classroom at every possible time. The LEA has gone to great lengths to see that this child’s schedule has been arranged to maximize the time that she is in the general education classroom. The child needs math remediation in an environment that will maximize her ability to concentrate free from the distraction of general education class activities. The LEA has not failed to deliver services to the child in the least restrictive environment.

1. *Whether the IEP proposed by the LEA in October 2004 was appropriate to meet the identified needs of the child.*

**(C 1.1)**

The individualized education program for this child was developed according to the procedures required under IDEA/Article 7. It was developed after considering the input of the child, the parent, and the parent’s experts. The IEP team formulated goals for the child based on her then-current level of educational performance and the amount of progress she could reasonably be expected to make in a 12-month period.

**(C 1.2)**

The child has, in fact, made progress towards meeting the IEP goals and objectives proposed by the LEA after considering parental input and revised at the case conference committee meeting on October 8, 2004 after considering further input from the parent.

**(C 1.3)**

The proposed IEP provides that the child receive her educational services in the general education classroom to the maximum extent appropriate to meet her needs after taking into consideration her problems with distractibility in a general education classroom.

**(C 1.4)**

Because of the child’s orthopedic handicap and visual problems, it is especially important that the child be clearly intelligible not only to those who are familiar with her speech but others she may need to communicate with. Articulation goals and objectives should be reinstated in the child’s IEP.

**The IHO’s Orders**

1. The LEA is ordered to provide the child with an instructional assistant who is physically capable of effecting a “one-person” transfer and who is available to take the child to the restroom when the child so requests.

2. The LEA shall cease combining Assistive Technology instruction with the child's Math Resource instruction until the child demonstrates a reasonable degree of proficiency in accessing computer programs. The LEA may, however, continue to allow the child to play computer math games during Math Resource.

3. The LEA is ordered to provide the child with 45 hours of compensatory math services to be completed before the end of the 2005-2006 school year. This order may be fulfilled by reimbursing the parent for math tutoring already performed, or in the alternative, paying for services yet to be rendered.

4. The LEA is ordered to circulate a memo to all relevant staff stressing to them that they need to give the parent timely and meaningful notice of any intent to initiate or change the identification, evaluation, special education placement or the provision of a free appropriate public education, including special education and related services that are provided in conformity with an IEP meeting the requirements of Article 7. They should be advised that this is necessary if they have any reason to believe the parent would consider the contemplated action a change or discontinuation of a service, even if, in their judgment, it is not.

5. The LEA is ordered to perform a comprehensive evaluation of the child's visual functioning. While professionals from the School for Blind may do part of this evaluation, the LEA shall include in its evaluation professionals who have expertise in areas other than "low vision." The results of that evaluation shall be used in considering whether the child can receive educational benefit from vision services in areas other than those set out in the proposed IEP of October 2004.

6. The LEA is ordered to reinstate articulation goals into the child's Speech services.

7. Except as set out above, the LEA is ordered to implement the October 2004 IEP, updating the goals based on the child's level of performance at the end of the 2004-2005 school year.

8. In an effort to balance the parent's right to receive a reasonable amount of information regarding the child's services, the LEA's right to do their jobs without undue interference and the LEA's duty to serve all children, the LEA shall do the following:

At the end of every 3-week period each of LEA's staff persons providing special services in the areas of Assistive Technology, Vision, Speech, Occupational Therapy, Physical Therapy, Social Skills, Activities of Daily Living, Language, and Math Resource shall give the parent a written report disclosing, at minimum, the dates on which services were provided, the nature of those services and the child's progress. A copy of the provider's log of services pertaining to the child shall suffice if it provides the requisite information.

The parent may submit written questions to each provider and the provider shall make a good faith attempt to answer those questions in writing with appropriate detail. Having done that, the service provider need not address further parental communications until the end of the next 3-week period unless that communication relates to the immediate physical or emotional well-being of the child.

The parties shall continue the practice of sending the assignment notebook and daily log (including "check boxes" regarding services) from school to home and back. The child's instructional assistance shall not be required to respond to parental questions not related to the physical care of the child, however.

*The parties are ordered to implement the provisions of this decision within thirty (30) calendar days from the date this decision is received unless, during that same time period an appeal to the Special Education Board of Appeals is filed.*

Nothing in this decision should be construed so as to prevent the parties from modifying the effect of this decision by their agreement.

## **APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS**

### **Procedural History of the Appeal**

On June 22, 2005, the School timely filed a Petition for Review of the IHO decision before the Indiana Board of Special Education Appeals (BSEA). On June 23, 2005, the Student was notified that she had (10) calendar days or until July 5, 2005, to respond to the Petition for Review. On June 30, 2005, the Student requested an extension of time to file a Reply to the Petition for Review. On June 30, 2005, the Student's Motion for extension was granted and the Student was given until the close of business Monday July 11, 2005 to file her Response. On July 11, 2005, the Student timely filed her response to the Petition for Review. On July 20, 2005, both parties were notified that BSEA would conduct a Review Without Oral Argument in Room 225 of the State House, Indianapolis, Indiana on Monday August 8, 2005.

### **The School's Petition for Review**

The School objects to Orders 1, 3 and 4. The School argues that the IHO should not have dictated a bathroom routine for the student different from the sound approach used by the school. The School argues that there was substantial evidence regarding the School's rationale for its use of two people, an approach substantiated by industry literature admitted into evidence. The "soundness" of the School's approach having been articulated and unrefuted, it was error for the hearing officer to impose her own standard regarding a subject area beyond the scope of Article 7. The issue is a question of methodology and everyday school management left to the School's discretion. The School further argues that the Order requiring an aide of a certain strength is arbitrary and capricious and invades one of a school corporation's inherent powers, i.e. the power to employ personnel. I.C. 20-5-2-2(7).

The second issue in the Petition is that the IHO had no basis to require 45 hours of compensatory math services. The School argues that compensatory education is recognized as an appropriate remedy for certain IDEA violations and that this type of award is made to give students qualifying under the IDEA relief to compensate or reimburse them for services they should have received in the past, but did not receive totally or in part. The award of compensatory math

services is not supported by the Findings of Fact and Conclusions of Law. The IHO found that the Student has received sufficient benefit from her Math Resource services to meet the minimum requirements of the law. (Conclusion C 17.8) Further, the IHO found that the failure to provide 3 sessions of Math Resource Services in a 6 1/2 month period is not a significant breach of the mandates of the child's IEP. (Conclusion C 7.5)

The third issue in the Petition is that the School complied with the requirements for prior written notice. The School argues that both federal and state regulations require prior notice when the school proposes to change or refuses to change the identification, evaluation or special education placement of a student but that in this case the School did not propose to change the identification, evaluation or placement of the student. Rather, the School proposed a change in the details of a few services comprising a few lines in a proposed IEP that spans multiple pages. The changes reflected positions that the school had taken before and positions known by the parent which were reflected in a draft IEP given to a parent as a working document in advance of a case conference that constituted one in a series of meetings designed to obtain agreement to an IEP. The School suggests that the IHO proposed an unworkable standard for prior written notice as she based it upon the school being able to divine the subjective opinion of the parent as to whether prior written notice is required and that the IHO does not determine whether prior written notice is required under the regulations but concludes that prior written notice is required because the School had reason to believe the parent may think that the proposed IEP's triggered the prior written notice requirements.

The School requests the BSEA to reverse and vacate Orders #1, #3 and #4 as well as the Findings of Fact and Conclusions that form the basis for such orders. The School fails, however, to specify which Findings of Fact or Conclusions of Law it takes exception to.

### **Student's Response to the Petition for Review**

The Student argues that the key issue in the School's first assertion is that the Student has a medical urology challenge that is well documented by her physicians, and which requires that she be taken to the bathroom with immediacy and efficiency. The evidence and testimony in the record shows that in every other aspect of the Student's life only one person is required and employed to safely and expeditiously assist her in her toileting needs. The one person lift is not a parental preference rather, it is a necessary medical and physical support that is in accordance with the Student's abilities and challenges.

The Student further argues that if she did require a two-person transfer, the problem with the school's system is that it flies in the face of doctor's orders and the process used in her life elsewhere because the second person is most often not readily available. Because the school requires a second person they use a walkie-talkie system to locate the second person who often is occupied and cannot immediately leave his or her position elsewhere in the school, or the walkie-talkie malfunctions or the second person does not have it in his or her possession. The result is that the Student too often has to wait for the two-person assistance and has a toileting accident while waiting, which is publicly humiliating for a ten year old.

On the School's second issue, the Student argues that based on evidence and testimony, there is reason to believe that the Student would have made meaningful progress in her math skills had she not been hindered by the use of the Assistive Technology approach that combined her most difficult physical skills necessary to operate the assistive technology device with her most difficult academic subject. There was a denial of FAPE because the use of assistive technology as a support actually hindered her ability to benefit from her math instruction. The amount of the award should be upheld and that the IHO based her decision on the amount of hours the Student should have been provided yet was denied the benefit of the instruction in because the cumbersome Assistive Technology interfered with her ability to learn material.

In response to the School's third point the Student argues that the assertion is incorrect because it only addresses part of the order and fails to take into account the entire order. The Student suggests that the order does not require notice only if the staff feels the parent would consider the placement a change but that the order requires notice of any intent to change. The final sentence of the IHO's order is not predicated on what the mother believes but it is to qualify that the school must provide notice of any intent to change, if it could be perceived as such, even if in the school's judgment it is not. The purpose of the final sentence is to prohibit the school from acting unilaterally and to avoid the excuse of not providing notice based upon what the school believes the mother believes. The order simply reinforces what the law already states, which is that prior written notice is required when a school proposes to or refuses to initiate or change a child's placement. The order does not place any additional burden on the school beyond what the law already requires and it clarifies that the school cannot escape the requirement by claiming that they didn't think the parent would object.

## **REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS**

The complete record was photocopied and transmitted to the members of the BSEA on July 12, 2005. On July 20, 2005, both parties were notified that BSEA would conduct a Review Without Oral Argument in Room 225 of the State House, Indianapolis, Indiana on Monday August 8, 2005. On that date all three members of the BSEA met in the offices of the Indiana Department of Education 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 School timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. The School has objected to Orders No. 1, No. 3, and No. 4, and requests that the BSEA reverse and vacate these orders as well as the findings of fact and conclusions of law supporting these orders. Although the School has failed to identify the findings and conclusions supporting the challenged orders, the BSEA has determined that findings of fact F 12.1 through F 12.5 and conclusions of law C 12.1 and 12.2 address Order No. 1; findings of fact F 10.1 through 10.4 and F 11.1 and 11.2, and conclusions of law C 10.1 through 10.5, C 11.1, C 7.5, and C 17.8 address Order No. 3; and findings of fact F 4.1 through 4.4 and conclusions C 4.1 through 4.4 address Order No. 4.
3. The Board sustains the IHO's Findings of Fact F 12.1, F 12.2, F 12.3, F 12.4 and F 12.5.
4. Conclusion of Law C 12.1 is supported by the Findings of Fact and is not contrary to the law.
5. Although the first sentence of Conclusion 12.2 is supported by the findings of fact, the remainder of the conclusion is not supported by the findings of fact or is contrary to law. Conclusion 12.2 is amended to read as follows:

The LEA has made good faith attempts to develop an appropriate toileting procedure taking into consideration staff safety and liability issues. However, the immediate urgency of the child's toileting needs should be met.

6. Issues of negligence and liability for personal injury are beyond the authority and jurisdiction of an IHO. Although schools and public employees acting within the scope of their employment enjoy immunity for tort claims, such immunity is provided by state statute rather than the Constitution of the United States. Eleventh Amendment immunity applies to actions against the States and provides no protection to schools and school employees.
7. The Board sustains Findings of Fact F 10.1, F 10.2, F 10.3, F 10.4, F 11.1 and F11.2.
8. Conclusions of Law C 10.1, C 10.2, C 10.3, C 10.4, C 10.5 and C 7.5 are supported by the Findings of Fact and are not contrary to the law, and are sustained as written.
9. The IHO appropriately concluded that "the child has received sufficient educational benefit from her Math Resource services to meet the minimum requirements of the law." (C 17.8) However, the remainder of Conclusion 17.8 is not supported by substantial evidence and is contrary to the IHO's determination that the LEA has provided appropriate services. As such, the remainder of Conclusion 17.8 is deleted. Conclusion of Law 17.8, as amended, now states:

The child has received sufficient educational benefit from her Math Resource services to meet the minimum requirements of the law.

10. The Board sustains Findings of Fact F 4.1, F 4.2, F 4.3 and F 4.4.
11. Conclusion of Law C 4.1 is supported by the Findings of Fact and is not contrary to the law.
12. Conclusions of Law C 4.2, C 4.3 and C 4.4 are not supported by the Findings of Fact and are contrary to the law and are deleted.
13. A new Conclusion of law 4.2 is inserted as follows:

Prior written notice of the child's placement cannot be provided prior to the meeting of the case conference committee, as the LEA is prohibited from unilaterally determining the child's placement. The LEA is required to give notice of the case conference meeting that meets the requirements of 511 IAC 7-27-2. However, this notice cannot include a predetermination of the services and placement that will be provided. Educational services and placement are case conference committee determinations that are made in consultation with the parent; they are not unilateral decisions made by the LEA prior to the case conference committee meeting. The LEA did not fail to provide prior written notice to the parent by failing to include all possible proposals that might be discussed at the case conference committee meeting in a draft IEP provided to the parent prior to the CCC meeting.

14. Article 7 (511 IAC 7-17, *et seq.*) provides procedural safeguards for students with disabilities and their parents. To ensure parents are aware of their rights, and the rights of their children, parents must be provided written notice of procedural safeguards (511 IAC 7-22-1) and they must be provided prior written notice when a public agency proposes to initiate or change the identification, evaluation, or special education placement of the student or the provision of a free appropriate public education to the student, or refuses to do the same. (511 IAC 7-22-2). This prior written notice is provided by the LEA as a part of the written report of the case conference committee meeting, as required by 511 IAC 7-27-5.

### **ORDERS**

1. The IHO's Findings of Fact and Conclusions of Law are upheld except as amended above in the combined findings of fact and conclusions of law.
2. The IHO's Order No. 1 is amended as follows:

The LEA shall develop and implement a toileting routine for the child that will address the urgency of the child's needs. The LEA may utilize one person or two persons for the transfer. However, the LEA shall ensure that utilization of a two-person transfer will not result in undue delay in meeting the child's needs.

3. The IHO's Order No. 3 is deleted.
4. The IHO's Order No. 4 is deleted.

All other Motions not specifically addressed herein are hereby deemed denied

DATE: \_\_\_\_\_

/s/Raymond W. Quist  
Raymond W. Quist, Ph. D., 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).