

Indiana Board of Special Education Appeals



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

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of H.H.,)
John Glenn School Corporation)
and Joint Educational Services)
in Special Education (JESSE))
)
Appeal from the Decision of)
Joseph R. McKinney, J.D., Ed. D.)
Independent Hearing Officer)

Article 7 Hearing No. 1532.06

Procedural History

This due process hearing request, filed by the Student,¹ was received by the Division of Exceptional Learners on August 18, 2005. The hearing was requested to resolve disputes between the Student and John Glenn School Corporation and Joint Educational Services in Special Education (JESSE) (hereinafter, "School") pursuant to provisions of 511 IAC 7-30-3 (Article 7).

On August 18, 2005, the State Superintendent of Public Instruction appointed Joseph R. McKinney as the Independent Hearing Officer (IHO). In accordance with I.C. 4-21.5-3-19(b) and (c), a Prehearing Conference was held by telephone on August 31, 2005. Both parties were represented by counsel. The School's special education director and the parents of the Student were also present. The IHO denied the School's motion to dismiss.

The issues in dispute were reduced to writing in a Prehearing Order issued by the IHO on September 12, 2005. The following issues taken from the IHO's Prehearing Order were deemed in controversy for the due process hearing set for October 17, 18, 19, and 20, 2005:

- A. Whether School failed to devise appropriate programming for the Student for the past two-years. Whether FAPE² was denied because of the following alleged IEP shortcomings:
1. Failure to provide appropriate Extended School Year services.

¹ The term "Student" as used throughout denotes the student or her parents as appropriate.

² FAPE is an acronym for "Free Appropriate Public Education."

2. Failure to provide sufficient speech, occupational, and physical therapies³ for the Student.
3. Failure to provide copies of the Student's evaluations at least five days prior to the Student's case conferences, (the School would hold a pre-meeting, right before the case conference, to discuss the evaluation results, and limited the discussion to five to 10 minutes because the School told the family that it wouldn't or couldn't mail evaluations to them).
4. Failure to devise appropriate and measurable goals and objectives (because they were insufficient in number, some were not measurable and did not address all of the Student's academic, social and behavioral needs, such as her attention problems and working memory problems). Failure to have writing goals for the Student in her IEP (despite a long history of writing problems).
5. Whether the School unilaterally removed from the Student's IEP her aide and reduced related services without even discussing these items at CC (and then when the parents balked at this reduction in services, the School agreed to add those back in and called the deletion of those services accidental omissions).

B. Failure to appropriately and timely respond to the parents' request for an OT evaluation.

C. Whether the Student suffered academic, intellectual and/or cognitive harm because of the School's failure to provide FAPE to the Student.

D. Whether the School failed to specify the length, frequency and duration of services for the Student.

E. Whether the School failed to appropriately respond to the parents' request for records last spring, giving the family six pieces of paper in response to their records request.

F. Whether the School failed to appropriately train its teachers and ensure that they were adequately licensed to work with the Student. (for example, the teacher assigned to the Student was untrained in the "Tucker" method of reading instruction, which is specifically listed in her IEP).

G. Whether the School failed to give written progress reports on the Student's goals and objectives at least as frequently as regular education peers, (a problem the parent has been complaining about since May 2003, when she wrote a letter to School on that subject).

H. Whether the School failed to include a special education teacher at the Student's case conference on September 2, 2003, and August 5, 2003.

³ The parties agreed to eliminate "physical therapies" as an issue for the hearing.

I. Whether the School failed to give the family prior written notice in regard to the following items: parent requests for FastForward program, one-on-one aide, as noted in case conference documents 01-26-04 and 01-15-04 and 10-06-03 and 09-25-03, removal of the Student's aide, reduction in the amount of related services and speech therapy services, which the School unilaterally eliminated.

The parties agreed to mediation. Mediation was not successful. A second pre-hearing conference was held by telephone on October 17, 2005. By agreement of the parties, the due process hearing was reset for November 16, 17, 30, and December 1, 2005. The new decision deadline was December 22, 2005.

On November 11, 2005, the Student's counsel filed a motion to continue the hearing because the Student had located an expert in 47 Triple X Syndrome. The expert could not examine the Student until January, 2006. The IHO granted the Student's request for a continuance.

The hearing took place over seven days, November 16, 17, 20; December 1, 15, 16, 2005, and February 1, 2006. The hearing was closed to the public at the request of the Student. The decision deadline was extended to March 9, 2006, by written agreement of the parties for good cause and written order by the IHO.

The School objected before and at the hearing to issues raised by the Student concerning facts prior to August 18, 2003. The School argued that some of the issues in the request for a hearing were barred by the two-year statute of limitations as adopted by the BSEA in past decisions and as made effective by the revised IDEA. The Student claimed the two-year statute of limitations should not apply because the revised IDEA did not contemplate retroactive enforcement, and in any event the School's procedural and substantive inadequacies impeded the child's right to a free and appropriate education. The IHO took the School's motion under advisement in order to hear evidence on the issues. The parties agreed to the admission of all submitted evidence.

Decision by IHO

On March 9, 2006, the IHO issued a written decision that included the following Findings of Fact:⁴

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 et seq. and 511 IAC 7-30-3, which gives the IHO authority to hear and rule upon all matters.
2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. The Student is a nine-year-old child (date of birth: March 6, 1997).

⁴ The restatement of the IHO's Findings of Fact, Conclusions of Law, and Order have been edited for format purposes.

4. The Student is in the second grade at an elementary school in the John Glenn Community School Corporation. The school district is part of, and served by, the Joint Educational Services in Special Education (JESSE) Cooperative.
5. When the Student was approximately 18 months old and not talking, her parents became very concerned.
6. At approximately 18 months of age, the Student was diagnosed with 47 XXX (Triple X Syndrome).
7. The Student attended a private daycare and preschool.
8. The Student received speech-language therapy through First Steps prior to age 3 years.
9. The Student attended a private developmental preschool and a private Kindergarten.
10. The Student had asthma, which improved after age 5 years.
11. The Student went to her present elementary school for first grade.
12. The Student began receiving services from the School when she was 3 years old pursuant to an IEP dated March 1, 2000. The parents signed the IEP.
13. When the Student was 3 years, 2 months old more services were added to her IEP, including Extended School Year (ESY) services. The parents signed the IEP.
14. The Student's March 14, 2001, IEP (Student was four years old) provided for speech therapy 60 minutes per week, early childhood consultation and occupational therapy (OT). The parents signed the IEP.
15. On May 23, 2001, the Student, then 4 years, 2 months old, received an IEP that required speech therapy 90 minutes per week, early childhood special education 12.5 hours per week, OT for 30 minutes per month and ESY consisting of four (4) 60-minute speech sessions during July. The parents signed this IEP.
16. The Student's 5th IEP was signed by parents on May 23, 2002, (Student was 5 years, 2 months old) and it provided 2 hours of speech therapy per week, 90 minutes a semester of OT and ESY speech services of 60 minutes per week for the month of July.
17. On August 29, 2002, (Student was 5 years, 5 months old) more speech therapy was added to the Student's IEP. Parental consent was provided on this IEP.
18. The Student's 7th IEP was dated May 7, 2003, (Student was 6 years, 2 months old) and contained Kindergarten and first grade speech therapy, OT and ESY. The parents signed this IEP. The parents agreed the Student was making progress (at CCC meeting).

19. An IEP was developed on August 13, 2003, (Student was 6 years 5 months old) containing speech therapy (2 sessions with speech therapist and 2 with speech tech.), OT-consultation 2 times per year (more if needed), and the Screen for Bridges Program. Parental consent was provided for this IEP.
20. Parents were provided their procedural safeguards and provided with case conference notes for all of the case conference meetings relative to the above-mentioned IEPs.
21. The Student was identified with a Communication Disorder under Article 7 during the above-mentioned case conference meetings and on the IEPs that were developed at these meetings.
22. The Student was evaluated in 2002 and given several tests. The Student was administered the KABC with results falling in the low-average range of intelligence (KABC: Mental Processing Composite = 82).
23. The 2002 evaluation found achievement skills ranged from borderline to average, and visual motor skills fell in the low-average range. Adaptive behavior skills fell in the range of a mild mental disability. Language assessment showed significant delays with respect to receptive and expressive language and articulation.
24. The Student was evaluated again by the School in 2004. The Student was administered several ability tests with results ranging from a Mild Mental Disability to borderline/below average. Her scores on the Stanford Binet were: Full scale IQ = 71, Nonverbal IQ = 74, Verbal IQ = 71. Other tests were, UNIT: SS = 77/74, WJ Test of Cognitive Abilities III: SS = 67, WISC-IV: FSIQ = 70, VC = 77, PR = 77, WM = 74.
25. The Student did not speak single words until she was 5 years old, and combined words at age 6.
26. Dr. Julie Steck, Ph.D., HSPP of Children's Resource Group, evaluated the Student in August and September of 2005. Her findings indicated the Student's nonverbal ability or perceptual reasoning development, along with her working memory, fell in the range of a Mild Mental Disability, and processing speed fell in the borderline/below low average range.
27. Dr. Steck's evaluation revealed academic skills varied, with scores ranging from a mild mental disability to low average. Basic reading skills measured borderline, and reading comprehension skills fell in the range of a mild mental disability. Math skills also fell in the range of a mild mental disability. Written expression skills measured borderline, spelling skills fell in the low average range.
28. Dr. Steck gave the Student portions of the WISC-IV for children. The Student was not given the verbal comprehension portion of the test because of her history of speech and language difficulties.

29. The Student's scores on the WISC-IV showed that perceptual reasoning and working memory development fell in the range of a mild mental disability (PRI = 65 and WMI = 62), and processing speed measured in the borderline/below low average range (PSI = 75).
30. The Student's visual-motor skills ranged from a 5 year, 5 month age equivalent to a 5 year, 6 month age equivalent. Adaptive behavior scores measured low average with a relative weakness in communication skills. Computerized testing revealed attention concerns. In fact, Dr. Steck diagnosed the Student with Attention Deficit Hyperactivity Disorder, Combined Subtype.
31. Dr. Carole Samango-Sprouse, Ed.D. was hired by the parents to evaluate the Student. Dr. Sprouse is one of the only experts in the U.S. with respect to Triple X children and adults. She evaluated the Student in January 2006 (met with her for approximately 12 hours over 2 days).
32. Dr. Sprouse administered the Woodcock-Johnson III Tests of Cognitive Abilities. The Student's scores varied considerably on the test. She scored a 58 (standard score) on verbal comprehension (>K.0), 58 on decision speed (>K.0) with most scores well below her grade level, but had some relatively high scores, 118 on sound blending and 108 on planning.
33. Dr. Sprouse gave the Student the Woodcock-Johnson III (WF-III) tests of achievement and concluded the Student's scores were consistent with a neurogenetic disorder (Triple X Syndrome).
34. The Student's standard score on the WJ-III Spelling of Sounds was 89, understanding directions was 78, math scores were relatively low, 62 and 67 (1.0 grade level) and her story recall score was 60 (>K.0).
35. Dr. Sprouse concluded the Student does not have a mental disability. Dr. Sprouse found the Student has complex problems due to her language based disorder with attention deficits and graphomotor dysfunction.
36. The Student's program disability category has changed from communication disorder to multiple disabilities to her current primary disability area of Other Health Impaired (OHI) (2004 IEP change). The parents asked for the change from multiple disabilities to OHI.
37. The Student's general education classroom teachers at her elementary school all testified she had made academic and social progress in their classrooms.
38. The Student's current 2nd grade teacher has the Student for class pursuant to the IEP for math, social studies, science and health. The Student has an aide for math. However, the teacher (10 years of experience) testified the Student would benefit more by taking math in the special education resource room. She does not work on the same math problems as the general education students in the classroom.

39. The Student repeated the first grade. The Student's first grade teacher for the 2004-05 school year testified the student does not need a one-on-one aide for "specials" classes.
40. The Student's special education teacher testified that the Student does not need an aide in the resource room. She also agreed with the Student's 2nd grade teacher that the Student should take math in the resource room.
41. The School's special education director testified that the Student does not need a full-time one-on-one aide in the general or special education resource room.
42. The parents have asked for a one-on-one aide for the Student over the past two years. The parents have asked that the School consider placing the Student in the general education classroom full-time. They have also asked for more speech therapy and OT.
43. The School has responded to these parental requests at case conference committee meetings and through case conference notes provided to the parents.
44. The parents signed a mediation agreement with the School on February 19, 2004. This agreement called for the Student's primary disability to be OHI. The agreement also set forth the Student's ESY program for summer, 2004. These changes, and others, were incorporated into the Student's IEP.
45. The Student's most recent IEP, January 11, 2005, provided for ESY that included speech and language arts.
46. The January 11, 2005, current IEP provides speech therapy 2 hours per week, resource room, 750 minutes per week, inclusion support (an aide) for math daily and OT consultation two times per year and more if needed.
47. The Student's respective IEPs of September 3, 2003, October 6, 2003, January 14, 2004, March 10, 2004, (mediation agreement attached), and January 11, 2005, contain the Student's present level of performance, and measurable goals and objectives. Handwriting goals are contained in these IEPs.
48. The School provided the parents notice that they could pick up evaluation reports prior to case conference meetings and if they wanted to discuss an evaluation they could call the School to set-up a pre-meeting (before the CCC met). On some occasions, the parents availed themselves of this process.
49. The goals and objectives of the IEPs that have been written since August 18, 2003, were designed to meet the very complex educational needs of the child. The Student's special education programming has been appropriate.
50. The School did not unilaterally change the Student's IEP in a manner reducing related services and removing her aide. The Student was provided services and an aide as

contemplated by the IEP. Any confusion over this issue was due to a clerical mistake which was corrected by the School.

51. The Student has been provided with several OT evaluations and the School has followed the recommendations made by the occupational therapist.
52. The School did not provide the parents with the Student's records they requested at the May, 2005, CCC meeting until the August 2005, CCC meeting. This omission was the result of a new principal who only gave the parents the School's cumulative file. He did not provide them with the Student's special education records.
53. When the School's assistant special education director learned that the principal had only provided the cumulative file from the School without special education records she copied all of the records and provided the parents with all records pursuant to their request. The reason for the delay from May to August was the summer vacation and the School not knowing that the principal had not provided all of the records.
54. The Student's teachers (since August 18, 2003) have provided progress reports pertaining to the goals and objectives of the IEP to the parents.
55. The Student's current special education teacher was trained in the Tucker Method and is employing it in her classroom with the Student. The teacher has reported that the Student is making progress.
56. The Student's speech aide has worked with her "off and on" for 5 years. The speech aide follows the directions she is given from the speech language pathologist. The speech aide was registered with the State when she was in private practice. She is not currently registered as a speech aide in a school supervised by a speech language pathologist pursuant to a law that has been in effect since July, 2005.
57. The Student's teachers, including special education teachers, and the professionals who have provided related services to the Student are all duly licensed, experienced school personnel.
58. The Student's teachers over the past 2 years have read the information on Triple X Syndrome that the parents have provided the School.
59. The School's speech and language pathologist was in attendance at the September 3, 2003, CCC. The Student's primary disability at that time was communication disorder.
60. The parents are loving, caring parents. The father testified that he would like the School to provide maximum educational benefit to the child.

Based upon the preceding sixty (60) Findings of Fact, the IHO made the following Conclusions of Law:

1. Based on the evidence, the School's Motion regarding the imposition of the two-year statute of limitations adopted by the BSEA⁵ is granted. Therefore, the written decision that follows covers the period of August 18, 2003, to present.

ISSUES FOLLOWED BY CONCLUSIONS OF LAW

A. Whether School failed to devise appropriate programming for the Student for the past two years. Whether FAPE was denied because of the following alleged IEP shortcomings:

1. Failure to provide appropriate Extended School Year services.

Held - The School has provided appropriate Extended School Year services.

2. Failure to provide sufficient speech and occupational therapy for the Student.

Held - The School has provided sufficient speech and occupational therapy for the Student.

3. Failure to provide copies of the Student's evaluations at least five days prior to the Student's case conferences, (the School would hold a pre-meeting, right before the case conference, to discuss the evaluation results, and limited the discussion to five to 10 minutes because the School told the family that it wouldn't or couldn't mail evaluations to them).

Held - The School has provided or made available the Student's evaluations in a timely manner.

4. Failure to devise appropriate and measurable goals and objectives (because they were insufficient in number, some were not measurable and did not address all of the Student's academic, social and behavioral needs, such as her attention problems and working memory problems). Failure to have writing goals for the Student in her IEP (despite a long history of writing problems).

Held - The IEPs that have been developed since August 13, 2003, are appropriate and include measurable goals and objectives.

5. Whether the School unilaterally removed from the Student's IEP her aide and reduced related services without even discussing these items at CC (and then when the parents balked at this reduction in services, the School agreed to add those back in and called the deletion of those services accidental omissions).

Held - The School did not unilaterally reduce related services or remove an aide for the Student.

⁵ BSEA is a reference to the Board of Special Education Appeals.

- B. Failure to appropriately and timely respond to the parents' request for an OT evaluation.

Held - The School has appropriately and timely responded to the parents request for OT.

- C. Whether the Student suffered academic, intellectual and/or cognitive harm because of the School's failure to provide FAPE to the Student.

Held - The School has provided FAPE to the Student.

- D. Whether the School failed to specify the length, frequency and duration of services for the Student.

Held - The School has not failed to specify the length frequency and duration of services.

- E. Whether the School failed to appropriately respond to the parents' request for records last spring, giving the family six pieces of paper in response to their records request.

Held - The School did not comply with Article 7 with regard to providing school records to the parents in a timely manner. However, this mistake was made in good faith, and did not result in a denial of FAPE or meaningful participation of the parents.

- F. Whether the School failed to appropriately train its teachers and ensure that they were adequately licensed to work with the Student. (for example, the teacher assigned to the Student was untrained in the "Tucker" method of reading instruction, which is specifically listed in her IEP).

Held - The School's teachers are appropriately trained and licensed. A speech tech is not currently registered with the State in accordance with a relatively new state law, but this lack of registration has had no effect on the provision of FAPE for the Student.

- G. Whether the School failed to give written progress reports on the Student's goals and objectives at least as frequently as regular education peers (a problem the parent has been complaining about since May 2003, when she wrote a letter to School on that subject).

Held - The School has provided written progress reports on the Student's goals and objectives.

- H. Whether the School failed to include a special education teacher at the Student's case conference on September 2, 2003, and August 5, 2003.

Held - This issue is in part barred by the 2 year statute of limitations. A special education teacher, the speech language pathologist was present at the September 3, 2003, CCC.

- I. Whether the School failed to give the family prior written notice in regard to the following items: Parent requests for Fast Forward Program, one-on-one aide, as noted in case

conference documents 01-26-04, 01-15-04, 10-06-03, and 09-25-03, removal of the Student's aide, reduction in the amount of related services and speech therapy services, which the School unilaterally eliminated.

Held - The School has provided appropriate prior written notice to the parents under Article 7.

Based upon the preceding Conclusions of Law, the IHO issued the following Order:

The most recent IEP that was signed by the parents is dated January 11, 2005. The parties have not been able to resolve their differences regarding the placement of the Student. In fact, the experts who have testified in this case do not agree on the appropriate placement. Based on the evidence presented in this case, including the Findings of Fact and Conclusions of Law the School is hereby Ordered to immediately convene a case conference committee meeting and prepare an IEP in accordance with Dr. Steck's recommendations at pages 12-16 of her evaluation report (p. 1043, Res. Ex.). except for the following:

1. The Student's primary disability will continue to be OHI (not mild mental disability).
2. The Student shall be provided math instruction in the resource room (in addition to the other classes that she is receiving in the resource room).
3. The Student shall continue to receive OT.
4. The School is not required to use the Fast Forward Program.
5. The new IEP shall be implemented as soon as possible.

The IHO notified the parties of their right to appeal the decision to the Indiana State Board of Special Education Appeals.

Appeal to the Board of Special Education

On March 15, 2006, counsel for School advised the IHO that the School was unable to execute the IHO's Order to convene a case conference committee meeting as Student's parents have declined to attend.

On March 27, 2006, the Student filed a request for an extension of time in which to file an appeal, along with a request for the transcript. On March 27, 2006, the Student's request for a continuance until the close of business on April 27, 2006, was granted by the Board of Special Education Appeals (BSEA). The date for the appeal decision was extended until May 30, 2006.

On March 31, 2006, the Student renewed her request for the transcript and requested a two week extension of time from the April 27, 2006, date or in the alternative, thirty (30) days from the receipt of the transcript. The BSEA granted the extension of time until the close of business on May 3, 2006.

On April 6, 2006, the School, by counsel, filed a motion to extend the time for filing a response to Student's appeal to May 30, 2006. On April 10, 2006, the motion was granted, and the deadline for the decision was extended until June 29, 2006.

On May 2, 2006, a Notice of Appearance and a Motion For Further Extension of Time in Which to File Petition for Review were filed by Gregory K. Blanford, who replaced the Student's former counsel for this appeal. On May 3, 2006, the BSEA granted the request for an extension of time until the close of business on May 19, 2006. The School requested and was granted an extension of time to the close of business on June 12, 2006, to file its Response to the Petition for Review. The decision deadline was extended until July 12, 2006.

The Petition for Review was received on May 19, 2006. The School's Response to the Petition for Review was received on June 12, 2006. A Notice of Review Without Oral Argument was sent to the parties on June 14, 2006. The parties were notified of the review date of July 6, 2006, and advised of their judicial review rights.

Petition for Review

In the Petition for Review, the Student took exception to Findings of Fact Nos. 13-19, 20, 26-30, 31-35, 48, 52-53, 55, and 58. The Student objects to Conclusions of Law No. 1, A1, A2, A3, A5, C, E, F, and I. The Student objects to the IHO's Order directing the school to convene a case conference for the purpose of implementing Dr. Steck's recommendations, based in part on the Student's allegation of potential costs of Dr. Steck's services to the Student. The Student objects to parts 2 and 3 of the Order.

The Student argues that the IHO's Findings of Fact Nos. 13-19, while accurately indicating the Student's signed consent on case conference reports and IEPs, is of "little consequence" citing lack of full and complete disclosure, failure to provide written notice in response to requests as required by Article 7, and duress. The Student argues that she was not provided with her procedural safeguards (Finding of Fact No. 20).

The Student alleges that the examination, diagnosis and prognosis offered into evidence by Julie Steck, Ph.D. is flawed due to her lack of experience evaluating children with Triple X syndrome (Findings of Fact Nos. 26-30). The Student challenges the IHO's reliance upon Dr. Steck's diagnosis of ADHD-CS as unsupported by the testimony. The Student also challenges the IHO's failure to acknowledge Dr. Steck's observation of Holly's speech problem and her recommendation, supported by the recommendation of the Student's expert, of the Fast ForWord Program.

The Student, in challenging Findings of Fact Nos. 31-35, alleges that the IHO failed to acknowledge the significant disparity in the knowledge, background and resources between Dr. Samango-Sprouse and Dr. Steck as it impacts the needs assessment and educational programming of the Student.

The Student objects to Finding of Fact No. 48, arguing that the School's procedures for providing copies of "evaluations, IEP's, reports and the like" were not sufficient under Article 7, and that the School's failure to provide the Student with records rendered the Student unable to benefit as fully from speech therapy services provided over the summer.⁶

The Student alleges that the resource room teacher was not familiar with the Tucker Method of Signing contained in the Student's original IEP (Finding of Fact No. 55), and that the Student's teachers were not sufficiently able to understand and address the Student's disability (Finding of Fact No. 8).

The Student objects to the retroactive application of the IDEIA two-year statute of limitations (SOL) and the IHO's consideration of matters subsequently barred by the application of the SOL. The Student argues the exclusion of matters pre-August 18, 2003, is error because the Student had not been advised of her rights to a due process hearing.

The Student objects to the IHO's determination that the school corporation provided sufficient Extended School Year services (ESY) because the services were not spread out over time, and the service time frame was improperly rationalized by unavailability of personnel (Conclusion of Law A1).

The Student asserts the IHO's determination that the School provided sufficient speech and occupational therapy for the Student was contradicted by the facts (Conclusion of Law A2). The Student also argues that the evidence supports a conclusion that the Student was not provided evaluations in a timely fashion and changes were made to the IEP without notification to the Student (Conclusions of Law A3 and A5).

The Student challenges the Order to provide the Student with math instruction in the resource room as error based on least restrictive environment availability. The Student objects to the Order to implement Dr. Steck's recommendations as depriving the Student of a FAPE by mandating services that create a charge to the parents.

Response to Petition for Review

The School asserts that the IHO's Findings of Fact support the Conclusions of Law and the Board of Special Education Appeals should affirm the decision. The response argues that there is no evidence to support the Student's contention that Dr. Steck's testimony should be given less weight than that of Dr. Samango-Sprouse and in fact their evaluation findings are consistent.

The School cites the transcript and exhibit record in response to the Student's allegations that procedural safeguards and copies of "evaluations, IEP's, reports and the like" were not provided.

⁶ The Student, in the Petition for Review, identifies the date of this occurrence as spring/summer 2004. However, the record indicates that this event took place between May and August of 2005. For purposes of this appeal, the issue identified by the Student and in the hearing record will be considered to be one and the same.

The School also argues that the Student has provided no evidence to support her argument that consent was not “fully informed” or given under duress.

The School defends the IHO’s recognition of the two-year statute of limitations and supports its position with case law and previous BSEA decisions. The School also alleges that testimony supports the IHO’s finding that parents were provided an opportunity to discuss evaluation results prior to case conferences and the failure of the School to provide the Student’s record did not result in harm.

The School contends the Student’s objections to personnel qualifications are contrary to the evidence and evidence was presented that supports Finding of Fact No. 58 related to teachers’ reading of information on Triple X Syndrome.

The School supports the IHO’s Conclusion of Law with respect to the appropriateness of the two-year SOL, and the sufficiency of speech therapy, occupational therapy and ESY services based on previously cited case law, BSEA decisions, and testimony provided at the hearing.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

On July 6, 2006, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows:

Combined Findings of Fact and Conclusions of Law

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right power, privilege, or immunity; in excess of the IHO’s jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. The Student timely filed a Petition for Review.
3. The record supports that the parents were provided with their procedural safeguards at each Case Conference Committee meeting. The parents had numerous Case Conference Committee meetings. The evidence and testimony provided at the hearing support the IHO’s Findings of Fact Nos. 13-19.

4. The record and testimony at the hearing support the IHO's Finding of Fact No. 20 that parents were provided their procedural safeguards during the period in question.
5. The results of Dr. Steck's evaluation included in the IHO's Findings of Fact Nos. 26-30 are supported by the record and testimony provided at the hearing. The IHO has the advantage of being present to hear testimony and to assess the credibility of witnesses.
6. The record and testimony given at the hearing support the IHO's Findings of Facts Nos. 31-35. The IHO does not have to include all testimony in the findings of fact.
7. 511 IAC 7-25-4 (l) provides that parents shall have the opportunity to review evaluation results prior to the case conference committee meeting. Testimony, supported by documentation in the record, indicates the Student had such opportunities. Finding of Fact No. 48 is supported by the record.
8. The IHO correctly stated Findings of Fact Nos. 52-53. They are supported by the record and the testimony given at the hearing.
9. The IHO's Finding of Fact No. 55 accurately indicates that the Student's current teacher is trained in the Tucker Method.
10. The testimony given at the hearing demonstrates that information provided on the Student's specific disability was read by the School's teachers and supports the IHO's Finding of Fact No. 58.
11. IDEA 2004 contains a two-year statute of limitations period for filing for a due process hearing. In the instant matter, the issues, as identified by the IHO in the Prehearing Order, were properly subject to the two-year statute of limitations. The Student did not object to the statement of issues as contained in the Prehearing Order.
12. The IHO's Conclusions of Law Nos. A1-5 are supported by the record and the testimony given at the hearing. The School complied with administrative requirements and provided an appropriate program reasonably calculated to provide educational benefit to the Student as it related to Extended School Year (ESY) services under 511 IAC 7-21-3 (b). Procedural errors do not create harm if there is no resulting loss of FAPE. The Student agreed to the ESY IEPs developed by the CCC.
13. The IHO's Conclusion of Law (C) on the issue of harm to the Student due to the School's failure to provide FAPE is supported by testimony and the record. The School provided special education and related services in accordance with the Student's individualized education program and made a good faith effort to assist the Student to achieve the goals and objectives listed in the Student's IEP (511 IAC 7-27-8). The Student did make educational progress. The Student participated in CCC meetings and contributed to IEPs.

14. The School conceded the failure to provide the Student's record in its entirety. The IHO's Conclusion of Law (E) that the mistake was made in good faith and did not result in denial of FAPE is not contrary to law and is supported by the evidence.
15. The testimony supports the IHO's finding that the Student's new teacher was trained in the Tucker Method. The IHO properly concluded (Conclusion of Law F) the Student's teachers were properly licensed. Although the speech technician was not registered as a speech aide in a school supervised by a speech pathologist, she had been registered while in private practice and met the qualifications to work as a speech aide.
16. Neither IDEA nor Article 7 requires a School District to employ a particular methodology. Schools are not required to provide services that maximize each child's potential. IDEA and Article 7 guarantee an "appropriate education," but do not guarantee everything that might be desirable.
17. The documented communication between the School and the Student supports the IHO's Conclusion of Law (I) that sufficient notice was provided in response to their requests.

ORDERS

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

1. Findings of Fact Nos. 13-19, 20, 26-30, 31-35, 48, 52-53, 55, and 58, and Conclusions of Law Nos. 1, A1, 2, 3, and 5, C, E, F, and I are upheld as written.
2. The IHO's decision is affirmed in its entirety.
3. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

Date: July 6, 2006

/s/Cynthia Dewes _____
Cynthia Dewes, chair
Board of Special Education Appeals

APPEAL RIGHT

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