

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 M.C. and)
the MSD of Southwest Allen Co.) **Article 7 Hearing No. 1588.06**
)
Appeal From the Decision of:)
James A. Jacobs, Ph.D.,)
Independent Hearing Officer)

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History¹

A request for a due process hearing was initiated by the Student² in a letter dated June 5, 2006, to the superintendent of the local school corporation, the MSD of Southwest Allen County (hereinafter, the "School"), which was forwarded to and received by the Indiana Department of Education on June 6, 2006. James A. Jacobs, Ph.D., was appointed as the Independent Hearing Officer (IHO) on June 6, 2006, with July 21, 2006, as the original date for a final written decision. A telephonic prehearing conference was conducted on June 13, 2006, with counsel for the parties, the Student's parents, and representatives from the School in attendance. During this conference, both parties agreed to waive the resolution session and subsequently provided the IHO with a written agreement regarding waiver of the resolution session. The issues submitted for hearing on the original request for hearing were:

1. That the School failed to devise appropriate IEP's for the Student in the following ways:
 - a. The School failed to use scientifically based, peer-reviewed methods of instruction with the student.
 - b. Failed to conduct an appropriate and timely functional behavior assessment and failed to devise an appropriate behavior intervention plan with positive reinforcers and strategies for the Student.
 - c. That the IEPs³ didn't contain an appropriate plan for speech therapy, occupational therapy, vision therapy or self-help skills for the Student.

¹The Procedural History is taken substantially from the Independent Hearing Officer's final written decision. Neither party objected to the IHO's recitation of the procedural history. Corrections and additions have been made where warranted.

²"Student" shall refer to the Petitioner or Petitioner's parents, depending upon context.

³"IEP" refers to an Individualized Education Program. See 511 IAC 7-17-44.

- d. That the IEPs didn't contain appropriate and measurable goals and objectives in the entire Student's areas of need.
 - e. That the IEPs didn't offer the Student appropriate extended school year (ESY) services, ISTEP⁴ remediation, self-help skills remediation, counseling services and social skills training.
 - f. That the school failed to offer the Student programming in her least-restrictive environment (LRE).
2. That the School failed to provide progress reports to the parents on the Student's progress (or lack thereof) on her IEP goals and objectives on either the time schedule required by law or pursuant to the Student's own IEP.
 3. That the School failed to ensure that its staff was appropriately certified, licensed and trained in all the areas of the Student's disabilities.
 4. That the School made decisions about the child's programming outside the case conference process.
 5. That the School failed to provide written notice to the parents when the School denied or ignored the family's requests for provision of "free appropriate public education" (FAPE)⁵ to the Student.
 6. That the School violated the stay-put provisions of 511 IAC 7-17 *et seq.* ("Article 7") and the Individuals with Disabilities Education Act (IDEA)⁶ in regard to the Student's part-time placement at the Fort Wayne Center for Learning by withholding payment for same.
 7. The family asked the IHO to determine whether a two-year statute of limitations should not apply in this matter. They asked because one of the provisions of the new federal law says that if the School failed to provide information that it was required to give to the family, the two-year statute of limitations should not apply. Specifically, the School failed to include in its notice of procedural safeguards a notice that a two-year statute of limitations would apply, and it also failed to provide progress reports on the Student's goals and objectives.
 8. That the School failed to timely and appropriately evaluate the Student, pursuant to a settlement agreement executed in this matter, and as such whether the School should be ordered to reimburse the family for the costs of the private evaluations it is seeking.
 9. That the School failed to conduct standardized testing of the Student in the same manner as her regular-education peers, such as the ISTAR and NWEA.
 10. That the School has failed to reimburse the parent for transportation costs.

Respondents' did not challenge the adequacy of the hearing request. However, the IHO determined that the issues, as stated, were without necessary clarity and specification.

⁴"ISTEP" refers to the Indiana Statewide Testing for Educational Progress." See I.C. § 20-18-2-10.

⁵See 511 IAC 7-17-36.

⁶State and federal law require generally that a student remain in the student's current educational placement (the "stay put" placement) during the pendency of administrative proceedings. See 511 IAC 7-30-3(j) of Article 7 and 20 U.S.C. § 1415(j).

Therefore, the IHO requested that the parties review the issues as presented and resubmit same to the IHO. Parties agreed to review the issues submitted by the Student and resubmit an agreed-upon list of issues to the IHO not later than June 29, 2006. The IHO received a modified wording of issues from parties on June 29, 2006. Counsel for the School was provided until July 10, 2006, to respond in writing to these newly agreed-upon issues. A second telephonic prehearing conference was scheduled for August 14, 2006. The dates of August 22, 23, 24 and 25, 2006, were scheduled for hearing with August 28, 2006, being reserved for continuation should a fifth day be necessary. Parties elected to receive an electronic verbatim transcript of the hearing and the IHO's written decision in this matter. Counsel for the Student requested a fifty-nine (59) day extension of time for this matter to be heard and the IHO's decision rendered, thus extending the date for a decision to be issued in this matter until and including September 26, 2006. The IHO verbally granted this request for an extension of time. The Student agreed that a neutral site for hearing was not necessary, and as such, the hearing was scheduled to be held in the School's Transportation Building. No subpoenas were requested. A prehearing order was issued on June 16, 2006, which delineated procedural requirements for hearing and provided a *Notice of Rights* to both parties. An *Order Granting Request for Extension of Time* was provided to both parties by facsimile transmission on June 16, 2006.

The IHO received a *Partial Motion for Summary Judgment* from the School on June 23, 2006, wherein the School requested that the Student be barred from raising any claims or putting on any evidence relating to claims that arose prior to August 18, 2004, and for all other relief just and proper in the circumstances. On June 28, 2006, the IHO provided to Student a *Notice of Petitioner's Right to Respond to Respondent's Partial Motion for Summary Judgment*. The IHO received such response on July 7, 2006. The IHO received *Respondent's Reply in Support of Partial Summary Judgment* on July 7, 2007.

On June 29, 2006, the IHO received *Petitioner's Motion for Order Defining Student's "Stay-Put" Placement and Motion for Order for School to Continue to Pay for Stay Put Placement*. On June 30, 2006, the IHO provided the School a *Notice of Respondent's Right to Respond to Petitioner's Motion for Order Defining Student's "Stay-Put Placement" and Motion for Order for School to Continue to Pay for Stay Put Placement*. The School provided the IHO such response dated July 7, 2006.

On July 6, 2006, the IHO received a request from the Student that the IHO order the School to provide the Student copies of all educational records at no cost. On this same date, the IHO received the School's response to this request.

The IHO notified the parties that a prehearing conference was to be scheduled for either July 11 or 12, 2006, at the discretion of the parties, by *Notice of Prehearing Conference*, dated June 30, 2006. The prehearing conference was scheduled in order to address the following matters:

1. Respondent's Partial Motion for Summary Judgment,
2. Petitioner's Response to Respondent's Partial Motion for Summary Judgment,
3. Petitioner's Motion for Order Defining Student's "Stay Put Placement,"
4. Petitioner's Motion for Order for School to Continue to Pay for Stay Put Placement,
5. Respondent's response to items 3 and 4 above,

6. Clarification of Petitioner's document of June 29, 2006, wherein Petitioner stated Issues proposed for hearing, and
7. Any other matters as may be identified by the Independent Hearing Officer.

A subsequent *Notice of Prehearing Conference* was issued on July 10, 2006, scheduling a prehearing conference for July 12, 2006, to address, the following additional matters:

1. Motions and Cross Motions filed by parties.
2. Confirming issues to be decided in this matter.
3. Other matters as deemed appropriate.

A telephonic prehearing conference was held on July 12, 2006. The Student was represented by counsel and the Student's parents. Counsel for the School and additional representatives from the School were in attendance. An *Order on Prehearing Conference and Affirmation of Hearing Dates* was issued the same day. A re-wording of the previously stated issues resulted in the following issues as those to heard in this matter:

During the 2004-2005 and 2005-2006 School Years, did the School—

1. Fail to use scientifically based, peer-reviewed methods of instruction when implementing the goals and objectives contained in the Student's IEP(s)?
2. Fail to appropriately and timely conduct a Functional Behavioral Assessment (FBA)⁷?
3. Fail to devise an appropriate Behavioral Intervention Plan (BIP)⁸ based on the principles of positive behavioral supports?
4. Fail to provide speech therapy as required by the Student?
5. Fail to provide occupational therapy as required by the Student?
6. Fail to provide vision therapy as required by the Student?
7. Fail to provide self-help skills training as required by the Student?
8. Fail to provide for ESY services as required by the Student?
9. Fail to provide measurable goals and objectives in each area of identified need as recorded in the Student's IEP?
10. Fail to provide ISTEP remediation as required by the Student?
11. Fail to provide counseling services as required by the Student?
12. Fail to provide social skills training as required by the Student?
13. Fail to provide required or necessary educational services for the Student in the LRE?
14. Fail to provide progress reports to the Parents as required by the Student's IEP(s) or Article 7?
15. Fail to ensure that its staff was appropriately certified, licensed or trained to provide the Student those services as contained in the Student's IEP?
16. Make the following decisions regarding the Student's educational program outside the Case Conference Committee (CCC)⁹ process?

⁷See 511 IAC 7-17-38.

⁸See 511 IAC 7-17-8.

⁹See 511 IAC 7-17-10.

(The School requested a list of any alleged violations. The Student was provided ten (10) calendar days in which to provide this information to the IHO and the School. The School was provided an additional seven (7) calendar days to respond to those alleged violations. The IHO reserved the right to accept, modify, or reject the Student's listing of alleged violations inappropriately made by the School.)

17. Violate the "stay-put" provisions of Article 7 or IDEA by withholding payments to the Fort Wayne Center for Learning?
18. Fail to evaluate the Student within the timelines established by Article 7 or a previous settlement agreement?
19. Fail to conduct mandated statewide assessment(s) of the Student, specifically either ISTEP or ISTAR as required by Article 7 or the Student's IEP(s)?
20. Fail to reimburse the Parents for the costs of transportation as required by previous written agreement or Article 7?

The IHO determined that the rewording of issues, as stated above, did not occasion the need to recompute timelines as previously established in that no new issues were presented. The IHO determined that the School could charge the Student up to and including the School's actual cost per page for copying the Student's educational records. The previously established dates for hearing were affirmed as well as the site for hearing. A *Notice of Rights* available to both parties was included in this *Order*.

An *Order Granting Respondent's Motion for Partial Summary Judgment* was issued on July 12, 2006, wherein the School's *Motion for Partial Summary Judgment* was granted. As such, a two-year statute of limitations was to be in effect in regard to all issues to be considered in this matter.

On June 16, 2007, the IHO issued an *Order Defining the Student's Stay-Put Placement*. This *Order* contained the following:

1. The Student is eligible to receive ESY services during the summer of 2006.
2. These services shall be provided by the Fort Wayne Center for Learning.
3. These services shall be provided for a period of up to four (4) calendar weeks, five (5) days per week, or the number of weeks, or days, provided the Student as ESY services during the summer of 2005, whichever is less.
4. The School shall be responsible for payment of these services.
5. The Parents and the School are encouraged to mutually agree as to which four (4) weeks of services are to be provided as ESY services. If agreement cannot be reached by consensus, the School shall have the authority to specify the weeks the Student is to receive ESY services during the summer period of 2006. Services must be completed prior to the beginning of the 2006-07 academic school year.
6. If the Student has been enrolled prior to this date at the Fort Wayne Center for Learning and subsequent to June 6, 2006, such period of time may, at the option of the School, be counted toward the four (4) week obligation required of the School to provide ESY services. If the Student has been attending the Fort Wayne Center for Learning since June 6, 2006, for a time period exceeding fifteen hours per week, the School is

authorized to obtain an adjusted invoice reflecting cost for services based on a maximum attendance of fifteen (15) hours per week and reimburse the Parents accordingly.

The IHO received correspondence from the Student regarding additional specificity of the issue alleging unilateral decisions made outside the CCC process. The School responded to this additional specificity on July 25, 2006, by objecting to its inclusion for hearing.

The Student submitted a *Motion for Continuance* in this matter on August 4, 2006, basing such request on the non-availability of a previously requested evaluation of the Student by an outside evaluator, Dr. Ronald C. Savage. Additionally, the Student requested a forty (40) day extension of time in this matter "...so that the evaluation results may be utilized by all parties in an effort to resolve their differences, and so that the evaluation results may be available for use during the due process hearing." The IHO provided, by *Notice of Respondent's Right to Respond*, the School an opportunity to respond to the Student's request for a continuance and an extension of time in this matter prior to the IHO issuing a ruling. The School responded on August 9, 2006, stating that, "...while believing that its own evaluations, assessments, and testing have rendered more than sufficient information to provide the Student an appropriate education, it welcomes any additional information that could prove helpful." The School further requested that the continuance not exceed forty (40) days. The IHO issued an *Order Granting Request for Extension of Time* on August 15, 2006. The new date by which this matter was to be heard and the IHO's decision be issued was determined to be November 4, 2006.

By agreement of the parties a telephonic prehearing conference was held on August 14, 2006. The Student was represented by counsel and the Student's parents. Counsel for the School and additional representatives from the School were in attendance. The IHO issued an *Order on Prehearing Conference and Notice of Change of Hearing Dates* on August 15, 2006. As a result of this prehearing conference, new hearing dates of October 4, 5, 6, 9, and 10, 2006, were selected. Issues 1-15 and 17-20 as stated in a previous *Order* were affirmed. Issue sixteen (16) as stated in previous *Order* was dismissed. The parties entered into a mutual agreement concerning the educational placement of the Student during the pendency of this matter. A *Notice of Rights* available to both parties was included in this *Order*.

Subsequent to the prehearing conference of August 14, 2006, a dispute arose between parties regarding the dates of and payment for private services. On August 29, 2006, the IHO issued an *Order Restating Dates for Private Services* in order to resolve this dispute.

On September 14, 2006, the Student, by counsel, through a letter to the Indiana Superintendent of Public Instruction, requested that an additional issue be added to those currently approved by the IHO. The IHO received notification of the Student's request from the Division of Exceptional Learners, Indiana Department of Education, on September 15, 2006. Contained therein was the following proposed issue: "Whether the School failed to devise an appropriate and timely IEP for the [S]tudent for the 2006-07 School year."

On September 20, 2006, the IHO was notified by the School that certain evaluation reports remained unavailable to them. The Student, through counsel, responded that they were not compelled to release any records in their possession to the School prior to the established

exchange date. The IHO received correspondence from the School wherein the School issued a *Motion for Continuance of Hearing and Other Relief*, a *Motion for Summary Judgment*, and *Respondent's Answer to Petitioner's Due Process Hearing Request, and Affirmative Defenses*.

The Student filed *Petitioner's Response to Respondent's Motion for Summary Judgment and Petitioner's Motion to Strike* on September 23, 2006. The IHO received *Respondent's Reply in Support of Motion for Continuance of Hearing and Other Relief* on September 24, 2006.

On September 26, 2006, the IHO issued an *Order Granting Request for Extension of Time*, wherein the School's request for a thirty (30) day extension of time was granted. As such, this extension established December 4, 2006, as the date by which this hearing was to be concluded and the hearing officer's written decision issued.

Pursuant to a *Notice of Prehearing Conference* dated September 6, 2006, and by agreement of the parties, a prehearing conference was held on September 25, 2006. The Student was represented by counsel and the Student's parents. Counsel for the School and additional representatives from the School were in attendance. An *Order on Prehearing Conference* was issued on September 26, 2006. This *Order* included, among other things:

1. The IHO stated that he would rule on the Student's request to add an issue in writing subsequent to this prehearing conference.
2. Issues for hearing were discussed and affirmed, less the additional issue proposed by the Student.
3. The IHO stated that he would rule on the School's request for continuance and extension of time in writing subsequent to this prehearing conference.
4. The IHO received a verbal request from the School to order the Student to grant written authorization for the School to release any and all educational records pertaining to the Student to experts of the School's choosing in preparation for hearing. The IHO stated that he would rule on the School's request in writing subsequent to the current prehearing conference.
5. A *Notice of Rights* was provided to both parties.

On September 27, 2006, the IHO issued an *Order of Petitioner's Motion to Add Issue* wherein the School's *Motion for Summary Judgment* was granted and the Student's request to add an additional issue to this matter was denied. On this same date the IHO issued an *Order Granting the School Permission to Release Student's Records*.

Pursuant to a *Notice of Prehearing Conference* dated September 20, 2006, and by agreement of the parties, a prehearing conference was held on October 4, 2006. The Student was represented by counsel and the Student's parents. Counsel for the School and additional representatives from the School were in attendance. An *Order on Prehearing Conference* was issued on October 4, 2006. This *Order* included, among other things that:

1. Dates for hearing would be October 30, 31, November 1, 3, and 6, 2006.
2. The IHO would respond to the Student's *Motion to Strike* by separate *Order*.
3. The previously agreed-upon site for hearing was affirmed.
4. The following nineteen issues were affirmed:

During the 2004-2005 and 2005-2006 School Years, did the School–

1. Fail to use scientifically based, peer-reviewed methods of instruction when implementing the goals and objectives contained in the Student's IEP(s)?
2. Fail to appropriately and timely conduct an FBA?
3. Fail to devise an appropriate BIP based on the principles of positive behavioral supports?
4. Fail to provide speech therapy as required by the Student?
5. Fail to provide occupational therapy as required by the Student?
6. Fail to provide vision therapy as required by the Student?
7. Fail to provide self-help skills training as required by the Student?
8. Fail to provide for ESY services as required by the Student?
9. Fail to provide measurable goals and objectives in each area of identified need as recorded in the Student's IEP?
10. Fail to provide ISTEP remediation as required by the Student?
11. Fail to provide counseling services as required by the Student?
12. Fail to provide social skills training as required by the Student?
13. Fail to provide required or necessary educational services for the Student in the LRE?
14. Fail to provide progress reports to the Parents as required by the Student's IEP(s) or Article 7?
15. Fail to ensure that its staff was appropriately certified, licensed or trained to provide the Student those services as contained in the Student's IEP?
16. Violate the "stay-put" provisions of Article 7 or IDEA by withholding payments to the Fort Wayne Center for Learning?
17. Fail to evaluate the Student within the timelines established by Article 7 or a previous settlement agreement?
18. Fail to conduct mandated statewide assessment(s) of the Student, specifically either ISTEP or ISTAR as required by Article 7 or the Student's IEP(s)?
19. Fail to reimburse the Parents for the costs of transportation as required by previous written agreement or Article 7.

On October 26, 2006, the IHO issued a *Response to Petitioner's Motion to Strike as Contained in Petitioner's Motion for Summary Judgment and Petitioner's Motion to Strike* wherein the Student's request that the document specified would not be considered in this matter. On October 5, 2006, the IHO Issued a *Response to Petitioner's Motion to Clarify, Motion to Correct Errors and Motion to Reconsider*, wherein the IHO denied, in total, both of the Student's motions.

A *Motion to Withdraw* was received by the IHO on October 12, 2006, from counsel for the Student at the request of the Student. The IHO granted this request by *Order Granting Counsel's Motion to Withdraw* on October 16, 2006. The IHO received a *Motion to Dismiss, or in the Alternative, Exclude All Reports and Testimony of Petitioner's Experts* on this same date, October 12, 2006. Further, on the same date, the IHO received a notice from attorneys John C. Theisen and Holly A. Brady of their appearance in this matter as representatives for the Student. In that both parties were currently licensed to practice law in the State of Indiana, the IHO, by

Notice of Acceptance of Appearance, dated October 18, 2006 accepted their appearance as representatives of the Student in this matter.

On October 16, 2006, the IHO received from the Student a *Motion for Admission of John B. Comegno, II, Esq.*, and a *Motion to Continue Hearing*. On October 17, 2006, the IHO, through *Response to Petitioner's Motion to Continue Hearing*, provided the School three (3) calendar days in which to respond to said *Motion*.

On October 18, 2006, the IHO responded to the Student's request to admit John Comegno, Esq. as counsel for the Student. In this communication, the IHO admitted John Comegno, Esq., as Advocate for the Student, until such time as Mr. Comegno was admitted *Pro Hac Vice* to represent the Student in this matter.

On October 18, 2006, the IHO through *Notice to Petitioner of Intent to Rule on Respondent's Motion to Dismiss, or, in the Alternative, Exclude all Reports and Testimony of Petitioner's Experts and Petitioner's Motion to Continue Hearing*, informed the Student that the IHO had not received a response from the Student regarding this matter, and should such not be forthcoming by October 20, 2006, he would rule without consideration of a response to this issue from the Student.

The IHO received *Respondent's Response to Petitioner's Motion to Continue Hearing* on October 20, 2006. Within this response the School stated that "Nevertheless, if this matter is not dismissed, the School does not object to the latest continuance sought by Petitioners."

The IHO, by *Order Granting Request for Petitioner's Motion to Continue*, dated October 20, 2006, granted the Student's request for continuance of the hearing. New hearing dates were to be determined at the prehearing conference scheduled for October 20, 2006. On October 20, 2006, the Student requested a sixty (60) day extension of time for this matter to be heard and the IHO's decision be issued. By *Order Granting Request for Extension of Time*, dated October 20, 2006, the IHO granted the Student's request. The previous date by which this matter was to be heard and the IHO's decision be issued was December 4, 2006. The new date by which this matter must be heard and the IHO's decision be issued was February 3, 2007. Additionally, on October 20, 2006, the IHO, by *Order Denying Respondent's Motion to Dismiss or, in the Alternative, Exclude all Reports and Testimony of Petitioner's Experts*, denied the Schools' *Motion*.

Pursuant to a *Notice of Prehearing Conference* dated October 19, 2006, and by agreement of the parties, a prehearing conference was held on October 20, 2006. The Student was represented by counsel and the Student's parents. Counsel for the School and additional representatives from the School were in attendance. An *Order on Prehearing Conference* was issued on October 21, 2006. This *Order* included, among other things:

1. The hearing would be conducted on November 27, 28, 29, and December 4 and 5, 2006.
2. There are nineteen (19) issues to be decided in this matter. These are:

During the 2004-2005 and 2005-2006 School Years, did the School–

1. Fail to use scientifically based, peer-reviewed methods of instruction when implementing the goals and objectives contained in the Student IEP(s)?
2. Fail to appropriately and timely conduct an FBA?
3. Fail to devise an appropriate BIP based on the principles of positive behavioral supports?
4. Fail to provide speech therapy as required by the Student?
5. Fail to provide occupational therapy as required by the Student?
6. Fail to provide vision therapy as required by the Student?
7. Fail to provide self-help skills training as required by the Student?
8. Fail to provide for ESY services as required by the Student?
9. Fail to provide measurable goals and objectives in each area of identified need as recorded in the Student's IEP?
10. Fail to provide ISTEP remediation as required by the Student?
11. Fail to provide counseling services as required by the Student?
12. Fail to provide social skills training as required by the Student?
13. Fail to provide required or necessary educational services for the Student in the LRE?
14. Fail to provide progress reports to the Parents as required by the Student's IEP(s) or Article 7?
15. Fail to ensure that its staff was appropriately certified, licensed or trained to provide the Student those services as contained in the Student's IEP?
16. Violate the "stay-put" provisions of Article 7 or IDEA by withholding payments to the Fort Wayne Center for Learning?
17. Fail to evaluate the Student within the timelines established by Article 7 or a previous settlement agreement?
18. Fail to conduct mandated statewide assessment(s) of the Student, specifically either ISTEP or ISTAR, as required by Article 7 or the Student's IEP(s)?
19. Fail to reimburse the Parents for the costs of transportation as required by previous written agreement or Article 7.

The Parties entered into a written agreement regarding the placement of the Student until the IHO's decision was issued in this matter. This agreement was dated October 25, 2006, and received by first class mail by the IHO on October 28, 2006.

The IHO received the Student's *Supplemental Motion for Admission of John B. Comegno, II* on November 16, 2007, wherein Mr. Comegno had been admitted *Pro Hac Vice* to represent the Student in this matter through *Judgment Entry* issued by David J. Avery, Judge, Allen County Superior Court, Cause number 02001-0611-M1-14640, dated November 14, 2006. By *Response to Supplemental Motion for Admission of John B. Comegno, II*, dated November 22, 2006, the IHO granted the Student's request that Mr. Comegno be admitted to represent the Student in this matter as attorney for the Student.

The School requested the IHO, through *Respondent's First Motion in Limine*, dated November 20, 2006, that the IHO rule that the Student's exhibits II-EE, II-FF, II-GG, be stricken in their

entirety, along with pages 782 through 784 of exhibit II-LL. Further, by *Respondent's Motion for Involuntary Dismissal of Petitioner's Claims 10 and 18*, the School requested that the IHO involuntarily dismiss the Student's claims to issues ten (10) and eighteen (18) as previously identified.

Pursuant to a telephonic *Notice of Prehearing Conference*, and by agreement of the parties, a prehearing conference was held on November 30, 2006. The Student was represented by counsel, John B. Comegno, Esq. The School was represented by Jason T. Clagg, Esq. An *Order on Prehearing Conference and Notice of Additional Date for Hearing* was issued on December 2, 2006. The purpose of this prehearing conference was to establish the date of December 18, 2006, as an additional date for hearing, should such be necessary.

The hearing was conducted on November 27, 28, 29, and December 4 and 5, 2006. Subsequent to the Student resting her Case in Chief at hearing, the IHO received a motion from the School requesting involuntary dismissal of the Student's issues 10 and 18. By *Order Granting Respondent's Motion for Involuntary Dismissal of Petitioner's Claims 10 and 18*, dated December 2, 2006, which was subsequent to the Student having rested her Case in Chief, and having reserved the right to only call rebuttal witnesses regarding these issues, the IHO granted the School's *Motion*. Thus, issue ten (10), previously worded as during the 2004-2005 and 2005-2006 School years, the School "failed to provide ISTEP remediation as required by the Student" was dismissed with prejudice. Likewise, issue eighteen (18), previously worded as during the 2004-2005 and 2005-2006 School years, the School "failed to conduct mandated statewide assessments(s) of the Student, specifically either ISTEP or ISTAR, as required by Article 7 or the Student' IEP(s)" was dismissed.

Based on the testimony at the hearing and in consideration of the documentary evidence submitted, the IHO determined the following 153 Findings of Fact.

FINDINGS OF FACT

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 the authority to hear and rule upon all matters presented.

2. All Findings of Fact that can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact.

3. It was determined that all due process procedures were in compliance with requirements of 511 IAC 7-30-3 and IC 4-21.5 *et seq.*

4. The Student is fourteen years, six months old (DOB 7-15-92) and has been identified as having multiple disabilities.

5. The Student has been identified as having a communication disorder .

6. The Student has been identified as having a visual impairment.

7. The Student has been identified as having significant speech difficulties.

8. At the age of three months the Student suffered a stroke that resulted in significant damage to the right hemisphere, left hemisphere, and frontal lobe of her brain.

9. Among other difficulties, the Student has significant difficulty controlling drooling.

10. The parties entered into a settlement agreement on August 4, 2004.

11. The settlement agreement was composed by the Student's father, who is an attorney-at-law (Respondent's (R) exhibit 4).
12. This settlement agreement included, among other things:
 - a. The School's obligation to pay for ESY services at a private facility for a four-week period of time.
 - b. The School's agreement to provide transportation for the Student after 2:15 p.m. However, it was noted that the mother would "likely" provide such transportation.
 - c. The Student's parents agreed "...to release the [S]chool from any civil liability for any events prior to the signing of an agreed IEP for the 2004-2005 School year following the case conference."
13. The Student's parent (mother) subsequently agreed with the services to be provided the Student by the School as listed in this IEP, and signed this IEP on August 18, 2004 (R 6, 0009). This IEP specified those programs and services that were to be provided to the Student for the 2004-2005 School year.
14. On August 19, 2005, the Student's parent (mother) agreed to services specified in the IEP proposed by the School which specified those programs and services that were to be provided to the Student for the 2004-2005 School year (Petitioner's XX, pages 000323-000335).
15. The IEP of August 28, 2004, stipulated that the Student was to receive ninety (90) minutes of instruction from the School, 100% pull-out, each day for each of the two academic semesters. The Student was to spend the remainder of the school day (4 hours per day) for the 2004-2005 School year at the Fort Wayne Center for Learning (FWCL) at the School's expense.
16. By parental choice, the Student was enrolled, full-time in the local School corporation for the 2005-2006 School year.
17. Throughout the 2005-2006 school year the Student's education was provided consistent with the then-current IEPs, as amended during this time period.
18. Throughout the 2005-2006 school year, the Student received part of her educational services in pull-out programs and the remainder in general education settings.
19. Throughout the 2005-2006 School year, the Student received the support of a one-to-one full time instructional assistant whenever participating in the general education environment.
20. The School provided sufficient in-service training to this instructional assistant to adequately prepare the instructional assistant to provide those services and supports required by the Student as reflected in the Student's IEP.
21. In addition to the services provided by the School at the Student's public school and the FWCL, the School offered to provide speech, vision, and occupational therapies to the Student.
22. The Student's parents unilaterally refused those related services, choosing instead to seek private services at their expense.
23. The School incorporated suggestions and recommendations into the Student's educational program throughout the school year as it received such suggestions and recommendations from the private practitioners whose services had been obtained by the Student's parents.
24. At parental request, several of the goals and objectives contained in the Student's IEP(s) for the 2005-2006 School year corresponded with those specified in state standards for the grade level in which the Student was placed while attending general education classes.
25. Throughout this two-year time period, the Student's parents were provided multiple and continuing opportunities to influence the education of their Student, to include the academic

and related services to be provided the Student, who would provide such services, and the educational placement in which such services were to be provided.

26. The School responded appropriately to the Student's parental input by making multiple accommodations, adaptations to the Student's IEP as per parental request throughout this two-year period.

27. The Student is currently enrolled in the FWCL for part of the day and receives additional therapies (physical therapy, speech/language therapy and occupational therapy) from Lutheran Outpatient Rehabilitation Hospital due to the unilateral decision of the Student for such placement over the objection of the School. The Student's parents now come at hearing requesting that the IHO support their current request that the Student be placed full time in a combination of a private educational setting (FWCL) at the School's expense, and further, provide additional educational and psychological services beyond what the FWCL can provide through additional private practitioners at Lutheran Rehabilitation Center, at School expense.

28. As such, the Student is requesting complete removal from the public school setting.

29. Testimony from multiple witnesses clearly established that the Student has a "wonderful" sense of humor, enjoys her social relationships and daily interactions with her peers while at school, and has "positive relationships" with her teachers and other significant adults in the public school environment.

30. The School provided academic and social skills instruction in support of the goals and objectives contained in the Student's IEP(s), using nationally recognized and commercially published curriculum materials, to include, but not limited to, Project Read and Touch Math.

31. The School provided instructional strategies congruent with "best practices" for students with similar disabilities to those of the Student in this matter, to include oral stimulation exercises, speech cards, direct instruction in one-to-one and small group settings.

32. School personnel testified that, while enrolled in the public school setting during the 2005-2005 school year, the Student made multiple academic and social gains. Support for this testimony was offered by way of teacher notes and indications of progress on case conference summaries, multiple written reports, and progress reflected on report cards provided to the parents.

33. In addition to goals and objectives that were based on state standards during the 2005-2006 school year, and which were developed at the request of the Student, the School provided instruction in self-help skills, functional math and language, and daily living. Additional instruction/intervention in the control of the Student's drooling behavior was also provided.

34. ESY services provided by and paid for by the School were consistent with those requested by the Student for the summers of 2005 and 2006 and congruent with those recorded in the Settlement Agreement, dated August 14, 2004.

35. The School provided frequent feedback to the Student's parents during the periods of time the Student was enrolled in the public school by a variety of means, including nine-week reports, daily logs, other oral and written communication (including electronic mail), and multiple face-to-face meetings.

36. There was no credible evidence presented to establish that the Student required psychological counseling during the 2004-2005 or 2005-2006 school years.

37. All teachers and other "specialists" employed by the School who provided services to the Student during the 2004-2005 and 2005-2006 School years were appropriately licensed or certified to deliver the services or therapies so delivered.

38. Documents submitted by the School, and which were not contested by the Student, supports the School's position that all services provided by the FWCL as per the August 4, 2004, agreement have been made. There are no outstanding "bills" for which the School is responsible.

39. Transportation provided to the Student by the Student's parents was voluntary. The School agreed to provide any necessary transportation to the Student between home, school, and private school settings. The Student's parents have not presented the School with a written request for reimbursement for transportation services.

40. An agreed-upon IEP was in effect for each of the years in question in this matter. The Student's parents are well educated. The father is an attorney. The mother is a college graduate. Additionally, both were supported by private practitioners during the development of each IEP developed during this two-year period as well as any amendments thereto.

41. The Student is currently receiving all educational services in private facilities based on the unilateral decision of the Student at the Student's expense.

42. Dr. Barbara Fisher, Psychologist, conducted an extensive neuropsychological assessment of the Student, at the request of the Student's parents, on May 27 through 29, and July 9, 2006. Dr. Fisher reported that the Student's skills, as assessed by her, displayed a range of up to and including thirteen (13) standard deviations from the mean expected.

43. Dr. Fisher, Psychologist, testified for the Student that subsequent to such major trauma (stroke) as experienced by the Student that the brain can continue to develop; however, "research is divided on this issue." She further testified that "there is always hope." Dr. Fisher also stated that it is best to have such therapies shortly after an injury such as the one sustained by the Student.

44. In her neuropsychological report dated September 25, 2006, Dr. Fisher stated that specific suggestions were provided following each area of evaluation. "...However, the following general themes are suggested to be carried out in a small classroom with greater proportion of teachers or professionals to student ratio." (P. N, 000505) Dr. Fisher later testified that her recommendations were for a later time, not "now." Subsequently, she testified that some of these recommendations were actually for "now" and others were for "later." Still later she testified that the Student could only learn in a segregated one-to-one instructional environment.

45. Dr. Fisher testified that "it would be impossible to teach her (Student) with other students in the room." She strongly recommended an educational and therapeutic program (e.g., FWCL) that would completely isolate the Student from her peers for most, if not the entire instructional day, and further, that those students with whom the Student would have contact would also have significant disabilities.

46. On multiple assessments of intellectual ability conducted within the past two years, including those administered by Dr. Fisher, scores ranged from a low of 45 (Leiter) to a high of 84 (PPVT).

47. Dr. Fisher testified that while the Student needed social skills training, at the present time she did not have the "...capacity to receive..." such services. However, in her report, Dr. Fisher recommended, among other things, that the Student requires a "small classroom whereby she has more one on one instruction than anything else while providing sufficient time to socialize and learn in a larger classroom setting."

48. Dr. Fisher testified that the School's assessment "...revealed nothing of use..."

49. Amy Stauffer, M.D., Pediatric Neurologist, stated in her Report dated November 17, 2006, that based on a review of medical and educational data, that "...it appears that the Student is benefitting from the social interaction in her current school situation, in that it is a significant motivator. She also has the opportunity to learn in, socially and knowledge-wise, from her peers. These benefits need to be balanced with the more therapeutically intensive but also more socially isolated educational placement. At the age of fourteen, she may still improve with the kind of intensive support proposed, but at this late date the improvement is not likely to be of a degree that would outweigh the problem that may be created by removing her from her peer relationships, familiar environment, and motivating factors." Later she stated that, "With this much time elapsed between the brain injury and the present time, it is likely that the benefit would be modest at best."

50. Dr. Fisher testified that the Student would benefit from counseling services at this time.

51. Dr. Fisher testified that, while insisting that the School could not and did not provide appropriate services for the Student, she had little knowledge of the programs and services offered or provided by the School.

52. Dr. Fisher testified that the Student had no control over her drooling behavior.

53. Under cross examination, Dr. Fisher stated that she did not have any specific licensure as a neuropsychologist, and she was not affiliated with the national "Board" for neuropsychologists.

54. Dr. Fisher testified that she didn't know what curriculum or materials the School was using by which to provide instruction to the Student.

55. Dr. Fisher further testified that, assuming the Student would receive the intensive, segregated therapies she recommended, the Student could graduate from high School with a standard diploma, and college was a possibility. However, she went on to state that "Unless these therapies and direct instruction methodologies begin as soon as possible, it is my clinical opinion that [the Student] will most likely end up living in an institution."

56. Dr. Fisher testified that interaction with age-appropriate peers, while the Student wants to be social and is highly motivated by social interactions with her non-disabled peers, is not appropriate at this time.

57. Dr. Fisher testified that she had never visited the FWCL even though she was strongly recommending that facility as being the most appropriate LREE for the Student.

58. Dr. Fisher testified that the director of the FWCL knew what she was talking about regarding "brain research."

59. The director of the FWCL has no degree, or licensure in any area of psychology, neuropsychology, education, or special education. Her degree is in home economics and was obtained many years previously.

60. Lori Ailor, MS, OTR, Director of Outpatient Rehabilitation Services, Lutheran Hospital, testified that the services currently being provided the Student are "intensive" therapies, and that the services currently being received by the Student are "extremely" intensive for this community. Ms. Ailor further stated that the primary goal of these therapies, as provide by Lutheran Outpatient Rehabilitation Services, was to "assist the patient to achieve the highest level of independence possible." The current goals being addressed in her facility were to control drooling behavior, working on communication, improving handwriting, self-help skills of buttoning, zipping and dressing, and increased ambulation and improved strength.

61. Ms. Ailor testified that, in her opinion, the speech therapy the School had provided the Student did not provide any benefit. However, she further testified that she did not have

reasonable or accurate knowledge of what speech therapy the Student received during the past year from the School. This witness stated that she could not evaluate the possible benefits of OT and PT services previously provided by the School in that she had not seen any program reports of such services. In summary, this witness stated that she did not feel that the Student received any value from the School's services, including self-help skills, also referred to by the School as activities of daily living (ADL).

62. Ms. Ailor testified that intensive treatments "ten (10) years out" are not suggested by the preponderance of the research or practitioners in the field.

63. Anita Tom, M.S., CCC-SLP, Lutheran Hospital, Rehabilitation Department, testified that when the Student received intensive speech therapy, defined as six hours per day, six days a week, for three weeks, in June, 2004, the Student would make "tremendous" gains. However, when these intensive therapies were replaced by more modest interventions, the gains previously achieved by the Student rapidly deteriorated. Ms. Tom further testified that those professionals currently licensed as PT's, OT's, and SLP's who were not "grandfathered in" would have similar qualifications as those providing these same therapies at her facility. She further testified that "...a coordinated, integrated plan in schools would be possible," and that the Student would benefit from such interventions.

64. Under cross examination, Ms. Tom testified that intensive treatments for injury, such as those incurred by the Student, ten (10) years "out" are not suggested or supported by the preponderance of the research or practitioners in the field.

65. Ms. Tom's Speech Progress Summary, dated October 23, 1998, (P2, 000414-5) reveals that subsequent to receiving "intensive" speech therapy, defined as six (6) hours per day, six (6) hours per day for an extended periods of time, the Student would make "tremendous" gains. However, in this same report Ms. Tom offers that when such "intensive" therapies are discontinued, the prior gains are short lived and that the Student's skill levels are likely to "fluctuate greatly." Ms. Tom further testified that without these "intensive" speech therapies, the Student would not make any gains. However, under cross examination, it was learned that Ms. Tom has been the Student's speech-language pathologist (SLP) since 1998. Prior to April 2006, Ms. Tom provided services to the Student on a three times per month basis. When asked by counsel for the School if she perceived her services during this six-year period to be valuable, the witness' response was "yes."

66. Under cross examination, Ms. Tom testified that she agreed with Jennifer Barnes' statements in her report (R 26, 0003), which offered that "[the Student's] strengths include a desire to be at school, to be independent, and a desire to learn, she is confident and wants to make friends." At R 26, 0007. Ms. Tom supported a teacher's statement (Joan Ross) concluding that "She loves to socialize and be around people her own age. She seemed to enjoy learning about the Middle Ages and participating in the hands-on assignments. Ms. Tom also stated that she supported the observations and conclusions of Linda Rohrbacker, School Counselor, as reported in CCC notes dated January 20, 2006, that the Student is "...interacting with kids at lunch..." (R 45 0010).

67. Ms. Tom testified that she had not observed the Student in the school setting and therefore could not evaluate the quality of friendships the Student may have made, nor could she evaluate the extent to which peer relationships had been established in the public school environment.

68. Under questioning by the IHO, this witness testified that the private services currently being received by Student from Lutheran and the FWCL are “best” services that can be provided.

69. The IHO asked this witness what, if anything, the Student needs that she is not currently receiving from the intensive therapies being provided by Lutheran Rehabilitation Services and the FWCL. The witness’s response was “a peer interaction group.”

70. Olive Swenson, Executive Director of the FWCL and owner of Integrated Learning Systems, testified that the student population in her facility was composed of students with leaning disabilities, autism spectrum disorders, developmental delays, neurological difficulties, and “some gifted kids.” Ms. Swenson currently holds a degree in home economics. She is not licensed or certified by any professional educational, psychological, or medical organization. Ms. Swenson testified that she provides all the training for her instructors. The FWCL has ten “instructors.” Three were identified in documents/exhibits provided by the Student as licensed teachers, two in general education, elementary grades, and one general education, secondary education (R 92, 0017,-19). None have training beyond the bachelor’s degree. The FWCL is not licensed or recognized by any professional organization.

71. This witness testified that unless one was well versed in “brain research,” he/she would have little prospect of providing appropriate instruction for the Student. Under cross examination, Ms. Swenson stated that, beyond her independently obtained skills, no one at the FWCL has expertise in brain research. When queried by the IHO, she did not understand the term “haptic learning.”

72. Instruction received by the Student in the FWCL consisted of, and currently consists primarily of, one-to-one instruction with “occasional” small group instruction.

73. Ms. Swenson testified that teaching the Student to control her drooling behavior was the main focus for the 2005-2006 school year. She further testified interventions were “not very successful.”

74. The Student is currently receiving services from the FWCL for three (3) hours per day, one-to-one instruction, in mathematics. Ms. Swenson’s testimony revealed that there was a disagreement between the School and the FWCL regarding the most appropriate instructional methodology to be used when instructing the Student, curriculum-based (School) as compared to process-based instruction (FWCL). The witness later testified that the Student could receive benefit from curriculum-based instruction.

75. When queried about the method by which the FWCL provided the Student an opportunity for social interactions, the witness stated that the Student is provided an opportunity for social interaction, specifically “reciprocal interaction” between the Student’s instructor and the Student. However, Ms. Swenson further testified that the Student is sometimes distracted because “she is constantly seeking socialization.” The FWCL strongly endorses, and insists on using, the Lindamood Bell Instructional Methodology while the School more frequently uses the Project Read instructional methodology. Ms. Swenson testified that the Project Read curriculum is a recognized program which incorporates a multi-sensory approach to teaching.

76. The current service arrangement being provided at the initiative of the parents, and in response to their demands, through the FWCL and Lutheran Rehabilitation Services results in an extreme degree of separation of the Student from any meaningful contact or interaction with non-disabled peers.

77. Letter from the Student (R 118, 0001) presents a strong plea for re-establishing peer relationships at her public school.

78. Testing conducted through the FWCL is conducted by Ms. Swenson. However, Ms. Swenson was unable to demonstrate a fundamental understanding of such psychometric principles as reliability and validity. Only parts of achievement tests are used for the establishing baseline and progress of students instructed at the FWCL.

79. A functional behavioral assessment for drooling was administered on or about the end of May, 2006 (P 000659). This assessment resulted in the development of a behavior intervention plan (P 664a, 665).

80. The Parents rejected the related services offered by the School during the 2004-2005 and 2005-2006 School years. Additionally, the Parents chose to provide all “related services,” to include occupational, physical, vision and speech therapy from private practitioners at their own expense.

81. Ronald Savage, Ed.D., conducted a review of the assessments conducted by Barbara Fisher, Ph.D., (previously referenced) and issued a report of his review on September 3, 2006. (P 000648-653) Dr. Savage testified that “[the Student’s] brain is damaged forever, but to conclude that she [Student] can’t learn is a mistake.” Dr. Savage supported each of the recommendations made by Dr. Fisher as published in her evaluation. Dr. Savage also challenged each of the clinical opinions and recommendations of Dr. Couvillion, Pediatric Neuropsychologist, who later testified for the School in this matter.

82. Dr. Savage testified that several of the goals in the Student’s IEP dated August 18, 2004, were inappropriate. It was these same goals that the parents insisted be included in the Student’s IEP as the parents were insisting on the Student being enrolled in coursework that led to graduation from high school and passing Indiana’s high stakes graduation qualification examination (GQE) as part of the ISTEP. This IEP was signed by the parents as being in agreement with both the LREE and the goals and objectives recorded therein.

83. Dr. Savage testified that the IEP dated August 5, 2005, did not meet the Student’s needs. His testimony stated that reasonable goals for the Student over the next few years would be to live as independently as possible and have a social network.

84. Dr. Savage’s testimony and written report were based on responding to what had been provided to him by the Student and those employed by the Student. At the time of his report, Dr. Savage was unaware of the qualifications, or lack thereof, of any of the staff at the FWCL.

85. Dr. Savage testified that he had discussed this matter with Dr. Fisher, including her testimony, prior to giving his testimony. The School entered a motion that Dr. Fisher’s and Dr. Savage’s testimony be stricken. The IHO denied the motion. However, the IHO stated that he would consider the matter as a direct violation of the order from the IHO to Dr. Fisher that she not discuss her testimony with anyone other than counsel for the Student. The IHO stated that he would give the testimony of both witnesses the weight he felt they deserved in light of this violation.

86. The mother testified that the evaluation mentioned in the settlement agreement between the parents and the School dated August 4, 2004, was never conducted in that the parties could not agree on the evaluator. (P 000019(9)) She further testified that there was neither a functional behavioral assessment conducted nor subsequent behavior interventions plan developed and incorporated into the Student’s IEP during the school years in question for the purposes of managing drooling, assisting with the development of social behavior, eating behaviors and the development of organizational skills.

87. The mother testified that speech therapy, occupational therapy, vision therapy, or self-help skill training were not provided by the School as required by the Student during the time period previously established in this matter.

88. The mother testified that the Student could not currently sense hot or cold bath water, could not brush her teeth, nor could she tie her shoes without assistance.

89. The mother testified that the School provided private ESY services during the summers of 2005 and 2006 as per agreement with the School and in compliance with the IHO's previous *Order*.

90. Testimony established that the School has paid all bills received from FWCL as per agreement with the parents. The Student's mother testified that "most payments were on time." Mrs. Swenson, Director of the FWCL when providing her testimony, did not allege any failure to receive payment due from the School. Neither did she claim that any payment was received beyond its due date.

91. The mother testified that she wanted all instruction for the Student to be "Processing Based Instruction," along with response-to-intervention programs.

92. The mother testified that she did not request, in writing, that the School reimburse her for any transportation expenses incurred by the parents, and further that the School had agreed to provide all needed transportation and that transportation provided by the parents was at the parents' election.

93. The mother testified that she felt that socialization with non-disabled peers was "totally inappropriate" due to the issue of drooling.

94. The mother testified that the Student "loves" the dances sponsored by the School. The Student attended approximately three such dances during the 2004-2005 School year and at least five out of six during the 2005-2006 school year. The mother further testified that the Student would leave each dance crying "hysterically" due to the rejection of her peers, primarily due to drooling behavior.

95. The mother testified that "the only time [the Student] has to face that she is different is when she is in public school."

96. The mother testified that her major goals for her daughter were to stop drooling, continued improvement in speech (oral communication), improved hygiene, developing self-care skills, developing a peer group, and learning functional math.

97. During cross examination of the mother, it was established that by parental request, the Student's IEP for 2004-2005, dated August 18, 2004, and agreed upon by the parents, provided that the Student would be in the public school for only ninety (90) minutes per day with the remainder of the day spent at the FLCW. When in the public school, the Student was in special education with five to six (5-6) other students with a full-time assistant.

98. During a CCC meeting dated September 30, 2004, the Student's' IEP was modified. The newly modified IEP required the Student "...to move from 100% pull-out in special education to '50% Pullout' and '50% Plug-in' during [the Student's] time at Woodside." This same IEP continued to reflect that "[the Student's] mother would like her to attend general education social studies class with support of an aide. She will begin at the second marking period on Monday, November 1, 2004. She will attend on one block (B4) and use the next day (G4) for review and reteach [sic] activities." This modification to the prior IEP was made at the request of the mother, who signed this modified IEP on September 30, 2004. Olive Swenson also signed this IEP. (R8, 0001) The Student was provided a one-to-one aide anytime she was to be in the general education setting.

99. At the request of the mother, the six-week IEP was modified to reflect that the Student "...will be excused from school every other Friday to go to Indy by parents [sic] to attend physical therapy and vision therapy."

100. On August 19, 2005, a CCC meeting was held for the purpose of developing an IEP for the Student for the 2005-2006 School year. The mother, subsequent to four days provided by the School to examine the proposed IEP, signed this IEP on August 23, 2005 (R29, 0005). The duration of this IEP was to be through June 7, 2006.

101. The Student's progress toward the goals and objectives as contained in the 2005-2006 IEP were assessed in October, January, March and June, 2006 and the results of such assessments were reported to the Students' parents.

102. A CCC meeting was held on November 15, 2006, for the purpose of reviewing the Student's progress at both the public school and the FWCL. Olive Swenson from the FWCL attended (R13 0001). Multiple other such contacts between the School, the FWCL, and parents occurred throughout the time frame relative to this matter for the purposes of coordinating the Student's educational program and informing the Student's parents of the Student's progress.

103. At each meeting of the CCC throughout the time frame relative to this matter in which the Student's IEP was developed or modified, the parent participated and provided input regarding the goals and objectives to be taught. In every case the parental input was considered, and most frequently took precedence. In simple terms, she got what she asked for.

104. The School conducted a thorough educational and psychological evaluation of the Student during June and July, 2005 (R2 0001-00013). An additional psycho-educational evaluation was conducted by the School "...for the third and final re-evaluation of her skills in accordance with the settlement agreement rendered in August of 2004 that stipulated [the Student's] cognitive, academic and adaptive functioning be reviewed each year..." This report clearly identified the parties responsible for providing related services for the Student. This report stated that "[the Student] accessed Occupational Therapy as a related service on a consultation basis for the 2005-2006 School year. Parents continued to provide private speech and language therapy at their own initiation and expense in lieu of this service [sic] that are available through MDS of Southwest Allen."

105. During the 2004-2005 School year, the School constructed a room especially for the Student in which she could receive one-to-one instruction without distraction.

106. The instructional assistant assigned to the Student, Becky Niles, possessed a teaching degree. Special Education teacher, Kristie White, is appropriately licensed, and was throughout the three school years during which time she was the primary teacher for the Student.

107. The Student's mother concurred that the related services were provided to the Student by the parents at their request and expense, thus clarifying the absence of such from the Student's IEP's.

108. During hearing counsel for the Student requested that the Student be allowed to withdraw issues 10 and 18. Motion was denied.

109. Kristie White, special education teacher, testified that materials used to instruct the Student in her school were commercially available and nationally recognized. Such material included Project Read and Touch Math. Instructional methodology consisted of nationally recognized pedagogy appropriate for instructing the Student and included structure, repetition, and daily review of the material taught. These strategies were selected from various recognized sources including *Teaching Strategies that Work*, authored by Barbara Beckman, *Reading Strategies for Middle School*, published by Holt, Rinehart and Winston, *Vocabulary Connections*

published by Steck/Vaughn, and Harcourt Achieve. A complete list of instructional strategies incorporated into the instructional methodology used for the Student are listed in R117, 0001. This list includes over forty (40) such strategies.

110. Kristie White testified that the School did not conduct a formal FBA which would result in a written BIP during the time period under consideration in this matter until the end of the 2005-2006 school year in that, at the request of the parents, behaviors were addressed through goals and objectives on the IEP. Cited as an example was the CCC meeting of May 17, 2006, wherein the CCC notes reflect that the “Parents do not wish for an evaluation [for ADD] at this time.” The School purported that such evaluations specifically the “Browns ADD” and the “CTOP” would assist to develop recommendations to address any behavior concerns, and particularly the drooling (R64 0002). Subsequently, parental permission was given to Dr. Fisher to conduct an FBA and develop a BIP. Additionally, the Student’s parents were requested to complete a Vineland Social-Adaptive Behavior Scales: Interview Edition on June 29, 2005. The Student’s parents were again asked to complete this assessment in June of 2006. The results of these assessments were to provide the School information regarding the Student’s skills and needs in the areas of communication, daily living skills, and socialization. Jennifer Barnes, School Psychologist, testified that the parents failed to complete either of these assessments. Multiple accommodations and modifications were made available to the Student to assist with the drooling behavior issue as reflected in various CCC notes and the 2005-2006 IEP.

111. During the 2004-2005 school year, the Student was taking prescription medication to control seizures. During the 2005-2006 school year, there was an increase in seizure activity. Testimony revealed that an increase in seizure activity could also cause an increase in drooling behavior.

112. The Student’s parents insisted that they provide and be responsible for the cost of multiple therapies, those commonly referred to as related services as documented in numerous CCC notes and resulting IEP’s.

113. Kristie White testified that multiple and frequent assessments of the Student’s progress were made throughout the 2004-2005 school years. (R38, 001-13)

114. Throughout the 2004-2005 and 2005-2006 school years, the School consistently coordinated with private therapists employed by the parents, included these “outside providers” in CCC meetings, frequently coordinated the Student’s programs with the parents through meetings, written and telephonic communication, made multiple revisions to the Student’s IEP at the request of the parents, and addressed the Student’s specific educational and behavioral needs.

115. An Occupational Therapy Triennial Evaluation, conducted by Diane R. Jones, OTR, included an assessment of the Student’s behavioral activity. The recommendations resulting from this behavioral assessment were included in subsequent IEP’s.

116. When attending the public school, testimony established that the Student learned to adjust to the School routine and learned to handle social conflicts in a rather mature manner for one her age and with the disabilities documented.

117. When attending public school, the Student was able to work on multiple self-help skills throughout the day, learned to imitate appropriate behaviors and social skills, and successfully participated in some group work in a general education setting.

118. While attending the public School, the Student learned basic computing skills.

119. Kristie White testified that the Student “was a very good advocate for herself.”

120. As per agreements with the parents, the School provided all necessary ESY services.

121. During hearing the appropriateness of the assignments made in general education social studies and science classes was discussed. When it was explained to the Student's mother that the assignments would prove to be too difficult for the Student, the Student's mother requested that the assignments not be modified.

122. The special education teacher provided progress reports to the parents on a frequent basis, but in no case less frequent than every nine weeks during the 2005-2005 school year.

123. Kristie White testified that the Student's primary strength was her ability and desire to socialize with her peers. "She loved time she could be with other kids." She would frequently be seen walking "arm-in-arm" down the halls with other non-disabled Students. During the 2004-2005 school year, the Student chose to be candidate for the student council. As part of her campaign, she addressed an open assembly of between 250 and 300 other students asking them for their support. The Student is "fad" conscious and enjoys such things as music appropriate for her age and that enjoyed by her peers, teen clothing, boys and cellular telephones.

124. The Student's parents were provided written feedback regarding the Student's educational progress and behavior multiple times through each school week by means of a handbook provided to all students (R90, 0001-107).

125. No significant internalizing or externalizing behaviors were noted by the School.

126. On November 5, 2005, all staff working with the Student received specific training in assessing functional behavior, developing behavior intervention strategies and the general requirements of the IDEA. (R100, 04)

127. Many of the recommendations proposed by the private practitioners were included in the Student's IEP's prior to the "experts'" reports.

128. The School made the related services of OT, PT, vision therapy, and speech therapy available through the School. The Student's parents declined these services. The Student's mother testified that she was "too tired" to pursue requesting any related services.

129. The Student's current placement (FWCL and Lutheran Rehabilitation Services) was never discussed at a CCC meeting, nor agreed upon by the School in any other meeting or communication.

130. The School wanted to teach keyboarding as an essential skill regarding the use of computers and other technology. The Student's parents, on advice from the staff at FWCL, did not want keyboarding taught, but rather demanded that the Student be forced to use cursive handwriting instead.

131. Kristie White testified that she attended all school dances at which the Student attended and did not see her crying at any dance.

132. The Student's parents have not requested in writing any additional evaluations of the Student beyond those conducted.

133. During therapeutic interventions in which the Student was being asked to take small drinks of water as a way to condition swallowing, which in turn was an effort to control drooling behavior, Cheryl Carter, teacher, noted that the Student frequently choked. However, when offered a carbonated beverage (Coke) in lieu of water, the Student did not choke when drinking.

134. In an electronic mail from the Student's parents to Jackie Gruesbeck, Director of Special Education, dated March 14, 2006, the parents stated that, "Our belief then and now is that the educational needs of [the Student] would be best served if she were at Woodside for the morning session (3 blocks) and FWCL for the afternoon. Our feeling was and is that [the Student] could benefit from a full year of science and a full year of social studies, as well as

physical education. These could be accomplished in a morning session at Woodside.” (R49 0001)

135. Jennifer Barnes, School Psychologist, testified that teaching keyboarding to the Student provides “rational good sense.”

136. Jennifer Barnes testified that her assessments revealed that the Student shares common interests with same-age peers including music, horses, cellular telephone, and “loves her IPOD.”

137. Jennifer Barnes administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) on or about July 15, 2004. Results indicated that the Student’s “...reasoning abilities were much better developed than her nonverbal reasoning abilities. Her reasoning abilities on verbal test were generally in the low average range (VCI = 83), while her nonverbal reasoning abilities were found to be in the extremely low range (PRI = 49).”

138. When asked if the Student will ever be able to pass the ISTEP + examination, Jennifer Barnes responded in the negative.

139. Jennifer Barnes testified that the Student demonstrated significant variations in abilities, including handwriting, from day-to-day based on such variables as fatigue, the difficulty of the particular assignment, time of day, and the recent of seizures.

140. Jennifer Barnes testified that the most appropriate LREE for the Student was the public schools because such placement would most likely occasion positive interaction with non-disabled peers, provide opportunities for imitation training, and continued learning. She further testified that reintegration after an extended separation from the public schools and the peer group of one, two, or three years would “be very difficult” for the Student.

141. Steven Couvillion, Ph.D., ABPdN, HSPP, Pediatric Neurologist,¹⁰ licensed clinical psychologist, and member of the American Board of Pediatric Neuropsychology, conducted a review of the Student’s records for the School, including reports by Dr. Fisher and Dr. Savage.

142. Dr. Couvillion testified that Jennifer Barnes psycho-educational report was comprehensive and of significant value. He further testified that the Student’s stroke at age three months resulted in a “profound” impact in that “...she has very a dysfunctional right hemisphere ...[the Student] has some functionality but very little in the right hemisphere, and many of the difficulties Dr. Fisher raises are directly tied to right hemisphere injury.”

143. Dr. Couvillion testified that the process referred to as “migration of function” does not apply for motor areas of the brain. Further, damage to the right parietal area of the brain, which also characterizes the Student’s injury, seriously affects “...many aspects of learning, non-language learning, which [further] impacts academic learning.”

144. Dr. Couvillion testified that it was not possible for the Student, as a result of the severity of her brain injuries, to learn algebra at the tenth-grade level and then subsequently pass the math portion of the ISTEP test. He further communicated that the impact on the area of the brain responsible for mathematical calculations is “...very decimated according to the documentation.”

145. Dr. Couvillion testified that the “...ideal time for working with any brain-injured individual, whether that comes from a blow to the head, from a stroke or even from a toxic event, is within the first 12 to 18, 20 months, because you get some spontaneous recovery. After that, remediation and learning can occur, but it becomes much more limited.”

¹⁰The BSEA notes that Dr. Couvillion is a pediatric clinical neuropsychologist and not a neurologist.

146. When queried regarding the value of intensive therapies for one with the type and extent brain injury as seen in the Student, the witness stated that such intensive therapies are usually discontinued after one year post trauma due to the inefficiency of such interventions, in that the individual is not likely to make more than limited gains from that point forward.

147. Dr. Couvillion testified that providing such intensive therapies "...for hours a day, seven days a week, or five days a week, there are a couple of therapies that attempted to do that or said they did it a number of years ago that have been pretty thoroughly discredited." He further commented that, "I am not aware of anyone in the State of Indiana who would say 14 years after this type of debilitating injury, that very intensive types of therapies of this sort for multiple hours a week would be beneficial beyond perhaps some minor gains."

148. Regarding the possible effects of removing the Student from school and placing her in an exclusionary, therapeutic environment for a period of time, Dr. Couvillion testified that "Because socialization is so important at this [time], I am not saying you can't teach socialization later, but when you take it totally away at this time, during the adolescent period in a child who already has impairments, you have a big risk of losing the ability to make whatever gains she could have made. And if you put them off by themselves where you have a lot of children who do not learn well, they learn from each other, and they learn poorer skills. They learn less efficient or sometimes downright disruptive skills."

149. Dr. Couvillion testified that "...it is not unusual for people who have had brain impairment to have difficulty swallowing their saliva."

150. A report by Amy Z. Stauffer, M.D., Pediatric Neurologist, contains the following statement: "With this much time elapsed between the brain injury and the present time it is likely that the benefit [of removing the Student from school in favor of private, intensive services in a segregated environment] would be modest at best. Those who know [the Student] best are in a position to judge whether that modest benefit is worth the cost to her of being removed from her environment and the physical and emotional fatigue of such an intense schedule, he replied, Yes. It is I think it is a good characterization by a pediatric neurologist. That is what I have tried to put forth in my, my document, my report."

151. When asked to respond to some of Dr. Fisher's assessments and conclusions drawn from those assessments, Dr. Couvillion testified that "...when you get really into looking at what she is saying, I don't see any way that some of the things she has recommended can be done pretty much anywhere. I mean, you know, and some of them, in my opinion, are just flatly wrong. She is saying that, you know, doing math this way will result in improvement. She is ignoring her data."

152. When asked to respond to a general summary of his reaction to Dr. Savage's report, Dr. Couvillion stated that "And so, my, my general impression was, um, it was very good, um, report to recommend what he wanted to recommend, but the findings for doing so were not contained in the report."

153. In conclusion, Dr. Couvillion testified that, "To deprive her [the Student] of her social interactions for unproven and un-researched 'intensive therapies' 14 years following her destructive stroke does not comply with good research or clinical rehabilitation techniques."

Based on the foregoing Findings of Fact, the IHO made the following Conclusions of Law.¹¹

¹¹The first three Conclusions of Law that appeared in the IHO's written decision were jurisdictional. These have been removed as they are not relevant in this appeal.

CONCLUSIONS OF LAW

Issue #1: During the 2004-2005 and 2005-2006 School years, did the School fail to use scientifically based, peer-reviewed methods of instruction when implementing the goals and objectives?

Answer: No

The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq.*) and subsequent regulations (34 CFR Part 300) require that local educational agencies provide students with disabilities instruction that is scientifically based and peer reviewed. While the IDEA requires teachers to use scientifically based, or evidence-based, peer-reviewed practices, the [U.S.] Education Department has yet to determine the specific criteria for what constitutes peer-reviewed, evidence-based practices, or even whether special education has a solid foundation of evidence-based instructional practices. The conclusion has been that it is difficult, if not impossible, to get “experts” in the field to arrive at a consensus regarding precisely what constitutes effective research-based, peer-reviewed instructional strategies. As a result, a single definition of “scientifically based, peer-reviewed methods of instruction” does not exist. The Education Department has explained that “peer-reviewed research” refers to “research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published.” The Education Department further explained that reducing the term to a single definition would be difficult, if not impossible, because the review process varies depending on the type of information to be reviewed. Even if a common definition were available, it would be imperative for practitioners in the area of special education to realize that every child will not benefit from a prescribed curriculum. For instruction to be effective, modifications and accommodations to any prescribed curriculum will frequently be necessary. The same would also apply to the methodology by which a particular curriculum was taught. It remains necessary for teachers and schools to realize that individualized instruction remains as the essential key for assisting Students with disabilities master the goals and objectives specified in their IEPs. Notwithstanding, individualized instruction should, and is now required, to be based on the utilization of materials and instructional strategies supported by documented evidence of effectiveness.

In the matter being decided here, the School, its teachers, psychologists, and others familiar with available special education curricula, selected instructional materials that are respected throughout the special education fraternity, are in frequent use nationally, and which have a substantial research base. Additionally, these materials were appropriately modified by experienced, well trained, licensed teachers as deemed appropriate to meet the individual needs of the Student. Additionally, the instructional methodologies used to instruct the Student while using selected curricula were those known to be effective as supported by numerous national publications and the preponderance of research in the field.

In conclusion, the School incorporated what is commonly referred to as “best practices” as it instructed the Student toward attainment of the goals and objectives contained in the Student’s IEPs during the 2004-2005 and 2005-2006 School years. Further, the School utilized a variety of nationally published and respected curricula as its instructional base in doing so. As such, during the 2004-2005 and 2005-2006 school years, the School did not fail to use scientifically

based, peer-reviewed methods of instruction when implementing the goals and objectives for the Student.

Issue 2: During the 2004-2005 and 2005-2006 School years, did the School fail to appropriately and timely conduct an FBA?

Answer: No

Indiana's Article 7 provides specific guidelines regarding this issue. A functional behavioral assessment is defined as "a systematic collection and analysis of data that will vary in length and scope depending on the severity of a Student's behavior. Results and analysis of the data collection are used in developing the Student's behavioral intervention plan. A functional behavioral assessment shall identify patterns in the Student's behavior and the purpose or function of the behavior for the Student." 511 IAC 7-17-39. A functional behavioral assessment shall be conducted "(a) Either before but not later than ten (10) business days after either first suspending the student for more than ten (10) cumulative instructional days in a school year, placing the student in an interim alternative educational setting, expelling the student, or otherwise commencing a removal that constitutes a change of placement, the public agency shall convene a case conference committee meeting for one (1) of the following purposes:

(1) To develop a plan for assessing the student's functional behavior if no functional behavioral assessment was conducted or behavioral intervention plan was implemented prior to the occurrence of the behavior that resulted in the removal....

(b) After an assessment plan has been developed as described in subsections (a)(1) and the assessments required by the plan are completed, the public agency shall convene a case conference committee meeting within ten (10) instructional days of the completion of the assessments to develop a behavioral intervention plan and provide for its implementation." 511 IAC 7-29-5 (a),(b).

A behavior intervention plan is defined as "a plan, agreed upon by the case conference committee and incorporated into a Student's individualized education program, that describes how the student's environment will be altered, identifies positive behavioral intervention strategies, and specified which skills will be taught in an effort to change a specific pattern of behavior of the student. The plan shall be linked to information gathered through a functional behavioral assessment. To ensure transference, the behavioral intervention plan seeks to maximize consistency of implementation across people and settings in which the Student is involved." 511 IAC 7-17-8.

It is clear that the intent of a functional behavioral assessment and the subsequent development of a behavioral intervention plan, as defined above, is for the purpose of dealing with those students whose behavior(s) is/are constituting a disruption of the educational process or which constitute a danger for the student or other students. By definition, a functional behavioral assessment and a behavior intervention are required only when a student with a disability is being considered for suspension, expulsion, being placed in an interim alternative educational setting, or when the school proposes to implement a change in a Student's educational placement based on the student's behavior.¹² In the current matter, at no time during the 2004-2005 and

¹²The Board of Special Education Appeals does not agree with the IHO's restrictive reading of the functions and utilizations of a BIP. A BIP would not be required solely under the

2005-2006 school years was the Student being considered for any of the above actions, all of which clearly relate to disciplinary matters. The Student contends that a functional behavior assessment should have been conducted to address the Student's drooling behavior. First, there was no reason to "assess" the function, or purpose, of the Student's behavior. It has been clearly established through testimony and multiple documents that the drooling behavior was a result of brain damage due to stroke, and this "reason" for the drooling behavior was known to all parties throughout the time period in question.

Would it have been a prudent for the School to address the Student's drooling through other means? Absolutely, and the School did address the drooling behavior throughout the two school years in question by means of specific interventions, several of which were a result of considering input from the private practitioners employed by the Student's parents. All interventions designed to address the Student's drooling behavior were based on the behavioral principles of modeling, imitation, and positive reinforcement, all of which are considered positive behavioral interventions, or supports.

It is also relevant to note that when the School attempted to conduct a formal behavioral assessment of the Student, it met resistance from the Student's parents. Toward the end of the 2005-2006 school year, subsequent to receiving data from a private psychologist that the Student's parents had refused to provide through an assessment requested by the School's related services personnel, a more formal functional behavioral assessment was developed. This functional behavioral assessment, as it related to the Student's drooling behavior, did not provide any data which was not previously available to both parties. Regarding what may result from therapeutic efforts to assist the Student control her drooling behavior, the preponderance of the testimony and documentation support the unfortunate deduction that these specific interventions addressing this behavior are not likely to meet with more than limited success. Nonetheless, it is an important matter in regards to the Student's ability to gain social acceptance in a non-disabled community and will be further addressed in subsequent sections of this *Order*.

In conclusion, during the 2004-2005 and 2005-2006 school years, the School did not fail to appropriately and timely conduct an FBA for this Student. Further, the School did appropriately address the Student's drooling behavior throughout the very limited time the Student was available to the School during the 2004-2005 School year, and more specifically during the 2005-2006 School year. Thus, during the 2004-2005 and 2005-2006 School years, the School did not fail to appropriately and timely conduct an FBA.

Issue 3: During the 2004-2005 and 2005-2006 school years, did the School fail to devise an appropriate BIP based on the principles of positive behavioral supports?

Answer: No.

There is no reason to address this issue in more depth than was addressed in the preceding issue.

circumstances described by the IHO. A BIP would be necessary any time an eligible student demonstrates an untoward behavior that adversely affects educational performance, which could include safety issues without any regard to disciplinary measures. Notwithstanding, the BSEA does agree the Student did not require and does not require a BIP.

Issue 4: During the 2004-2005 and 2005-2006 school years, did the School fail to provide speech therapy as required by the Student?

Answer: No.

Speech therapy must be provided any student with a disability as a related service when such therapy is required for the student to benefit from special education.¹³ The Student in this matter has a significant disability in the area of speech. Therefore, it is indisputable that the Student required and continues to require speech therapy as a related service. It is also clear that the School offered to provide speech therapy to the Student during the 2004-2005 and 2005-2006 school years. However, the Student's parents unilaterally rejected the speech services offered by the School in favor of those provided by private practitioners, unilaterally selected by the Student's parents. As such, the School had no option. A public agency cannot provide special education or a related service to a student with a disability without the informed, written consent of that student's parents. Even so, the School continued to coordinate interventions with the private practitioners selected by the Student's parents in an attempt to facilitate the Student's continued development of speech skills while in the school setting.

Additionally, the Student's parents were participants at each meeting of the CCC meetings during which an IEP was either developed or modified. Frequently, the Student's parents were accompanied by "experts" of their choosing for the purpose of providing additional input to the Student's parents and the case conference committee regarding the identification and specification of the special education and related services to be provided to the Student. In every instance the Student's parents provided informed, written consent for the services to be provided to the Student throughout the 2004-2005 and 2005-2006 School years.

In conclusion, the School provided those speech services it was allowed to provide during the 2004-2005 and 2005-2006 school years. Further, the School accepted and, to the extent warranted, followed the recommendations of the private practitioners chosen the by Student's parents. Additionally, the Student's parents provided informed, written consent for the School to provide those, and only those, special education and related services contained in each of the Student's IEPs. As such, it is determined that during the 2004-2005 and 2005-2006 school years, the School did not fail to provide speech therapy as required by the Student.

Issue 5: During the 2004-2005 and 2005-2006 school years, did the School fail to provide occupational therapy as required by the Student?

Answer: No.

The same reasoning applies here as expressed in response to Issue 4. The Student's parents chose to have occupational therapy provided by private practitioners at parental expense during both the 2004-2005 and 2005-2006 school years. Additionally, the Student's parents provided informed, written consent for the School to provide those, and only those, special education and related services contained in each of the Student's IEPs developed during this time period. As

¹³The BSEA notes that in Indiana speech-language services are not considered a related service. Such services are considered educational services. This error does not affect the IHO's decision, however.

such, during the 2004-2005 and 2005-2006 school years, the School did not fail to provide occupational therapy as required by the Student.

Issue 6: During the 2004-2005 and 2005-2006 school years, did the School fail to provide vision therapy as required by the Student?

Answer: No

The same reasoning applies here as expressed in response to the two previous Issues. The Student's parents failed to request that the School provide vision therapy for the Student and chose to have vision therapy provided by private practitioners at parental expense during both the 2004-2005 and 2005-2006 school years. Additionally, the Student's parents provided informed, written consent for the School to provide those, and only those, special education and related services contained in each of the Student's IEPs developed during this time period. Thus, during the 2004-2005 and 2005-2006 school years, the School did not fail to provide vision therapy as required by the Student.

Issue 7: During the 2004-2005 and 2005-2006 school years, did the School fail to provide self-help skills training as required by the Student?

Answer: No.

The School provided those self-help skills to the Student throughout the 2004-2005 and 2005-2006 School years as was included in her IEPs. During the 2004-2005 school year, the School was permitted to work with the Student for a very limited time period; specifically, only ninety (90) minutes per School day. During some weeks the Student was at School only four days each week. Additionally, the Student's parents insisted the Student be included in general education classes for a significant portion of each school week. During the 2005-2006 school year, more attention was addressed toward developing improved self-help skills. Interventions included instruction in areas such as daily living, organizational skills, monitoring swallowing, monitoring drooling, and following daily schedules. Limited testimony was presented which identified personal hygiene as having been addressed as well.

In conclusion, the School provided limited self-help skills during the 2004-2005 school year, most notably due to the very limited time period the Student was in school on a daily basis. More comprehensive self-help skills were provided during the 2005-2006 school year. However, the Student would have received increased benefit from self-help training should an increased emphasis been directed to this area. As such, during the 2004-2005 and 2005-2006 school years, the School did not fail to provide self-help skills training as required by the Student.

Issue 8: During the 2004-2005 and 2005-2006 school years, did the School fail to provide ESY services as required by the Student?

Answer: No.

Extended School year services are defined as "special education services that: are provided to a student with a disability;

beyond the normal school year of the public agency;
in accordance with the student's individualized education program; and
at no cost to the parent or the Student; and
meet the standards of the state educational agency." 511 IAC 7-17-35.

This Student requires extended year services so as to be able to retain as much of what was taught during the preceding academic semester as possible. The School provided such ESY services for the summer of 2005 as contained in the Agreement signed by both parties, dated August 4, 2004. Specifically, the School paid for fifteen (15) hours per week of private services, provided by the FWCL, for a four-week period. By *Order Defining Stay-Put Placement*, dated July 13, 2006, the School was ordered to provide, at the School's expense, four weeks of private services at the FWCL during the summer of 2006. The School complied with the IHO's *Order*.

In conclusion, there can be no debate regarding the provision of extended year services. The Student's parents requested not only that these services be provided but also identified the provider, being the FWCL. The School has clearly demonstrated that extended year services were provided as requested by the Student's parents and ordered by the IHO. As such, during the 2004-2005 and 2005-2006 school years, the School did not fail to provide ESY services as required by the Student.

Issue 9: During the 2004-2005 and 2005-2006 school years, did the School fail to provide measurable goals and objectives in each area of identified need as recorded in the Students' IEP?

Answer: Yes.

An individualized education plan shall contain "a statement of measurable annual goals that describe what the Student can be expected to accomplish within a twelve (12) month period." 511 IAC 7-27-6(a)(2). Additionally, the IEP must contain measurable annual goals which are designed to meet each of the Student's other educational needs that result from the Student's disability. 511 IAC 7-27-6(a)(2)(C).

There are two separate elements to this particular alleged violation of state and federal law that require comment. First, the IHO will address whether the Student's IEPs contained a statement of annual goals in each area of the Student's identified needs that described what the Student could have been expected to accomplish within a twelve (12) month period of time. Such was not the case. However, there are mitigating circumstances regarding the failure by the School to include an annual goal in each area of the Student's identified need. The School was effectively relieved of developing goals or objectives in the area of related services by mandate from the Student's parents. Thus, while the Student's IEPs did not contain certain goals in the area of related services, the School should not be regarded as failing to comply with this mandate regarding related services. The Student's parents, while frequently being advised by advocates during the case conference meetings at which the Student's IEPs were being developed, had the unfettered opportunity to request additional needs for the Student be addressed by their inclusion in these IEPs. They did not. There was absolutely no testimony alleging the School failed to include any objective in the Student's IEP when requested to do so by the Student's parent.

Additionally, the Student's parents, by their signature, expressed agreement with the content of each of the Student's IEPs or amendments thereto. This agreement would include the goals and objectives identified, or as the case may be, not identified. Additionally, there were instances in which the School suggested specific related services be provided by the School, and thus would have included goals and objectives regarding such in the Student's IEPs. However, these services were refused by the Student's parents.

Secondly, the "measurability" of each goal is addressed. Each goal included in each IEP for this Student is capable of being measured by some method or procedure, and the School did provide some documentation that such measurement occurred. However, whether each of these goals or objectives could have been measured by some objective process remains in question. In fact, several of the goals and objectives listed in the Student's IEP are in need of additional specificity, including the important conditions under which the Student's performance will be assessed, the performance or performances the Student must demonstrate so that achievement can be adequately measured, the criteria for success that will be employed to measure relative attainment of the objective, and the methodology to be used to measure each goal or objective.

In conclusion, while the Student's IEPs did not contain measurable goals and objectives in each area of identified need, the School should not bear the full responsibility for such omissions. Regardless, these omissions, while constituting a procedural error, did not impede the Student's right to a free appropriate education nor did these omissions significantly impede the Student's parents an opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student, nor did such omissions cause a deprivation of educational benefit for the Student. As such, during the 2004-2005 and 2005-2006 school years, the School did fail to provide measurable goals and objectives in each area of identified need as recorded in the Student's IEP.

Issue 10: During the 2004-2005 and 2005-2006 school years, did the School fail to provide ISTEP remediation as required by the Student?

Answer: No.

By Order Granting Respondent's Motion for Involuntary Dismissal on Petitioner's Claims 10 and 18, dated December 2, 2006, this issue was dismissed with prejudice.

Issue 11: During the 2004-2005 and 2005-2006 school years, did the School fail to provide counseling services as required by the Student?

Answer: No.

Counseling is one of any number of related services that may be required by a student with a disability when the case conference committee determines that the student requires such service in order to benefit from special education. In the case at hand, there was no evidence presented to suggest that the Student was in need of counseling services in order to benefit from the educational services provided. Neither the Student nor her parents requested counseling services from the School at any time during the 2004-2005 or 2005-2006 school years. School personnel did not identify any emotional or behavioral issue displayed by the Student that would have

suggested a need for counseling services. As such, the case conference committee did not consider including counseling services as part of the Student's IEP during the time period encompassing this matter.

However, counseling services are frequently narrowly defined as the provision of services which are designed to assist another deal with a personal dilemma or stress-related event or events. Rather, counseling services may include any of the following:
sharing career information, administering interest inventories or other career assessment instruments, and providing assistance in career planning;
guiding the identification of and planning for a student's course of study designed to help the student achieve the post-school goals and outcomes;
assisting the student to understand and cope with a disability;
assisting the student to cope with a personal problem or crisis; and
assisting the student to develop and implement a behavioral intervention plan. 511 IAC 7-28-1(c)(1)(A-E). As such, the IHO will address the possible need for counseling services in subsequent section of this Order.

In conclusion, the School did not fail to provide counseling services as required by the Student during the 2004-2005 or 2005-2006 school years. Neither the School, the Student, nor the Student's parents identified a need for such service.

Issue 12: During the 2004-2005 and 2005-2006 school years, did the School fail to provide social skills training as required by the Student?

Answer: No.

This Student is highly motivated to interact with her peers, teachers and significant others and frequently receives significant positive reinforcement from such interactions. Multiple instances of the Student initiating social contact with others is well documented. That several of her non-disabled peers initiate contact with her is also documented. The most significant detriment to continued development of the Student's ability to successfully interact socially with her peers and adults, and they with her, is the matter of uncontrolled drooling behavior which has been previously addressed. It was apparent to the IHO that all school personnel assisting with the Student's education were aware of her need for social interaction with others and provided such opportunities to the extent the Student's schedule and personal strengths and weaknesses would permit. Additional areas of personal-social growth, most particularly, personal hygiene are seen as targets for further intervention.

In conclusion, there were no instances in which the Student's parents requested inclusion of additional goals or objectives on the Student's IEPs regarding social skills training. As previously cited, there were multiple opportunities during the two-year time period under consideration for any such unaddressed needs be identified and included in the Student's IEPs. As such, during the 2004-2005 and 2005-2006 school years, the School did not fail to provide social-skills as required by the Student?

Issue 13: During the 2004-2005 and 2005-2006 school years, did the School fail to provide required or necessary educational services for the Student in the LRE?

Answer: No.

Counsel for the Student expended considerable effort to demonstrate that the services provided through the FWCL, in combination with those being provided the Student through Lutheran Rehabilitative Services, were and currently are superior to those the School has or can provide. The issue is not which program (School's vs. Private Services) offers the superior level of services. As has been well established by the courts, there is a strong preference for educating a Student with a disability in the least restrictive educational environment (LREE). The LREE is defined as, "To the maximum extent appropriate, students with disabilities, including those students placed in public or private institutions by the public agency outside the public agency's jurisdiction and those students placed in public or private institutions and other care facilities in the public agency's jurisdiction, are educated with nondisabled students. Special classes, separate schooling, or other removal of students from the general education environment occurs only when it is documented that education in general education classes using supplementary aids and services cannot be satisfactorily achieved. Unless the individualized education program requires some other arrangement, the student's placement is as close as possible to the student's home school and is in the school the student would attend if not disabled." 511 IAC 7-27-9(a)(1-3). Further, the School is required only to provide a level of services that provide the Student an education which results in meaningful benefit, not maximum benefit.

At this point, holding the School responsible for any "failure" to provide more [sic] appropriate or intensive services to the Student during the 2004-2005 and 2005-2006 school years is tantamount to blaming an incarcerated individual for failing to attend the Super Bowl, in that as much as this individual might have wished to attend this annual event, he was prevented from doing so by authority beyond his control. Such is the same in this case. The School was consistently prevented by the Student's parents from providing many of the services now being sought throughout this time period. As an example, at the insistence of the Student's parents, the Student attended the public school during the 2004-2005 School year only for instruction in social studies and science. This instruction was delivered in general education classes at the request of the Student's parents. The goals and objectives attempted in this educational setting were aligned with state standards, also at the instance [sic] of the Student's parents. The remainder of the day the Student was provided private educational and therapeutic services, also at the insistence of the Student's parents.

The Student failed to show that the special education and related services provided the Student in the public school, as reflected on agreed-upon IEP's for the 2004-2005 and 2005-2006 school years, were not appropriate, nor was it demonstrated that these services failed to provide the Student with benefit. While the School's data-keeping process was lacking in some areas, to the level of constituting what this IHO would characterize as moderate procedural deficiency, the School was able to demonstrate that the Student made reasonable gains on the majority of the goals and objectives listed in her IEP for the school years under consideration. At the insistence of the Student's parents, the School entered into an agreement regarding the special education and related services to be provided the Student for a two-year period of time in August of 2004.

Among other things, this agreement established the parameters of the services to be provided the Student as well as the educational environment in which many of these services were to be provided. The Student's parents, one of which is an attorney-at-law, were primarily responsible for the initiation, development, wording, and content of this agreement.¹⁴ Subsequently, the School fulfilled each of its obligations as specified in this agreement, and in many instances provided services that were well beyond what a literal interpretation of this agreement would require. That the Student had only limited participation in the public school environment during the 2004-2005 school year was not only at the request of the Student's parents, it was a result of their insistence. While the 2005-2006 IEP, with amendments, as compared to the IEP established for the 2004-2005 school year, provided for significantly more inclusion in the public school system, the Student was frequently removed from school during various parts of the school day at the request of the Student's parents for the purpose of receiving private educational and therapeutic services. Thus, any lack of participation in the public school was the result of parental choice. The School, throughout the 2004-2005 and 2005-2006 school years, expressed a strong preference that the most [sic] appropriate LRE for the Student was full-time placement in the public school with the necessary special education and related services being provided by the School therein. The Student's parents provided input, and on multiple occasions were primarily responsible for the formulation and content of the Student's IEPs and amendments thereto during the two-year period under consideration. The Student's parents negotiated most strongly for the educational placements they preferred at each meeting of the case conference committee meeting. In each event the School acquiesced to their demands regarding the LRE for the Student.

In conclusion, it is well established that the Student received her educational services through an array of educational arrangements, public and private. Each such arrangement was at the insistence of the Student's parents and was agreed to [by the parents] as attested by their signatures on each of the IEPs constructed during the 2004-2005 and 2005-2006 school years. The School demonstrated, through testimony and documents submitted to the IHO in this matter, that the Student received educational benefit, gains, and in some instances, considerable educational benefit from her individualized educational program, especially so when considering the limited time the School was allowed to work with the Student during the 2004-2005 school year. As such, during the 2004-2005 and 2005-2006 school years, the School did not fail to provide required or necessary educational services for the Student in the LRE.

Issue 14: During the 2004-2005 and 2005-2006 school years, did the School fail to provide progress reports to the Parents as required by the Student's IEP(s) or Article 7?

Answer: No.

The parents of students with disabilities are entitled to receive reports regarding their child's progress on at least the same schedule, or frequency, as are parents of students without disabilities. Additionally, should a student's IEP require additional communication with or

¹⁴As will be noted *infra*, the purported role of the Student's father in the drafting of the settlement agreement is not relevant to this dispute.

reports to parents, such would then become the standard. In this Student's case, as recorded in her IEPs and written agreements, frequent reports to parents were required in addition to those provided students without disabilities.

The School complied with these requirements for additional communication with and provided those additional reports to the Student's parents with occasional deviation. The Student's parents received a multiplicity of documentation of their Student's progress throughout the 2004-2005 and 2005-2006 school years through a variety of means. These included daily notes, phone calls, electronic mail, multiple case conference meetings with written reports that followed each, reports of progress related to the goals and objectives on the Student's IEP on a scheduled basis, along with multiple reports from psychologists, occupational therapists, physical therapists and other related services personnel. Some of these reports were provided by specialists retained by the Student's parents at their expense. Reports from the FWCL were frequently provided.

In conclusion, the School provided communication, oral and written, along with required written reports regarding the Student's educational progress to the Student's parents, with rare exception. These infrequent exceptions did not compromise the Student's right to a free appropriate public education, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to their child, or caused a deprivation of educational benefits. Thus, during the 2004-2005 and 2005-2006 school years, the School did not fail to provide progress reports to the parents as required by the Student's IEP(s) or Article 7.

Issue 15: During the 2004-2005 and 2005-2006 school years, did the School fail to ensure that its staff was appropriately certified, licensed or trained to provide the Student those services as contained in the Student's IEP?

Answer: No.

Testimony, supported by documents and exhibits, clearly assert [sic] that each of the School's staff that [sic] facilitated the implementation of the Student's IEP was appropriately licensed or certified. As such, during the 2004-2005 and 2005-2006 school years, the School did not fail to ensure that its staff was appropriately certified, licensed or trained to provide the Student those services as contained in the Student's IEP.

Issue 16: During the 2004-2005 and 2005-2006 school years, did the School violate the "stay-put" provisions of Article 7 or the IDEA by withholding payments to the Fort Wayne Center for Learning?

Answer: No.

No testimony was received nor documentary evidence provided that supported the accusation that payments due to the FWCL were not paid and paid within the allowable time frame provided by the FWCL. As such, during the 2004-2005 and 2005-2006 school years, the School did not violate the "stay-put" provisions of Article 7 or the IDEA by withholding payments to the Fort Wayne Center for Learning.

**Issue 17: During the 2004-2005 and 2005-2006 school years, did the School fail to evaluate the Student within the timelines established by Article 7 or previous Settlement Agreement.
Answer: No.**

During the 2004-2005 and 2005-2006 school years, the Student's parents received at least three psycho-educational evaluations, three occupational therapy evaluations, and numerous other educational evaluations from the FWCL as well as the School's staff. Testimony was presented regarding an evaluation mentioned in the Settlement Agreement, dated August 4, 2004. Item nine (9) of this agreement states that "The School agrees to pay for the cost of additional assessment by a mutually agreed upon independent educational evaluator in the areas of phonological processing, phonics, fluency, comprehension/vocabulary, spelling, math,, writing and visual motor. The parents agree to submit the bill first to their insurance company and seek any reimbursement thereafter." Testimony revealed that this additional assessment was never conducted. However, testimony also revealed that the Student's parents failed to initiate the necessary follow-up to ensure this evaluation was completed. No documentation of a written request for this evaluation was not [sic] provided in the documents and exhibits provided by the Student. As such, during the 2004-2005 and 2005-2006 school years, the School did not fail to evaluate the Student within the timelines established by Article 7 or previous Settlement Agreement.

**Issue 18: During the 2004-2005 and 2005-2006 school years, did the School fail to conduct mandated statewide assessment(s) of the Student, specifically either ISTEP or ISTAR, as required by Article 7 or the Student's IEP(s)?
Answer: No.**

By Order Granting Respondent's Motion for Involuntary Dismissal on Petitioner's Claims 10 and 18, dated December 2, 2006, this issue was dismissed with prejudice. As such, during the 2004-2005 and 2005-2006 school years, the School did not fail to conduct mandated statewide assessment(s) of the Student, specifically either ISTEP or ISTAR, as required by Article 7 or the Student's IEP(s).

**Issue 19: During the 2004-2005 and 2005-2006 school years, did the School fail to reimburse the parents for the costs of transportation as required by previous written agreement or Article 7?
Answer: No.**

"Transportation as a related service, under 511 IAC 7-28-1(o), may be necessary for a student to receive special education and related services as specified in the student's individualized education program." 511 IAC 7-21-7(b). "Parents of students with disabilities shall not be required to provide transportation for their student. If the parent does transport the student, pursuant to a written agreement with the public agency, the public agency shall reimburse the parent at no less than the per mile rate at which employees of the public agency are reimbursed." 511 IAC 7-21-7(d). Exhibit I-C, item 3 of the Settlement Agreement, dated August 4, 2004, states that, "Transportation will be available for [the Student] at 2:15 p.m., though mother will likely transport [the Student] from School to home."

At no time during the 2004-2005 or 2005-2006 school years did the School fail to offer all needed transportation services to the Student. Additionally, testimony revealed that the School was, at the time, willing to reimburse the parent for transporting the Student from school to home or from school to the FWCL even though the School had agreed to provide such transportation. However, the Student's mother testified that she called the transportation division on one occasion to inquire about how she could be reimbursed but did not receive closure regarding this matter during this telephone call. The Student's mother then testified that she was "too tired" to pursue the issue further. The School, at the time of hearing, had received no itemized billing from the parent regarding the reimbursement of transportation, nor at this time would such an accounting of reimbursement be feasible.

In conclusion, the School went beyond the requirements of both Article 7 and any other arrangements as may have been made through the Settlement Agreement of August, 2004, regarding the issue of transportation of the Student. Thus, during the 2004-2005 and 2005-2006 School years, the School did not fail to reimburse the parents for the costs of transportation as required by previous written agreement or Article 7.

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

ORDERS

1. The School will conduct a case conference committee meeting within fifteen (15) calendar days of the date of this Order to review and revise the Student's current IEP. This revised IEP shall include all required components of IEPs as established by 511 IAC 7-27-6. Additionally, the following will be included as partial fulfillment of these requirements:
 - A. The Student will receive special education and related services in the public school by professionals or appropriately trained assistants employed by the public school. The degree to which the Student will receive services in general education classrooms shall be decided by the case conference committee.
 - B. Individual (one-to-one) speech therapy services shall be provided by the School's speech therapist a minimum of twice a week for a minimum of thirty (30) minutes each session. The Student's IEP will also specify the methods by which all service providers will be involved in supporting the overall speech therapy intervention plan developed by the School's speech therapist and the case conference committee.
 - C. Occupational therapy services shall be provided either by or under the supervision of the School's occupational therapist as deemed appropriate by the case conference committee. The Student's IEP will also specify the methods by which all service providers for the Student will be involved in supporting the overall occupational therapy intervention plan developed by the School's occupational therapist and the case conference committee.
 - D. Conduct an informal evaluation regarding of the Student's social skills strengths and weakness. Based on the outcome of such assessment, the case conference committee will develop specific interventions designed to assist the Student's acquisition of appropriate social skills. Such interventions will be based on a social skills curriculum

that is commercially published, such as the *Boys/Girls Town Social Skills Curriculum*, and modified as appropriate as determined by the case conference committee. All services providers will participate in the social skills intervention plan to the degree appropriate.

2. The case conference committee shall review all data available and will determine whether vision therapy is required to be provided to the Student as a related service, and if so to what degree and by whom such service will be provided.
3. The School will consult with Dr. Steven Couvillion, Pediatric Neurologist, for the purpose of designing, and subsequently implementing, a specific strategy to ameliorate, to the degree possible, the Student's drooling behavior. Such strategy will be implemented in the public school under the direction of an appropriately licensed physical or occupational therapist as determined by the case conference committee. The IHO is aware that, due to the nature and severity of the Student's prior injury, such interventions may not prove entirely successful. Nonetheless, such a program will be developed and implemented for the duration of the Student's public school experience.
4. Goals and objectives shall be established to address the Student's acquisition of appropriate personal hygiene and self-help skills as determined appropriate by the case conference committee.
5. The School will ensure that specific, measurable goals and objectives are included in the Student's IEP that address each area of need as determined by the case conference committee. All goals and objectives shall include performance-based terms that describe those behaviors and academic tasks the Student is expected to perform, the conditions under which the Student is expected to perform each goal or objective, and the criteria for measuring the Student's achievement toward mastery of each goal and objective contained in this revised IEP.
6. The Student's progress toward meeting each of the goals and objectives contained in the Student's IEP will be reviewed at least twice each grading period by the Student's teacher of record. The results of this review will be provided to the Student's parents in writing within five (5) calendar days of completion.
7. The Student's academic instruction will be based on a functional curriculum designed to facilitate the Student's degree of independent living skills. The specific academic skills to be addressed shall be determined by the case conference committee.
8. The Student's parents are to be invited to any meetings that address the addition, removal or modification of goals, objectives, or other possible such changes in the Student's IEP. However, consistent with law, school personnel may discuss among themselves matters regarding teaching methodology, lesson plans, or coordination of services, or additions or modifications to the Student's current IEP for the purpose of formulating recommendations to be presented to the Student's parents at a subsequent meeting of the case conference committee.

9. The School has no further obligation to provide reimbursement to the Student for any privately provided educational, psychological, speech/language interventions, tutoring, cognitive training, or other such direct or related services unilaterally obtained by the Student's parents on her behalf, including payments to private schools or programs, other than as specified in a prior written agreement between the parties or prior order of the IHO.

The IHO appropriately advised the parties of their right to administrative appeal.

APPEAL TO THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The Student timely filed her Petition for Review on March 5, 2007. Thereafter, Thomas J. Huberty, Ph.D., was appointed by the State Superintendent of Public Instruction to serve in the place of Board of Special Education Appeals (BSEA) Member Raymond W. Quist, Ph.D., who is ill. Dr. Huberty was appointed on March 6, 2007.

On March 5, 2007, the School requested an extension of time to prepare and file its Response to the Petition for Review. The Student, on March 6, 2007, objected to the request for an extension of time. The BSEA granted the request, giving the School an extension of time to and including April 4, 2007, to file its Response.

The record from the hearing below as copied and transferred to the BSEA members on March 22, 2007. During the review of the record, BSEA member Rolf W. Daniel, Ph.D., advised General Counsel of the Department of Education that, in his position as Dean of the University of St. Francis, he was acquainted with one of the attorneys representing the School. The attorney serves on the Board of Trustees for the University. Both Dr. Daniel and the attorney are presently part of a feasibility study group. On April 2, 2007, General Counsel advised counsel of record of Dr. Daniel's disclosure. Both parties were offered the opportunity to request Dr. Daniel recuse himself. On that same date, Student's counsel requested Dr. Daniel recuse himself, which he did. The State Superintendent, on April 3, 2007, appointed Kristin Anderson, Esq., to serve in Dr. Daniel's stead.

The School filed its Response on April 2, 2007. On April 13, 2007, the Student requested an extension of time in order for the Student's out-of-state counsel to obtain *pro hac vice* admission to the Indiana Bar. On April 16, 2007, the BSEA granted the request, giving Student's counsel until the close of business, May 15, 2007, to obtain admission *pro hac vice*. The date for issuance of the final written decision was set as the close of business, June 14, 2007.

On April 20, 2007, the Office Manager, Legal and Legislative Affairs, Department of Education, contacted the parties to obtain available dates should the BSEA elect to hold oral argument. Parents were also requested to indicate how they wished to receive the final written decision of the BSEA and whether they wish to have oral argument opened or closed to the public. The parties responded timely, indicating available dates.

The parents responded on April 23, 2007, indicating they wish to receive the final written decision of the BSEA in electronic format and that oral argument would be closed to the public. Student's counsel obtained a judgment entry on April 25, 2007, from the Allen County Superior Court, admitting counsel *pro hac vice*. On May 7, 2007, the Indiana Supreme Court temporarily admitted Student's counsel to the Indiana Bar.

On May 10, 2007, the BSEA notified the parties that oral argument would be conducted in this matter. At the parents' election, oral argument would be closed to the public and would be conducted in Indianapolis.¹⁵

Oral argument was conducted on June 1, 2007, in Room 125, State House, Indianapolis, beginning at 10:00 a.m. local time. Both parties appeared and were represented by counsel.¹⁶ All three members of the BSEA were present. Oral argument was closed to the public.

Student's Petition for Review

The Student challenged the following Findings of Fact: Nos. 11, 20, 21, 22, 23, 32 (as contrary to Conclusion of Law No. 9), 33, 40, 62, 63, 68, 74, 77, 110, 118, 121, and 130. The Student also challenged the following Conclusions of Law: Nos. 1, 2, 3, 4, 5, 6, 7, 9 (in part, as contrary to Finding of Fact No. 32), 11, 12, 13, 14, and 17. The Student also challenged the IHO's Orders Nos. 1, 3, 4, 5, 6, 7, 8, and 9 (indicated in the IHO's written decision as the second "No. 8").

The Student generally asserts the IHO did not accord sufficient weight to the testimony of the Student's witnesses. In addition, the Student argues the IHO appeared to place greater responsibility upon the parents based on their educational and professional backgrounds. The general thrust of the Student's Petition for Review was to contest the IHO's determinations on the use of scientifically based, peer-reviewed instruction; the need for the conduct of an FBA and a resulting BIP; the provision of appropriate related services; whether the Student was denied a FAPE based on the deficiencies determined in the Student's IEP; whether the parents were provided timely and meaningful progress reports; whether the School complied with the settlement agreement of August 2004 when it did not provide for a neuropsychological evaluation; and whether the School proposed an appropriate educational placement. Additional information will be supplied *infra*.

¹⁵Although Article 7 indicates that oral argument is to be held at a time and place convenient to the parties, 511 IAC 7-30-4(k), IDEA requires that oral argument be held at a time and place convenient to the parents. See 34 C.F.R. § 300.515(d).

¹⁶The Student was represented by Kimberly A. Sukinik. The School was represented by Jason T. Clagg. The BSEA appreciates the professional presentations by counsel. Both parties were ably represented.

School's Response to the Petition for Review

The School noted that the burden of persuasion was with the parents, citing to *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).¹⁷ In this matter, the parents failed to persuade the IHO. The IHO's decision is based upon substantial evidence in the record and should be sustained. The BSEA cannot reweigh the evidence or question credibility determinations absent any of the reasons delineated at 511 IAC 7-30-4(j). The School also submitted additional documentation that was not available at the hearing (ISTEP results), to which the parents did not object. The School also seeks reimbursement from the parents for the maintenance of the Student's current improper placement.¹⁸ Additional information will be supplied *infra*.

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, a Conclusion of Law, or Order determined, reached, or directed by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law; contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The School timely filed a Response to the Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. The Student, in her Petition for Review, requested the BSEA to review "all Findings of Fact, Conclusions of Law and Orders." However, 511 IAC 7-30-4(d)(3) requires a petitioning party to be "specific as to the reasons for the exceptions to the independent hearing officer's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken[.]" The BSEA does review the entire record to ensure the procedures employed below were consistent with the due process requirements of 511 IAC 7-30-3. See 511 IAC 7-30-4(j). With respect to the Student's request, the BSEA will

¹⁷The Administrative Orders and Procedures Act (AOPA), I.C. § 4-21.5-3 *et seq.* applies to due process hearings under Article 7. See 511 IAC 7-30-3(p). The AOPA already assigned the burden of persuasion and the burden of going forward with the proof of the request for an agency to perform some function or take some action. See I.C. § 4-21.5-3-14(c).

¹⁸The BSEA notes the School did not seek permission to submit the additional evidence. The BSEA will not rely upon this document in its consideration of the IHO's written decision as the written decision was not based upon this document. The BSEA also notes the School did not file a Petition for Review but attempted to challenge certain remedial action ordered by the IHO. The BSEA will address this *infra*, primarily to correct the School's misunderstanding of applicable law.

review only those aspects of the IHO's written decision to which specific exception has been made. As for due process procedures, the IHO concludes that the proceedings below as conducted by the IHO were consistent with the requirements of 511 IAC 7-30-3.

3. The Student objects to Finding of Fact No. 11, which reads as follows: "The settlement agreement was composed by the Student's father, who is an attorney-at-law." The settlement agreement refers to the August 4, 2004, settlement agreement that is implicated *infra* on other matters. In this matter, it is not relevant who authored the settlement agreement. Accordingly, the Finding of Fact is not relevant and will be removed from the final decision.
4. The Student also objects to Findings of Fact Nos. 20-23 inclusive. In these Findings, the IHO determined the School provided sufficient in-service training to the instructional assistant assigned to the Student; the School provided services to the Student at the Student's public school and offered to provide speech, vision, and occupational therapies to the Student, but the Student's parents unilaterally declined these services, choosing instead to provide these services through private providers at the parents' expense; and the School incorporated suggestions and recommendations into the Student's educational program throughout the school year as it received such suggestions and recommendations from the private practitioners whose services had been obtained by the Student's parents. In a review of the record, the BSEA determines that there is sufficient evidence in the record to support the IHO's Findings of Fact. Accordingly, the Findings of Fact are sustained.
5. The Student argues that Finding of Fact No. 32 ("School personnel testified that, while enrolled in the public school setting during the 2005-2005 school year, the Student made multiple academic and social gains. Support for this testimony was offered by way of teacher notes and indications of progress on case conference summaries, multiple written reports, and progress reflected on report cards provided to the parents.") contradicts Conclusion of Law No. 9 (failure to provide measurable goals and objectives in each identified area of Student need). The BSEA finds no conflict between the two. There was sufficient evidence from credible sources to support Finding of Fact No. 32. In addition, the IHO determined the lack of measurable goals and objectives did not serve to deny the Student a FAPE. See 20 U.S.C. § 1415(f)(3)(E)(ii) (procedural violations did not impede child's right to a FAPE; did not significantly impede parents' opportunity to participate in the decision-making process; and did not otherwise result in a deprivation of educational benefits).
6. Finding of Fact No. 33 ("In addition to goals and objectives that were based on state standards during the 2005-2006 school year, and which were developed at the request of the Student, the School provided instruction in self-help skills, functional math and language, and daily living. Additional instruction/intervention in the control of the Student's drooling behavior was also provided.") is also supported by the record. The BSEA has amended the Finding of Fact to describe the Student's "drooling behavior" rather than "drooling." Corresponding changes have been made throughout. The Finding of Fact is sustained as amended.

7. The Student challenges Finding of Fact No. 40 (“An agreed-upon IEP was in effect for each of the years in question in this matter. The Student’s parents are well educated. The father is an attorney. The mother is a college graduate. Additionally, both were supported by private practitioners during the development of each IEP developed during this two-year period as well as any amendments thereto.”). To the extent the IHO may have been assigning greater responsibility to the parents based upon their educational and professional backgrounds, this is irrelevant. The BSEA strikes “The Student’s parents are well educated. The father is an attorney. The Mother is a college graduate.” Neither IDEA nor Article 7 places greater responsibilities upon parents based upon their educational or professional backgrounds. The remainder of the Finding of Fact is sustained as supported by testimony and documentation in the record. The parents were actively involved in the CCC process, were supported by private practitioners in the process, and there were agreed-upon IEPs in place for the school years in question.
8. Although the Student challenges Finding of Fact No. 59 (“The director of the FWCL has no degree, or licensure in any area of psychology, neuropsychology, education, or special education. Her degree is in home economics and was obtained many years previously”), this is a statement of fact and is relevant. The Finding of Fact is sustained.
9. The Student challenges Findings of Fact Nos. 62, 63, 68, 74, 77, and 110; however, there is testimony and documentation in the record to support each of these Findings of Fact. The IHO’s characterization of the Student’s letter as a “strong plea” (Finding of Fact No. 77) is not arbitrary or capricious. Given the record as a whole, this is an acceptable characterization of the letter.
10. Finding of Fact No. 118 (“While attending the public School, the Student learned basic computing skills”) is supported by the record. The Student did learn some basic computing skills, including how to load a program and how to log on/off. While the Student may not have been as successful as the School and the parents wished, there is no guarantee a student will progress at any given rate. The requirement is that a good faith effort be made. 511 IAC 7-27-8(b). A good faith effort was made. The Finding of Fact is sustained as written.
11. The Student challenges Finding of Fact No. 121 (“During hearing the appropriateness of the assignments made in general education social studies and science classes was discussed. When it was explained to the Student’s mother that the assignments would prove to be too difficult for the Student, the Student’s mother requested that the assignments not be modified”). The Finding of Fact will be sustained. Although there is conflicting testimony in this regard, it is the IHO’s responsibility to resolve such conflicts through the weight to be accorded certain testimony or documentary evidence and the credibility to be assigned. In this matter, the IHO’s determination is not contrary to any of the areas of error noted under 511 IAC 7-30-4(j).
12. The Student also challenges Finding of Fact No. 130 (“The School wanted to teach keyboarding as an essential skill regarding the use of computers and other technology. The

Student's parents, on advice from the staff at FWCL, did not want keyboarding taught, but rather demanded that the Student be forced to use cursive handwriting instead"). The general thrust of the Finding of Fact is supported by the record. The use of "demanded," however, is a bit strong. From the record, it appears the parents "requested the Student be instructed to use cursive handwriting instead." The CCC process depends upon consensus. The parents could not make a "demand" to which the School would be without any recourse to challenge. The School certainly could have challenged any suggestion by the parents, as could the parents challenge any refused or proposed action of the School. The Finding of Fact will be amended as indicated.

13. Although the Student challenges the IHO's Conclusion of Law No. 1,¹⁹ the BSEA finds that the IHO correctly concluded the School employed scientifically based, peer-reviewed methods of instruction when addressing the educational needs of the Student. To the extent the Student is expressing a preferred methodology where the School's methodology is appropriate to the Student's needs, there is no right to compel the school district to provide a specific, parent-preferred methodology. *Lachman v. Illinois State Board of Education*, 842 F.2d 290, 297 (7th Cir. 1988), *cert. den.* 488 U.S. 925, 109 S. Ct. 308 (1988). An educational approach proposed by a school district satisfies legal standards for soundness where (1) the school district can articulate its rationale or explain the specific benefits of using that approach in light of the particular disabilities of the student; (2) school personnel involved in implementing that approach have the necessary experience and expertise to do so successfully; and (3) there are qualified experts in the educational community who consider the school district's approach to be at least adequate under the circumstances. *J.P. v. West Clark Community School Corp.*, 230 F.Supp.2d 910, 936 (S.D. Ind. 2002). See also 511 IAC 7-27-4(e). The School has satisfied these criteria. The Conclusion of Law is sustained.
14. The Student challenges Conclusion of Law No. 2 (the School did not fail to timely conduct an FBA during the 2004-2005 and 2005-2006 school years). The Conclusion of Law is sustained. The targeted behavior—drooling behavior—is involuntary behavior. As noted *supra* at footnote 12, the BSEA disagrees with the IHO that an FBA and a BIP relate solely to disciplinary matters and, since the Student was not subject to the such disciplinary matters, an FBA and a BIP would not be appropriate. An FBA can be conducted and a BIP developed for any untoward behavior that affects a student's educational performance and experience, such as running, eating, hugging (and similar behaviors that in the community can pose a danger to the student), as well as certain self-injurious behavior. An FBA and a BIP are not as restricted as the IHO seems to indicate. However, a BIP does presuppose that there is an intervention to address a behavior. That would not be the case here with regard to the Student's drooling behavior, which is involuntary. The School did assess the behavior and did develop intervention strategies. These are included in the Student's IEP. While these procedures may not have been labeled as an FBA or a BIP, the same function

¹⁹In the IHO's written decision, this is described as "Issue No. 1." As noted *supra*, the jurisdictional Conclusions of Law have been removed so that the Issue numbers and the Conclusions of Law match.

is being served. With this clarification, the IHO's Conclusion of Law No. 2 is sustained. For the same reasons, Conclusion of Law No. 3 is sustained.

15. The Student challenges Conclusion of Law No. 4 (the School did not fail to provide speech therapy during the 2004-2005 and 2005-2006 school years). The BSEA notes the IHO did err in his first sentence ("Speech therapy must be provided any student with a disability as a related service when such therapy is required for the student to benefit from special education"). This sentence will be struck from the written decision. In Indiana, speech language services are always provided as a special education service and not as a related service. The third sentence is amended to read as follows: "Therefore, it is indisputable that the Student required and continues to require speech therapy as a special education service." In all other respects, Conclusion of Law No. 4 is sustained.
16. Although the Student challenges Conclusions of Law No. 5 (the School did not fail to provide occupational therapy to the Student during the 2004-2005 and 2005-2006 school years), 6 (the School did not fail to provide vision therapy to the Student during the 2004-2005 and 2005-2006 school years), and 7 (the School did not fail to provide self-help skills training to the Student during the 2004-2005 and 2005-2006 school years), the BSEA sustains these Conclusions of Law. As noted *supra*, there is ample factual bases for the IHO's legal conclusions. In addition, as noted in Combined Finding of Fact and Conclusion of Law No. 5, *supra*, there is no conflict between Conclusion of Law No. 9 and Finding of Fact No. 32. Accordingly, Conclusion of Law No. 9 is sustained.
17. The BSEA has considered the Student's challenges to Conclusions of Law Nos. 11 (the School did not fail to provide counseling services to the Student during the 2004-2005 and 2005-2006 school years), 12 (the School did not fail to provide social skills training to the Student during this period), 13 (the School did not fail to provide services for the Student in the LRE), and 14 (the School did not fail to provide progress reports to the Parents as required by the Student's IEPs or by Article 7). However, each Conclusion of Law is supported by substantial evidence and will, accordingly, be sustained.
18. The Student asserts the School did not comply with the terms of the August 4, 2004, settlement agreement when it failed to provide for a neuropsychological evaluation. The referenced settlement agreement reads in relevant part:

The school agrees to pay for the cost of additional assessment by a mutually agreed upon independent educational evaluator in the areas of phonological processing, phonics, fluency, comprehension/vocabulary, spelling, math, writing and visual motor. The parents agree to submit the bill first to their insurance company and seek any reimbursement thereafter.

The settlement agreement does not obligate the School to provide for a neuropsychological evaluation. It is evident the parties did not mutually agree upon an independent evaluator to do so. The objection is without merit. Conclusion of Law No. 17 is sustained.
19. The Student challenges the IHO's Order No. 1. The BSEA sustains the thrust of the IHO's Order, but amends (A) to read: "The appropriate placement for the Student is in the public

school setting where special education and related services are to be provided by licensed professionals or appropriately trained individuals employed by the School. The degree to which the Student will receive services in general education classrooms shall be determined by the case conference committee.” The BSEA sustains (B) and (C) as written. Subpart (D) is amended to indicate the evaluation to be conducted will be a “systematic evaluation.” The resulting interventions must be based on sound social skills methods, techniques, and materials for social skills instruction, and need not be based on “commercially published” curricula, although such can be considered.

20. The Student challenges Order No. 3. The IHO does order the School to consult with Dr. Steven Couvillion as a “Pediatric Neurologist.” However, Dr. Couvillion is not a pediatric neurologist. He is a pediatric neuropsychologist. It is apparent from context that the IHO intended Dr. Couvillion to be consulted, not necessarily a “pediatric neurologist.” Should Dr. Couvillion not be available for such consult, the School is to consult another pediatric neuropsychologist. The BSEA strikes the IHO’s last sentence (“Nonetheless, such a program will be developed and implemented for the duration of the Student’s public school experience”) as being too expansive and interfering with the function of the Case Conference Committee.
21. Objections notwithstanding, the BSEA sustains the IHO’s Orders Nos. 4, 5, and 6. Although the School did not file a Petition for Review, the School did attempt to challenge the IHO’s Order No. 5, requiring the School to ensure the Student’s IEPs have specific measurable goals and objectives. The IHO had earlier found the School failed to do so, even though this did not result in a denial of FAPE. See Combined Finding of Fact and Conclusion of Law No. 5, *supra*. The School believes the IHO “went beyond the scope of his authority and arguably should be limited (or done away with altogether) by the Board.” The School further states the IHO cannot provide a remedy for a deficient IEP where he has concluded the procedural defects do not result in any substantive harm to the Student. The School is mistaken. The IHO had the authority to consider the issue of procedural defects of the Student’s IEPs. The IDEA plainly states at 20 U.S.C. § 1415(f)(3)(E)(iii) that “[n]othing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.” The IHO had the authority to do so; the School now has the obligation to do so.
22. The BSEA sustains the IHO’s Order No. 7 as amended. The first sentence will now read” “The Student’s academic instruction will include a functional curriculum designed to facilitate the Student’s degree of independent living skills.”
23. The BSEA sustains the IHO’s Order No. 8 as written.
24. The BSEA sustains the IHO’s Order No. 9. To the extent the School is attempting to challenge Order No. 9, by either its content or its possible implications for reimbursement from the parents, the BSEA notes the School did not file a Petition for Review, as it could have and probably should have. The BSEA will not entertain the issue of reimbursement

when it was not presented below and was not raised in a Petition for Review, allowing the opposing party the opportunity to respond.

ORDERS

1. Except as amended above, the IHO's written decision is affirmed.
2. In any other matter not specifically addressed above is considered denied or overruled, as appropriate.

DATE: June 14, 2007

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

APPEAL RIGHT

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