

**BEFORE THE INDIANA BOARD  
OF SPECIAL EDUCATION APPEALS**

<b>In the Matter of A.S. and the Jennings County School Corporation</b>	) ) ) )	<b>ART. 7 HEARING NO. HR 202-2008</b>
<b>Appeal from the Decision of: Terry R. Curry, J.D., Independent Hearing Officer</b>	) ) )	<b>Status: Closed to the Public</b>

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

**Procedural History**

A request for a due process hearing was initiated by the Student<sup>1</sup> in a letter dated July 12, 2007 and received, via facsimile, by the Indiana Department of Education, Division of Exceptional Learners, on July 13, 2007. A hard copy version was received July 17, 2007. Terry R. Curry, Esq., was appointed as the Independent Hearing Officer (IHO) on July 13, 2007.

On August 3, 2007, the IHO conducted a telephonic prehearing conference. During the conference, the IHO was informed that the parties had agreed to mediation in lieu of a resolution conference. The decision deadline for this matter was set for September 26, 2007. The parties were unable to determine mutually convenient hearing dates prior to September 26, 2007. Petitioner filed a Motion for a Continuance and an Extension of Decision Deadline<sup>2</sup>, which was granted by the IHO on August 15, 2007.

The hearing was scheduled for October 23, 24, 25, and 26, 2007, and the deadline established for the final decision of the IHO was set for November 21, 2007. A second prehearing conference was conducted on November 14, 2007 for the purpose of establishing procedures for the hearing. Petitioner filed a Motion for Continuance and Extension of Decision Deadline which was granted by the IHO on October 11, 2007. The parties advised the IHO that a facilitated case conference had been scheduled for October 25, 2007. The IHO informed the parties that if they were unable to reach a resolution by October 29, 2007, he would schedule another prehearing conference so the parties could establish hearing dates.

A prehearing teleconference was conducted on November 14, 2007. Respondent, in a letter dated December 28, 2007, requested an Extension of Decision Deadline in order to allow sufficient

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<sup>1</sup>The term "Student" shall refer to the Petitioner or Petitioner's parents, unless otherwise indicated.

<sup>2</sup>Petitioner's Motion does not include a certificate of service that indicates the date when the motion was filed.

time for preparation of the hearing transcript.<sup>3</sup> The Motion was granted December 28, 2007. The hearing was set for January 8, 9, and 14, 2008, and the decision deadline was extended to February 8, 2008.

The hearing was closed to the public and both parties were represented by counsel. The following issues, as framed by the submissions of the parties and by the IHO in a prehearing Order, were heard at hearing, with the burden of proof upon Petitioner to establish the factual basis for said issues.

1. Is the Student's proposed placement at Sand Creek Elementary appropriate and the least restrictive environment?
  
2. Has Respondent failed to provide the Student a free appropriate public education in that the Student's individualized education plan is alleged to be deficient in the following respects:
  - A. Failure to provide the Student with appropriate speech services.
  - B. Failure to provide appropriate services for extended school year.
  - C. Failure to conduct a functional behavior assessment.
  - D. Failure to prepare an appropriate behavior intervention plan.
  - E. Failure to provide social skills training.
  - F. Failure to provide appropriate counseling for anxiety.
  
3. Has Respondent failed to provide the Student a free appropriate public education by assigning instructional assistants to the Student who are not sufficiently trained in regard to the Student's disability?
  
4. Did Respondent violate procedural requirements of the Individuals with Disabilities Education Act ("IDEA") and Article 7 in the following respects:
  - A. Failure to schedule a case conference committee to discuss a private educational evaluation obtained by the Parents and failure to consider such evaluation.
  - B. Failure to provide appropriate training for instructional assistants assigned to Student.
  - C. Failure to appropriately discuss and consider goals for the Student in the case conference committee.
  - D. Failure to consult with the Parents and obtain participation by the Parents in the determination of the Student's placement.
  - E. Failure to provide appropriate prior written notice in accordance with 511 IAC 7-22-2.
  
5. Do the alleged procedural violations asserted by Petitioner rise to the level of a denial of a free appropriate public education for the Student?

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<sup>3</sup>Respondent's letter was treated as a Motion For Extension of Decision Deadline.

### **The Written Decision of the IHO**

The IHO issued his decision on February 7, 2008. He determined thirty-five (35) Findings of Fact and twenty-two (22) Conclusions of Law.<sup>4</sup>

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

1. The Student is a nine year-old female who was first determined to be eligible for special education services during preschool level. The Student's primary diagnosis is moderate mental disability, with a secondary diagnosis of communication disorder. She has been continuously enrolled in Respondent's school system since kindergarten and is now a third grade student at Hayden Elementary School ("Hayden") in the Respondent's school system.
2. Respondent Jennings County School Corporation (the "School") is a school corporation in Jennings County, Indiana, with administrative offices in North Vernon, Indiana.
3. The Student has received special education services continuously from kindergarten to the present at Hayden. Such services have included assignment of paraprofessional assistants, speech services, and occupational therapy.
4. The Student and the Parents reside approximately two blocks from Hayden, which is thus the Student's home school. The Hayden staff and Student are thus familiar with each other.
5. Hayden has received recognition awards in recent years, including that of Blue Ribbon School and Four Star School.
6. During the school day, the Student is accompanied by a teacher's assistant for virtually all activities. Such assistant will work variously with the Student on a one-on-one basis outside of the classroom or assist the Student when she is participating in the general education classroom. From the commencement of the Student's enrollment in kindergarten, such assistants have included Jessica Danford ("Danford"), Angie Phillips ("Phillips"), and Kim Blevins ("Blevins").
7. Danford was assigned to the Student in kindergarten and at the start of first grade; she was reported to have an excellent relationship with Student. However, she was reassigned to another school in September of Student's first grade year. Danford thus provided five days of training regarding the Student to Phillips.
8. Phillips has been an assistant for 14 years. As noted, she was assigned to work with the

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<sup>4</sup>The IHO's decision is reproduced in its entirety. It is edited only as to format. The substance of the IHO's decision remains intact.

Student beginning in the first grade. Phillips currently works daily with the Student during the morning half of the school day in regard to the goals of the Student's individualized education plan ("IEP"). Phillips receives lesson plans for the Student from the teacher of record Marcia Holcomb ("Holcomb"), and she is able to consult with Holcomb and Marcia Culbreath ("Culbreath"), both of whom are licensed teachers of students with moderate mental disabilities at Sand Creek Elementary ("Sand Creek"), as needed.

9. Phillips believes that the Student has difficulty maintaining attention, is easily distracted, and has difficulty with socialization skills. Phillips believes the Student would have such problems whether she was enrolled at Hayden or Sand Creek. It is also Phillips' opinion that the Student has made adequate academic and social progress at Hayden and will continue to do so.
10. Blevins has been an assistant for nine years. She has been assigned as the Student's assistant in second and third grades, and she currently assumes responsibility for the Student in the afternoon after relieving Phillips. Blevins also notes that the Student has difficulty maintaining attention and is easily distracted. Blevins acknowledged that a behavior plan for the Student would be appropriate.
11. Linda Ray ("Ray") is the Student's third grade general education teacher at Hayden. The Student is the first student for Ray with a moderate mental disability. Ray has received no training regarding moderate mental disability. She also acknowledged that the Student is easily distracted and that a behavior plan would be helpful.
12. Vicki Anderson ("Anderson") has been a speech pathologist for 17 years and is currently employed as a speech pathologist for Hayden and North Vernon Elementary Schools. She has provided speech services to the Student continuously from kindergarten to the present, and Student currently receives 120 minutes per month of speech services. Anderson also observed that the Student has difficulty maintaining attention and is easily distracted. As to speech goals for Student, Anderson states that the Student has met the speech goals set forth in the Student's IEP, including the goals set forth in the IEP from the Case Conference Committee in April, 2007. Finally, it is Anderson's opinion that the Student has not shown regression in speech at any time so as to justify extended school year services.
13. Paula Kahrs ("Kahrs") is the music teacher for the Student at Hayden. Kahrs likewise has observed the Student's difficulty in maintaining attention.
14. Holcomb is the Student's current teacher of record. Holcomb is assigned to a program for moderate mental disability students at Sand Creek. As teacher of record, Holcomb's responsibilities include monitoring the Student's progress, providing instructional materials, conferring with assistants, completing progress reports, and assisting in the establishment of the Student's goals. Holcomb provides work assignments and lesson plans

to the assistants assigned to the Student. Holcomb believes she could more effectively assist the Student at Sand Creek because Holcomb could directly observe the Student and make modifications in the Student's instruction as needed.

15. A Case Conference Committee ("CCC") was convened on April 16, 2007, for Student's annual case review. At such CCC, representatives of the School discussed the respective programs available for special needs students at Hayden and Sand Creek and proposed placement of the Student at Sand Creek for the 2007-2008 school year. The Parents refused to agree with placement of the Student at Sand Creek.
16. Representatives of the School had previously discussed with the Parents the alleged advantages of placement of the Student at Sand Creek, including having done so at CCC in September, 2004. The Parents had also visited Sand Creek to view the program, as well as conferring with parents of students at Sand Creek.
17. Sand Creek is characterized by the School as its "magnet" program for moderate mental disability students at the elementary level. As noted, teachers licensed for moderate mental disability assigned to the Sand Creek program include Holcomb and Culbreath. The School contends that the entire staff assigned to the Sand Creek program has significantly more experience with moderate mental disability instruction than the Hayden staff. In addition, specialized "life skills" facilities are available at Sand Creek, including a life skills kitchen, laundry training area, in-room hygiene training areas, and multiple computer banks. The moderate disability program at Sand Creek is one of inclusion, in that the students are all assigned to a general education classroom and participate in some general education class activities based upon abilities and with adult assistant support. Likewise, the Student's participation at Hayden is also one of inclusion, with the Student assigned to a general education class and participating in some general education class activities with adult assistance.
18. Rebecca Jackson ("Jackson") is director of special education for the School. Jackson advocates the placement of the Student at Sand Creek. Jackson believes that Sand Creek is the appropriate placement based upon several considerations, including the following: (a) the Student will more likely make friends and a connection with students of comparable social and cognitive level, (b) she would be less dependant on an adult assistant, (c) she will benefit from the services available at Sand Creek, such as the life skills facilities, and (d) the gap between the Student and non-disabled students will continue to increase as the Student progresses to higher grades. Jackson stated that the Student requires an assistant because of safety concerns and to assist the Student in the general classroom, and she acknowledged that such considerations would require that an assistant be placed with the Student no matter where the Student was attending school. Jackson further acknowledged that (a) Student has made progress at Hayden, (b) Student's IEP goals could be implemented at either Hayden or Sand Creek, and (c) the gap between the Student and non-disabled students will continue to increase whether the Student attends Hayden or Sand

Creek.

19. Four other students with a primary disability of moderate mental disability were previously enrolled at Hayden. However, two of those students have subsequently “tested out” of moderate disability and now have a primary disability of mild mental disability. The other two students with moderate mental disability have since transferred to Sand Creek, even though Hayden is the home school for those two students. Both such students have been transferred to Sand Creek as a result of their respective CCC decisions. Student thus remains the sole student at Hayden with a primary disability of moderate mental disability.
20. A program similar to that in place at Sand Creek for moderate mental disability students is also utilized at Jennings County Middle School, where the Student will attend beginning in seventh grade. In addition, the School maintains a system-wide curriculum for students with moderate mental disability.
21. Phillips, Anderson, Ray, and Jackson acknowledge that progress has been made by the Student at Hayden. ISTAR test results for the Student reflected minimal progress through second grade, but the ISTAR test administered to the Student in October, 2007, for third grade showed significant progress over prior test results.<sup>5</sup>
22. A psychological evaluation of the Student was undertaken by Dr. Jill Christopher (“Dr. Christopher”) in September and October, 2006. The evaluation was done at the request of the Parents in order to rule out the presence of autism spectrum disorder. Dr. Christopher’s overall diagnosis of the Student was that she met criteria for pervasive developmental disorder-not otherwise specified and moderate mental disability. Dr. Christopher found the Student’s full-scale IQ to be in the moderate range, with some sub-areas of the IQ scale in the mild range and others in the moderate range. As with the Student’s teachers and assistants, Dr. Christopher noted that the Student was easily distracted and concurred that it would be appropriate to implement “general behavior programming consisting of positive reinforcement for appropriate behaviors.” Finally, Dr. Christopher believes that the Student will exhibit such difficulty with attention whether the Student is with non-disabled students or other moderate mental disability students.
23. An independent educational evaluation of the Student was undertaken by Dr. Julie Steck (“Dr. Steck”) in September, 2007, at the request of the Parents. Results of testing administered by Dr. Steck were consistent with Dr. Christopher, finding that the testing of the Student demonstrated functioning at the upper end of moderate disability with some strengths in the lower end of mild disability. On the other hand, Dr. Steck disagreed with Dr. Christopher’s diagnosis of pervasive developmental disorder (“PDD”). In explaining such disagreement, Dr. Steck noted as follows: (a) PDD has at its core “a deficit in

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<sup>5</sup>“ISTAR” stands for Indiana Standards Tool for Alternative Reporting. This is the alternate assessment employed for students for whom standardized assessment is not appropriate.

reciprocal social interaction,” while Dr. Steck viewed the Student’s interaction with others to be the “[Student’s] strengths,” and (b) another characteristic of PDD is difficulty with communication, while Dr. Steck observed the Student’s communication skills to be consistent with her cognitive abilities. Dr. Steck likewise observed the Student’s attention problems, which Dr. Steck believed reflected symptoms of attention deficit hyperactivity disorder. It was also Dr. Steck’s opinion that the Student would benefit from interaction with both non-disabled and similarly disabled students. Finally, Dr. Steck set forth a detailed conclusion in her written report with recommendations, goals and objectives, and strategies for the Student.

24. The Parents contend that the School has failed to provide a free appropriate public education (“FAPE”) to the Student in that her individualized education plan (“IEP”) is alleged to be deficient in several respects. As set forth below, the IHO concludes that any alleged deficiencies fall solely within the need for a Functional Behavioral Assessment (“FBA”) and resulting Behavioral Intervention Plan (“BIP”).
25. The Parents first contend that the IEP fails to provide appropriate speech services for the Student. The Parents’ evidence in regard to speech services was presented primarily through the testimony of speech language pathologist Amy McConkey Robbins (“Robbins”). However, Robbins has neither interviewed nor evaluated the Student. Robbins’ general observations regarding appropriate speech services are insufficient to sustain the Parents’ burden of proof to establish that the Student’s IEP is insufficient in regard to speech services.
26. The Parents further contend that the IEP fails to provide appropriate services for an extended school year (“ESY”). However, no evidence has been presented regarding regression by the Student or difficulty of the Student in regard to recoupment or retention so as to justify ESY services. On the contrary, as noted above, ISTAR results from October, 2007, show significant improvement by the Student. The Parents have failed to sustain the burden of proof to establish that the absence of ESY constitutes denial of FAPE.
27. The Parents contend that the School failed to provide FAPE because the IEP fails to provide social skills training. While the evidence does establish that the Student has difficulty with social skills, the assistants assigned to the Student and other Hayden staff regularly work with the Student regarding appropriate social skills and boundaries. Social goals and objectives are built into Student’s IEP. Parents have failed to sustain the burden of proof to establish that the alleged absence of social skills training constitutes denial of FAPE.
28. The Parents further contend that the IEP fails to provide appropriate counseling for anxiety. However, the only significant evidence in regard to anxiety of the Student was noted in the psychological evaluation undertaken by Dr. Christopher, which was completed in October,

2006, and noted that the Student exhibited anxiety from the change in her assistant after the transfer of Danford. On the contrary, evidence presented by both parties was that the Student is cheerful and comfortable at Hayden. Based upon the evidence presented, the pertinent issue is the Student's difficulty with attention, which is more appropriately addressed by an FBA and BIP. The evidence is thus insufficient to sustain the Parents' burden of proof to establish that Student's IEP is insufficient in regard to counseling for anxiety.

29. As to the alleged deficiencies of the Student's IEP, the IHO further notes that the Parents agreed to all IEPs adopted and implemented prior to the CCC of April, 2007.
30. The Parents contend that the IEP fails to provide FAPE because of the School's alleged failure to conduct a functional behavioral assessment and to prepare and implement a behavioral intervention plan. While the IHO agrees that an FBA is appropriate, the IHO declines to find that the School and the existing IEP failed to provide FAPE for the following reasons. The propriety of an FBA was discussed as early as the Student's kindergarten year, but it was a joint decision by the School and the Parents to forego the FBA at that time. The combined testimony of School personnel, Parents, and professional evaluators make it abundantly clear that the Student's inability to maintain attention is a significant obstacle to the Student's educational progress and that guidance in addressing such attention problems, by way of a BIP, would be beneficial. Dr. Christopher and Dr. Steck also agree as well, although Dr. Steck is hesitant to characterize any such strategy as a "typical behavior management plan." Finally, the Parents consented to completion of an FBA on December, 4, 2007, and School completed an FBA as of December 10, 2007. However, the Parents contested the validity of the FBA at the hearing. As a consequence, the IHO specifically requested both parties to address the validity of the FBA by way of their post-hearing submissions, but neither party did so. The IHO thus addresses the requirement of an FBA and BIP by Order below. As discussed by Dr. Steck, the FBA is not intended to be punitive in nature, but instead should be consistent with the requirement of Article 7 that a student's IEP include consideration of "strategies, including positive behavioral interventions and supports, to address a student's behavior that impedes his or her learning or that of others." 511 IAC 7-27-4(c)(3).
31. The Parents contend that the School failed to provide a FAPE to the Student by assigning paraprofessional assistants to the Student who were not sufficiently trained in regard to the Student's disability. The current assistants assigned to the Student—Phillips and Blevins—have 14 years and nine years of experience, respectively, as assistants at Hayden. Both work with the Student by way of lesson plans and guidance from the Student's teacher of record. As set forth below in the Conclusions of Law, there is no requirement in Article 7 for specialized training in regard to a Student's disability. Finally, the effectiveness of the paraprofessional assistants in working with Student is more appropriately addressed by the FBA and BIP. While specific and applicable training is always beneficial, the evidence is insufficient to sustain the Parents' burden of proof to

establish that the School failed to provide a FAPE by assigning assistants who were not sufficiently trained in regard to the Student's disability.

32. The Parents also assert that the School violated procedural requirements of the IDEA and Article 7. Other than the allegation regarding prior written notice, all of the other alleged procedural violations can be generally characterized as the Parents' contention that they were not able to meaningfully participate in meetings of the CCC and formulation of the IEP. Indeed, Parents allege that School representatives attempted to "intimidate" the Parents and coerce the Parents into accepting placement of the Student at Sand Creek. However, the IHO finds that the evidence does not support any finding that the Parents were denied meaningful participation in CCCs or that School representatives attempted to coerce the Parents. Instead, the evidence establishes that the parties merely have a good faith disagreement regarding the Student's placement. The evidence is insufficient to sustain the Parents' burden of proof to establish that the School violated the procedural requirements of Article 7.
33. The Parents' final contention is that the School failed to provide prior written notice of the proposed change in placement for the Student in accordance with 511 IAC 7-22-2:
  - (a) The public agency shall provide the written notice to the parent a reasonable time before the public agency:
    - (1) proposes to initiate or change the identification, evaluation, or special education placement of the student or the provision of a free appropriate public education to the student....
34. The School could not provide prior written notice prior to the meeting of the CCC because the School is prohibited from unilaterally determining placement, as set forth in the Conclusions of Law below. The Parents were clearly aware of the School's recommendations regarding Sand Creek long before the April, 2007, CCC, and the school's recommendations were discussed in detail at that CCC. The recommendation regarding placement at Sand Creek is set forth in the April, 2007, CCC conference notes, which the Parents then refused to sign because of their disagreement regarding placement. The Parents were thus able to timely file this request for a due process hearing challenging placement at Sand Creek. Therefore, even if one were to assume that the School failed to comply with the requirements of prior written notice, there is no evidence that the Parents have been prejudiced in any manner.
35. To the extent that any of the foregoing Findings of Fact might more properly be categorized as a Conclusion of Law, it shall be considered a Conclusion of Law.

### **The IHO's Conclusions of Law**

Based on these Findings of Fact, the IHO reached twenty-two (22) Conclusions of Law.

- A. Petitioner has the burden of proof in an action under IDEA and Article 7. Schaffer v. Weast, 126 S.Ct. 528 (2005). To meet the burden of proof on an issue, petitioner must present sufficient relevant evidence to outweigh respondent's evidence to the contrary.
- B. A party's opinions, beliefs, suppositions, interpretations, characterizations, explanations, conclusions, or arguments relating to events or evidence are not evidence.
- C. **The first issue is whether Student's proposed placement at Sand Creek is appropriate and the least restrictive environment.** The requirements of least restrictive environment as pertinent herein are set forth at 511 IAC 7-27-9:
  - (a) Each public agency shall have in place written policies and procedures to ensure the following:
    - (1) To the maximum extent appropriate, students with disabilities, including those 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.
    - (2) 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.
    - (3) 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 the school the student would attend if not disabled.
    - ....
    - (5) The services provided for each student are based upon the goals and benchmarks or short term objectives in the student's individualized education program.
- D. By their post-hearing submissions, the parties set forth argument regarding an appropriate "test" to determine what constitutes least restrictive environment. However, the IHO concluded that the appropriate resolution is determined simply by application of

unambiguous Article 7 language, at least as applied to the circumstances of this matter. In other words, if the Student's education can be satisfactorily achieved at Hayden with supplementary aids and services, then her home school is the least restrictive environment.

- E. The holding of the Seventh Circuit in Beth B. v. Van Clay, 282 F.3<sup>rd</sup> 493 (7<sup>th</sup> Cir. 2002), is consistent with such a conclusion. While upholding the school's transfer of the student in Beth B., the Seventh Circuit observed that "[e]ach student's educational situation is unique" and thus declined to adopt a formal test regarding what constitutes least restrictive environment. 282 F.3<sup>rd</sup> at 499. More importantly, the Seventh Circuit further stated that if a student's current placement "was satisfactory, the school district would be in violation of the [IDEA] by removing her." 282 F.3<sup>rd</sup> at 493.
- F. The School has presented substantial evidence regarding what it contends are the benefits of the Sand Creek program for moderate mental disability students. However, such evidence in large part merely begs the pertinent question. The contention that the Sand Creek program is incrementally better is not the test. Instead, the question is whether Student's "education in general education classes using supplementary aids and services cannot be satisfactorily achieved" at Hayden. The fundamental "supplementary aids and services" required for Student will be essentially the same at Sand Creek or Hayden, other than the life skills facility. School witnesses admit that Student's goals and objectives can be achieved at either Hayden or Sand Creek. Moreover, any incremental benefits of attendance at Sand Creek must be balanced against the benefits of continued placement at Hayden, including but not limited to continuity and consistency for the Student, familiarity with staff and routine at Hayden, and the benefit of a full day at Hayden as opposed to the anticipated shorter day at Sand Creek necessitated by travel considerations. Accordingly, the least restrictive environment for Student is her home school of Hayden.
- G. The Parents have sustained the burden of proof to establish that the proposed placement of the Student at Sand Creek is not appropriate and is not the least restrictive environment within the provisions of 511 IAC 7-27-9.
- H. **The second issue is whether the School has failed to provide the Student a free appropriate public education.**
- I. Parents have failed to sustain the burden of proof to establish that the School has failed to provide the Student with appropriate speech services. The testimony of Robbins and other evidence of the Parents do not establish that speech services provided by Anderson are insufficient or inappropriate.
- J. The Parents have failed to sustain the burden of proof to establish that School has failed to

provide appropriate services for extended school year. Specifically, Parents have failed to show any regression by Student so as to justify extended school year services.

- K. The Parents have proven by the evidence that a functional behavioral assessment and behavioral intervention plan are appropriate. However, the Parents have failed to sustain the burden of proof to establish that failure to include an FBA and BIP in prior IEPs constitutes a denial of free appropriate education.
- L. The Parents have failed to sustain the burden of proof to establish that School has failed to provide appropriate social skills training.
- M. The Parents have failed to sustain the burden of proof to establish that the School has failed to provide appropriate counseling for anxiety for the Student. Specifically, the Parents have failed to present any substantive evidence regarding the necessity for counseling or the nature of any such counseling.
- N. **The third issue is whether the School has failed to provide the Student a free appropriate public education by assigning instructional assistants to the Student who are not sufficiently trained in regard to the Student's disability.**
- O. Article 7 mandates "specialized inservice training" for paraprofessionals serving students with specified disabilities. See, for example, 511 IAC 7-26-2 (autism spectrum disorder); 511 IAC 7-26-4 (deaf-blind); 511 IAC 7-26-12 (other health impairment); 511 IAC 7-26-13 (traumatic brain injury). No specialized inservice training is mandated for mental disability. 511 IAC 7-26-9.
- P. The Parents have failed to sustain the burden of proof to establish that the School has failed to provide the Student a free appropriate public education by assigning instructional assistants to the Student who are not sufficiently trained in regard to Student's disability.
- Q. **The fourth issue is whether the School violated the procedural requirements of the Individuals with Disabilities Education Act and Article 7.**
- R. As to the alleged failure to provide prior written notice, such prior written notice cannot be provided prior to the meeting of the case conference committee in that the School is prohibited from unilaterally determining the child's placement. In the Matter of K.O. and Metropolitan School District of Lawrence Township, HR #1469.05 (BSEA Aug. 8, 2005).
- S. Parents have failed to sustain the burden of proof to establish that School has violated procedural requirements of IDEA and Article 7.
- T. **The fifth issue set forth above is whether the alleged procedural violations asserted by the Parents rise to the level of a denial of a free appropriate public education for the**

**Student.**

- U. The Parents have failed to sustain the burden of proof to establish that the School committed any procedural violations or that any alleged procedural violations by the School rise to the level of a denial of a free appropriate public education for the Student.
- V. To the extent that any of the foregoing Conclusions of Law might more properly be categorized as a Finding of Fact, they shall be considered Findings of Fact.

The IHO's Orders

Based on the Findings of Fact and Conclusions of Law, the IHO issued four (4) Orders.

1. The parties shall immediately convene a case conference committee.
2. By such CCC, the parties shall confirm the Student's continued placement at Hayden Elementary School.
3. By such CCC, the parties shall develop a plan for assessing the Student's functional behavior. The FBA previously completed by School as of December 10, 2007, shall be the foundation for the plan to be developed, with such additional data as established by input by the Parents and as suggested by the School.
4. At such CCC, or at a subsequent CCC to be convened no later than ten (10) instructional days after development of the FBA, the parties shall develop a behavioral intervention plan for the Student and provide for its implementation as a component of the Student's IEP. In developing the BIP for the Student, the parties are encouraged to incorporate the recommendations and strategies set forth in the written report of Dr. Julie Steck. (Pet. Ex. B, p. 129-39)

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

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

**Procedural History of the Appeal**

On February 29, 2008, Petitioner filed with the IHO a Motion To Correct Error and Reconsider along with a brief in support of the Motion. In its reply letter of March 4, 2008, Respondent characterized Petitioner's Motion as more than a request for clarification, that it was essentially an appeal of the IHO's decision and an attempt to circumvent the administrative process for appeal. On March 10, 2008, the IHO issued an order denying Petitioner's Motion to Reconsider. In his order the IHO stated, "[I] find no authority for a Motion to Correct Error or for a Motion to

Reconsider in either Article 7 or in the Administrative Orders and Procedures Act.”

On February 29, 2008, Petitioner filed with the Board of Special Education Appeals (BSEA) a Motion for Extension of Time in order to file a Petition for Review of the IHO’s decision. The BSEA granted the Motion the same day and ruled that the Petitioner had to file her Petition for Review by the close of business on April 7, 2008. The BSEA received Petitioner’s Petition for Review on April 7, 2008. On April 8, 2008, Respondent filed a Motion for Extension of Time to file a reply to the Petition for Review. The BSEA granted the motion on April 9, 2008 and ordered Respondent to file its Reply to the Petition for Review by close of business, May 16, 2008. Respondent filed its Reply on May 16, 2008.

### **Petitioner’s Petition for Review**

Petitioner did not identify any specific Findings of Fact, or Conclusions of Law to which she objected. Petitioner’s sole argument is that Respondent committed substantive and procedural violations of the IDEA and Article 7; moreover, these violations amounted to a denial of a free and appropriate public education (FAPE). Petitioner identified several subordinate issues, and provided argument and citation to authority to support her argument.

The evidentiary errors alleged by Petitioner were as follows:

- A. The IHO erred in finding that despite acknowledged deficiencies in the IEP there was no denial of FAPE as required by 511 IAC 7-18-2, et seq., as shown in Conclusions of Law I-P.
- B. The IHO erred in concluding that the School had included appropriate speech and social goals in the IEP, as shown in Findings of Fact 12 and 27, and Conclusion of Law I despite School personnel testimony that these goals were not included.
- C. The IHO erred in concluding that the acknowledged omission of an FBA and BIP in the Student’s services did not reach the level of denial of a FAPE, as shown in Findings of Fact 24 and 30, and Conclusion of Law K.
- D. The IHO erred in determining there was no justification for ESY services due to a lack of evidence of regression, as shown in Finding of Fact 26 and Conclusion of Law J.
- E. The IHO erred in finding no denial of FAPE for procedural reasons, specifically finding that there was sufficient prior written notice as required by 511 IAC 7-22-2 and any denial of prior written notice was without prejudice.
- F. The IHO erred in concluding in Finding of Fact 34 and Conclusions of Law R, S, and U that the School was not required to provide the Student with prior written notice regarding the possible change in placement to Sand Creek Elementary School, as required by 511 IAC 7-22-2.
- G. The IHO erred in concluding in Finding of Fact 34 that even if prior written notice were required, but not provided, that there was no prejudice to the Student because the Student was able to timely file a due process request.

### **Respondent’s Response to The Petition for Review**

The Respondent noted that the Petitioner, in addressing the standard of review to be used by the

BSEA in conducting its review, cited to Seventh Circuit case law discussing the standard of review to be utilized by federal courts in reviewing IDEA administrative decisions. Respondent argues that the correct standard of review is that set forth in Article 7 at 511 IAC 7-30-4(j).

With regard to the Findings of Fact, Respondent argues that the Findings should be upheld because they are supported by substantial evidence in the record. Furthermore, the Conclusions of Law should be upheld because they are: supported by substantial evidence in the record, in accordance with applicable law, not beyond the scope of authority, and neither arbitrary nor capricious.

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

On May 28, 2008, the BSEA convened in Indianapolis for the purpose of hearing oral argument and conducting its review in this matter. All three members of BSEA participated. Each had received and reviewed the record from the due process hearing below, including the Petition for Review and the Respondent's Response to the Petition for Review. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto and in consideration of the oral arguments, the BSEA now decides as follows.

### **COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determine or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. Article 7 hearings are conducted pursuant to the Administrative Orders and Procedures Act, I.C. 4-21.5-3 et.seq. and 511 IAC 7-30-3
3. The IHO's decision must contain separately stated Findings of Fact, Conclusions of Law, and, if applicable, orders. The Conclusions of Law must be based upon the Findings of Fact and the Orders must be derived from the conclusions of law.
4. A Petition for Review of a due process hearing must be specific as to the reasons for the exceptions to the IHO's decision, identifying those portions of the Findings, Conclusions, and Orders to which exceptions are taken. 511 IAC 7-30-4(d).
5. No objections were raised to any of the IHO's Findings of Fact. The Findings of Fact are

supported by substantial evidence and should be upheld in their entirety.

6. Petitioner did not object to the IHO's Conclusions of Law. The Conclusions of Law are supported by the Findings of Fact, are not contrary to law, and are within the IHO's jurisdiction and authority.

7. The sole issue raised in the appeal was "Whether Respondent's purported substantive and procedural violations of the IDEA and Article 7 constitute a denial of a free and appropriate public education (FAPE)?" (Petitioners Argument A & B)

8. In ruling on the FAPE issue, the IHO determined the following:

a. Petitioner failed to establish the Respondent did not provide appropriate speech services.

b. Petitioner failed to show any regression by the Student so as to justify the need for extended school year services.

c. Petitioner did not establish that a failure to include an FBA and BIP in prior IEP's constituted a denial of a free and appropriate education.

d. Petitioner did not establish that Respondent failed to provide appropriate social skills training.

e. Petitioner failed to present substantive evidence documenting the need for counseling for the Student's anxiety.

f. Petitioner did not establish that Respondent's failure to assign instructional assistance specifically trained in regard to the Student's disability constituted a denial of FAPE. Article 7 mandates "specialized inservice training" for paraprofessionals serving students with specified disabilities but no specialized inservice training is mandated for a mental disability.

g. Petitioner failed to establish the Respondent violated the procedural requirements of IDEA and Article 7. With regard to Respondent's alleged failure to provide prior written notice, the IHO stated: "Such prior written notice cannot be provided prior to the meeting of the case conference committee in that the School is prohibited from unilaterally determining the child's placement." In the Matter of K.O. and Metropolitan School District of Lawrence Township, HR # 1469.05 (BSEA Aug 8, 2005).

h. Petitioner failed to establish the Respondent committed any procedural violations or that any alleged procedural violations by Respondent rose to the level of denial of a free and appropriate public education for the Student.

9. These rulings are supported by substantial evidence in the record.

## ORDERS

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

1. The IHO's Findings of Fact, Conclusions of Law, and Orders are upheld in their entirety.

2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: June 11, 2008

/s/ Cynthia Dewes

Board of Special Education Appeals

### **Appeal Right**

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