

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

In the Matter of C.A.,)	
Hamilton Southeastern Schools, and)	
Hamilton-Boone-Madison Special)	ART. 7 HEARING NO. HR 211-2008
Services)	
)	
Appeal from the Decision of:)	Status: Closed to Public
Thomas J. Huberty, 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 August 18, 2007 and was received by the Indiana Department of Education, Division of Exceptional Learners, on August 23, 2007. Thomas J. Huberty, Ph.D., was appointed as the Independent Hearing Officer (IHO) on August 24, 2007. The request for hearing asserted the Student had not been in school since February of 2007 and was being denied educational services.

The IHO attempted to contact the parties to establish a pre-hearing conference, finally sending a letter to the Student on August 31, 2007, requesting that the parent contact him to discuss procedures for the hearing. The parties informed the IHO that a resolution session was scheduled for September 10, 2007. The resolution session was not successful. The School requested an order for an interim educational placement and for an evidentiary hearing on the placement.

An evidentiary hearing was scheduled for September 18, 2007 to determine the interim placement for the Student during the pendency of the hearing proper. The School asserted that the interim placement should be at the local Juvenile Services Center (JSC), due to concerns about managing the Student's behavior in the school setting. The School also asserted that it believed the appropriate educational placement is a residential treatment program. Consequently, the School also asked for a ruling from the IHO permitting it to contact potential residential placements without written parental consent.

The evidentiary hearing was convened and completed on September 18 subsequent to a pre-hearing order describing the proceedings and the parties' rights and responsibilities. The parent appeared on behalf of the Student, but did not present exhibits, testimony, call witnesses, present opening or closing statements, or otherwise participate in the proceedings. The School was

¹ The 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 parent, depending upon the context.

represented by counsel and personnel from the school corporation and the special education cooperative. The School called three witnesses, but only two testified due to the parent's objection to one witness. She left the room, but returned when the School did not call the witness. On September 24, 2007, the IHO issued a ruling and ordered the Student's "stay put" placement to be at the JSC as proposed by the School. On the same date the IHO issued another ruling permitting the School to contact potential residential sites without written parental permission.

Extensions of time were granted by the IHO to permit the Student additional time to retain counsel, but there was little success. Due to concerns that the Student required educational services, a hearing date of November 8 was scheduled. On November 7, the parent contacted the IHO by telephone to report that the legal counsel she thought was available was not able to serve, and she asked for an extension of time. The extension of time was granted with dates of November 29 and 30 set for the hearing and a decision date of December 24, 2007.

On November 17, counsel obtained by the parent contacted the IHO and the School's counsel to advise of her appearance on behalf of the Student. Counsel requested an extension of time into January, 2008, and, over the School's objection, the IHO granted an additional extension of time to and including March 8, 2008, with hearing dates of January 29, 30, and 31, 2008. A co-counsel was obtained effective January 7, 2008 to represent the Student, who participated fully in the proceedings. At the time of obtaining counsel, the Student's parent had not complied with the order for the stay put placement. Thus, the Student was not receiving any educational services. His counsel assisted in informing the parent that she must comply with the order and services were started and maintained during the pendency of the hearing.

On November 27, 2007, counsel for the Student submitted a request to dismiss the hearing. Given the nature of the issues in the hearing, the IHO gave the School the opportunity to determine if it wished to continue the proceedings and obtain a ruling on the single issue that had been identified prior to the Student obtaining counsel. The School indicated its desire to continue and assumed the burden of proof, although the Student remained the identified Petitioner.

A single issue had been identified for the hearing: **What is the appropriate placement for the Student?**

On January 18, 2008, the Student's counsel filed a motion to clarify the issue for the hearing, eleven days before the hearing was to begin. The School objected to the motion, asserting that it was too close to the start of the hearing and the Student's counsel had ample opportunity to file the motion earlier in a timely manner. The IHO denied the motion and the single issue remained for the hearing.

A pre-hearing order had been issued on October 29, 2007, delineating the parties' rights and responsibilities and procedures for the conduct of the hearing. The issue was restated in the pre-hearing order. Several requests for subpoenas to appear and *subpoenas duces tecum* were requested by the Student and the School and were granted by the IHO.

The hearing was convened at approximately 8:30 on January 29, 2008, and was closed to the public with witnesses being separated. All witnesses were sworn under oath to provide accurate testimony. A pre-hearing conference was conducted prior to the beginning of testimony, with objections to exhibits and procedures discussed. All exhibits were admitted simultaneously, although the Student indicated there might be objections based on how some were used. The IHO indicated that objections could be made at the time, and rulings would be made accordingly.

The parties' representatives made opening statements with the School going first as accepting the burden of proof. Both parties made closing statements and agreed not to submit post-hearing briefs. The Petitioner requested printed copies of the decision and transcript..

On February 29, 2008, the Student's counsel sent correspondence to the IHO in the form of signed affidavits that the Student had begun to receive psychological and medical services that were recommended by providers and discussed during testimony. The Petitioner presents the material as newly discovered evidence under Trial Rule 60. The School objected to this material in a written response dated March 3, 2008, arguing the material is not newly discovered evidence under Trial Rule 60, submitting written materials after the hearing prevents the School from cross-examining witnesses, and the submission is inappropriate a few days before the decision in this matter is to be rendered. Having considered the nature of the material, the School's response, and that the material does not constitute newly discovered evidence that can be subjected to cross-examination, the documents are not admitted as new evidence and were not considered in the rendering of this decision.

Based on the testimony at the hearing and in consideration of the documentary evidence submitted, the IHO determined the following 34 Findings of Fact.

FINDINGS OF FACT

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5.3 *et seq.* and 511 IAC 7-30-3, which give the IHO the authority to hear and rule upon all matters presented.
2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. It was determined that all due process procedures were in compliance with requirements of 511 IAC 7-30-3 and IC 4-21.5.3 *et seq.*
4. The Student is fifteen (15) years old and is enrolled in the school corporation, although he does not attend a public school setting currently. He continues to receive his instruction for approximately one and one-half hours per day, five days per week pursuant to the IHO's stay put order of September 24, 2007. His instruction is provided by a licensed teacher employed by the school corporation, with the assistance of a teacher at the JSC.
5. The Student has been found eligible to receive special education services as a student with an Emotional Disability (511 IAC 7-26-6) and a secondary disability of a learning disability (511

IAC 7-26-8). There is no dispute that the Student requires special education services, but the parties disagree about the appropriate program to meet his needs.

6. The Student is described as being kind and sensitive often, despite occasions of behavioral difficulties.

7. The Student has a history of behavioral problems, including being defiant, oppositional, resistant to following directions, verbal and physical aggression, leaving the school setting without permission, and frequent use of profanity.

8. The Student is large for his age, including being over 6'4' tall and weighing over 350 pounds. These characteristics inhibit school personnel from managing noncompliant or aggressive behavior.

9. His medical history includes having Type II diabetes, and an eating disorder, which are not currently being treated or are under control. There is also a history of sleep apnea. There are statements in the independent educational evaluation that he experienced some seizures as a young child and was hit by a car at the age of eight. His mother testified that he has had difficulties since that accident.

10. The Student has received counseling for his behavior, although was not participating in these services at the time of the hearing. According to the mother testimony, referrals were in progress to address his behavioral and psychological needs, as well as to treat the eating disorder and obesity.

11. He is taking psychiatric medications to treat depression and mood difficulties. There are also concerns about his personal hygiene, as he does not bathe on a regular basis.

12. The Student attended a day treatment program in Indianapolis in 2006 to address his psychological and behavioral problems. While there, he received individual and group therapy and academic instruction. He was discharged from that facility after a few months because his aggressive and noncompliant behavior could not be effectively managed by the staff, in part due to his size and physical strength.

13. Following discharge from this program, he was placed in a residential facility for adolescents with emotional and behavioral problems, although it was not considered a "secure" setting as would be seen in a program where doors were locked. The facility was about two hours from his home and parent visits were limited. The facility knew about his behavioral problems upon admission but also wanted to try to address his medical needs, as well.

14. After a few months, the facility staff began discussing discharge, because they could not handle his aggressive and noncompliant behavior and could not maintain the type of security they felt the Student needed to make progress.

15. The residential treatment program director testified that he believed the Student needs a residential treatment program in a secure facility where he can be kept in a physical space and be

required to comply. It was his opinion that the Student needs an intensive, structured, highly treatment focused program, education, significant supports, and work on self-care skills. The Student left that facility in February, 2007 and the director has had no contact with him since that time.

16. After leaving the residential facility, the Student returned to his home school corporation. He then moved into the Respondents' school corporation district.

17. The Student has been evaluated and determined to have some learning difficulties and is in the low average to borderline range of cognitive ability. He has experienced frustration in the classroom when attempting academic tasks and has refused to comply, including leaving the classroom setting and school building. On one occasion, he left the school building and refused to return. He crossed a busy highway and school personnel called emergency services (i.e., "911") due to concerns about his safety. The school staff were unable to talk with him to prevent him leaving and were unable to restrain him physically.

18. School staff testified being concerned about their safety when the Student becomes noncompliant and aggressive. Testimony also indicated that the Student has social skills deficits and difficulties with anger management. At times, he will refuse to work on his academic assignments and get angry when he feels he cannot do the work. On some days, he will come to school and refuse to work and sometimes become angry without apparent provocation.

19. He has made some academic progress, but there is little evidence that he has made substantial progress on his IEP goals, which include both academic and social skills objectives. His teacher indicated that his math skills are at approximately a third grade level. He can read at a fifth to sixth grade level, but reading comprehension is at about a third grade level.

20. The therapist and case manager for the day treatment program who had worked with the Student about one and one-half years ago testified that the Student showed rages, shoving others, elopement from the setting, intimidating of other youths and staff, and noncompliance. The Student was in the program about three months before being discharged. Even in positive situations, he would show anger at times. Enforcement of rules was difficult and the Student would insist on receiving program rewards despite not earning them. On one occasion before he was discharged, the Student became enraged and left the setting, broke a desk, threw a chair, and was handcuffed and taken to the JSC. Although there were "...some good days..."³, they declined to the point where he could not be managed in the program. He "...really struggled..." with academics while in the program. He was considered "...way too aggressive..." for a public school program.

21. A child services coordinator who works with the school system recommended a more restrictive setting for the Student that is secured where emphasis can be placed on addressing his behavior problems, to be with his peers, and to develop social skills. The recommendation was based upon review of the Student's record.

³ Text in quotation marks with ellipses indicates verbatim statements.

22. The first case conference between the School and the Student occurred on April 10, 2007 after he had been discharged from the residential facility. An extensive review of his background was conducted by the School and it followed the recommendations of the previous school district, which included residential placement.

23. The School did not feel that additional educational evaluation was necessary, but did agree to pay for the independent evaluation at parent request. This evaluation was conducted by the psychologist in August, 2007, and is the most recent educational and psychological assessment completed on the Student.

24. The Student was provided homebound instruction at the school for a few hours per week, but progress was limited due to behavioral patterns of refusal, difficulty starting to work, and frustration. School personnel concluded that they could not control his behavior at the School, which led to the recommendation that his services be provided at the JSC.

25. A child and family services case worker last worked with the Student in March of 2005, with emphasis on hygiene, exercise, and his sleep apnea. He expressed concern about the effects of being separated from his mother if he were to be placed in a residential facility and believes that he could be successful with a 1:1 teaching arrangement.

26. The teacher employed by the JSC and who assists the School corporation teacher testified that he has worked well with the Student in the 1:1 arrangement. The Student most often has worked well with him and there have been a few occasions when it was difficult to begin working on academic tasks. He does not work well independently and the teacher uses a “coaching” approach to work with him. It was his opinion that the setting works well for the Student and that there have been no incidents where he tried to leave and there have been no behavior problems.

27. A social worker at his prior school during 2005-2006 worked with the Student on his behavior, hygiene, and medical appointments. He described the Student as having male dependency needs, being anxious, and impulsive, but also as being sensitive, “...sweet...”, and caring. He has major concerns about his health needs, eating disorder, emotional needs, and medications.

28. The Student’s mother has worked to address his medical and behavioral problems, including his eating disorder. He has received counseling for his emotional and behavioral problems, although he was not in counseling at the time of the hearing. She had discontinued counseling in December, 2007, because she did not believe it was helpful. Appointments had been made for him to receive counseling, medication review, and treatment for his eating disorder by community providers. He has had surgery for sleep apnea, and his sleeping has improved. She describes him as having his feelings easily hurt, will play with toys, impulsive, and can have behavioral problems. She also described him as being a “...big old teddy bear...” and can be caring and kind. She describes him as a follower rather than a leader and will do what others do to gain friendship. Although she was opposed to his homebound instruction at the JSC, she believes that he has learned from it. His needs include social skill development, treatment for his eating disorder, academics, and a stable home environment.

29. The IEP developed by the School identified the Student's primary disability as Emotional Disability and Learning Disability as a secondary disability. No indication was presented to suggest that he has a mild mental disability. Full-time placement in an Emotional Disability Program in a separate school was considered to be the least restrictive environment. A transition plan was written that included his needing support in developing post-school education, community living and participation, and supported employment. The IEP also documented incidents of aggression while he was receiving homebound instruction at the school in a 1:1 teaching situation. On three occasions, the police or crisis team was called and the Student was physically restrained or handcuffed.

30. The independent evaluation included assessment of cognitive, academic and social-emotional status. His general cognitive ability was assessed as being in the borderline (below average) range. His verbal comprehension was in the borderline range, while perceptual reasoning and working memory were in the average range. Processing speed was lower than verbal comprehension and was in the mild disability range. Reading skills were in the average range for fluency and word attack skills, but reading comprehension was below average, as were his math skills.

31. Prior evaluations in April, 2001, October, 2001, and November, 2005, indicated intellectual functioning in the low average range

32. Assessment of social, emotional, and behavioral functioning indicated that the Student has significant difficulties with unregulated mood, anxiety, impulsiveness, attention, social skills withdrawal, sleeping, depression, organization, eating disorder, distractible, mood lability, and concentration. The evaluation indicated that the Student is "...very sensitive to his academic weaknesses and embarrassment on this issue could be a likely trigger for his behavioral episodes". Additional diagnoses included Anxiety Disorder, Not Otherwise Specified, Attention Deficit Hyperactivity Disorder-Combined Type, and a learning disability.

33. Several recommendations were made, among them that he should be placed in an educational program that focus on an alternative school setting (e.g., MOSAICS), on a partial day basis to help with the transition, rather than a residential setting. He should also have access to adults he trusts to add support to him. The psychologist testified that he needs to be "...protected..." from others. He also testified that the Student should not be in mainstream educational settings until his mood is stabilized and should be where contact with others is limited. He opined that aggressive behavior likely would be seen if he were to be placed in a residential setting and he would be a "target" of other residents. The psychologist believed that medication management is "...critical...", and may take several months to stabilize the mood disorder.

34. During the course of the Student's enrollment in public school programs, the residential program, and day treatment program, inquiries were made to several residential facilities regarding placement. Admission was refused due to the severity of the Student's aggressive behavior, as well as being unable to meet his medical needs.

Based on the foregoing Findings of Fact, the IHO made the following Conclusion of Law.⁴

CONCLUSION OF LAW

3. Issue: What is the appropriate placement for the Student?

This sole issue was framed for the hearing and the Conclusions of Law regarding it are based upon the evidence and testimony presented. The Student has multiple educational, psychological, and medical needs, all of which contribute to his difficulties in educational performance. A student is to be placed in the least restrictive environment (511 IAC 7-27-9) and is to be removed from the general education environment only when education cannot be satisfactorily achieved using supplementary aids and services (511 IAC 7-27-9(a)(2)). Early in the testimony, the parent stipulated that a general education setting is not appropriate for the Student and asserted that 1:1 instruction is appropriate. Although the Student can demonstrate appropriate behavior at the JSC and with the social worker, he has not been able to work 1:1 in an educational or unsecured residential setting with adults. Often, behavioral problems that interfered with instruction and created safety concerns for him and others resulted. Although he has shown some improvements at the JSC, it is also a restrictive environment and he is not exposed to social interactions. The evidence and testimony established that an educational environment for the Student must take his and others' safety into consideration as a primary concern.

Therefore, the IHO determines that a residential placement is appropriate for the Student at the present time.

Based on the foregoing, the IHO issued the following orders:

ORDERS

1. The Student is to be placed in an appropriate residential setting as soon as is possible. Permission is given without parental consent to the Respondents to share information as necessary to facilitate a residential placement. .
2. The Student will remain in his current homebound instructional setting at the JSC pending residential placement.

On April 2, 2008, the School submitted a letter to the IHO asserting that the Student had not complied with the IHO's order requiring the Student to share information to facilitate a residential placement. The Student sent a letter to the School (with a copy to the IHO), indicating that the IHO had ordered in the decision that a case conference committee was to be convened. The School responded, indicating that the IHO did not order the case conference committee to convene. The School also indicated that the Student refused to participate in the educational services at the JSC on March 24 and 25, 2008, and that on March 31, 2008, the student would not attend the JSC because he would not get on the bus. On April 3, 2008, the IHO issued an order with the following findings of fact:

⁴ The first two 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.

1. The hearing decision of March 7, 2008, did not order a case conference to be convened as asserted by Petitioner. By seeking to convene a case conference and failing to respond to the School's requests for participation and information to facilitate the application process to Indiana Developmental Training Center (IDTC), the Student has impeded the School's efforts and obligations to comply with the hearing decision Order #1. The Order to place the Student in a residential facility "...as soon as is possible..." is legally binding on the Petitioner. There was testimony during the hearing process that IDTC was considered as a possible appropriate placement for the Student. However, the issue for the hearing was whether residential placement is appropriate for the Student, not specifically whether IDTC is appropriate. Therefore, other facilities in addition to IDTC could be considered as possible placements.
2. The Student has not fully complied with Order #2 that the Student's instruction will continue at "...the JSC pending residential placement..." by leaving the facility without permission and failing to attend on the occasion noted above. This Order is legally binding on the Student and attendance of the Student for instruction is required, except for circumstances such as physical illness or medical appointments.
3. The additional information requested by the School to be kept informed about treatment and medication management due to behavioral problems seen at the JSC is appropriate.
4. The requests that continuing supplementation of the School's records by Children's Resource Group personnel and documentation of participation in the Riley Eating Disorder Clinic be provided are appropriate.

The IHO issued the following orders:

1. The Student is Ordered to contact the School in writing by the close of business on Monday, April 7, 2008, and to make arrangements to participate in the interview process and provide necessary medical information to IDTC personnel at a reasonable time and place, but by no later than April 17, 2008.
2. The Student is Ordered to cooperate as expeditiously as possible with application procedures, provide necessary information, and participate as necessary with other potential residential facilities that may be considered.
3. The Student is Ordered to attend instructional services at the JSC each day as required until residential placement is established, except for physical illness, medical appointments, or other reasonable circumstances.
4. With written parental consent, personnel from the Children's Resource Group and the Riley Eating Disorder Clinic are Ordered to provide the School with ongoing information at least monthly regarding the Student's attendance, participation, medication management, and other information relevant to the Student's education to the extent permitted by Indiana law regarding release of medical and mental health information.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The Student timely filed his Petition for Review on April 7, 2008. The Student requested oral argument. The Student also requested the BSEA issue a stay of the IHO's order, including the IHO's clarifying order of April 3, 2008.⁵ On April 8, 2008, the School filed its response to the Student's request to stay the IHO's orders, and requested an extension of time to prepare and file its Response to the Petition for Review. The BSEA issued an Order on April 16, 2008, granting, in part, and denying, in part, the Student's request to stay the IHO's orders. The IHO's order that the Student be placed in a residential facility was stayed pending the outcome of the appeal. The BSEA denied the request to stay the remaining parts of the IHO's orders thereby enabling the School to share information to facilitate a residential placement and requiring the Student to cooperate in the process. The BSEA granted the School's request for an extension of time, giving the School an extension of time to and including May 16, 2008, to file its Response. The timeline for the BSEA's review and issuance of a written decision was extended until June 16, 2008. The School timely filed its Response on May 16, 2008.

The record from the hearing below was copied and transferred to the BSEA members on April 23, 2008.

On April 7, 2008, the Office Manager, Legal Affairs, Department of Education, contacted the parties to obtain available dates should the BSEA elect to hold oral argument. The parties responded timely, indicating available dates. The Student was also requested to indicate whether the Student wished to receive the final written decision of the BSEA in electronic form or hard copy and whether the Student wished to have oral argument opened or closed to the public. The Student did not respond to this request. Therefore, the oral argument will be closed to the public and the written decision of the BSEA will be provided in hard copy rather than electronic format.

On May 8, 2008, the BSEA notified the parties that oral argument would be conducted in this matter. The parties were provided with notice of the date, time, and location of oral argument.

Oral argument was conducted on May 21, 2008, at the Hamilton-Boone-Madison Special Services Cooperative, 400 South Guilford, Carmel, Indiana, at 10:00 a.m. local time. Both parties appeared and were represented by counsel.⁶ All three members of the BSEA were present. Oral argument was closed to the public.

Student's Petition for Review

The Student did not identify any specific findings of fact, or conclusions of law to which he objected. The Student did object to the order providing for a residential placement. The Student identified several issues, and provided argument and citation to authority to support his argument. The Student raised the following issues in his petition: The IHO did not make any findings regarding the appropriateness of the Student's individualized education program (IEP)

⁵ The Student refers to the IHO's clarifying order of April 2, 2008. The order was dated April 3, 2008.

⁶The Student was represented by Alexandra Curlin. The School was represented by Andrew Manna.

nor did the school meet its burden in proving the appropriateness of the Student's IEP; the IHO's decision ordering residential placement was arbitrary and capricious because the IHO ordered residential placement without making any findings regarding the appropriateness of a particular residential placement; and, the IHO made several evidentiary errors while conducting the hearing that affected the outcome of the hearing.

The evidentiary errors alleged by the Student were as follows:

- A. The IHO erred in considering evidence of medical needs, as shown in FFs # 9, 10, 11, and 13 and the order of clarification dated April 3, 2008.⁷
- B. The IHO erred by using stale evidence as the gravamen of his decision that residential placement is appropriate for the Student, as shown in FFs # 7, 8, 12, 13, 18, and 30.
- C. The IHO erred by concluding that residential placement is the most appropriate way to deal with the Student's issues of elopement.
- D. The IHO erred by not relying on Dr. Kinder's testimony regarding the Student's need to be protected from other students, high separation anxiety, and the harm a residential placement would likely cause.
- E. The IHO erred by admitting the School's evidence over objection when the School had not provided foundation, authentication, or relevance of the majority of its exhibits.
- F. The IHO erred by allowing witnesses to testify from documents that were unjustly admitted rather than from their own memory or personal experience.
- G. The IHO erred by allowing prejudicial testimony from the School's counsel regarding the Student's absence during the hearing.
- H. The IHO erred by allowing the School's counsel to request from the IHO the information needed when the School's counsel was conducting the direct examination of Rob Sturm.
- I. The IHO erred by not allowing testimony regarding the cost of residential placement versus the cost of therapy at the Children's Resource Group.

School's Response to Petition for Review

The School noted that the Student, 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. The School argues that the correct standard of review is that set forth in Article 7 at 511 IAC 7-30-4(j). The School argues the decision of the IHO should be affirmed because it is supported by substantial evidence and law. The School points out that the U.S. Department of Education has interpreted location to mean the type of environment rather than a specific school, and that educational placement is not statutorily defined. The IHO's finding in Conclusion of Law #3 that residential placement is appropriate for the student is supported by the broad interpretations of location and change of placement under both federal and state law. The evidence and testimony provided at the hearing support the IHO's determination that a residential placement is the appropriate placement. Although the Student requests the BSEA to order the School to provide the Student with education in a safe environment with trained professionals that use a 1:1 teaching approach, the Student has failed to name a specific location for such a placement. However, the Student did stipulate that any environment that is a traditional school environment, a self-contained

⁷ The Student's Petition for Review refers to the order of clarification dated April 2, 2008. The order was actually dated April 3, 2008.

classroom, resource room, inclusion, an alternative education placement where other students are, or a MOSAIC setting, is not appropriate.

The School further argues that the IHO did not err when considering the medical needs of the Student. The Student failed to show that the IHO's conclusions concerning the Student's medical needs were either not supported by substantial evidence or inconsistent with Article 7. The IHO did not use stale evidence in making his decisions. The IHO's findings were supported by substantial and reliable evidence. The IHO did not err by concluding that residential placement is the most appropriate way to deal with the Student's issues of elopement. The IHO's conclusions do not make such a determination. The IHO did not err in weighing the testimony of Dr. Kinder, nor did the IHO err in the course of admitting documents presented in the course of the hearing. The School's exhibits were the Student's educational records and, as such, were business records and not hearsay. Ind. Evidence Rule 803(6). The IHO did not err in admitting testimony of witnesses personally knowledgeable about the Student.

The School argues the IHO did not err in issuing his April 3, 2008, order regarding the attendance requirements for homebound services. The order was within the discretion of the IHO. The IHO did not err in exercising his discretionary authority with respect to the presentation of testimony, nor did he prevent the Student from presenting testimony about the costs of therapy at Children's Resource Group. The School concludes that the IHO correctly determined that a residential placement is appropriate for the Student and that the IHO's decision should be affirmed.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

On May 21, 2008, the BSEA convened in Carmel for the purpose of conducting oral argument and its review in this matter. All three members of the BSEA participated. Each had received and reviewed the record from the due process hearing below, including the Petition for Review and the School'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 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 determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. Article 7⁸ hearings are conducted pursuant to the Indiana Administrative Orders and Procedures Act⁹ and 511 IAC 7-30-3.
3. The IHO's decision must contain separately stated findings of fact, conclusions of law,¹⁰ 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. The Student 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 hearing was "What is the appropriate placement for the Student?" The parties developed an agreed-upon IEP on August 20, 2007, as shown by School's Exhibit L, pages 969-1006, Volume 3. Three days later, the Student requested this due process hearing, disagreeing only with the placement. The Student did not claim the IEP was not appropriate, nor did he raise any alleged procedural violations.¹¹ The IHO did not err by not addressing issues not raised.
8. In ruling on the sole issue of the appropriate placement for the Student, the IHO was not required to determine a specific location for that placement. The U.S. Department of Education has indicated that neither placement nor educational placement refers to a specific location.

The terms "educational placement" and "placement" are used throughout the Act, and we have followed the language of the Act whenever possible. We do not believe it is necessary to define "educational placement." Section 300.116, consistent with section 612(a)(5) of the Act, states that the determination of the educational placement of a child with a disability must be based on a child's IEP. The Department's longstanding position is that placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school.

71 FR 46540, 46687.

⁸ 511 IAC 7.

⁹ I.C. 4-21.5-3.

¹⁰ **Error! Main Document Only.** The Administrative Orders and Procedures Act uses the terminology "findings of ultimate fact."

¹¹ Although no procedural issues were raised in the hearing, the Student did present evidence and testimony of alleged procedural violations occurring during the spring and early summer of 2007. These procedural violations were addressed through the complaint process. The final Complaint Investigation Summary in Complaint No. CP-228-2007 was issued July 23, 2007. Those procedural violations were not issues before the IHO.

9. Although the Student complains that neither the School nor the IHO named a specific location for the residential placement, the specific facility where the Student might be placed was not before the IHO. Until the Student's placement was known, a specific location could not be determined. The Student proposed to continue the one-to-one homebound placement at the Juvenile Services Center (JSC) while the School recommended a residential placement. Finding a residential placement that is appropriate for a Student, can meet his needs and provide the services specified in the IEP, and has space available in the appropriate setting requires the consent and cooperation of the Student.
10. The Student's argument¹² that the School never raised a concern about a lack of cooperation on the part of the Student in exploring residential placements is belied by the record. In his ruling of September 24, 2007, the IHO indicated the "parent has refused to give the [School] permission to investigate residential options, which would include providing information about the Student's educational, behavioral, and psychiatric history. The [School] request[s] that the Hearing Officer grant permission to investigate options and give necessary information for evaluation of appropriateness for residential placement." The IHO then granted the School permission to investigate residential placement options and release appropriate information without parental consent. In the IHO's written decision of March 7, 2008, the IHO ordered the Student to be placed in an appropriate residential setting as soon as possible and further granted the School permission without parental consent to share information as necessary to facilitate the placement. Finally, in his order of April 3, 2008, the IHO ordered the Student to contact the School by April 7, 2008, to make arrangements to participate in the interview process and provide necessary medical information to personnel of IDTC no later than April 17, 2008. The Student was further ordered to cooperate as expeditiously as possible with application procedures, provide necessary information, and participate as necessary with other potential residential facilities that may be considered. To now complain that the School has not named a specific facility, when the Student's continued refusal to cooperate in the process has effectively tied the hands of the School in its attempts to locate a specific facility, is disingenuous at best.
11. The IHO's order of residential placement is supported by the findings of fact and conclusions of law. The order is not arbitrary or capricious.
12. The Student's claims of evidentiary error are not supported by the record or the law. The Student refers to "stale" evidence and evidence "unjustly admitted" without identifying the specific evidence objected to, nor the legal bases for such objections. Both the School and the Student presented evidence of the Student's educational placement and behaviors during the past two or three years. Such evidence is relevant to any determination of an appropriate educational placement for the Student.
13. The Student makes hearsay objections without identifying with particularity the evidence claimed to be hearsay, nor making any reference to the record to indicate that the same objection to specific evidence or testimony was raised before the IHO. Any such objection is therefore waived.

¹² During oral argument the Student asserted that the School never indicated a lack of cooperation on the part of the Student in exploring residential placements.

14. The written evidence presented by the School consists of the Student's educational record which was authenticated by the School. As a business record, it is not excluded by the hearsay rule. Indiana Rules of Evidence, Rule 803(6). The evidence is also a public record as defined by I.C. 5-14-3-2(m). Public records are not excluded by the hearsay rule. Indiana Rules of Evidence, Rule 803(8). There was no error in admitting the Student's educational records.

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: May 28, 2008

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

APPEAL RIGHT

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