

# Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798  
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## BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

*In the Matter of J.K.,* )  
*and the* )  
*MSD of Southwest Allen County* ) **Article 7 Hearing No. 1388.04**  
*Schools and the Smith-Green* )  
*West Allen Special Education* )  
*Cooperative* )  
)  
)  
Appeal from the Decision of )  
Joseph R. McKinney, J.D., E.D. )  
Independent Hearing Officer )

### **Procedural History and Background**

The Student's<sup>1</sup> request for a due process hearing was received by the Indiana Department of Education, Division of Exceptional Learners, on October 21, 2003. On October 21, 2003, Lon Woods Esq., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO).

A pre-hearing conference was scheduled for November 26, 2003. On November 26, 2003, counsel for the Student requested an extension of time to conduct settlement negotiations. On November 29, 2003, the IHO granted the Student's request for an extension of time until January 5, 2004. The IHO issued a Notice of Recusal on December 8, 2003, indicating that he would be unable to comply with the January 5, 2004, deadline for issuing a decision.

A new IHO was appointed by the State Superintendent of Public Instruction on December 9, 2004. A pre-hearing conference was held on December 23, 2003. By agreement of the parties, the decision deadline was extended until February 19, 2004. The hearing was scheduled for January 28, 29 and 30, 2004. A fifth date, February 5, 2004, was subsequently added. The pre-hearing order of December 23, 2003, identified seven issues for hearing:

1. The School's failure to complete its evaluation, convene a case conference committee, develop an individualized education program for the child and implement said individualized education program by the date of the child's third birthday, all in violation of 511 IAC 7-28-2(e). This delay in the development of the child's IEP resulted in delays and gaps in services since J.K. left the First Steps Program in December 2002.

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<sup>1</sup>Student refers to both the Student and Parents as parties herein.

2. The School's failure to develop and implement a system to provide that parents, teachers, staff and administrators were adequately trained/licensed in the areas of the child's needs and disabilities, in violation of 511 IAC 7-21-2, 511 IAC 7-20-3 and 511 IAC 7-28-1(h).
3. The School's failure to develop and implement an appropriate IEP taking into consideration the unique needs of J.K. J.K. is a child with Autism Spectrum Disorder. The School has provided in the past and is currently providing an insufficient number of hours for Applied Behavioral Analysis Therapy (ABA). Further the School has denied extended hours of therapy, stating that it is its policy not to deliver these services outside the normal school day hours. This unbending policy fails to address the unique needs of the child with this disability. Because the School refused to support the appropriate number of hours to meet the educational needs of the child, the parents have been forced to incur the additional expense to support the appropriate level of therapy as well as the cost of an appropriate consultant. The School also refused to supply flashcards for the child that the Parents requested. The School also refused to provide necessary occupational therapy (OT) services for the child.
4. The School's failure to provide an appropriate level of recreational and physical therapy. Although the Parents proposed physical education in the form of swimming and tae kwon do to appropriately support the needs of the child, the School rejected this proposal and offered no alternative, in violation of 511 IAC 7-17-59 and 511 IAC 7-28.
5. The School failed to comply with written notice requirements of 511 IAC Article 7 in that it failed to provide an appropriate written notice to the parents in a reasonable period of time prior to refusing to include and provide certain services in the child's education program as requested by the Parents in violation of 511 IAC 7-22-2.
6. Whether the child is entitled to compensatory education.
7. If procedural errors occurred and did they have an adverse effect on the child's education.

On February 6, 2004, the Student, by counsel, submitted an email request to the IHO for an extension of time for the hearing decision until February 27, 2004. The IHO granted the request by order dated February 19, 2004. On February 26, 2004, at the request of the IHO, the Student, by counsel, requested an additional extension of time for the decision until March 5, 2004. The IHO issued an order granting this extension on February 27, 2004. The parties' tendered exhibits were admitted, with the exception of the School's Exhibit C-20. The Student objected to this exhibit as being part of settlement negotiations. The IHO sustained the Student's objection.

The IHO issued his written decision on March 5, 2004. The IHO determined seventy-one (71) findings of fact.

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 et seq. and 511 IAC 6-30-3, which gave the IHO the authority to hear and rule upon all matters.

2. All Findings of Fact which can be deemed Conclusion of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. The Student is approximately 4 years and 2 months of age (date of birth: December 29, 1999).
4. The Student began attending the First Steps program because of developmental delays at about 22 months old. First Steps is a provider of early intervention services to children with disabilities under three years of age.
5. An Individualized Family Service Plan was developed for the child December 21, 2001.
6. The Student used about six to twelve words at age two. He received speech therapy beginning in November 2001 and developmental therapy from First Steps starting in January 2002. The Student preferred to play alone.
7. The Student also received some occupational and physical therapy at First Steps.
8. The Student was evaluated by Lisa Petrass when he was two years old and he was found to have significant expressive and language delay.
9. In May 2002, the Student was administered the Rosetti Infant-toddler Language Scale and was found to fall substantially below his age level across all-expressive and language development categories, especially language expression and comprehension.
10. The developmental therapist for First Steps provided a 6<sup>th</sup> month/annual review report on June 5, 2002. The Student had significant delays across all domains except regulatory/sensory. He had delays in cognitive, language receptive, gross motor, fine motor, social emotional and self help.
11. The developmental therapist noted in her June 5, 2002 report that the Student could be physically aggressive at times.
12. The Turnstone Center conducted a physical therapy/plan of care evaluation in August 2002 when the Student was 2 years and 8 months old. At this age the Student spoke a total of 12 words. The report noted that the Student's mother said he banged his head a lot and had begun pinching others.
13. The School held a 90-day transition meeting with the mother on November 19, 2002. The mother expressed concerns about the Student's language and behavior management. She talked about the Student pinching and biting others.
14. The School's early childhood coordinator (EC) indicated that the child looked like he might be autistic at the November 19, meeting.

15. First Steps information (including testing results) were given to the EC at the November 19<sup>th</sup> meeting. The discussion at this meeting centered on “whether the Student fit into the autism category.”
16. The EC indicated the School would wait to evaluate the Student until after it received an evaluation that was scheduled to be conducted by Riley Children’s Hospital on December 18, 2003. This evaluation had been scheduled through the First Steps program. The EC said that the School would evaluate the Student after it reviewed the Riley report.
17. The School conducted a speech-language evaluation on December 5, 2004. During the testing the Student displayed self-injurious behavior. The mother asked the School to conduct a psychological evaluation of the Student. The School did not respond to the request in writing.
18. The Student was evaluated by Dr. Angela Tomlin at the Riley Hospital for Children on December 18, 2003. Dr. Tomlin found the Student to have behaviors that met criteria for Pervasive Developmental Disorder, Not Otherwise Specified (PDDNOS), as listed in the DSM-IV-TR.<sup>2</sup> Websites and resources with information about autism spectrum disorders were provided the parents.
19. The first written recommendation made by Dr. Tomlin in her December 19, 2003 report was that the Case Conference Committee (CCC) consider eligibility for services for Students With Autism Spectrum Disorder (ASD).
20. A case conference committee meeting was held on January 9, 2003 and the Student was found eligible for services under Article 7 in the disability area of communication disorder. The IEP provided for speech therapy for 30 minutes twice a week at Whispering Meadows elementary school starting January 9 until June 3, 2003. The speech-language pathologist became the teacher of record (TOR).
21. The mother gave the EC Dr. Tomlin’s evaluation on January 9, 2003. CCC notes indicate that the school psychologist would be asked to evaluate the child to determine eligibility as a child with autism.
22. During the January 9, 2003 CCC the mother requested ABA treatment for his disorder. She also requested occupational therapy (OT) for her son. The School did not respond to these requests in writing.
23. The EC told the mother that OT services could not be a “stand-alone” service at the January 9, 2003 CCC. She told the mother that the Student would not receive an OT evaluation unless he enrolled in the School’s developmental preschool.

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<sup>2</sup>*Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition (Text Revision)* (DSM-IV-TR), published by the American Psychiatric Association, Washington D.C., 1994, the main diagnostic reference of Mental Health professionals in the United States of America.

24. The School did not contact the Student's parents about scheduling a psycho-educational evaluation. The mother called the school psychologist the week of January 27, 2003 to schedule the evaluation.
25. The school psychologist conducted a psycho-educational evaluation on February 10, 2003. The Student was 3 years and 2 months old.
26. The school psychologist conducted several tests of the Student. She noted his December 19, 2002 Riley diagnosis of PDD.<sup>3</sup> The Student's overall ability as measured by the DAS fell into the Mildly Mentally Disabled (MiMD) range. The CDI<sup>4</sup> indicated significant delays in the areas of social skills, expressive language, language comprehension, self-help and general development. Results of The Vineland Adaptive Behavior Scales showed significantly delayed communication skills with daily living skills and motor skills falling in the low average range.
27. The Gilliam Autism Rating Scale (GARS) and the Childhood Autism Rating Scale (CARS) were not administered as part of the February 10, 2003 evaluation. These are considered standard and important tests typically used to determine if a child is autistic.
28. Parents were contacted by phone that a CCC meeting would be held on February 14, 2003. A summary of the meeting was written by the EC on a case conference summary form. IEP<sup>5</sup> Addendum forms were used for this meeting and the purpose of the meeting was marked IEP revision/review.
29. School personnel testified that the February 14, 2003 meeting was not a CCC meeting.
30. The School refused to find the Student eligible for services in the area of autism at the February 14, 2004 CCC. The parents thought he should be classified as autistic. The School changed the Student's eligibility from communication disorder to "developmental delay with communication." Parents did not agree with change.
31. The School's autism consultant at the February 14<sup>th</sup> meeting said she did not have sufficient information about the Student to recommend classifying him as autistic. The School requested a CARS and GARS evaluation be completed by the parents.
32. On February 14, 2003 the School recommended the Student be placed in its developmental preschool for two afternoons per week. The mother requested one-to-one ABA as a school-supported option for the Student. The autism consultant indicated the School would not support an ABA program.

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<sup>3</sup>Pervasive developmental disorder.

<sup>4</sup>Communicative Developmental Inventory.

<sup>5</sup>Individualized education program.

33. On February 19, 2003 the father sent an email to the EC expressing concern over the diagnosis of the Student as developmentally delayed instead of autism spectrum disorder (ASD). Parents requested an ABA methodology for a home program, parent training in ABA, paraprofessional training and more speech therapy. They also requested a qualified ABA consultant to oversee the program.
34. On February 21, 2003 the School provided the parents with the CARS and GARS assessment.
35. On February 25, 2003 the father met with the EC and the special education director. The notes of the meeting were written on a CCC summary form. The purpose of the meeting was to discuss educational placement and services for the Student. The School did not indicate on the CCC form how parents were notified of the meeting.
36. The parent presented the EC and director with a list of the Student's behaviors that needed to be eliminated in order for him to make educational progress at the February 25<sup>th</sup> meeting.
37. The parent was informed at the February 15<sup>th</sup> meeting that he would need to ascertain a physician's prescription for an occupational therapy evaluation before the School would begin OT services. The EC indicated she would administer the ABBLs<sup>6</sup> assessment to the Student.
38. The parents were contacted by telephone that the School was scheduling a meeting for March 7, 2003. The father met with the EC and the autism consultant. Psycho-educational testing that was completed in late February revealed scores on the GARS and CARS that were consistent with ASD.
39. On March 7, 2003 the School agreed to change the Student's disability to ASD. The Student began receiving 12-15 hours of paraprofessional services from the School in late March.
40. The CCC met on March 28, 2003. The parents were not notified in writing of this meeting. This meeting had been set at the March 13, 2003 meeting. The TOR was not present at the March 28<sup>th</sup> CCC. The role of the School's autism consultant was discussed. Parents were concerned that the autism consultant did not have enough expertise in the area of autism to be the consultant.
41. The parents were informed at the March 28<sup>th</sup> CCC that it was the intent of the School to offer all services for the Student and other children with autism in the School's own buildings. The School told the parents that any additional paraprofessional services beyond the 15 hours the Student was receiving at home had to be provided at school. This information was a complete surprise to the parents.
42. School personnel testified that during the spring of 2003 the School decided it needed to expand its continuum of placements (services) for ASD children. The new intensive classroom was set to begin at the start of the fall 2003 semester. Clearly, the School wanted to end providing services to ASD children in home-based programs.

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<sup>6</sup>Probably should be ABLLS - Assessment of Basic Language and Learning Skills.

43. The School informed parents on March 28<sup>th</sup> that home-based teaching wouldn't be provided (paid for) by the School outside of school hours, 8-3:00 p.m. or on weekends. The parents had previously discussed the Student's sleep disorder with school personnel indicating that he awakened at night between 1-4 a.m. and was tired during the day.
44. The father wrote a letter to the EC dated April 22, 2003 requesting the School to respond to his letter in writing. In the letter he made several requests for home-based services using ABA therapy.
45. The parents were contacted by phone about a CCC that was scheduled for April 29, 2003. The Student's behavioral consultant, and former independent behavior consultant for the School (at this meeting still under contract) presented the School (on behalf of the parents) with a list of behavioral goals and objectives that covered all developmental domains to the CCC. The Student's behavior was affecting his ability to be educated. Services were agreed upon for the remainder of the 2002-03 school year. No educational methodology was mentioned in the IEP.
46. The behavior goals presented by the behavioral consultant were not incorporated into the IEP Addendum. The School argued that the behavior goals were part of the IEP because they were "imbedded" in the ABLLS<sup>7</sup> goals.
47. The CCC discussed the results of the OT evaluation. The School offered OT services for 30 minutes per week. The role of the consultant to the child's home program was discussed, but parents were confused about who would lead the 30-hour home program. On April 30<sup>th</sup> the parents received a letter that the School's autism consultant would lead the program.
48. The parents emailed the School complaining that several of the Student's behaviors still needed to be addressed as well as measurement criteria in the IEP.
49. The parents sent a letter to the School on May 12, 2003 requesting a behavior plan and behavior goals be made part of the Student's IEP. The parents informed the School again that the Student's behavior was directly affecting his ability to learn and preventing him from receiving FAPE. The School did not respond to this letter.
50. On May 13, 2003 the School's autism consultant was removed as TOR. OT services began in May for the Student.
51. A CCC was held on May 22, 2003 to discuss extended school services (summer) for the Student. The parents were contacted by phone to set up the CCC. An IEP Addendum was agreed upon that provided services for up to 20 hours during the 8-4 p.m. school day from June 4 – August 15 and speech therapy 2 times per week. No OT was provided. No behavior plan or goals were placed on the IEP. The School indicated that the CCC would reconvene the week of August 12<sup>th</sup> to develop 2003-2004 IEP.

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<sup>7</sup>Probably should be ABLLS - Assessment of Basic Language and Learning Skills.

52. The Schools Assistant Special Education Director wrote a memorandum (not sent to parents) in June, 2003 that stated “We are not setting up home programs now, so would home visits assist in the process of setting up school programs...”
53. The next meeting of the CCC was held on September 5, 2003. Parents were contacted by phone of this meeting. The mother presented the CCC with a comprehensive set of goals and objectives for the 2003-2004 IEP. Most goals were measurable pursuant to the ABLLS.<sup>8</sup> School personnel agreed on some of the behavioral goals. Parents told the CCC that there had been an increase in the Student’s behaviors that were preventing him from learning. Parents discussed his biting, screaming and head banging.
54. The next meeting was held on September 10<sup>th</sup>. Notice of the CCC meeting was given by phone and by personal contact at the previous meeting. At this meeting, the School accepted the goals and objectives of the parents for a 9-week period (not for 1 year). However, no behavior plan and not all of the behavior goals were placed in the IEP. The TOR was not present at this meeting.
55. The CCC (September 10, 2003) discussed the School’s intensive preschool program with the parents. CCC summary notes indicated that detailed plans of potential programs (school based) for the Student needed to be developed and explored. School personnel did not explain what educational methodology would be employed in the intensive preschool program.
56. The next CCC meeting was held on September 19, 2003. The purpose of the meeting continued to be the development of an IEP for 2003-2004 school year. The TOR suggested the Student begin the 2<sup>nd</sup> semester receiving some instruction in the intensive preschool program at the School. The TOR also requested a home visit to get to know the child better. The School provided no written information about the program to the parents. The parents voiced dissatisfaction with the School’s refusal to provide services outside of the 8-4 p.m. school day. No OT goals were presented at the September meetings.
57. According to testimony the School’s intensive preschool program currently has 5 students receiving one-to-one services and ABA therapy as a part of every child’s IEP.
58. The parents filed for a due process hearing on October 21, 2003.
59. At the parents request a meeting was held on November 20, 2003. The School recommended that the Student transition into the School’s preschool program. The School indicated it would consist of an intensive one-to-one program. The School did not clearly indicate the educational and methodological approach that would be used at the preschool.
60. The School indicated at the November 20<sup>th</sup> meeting that it had accepted the same behavioral goals and objectives that the parents provided the School at the April 29<sup>th</sup> CCC. The School did not have a behavioral plan to address these behaviors.
61. The next meeting between the parties was December 10, 2003. The purpose of the meeting

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<sup>8</sup>Assessment of Basic Language and Learning Skills.

was to finalize an IEP and discuss a transition plan. The parents continued to discuss the Student's behavior, i.e., banging head, biting self, throwing himself to the ground. Intensity of these behaviors had escalated over the previous 90 days. The School did not have a behavioral intervention plan for the Student. The School offered to pay for Tadpoles swimming two times per week.

62. The December 10<sup>th</sup> meeting also focused on a transition plan from home to school for the Student. The School said the Student would benefit from the flexibility of the school program and utilizing school staff and resources.
63. The Student's behavioral consultant (BC) prepared a detailed behavioral report dated October 25, 2003 and testified at the hearing. The Student was 3 years and 9 months old when evaluated and was 4 years old and 2 months at the time of the hearing. The BC has worked closely with the Student since April 2003. She stated that the Student's maladaptive behavior is the greatest impediment to his successfully experiencing many social and educational settings and activities. Aggressive behaviors include biting, hitting, pinching, and hair pulling. Aggression also occurs when therapists attempt to interrupt inappropriate behaviors. She indicated that a functional behavioral assessment and plan were absolutely necessary in order to address the Student's goals.
64. The BC testified that the Student was not under "instructional control" at this time.
65. Dr. Umbreit, an expert for the School, testified that home-based ABA programs should be integrated into other settings as soon as possible. He also maintained that all therapy should be individualized and that an autistic child who was a danger (unsafe) to himself or others because of "extreme behaviors" would not be ready to transition from home to school.
66. Dr. James Mulick, Ph.D. and Student's expert, evaluated the Student on November 14, 2003 and testified at the hearing. He found that the Student has significant cognitive deficits and significant adaptive behavior deficits in a language context. He indicated that the Student is at risk for mental retardation if his language deficits and other deficits attributable to ASD were not remediated. Dr. Mulick recommended a 40-hour per week home-based ABA program. He said this should be maintained for at least 24 months, with modification based on his progress. He also said that some interaction with typically developing peers would be appropriate. Finally, he said the "window of opportunity" for language acquisition and development for autistic children was ages 3 through 5.
67. Dr. Claire Thorsen, one of the Schools' experts observed the Student and testified. She said the Student's home program was the best she had seen and described it as excellent. She said the home program did an excellent job of "generalizing." She also testified that a transition plan for the Student should be in writing and shared with parents. She also testified that a functional behavioral assessment was essential for developing goals and objectives.
68. The parents requested flash cards from the School, but School personnel do not remember this request.

69. School personnel did receive adequate and appropriate training regarding ASD children. Parents were invited to workshops and in-services.
70. There was a gap or delay in services for approximately 4 months, January to April, with respect to the School providing OT and ABA therapy.
71. The parent paid \$8,820 to the behavioral consultant, \$1,350 for parent training and \$1,596 for parent counseling and \$250 for swimming. He is asking to be reimbursed for these sums of money.

Based upon these findings of fact, this Hearing Officer made the following conclusions.

1. The School failed to complete its evaluation, convene a case conference committee, develop and individualized education program by the date of the child's third birthday, all in violation of 511 IAC 7-28-2(e). This delay in the development of the child's IEP has resulted in delays and gaps in services since the Student left the First Steps Program in December 2002.
2. The School did develop and implement a system to provide that parents, teachers, staff and administrators were adequately trained/licensed in the areas of the child's needs and disabilities. The School did not violate Article 7 in this regard.
3. The School did fail to develop and implement an appropriate IEP taking into consideration the unique needs (ASD) of the Student. The School has provided an insufficient number of hours of ABA therapy in the past and is currently providing an insufficient number. The School has denied extended hours of therapy outside of the normal school day. This has resulted in a denial of FAPE.<sup>9</sup> The parents have been forced to incur additional expenses to support the appropriate level of therapy as well as the cost of an appropriate consultant. If the School refused to supply flash cards this did not cause a denial of FAPE. The School did refuse to provide necessary OT services for the child.
4. The School did fail to provide an appropriate level of recreation services (therapeutic recreation). The parents proposed physical education (for fundamental motor skills, motor development) in the form of swimming appropriately supports the needs of the child.
5. The School repeatedly failed to comply with written notice requirements of 511 IAC Article 7 in that it repeatedly failed to provide appropriate notice of case conference committee meetings and written notice to parents in a reasonable period of time prior to refusing to include and provide services in the child's education program as requested by the parents in violation of 511 IAC 7-22-2.
6. The child is entitled to compensatory education.
7. Procedural errors repeatedly occurred by the School and definitely had an adverse effect on the child's education.

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

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<sup>9</sup>Free appropriate public education.

1. The Student's current home-based program shall continue to be the Student's FAPE in the LRE from March 5, 2003 until March 5, 2004. The current ABA approach to teaching the Student is appropriate. The School shall support (financially and otherwise) the Student's home-based program for 40 hours per week. This may result in providing services beyond the regular day. In part this constitutes compensatory education.
2. The School will provide extended school year services for the Student throughout summer, 2004 (June-August). The School shall support the 40-hour home-based program, and additionally including OT and swimming.
3. Speech therapy shall be provided 120 minutes each week; occupational therapy will be provided 30 minutes each week, including summer.
4. The School will meet with the parents in December 2004 to develop an appropriate written transition plan for the Student regarding a transition from home to school.
5. The School will reimburse parents for the amount and reasons set forth in FOF number 71.
6. This ORDER is effective immediately (upon receipt). Within fifteen calendar days of the date of this ORDER, the School shall develop an IEP consistent with this ORDER.

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

On March 7, 2004, the IHO issued an Addendum to Article 7 Hearing Decision, indicating that due to a clerical error, one Finding of Fact was omitted. The following should be inserted as FF No. 39(a):

39(a) Another CCC meeting was held on March 13, 2003. The School affirmed that the child's primary disability area would be ASD and it was put into writing. A new TOR was named for the Student at this meeting. The father was concerned about the person identified as the new TOR.

The IHO made an additional correction on March 9, 2004, ordering that the first sentence of Order No. 1 should read: The Student's current home-based program shall continue to be the Student's FAPE in the LRE from March 5, 2004, until March 5, 2005.

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

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

On March 16, 2004, the School requested an extension of time in which to file its Petition for Review. The Board of Special Education Appeals (BSEA) granted this request by order dated March 18, 2004, granting the School an extension of time such that the petition for review would be filed by April 23, 2004, with the BSEA's decision due by May 24, 2004. On March 23, 2004, the Student requested an extension of time until May 25, 2004, in which to file the Student's response. The BSEA granted the Student's request on March 24, 2004, such that the Student's response would be filed by May 25, 2004. The date for the BSEA's decision was similarly extended until June 24, 2004. On April 20, 2004, the School requested a second extension of

time until April 29, 2004, which was granted by the BSEA on April 21, 2004. On April 27, 2004, the School requested a third extension of time until May 7, 2004. The BSEA granted the School's request on April 28, 2004. On May 18, 2004, the Student requested an extension of time until June 14, 2004, in which to file its Response to the Petition for Review. The BSEA granted this request by order dated May 18, 2004, granting the Student an extension of time such that the response to the petition for review would be filed by June 14, 2004, with the BSEA's decision due by July 14, 2004. On June 7, 2004, the Student requested an additional extension of time to file the response. By order dated June 8, 2004, the BSEA granted the Student's request such that the Student's response to the petition for review would be filed by June 28, 2004. The time lines for review and issuance of a written decision remained July 14, 2004.

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

The School's Petition for Review was timely filed on May 7, 2004. The School believes the IHO's Findings, Conclusions and Orders are not based upon sufficient evidence in the record nor upon a clear understanding of the legal requirements Article 7 places upon the School in a case such as this. The School claims the IHO erred in sustaining the Student's objection to the admission of the School's Exhibit C-20 as being part of a settlement offer proffered by the School. The School maintains the exhibit was part of ongoing discussions to transition the Student to the school-based program. The School objects to Findings of Fact Nos. 15 (not based on the evidence), 17 (speech-language evaluation was performed in December 2002, not 2004, and there was no evidence of self-injurious behavior), 21 (inaccurate), 22 (arguing it would be inappropriate to grant or refuse services as the Student had not yet been identified as eligible), 23 (wrong date), 32 (last sentence is not supported by the evidence), 37 (wrong date), 41 (last sentence not based on evidence), 43 (incomplete), 45 (inaccurate), 47 (inaccurate), 49 (inaccurate), 56 (incomplete), 61 (finding fails to specify that escalating behaviors were only in the home setting and were not observed in the school program), 63 and 64 (cites testimony of outside behavior consultant, but fails to mention the consultant never observed the Student working with the School's OT or SLP), 65 (doesn't reflect all of the testimony of the witness), and 67 (doesn't reflect all of the testimony of the consultant). The School also objects to Conclusions of Law Nos. 1, 3, 4, 5, 6 and 7; and Orders Nos. 1, 2, 3, 4, and 5.

The School argues the conclusions lack specificity in showing the School provided S/L services as soon as eligibility was determined. OT services were provided in March and April, 2003, after the School received a doctor's prescription ordering the evaluation. The School began to underwrite the home ABA program after the CCC decision that the Student was eligible as a child with autism. The School maintains it developed an appropriate IEP incorporating the suggestions of the Parents and their consultants in developing the goals and objectives. The School provided OT services as soon as the Student was determined eligible for services, the Parents secured a doctor's order, and the evaluation and CCC had taken place. The CCC never determined that therapeutic recreation services were required for the Student to benefit from his education. The School did, however, reimburse the Parents for swimming services. Although the School may not have always provided written notice of CCC meetings, the parents were aware of and attended all meetings. The technical violation caused no harm. The IHO also concluded the School failed to provide written notice prior to refusing or including a requested service in the IEP. These were all discussed at CCC meetings and the Parents were aware of the School's position. No harm was caused because of the absence of a separate notice. Neither the technical violations nor the delay in services make the Student eligible for the type and amount of compensatory education in the Hearing Officer's order.

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

The Student's Response was timely filed on June 24, 2004. The Student notes that the IHO properly excluded the School's Exhibit C-20 as it was a part of settlement negotiations. With a few minor exceptions, the Student argues the IHO's Findings of Fact are supported by substantial evidence and should be upheld as written. The Student agrees that amendments should be made to three findings. Finding of Fact No. 17 should be amended, as there was not evidence of self-injurious behaviors. However, the Student's behaviors prevented the evaluation from being completed. The Student agrees with the School that FF No.21 should be amended to reflect that the Riley recommendations were provided to the School on January 9, 2003. The Student also agrees that the date in FF No. 37 should be changed to February 14, 2003.

The Student maintains the IHO's conclusions of law and orders are supported by the evidence and in compliance with the law. As such, the IHO's decision should be upheld.

On June 8, 2004, the BSEA notified the parties that on July 6, 2004, this matter would be reviewed without oral argument and without the presence of the parties. The complete record was photocopied and supplied to the BSEA members on May 18, 2004.

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

On July 6, 2004, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petitions for Review and the Response thereto, the BSEA now decides as follows.

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

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The School timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7- 30-4(h).
2. The BSEA upholds the IHO's determination to exclude Exhibit C-20 as being part of a settlement offer.
3. The BSEA, after careful review, upholds the following challenged Findings of Fact as supported by the record: Findings of Fact Nos. 43, 65 and 67.
4. The BSEA amends Finding of Fact No. 15 by deleting the second sentence.
5. The BSEA amends Finding of Fact No. 17 to read as follows: "The School conducted a speech-language evaluation on December 5, 2002. The mother asked the School to conduct

a psychological evaluation of the Student. The School orally responded to the request.”

6. The BSEA amends Finding of Fact No. 21 to read as follows: “The mother gave the EC Dr. Tomlin’s recommendations on January 9, 2003. CCC notes indicate that the school psychologist would be asked to evaluate the Student to enable the CCC to determine eligibility as a child with autism.
7. The last sentence of Finding of Fact No. 22 is deleted.
8. Finding of Fact No. 23 is amended as follows: “The EC told the mother at a CCC meeting that OT services could not be a ‘stand-alone’ service. She told the mother that the Student would not receive an OT evaluation unless he enrolled in the School’s developmental preschool. On February 14, 2003, the School recommended an OT evaluation which was conducted on April 10, 2003.”
9. The last sentence of Finding of Fact No. 32 is amended to “The autism consultant indicated the School would not support only an ABA program.” The remainder of the finding is sustained as written.
10. The date in Finding of Fact No. 37 is changed to February 14, 2003.
11. The last sentence in Finding of Fact No. 41 is deleted.
12. The sentence “The Student’s behavior was affecting his ability to be educated” is deleted from Finding of Fact 45. The remainder of the finding is sustained as written.
13. The third sentence of Finding of Fact No. 47 is amended to read as follows: “The role of the consultant to the child’s home program was discussed, but the parents preferred that their consultant lead the 30-hour home program.” The remainder of the finding is sustained as written.
14. The last sentence of Finding of Fact No. 49 is amended to indicate “The School did not respond in writing to this letter.” The remainder of the finding is sustained as written.
15. The last sentence of Finding of Fact No. 56 is amended to indicate that “No new OT goals were presented at the September meetings.” The remainder of the finding is sustained as written.
16. The third sentence of Finding of Fact No. 61 is amended to read: “The parents continued to discuss the Student’s behavior at home, i.e., banging head, biting self, throwing himself to the ground.” The remainder of the finding is sustained as written.
17. The fourth sentence of Finding of Fact No. 63 is amended to read: “She stated that the Student’s maladaptive behavior at home is the greatest impediment to his successfully experiencing many social and educational settings and activities.” The remainder of the finding is sustained as written.
18. Finding of Fact No. 64 is amended to read: “The BC testified that the Student was not under ‘instructional control’ at home at this time.”

19. The IHO's Conclusions of Law Nos. 1, 3, 4, 5, 6 and 7 are not supported by the findings of fact and the record.
20. Conclusion of Law No. 1 is deleted and replaced with the following:

The School conducted a S/L evaluation in December, 2002. A CCC meeting was held on January 9, 2003. The CCC determined the Student eligible under Article 7 for services as a student with a communication disorder. An IEP was developed to provide services to the Student from January 9, 2003, to June 3, 2003. The Student's third birthday was on December 29, 2002, during the holiday break. Although services did not begin on the Student's third birthday, any delay in beginning services was minimal.
21. Conclusion of Law No. 3 is deleted and replaced with the following:

The School developed and implemented an appropriate IEP taking into consideration the needs of the Student. There was no denial of a FAPE.
22. Conclusion of Law No. 4 is deleted and replaced with the following:

There was no evidence presented that the Student needed therapeutic recreational services.
23. Conclusion of Law No. 5 is amended to read as follows:

The School repeatedly failed to comply with written notice requirements of Article 7 in that it repeatedly failed to provide appropriate notice of case conference committee meetings. Although there were technical violations, no harm resulted to the child as the parents attended every meeting.
24. Conclusion of Law No. 6 is amended to read as follows:

The Student is not entitled to compensatory education.
25. Conclusion of Law No. 7 is amended to read as follows:

Procedural errors by the School had no adverse effect on the Student's education.
26. The IHO's discussion of the law prior to his orders is deleted.<sup>10</sup>
27. The IHO's Orders are deleted.

## **ORDERS**

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

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<sup>10</sup>The IHO's discussion is not set forth in this opinion as it is not a part of the findings, conclusions, or orders.

1. The IHO's decision is amended as indicated above.
2. The School's proposed IEP of September 5, 2003, shall be implemented. The location of the Student's placement shall be transitioned from the home to the school during the first semester of the 2004-2005 school year and the IEP shall be fully implemented within the school setting by the beginning of the second semester of the 2004-2005 school year.
3. The School will meet with the parents in August, 2004, to develop an appropriate written transition plan consistent with Order No. 2.
4. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: July 6, 2004

/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).