

# 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 A.H., )  
And )  
School Town of Highland, and ) **Article 7 Hearing No. 1440.04**  
Northwest Special Education Cooperative )  
)  
Appeal from a Decision by )  
Joseph R. McKinney, J.D., Ed.D. )  
Independent Hearing Officer )

### COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

#### **Procedural History**

The Student<sup>1</sup> is a ten-year-old student. School Town of Highland and Northwest Indiana Special Education Cooperative will be referred to as the "School." The Student, by his mother, requested a due process hearing on June 14, 2004, pursuant to 511 IAC 7-30-3. Joseph McKinney, J.D., Ed.D., was appointed on June 16, 2004, as the Independent Hearing Officer (IHO). After the parties were duly notified, a Pre-hearing Conference was held by telephone on June 24, 2004. A due process hearing was set for August 18 and 19, 2004 at the Northwest Indiana Special Education Cooperative office at Crown Point, Indiana. Since the Petitioners' attorney had just entered the case and at the request of Respondents for more specificity with respect to the issues, the IHO ordered her to provide an amended list of issues for the due process hearing. The parties also jointly requested that an extension of time to conduct and render the decision on this matter be ordered. Subsequently, on July 7, 2004 the IHO ordered the new decision deadline would be set for September 9, 2004.

On July 14, 2004 the IHO issued an Order setting forth the issues to be heard at the due process hearing. These issues were based on Petitioners' amended list of issues. Respondents raised no objections to these issues prior to the due process hearing.

The Due Process Hearing was held on August 18 and 19, 2004, and August 26, 2004. The Student and his mother were represented at the due process hearing by Dorene Philpot, attorney at law. She was assisted throughout the hearing by Edward Kersten, attorney at law. The School was represented at the due process hearing by Monica Conrad, attorney at law of Bose, McKinney and Evans LLP.

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<sup>1</sup>"Student" shall refer to the Student and the Student's Parents, unless otherwise indicated.

The hearing was open to the public at the request of the parents. At the request of the parties at the hearing the decision deadline was extended to September 14, 2004 after the court reporter indicated she would send the transcript to the hearing officer on or before September 7, 2004.

The parties requested the IHO make an interim Order regarding the placement of the Student prior to the final decision. The IHO issued a temporary Order on August 23, 2004 regarding placement and services of the Student pending the final decision.

The specific issues for the hearing were as follows:

1. That the school failed to devise an appropriate IEP for the child in the case conference held on 06-01-04, including failure to educate the child in the least restrictive environment, including the homebound placement, and including failure to have the child's TOR and a speech/language pathologist attend the case conference committee meeting and failure to devise an appropriate extended school year program and a shortened school day.
2. That the school failed to devise an appropriate functional behavior assessment and implement an appropriate behavior and intervention plan during the spring semester of 2004 and failure to conduct a manifestation determination upon a change in the student's placement due to disciplinary reasons.
3. That the school failed to follow the child's IEP in the spring semester of 2004, did not have a teacher of record in place, did not provide progress reports to the parent on the schedule delineated in the IEP and did not follow the Student's behavior intervention plan, failure to conduct an assessment by the Autism Team; and assign an additional paraprofessional to the student's classroom.
4. That the school failed to comply with the requirements for prior written notice in regard to the child's change of placement and changes in services delineated above.
5. The school failed to provide all professional and paraprofessional staff serving the student with specialized in-service training in the spring of 2004.
6. Failure to give proper notice of the case conference committee meetings on 02-02-04 and 06-01-04 by failure to list the purpose of the meeting in the meeting notices and failed to schedule a case conference at a mutually agreeable time and place on 05-21-04 and failed to explain the notice of procedural safeguards to the parents at the June 1, 2004, case conference committee meeting and failure to include required participants at the 02-02-04 and 06-01-04 meetings, failing to state why the student was not being educated in the school the student would attend if not disabled and failing to make evaluation results available to the parent at least five days before the case conference committee meeting

and offer an explanation of the results to the parent and failure to include in its disaster plan provisions for warning and evacuating student who requires special warning and evacuation procedures.

7. That the school failed to devise and properly implement an appropriate physical education program for the child.
8. Failure to properly evaluate the child to determine the appropriate areas of eligibility for special education and related services in the spring semester of 2004.
9. Failure to comply with the parent's request for original case conference committee recordings from the 06-01-04 meeting and the records requested on 05-20-04.
10. Failure to provide appropriate transportation in that student was exposed to an inappropriately lengthy transit time to and from school.
11. Failure to protect against unauthorized disclosure of personally identifiable student information with an unauthorized individual in regard for the time period 02-02-04 through 06-01-04.

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

The IHO's written decision was issued on September 14, 2004. In his decision, he determined eighty-seven (87) Findings of Fact. These Findings of Fact are reproduced below:

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

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 et seq. and 511 IAC 7-30-3, which gave the IHO the authority to hear and rule upon all matters.
2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. The Student was born on May 21, 1994 and is approximately 10 years and 3 ½ months of age.
4. The Student lives with his mother and stepfather in the School Town of Highland district. The mother moved to Indiana from Florida during the summer of 2003 and married the stepfather.
5. The Student's parents never married and a child custody, paternity and support agreement was reached in February 1999. The Student rarely visits his natural father.

6. The Mother enrolled the Student in the Highland School District on August 26, 2003 from Manatee School in St. Lucia County, Florida. She provided the School with an IEP from Florida.
7. The Florida school did not immediately send all of the Student's records to Highland. The complete records of the Student were not received until September 3, 2003.
8. The Student attended several elementary schools in Florida before transferring to the Highland School District.
9. The Student was first evaluated when he was in preschool due to behavioral concerns; he was 4 years and 8 months of age. The results indicated that his cognitive and adaptive functioning skills were within the mild mentally handicapped range. Later, reevaluation results showed this was not accurate and he was reclassified.
10. The Student was determined eligible for the Emotional Handicap program on October 3, 2001 after a reevaluation.
11. The reevaluation was conducted in April, 2001 to investigate academic and behavioral difficulties.
12. The Student achieved in the low average range on the Differential Ability Skills during the April 2001 testing. His nonverbal reasoning skills were average. His reading comprehension and written expression skills were significantly lower than expected. Clinically significant scores were found on the Depression and Atypicality scales on the BASC-TRS, and on the Hyperactivity, Somatization and Atypicality scales of the BASC-PRS.
13. In May 2001, Robert Brugnoli, Ph.D., evaluated the Student and reported that the Student was seen as a behaviorally and emotionally disturbed youngster with considerable difficulty adapting to the school environment.
14. Dr. Brugnoli also found the Student suffering with an Attention Hyperactivity Disorder, combined type (ADHD) and said he would continue to need psychiatric intervention with medication for the disorder.
15. Dr. Brugnoli found the Student's ADHD, as well as his other behavioral and emotional difficulties would effect his ability to have appropriate relationships. He also noted the Student suffered from significant anxiety, regressive behavior, and possible psychotic experiences.
16. The Student's IEP from Manatee School, Florida was dated September 23, 2002 with a "corrective action" added to the IEP on May 7, 2003 anticipating his move to Indiana.

17. The Manatee IEP team recommended in May 2003 the Student be placed in a separate class setting with mainstreaming in the general education setting for reading and language arts, along with lunch and “specials”. The team did not recommend any related services. The Student had a behavioral intervention plan (BIP) with this IEP.
18. A “move-in” case conference committee (CCC) meeting was conducted on September 9, 2003. The School developed an IEP, in large part based on the Student’s previous IEP and information provided by the Mother at the September 9<sup>th</sup> CCC meeting. The Student’s new special education teacher also provided input.
19. The Mother agreed with the IEP and signed for continuation of special education services at Wood Elementary School in Merrillville. This was not the Student’s neighborhood school. The Student was included in the 4<sup>th</sup> grade general education classroom for morning activities, silent reading, social studies and “specials”. He was placed in the self-contained room for the remainder of the subjects.
20. The September 9<sup>th</sup> IEP noted the Student was easily distracted and easily frustrated when introduced to new concepts. It also reported he had difficulty controlling his anger and could be defiant of authority.
21. The September 9<sup>th</sup> IEP did not contain a BIP but noted it would be developed if necessary.
22. The September 9<sup>th</sup> IEP did contain a provision that a behavior point sheet would be used in all of his classes.
23. The September 9<sup>th</sup> IEP did provide the Student with transportation to and from school. It indicated that it was a 40 minute one-way trip from his home to school.
24. On October 30, 2003 the Student was suspended for one (1) day from Wood Elementary School. He became upset with having to complete an assignment in the E.D. resource room. He was put in the time-out room because he talked back to a substitute teacher and the paraprofessional. He kicked the time-out door and pounded on it with his fists. He called the paraprofessional a Fat F---er and used swear words.
25. A CCC meeting was held on December 10, 2003 at the request of the Mother to discuss her concerns about the Student’s E.D. program.
26. The Student had received misbehavior slips in his physical education (PE) class. His misbehavior was discussed and the principal said his behavior had improved in the class.
27. At the December 10, 2003 CCC meeting, the Mother stated that the special education teacher (SET), kept her very well informed of the Student’s behavior. The SET shared graphs she had created based on the Student’s behavior charts at the CCC meeting. The charts indicated significant improvement in compliance since the beginning of the school year.

28. The Mother expressed concern on December 10<sup>th</sup> that the School did not provide enough physical assistance when the Student was non-compliant or inattentive. The School indicated that its behavioral consultant (BC) would be meeting with teachers to assist in creating a BIP for the Student.
29. On December 22, 2003 the Student threatened to kill another student. He said he needed revenge and “they will die on recess”. During this time he was grunting, rocking and banging in class. He also wrote his thoughts in his journal. The SET and principal considered this a serious matter but not an immediate threat of danger. The principal called the Mother about the incident.
30. On December 16, 2003 the Mother requested a due process hearing. A prehearing teleconference was held on January 7, 2004. The parties agreed to mediation. The mediation was held on February 3, 2004. A mediation agreement was signed by the parties, and it stated the Mother signed an IEP written on February 2, 2004. The due process hearing was dismissed.
31. On January 21, 2004 the Mother filed a complaint with the Office of Civil Rights (OCR) against the Respondent Northwest Indiana Education Cooperative. The Mother claimed that the Student had been subjected to continuous harassment in the form of teasing, bullying and name-calling by other students. The School received notice of the OCR complaint from OCR in mid-February.
32. On January 3, 2004 the Mother informed the School the Student would no longer be attending Wood Elementary.
33. The Cooperative’s Director talked to the Mother on January 5, 2004. The Mother indicated to the Director that she had registered the Student as a “Home School Student.” The Mother indicated she thought the Student was not an E.D. student, but only ADHD and maybe OHI.
34. A CCC meeting was held on January 20, 2004 to discuss homebound E.D. services for the Student. The School’s E.D. homebound teacher provided input at the CCC meeting.
35. On January 28, 2004 the Mother refused homebound services.
36. A CCC meeting was held on February 2, 2004. Notice of this meeting including its purpose was sent to the Mother.
37. The purpose of the February 2, 2004 CCC meeting was to review the triennial evaluation, determine continued eligibility for special education services and to develop an IEP. The Student was due for the triennial evaluation on April 25, 2004.
38. The CCC discussed the Student’s evaluation results. After a lengthy discussion the CCC agreed that the Student continued to qualify for services under E.D. with a secondary

disability of OHI. The Mother disagreed, stating she thought he met the Asperger's checklist and should be identified as autistic. The CCC also discussed his continued inappropriate behavior.

39. The Student had been evaluated for Aspergers pursuant to the checklist and these results were consistent with previous findings from Florida. The school staff agreed that he exhibited some autistic characteristics, but not across all settings or to the extent to be eligible under this category.
40. The Student's medical information was also updated at the CCC meeting. His Mother reported he would be changing medication and would be taking Ritalin.
41. The Mother agreed the Student would receive full time E.D. services, 30 hours weekly at Wood Elementary School. Transportation was listed as a related service. The CCC reached consensus on the IEP and BIP. The Mother agreed to and signed a mediation agreement on February 3, 2004 that called for the IEP and BIP to be implemented starting February 9, 2004.
42. The Student's social/behavior/emotional evaluation results discussed at the February 2, 2004 meeting showed he scored in the clinically significant range on the anxious/depressed scale by general education and special education teachers and at the 92<sup>nd</sup> percentile by the Mother. The Mother and teachers indicated clinically significant social problems. Teachers also indicated clinically significant anxiety, atypicality, withdrawal and social skill problems.
43. The Student did not attend school from December 16, 2004 until February 9, 2004 (this includes Christmas vacation).
44. The School's behavioral consultant, who is a fulltime school employee, assisted the SET in preparing a BIP.
45. The SET immediately started to follow the BIP when the Student returned to school on February 9, 2004.
46. The February 2, 2004 IEP was modified at the CCC meetings in March, April and May, but was in effect until the June CCC meeting.
47. The BIP was effective for approximately 3 ½ weeks after it was implemented by the SET and then worked "sporadically". The Student was progressing academically during this time, as well.
48. On March 2, 2004 the Student engaged in extremely disruptive behavior and was a danger to himself and others. He verbally threatened to slice his head off and yelled he would destroy everything in sight, he would burn everything to ashes. He dumped out all of his desk's contents, kicked chairs and everything nearby. The classroom had to be emptied of students.

49. A CCC meeting was held on March 11, 2004 to discuss the Student's behavior and progress since his return to school. The SET reported that during the past week the Student's negative behaviors had become more frequent (meltdowns) and time to de-escalate was becoming longer. The Mother indicated that his doctor had changed his medicine from Ritalin to Strattera. The SET assured the Mother the BIP was being followed. The Mother reported she was experiencing significantly increased negative behavior at home.
50. The Mother suggested she would keep the Student at home for a couple of weeks and meet with his doctor and try to get the medications regulated. The School offered homebound services, but the Mother refused. She asked that his homework be sent home (she took home one (1) week of homework). The School indicated that a doctor's verification would be needed if the Student stayed home longer than 2 weeks.
51. A telephone case conference committee meeting was held on April 13, 2004. The Student had been on homebound status since March 11, 2004. During that time he received his work by email and fax from his E.D. teacher. The School also had Spring break. He had completed all of his work as of this CCC meeting. The Student had changed medication at this time and the Mother thought he was ready to return to school.
52. The CCC agreed that the goals and benchmarks from the February 2, 2004 IEP would be continued along with his BIP.
53. The Student returned to school on April 14, 2004. On the first day back to school he refused to work. He turned his desk upside down. He threw books and pencils on the floor. He talked about sex before marriage.
54. On April 26<sup>th</sup> he tossed his chair to the floor and used profanities. He used his middle finger in an obscene way. He did no schoolwork until the afternoon.
55. On April 27, 2004 the Student verbally threatened to kill another student. He yelled he would take a gun and shoot and poke the student's eyes out. The Student said he would climb the wall and let a SWAT team shoot him. The Student refused to do any schoolwork. The Student was suspended from school for one day.
56. On April 28<sup>th</sup> the Student threw his paper and books, rocked and banged his desk, used the "F" word and talked about hurting people. He refused to do school work.
57. On April 29<sup>th</sup> the Student threw books and was disruptive. He threw a temper tantrum and kicked things.
58. On May 3<sup>rd</sup> the Student did no school work. He refused help from his SET and ripped up the schoolwork and threw the desk over. He vandalized the time-out room writing dam, shit and ass on the wall.

59. On May 4<sup>th</sup> the Student refused to do schoolwork. He threw his desk and yelled and the other students were removed from the class. When they returned he called them F---ers and jacka----. Again, students were removed from the room. He finished the rest of the week without any major behavior problems.
60. On May 10<sup>th</sup> the Student kicked his desk and turned over a chair and refused to work. The School had a fire drill and he refused to go outside on his own. The SET escorted him outside for the fire drill. This was the first time all year that the Student had difficulties with a fire drill. After lunch he refused to work and used profanities.
61. On May 14<sup>th</sup> the Student refused to do any work and became physically out of control.
62. On May 17<sup>th</sup> the Student became very angry because he heard a conversation that he might have to attend summer school. He threw a water bottle and the SET had to use a therapeutic hold on him for several minutes. Later in the day the Student became upset and kicked over a chair and screamed and yelled using the "M.F." word. The Mother was called to calm him down. He did calm down briefly, but threw his pencil and wrote Ass all over his desk.
63. On May 18<sup>th</sup> the Student refused to work, threw his book down. He refused to sit quietly and the SET had to use a therapeutic hold for 10 minutes. He called the SET and paraprofessional bitches and f---ers.
64. On May 19<sup>th</sup> the Student refused to do schoolwork and banged and kicked the wall. Again, the SET held him in a therapeutic hold and he attempted to head butt her, but missed. The Mother was called to calm him down.
65. On May 19<sup>th</sup>, 2004 the School convened a CCC to discuss the Student's behavior. The Mother agreed to waive the week's notice to hold the conference due to the Student's increasing serious behavior problems at school. The conference was held by telephone. The SET discussed his behavioral outbursts, use of profanity and physical aggression, etc. The CCC discussed a partial day placement for the Student. However, the Mother asked about the possibility of homebound services. The CCC agreed on homebound services for the remainder of the year. The Mother said she did not want the services of homebound itinerant teachers.
66. On May 20<sup>th</sup> the Mother notified the School that she was withdrawing him from school because she didn't think he was receiving a FAPE.
67. A CCC meeting was held on June 1, 2004. The Student's present level of non-academic and academic performance was discussed. His intellectual ability falls within the low average to borderline range. Full scale scores were within the borderline range. The Student's emotional and behavioral areas were discussed.

68. The SET talked about the variety of interventions that have been used to assist the Student in the classroom. The SET said she had ongoing consultation with the School's behavioral assistant and had fully implemented the BIP. However, the Student's outbursts had increased in frequency, duration and intensity lasting from 20 minutes to several hours. His verbal and physical aggression toward others had also increased substantially during April and May.
69. The CCC discussed program and placement options. The Student needs a small group setting in a highly structured environment to manage his behaviors and that offers him constant individual attention.
70. The CCC decided that the Therapeutic Day Program at Eagle Park was appropriate. Services offered at Eagle Park include individual, group, and family therapy, behavior intervention specialist services, case management services, recreational art therapy, adaptive physical education, and affective education. The Student would be in a room with only 3 other students.
71. The Mother was given the procedural safeguards at the June 1, 2004 CCC. An IEP was developed at this CCC meeting. Procedural safeguards were provided by 2 School employees.
72. Prior written notice was given to the Mother for each CCC meeting during Spring, 2004.
73. The School provided the Mother with progress reports for the Student during the Spring, 2004 semester.
74. The SET reported one incident of the Student being teased by another student during the Spring, 2004 semester. This matter was promptly resolved by the teacher.
75. The principal and SET believe the Student is a danger to himself and others during his behavioral outbursts.
76. The Student's E.D. classroom at Wood Elementary did have a paraprofessional in the classroom. Another paraprofessional was added to the room in mid-May. The Student did not have a one-on-one aide in Florida.
77. The SET did attend in-service training for ADD/ADHD. All staff working with the Student attended several in-service training workshops.
78. The CCC meetings were held at mutually agreeable times, twice by telephone for the Mother's convenience.
79. The Student's neighborhood elementary school does not have an E.D. classroom because only 2 or 3 students would be eligible for it. The Merrillville Middle School does have an

E.D. classroom with as many as 11-13 students. This E.D. classroom is not as highly structured as the Eagle Park classroom nor does it provide the integrated therapies as needed by the Student.

80. The Student's TOR was present at all CCC meetings.
81. Evaluation results for the Student were provided to the Mother prior to CCC meetings and were carefully discussed at the meetings.
82. The parties decided the issue of physical education for the Student through mediation. The June 1, 2004 IEP called for the Student to receive adaptive P.E. The behavioral consultant also pointed out that P.E. is a component of some of the integrated therapies at Eagle Park.
83. The School evaluated the Student in all suspected areas of disability including those raised by the Mother.
84. The School did provide the Mother with a copy of the case conference recording in a timely fashion.
85. The School did provide transportation to the Student in the fastest manner possible.
86. The School did not in an unauthorized manner disclose any personally identifiable material relating to the Student to others without the parent's consent. The behavioral consultant was a fulltime employee of the School. The Mother requested the School to respond to calls from Ms. Owens regarding the Student's medication.
87. An extended school year (ESY) was discussed at the June 1, 2004 CCC meeting. The Student did not significantly regress immediately after coming back from December 16 to February 9, 2004. ESY was not part of the Student's Florida IEP.

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

Based on the eighty-seven (87) Findings of Fact, the IHO reached eleven (11) Conclusions of Law. These Conclusions of Law are reproduced below:

1. The School did not fail to devise an appropriate IEP for the child in the case conference held on 06-01-04, and it did not fail to educate the child in the least restrictive environment, including the homebound placement, and it did not fail to have the child's TOR and a speech/language pathologist attend the case conference committee meeting and nor did it fail to devise an appropriate extended school year program and a shortened school day. The speech/language pathologist issue was dropped by mutual agreement of the parties.

2. The School did not fail to devise an appropriate functional behavior assessment and implement an appropriate behavior and intervention plan during the spring semester of 2004 and did not fail to conduct a manifestation determination upon a change in the student's placement due to disciplinary reasons.
3. The School did not fail to follow the child's IEP in the spring semester of 2004, it did not fail to have a teacher of record in place, the School did provide progress reports to the parent on the schedule delineated in the IEP and did follow the Student's behavior intervention plan, it did not fail to conduct an assessment by the Autism Team (CCC); and did assign an additional paraprofessional to the student's classroom.
4. The School did not fail to comply with the requirements for prior written notice in regard to the child's change of placement and changes in services delineated above.
5. The School did not fail to provide all professional and paraprofessional staff serving the student with specialized in-service training in the spring of 2004.
6. The School did not fail to give proper notice of the case conference committee meetings on 02-02-04 and 06-01-04 by failure to list the purpose of the meeting in the meeting notices and did not fail to schedule a case conference at a mutually agreeable time and place on 5-21-04 and did not fail to explain the notice of procedural safeguards to the parents at the June 1, 2004, case conference committee meeting and did not fail to include required participants at the 02-02-04 and 06-01-04 meetings, did not fail to state why the student was not being educated in the school the Student would attend if not disabled and did not fail to make evaluation results available to the parent at least five days before the case conference committee meeting and offer an explanation of the results to the parent; and it was unnecessary to include in its disaster plan provisions for warning and evacuating the Student because he did not require special warning and evacuation procedures.
7. The School did not fail to devise and properly implement an appropriate physical education program for the child.
8. The School did not fail to properly evaluate the child to determine the appropriate areas of eligibility for special education and related services in the spring semester of 2004.
9. The School did not fail to comply with the parent's request for original case conference committee recordings from the 06-01-04 meeting and the records requested on 05-20-04.
10. The School did not fail to provide appropriate transportation in that student was exposed to an inappropriately lengthy transit time to and from school.

11. The School did not fail to protect against unauthorized disclosure of personally identifiable student information with an unauthorized individual in regard for the time period 02-02-04 through 06-01-04.

### *The IHO's Order*

Based upon the Findings of Fact and Conclusions of Law, the IHO issued the following Order:

The School is hereby Ordered to implement the June 1, 2004 IEP at Eagle Park. The School is also ordered to convene a case conference committee meeting and draft a new Behavioral Intervention Plan.

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

The Student, by counsel, requested an extension of time within which to prepare and file a Petition for Review. The request was received on October 7, 2004. The BSEA granted the request and issued an Order on October 8, 2004, extending the time line to the close of business on November 15, 2004, within which the Student must prepare and file his Petition for Review. The timelines for review and issuance of a written decision was also extended to and including December 15, 2004. The School, by counsel, requested an extension of time within which to prepare and file a Response to the Student's Petition for Review. The request was received on November 17, 2004. The BSEA granted the request and issued an Order on November 18, 2004, extending the time line to the close of business on December 20, 2004, within which the School must prepare and file its Response to the Petition for Review. The timelines for review and issuance of a written decision by the BSEA were also extended to and including January 20, 2005.

#### **The Student's Petition for Review**

The Student timely filed on November 9, 2004, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review is reproduced, in part, as follows:

PROCEDURALLY AND SUBSTANTIVELY, THE DISTRICT FAILED TO PROVIDE A[.] WITH A FAPE

....it is clear that his IEP failed to objectively measure goals and objectives. Barb Kepchar, the district supervisor of the Highland school district, even admitted in her

testimony that she did not see any progress reports on A[.]'s goals and objectives (Transcript, p.247). Clearly, this is a flaw in A[.]'s IEP. It is difficult to imagine how the Highland school district could accurately assess A[.]'s progress and needs when there were no records being kept of what, if any, progress he was making on the goals and objectives in his IEP. The failure to provide a mechanism by which the school would document goals and objectives is only one way, however, in which the devising and implementation of A[.]'s IEP was not reasonably calculated to provide FAPE...

...The reason A[.] has not been successful educationally is that he has no educational goals in his IEP. His teacher of record, Susan Cramer, even admitted at hearing that there were not *any academic goals* on A[.]'s IEP (Transcript, p.289). An IEP that admittedly fails to set any academic goals for a student is clearly not providing FAPE. See Respondent's exhibit page 138, which shows that there were NO academic goals in any area in his IEP devised when he first entered the school nor were there any in the 06-01-04 IEP.

#### The Evidence At the Hearing Showed That Placement Was Illegally "Predetermined" Before the Case Conference Meetings

....The Highland school district denied A[.]'s right to be offered a full continuum of services when they predetermined his placement. Article 7 at 511 IAC 7-27-9(a)(6) states that, "[E]ach public agency shall have in place written policies and procedures to ensure that [a] continuum of services is available to meet the individual needs of students with disabilities." Here, the Highland school district dictated A[.]'s placement and program without ensuring access to the full "continuum." Chris Georgeff, the Highland behavioral specialist, testified that the school district prepared a behavior plan to be implemented for A[.] at Eagle Park even before the June 1, 2004, case conference (Transcript, p.845). This means that the Highland school district "shoehorned" A[.] into its Eagle Park program by designing his IEP around what Eagle Park had to offer...

#### A[.] Met His Burden of Proof To Show That The District Impermissibly Exalted LRE Without Subjecting LRE To An "Appropriateness" Test

...When A[.] was in the Manatee school in Florida, he had an appropriate program. His former teacher, Lee LaBaff, testified that A[.] became well-adjusted and happy after some time (Transcript, p.811). However, the program implemented by Susan Cramer in her classroom was not the type of program that A[.] needed. She viewed his outbursts as "blips," meaning she trivialized what the anguish A[.] was feeling (Transcript, p.374). Although Susan Cramer meant well, the program that she was implementing with A[.] was not specifically tailored to his needs. A[.] needed someone who was able to sit with him and calm him down, a paraprofessional trained in dealing with emotionally disabled children, not a teacher who would send him to a time-out room to sit by himself only to work himself into an even bigger frenzy.

The school's response to A[.]'s outbursts was equally inappropriate. Highland took A[.] out of his mainstreamed specials, lunch and recesses, except for one hour per week (Transcript, p.384). To take away recess from a hyperactive child is to set him up for failure. Recess is one of the only times that ADHD children can "let off some steam," and for A[.] to have been removed from physical education classes and recess except for one hour per week was a very poor choice. This was not an effort to meet A[.]'s needs — it was a step to make life easier for the teachers at Highland. Additionally, it removed A[.] from the only time that he was to spend in a regular classroom. This is clearly in violation of IDEA.

THE HEARING OFFICER SHOULD HAVE INSISTED ON SCIENCE  
AND DATA AND PROPERLY EXERCISED HIS "GATEKEEPER"  
FUNCTION TO SCREEN ALL "EXPERT" TESTIMONY FOR  
RELIABILITY AND RELEVANCE

...The hearing officer failed to exercise caution in accepting Highland school district educators' testimony to the effect that all of A[.]'s educational needs can be met in the Eagle Park setting. Such is not the case. For the sake of consistency and to promote basic learning and generalization, A[.] still needs to be around mainstreamed children. One of A[.]'s true deficiencies is his ability to function in social situations. This is a skill that may only be learned by modeling. Even A[.]'s last teacher, Susan Cramer, admits that it is important that A[.] learn social skills through modeling (Transcript, p.389). Placing him in Eagle Park, with other socially challenged children, is not going to give A[.] the role models that he needs to learn about appropriate peer relationships. The social skills that A[.] lacks can be gained by interactions with mainstreamed peers. He cannot have those interactions at Eagle Park. As such, the hearing officer overlooked one of A[.]'s key educational needs in accepting Highland's recommendation of Eagle Park....

### **Erroneous Findings of Fact**

...**Finding of Fact #69** states that "CCC discussed program and placement options." We believe this statement is inaccurate and misleading. The 6/1/04 CCC did not discuss program and placement options. They had already decided that A[.] was going to be placed at Eagle Park (Respondents' Exhibit 23, p.240). This letter shows that the CCC was trying to place A[.] in Eagle Park even before the CCC met.

**Finding of Fact #70** states that "the CCC decided that the Therapeutic Day Program at Eagle Park was appropriate." This statement is simply false. In order for a CCC to decide anything, it must be unanimous among all the conference participants. E[.] M[.], A[.]'s mother, attended the CCC and she disagreed then with the proposal that A[.] should attend Eagle Park (Transcript, p.537). Thus, the decision was not unanimous and the CCC did not "decide" any such thing. The statement by the Independent hearing officer is inaccurate.

**Finding of Fact #73** is incorrect in that progress reports were NOT sent home to the Mother during the Spring, 2004 semester. Susan Cramer, A[.]'s teacher of record, admitted in her testimony that she doesn't usually send progress reports home, except for at report card time (Transcript, p.366).

**Finding of Fact #80** is incorrect because Susan Cramer, A[.]'s teacher of record, did not attend all of the CCC meetings. She missed the February 2, 2004 conference (Respondents' Exhibit 19, p.186). There is a different teacher listed under Teacher of Record for that date.

**Finding of Fact #83** is incorrect because the Highland school district did not evaluate the student in all suspected areas of disability, including those raised by the mother. Examples include that she wanted him tested further for Asperger's. See email mother wrote on Petitioner's page 260. The testimony of Dr. Lubin also indicate other possible areas of need, and the school failed to list LD and OHI as areas of eligibility.

**Finding of Fact #84** is incorrect because the Highland school district did not provide E[.] M[.] with a copy of the case conference recording in a timely fashion. The school was supposed to give her a copy right away, and they simply did not (Transcript, p.646). The statement of the hearing officer is incorrect.

**Finding of Fact #87** is simply wrong. It states that "ESY was not part of the Student's Florida IEP." The very first page of A[.]'s IEP from Florida has the box checked for "The need for extended school year services" (Respondents' Exhibit 6, p.30). Further into the Florida IEP is the notation that A[.] needs specialized instruction for "all academics ESY" (Respondents' Exhibit 6, p.37). The statement of the hearing officer does not reflect the truth.

## **ERRONEOUS CONCLUSIONS OF LAW**

**Issue #1:** Is the proposed IEP for the 2004-2005 appropriate? The IHO states, "the School did not fail to devise an appropriate IEP..." yet the IEP was incomplete in many ways. Despite A[.]'s needs for consistency, he has not been offered ESY services...

Another weakness in A[.]'s IEP is the lack of any social skills training. A[.]'s problems are rooted in his ED and his poor acquisition of social skills. Placement at Eagle Park, with its intense therapeutic curriculum, is not what A[.] needs. He needs modeling and examples, not group therapy...

Yet another weakness in A[.]'s IEP as designed by Highland is the goals and objectives for A[.] to achieve. A[.]'s goals and objectives seem to be solely behavioral — they basically address his ability to not disrupt a classroom. *There are no goals for proper interaction with his peers or for his academic progress* (Respondents' Exhibit 23, p.248-257). A[.] needs his goals to both further him academically and socially, not just teach

him how to remain quiet...The goals and objectives are inappropriate and are not tailored to further A[.]'s education or social skills.

Lastly, A[.]'s IEP lacks an adequate BIP (Respondents' Exhibit 23, p.262-263). The BIP developed for the 2004-2005 school year consists of short phrases describing the desirable behaviors to be shown by A[.], and a list of people responsible for working with him on those behaviors. There are no strategies outlined, and no descriptions of what has or has not worked in the past. There are no ascertainable goals other than vague descriptions such as "follows classroom and school rules consistently."...

...Oddly, for a child who had such severe behavioural problems the school offered NO counseling services, either in-house or privately. How can an IEP that lacks such services for a child who has serious emotional needs be appropriate?

**Issue #2:** Examples of specific statutes of which there were violations upon which there was no ruling, despite the parent's requests:

- 1) Statute: 20 U.S.C. 1414(d)(1)(A)(ii)(1)  
Regulations: 34 C.F.R. 300.347 (a)(z) [sic]

"a statement of measurable annual goals....related to meeting the child's needs that result from the child's disability, to enable the child to be involved and progress in the general curriculum.

- 0 academic goals
- Petitioners exhibit 23 Pages 248-257

- 2) Statute: 20 U.S.C. 1414(D)(1)(A)(ii)(11)

Short term objectives related to meeting other educational needs that result from the child's disability.

No short term objectives on social behavior goals

- Petitioners exhibit 23 Pages 248-257

- 3) Statute: 20 U.S.C. 1414(d)(1)(A)(viii)(1)  
Regulations: 34 C.F.R. 300.347 (a)(7)(i)

- Statement of how your child's progress toward each annual goal will be measured
- Observation is only method of assessment classroom behavior goals
- Petitioner's exhibit 23 Pages 248-257

- 4) Statute: 20 U.S.C. 1414(d)(I)(A)(viii)(1)(aa)  
Regulations 34 C.F.R. 300.347 (a)(7)(i) [sic]

- How you will be regularly informed (at least as often as parents are informed of their non-disabled student's progress) of you child's progress [sic]
- Omitted from goals, Exhibit 23 Pages 248-257

- 5) Statute 20 U.S.C. 1414 (d)(3)(A)(i)

- The IEP team consider "the concerns of the parents for enhancing the education of their child"
- Despite several requests for academic goals none were added.  
Transcript, p.247, 289, 614

**Issue #3:** Were the School personnel properly trained on instructional methods to meet the student's needs? The IHO states that school personnel had attended some training workshops. The Highland school district provided no information about any of the workshops attended by A[.]'s teachers....It is strange that the hearing officer could come to said conclusion without any proof of actual attendance, any dates, or any subject matter covered of any alleged training for any teacher or staff member for A[.]...

**Issue #4:** The hearing officer found erroneously that the student's confidentiality had not been violated. E[.] M[.] never gave the school written permission to speak with the PA at Dr. Howard's office. She also never gave permission for information about A[.] to be faxed to an outside consultant firm (Transcript, p.657-665). Though Chris Georgeff was also a school employee, at the time of the fax, as evidenced by his letterhead, he was acting as an outside consultant in his own business. Anyone in his office could have seen the information about A[.] that was faxed to his offices.

### **IHO's Erroneous Order**

The IHO erred in that he ordered a new Behavior Intervention Plan. In doing so, he contradicts his conclusion that an appropriate IEP was created on June 1, 2004. If the BIP was inappropriate, that makes the IEP inappropriate. In ordering a new BIP the IHO in effect contradicts himself in his finding that the IEP was appropriate.

### **CONCLUSION**

The hearing officer, applying wholly erroneous standards and ignoring the substantial evidence, improperly blessed the District's IEP while at the same time noting a material defect and deficiency that requires a new case conference committee meeting and BIP in order to make the IEP work for A[.]...

## *The School's Response to the Petition for Review*

The School timely filed on December 20, 2004, the School's Response to the Petition for Review. The School's Response to the Petition for Review is reproduced, in part, as follows:

....The Petition improperly summarized and misconstrued the testimony. The Petitioner also relies upon inaccurate statements of the relevant law making improper legal arguments.

Beginning after page 23 of the Petition for Review are the specific exceptions taken with the IHO's Findings of Facts pursuant to 511 IAC 7-30-4(d)(3). This response focuses on facts supported by the record supporting the IHO's Findings of Fact and Conclusions of Law...

### **A. RESPONSE TO PETITIONER'S EXCEPTIONS TO THE IHO'S FINDING OF FACT**

**The Petition for Review takes exception with Finding of Fact (FF) #69....**The Parent claims that the CCC did not discuss the placement options because they had predetermined the Eagle Park placement before the June 1, 2004, CCC. As evidence of this "predetermination," the Petitioner points to Respondent's Exhibit 23, page 240 which is the letter sent to the Parent as notification of the June 1, 2004, CCC. However, the correspondence is directed to the Parent as a means of coordinating the meeting. The letter states that the purpose of the CCC is to discuss "TDP (therapeutic day program) possible placement" at Eagle Park. (R. Ex. p.240, *emphasis added*)...

This assertion overlooks the discussions and considerations from the May 19, 2004 case conference. This is where discussions began. Between the two case conferences, contacts occurred to provide the Student's mother with an opportunity to sit and observe the program at Eagle Park School. Nonetheless, Article 7 specifically provides that: "Public agency personnel may engage in preparatory activities to develop a proposal or response [to] a parent proposal that will be discussed at a later case conference committee meeting." 511 IAC 7-27-4(e).

There was no "predetermination of services. The IEP team believed placements for the student on the continuum in the general education setting was considered and exhausted. (R. Ex. p.243; Transcript p. 451-453. The CCC recommended the Eagle Park placement based upon the student's needs for a highly structured environment along with individual, group and family therapy, behavior intervention specialist services, case management services, recreational art therapy, adaptive physical education and affective education integral to a day treatment placement. (R. Ex. p.243; Transcript p. 393, 394, 839, 847, 848, 886). The CCC did not feel homebound services were sufficient as it would lack the academic focus the Student requires and full time placement in an EH class within a general education school could not support his needs. (R. Ex. p.243)....

**The Petition for Review also takes exception with FF #70**, which states "The CCC decided that the Therapeutic Day Program at Eagle Park was appropriate..." The Petitioner feels that this is an inaccurate statement because the Parent did not agree to this placement; and, therefore the CCC could not "decide" this placement as it failed to be unanimous. This is an inaccurate statement of the law....

As the cases dictates, it is the responsibility of the educators and multidisciplinary team to best recommend the Student's placement and educational needs. In making any recommendations, School personnel must consider any input provided by the parent. The School properly assessed the student's educational needs and recommended that the Eagle Park School's Therapeutic Day Program is the Student's most appropriate placement for the 2004-2005 School Year. Again, the IEP team and the IHO's decision should be given deference.

**The Petition for Review takes exception to FF #73**, which states, "The School provided the Mother with progress reports for the student during the Spring 2004 semester." The Petitioner states that progress reports were not sent home to the Mother and cited the special education teacher's, Susan Cramer's, testimony as being proof of this contention. Ms. Cramer did testify that her normal practice was to send progress reports home with the report cards. (Transcript p. 366). However, this was in accordance with the progress note dates outlined in the Student's IEP. (Transcript p. 366 and R. Ex. p. 141-142, 143, 207, 208). Also, Ms. McCormack, the Student's general education teacher did communicate the Student's progress to the Parent at the semester's mid-term. (Transcript pp. 64 and 366; R. Ex. 82 and 84). Additionally, the record demonstrates that the special education teacher and other school representatives consistently communicated with the Parent about concerns and her son's progress via e-mail and other methods of communication. (R. Ex. p. 54).

**The next FF that the Petition for Review takes exception with is #80**, which states, "The Student's TOR was present at all CCC meetings." Although Susan Cramer is identified as the TOR on several of the IEP's, the TOR changed during the 2004-2005 school year as a result of the Student's change in status once the Student was withdrawn by the Parent for home schooling. (R. Ex. p. 135, 151, 176, 182, 222, 229 and 236; Transcript p. 444). At the January CCC, Judy Watson was the teacher of record as the Student was receiving homebound services at that time. (Transcript p. 444). When the Student returned to classroom instruction, than Susan Cramer again became the Student's TOR. (Transcript p. 444). Hence, the change in the location where services were provided and the primary teacher providing the instruction caused the change in a different TOR attending the January CCC.

**The Petition for Review takes exception with FF #83**, "The School evaluated the Student in all suspected areas of disability including those raised by mother." The Mother feels that the Student should be eligible for services under the Autism Spectrum classification because he displays some Autistic characteristics. (Transcript p. 522-524).

School psychologist, Claudia Cannon, tested the Student on January 13, 2004, after receiving parental permission on January 8, 2004. (R. Ex. p.190). The Student was also observed and evaluated by an education diagnostician, Carole Utermark, and Itinerant ED Teacher, Judy Watson. (R. Ex. pp.191-204). Based upon the January evaluation and thorough discussion, the CCC concluded that the Student qualified for a primary disability of Emotional Disability and a secondary disability of Other Health Impaired and that these classifications continue to be the appropriate eligibility areas for the Student. (R. Ex.191-204, 213 and 221). However, the Parent insisted that the Student has Autism, Asperger's type. (R. Ex. p.185). The School Staff agreed that the Student may display some of the characteristics of Autism, but does not qualify for the classification. (R. Ex. p.185; Transcript p. 219-220). Again, absent substantive evidence to the contrary, deference should be given to the professional teachers and certified psychologists in this area....

**Next, the Petition for Review suggests that FF #84 was erroneous**, which states, "The School did provide the Mother with a copy of the case conference recording in a timely fashion." The testimony and evidence presented at the hearing reflect that the tapes were, in fact, provided to the Parent in a reasonable time period. After the June 1, 2004, CCC the Parent requested the tapes and the same were reproduced. (Transcript p. 124). Apparently, there was some confusion as to when the tapes were made available. (Transcript p.124-125). The Student had left some supplies at his school which were brought to the June 1, 2004 CCC by the TOR. (Transcript p. 124). The Parent left the bag at NISEC in Crown Point. (Transcript p. 124-125). Ms. Barbara Kepchar, NISEC's District Supervisor of Special Education for Griffith and Highland, brought the bag, with the tapes placed inside, to the Highland Administrative building so that the Parent could more easily obtain the items. (Transcript p. 124). In an e-mail between the School and Parent dated June 18, 2004, this was discussed and the Parent was informed that the tapes were available with the bag of supplies since June 10, 2004. (R. Ex. p. 851).

**The Petition for Review takes exception to FF #87**, which states, "An extended school year (ESY) was discussed at the June 1, 2004 CCC meeting. The Student did not significantly regress immediately after coming back from December 16 to February 9, 2004. ESY was not part of the student's Florida IEP." The Petitioner is correct that the Florida IEP did indicate that ESY is needed (R. Ex. 30 and 37). However, based upon the student's academic progress during the 2004-2005 School Year despite his absences, he displayed the ability to recoup information without the Florida 2003 ESY services and did not display regression which would warrant an ESY placement. (Transcript p. 249-251 and 456-457). Based upon the evaluation results and report, the Student was learning. (Transcript p. 457).

Based upon the evidence and testimony presented at the Due Process Hearing in this matter, it is clear that the IHO's Findings of Fact discussed above are consistent with the evidence and testimony in this matter, with the one exception of the inaccurate reference to the Florida IEP's ESY determination.

## **B. CONCLUSIONS OF LAW**

The Petition for Review specifically cites four (4) "Conclusions of Law" as allegedly erroneous in the IHO's Order. It appears that the Petition for Review addresses these alleged inaccuracies by confusing Findings of Fact with Conclusions of Law.

### **1. Student's IEP and BIP Addendum**

The Petition for Review suggests that the IHO mistakenly found the Student's 2004-2005 IEP appropriate and alleges that various statutory violations were not addressed in the IHO's ruling. The Petitioner suggests that the IEP is inefficient because ESY was not suggested for the Student, it lacks social skills training, focuses solely on behavioral goals and objectives, and lacks an adequate BIP. The Petition for Review states that the IEP lacks an adequate BIP because it gives short phrases describing the desirable behavior, list of people to work on the behavior, with no strategies or descriptions. The Petition also claims statutory violations in the IEP because it requires short term objectives related to meeting other educational needs that result from the child's disability. Petitioner asserts without any authority that the School should have developed academic oriented goals. This argument fails to analyze the unique educational needs of this Student....

The case conference committee identified that the only concern precluding the Student's participating in the general education curriculum was his management of frustration and anger. (R. Ex. p. 187). Logically, this identified educational need required the development of goals and objectives or benchmarks. Despite the Petition's allegation that the IEP failed to include "objectives" on social behavior goals, the IEP does include benchmarks for each goal area. Thus, the IEP specifically addressed the Student's unique needs and weaknesses. Thus, by definition, the absence of goals and objectives in the Student's academic areas required continued participation in the general education curriculum for his academics...

...[T]he School had a classroom modification plan in effect in the Fall of 2003 and the TOR assessed the progress in an accurate manner. (Transcript p. 757-758)....The CCC had indicated that a functional behavior assessment and behavior modification plan would be implemented if needed. (R. Ex. pp. 137, 146, and 152). However, by November 2003, the CCC recognized this need and began the process. (Transcript p. 763). The functional behavior assessment was initiated in December 2004 and the behavior intervention plan was developed in the February 2004 IEP when the Student returned to school. (Transcript p. 754-761; R. Ex. pp. 216-219)...

The School properly assessed the Student by performing a functional behavior assessment and developed an appropriate BIP for the Student based upon his needs. The CCC assessed whether the Student's disability-related behavior affected the Student's learning or that of others in the classroom. The IEP addressed the Student's disruptive

behaviors; and, therefore is reasonably calculated to enable the child to receive educational benefits and complies with the procedural requirements of the IEP as it related to the student's BIP. The School properly formulated the IEP with a behavior component and the BIP was not substantively inappropriate because it cannot "fall short of substantive criteria." The School's BIP for the Student included a description of how the Student's environment would be altered, positive intervention strategies, and the skills thought to change the Student's behavior.

The BIP developed for the Student was also appropriate because it was designed to confer an educational benefit upon the student.

The Petition further claims that the IEP is inadequate because ESY [was] not recommended. In order to obtain services for ESY, the parent must demonstrate that it is necessary to prevent regression or seriously affect a student's progress...An IEP shall contain a statement as to whether ESY is needed by the student. 511 IAC 7-27-6(a)(8)...

Based upon the student's academic progress during the 2004-2005 School Year despite his absences, he displayed the ability to recoup information and did not display regression which would warrant an ESY placement. (Transcript p. 249-251 and 456-457). The Student was learning. (Transcript p. 457). The IEP team did not feel that ESY services were appropriate for the Student based upon his abilities. (Transcript p. 249-251 and 456-457). Even when the Student had significant time away from classroom instruction, he did not display the type of regression to warrant this placement.

The Petitioner also suggests that the IEP lacks "social skills training" and should qualify as a "weakness." This issue is not included in the Petitioner's framed issues for the allegation of an inappropriate IEP. Regardless, the special education teacher, Susan Cramer, testified that she regularly practiced role-play and gave direct instruction on social skills in the Student's classroom. (Transcript pp. 388-392). The CCC of June 1, 2004, also suggests that the Student will obtain direct instruction in affective education in the Eagle Park placement. (R. Ex. p. 243).

The IEP was designed to confer an educational benefit upon the student. The Student demonstrated success in academics; therefore, the IEP's focus on behavior modification was designed to identify inappropriate behavior, detail a specific consequence and assist the Student in his educational needs. As determined by the IHO, the Student's IEP was properly developed at the June 1, 2004 for the Eagle Park placement. The above discussion addresses the Petition for Review's alleged statutory violations listed in Erroneous Conclusion of Law Issue #2 of the Petition.

## **2. School Personnel Training**

The Petitioner frames the next issue as an erroneous conclusion of law when it is clearly a factual issue. The Petition for Review suggests that School personnel were not properly trained to meet the Student's needs. The Petitioner even states, "the Highland School District provided no information about the workshops attended by the Student's teachers."

The Petitioner seeks "proof" of actual attendance of the "alleged" training for any teacher or staff member. Again, the testimony demonstrates that the opposite is true.

Susan Cramer testified that...she attended various workshops for behavior intervention plans, functional behavioral assessments, Student's with ADHD/ADD, violence identification and prevention, teenage suicide, challenge education, nonviolent crisis prevention intervention (CPI), and reading seminars. (Transcript pp. 353 and 354). Ms. Cramer's paraprofessional, Paula Krsak received training in CPI, communications for students with Autism, behavioral issues, childhood development, ADHD, as well as individual instruction on BIP's, FBA's and other classroom related issues. (Transcript pp. 355 and 944).

Since 2002, Claudia Cannon, the School Psychologist attended general in-service training through NISEC, Children and Family Conference on Creating Caring Communities seminar, Sensory Integration seminar, Study Skills Strategies workshop, Principals workshop, WISC-IV training, Stanford-Binets training, and the IDEA Spring Case Conference. (Transcript pp. 943 and 944)...

Barbara Kepchar, NISEC's District Supervisor for Special Education for the Griffith and Highland Schools has a Bachelor's of Science, Master's from Purdue Calumet and endorsements and administrative license from Purdue Calumet. (Trancript pp. 234 and 235). She has also attended seminars in the following areas: CPI, ADHD/ADD, FBA, BIP, Wilson reading, ICASE conference, and numerous conferences on various learning disabilities. (Transcript p. 441).

Although the Respondent has not listed every NISEC employee that gave testimony in this section, it is clear that the Student's teachers and staff are not only trained, but highly trained and educated. The witness' testimony is "proof" that they attended and received specialized training.

### **3. Disclosure of Student Information**

The fourth alleged erroneous conclusion of law addresses an alleged confidentiality breach of the Student's information. As noted above, the IHO's decision indicates that no breach occurred. Yet, the Petitioner claims that the School improperly communicated with a Physician's Assistant of Dr. Howard, the Student's psychiatrist with regard to medication issues. (Transcript p. 664). However, on cross-examination, it was shown that the Parent instructed and gave permission to Dr. Howard to contact the School. (Transcript p. 708). The Doctor's P.A., an employee of Dr. Howard actually called.

(Transcript p. 708). The Petitioner also alleges that a breach occurred when the behavior consultant, Chris Geogeff sent a facsimile or e-mail from his personal office to the School on his consulting firm's letterhead. (Transcript pp. 114 and 115). Chris Geogeff is a full-time employee of NISEC. (Transcript p. 115). Therefore, the IHO was correct w[hen] he found that the School protected against the unauthorized disclosure of personally identifiable student information.

#### **IV. CONCLUSION**

...[T]he School respectfully requests the Board of Special Education Appeals uphold the IHO's decision and to otherwise find in favor of the Respondents on all issues pending in this matter...

#### **Review by the Indiana Board of Special Education Appeals**

A copy of the record was prepared and provided to each member of the BSEA on December 10, 2004. The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated December 13, 2004. Review was set for January 14, 2005, in Room 225 State House, Indianapolis. All three members of the BSEA appeared on January 14, 2005. After review of the record as a whole and in consideration of the Petition for Review and the Response to the Petition for Review, the BSEA makes the following determinations.

#### **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 School timely filed a Response to the Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4.
2. The BSEA accepts Finding of Fact 69 as it is supported by substantial evidence and the record.

3. The BSEA accepts Finding of Fact 70 with the following addition: "The Parent disagreed with this decision but did not sign a dissenting opinion."
4. The BSEA accepts Finding of Fact 73 as it is supported by substantial evidence and the record.
5. The BSEA accepts Finding of Fact 80 as it is supported by substantial evidence and the record.
6. The BSEA accepts Finding of Fact 83 as it is supported by substantial evidence and the record.
7. The BSEA accepts Finding of Fact 84 as it is supported by substantial evidence and the record.
8. The BSEA accepts Finding of Fact 87 as it is supported by substantial evidence and the record.

The Petition for Review was not written according to the requirements of 511 IAC 7-30-4(d)(3) with regards to referencing the specific Conclusions of Law to which exceptions are taken.

9. The BSEA sustains the IHO's Conclusion of Law 1 as the record supports Conclusion of Law 1.
10. The BSEA sustains the IHO's Conclusion of Law 2 as the record supports Conclusion of Law 2.
11. The BSEA sustains the IHO's Conclusion of Law 3 as the record supports Conclusion of Law 3.
12. The BSEA sustains the IHO's Conclusion of Law 4 as the record supports Conclusion of Law 4.
13. The BSEA sustains the IHO's Conclusion of Law 5 as the record supports Conclusion of Law 5.
14. The BSEA sustains the IHO's Conclusion of Law 6 as the record supports Conclusion of Law 6.
15. The BSEA sustains the IHO's Conclusion of Law 7 as the record supports Conclusion of Law 7.

16. The BSEA sustains the IHO's Conclusion of Law 8 as the record supports Conclusion of Law 8.
17. The BSEA sustains the IHO's Conclusion of Law 9 as the record supports Conclusion of Law 9.
18. The BSEA sustains the IHO's Conclusion of Law 10 as the record supports Conclusion of Law 10.
19. The BSEA sustains the IHO's Conclusion of Law 11 as the record supports Conclusion of Law 11.

### **ORDERS**

In consideration of the foregoing, the Board of Special Education Appeals now issues the following Orders:

1. The Independent Hearing Officer's Order is sustained.
2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied or overruled, as appropriate.
3. Any additional issues or motions not specifically addressed herein are deemed denied or overruled, as appropriate.

Date: January 18, 2005

/s/ Richard Therrien, Chair  
Indiana Board of Special Education Appeals

### **APPEAL STATEMENT**

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