

# 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 L.B., the Greater Clark )  
County Schools, and the Clark County )  
Special Education Cooperative )  
)  
)  
Appeal from a Decision of )  
Laureanne Nordstrom, J.D., )  
Independent Hearing Officer )

**Article 7 Hearing No: 1502.05**

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

#### **Procedural History**

The Student<sup>1</sup> requested a due process hearing in a letter dated April 4, 2005, pursuant to 511 IAC 7-30-3. It was received by the Indiana Department of Education, Division of Exceptional Learners on the same day. On April 4, 2005, Laureanne Nordstrom, J.D., was appointed as the Independent Hearing Officer (IHO).

On April 29, 2005, the IHO conducted a telephonic prehearing conference. During the prehearing conference, the School's<sup>2</sup> request to observe the student at his private school was taken under advisement until May 5, 2005. The hearing dates were established for June 2, 3, 7, and 22, 2005. Additionally, since counsel for the Student was recently retained, the Student requested an extension of time in order to schedule the due process hearing and resolve the case. The School did not object to the extension request, and the request was granted on April 29, 2005, which extended the deadline for the written decision to and including July 1, 2005. Because the IHO was unable to participate, the scheduled May 5, 2005 prehearing conference was rescheduled and took place on May 16, 2005. In a letter dated May 16, 2005, the School asked for a Subpoena *Duces Tecum* to obtain the records of the Student from Summit Academy (Summit).<sup>3</sup> On May 17, 2005, the IHO

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

<sup>2</sup>"School" shall refer to Greater Clark County Schools and the Clark County Special Education Cooperative.

<sup>3</sup>Summit Academy is the private placement where the Student attended after withdrawing from Jonathan Jennings Elementary School.

issued the subpoena, requiring Summit to release all records concerning the Student to the School's attorney.

On May 19, 2005, the IHO issued her prehearing orders in which the School and the Student were to make arrangements for representatives of the School to observe the Student within the private placement setting (with the parents present). The issues were identified as the following:

1. Whether the IEPs devised by the School were appropriate.
2. Whether the School properly implemented the Student's IEP.
3. Whether the School conducted appropriate and timely functional behavioral assessments and behavior intervention plans.<sup>4</sup>
4. Whether the personnel who worked with the Student were appropriately trained and licensed in the Student's areas of disabilities.
5. Whether the School complied with the No Child Left Behind requirements for Title I Schools.<sup>5</sup>
6. Whether the Student suffered emotional harm or academic/intellectual regression.
7. Whether the School devised an IEP on an annual basis, in regards to the 4/6/00-4/13/01 IEPs and in regard to the 1/12/04-1/27/05 IEPs.
8. Whether the School ensured the attendance of proper personnel in the Student's case conference committee meetings.
9. Whether the School provided prior written notice in reference to the parents' requests for 1) an FM system, 2) the child to receive care from audiologist Norma Hogan, 3) Extended School Year (ESY) services, 4) Occupational Therapy (OT), 5) removal from the large classroom setting, and 6) discontinued use of index cards.
10. Whether an educational diagnostician or school psychologist should have been present at the 10/16/03 meeting where testing and evaluations were being discussed.
11. Whether case conference meetings were scheduled at mutually agreeable times and places.
12. Whether the School shared progress sheets on the Student's short-term objectives or benchmarks.
13. Whether the School provided all of the documents requested by the parents in their April 7, 2005 letter.
14. Whether the School required the parents to obtain a prescription from a physician before commencing Physical Therapy (PT) and OT services.
15. Whether the parents' notice prior to withdrawing the student from the School was sufficient.
16. Whether a statute of limitations bars claims arising out of the creation or implementation of IEPs prior to April 4, 2003.

Before the commencement of the hearing, both parties introduced proposed factual stipulations as agreed upon at the prehearing conference. The hearing was closed to the public and took place on

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<sup>4</sup>The parents withdrew this issue at the commencement of the due process hearing.

<sup>5</sup>The IHO determined she had no authority to rule on this issue.

June 2, 3, 7, 22 and August 17, 18, 2005, with both parties represented by counsel. Prior to the start of testimony on June 22, 2005, the Student's counsel requested an extension of time in order to schedule additional days of testimony and render a decision. In an order dated June 24, 2005, the IHO granted the extension of time, extending the issuance of a written decision to August 31, 2005.

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

The IHO issued her decision on August 31, 2005. The IHO determined thirty-three (33) Findings of Fact.<sup>6</sup>

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

1. This matter is properly before the Independent Hearing Officer (IHO) pursuant to Indiana Code, IC 4-21.5, et seq., 511 IAC 7-30-3, and the IHO has the authority to hear and rule upon all matters presented herein.
2. All Findings of Fact that can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. L.B. (hereinafter "Student") was born on July 28, 1993, has resided in the Greater Clark County Schools area for all relevant time periods in dispute, and was enrolled in Greater Clark County Schools until April 10, 2005.
4. In April of 1999, Student was diagnosed with cerebral palsy with a left hemiparesis and mild psychomotor delay. The damage is in the right front of the head in an area that affects language formulation and word retrieval, as well as left sided motor skills.
5. In June 1999, a case conference committee conducted an annual case review, and identified Student's disability as a learning disability and a communication disorder.
6. Student's performance in kindergarten through third grade was acceptable.
7. In the fourth and fifth grades, Student was assigned to general education classrooms at Jonathan Jennings Elementary School pursuant to his IEPs. Jonathan Jennings is an inclusive school that does not have a classroom dedicated to special education. The hallway and empty classrooms are used for resource pull-out.
8. Student's teacher of record and teacher of service in the fourth and fifth grades were licensed special education teachers. Student's fourth-grade special education teacher, Joanne Sawyer, also received training in test data analysis and interpretation and curriculum building and

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<sup>6</sup>The IHO's decision is reproduced in its entirety. It is edited only as to format. The substance of the IHO's decision remains intact.

planning based on test results. The teacher of record is responsible for ensuring the implementation of the IEP and providing progress reports to the parents.

9. Student was taught by general education teachers in a large classroom setting, and Student also had the assistance of a special needs assistant for portions of the school day. Student's fourth-grade teacher, Ms. Schafer, is licensed in elementary education, has 18 hours of special education schooling, and worked for one year as a special education teacher for the seventh and eighth grades. Student's fifth-grade teacher, Ms. Roberts, is licensed in elementary education, and she had undergraduate course work in learning disabilities. Student's special needs assistant from January 2005 through April 2005, Ms. Webb, has a Bachelor's degree in Social Work, no teaching license or certificates. She received no in-service training on cerebral palsy, learning disabilities, or listening disorders; however, she maintains daily contact with the special education teacher regarding Student. Student's speech/language pathologist, Robin Whitesell, has a bachelor's degree in speech pathology and audiology, a master's degree in elementary level curriculum and instruction, and 84 hours of post-graduate work in the areas of mild, moderate, severe, profound learning disabled and emotional handicapped.
10. At times, the general education teacher would work with Student and a few others in a small group-setting. The special needs assistant would work with Student one-on-one during portions of the day, reinforcing and reviewing lessons taught by the general education teacher. The general education teachers and special needs assistants would consult daily with the special education teachers about the Student, and the special needs assistant would keep a "documentation binder."
11. The School utilized the "Four Block" instructional method for reading, a scientifically based instructional method. Student used the same textbooks and took the same tests as his fourth and fifth grade classmates. However, either the general education teacher or the special education teacher would adapt his homework assignments by reducing the number of problems Student was responsible for completing and adapting tests by reducing the number of problems, by providing word banks, by providing tests with fewer choices, or by allowing the Student to use his textbook while taking tests.
12. Student's final grades in fourth grade were:

	Average
Reading	C
Language	C
Mathematics	C
Social Studies	C
Science	B
Spelling	A
13. Because he left school before the end of the final grading period, Student did not receive final grades for fifth grade. His grades for the first three grading periods were:

	First period	Second period	Third period
Reading	B-	C	C+
Language	B	B-	B
Mathematics	B	C+	C
Social Studies	B	C	B
Science	A	C+	C+
Spelling	A	A	A

14. Student did not pass the ISTEP+ test in his third, fourth, or fifth grade years. ISTEP+ scores are not used to make special education placement decisions, nor are they used to determine whether ESY services are needed.
15. In 1999, Student earned a full-scale score of 87 on the Stanford-Binet Intelligence Test. In 2002, Student earned a full-scale score of 81 and a GAI of 84 on the WISC-III. In the fall of 2004, Student earned a full-scale score of 71 and a GAI of 85 on the WISC-IV.
16. In the summer of 2003, the parents had Student evaluated at the Weisskopf Center. The evaluation included the administration of the Wechsler Individual Achievement Test Second Edition (WIAT-II), the Comprehensive Assessment of Spoken Language (CASL), and the Oral and Written Language Scales (OWLS). The results were below average in all areas except spelling and math.
17. The School notified the parents of the October 16, 2003 case conference via phone on October 9, 2003. Present at this case conference were principal Karen King, [the parent], general education teacher Dina Schafer, special education teacher of record/service Joanne Sawyer, Speech/Language pathologist Robin Whitesell, and Occupational Therapist Janet Purlee. The purpose of this case conference was to discuss the Weisskopf Center evaluation. The participants discussed the Student's difficulties with word recall and comprehension. They also discussed placement of the Student in small groups in math and the use of a peer assistant.
18. The School notified the parents of the January 12, 2004, case conference via phone on January 7, 2004. Present at this case conference were principal Karen King, [the parent], general education teacher Dina Schafer, special education teacher of record/service Joanne Sawyer, Speech/Language pathologist Robin Whitesell, and Occupational Therapist Janet Purlee. The purpose of this case conference committee was the Student's annual case conference. The participants discussed the Student's difficulties with recalling and learning vocabulary and his need for cuing to pay attention to the teacher. Three annual goals were established: increase listening comprehension skills, improve auditory processing skills, and improve fine and gross motor planning skills. Among the strategies for reading and speech/language was small-group instruction, with large-group instruction for math and tests.
19. The School notified the parents of the February 11, 2004, case conference via phone on February 11, 2004. Present at this case conference were [the parent], general education

teacher Dina Schafer, special education teacher of record/service Ashley Padgett, and Occupational Therapist Janet Purlee. The purpose of this case conference committee was to discuss the Student leaving early for private therapy sessions.

20. The School notified the parents of the October 19, 2004, case conference in writing on October 7, 2004. Present at this case conference were [the parent], general education teacher Aimee Roberts, special education teacher of record/service Ashley Padgett, Speech/Language Pathologist Robin Whitesell, Educational Diagnostician Phyllis Manners, and Occupational Therapist Kristi Tingley. The purpose of this case conference committee meeting was to prepare for the triennial re-evaluation.
21. The School notified the parents of the January 27, 2005, case conference via phone on January 18, 2005. Present at this case conference were psychologist Eileen Humphrey, [the parent], general education teacher Aimee Roberts, special education teacher of record/service Ashley Padgett, Speech/Language Pathologist Robin Whitesell, Educational Diagnostician Phyllis Manners, and Occupational Therapist Kristi Tingley. The purpose of this case conference committee meeting was the Student's annual case conference and to discuss the Student's triennial re-evaluation. The committee identified two annual goals: improving listening comprehension skills and language development skills. Among the general strategies for speech and language was small-group instruction.
22. As part of the triennial re-evaluation, Student was administered the Woodcock-Johnson Tests of Achievement. Average scores range from 90-109; low average scores range from 80-90; and high average scores range from 110-119. Student's scores were as follows:

Letter-Word Identification:	86	Spelling:	98
Reading Fluency:	83	Writing Fluency:	84
Passage Comprehension:	87	Writing Samples:	86
Broad Reading Cluster:	83	Broad Written Language Cluster:	90
Calculation:	103		
Math Fluency:	114		
Applied Problems:	97		
Broad Math Cluster:	102		

23. Also as part of the triennial re-evaluation, Student was administered a variety of auditory processing and language tests: the Test of Auditory Perceptual Skills (TAPS), Test of Auditory Reasoning and Perceptual Skills (TARPS), Oral and Written Language Scales (OWLS), Test of Language Development Intermediate (TOLDI), and the Clinical Evaluation of Language Fundamentals (CELF). These tests, as well as the PPVT-III that was administered to Student on January 25, 2005, all indicated that Student has difficulty with vocabulary and word retrieval.

24. Based on the Student's results in standardized, normed tests, including the Woodcock-Johnson, the WISC III, and the WIAT, the school assessed the Student to have normal to near-normal learning potential.
25. The School notified the parents of the March 18, 2005 case conference via phone on February 17, 2005. Present at this case conference were Principal Karen King, [the parent], general education teacher Aimee Roberts, special education teacher of record/service Ashley Padgett, Speech/Language Pathologist Robin Whitesell, and middle school special education teacher Angela Burgeayao. The purpose of this case conference committee meeting was to develop Student's sixth grade IEP. During this case conference, the School reported that Student works best in a small-group or one-on-one setting, and he was to receive services in a resource room.
26. Parents requested that the School provide Student an FM system and have Student tested by an audiologist at the 10/16/03, 10/19/04, and 1/27/05 case conferences. The School denied parents' requests.
27. At the beginning of his fifth-grade year, parents observed Student was developing a negative attitude at home and he was becoming negative towards school. The parents reported to the School that they were working with the Student for hours each night on Student's homework assignments.
28. The school personnel observed the Student to be happy at school and to be friends with his classmates. The School advised the parents to limit homework time to 60 to 90 minutes per night and Student would not be penalized for handing in incomplete homework assignments.
29. The parents did not receive progress reports from the School after January 2005.
30. Student's parents wrote a letter to the School dated March 28, 2005, notifying the School that Student would be withdrawn from Jonathan Jennings Elementary School (Jonathan Jennings) and enrolled in the Summit Academy in Middletown, KY. Summit is accredited by the Kentucky Department of Education and is a member of the Learning Disabilities Association and other professional educational associations.
31. Summit's average student/teacher ratio is 5:1. Students are grouped based on their current level of performance in a particular subject, not based on their grade level. Because all Students in the school are being taught the same subject during the same time period, Students can move into different groups as appropriate for their current level of performance.
32. Student's last day at Jonathan Jennings was April 8, 2005, and he completed the remainder of his fifth-grade year at Summit Academy. At Summit, he was working on third-grade reading materials, fourth-grade math (the same math book Student used in fourth grade at Jonathan Jennings), and fifth-grade science and social studies. Summit referred to Student's Woodcock-Johnson testing that was administered by the School in January 2005 as a

baseline. In May of 2005, Summit administered to Student a fourth-grade level criterion-referenced test, and Student scored in the 78<sup>th</sup> percentile.

33. Since enrolling at Summit Academy, parents have noticed a positive change in the Student's attitude toward himself and about school. At home, he is talking to his family about the things he is learning at school.

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

Based on these Findings of Fact, the IHO reached sixteen (16) Conclusions of Law.

#### **1. Whether the IEPs devised by the School were appropriate.**

The school corporation of legal settlement is responsible for providing educational services to Students who have legal settlement within the school corporation. Ind. Code §20-8.1-1-7.1. Until April 10, 2005, Student was enrolled in the Greater Clark County school system and was receiving special education services at Jonathan Jennings, an inclusive school that does not have a classroom dedicated to special education and uses the hallway and empty classrooms for resource pull-out. Student continues to reside in the Greater Clark County area, but his parents transferred him to Summit Academy in Middletown, KY. Summit Academy's average student- to-teacher ratio is 5:1, and Students are grouped based on their current level of performance in a particular subject, not based on their grade level.

In the 10/16/03 addendum to the Student's fourth-grade case conference report and IEP, the participants discussed the Student's difficulties with word recall and comprehension. The group discussed placement of the Student in small groups in math and the use of a peer to assist Student understand directions. In the case conference report and IEP dated 1/12/04, the participants again discussed the Student's troubles with recalling and learning vocabulary, as well as his need for cuing to look and listen while the teacher is lecturing. However, the strategies/modifications/accommodations/supports placed the Student in large-group math instruction and in large-group for testing and quizzing. He was also receiving the majority of his instruction in a large-group setting in his fifth-grade year, even though small-group instruction was recommended.

In the 3/18/05 case conference report and IEP that was being prepared for his sixth-grade year, Student's difficulty with recalling information and retrieving words was again discussed. Also discussed was the fact that the Student works best in small-group or one-on-one settings and that he requires repeated instruction in certain areas and verbal reminders in others. Thus, for sixth grade, the committee agreed that Student would be placed in a resource classroom for English, Math, Social Studies, and Science, where he would receive small-group instruction.

In reference to the Student's academic progress, the accommodations set out in his fourth- and fifth-grade IEPs included study guides, word banks, open book tests, tests with fewer choices, more time to complete tests, shortened assignments, and the one-on-one guidance of a special needs assistant.

Although the School's position was that Student was doing grade-level work with some accommodations, the Student was placed in third-grade reading and fourth-grade math upon admission to Summit Academy, which referred to Student's January 2005 Woodcock-Johnson testing results in making these placement decisions.

The IEPs developed by the School for Student's fourth- and fifth-grade years were not reasonably calculated to enable the child to receive educational benefit. While the Student is to be educated in the least restrictive environment, the discussions of the committee members clearly indicate that the Student works best in small-group settings, that the Student requires repeated reminders and instruction, and that the Student must be cued to pay attention to the lecturer. The committee members' discussions lead to the conclusion that this Student learns best in a small-group setting, which was finally identified as the least restrictive environment for the Student in March of 2005. The extent of the accommodations was so substantial that the Student was not making academic progress.

**2. Whether the School properly implemented the Student's IEPs.**

In the case conference report and IEP dated January 27, 2005, it was noted that the Student receives his instruction primarily in a large-group setting, with a special needs assistant 2.5 hours per day. However, the general strategies for reading and for tests and quizzes recommended small-group instruction. Similar notations and strategies are found in Student's fourth-grade IEP. While he did work with the general education teacher periodically in small-group settings, he did not receive the agreed-upon small-group instruction in reading, testing, and math. The one-on-one attention he received for portions of the day was provided by a special needs assistant who had no in-service training or education in special education, cerebral palsy, or learning disabilities. The IEPs were not being properly implemented.

**3. Whether the School conducted appropriate and timely functional behavior assessments and behavior intervention plans.**

Parents withdrew this issue at the commencement of the due process hearing.

**4. Whether the personnel who worked with the Student were appropriately trained and licensed in the Student's areas of disabilities.**

"Teacher of record" is a term used to designate the single special education teacher to whom a Student with a disability is assigned. Each Student with a disability must have a teacher of record identified. The teacher of record may be the teacher of service and must be appropriately licensed to work with the Student or, where appropriate state licensure is not available, appropriately trained. Ind. Admin. Code tit. 511, r. 7-17-72. All personnel employed or contracted by a public agency to provide or supervise the provision of special education or related services shall be appropriately licensed or certified to provide the services for which the individual is employed or contracted in accordance with standards established by the Indiana Professional Standards Board or other applicable licensing and certification bodies. Ind. Admin. Code, tit. 511, r. 7-21-2(a). Public agencies may allow paraprofessionals and assistants who are appropriately trained to work under

the direction and supervision of licensed teachers or related services personnel. Ind. Admin. Code, tit. 511, r. 7-21-2(b). The public agency shall provide preservice and inservice training to paraprofessionals, and document in writing the training provided, in the areas of the role of the paraprofessional related to the role of the professional person providing supervision and direction; the specific skills necessary to carry out the assigned responsibilities; information on the specific special needs and characteristics of the Students with whom the paraprofessional will be working; and information on special education procedures. Ind. Admin. Code, tit. 511, r. 7-21-2(c).

Student's teachers of record in fourth and fifth grades were licensed in special education. Student's special needs assistant from January 2005 through April 2005 held no teaching license or certificates, there was no written documentation concerning the training the school provided her, and she received no in-service training on cerebral palsy, learning disabilities, or listening disorders. She kept a documentation binder; however, there is no indication of what this binder contained. The special needs assistant was not appropriately trained to work with the Student.

**5. Whether the School complied with the No Child Left Behind requirements for Title I schools.**

The No Child Left Behind Act confers no individual rights on a Student. The hearing officer has no authority to rule on this issue.

**6. Whether the Student suffered emotional harm or academic/intellectual regression.**

The school personnel observed the Student to be happy at school and to have friends among his classmates, but the parents observed Student developing a negative attitude at home and becoming negative towards school. Since enrolling at Summit Academy, however, parents have noticed a positive change in the Student's attitude toward himself and about school, and at home, he is talking to his family about the things he learned at school. Although the Student may have been unhappy at school or at home while attending Jonathan Jennings, there is insufficient evidence to conclude that attendance at Jonathan Jennings caused Student to suffer emotional harm.

Even though the School projected that the Student's learning potential as normal to near-normal, the Student's Stanford-Binet and WISC-III test scores had dropped between 1999 and 2002 and his scores in the reading and writing portions of the Woodcock-Johnson test administered as part of his triennial re-evaluation fell in the below-average range. Student's fourth- and fifth-grade ISTEP+ scores fell below the passing rate, and he was doing third-grade level reading and fourth-grade level math at Summit. While at Jonathan Jennings, Student was doing the same work as his classmates, but with accommodations that included a reduction in the number of problems he needed to complete and one-on-one help from a special needs assistant. The test scores, combined with the extent of the accommodations the Student required to complete his work, suggests that, while not regressing, the Student was making very minimal progress given his projected learning potential.

**7. Whether the School devised an IEP on an annual basis, in regard to the 4/6/00-4/13/01 IEPs and in regard to the 1/12/04-1/27/05 IEPs.**

A case conference committee shall convene within twelve (12) months of the preceding case conference committee meeting for a Student previously determined eligible for special education to determine whether the annual goals for the Student are being achieved. Ind. Admin. Code, tit. 511, r. 7-27-4(a)(2). The school conducted case conference committee meetings on January 12, 2004, February 11, 2004, October 19, 2004, and January 27, 2005. Although the January 27, 2005, case conference committee meeting convened within twelve (12) months of the preceding case conference committee meeting of October 19, 2004, it did not convene within twelve (12) months of the preceding case conference committee meeting in which annual goals were discussed on January 12, 2004. The school did not comply with required procedures when scheduling the January 27 2005, case conference committee. Because more than two years have passed since the petitioner knew or should have known of the possibility of an issue with the convening of the 4/13/01 case conference committee, this claim is barred by a statute of limitations.

**8. Whether the School ensured the attendance of proper personnel in the Student's case conference committee meetings.**

Except as provided in subsection (e), the public agency shall ensure that the case conference committee participants include a representative of the public agency other than the Student's special education teacher who 1) is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of Students with disabilities, 2) is knowledgeable about the general education curriculum, 3) is knowledgeable about the availability of resources of the public agency; the Student's current teacher of record; one of the Student's general education teachers; and the parent of a Student less than eighteen years of age. Ind. Admin. Code, tit. 511, r. 7-27-3(a). At each of the case conference committee meetings the parent, the general education teacher, the special education teacher, and either the Jonathan Jennings principal, the educational diagnostician, or the school psychologist were present. Proper personnel were in attendance at the case conference committee meetings.

**9. Whether the School provided prior written notice in reference to the parents' requests for 1) an FM system, 2) the child to receive care from audiologist Norma Hogan, 3) ESY services, 4) OT, 5) removal from the large classroom setting, and 6) discontinued use of index cards.**

The public agency shall provide the written notice to the parent a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or special education placement of the Student or the provision of a free appropriate public education to the Student. Ind. Admin. Code tit. 511, r. 7-22-2(a). During the March 18, 2005, case conference committee meeting, the participants discussed and agreed on a change in the Student's placement from a general education classroom to a resource room in the sixth grade. This constitutes a change in placement requiring prior written notice. However, due to the fact that the parents had agreed to small-group instruction in previous case conferences and the fact that the parents removed Student and placed him in a private school with a small-student teacher ratio, there is no harm to the Student for this technical violation. In reference to the parents' requests for an FM system, that he be evaluated by an audiologist, that he receive ESY and OT services, and that index cards be

discontinued, these are not “the identification, evaluation, or special education placement of the Student” and, therefore, do not fall within the requirements of this rule.

**10. Whether an educational diagnostician or school psychologist should have been present at the 10/16/03 meeting where testing and evaluations were being discussed.**

The public agency shall ensure the participation in the case conference committee of additional individuals in the following circumstances: When no other member of the case conference committee can interpret the instructional implications of evaluation results, an individual who can interpret the instructional implications of evaluation results. Ind. Admin. Code tit. 511, r. 7-27-3(e)(2). Present at the October 16, 2003, case conference were principal Karen King, [the parent], general education teacher Dina Schafer, Special Education teacher of record/service Joanne Sawyer, Speech/Language pathologist Robin Whitesell, and Occupational Therapist Janet Purlee. The purpose of this case conference was to discuss the Weisskopf Center evaluation. Joanne Sawyer’s training in test data analysis and interpretation and curriculum building and planning based on test results qualifies her to interpret the instructional implications of the Weisskopf evaluation results.

**11. Whether case conference meetings were scheduled at mutually agreeable times and places.**

A case conference committee meeting shall be scheduled at a mutually agreed-upon date, time and place. The parent shall be given adequate notice of the case conference committee meeting early enough to ensure that one or both parents have the opportunity to attend. Ind. Admin. Code tit. 511, r. 7-27-2. Each case conference committee meeting was scheduled in advance of the meeting. Notice of the case conference date and time was provided to the parents via phone or written correspondence. Other than the February 11, 2004, the purpose of which was to discuss the Student leaving early for private therapy sessions, each case conference committee meeting was scheduled at least five days in advance. Furthermore, one of the parents attended each meeting. The meetings were scheduled at mutually agreeable times and places.

**12. Whether the School shared progress sheets on the Student’s short-term objectives or benchmarks.**

The teacher of record is responsible for providing progress reports to the Student’s parent. Ind. Admin. Code tit. 511, r. 7-17-72. The parent testified that she did not receive progress reports from the school after January 2005, and the School did not produce any progress reports dated after January 2005 at the hearing. The School did not meet its responsibility to provide progress reports to the parents.

**13. Whether the School provided all of the documents requested by the parents in their April 7, 2005 letter.**

The parent testified that she received from the School a list of three low- or no-cost legal service providers in response to her request for this information in her April 7, 2005 letter. Other than this

item, the parents did not provide testimony as to what items on the April 7, 2005 letter were not provided to them. The school provided all of the requested documents.

**14. Whether the School required the parents to obtain a prescription from a physician before commencing PT and OT services.**

Article 7 does not require a doctor's order in order to commence occupational therapy. Complaint Investigation 1649.00. Parent testified that she was required to obtain a doctor's order before the School would commence the occupational therapy. Page 494 and 554 of the petitioner's exhibit book are doctor's orders dated 4/30/01 and 7/24/99 for the Student to receive occupational therapy. Because more than two years have passed since the petitioner knew or should have known of the possibility of this issue, this claim is barred by a statute of limitations.

**15. Whether parents' notice prior to withdrawing the Student from the School was sufficient.**

"The hearing officer or the court may reduce or deny reimbursements to the parents if the hearing officer or the court finds any of the following: . . . (2) The parent failed to provide written notice to the public agency, at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the Student from the public agency, of the information required by subdivision (1)." Ind. Admin. Code tit. 511, r. 7-19-2 (d)(2). The parents notified the School in a letter dated March 28, 2005, that the Student's last day at Jonathan Jennings would be April 8, 2005, that he would be placed at Summit Academy, that a free appropriate public education had not been provided to the Student "per information below, 1) latest reassessment Dec 2004-Jan 2005 2) I-Step Testing 3) Regression." Petitioner's exhibit book p. 1. This letter stated the parents' concerns and their intent to enroll the Student in a private school at public expense. Student was removed from Jonathan Jennings at the end of the day on April 8, 2005, the ninth business day following the March 28, 2005 letter. Because the parents did not provide at least ten (10) business days notice prior to removing the Student from Jonathan Jennings, the notice was insufficient.

**16. Whether a statute of limitations bars claims arising out of the creation or implementation of IEPs prior to April 4, 2003.**

Claims a parent or public agency knew or should have known about are barred if they arose two years before the date the claim is made. Because more than two years have passed since the petitioner knew or should have known of the possibility of an issue with the convening of the 4/13/01 case conference committee (part of issue 7) and with obtaining prescriptions for occupational therapy in 1999 and 2001 (issue 14), these claims are barred by a statute of limitations.

***The IHO's Orders***

Based on the Findings and Fact and Conclusions of Law, the IHO issued five (5) Orders.

It is hereby ordered that the School failed to provide the Student with a FAPE and the private placement is appropriate.

1. The Student will be placed at Summit Academy at public expense for the 2005-2006 academic year, and the School is to pay for tuition and all mandatory fees required for attendance.
2. The School will provide or pay for transportation to and from the Student's home as provided in Ind. Admin. Code tit. 511, r. 7-19-1(i). The provision of transportation as per this Order is to be included in the Student's IEP.
3. The School will provide or pay for communication disorder programming for the Student.
4. Because the parents did not provide ten (10) days' notice of intent to enroll the Student in a private school, they are responsible for expenses for attendance at Summit Academy from April 11, 2005, to the beginning of the 2005-2006 academic year (511 IAC 7-19-2(d)).
5. The School is to provide in-service training to its special education assistants in accordance with Ind. Admin. Code tit. 511, r. 7-21-2(c) and maintain documentation of that training in accordance with that section. Training can be conducted by in-house staff or external consultants at the School's discretion. Training must be completed by November 1, 2005.

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

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

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

On October 3, 2005, the School submitted a Petition for Review in a timely manner to the Indiana Department of Education (IDOE) on behalf of the Board of Special Education Appeals (BSEA). In a facsimile transmission dated October 5, 2005, the Student's attorney stated that she received a copy of the Petition for Review, but inquired as to why she did not receive the Petition for Review from the School's attorney on October 3, 2005, the same day as the IDOE. In a letter dated October 6, 2005, the School replied to the Student's inquiry, in which the School stated that the due date for receipt of the Petition for Review was October 6, 2005.<sup>7</sup> Further, the School's attorney stated that the School had no objection to the Student seeking an extension of time if needed to prepare and file a Response.

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<sup>7</sup>511 IAC 7-30-4(d)(2) does require a party filing a Petition for Review, *inter alia*, to ensure such a Petition is "filed simultaneously with the department of education and the opposing party[.]" This does not require both the IDOE and the opposing party to receive it exactly at the same time or even on the same date. In this case, the Petition for Review was hand-delivered to the IDOE and apparently mailed to counsel for the opposing party. Article 7 has a relatively short period of time within which to respond. See 511 IAC 7-30-4(f), permitting a Response within ten (10) days of the filing of the Petition for Review. A hand-delivered Petition to the BSEA while mailing same to opposing counsel places opposing counsel at a disadvantage and may not serve the "simultaneous" filing requirement. The matter has been reconciled through the granting of an extension of time, but counsel should, in the future, not undermine the spirit of the law by resort to the letter of the law. Facsimile transmission is still a viable option.

In a letter dated October 11, 2005, the Student filed a Motion for Enlargement of Time to respond to the Petition for Review, asking for an extension of time beyond the 10 days allowed to file a Response. The BSEA granted the Student's request for extension of time by an Order dated October 12, 2005, giving the Student until November 7, 2005, to prepare and file a Response to the Petition for Review.

The BSEA timely received the Student's Response to the School's Petition for Review on November 7, 2005. In a letter dated November 14, 2005, the IDOE clarified for the parties that the transcript that appears in the official record will be used.<sup>8</sup>

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

As noted *supra*, the School filed its Petition for Review on October 3, 2005. The School took exception to the following Findings of Fact: Nos. 7, 9, 10, 16, 17, 18, 25, 29, 31, and 32. The School objected to the following Conclusions of Law: Nos. 1, 2, 4, 6, 7, 9, 12. The School also objected to the following Orders: Nos. 1, 2, 3, 4 and 5.

The School maintains that the IHO's decision was contrary to the substantial weight of evidence, current case law, and Article 7 in the following three areas: 1) evaluating data from the psychoeducational testing showing the Student did benefit from his educational placement; 2) confusing the IEP modifications and adaptations designed specifically for the Student's needs in meeting the least restrictive environment (LRE) requirements that enabled him to progress in the general education curriculum, with more restrictive IEP placement determinations; and 3) awarding reimbursement for private school placement without making any determination the private school placement was appropriate while at the same time ordering the School to remedy the deficits of the lack of FAPE available to the Student at the private school. The School also challenged the IHO's determinations the School committed procedural errors.

The School argues that the modified Rowley standard,<sup>9</sup> pursuant to the new Individuals with Disabilities Education Improvement Act (IDEIA), should be applied in this matter. The School maintains that the modified test provides that an IHO cannot find that the student did not receive a FAPE based on procedural error unless such error impeded the child's right to a FAPE; significantly impeded the parents' opportunity to participate in the decision-making process; or caused a deprivation of educational benefit on the student.<sup>10</sup> The School takes exception with several portions of the IHO's decision, claiming that the decision is unsupported by evidence, reached in violation of established practice, contrary to law, and an abuse of discretion.

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<sup>8</sup>With respect to the hearing transcript, there was some concern whether the written transcript or the electronic version would be employed. The parent, at the parent's request, received an electronic version, which had different pagination. The official transcript is the written one.

<sup>9</sup>See Board of Education v. Rowley, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982)

<sup>10</sup>20 U.S.C. §1415(f)(2)(e)(i).

The School maintains that its IEPs were appropriate and conferred an educational benefit, which was evidenced by standard test measurements, passing grades, and grade advancement. According to Rowley, the School argues that there is a preponderance of evidence to prove that the 5<sup>th</sup> and 6<sup>th</sup> grade IEPs were appropriate. The School claims that the IEPs contained specialized instruction and related services that were designed specifically for the Student. In order to determine appropriateness, the School argued that the test of appropriateness of past services is best judged by a review of objective data. Despite the alleged fact that the Student has progressed at the private placement, the School notes that an IEP cannot be deemed inappropriate “simply because parents show that a child makes better progress in a different program.”<sup>11</sup> The School asserts that its IEPs cannot be judged in hindsight by comparing it with what happened at the private school. Thus, the School maintains that its IEPs should be evaluated prospectively, which requires an understanding of the evaluation data used to form the basis of the IEPs. With regard to the evaluation data, the School maintains that the IHO failed to properly consider the assessment data.<sup>12</sup> The IHO’s finding incorrectly simplifies the evaluation data by concluding that the results were below average in all areas except spelling and math, thus leading to erroneous conclusions regarding the Student’s special education programming. Further, the School takes issue with the IHO’s finding regarding Summit’s use of criterion-reference tests<sup>13</sup> and percentiles to be representative of the Student’s abilities.<sup>14</sup>

The School contends that the IHO erred in failing to properly consider evidence concerning the Student’s progress in school as measured by passing grades, advancement in grade levels, and competency on Indiana’s grade-level standards, in order to support the appropriateness of the Student’s placement in a general education with accommodations. The School maintains that objective evidence should have been considered in order to determine the appropriateness of the IEP in conjunction with its educational benefit to a child. The School argues that the Student demonstrated achievement sufficient to advance to each grade level; however, the IHO dismissed the importance of this fact in deciding the issue. In addition, the IHO failed to appropriately consider the Student’s ability to work at grade level with accommodations. Furthermore, the School contends that at Summit the Student was working on subjects and content already mastered in the 4<sup>th</sup> and 5<sup>th</sup> grade levels. The School states that the IHO should have given more weight to the evidence of the Student’s performance at grade-level work before concluding that the Student’s IEPs were inappropriate.

With respect to LRE, the School maintains that the IHO mistook “small-group instruction” provided as a general education modification for a placement recommendation of “small-group setting.”<sup>15</sup> As

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<sup>11</sup> O’Toole v. Olathe Dist. Sch., 144 F.3d 692, 697 (10<sup>th</sup> Cir. 1998).

<sup>12</sup>Reference is to Finding of Fact No. 16.

<sup>13</sup>The School, in its Petition for Review but not at the hearing, referred to a book by Jerome M. Sattler, *Assessment of Children, Cognitive Applications*, 6 (4<sup>th</sup> Ed. 2001). The Student, in the Student’s Response, objected to the School’s introduction of this work.

<sup>14</sup>Reference is to Finding of Fact No. 32.

<sup>15</sup>References are to Findings of Fact Nos. 17, 18, and 25 and Conclusions of Law Nos. 1 and 2.

a result, the IHO incorrectly concluded that the Student's IEP was not implemented as written. The School further argues that the case conference committee (CCC) developed appropriate goals and objectives as well as program modifications to the general education classroom, which showed that the Student was making progress. Thus, the Student's placement in a general education classroom with the supports of small-group instruction along with supplemental aids and services was appropriate as evident by his academic progress. Furthermore, the School maintains that it was not until the complexities of a more demanding pace of the general education curriculum and transition concerns in middle school that the CCC decided that the Student might need a more restrictive placement in the resource room. In contrast, the School claims that the Student's needs were not met at Summit because of its failure to appropriately place the Student in a general education curriculum. Thus, the School argues that Summit is not appropriate nor the LRE for the Student.

The School states that the unilateral placement of the Student at Summit was inappropriate for the Student's needs. Furthermore, the parents failed to provide timely and sufficient notice of the placement; therefore, the School argues that all reimbursement must be denied. Since the IHO failed to determine that the private school was appropriate, the School maintains that reimbursement should not be awarded. Additionally, the School states that it did provide a FAPE for the Student, unlike Summit.<sup>16</sup> Since the Student's notice failed to accurately clarify any shortcomings of the IEP, the School argues that it was not given an opportunity to remedy the Student's IEP concerns.

Finally, the School maintains that the IHO's decision improperly decided procedural errors. The School reiterates that it did not impede the Student's right to FAPE, the parents opportunity to participate in the decision-making process, nor cause a deprivation of an educational benefit.

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

The Student timely filed on November 7, 2005, his Response to the School's Petition for Review. The Student maintains that the IHO reviewed all of the evidence and based her decision after considering all evidence. Further, the Student claims that the School failed to point to any "actual legal error" by the IHO and is only in disagreement with the outcome. The Student asks the BSEA to strike matters the School raised on appeal that were not raised in the hearing, notably the student's legal settlement, confidentiality concerns with respect to the Student's sibling, and the aforementioned information with regard to criterion-referenced testing. The Student also argued the School has the burden of proof to show that FAPE was provided, but the School has failed to meet this burden by merely rearguing the case and claiming that its witnesses and documents were more credible.

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<sup>16</sup>The School sets forth three factors to support its position that Summit is an inappropriate placement for the Student: 1) Summit did not individualize the Student's instruction nor address his unique educational needs; 2) Summit failed to meet all of the Student's needs, including speech and language therapy; and 3) Summit's personnel are not qualified to meet the Student's unique educational needs.

The Student maintains that on July 1, 2005, IDEIA went into effect and would not apply to this proceeding, particularly as the Student filed for the hearing in April 2005, well before the new law went into effect. The old IDEA should apply.

The Student argues that the regression was clearly shown by objective, not subjective data. The Student argues that based on current objective test data, the Student is doing very poorly.<sup>17</sup> The Student alleges that the School asked the IHO to ignore objective testing that showed regression and give more weight to subjective measures (such as grades). Even though the Student failed to meet ISTEP+ standards and the School's failure to point out that he was graded on special standards, the Student maintains that the School continued to pass the Student from grade to grade. During the hearing, the IHO declined to give more weight to subjective measures of the Student's alleged progress; the Student argues the BSEA should do the same.

The Student argues that the goals and objectives in the Student's IEP were inadequate. Even though the School maintained that the Student was making "good progress" on his goals and objectives, the Student claims that a number of written progress reports were not shared and that the goals and objectives remained virtually the same for three years. Additionally, the Student argues that all of the IEP goals and objectives relate to listening comprehension and neglect to include goals and objectives that address his other areas of need.

With regards to the LRE, the Student argues that the general education setting was always inappropriate, and a placement to include a resource room was never offered while he attended Jonathan Jennings Elementary School.<sup>18</sup> After becoming aware that the elementary school did not have a resource room and the School's purported admission that it mainstreamed every special education student, the Student maintains the School did not provide individualized instruction. The Student argues that the private school placement is appropriate because of its small class sizes, student-teacher ratio, grouped ability levels, and number of typical peers in attendance.

The Student maintains that the issue of reimbursement is contingent on the determination of whether the School's program was designed to confer a meaningful educational benefit in compliance with the IDEA and its procedural and substantive rights. The Student asks the BSEA to consider the standard outlined in Town of Burlington v. Dept. of Ed., Commonwealth of Massachusetts, 471 U.S. 359, 370 (1984): 1) Did the School deny the child FAPE and were the challenged IEPs adequate to provide the child with a FAPE?; and 2) Were the private educational services of the Summit Academy appropriate to the Student's needs at the time to the extent necessary by law? The Student argues that the IHO found Summit to be an appropriate placement. Additionally, the Student claims that because parents have a lack of access to a full range of educational placements, they are not required to adhere strictly to LRE requirements.

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<sup>17</sup>Specifically, the Student states that "the student has fallen 16 points, from an average IQ score in 1999 to nearly being mildly mentally disabled by 2004."

<sup>18</sup>The Student acknowledges that the School did finally recognize the need for a resource room type placement; however, it was offered many months later.

The Student maintains that the “basic floor” standard, which the School urges the BSEA to use, is no longer appropriate. Instead of merely providing access to an education as cited in Rowley, the Student asserts that IDEA amendments and the No Child Left Behind Act (NCLB)<sup>19</sup> require improved results and achievement. The Student argues that the law requires more than the “basic floor” of opportunity. The current standard requires a student to achieve “meaningful benefit” or to make “meaningful progress” in the areas where the student’s disability affects his education, the Student asserts, citing Nein v. Greater Clark County Sch. Corp., 95 F.Supp.2d 961 (S.D. Ind. 2000).

The Student also argues that the issue of legal settlement, which he claims has been raised for the first time on appeal, should not be considered by the BSEA. However, if the BSEA decides to consider the issue, the Student claims the actual legal settlement for the 2004-2005 school year does not appear to be a concern because there is no question that the IHO’s decisions were based on facts that occurred when the Student had legal settlement within the School.

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

On November 14, 2005, the BSEA issued to the parties a Notice of Review Without Oral Argument, setting this matter for review on November 29, 2005.

On November 29, 2005, the BSEA convened in Indianapolis to review this matter. This review was conducted without oral argument and without the presence of the parties. All three members of the BSEA participated. Each had received and reviewed the record from the due process hearing below, including the Petition for Review and the Student’s Response to the Petition for Review.

Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, 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;

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<sup>19</sup>The IHO concluded that the NCLB confers no individual rights on the Student and, as a result, she did not have authority to rule on its applicability. The Student did not challenge this Conclusion through a timely Petition for Review. Accordingly, the Student cannot rely upon the NCLB in the arguments he sets forth in his Response to the School’s Petition for Review. See IHO’s Conclusion of Law No. 5. 511 IAC 7-30-4(h).

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. Finding of Fact No. 7 is a factual statement supported by the record.
3. Finding of Fact No. 9 is a factual statement supported by the record.
4. Finding of Fact No. 10 is a factual statement supported by the record.
5. Although a specific objection has not been made with regard to Finding of Fact No. 15, the BSEA noted a reference to “a GAI [Global Assessment of Intelligence] of 84 on the WISC-III.” The WISC-III does not have GAI scores. Accordingly, the “and a GAI of 84” is deleted from this Finding of Fact.
6. Finding of Fact No. 16 is accurate as written.
7. As to Finding of Fact No. 17, it is factual to an extent. Some confusion may result from the IHO’s use of the word “placement” in this Finding of Fact and “strategies” in Finding of Fact No. 18, even though the terms are not interchangeable and “placement” may not be an entirely accurate descriptor in this sense. Nevertheless, the Finding of Fact is factual.
8. Finding of Fact No. 18 is not accurate as written. The IHO wrote, in part, “Among the strategies for reading and speech/language was small-group instruction with large-group instruction for math and tests.” Small-group instruction was identified for reading, while large-group instruction was to be employed for math, writing, and tests. See checklist, p. 152 of School’s Exhibits. The Student was to receive “speech/language services outside the classroom in order to have a quiet, non-distracting environment.” These services were not to be provided in a “small-group instruction” setting. See School’s Exhibits, p. 156. The BSEA amends Finding of Fact No. 18 to reflect the record, but otherwise finds Finding of Fact No. 18 to be factual.
9. Finding of Fact No. 25 is a factual statement based on the record.
10. Finding of Fact No. 29 is a factual statement, albeit an incomplete one. This will be addressed *infra*.
11. Finding of Fact No. 31 is a factual statement based on the record.
12. Finding of Fact No. 32 is a factual statement; however, the private placement’s use of the Woodcock-Johnson grade equivalents may be psychometrically inappropriate, as will be discussed *infra*.

13. With respect to Conclusion of Law No. 1: The BSEA disagrees with the IHO's statement that the Student "was also receiving the majority of his instruction in a large-group setting in his fifth-grade year *even though small-group instruction was recommended.*" ¶ 2 (emphasis added). Small-group instruction was checked for certain activities, as was individualized instruction. Large-group instruction was identified for other areas. See Combined Finding of Fact and Conclusion of Law No. 8, supra. There is no showing the Student's IEP was not implemented as written and as agreed to. Although the parties make much of the Rowley standards and whether the IDEIA should apply to this case,<sup>20</sup> the BSEA notes the parent was intimately involved in the Case Conference Committee process and approved of the IEPs. Of more import to this matter is 511 IAC 7-27-8, which is based upon 34 C.F.R. § 300.350 and states in pertinent part:

**511 IAC 7-27-8 Individualized education program; accountability**

Sec. 8. (a) The public agency shall:

- (1) provide special education and related services in accordance with a student's individualized education program; and
- (2) make a good faith effort to assist the student to achieve the goals and objectives or benchmarks listed in the student's individualized education program.

(b) The public agency, teacher, or other person may not be held accountable if a student does not achievement the growth projected in the annual goals and benchmarks or objectives....

The IEP does not serve as a guarantee that a student will make any progress; rather, the law requires that special education and related services be provided in accordance with a student's IEP and that a "good faith effort" be made to assist the student to achieve the goals and objectives or benchmarks listed in the student's IEP. In this case, the challenged IEPs were implemented as written and there is no evidence the School did not "make a good faith effort to assist the student," as contemplated by both federal and state law.

All due process hearings conducted pursuant to 511 IAC 7-30-3 are also governed by the Administrative Orders and Procedures Act (AOPA), I.C. § 4-21.5-3 *et seq.* 511 IAC 7-30-3(p). Under I.C. § 4-21.5-3-27(d), "Findings must be based upon the kind of evidence that is substantial and reliable." The AOPA also applies to BSEA reviews. See 511 IAC 7-30-4(c). I.C. 4-21.5-3-27(d) also provides that "technical competence [] and specialized knowledge may be used in evaluating evidence."

The private school's reliance upon the Woodcock-Johnson grade-equivalent scores and its own criterion-referenced testing to determine the Student's grade placement upon admittance was psychometrically inappropriate. The Student's standardized scores were

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<sup>20</sup>For the record, the BSEA does not believe the IDEIA applies to this case because the hearing request and operative facts precede the effective date of the IDEIA, July 1, 2005. See P.L. 108-446, Title III, § 302.

in the 80s, indicating low-average ability. The IHO statement in ¶ 4 of Conclusion of Law No. 1 is actually a Finding of Fact and not a Conclusion of Law. The use of the grade-equivalent scores by the private school in this fashion was not psychometrically sound. While it may be true that passing grades and grade promotion, in and of themselves, may not be indicative in some cases of educational benefit, the W-scores on the Woodcock-Johnson<sup>21</sup> do indicate continued improvement that support the testing, grades, and grade promotion of the Student. The Student's aptitude scores dropped, but such scores are not indicative of academic achievement. Standardized achievement scores, along with passing grades and grade promotion, do indicate academic progress that, in turn, is indicative of educational benefit.

There is no support in the record for the IHO's Conclusion at ¶ 5 that "The IEPs developed by the School for Student's fourth- and fifth-grade years were not reasonably calculated to enable the child to receive educational benefit." As detailed *infra*, the record demonstrates the Student's IEPs did enable the Student to receive educational benefit. The statement that "this Student learns best in a small-group setting" is also not supported by the record. A variety of settings had been employed, including large-group, individual instruction, and small-group settings. The IEPs reflected this. The IEP developed for the 2005-2006 school year, but never implemented because the Student withdrew from School, also reflected the continuing dialogue on instructional modalities and did include more small-group situations, especially in light of the Student's transition to a middle school environment where there would be multiple changes in classrooms and teachers. The record reflects procedures that adhere to the requirements of 511 IAC 7-27-8 and 34 C.F.R. § 300.350.

14. In Conclusion of Law No. 2, the IHO concluded the Student "did not receive the agreed-upon small-group instruction in reading, testing, and math." However, there was no agreement the Student would receive math in a small-group setting. The IEP indicated he would receive math instruction in a large-group setting. There are no factual findings to support the conclusion the Student did not receive the small-group instruction he was supposed to receive. There are no factual determinations that support the IHO's conclusion that "[t]he IEPs were not properly implemented." Finding no evidence of a substantial and reliable nature in the record, the BSEA reverses the IHO in these regards.
15. With regard to Conclusion of Law No. 4, this determination is within the discretion of the IHO. The record supports this Conclusion. However, the violation is a technical one in nature and there is no nexus between the lack of training and any denial of an educational benefit to the Student.
16. The BSEA sustains ¶ 1 of Conclusion of Law No. 6 as based upon the record. However, the BSEA does not agree with the IHO's ¶ 2 of Conclusion of Law No. 6. First, the IHO relies, in part, upon ISTEP+ scores even though the IHO noted earlier that such scores are

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<sup>21</sup>See Transcript beginning at p. 755, defining "W scores" as "growth scores provided by the Woodcock-Johnson that measure growth in specified areas of achievement included in the test.

not used for special education placement decisions (see IHO's Finding of Fact No. 14). The aptitude tests do not reflect academic regression. The W-Scores on the Woodcock-Johnson do indicate academic progress. These scores and the additional evaluative data in the record with respect to the Student indicate the Student was progressing commensurate with his abilities. He was making the progress one would expect. There were no signs of academic regression. The IHO's Conclusion the "Student was making very minimal progress given his projected learning potential" is not supported by the evidence and is, accordingly, reversed.

17. The IHO found a technical violation in Conclusion of Law No. 7, but also found the claim was barred by the applicable statute of limitations. The BSEA will not disturb this conclusion, except to note that the technical violation did not result in denial of any educational benefit to the Student.
18. With respect to Conclusion of Law No. 9, the BSEA finds that the record supports a conclusion that the School did provide the appropriate notice. The Case Conference Committee notes indicate such notice was provided. In all other respects, Conclusion of Law No. 9 is sustained.
19. Although it is factually accurate in Conclusion of Law No. 12 that the School did not provide progress notes after January of 2005, the Student's then-current IEP required progress reports every nine (9) weeks. The Student withdrew from the School before the nine-week grading period was over. The School did not fail to implement the IEP in this regard.
20. The BSEA finds and concludes that the School did provide the Student a FAPE. The BSEA further finds that the IEP developed for the 2005-2006 school year continued the good-faith efforts of the CCC participants to provide appropriate special education and related services tailored to the Student's individual needs. The IEP developed for the 2005-2006 school year is an appropriate IEP.

#### ORDERS

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

1. The BSEA reverses the IHO's Orders Nos. 1, 2, and 3, except as addressed in Order No. 4.
2. The BSEA sustains Order No. 4 as written.
3. The BSEA sustains Order No. 5 as written except to extend the date for compliance to Friday, January 13, 2006. Documentation of compliance shall be submitted to the Division of Exceptional Learners.

4. Because of the issues in this hearing and administrative appeal, the Student began the 2005-2006 school year in the private placement pursuant to the IHO's written decision. Orders 1, 2, and 3 of the IHO's written decision shall remain in effect until thirty (30) calendar days after both parties receive this written decision. Thereafter, the School shall have no further financial responsibility. Should the Student elect to return to the School during the 2005-2006 school year, the IEP developed for this school year is deemed an appropriate IEP for the Student and shall be implemented as written, unless the parties agree otherwise. Absent agreement, this Order stands.
5. Any allegation of error not specifically raised in the Petition for Review and not addressed above is deemed denied.

DATE: November 29, 2005

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

#### APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has 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).