

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

In the Matter of J.T.,)	
Vigo County School Corporation, and)	
the Covered Bridge Special Education District)	Article 7 Hearing No. 1133.99
)	
Appeal from the Decision of)	
Curtis L. Leggett, Ph.D.,)	
Independent Hearing Officer)	

PROCEDURAL HISTORY

This matter involves significant educational programming needs for J.T. (hereafter, the Student), a student with a primary disability of autism, who moved into the educational service area of the Vigo County School Corporation and the Covered Bridge Special Education District (hereafter, collectively the School) in August of 1996. The Student has exhibited aggressive behaviors towards others and engages in self-injurious behaviors as well. Twelve (12) case conference committees were conducted from September 18, 1996, to April 19, 1999, in attempts to construct an educational program and appropriate placement for the Student. In the April 19, 1999, case conference committee, the School recommended a residential placement as the least restrictive environment for the Student. The Parent¹ disagreed with a residential placement, but did provide written permission for the School to share information with a possible facility. School officials visited the proposed facility and provided a report to the Parent. However, the disagreement with respect to a residential placement continued. As a consequence, the School requested a due process hearing on November 19, 1999. Curtis L. Leggett, Ph.D., was appointed as the Independent Hearing Officer (IHO) that same date. Neither party was represented by legal counsel during the hearing phase.

¹The Student's mother and father are involved in his care and education. Wherever the term "Parent" appears in this decision, it will refer to both the mother and the father.

A pre-hearing conference was conducted via telephone on December 3, 1999. During the pre-hearing conference, the School requested an extension of time within which to conduct the hearing and issue a written decision.² This was granted to and including January 30, 2000. The following issue for hearing was determined:

What is the appropriate placement and/or setting to which the Student needs to be assigned to meet the requirements of his Individualized Education Program?

January 13, 2000, was set as the hearing date, with the following day reserved should it be necessary. The parties were advised of their hearing rights. A pre-hearing order was prepared following this conference and mailed to the parties on December 6, 1999.

THE IHO'S WRITTEN DECISION

The hearing was conducted on January 13, 2000, as scheduled. The IHO's written decision was rendered on January 24, 2000. The IHO determined seventeen Findings of Fact upon which he made five (5) Conclusions of Law.³ Based on the foregoing, the IHO issued four Orders.

The IHO's Findings of Fact

The IHO determined the Student is seventeen (17) years old (d/o/b 7/12/82) and eligible for special education and related services due to a primary disability of autism along with a communication disorder and a moderate mental handicap. He has auditory sensitivities, engages in self-stimulation behaviors, and has had incidents of physical aggression towards property and persons. The Student initially received services from the School during the 1996-1997 school year. During that initial year, a specific educational program was developed for the Student at the "Happiness Bag."⁴ In the Fall of the 1997-1998 school year, the case conference committee proposed a placement at a local high school.

²The IHO's pre-hearing order indicates the request was made by "petitioners' representative" but the eventual order indicates it is based on the "Respondents' Motion for Extension of Decision Deadline." Based on the final written decision of the IHO, it would appear the School requested the extension.

³The IHO did not number any of his Conclusions of Law, which makes it difficult for parties to address areas of disagreement and for the Board of Special Education Appeals (BSEA) to review. It is apparent the IHO did not intend there be one (1) Conclusion of Law but five (5). Accordingly, the BSEA has assigned each rhetorical paragraph a number in order to review this decision.

⁴"Happiness Bag" is a local facility that provides after-school care for students with developmental disabilities. (Transcript, p. 33)

At the Student's annual case review in May of 1998, it was decided to transfer the Student to another local high school. An extended school year (ESY) program was established for the Student during the summers of 1997 and 1998.

In January of 1999, an incident occurred during which the Student engaged in significant aggression towards a school staff member. The case conference committee was convened and a temporary homebound placement was established. In April of 1999, the case conference committee was convened. During this meeting, the school proposed residential placement for the Student as a means of providing an appropriate program. Following that meeting, a review of potential residential placement facilities was undertaken by the School.

The homebound services established in January of 1999 were not regarded as successful by the Parent or the School. This was due in some part to lack of coordination among various care and service providers from various agencies, including the School. The School has not provided any direct educational services to the Student during the 1999-2000 school year, although the School and Parent did continue to discuss the appropriateness of residential placement for the Student until November of 1999, when the School requested the hearing.

During the period the School ceased homebound instruction, the Student underwent a significant medication change. The Parent reported a notable behavioral change, including reduced aggressive responses toward the environment and persons, along with "a greater ability to focus on and participate in a number of self-care and environmental actions and/or interactions." (FoF #15). At the time of the hearing, the School had observed the Student following the change in medication. The Student is presently involved with other professionals and care givers, other than School personnel, which is funded by other sources.

The IHO's Conclusions of Law

Based on the foregoing, the IHO concluded:

1. The Student is eligible for special education and related services, and is appropriately identified.
2. The School did not violate any procedural requirements in the convening of the case conference committees for the Student.
3. The School has violated applicable special education law in not providing educational services to the Student during the 1999-2000 school year. At a minimum, the homebound program proposed in January of 1999 should have continued. The search for proposed residential settings and the continuing discussions with the Parent did not negate the School's responsibility to continue to provide educational services.

4. The reported change in the Student's behavior due to the change in his medication warrants a re-evaluation of the Student's current educational needs. Consideration should be made to identify transition services necessary for the Student to move from school to post-school activities. In addition, the School should ensure that alternative service options are fully explored and eliminated as inappropriate or unavailable before residential placement is considered.⁵
5. Any re-evaluation should also consider the severe communication deficits of the Student, including the need for any augmentative communication system and other related services that would be needed to support the Student's educational program.⁶

The IHO's Orders

Based on the foregoing, the IHO issued four (4) orders, which are stated below as written by the IHO:

1. The local school corporation and/or its agents are to undertake an evaluation of the student's current development to include, [but] not limited to, the areas of behavior, both personal and interpersonal; communication systems, both receptive and expressive; and, realistic functional skills possible for post-public school life.
2. Following the evaluation procedures cited in Order #1 above, the local school corporation and/or its agents are to conduct a case conference procedure to design a current [Individualized] Education [Program] and placement recommendation for the student.
3. The actions cited in Order #1 and Order #2 above are to be completed within twenty (20) school calendar days from the date of this decision.
4. During the period of assessment cited in Order #1, Order #2, and Order #3 above, the local school corporation and/or its agents are to provide, at minimum, the same level of the direct services to the student as were in place during the home bound placement for the 1998-1999 school year. These direct services contacts may be used as part of the evaluation/observation needs necessitated by Order #1 and Order #2 above.

⁵The Conclusion of Law resorted in several key respects to regulatory citations rather than direct statements by the IHO.

⁶This Conclusion of Law, as well as the one preceding it, was generally stated by reference to regulatory citations rather than direct Conclusions of Law based on ascertainable Findings of Fact. For the purpose of review, the BSEA has determined the above as the intended Conclusion of Law.

The IHO's written decision concluded with a statement of appeal rights that is not accurate. A party aggrieved by the decision of the IHO has thirty (30) calendar days from *receipt* of the IHO's written decision to file a Petition for Review. The time frame is not calculated from when the written decision is filed.

APPEAL TO THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

On February 8, 2000, the School, by counsel, moved for an extension of time within which to prepare and file a Petition for Review. The request was granted on February 9, 2000, giving the School until March 15, 2000, to prepare and file its Petition for Review, with the time frame extended accordingly to April 14, 2000, during which time the BSEA must conduct its review and render a written decision.

The School filed its Petition for Review on March 15, 2000. The School took exception to the IHO's finding that the lack of scheduling coordination that undermined the homebound instructional program was due in part to the School itself. Documentary evidence included the consultation logs of the teachers assigned to the Student. The consultation logs indicate that interruptions in the service delivery were not due to School personnel but to the actions of outside respite care providers. The School had attempted to coordinate its visits with the respite providers.

The School also objects to the IHO's finding that the Student's medication change occurred after the homebound ceased. The documentary evidence indicates, the School asserts, that the medication change occurred while the homebound was occurring and School personnel could observe him. The School maintains that there were no observable changes in the Student's behavior following the medication change. The School also objects to the IHO's finding that the medication change was "significant" when there was no credible medical testimony to support such a characterization. Additionally, the School objects to the IHO's finding that the Student is presently "involved with other professionals and care givers" (FoF #17). Evidence was the student is involved with respite care workers provided through a Medicaid waiver, and that these workers are not professionally trained individuals.

Although the School does not object to the IHO's determination that it failed to provide homebound instruction during the 1999-2000 school year, either prior to the request for the hearing or after, the School does object to the IHO's conclusion (COL #3) that the School was obligated to continue the program until a decision was reached on the need for a residential placement. The School asserts that the homebound program was inappropriate, was imparting no real benefit to the Student, and School staff were in jeopardy by going to the Student's home. The School acknowledges that it should not have acquiesced in the Parent's request that it not seek a due process hearing to resolve the placement issue.

The School also objects to Conclusion of Law #4, wherein the IHO referred to a “potentially significant impact” resulting from the change in the Student’s medication. As noted above, there is no medical evidence of any “significant” change, the medication change occurred while homebound instruction was being provided, and School personnel did not observe any changes in behavior they considered significant. The School also questions the IHO’s conclusion that a re-evaluation is needed when no party raised this issue. The Student’s IEPs called for continuous charting of his behaviors, daily activities, and progress. The charts were not submitted as documentary evidence because of the bulk of documentation involved. Nevertheless, the School argues, this continuous charting meets the definition for re-evaluation under the 1997 revisions to the Individuals with Disabilities Education Act (IDEA). Because standardized testing would yield little or no helpful information, the continuous charting and evaluation of this information by the case conference committee would be more helpful in meeting IDEA’s requirements to assess the Student’s continued eligibility for services, in defining his continuing educational needs, and in determining his progress towards attainment of the goals and objectives of his IEP.

The School objects also to Conclusion of Law #5, regarding the Student’s severe communication needs, but only to the extent such a Conclusion needed to be made. The School acknowledges the Student’s severe communication needs, but believes the disagreement between itself and the Parent is centered on the type of service delivery (indirect services by training of personnel for the Student’s instructional day versus direct services several times a week).

The IHO’s Order Nos. 3 and 4 have been stayed by this appeal. The School objects, however, to Order Nos. 1 and 2. As noted previously, the School does not believe there is any need for further re-evaluation. Had there been a significant change in the student’s behavior following the medication change, a need for re-evaluation may have been necessitated. Any further re-evaluation at this juncture would be unnecessary and would delay enrollment of the Student in an appropriate residential program.

The School also questions the IHO ordering the parties back to a case conference committee when the positions of the parties—which lead to the hearing request in November—was already set at cross purposes. Requiring the parties to reconvene yet another case conference committee would be futile.

In an issue related to the overall provision of due process rights to the parties involved, the School expressed concern over the conduct of the hearing by the IHO, especially in interrupting testimony by the School when it was attempting to demonstrate what actions it had taken to exhaust local programming options and what actions it was taking with respect to locating possible residential placement options. The interjections by the IHO occurred during presentation of evidence by the School and were not preceded by objections from the other party.

The IHO, the School maintains, was attempting to hasten the giving of testimony. However, by so doing, the IHO prevented the School from presenting the necessary historical background that demonstrated its compliance with the exhaustion of local programming options, thus leading to an erroneous legal conclusion by the IHO that the School did not exhaust such options (see Conclusion of

Law #4).

The Parent declined to file a Response. The BSEA, on March 31, 2000, notified the parties that it would review this matter on April 5, 2000, but would do so without oral argument and without the presence of the parties.

The BSEA convened on April 5, 2000, in the Board Room, Room 225, State House, within the offices of the Indiana Department of Education, to review this matter. All three members of the BSEA were present. All members had received a photocopy of the entire record prior to this date and had reviewed the contents prior to this review. In consideration of the record before it and the Petition for Review, the BSEA rules, by unanimous vote, as follows.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This is a review of a due process hearing initiated under 511 IAC 7-15-5 ("Article 7"). The parties have concluded the hearing phase, and the duly appointed IHO has rendered a written decision. The School timely appealed the written decision. Accordingly, the BSEA has jurisdiction to review this matter pursuant to 511 IAC 7-15-6.
2. Evidence and direct testimony established that the homebound procedures established following the January, 1999 issue were not regarded as successful, either by the Parents or by the School personnel. It was noted that at least part of the difficulty of the homebound instructional program (particularly in its early stages) was based on a lack of scheduling coordination among a number of service-providing agencies. (Amended IHO Finding of Fact No. 12)
3. Direct testimony established that during a period following the cessation of homebound instructional contacts with the School, the Parent noted the Student underwent a significant medication change. (Amended IHO Finding of Fact No. 14)
4. There is no direct documentation that the Student's behavior changed following the change in medication. (Amended IHO Finding of Fact No. 16)
5. Evidence and direct testimony established that the Student is currently involved with other care givers other than School personnel, as funded by those other sources. (Amended IHO Finding of Fact No. 17)
6. Although the Student remains eligible for special education and related services (IHO Conclusion of Law No. 1), and the School has not violated any procedural requirements in the convening of case conference committee meetings (IHO Conclusion of Law No. 2), the School has not provided any educational services to him for the 1999-2000 school year based on the

perceived danger of providing services to him in the present homebound situation.

7. The School, notwithstanding the issues involved in the hearing and upon review, has violated State and Federal special education law by not providing educational services to the Student during this school year (IHO Conclusion of Law No. 3). State and Federal law do not provide a “dangerous student” exception to ensuring a free appropriate public education is provided to an eligible student. The failure to provide services, or to seek administrative or judicial authority to provide services through some other interim means while the programming and placement issues were being addressed, is a substantial reason why the School personnel have not had continuing opportunities to observe the Student following the change in medication.
8. The IHO’s Conclusion of Law No. 4 is amended to read as follows: Parental testimony given at the hearing established that the Student has undergone a change in prescriptive medicine therapies since the April, 1999, case conference committee. Parental testimony established that potentially this change in medication has had a significant impact on the ability of the Student to attend, profit from experience, and self-manage his behaviors, or for others to manage or redirect his behaviors. The School had no adequate documentation of any change in the Student’s performance due to this change in medication. 511 IAC 7-10-3, Educational Evaluation, with specific notation to subsection (o), notes that “[f]or each student enrolled in Special Education, a comprehensive, multidisciplinary team reevaluation shall be conducted at least every thirty-six calendar months **or more frequently if conditions warrant** (emphasis added) or if the student’s parent or teacher requests an evaluation.” There is every reason to believe that if the Student’s change of behavior in response to the new medication is as reported as parental testimony during the hearing, that a reevaluation and reassessment of potential placement for the Student would be warranted. A reevaluation of the Student’s current educational needs are of particular significance as the April, 1999, case conference committee recommended a residential treatment placement. While provisions under 511 IAC 7-12-2, Least Restrictive Environment, provide for such a possibility, subsections (c) and (d)—regarding the continuum of placement alternatives and the responsibility to ensure residential placements are not pre-determined—are specifically applicable in the current situation. Based on the reported potential change of behavior on the part of the Student, specific note should be taken of 511 IAC 7-12-5(j) in this situation, which requires that alternative service options must be fully explored and eliminated as inappropriate or unavailable before residential placement is considered. In addition, should any reevaluation data substantiate the potential behavioral change as noted by the parental testimony at the hearing, that outcome could have a significant impact on the appropriate transition and ongoing adult services as cited under 511 IAC 7-13-4, with specific emphasis on subsection (d), which requires that a Student’s transition plan be reviewed and revised as appropriate on at least an annual basis, concurrently with the Student’s IEP.
9. Any reevaluation of the Student should also consider the severe communication deficits of the

Student, including the need for any augmentative communication system and other related services that would be needed to support the Student's educational program. (IHO's Conclusion of Law No. 5)

In consideration of the foregoing, the Board of Special Education Appeals issues the following three (3) **Orders**, which replace the orders issued by the IHO.

ORDERS

1. The School shall arrange for an assessment of the Student in a residential setting for no less than sixty (60) days, at the School's expense. The assessment shall include areas of behavior, both personal and interpersonal; the effects of current medication; communication system, both receptive and expressive; realistic functional skills; and the Student's propensity for aggression towards himself and others.
2. Following the assessment procedure in Order No. 1 above, the School shall convene the Student's case conference committee to design an Individualized Education Program and placement recommendation for the Student.
3. Following the case conference committee in Order No. 2 above, should the School believe the Student requires a residential placement in order to receive an appropriate education, the School is authorized to apply to the Indiana Department of Education, Division of Special Education, for available funding, consistent with the State's application process. This order should not be construed as a determination of the appropriateness of residential placement, as this issue was not before the Independent Hearing Officer or the Board of Special Education Appeals.
4. Any matter not specifically addressed above is considered denied or overruled.

The BSEA also noted the School's objection to the IHO's interjections during its testimony. Although the conduct was somewhat brusque on the IHO's part, this seems to stem somewhat from the imprecise establishment of the issue. The original written request from the School did not specifically indicate it was seeking the hearing for the purpose of applying for residential placement funds. The School acquiesced in the framing of the sole issue, which the IHO entered into the pre-hearing order. However, the School proceeded to the hearing with the apparent intent on addressing the issue by demonstrating it had exhausted all local options. It is clear from the record as a whole that this was the issue the School intended to address, but its lack of specificity in either its request for the hearing or in framing the issue during the pre-hearing conference resulted in the confusion. This does not otherwise explain or excuse the brusqueness and impatience demonstrated by the IHO, but the fault does not rest with the IHO alone. Any harm caused by the interruptions by the IHO are also compounded by the School's failure to provide educational services to the Student without legal justification. The BSEA

believes that the above orders will rectify the current situation.

Date: April 5, 2000

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

Appeal Right

Any party aggrieved by the decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to seek judicial review in the civil court with jurisdiction, as required by I.C. 4-21.5-5-5.