

Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of J.P. and the)
West Clark Community Schools and) **Article 7 Hearing No. 1211.01**
Greater Clark County Special Education)
Services)

The hearing and appeal issues were determined to be:

1. Are the goals and objectives of the proposed IEP appropriate?
2. Were the services provided appropriate to accomplish the goals and objectives in the current IEP?
3. Were the provisions of the current IEP followed regarding charting and logging of behavioral and academic progress?
4. Are the Extended School Year (ESY) services for the summer of 2001, as contained in the proposed IEP, appropriate to meet the Student's needs?
5. Is the Student entitled to compensatory instructional time for the Summer of 2000?
6. Is the program proposed for the 2001-02 academic year appropriate?
7. If the School's proposed program is not appropriate, is the program proposed by the parent's appropriate?

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

It should be noted from the outset that any references to the "Student" or the "Student's representative" include the parent or parents of the student. It should also be noted that West Clark Community Schools and Greater Clark County Special Education Services will be referred to collectively as the "School."

March 16, 2001 The Student filed a request for a due process hearing with the Indiana Department of Education (IDOE).

- March 19, 2001* Thomas J. Huberty, Ph.D., was appointed Independent Hearing Officer (IHO).
- March 23, 2001* A prehearing teleconference was held. During the conference, dates of May 14, 15, and 16, 2001 were established for the hearing.
- March 26, 2001* Order issued by the IHO regarding arrangements for home and school observation of the student. An extension of time to render the decision was granted to and including June 8, 2001, and an Order was issued by the IHO to that effect.
- April 11, 2001* List of issues forwarded to the parties.
- April 30, 2001* Student's counsel deposed the current preschool teacher.
- May 14-16, 2001* A prehearing conference was convened on the first day, prior to beginning the hearing. The due process hearing was convened on May 14, 2001 and completed on May 16, 2001. It was determined that the court reporter would need until May 29, 2001 to complete the transcript. An extension of time to render the decision was granted to June 25, 2001.
- May 22, 2001* The Student submitted a Motion to exclude testimony about the witness's observations of the Student. The School submitted a response on June 7, 2001. The IHO denied the Student's Motion.
- June 11, 2001* Both parties submitted post-hearing briefs.
- June 25, 2001* The IHO issued his written decision.

THE WRITTEN DECISION OF THE IHO

The IHO's written decision was issued on June 25, 2001. The following background information is reproduced verbatim from the IHO's written decision.

The Student was approximately four years, four months of age at the time of the hearing, and is enrolled in a preschool program for students with disabilities. The Student was referred for developmental evaluation at the age of two years, one month to the Child Evaluation Center in Louisville, Kentucky, where he was seen on March 1, 1999. A multidisciplinary evaluation by a pediatrician, speech language pathologist, occupational therapist, and a certified psychologist was completed and he was given the diagnosis of autism. His cognitive ability was indicated

with a score of 60 on the Bayley Scales of Infant Development- Second Edition, although the evaluator indicated that the score might be a minimal estimate of his abilities, due to difficulties with expressive language and communication difficulties. The speech and language evaluation indicated that the Student was below average on a test of language skills, with a total language score of 66. He demonstrated a relative strength in auditory comprehension... .

The Student was enrolled in the county First Steps program and his Individualized Family Service Plan (IFSP) was completed on July 28, 1999, when he was about 30 months of age... . He remained in the First Steps program until age three, when he was enrolled in the public school preschool program in January 2000.

A speech/language evaluation was completed in April, 1998, which questioned the possibility of speech apraxia. Oral apraxia has been confirmed, which is a neurologically based disorder which impairs the Student's ability to make oral motor movement, affecting speech production.

A psychoeducational evaluation was completed by the school system in January, 2000, which included assessment of cognitive ability, adaptive skills, social/emotional functioning, functional behavior assessment, readiness skills, speech/language functioning, physical therapy, and occupational therapy. The results were similar to those obtained in March 1999, indicating delays in all measured areas... .

The IHO determined forty-nine (49) Findings of Fact. The IHO's decision found that the Student has fine and gross motor delays, has few expressive language skills, and lacks verbalization skills for effective communication. A case conference was convened on 1/19/00 to discuss the evaluation results and to develop an IEP. The Student was determined to be eligible for special education services with autism and communication disorder. There was no disagreement on eligibility and type of disability, and goals and objectives were established. The objectives based upon goals of developing play skills, improving attending skills, improving imitation skills, improving communication skills, improving self-help skills, improving fine motor skills, and improving sensory motor skills. The Student was placed in the preschool program for 12½ hours per week. Evaluation procedures listed were charting/logs, teacher observation, and class participation. The IEP contained a list of strategies and modifications indicated as appropriate for his needs.

An annual case review was conducted on April 19, 2000, which included a review of progress of goals and objectives and development of an IEP for 200[0]-01. The Student was seen to have made progress in more objectives than objectives noted as "little or no progress" or "other" at various review times between 4/19/00 and 1/17/01. The Student began the 2000-01 school year with the IEP of 4/19/00 in effect. In the April 2000 annual case review, a plan for ESY was developed for functional communication with speech and language services to be given for one hour each week for eight weeks, for a total of eight hours to prevent significant regression of skills. The IHO found that: testimony

indicated that the case conference committee had determined that eight hours of speech therapy was appropriate to prevent regression or minimize it to the extent that skills could be recouped when school started in the fall; and testimony from the speech therapist indicated that when the academic year started, the Student did not demonstrate regression. The parents express concern regarding whether the summer program was sufficient to prevent the Student from regressing.

The IHO found that in August 2000, the Student's father asked school personnel for charts and logs of the Student's progress that were indicated in the IEP as measures of evaluation. School personnel did not have any charts or logs to give him, indicating that they did not exist. The IHO found that teachers and specialists each kept their own records on students. For this Student, they kept written notes and records in the form of notes and observations but these were not logs linked directly to the IEP goals and objectives. The IHO found there was no evidence that the School was keeping data in the form of charts with numerical or narrative data.

The IHO found that in February 2001, the parents asked for charts and logs of the Student's progress and were provided with copies of teacher and related service personnel documents in which they had written narrative comments about the Student's performance, behavior, and progress. No charts of progress on a regular basis were provided.

At the request of the parents, the case conference committee was convened on 8/20/00 to review the Student's progress. The parents claimed that the Student "has made no progress since he started in the preschool program in January" and suggested that the Student should receive a minimum of 25 hours per week of direct instruction in order to progress. The IHO found that there was agreement that more direct instruction was needed and the Student's program was changed from 12½ hours per week to 20 hours per week. Sixteen of the hours were to be provided in the preschool setting, and four hours were to be provided in a special education setting on Fridays. A teacher used her lunch hour to provide one hour per day of individual instruction. Communication disorders services remained at 90 minutes per week.

At the request of the parents, a case conference was convened on 2/13/01. The father "wanted objective data on the Student's progress." The School indicated that teachers kept their own daily notes, which could be made available to the parents. The IHO found that the parents testified that: they did not believe their input was adequately considered in developing the Student's IEP; and some of the goals and objectives proposed by the school were not appropriate because the Student could already do some of them.

In December 2000, the parents began an intensive, individualized behavioral intervention program referred to as Applied Behavior Analysis (ABA). The parents contracted with a company named Behavioral Interventions for Autistic Children (BIFAC) to provide the intervention of about 30 to 40 hours per week. The program emphasized increasing verbal behavior and other skills. The IHO found

that testimony showed that ABA is a broad field of research and practice where the principles of learning theory are applied to a number of problems. Discrete Trial Training (DTT) was described as method of instruction where tasks are analyzed in small units, instruction is given, and reinforcement is given for correct responses.

During the February 23, 2001 case conference, the parents proposed a program for the Student that included: (1) new or modified objectives for the IEP; (2) DTT and ABA, including a) training by BIFAC for the Student's teachers, aides, therapists, and parents, b) scheduling and funding of 40 hours of ABA at home and school with reimbursement for the parents' costs associated with the existing program, c) a school program with an aide trained in ABA or BIFAC personnel, d) an ABA trained member of BIFAC added to the IEP team; (3) ESY services to continue progress toward IEP goals and objectives; and (4) collection of data on skills with a trained ABA practitioner to collect and analyze the data.

The IHO found that testimony indicated that the ABA program should be based primarily at home, and that about 25% of the program should be in the preschool program. The parents requested the Student receive 30-40 hours per week of home-based ABA instruction, with about 10-15 hours per week in his current preschool program to facilitate socialization. Testimony also indicated that the range of ABA hours recommended for children with autism was from 25-40 hours per week, but there was no specific evidence for the number of hours needed for the Student. The IHO found that the School came to the 2001-02 IEP meeting with a proposed IEP that was very different from the earlier one that had been proposed. The School did not agree with the proposal of the ABA based program, stating that "they believed the eclectic approach they proposed for the Student's program was appropriate, with some direct instruction included."

The parents rejected the School's proposed program. The parties were unable to resolve the matter, which resulted in the request for a due process hearing.

The IHO found the proposed IEP contained annual goals in the areas of fine motor skills, sensory processing skills, imitation skills, improving play skills, attending to a developmentally appropriate task, and improving functional communication skills. Each goal and objective was behaviorally stated and was measurable. There was no goal or objective for toileting. The IEP provided for 90 minutes per week of speech therapy, 20 hours per week of classroom instruction, and 180 minutes per month of occupational therapy.

The IHO found the proposed ESY 2001 program suggests 12 hours per week of classroom instruction, 60 minutes per week for 8 weeks, and 30 minutes per week of occupational therapy for goals regarding fine motor skills, sensory processing, imitation and play, communication, and attending.

The IHO made the following Conclusions of Law. These read as follows:

Conclusions of Law

1. This matter was properly assigned to the IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.

2. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law.

3. The issues presented in this hearing are presented below and ruled upon accordingly:

Issue #1. Are the goals and objectives of the proposed IEP appropriate?

The goals of the proposed IEP are consistent with prior IEP goals and with the results of the evaluations of the child's needs by school personnel and external evaluators. The objectives are written in behavioral terms and are measurable with appropriate evaluation methods. There is no evidence that the goals and objectives as a whole are inappropriate for the Student's needs, although there may be disagreement between the parties about specific points. There is no goal for toileting, which remains an area of concern. Goals and objectives are included as guidelines for teachers and specialists to develop instructional methods. Therefore, the statement of goals and objectives are considered to be appropriate and are consistent with requirements of 511 IAC 7-26-6(a)(2) and 34 CFR §300.347(2)(j).

Issue #2. Were the services provided appropriate to accomplish the goals and objectives in the current IEP?

The Student received classroom instruction, occupational therapy, and speech therapy for the 2000-01 IEP, which included some direct instruction, similar to but not equivalent to an ABA approach. Interventions were provided for imitation, fine motor development, functional communication, and other goals and objectives in the Student's IEP. The testimony and evidence described a variety of instructional methods that were used by the teacher, speech therapist, and occupational therapist. The teacher and specialists had received training in working with children having autism and there was no evidence that they used techniques that were not appropriate for the Student for the time he attended the program. Therefore, the IEP was implemented appropriately, consistent with 511 IAC 7-27-7 and 34

CFR §300.350.

Issue #3. Were the provisions of the current IEP followed regarding charting and logging of behavioral and academic progress?

The evidence and testimony indicated that charts and logs were identified as evaluation procedures on the IEP, which were to give information on progress toward meeting goals and objectives. The teachers kept their own logs and progress notes, but there is no evidence that they kept data on what would be considered charts with either numerical or narrative data. The logs and notes also were not consistently linked to specific goals and objectives. Further, information about the Student that was contained in his educational record was not made know[n] or provided to the parents in a timely manner. There is no specific requirement in IDEA or Article 7 about how goals and objectives are to be kept, but the parents were reasonable to expect that logs and charts of progress would be available. Further, 511 IAC 7-27-6(7)(B) specifies how parents will be regularly informed of a student's progress, but there is no evidence of such a provision in the IEP and was not presented in the testimony and evidence. Therefore, the School failed to meet its full responsibility in compiling and making charts and logs readily available to the parents.

Issue #4. Are the ESY services for the summer of 2001, as contained in the proposed IEP, appropriate to meet the Student's needs?

Extended school year (ESY) is designed to help a student who is deemed to be at risk of loss of skills over the summer. The School has determined that ESY is appropriate for the Student and that he should receive classroom instruction as well as speech therapy. The classroom instruction is deemed appropriate for the Student, as is the speech therapy. The amount of classroom instruction is 12 hours, which is similar to the 12½ hours he received when he entered the program. The proposal suggests that he will receive 12 hours per week for six weeks, which is considered appropriate to prevent regression. The amount of occupational therapy also is deemed appropriate. Whether the number of hours of speech therapy are appropriate is unclear, however, and requires more information. This matter will be clarified in the Orders.

Issue #5. Is the Student entitled to compensatory instructional time for the Summer of 2000?

When a child receives ESY services, the goal is to maintain skills and prevent regression, rather than increase skills. Compensatory services and instructional time may be awarded only when there is clear evidence that a child has been denied a service to which he or she is entitled to such an extent that a free and appropriate public education has not occurred. Although the parents viewed a total of eight hours as being inadequate, testimony by the speech therapist and classroom teacher did not indicate that the Student had significantly regressed in his skills over the summer when he started school in the fall. No evidence was presented to refute their conclusions. Therefore, in the absence of evidence of significant regression over the summer, compensatory instructional time is not warranted.

Issue #6. Is the program proposed for the 2001-02 academic year appropriate?

This issue is the central dispute in this hearing. It is clear from the testimony and evidence that both the parents and School are interested in helping the Student and had a good working relationship for a period of time. The primary issue is how to enhance the Student's verbal and communication skills and the parties have a fundamental disagreement. In determining appropriateness of an educational program, the IDEA offers little direct guidance, leaving that determination to case conference committees (or to hearing officers if a dispute occurs that results in a due process hearing). The instructive case that has offered the most guidance has been *Rowley*, which established two criteria for determining appropriateness of a program: (1) has the LEA followed procedural requirements of the IDEA, and (2) has an IEP been reasonably calculated to enable a child to derive educational benefit? There is no requirement in *Rowley*, the IDEA, or Article 7 that an LEA provide the "best" educational program or attempt a variety of educational approaches. There may be other educational approaches that produce benefits for a student in one or more areas, such as the ABA approach discussed in this matter. The responsibility of the School, however, is to develop an appropriate program for this Student that addresses his needs in all areas of identified disability and provides educational and related services to give him the opportunity to progress. There is no requirement that the Student must make progress for the IEP to be appropriate, only that it is developed to provide

educational benefit. The evidence in this matter suggests that the School has considered the known information for the child from prior evaluations, interactions with him, and reports from others. In developing the IEP, the School has taken this information and crafted goals and objectives that are consistent with the child's educational and developmental needs identified by School personnel and others. There is no evidence that the School has violated IDEA or Article 7 procedural requirements required by *Rowley* in developing the IEP, and none were raised as issues in this matter.

The second criterion is whether an LEA has reasonably calculated an IEP for the child to receive educational benefit. The evidence and testimony indicate that the IEPs developed for the Student are very similar to each other in content and services offered. The IEP is crafted to address his functional communication, social, sensory, self-help, educational, and developmental needs. It is clear that a major concern is his inability to speak, but the evidence and testimony suggest that communication and language development is a complex process that requires both instruction and having the opportunity to engage in social interactions. The proposed IEP addresses these needs. There is ample evidence that the Student has shown progress in many areas and he has derived benefit from the current IEP. Because the proposed IEP for 2001-02 addresses similar needs, it is considered appropriate for the Student.

Issue #7. If the School's proposed program is not appropriate, is the program proposed by the parents appropriate?

In ruling on Issue #6 above, there is no suggestion that the ABA-based program proposed by the parents offers no benefit to the Student. However, having ruled that the School's proposed IEP is appropriate, this issue is considered moot.

The IHO's Orders read as follows:

1. The School is to convene a case conference to review goals and objectives for the proposed IEP, and develop any others that may be needed. Specifically, the testimony indicated that the Student may still need an objective to address toileting issues. The case conference committee should review the status of this matter and if an objective in this area or another is needed, it is to be included in the IEP. The IEP also is to include plans to address the Student's apraxia. The parents

are to be given full participation in the case conference process, and their suggestions fully considered.

2. The School is to implement the proposed IEP with any modifications for ESY 2001 and the 2001-02 school year that may emerge from the case conference.

3. There remains a question about the adequacy of speech services for ESY. Within ten (10) business days of receipt of this decision, the School is to contact a speech therapist with experience in working with a young child with autism and obtain an independent opinion as to the appropriateness of the ESY 2001 speech and language component. This consultant is to have no current or prior personal or professional conflict of interest with the School or parents. The School is permitted to provide a copy of the Student's educational records to the consultant, and parental permission is not required. The consultant shall determine the method of review, which may include observation of or interaction with the Student at her/his discretion. Any recommendations from the consultant are to be incorporated into the ESY 2001 IEP. The School will be responsible for costs associated with this consultation. Should the parents object to this consultation and not wish to have it completed, then the proposed ESY 2001 program will remain in effect. If the consultant cannot complete the review before the end of the summer program, any additional services indicated will be provided during the regular school year as additional time.

4. The School is to develop a method for teachers and specialists to record data about their work with the Student. The method is not required to be the same for each person. Logs are to be kept in the manner that each professional deems appropriate, but they are to clearly indicate which goals and objectives are being documented. Entries into these logs should be no less than once per week. Each professional is also to develop some method of charting progress on a weekly basis, such as a numerical scale or narrative summary that can be provided to the parents. It is not required that the method for each person be identical. Finally, the School is to develop a method to provide this information to the parents on a regular basis, and is to be no less frequent than monthly. This information is to be kept by the School as part of the Student's educational record. The methods of logging and charting are to be included in the IEP.

PROCEDURAL HISTORY OF THE APPEAL

The IHO's written decision was issued on June 25, 2001. On July 26, 2001, the Student requested an extension of time in order to prepare a Petition for Review. The Indiana Board of Special Education Appeals (BSEA), by order dated July 26, 2001, granted the Student until close of business on August 23, 2001, to prepare and file his Petition for Review. The time for completing the review and issuing a written decision was extended to and including Monday, September 24, 2001. The Student's Petition for Review was received on August 23, 2001. On September 5, 2001, the School requested an extension of time in order to prepare and file a Response to the Petition for Review. The BSEA, by order dated August 31, 2001, granted the School until close of business on September 17, 2001, to prepare a Response to the Petition for Review. The time for completing the review and issuing a written decision was extended to and included October 17, 2001.

The BSEA notified the parties by order dated September 14, 2001, that it would conduct its review on October 17, 2001, beginning at 10:00 a.m., but without oral argument and without the presence of the parties. The Board also notified the parties that it would complete its review on October 17, 2001, and reduce its decision to writing and serve the decision on the representatives of the parties by certified mail, return receipt requested. The BSEA issued an Amended Notice of Review Without Oral Argument that it would conduct its review on October 15, 2001.

Student's Petition for Review

The Student's Petition for Review was timely filed on August 23, 2001. The Student's objections include the following:

1. The IHO erred in not striking the testimony of Claire Thorsen as to her observation of the Student in the classroom.
2. The IHO erred in Finding of Fact #6 because the date that the IFSP was completed was around September 1998, rather than July 28, 1999. The IHO also erred in stating the Student was 30 months of age at that time, when he was actually 19 or 20 months of age.
3. The IHO erred in Finding of Fact #7 when he stated that oral apraxia was confirmed.
4. The IHO erred in [Finding of Fact] #11 when he stated only that "...Testimony indicated that the case conference committee had determined that eight hours of speech therapy was appropriate to prevent regression or minimize it to the extent that skills could be recouped when school started in the fall. Testimony from the speech therapist indicated that when the academic year started, the Student did not demonstrate regression."

5. The IHO erred in [Finding of Fact] #20 when he stated that “...Progress was noted in imitating verbalizations by the third month of school... .”
6. The IHO erred in [Finding of Fact] #21 when he stated that the ABA “...began consistently about the first of February, 2001... .”
7. The IHO erred in [Finding of Fact] #22 when he ignored the testimony of the Student’s witnesses.
8. The IHO erred in Finding of Fact #27 when he stated that “...There was no specific evidence given for the number of hours needed for the Student... .”
9. The IHO erred in [Finding of Fact] #28 because he was inconsistent.
10. The IHO erred in [Finding of Fact] #30 when he stated that “...The psychologist indicated that persons who are ABA therapists should have at least a major in Applied Behavior Analysis and that there is also a certificate that can be obtained to verify training and experience in the method... .”
11. The IHO erred in [Finding of Fact] #32 when he stated that “...There was no evidence as to the number of hours that the Student might need of ABA instruction, although the range reported by witnesses ranged from 25-40 hours... .”
12. The IHO erred in [Finding of Fact] #39 when he stated that “...His teacher and speech therapist testified that the Student’s verbal skills have improved since beginning the ABA program. Prior to that time, the School was using the PECS method, and the speech therapist testified that the Student could not imitate any sounds prior to the ABA program, but now she observes that he can imitate about a third of the alphabet. The occupational therapist testified that since December, 2000, she has seen marked improvement in the Student’s vocalizations.”
13. The IHO erred in [Finding of Fact] #43 when he stated that “...When the Student entered the preschool program, he had not mastered use of PECS but is better able to use that now... . She also testified that eight hours of speech therapy for ESY 2000 and 12 hours for ESY 2001 were appropriate to prevent regression of skills.”
14. The IHO erred in [Finding of Fact #44] in leaving out a timetable for the Occupational Therapist’s (OT’s) observation of improvements in the Student’s skills because the OT had clearly stated on the record that those skills had improved since December 2000.
15. The IHO erred in [Finding of Fact #45] in stating only that “The supervisor of the preschool program testified that ESY services offered to the children are not based upon administrative

concerns, such as available funds... .”

16. The IHO erred in #46 [Finding of Fact #49] by leaving out part of his sentence. It read, “60 minutes per week for 8 weeks and 30 minutes... .” This 60-minute reference should say “of speech therapy.”
17. The Student claims “[t]hat if the school did not properly perform its duties as to charting and logging that it logically follows that the previous IEP was violated because it was not followed, resulting in a denial of free appropriate public education for J.P.”¹
18. The IHO erred in [Conclusion of Law 3.] Issue #3 when he stated “...there is no evidence that they kept data on what would be considered charts with either numerical or narrative data. The logs and notes also were not consistently linked to specific goals and objectives... .”
19. The IHO erred in [Conclusion of Law 3.] Issue #4 when he stated “...Whether the number of hours of speech therapy are appropriate is unclear, however, and requires more information. This matter will be clarified in the Order.”
20. The IHO erred in [Conclusion of Law 3.] Issue #6 when he stated “...There is ample evidence that the Student has shown progress in many areas and he has derived benefit from the current IEP. Because the proposed IEP for 2001-02 addresses similar needs, it is considered appropriate for the Student.” The IHO also erred in [Conclusion of Law 3. Issue #6] when he stated, “...In developing the IEP, the School has taken this information and”
21. The IHO erred in Finding of Fact #17 because the inservice mentioned was to be given on DTT, not on behavioral techniques.
22. The IHO erred in Finding of Fact #23 in stating that ABA and DTT are the same thing.

School’s Response to the Petition for Review

The School filed its Reply to Petition for Review on September 17, 2001. In summary, the School argues that pursuant to 511 IAC 7-30-4(j), the BSEA is prohibited from disturbing the findings of fact, conclusions of law, or orders unless it finds that such were: (1) arbitrary or capricious; (2) an abuse of discretion; (3) contrary to law, contrary to a constitutional right, power, privilege or immunity; (4) in excess [of] the jurisdiction of the Independent Hearing Officer; (5) reached in violation of an established procedure, [or] (6) unsupported by substantial evidence. The School argues that none of the exceptions recited in the Petition for Review met this standard. of review.

¹ Paragraph #24 in the Petition for Review appears to be referring to Finding of Fact #17.

The School claims include the following:

1. With regards to #6 in the Petition for Review, "...the record does not support Petitioners challenge that the IHO wrongfully denied the Petitioners' Motion to Strike Testimony."
2. Respondents' Exhibit 2-C p.31 confirms Petitioners' exception to Finding of Fact #6 to the extent that the IFSP was completed July 28, 1999. However, the IHO correctly stated the Student's age to be 30 months at that time.
3. The issue raised before the IHO was the Student's "inability to speak. Whereas Petitioners attributed this inability solely an oral aphasia, the Respondents acknowledge the potential impact of aphasia... ."
4. The IHO accurately summarized the testimony in Finding of Fact #11 concerning ESY services, and that Finding of Fact #11 is substantially supported by the evidence.
5. Finding of Fact #17 is supported by the evidence.
6. Finding of Fact #20 stating "[p]rogress was noted in imitating verbalizations by the third month of school" is supported by the record.
7. Finding of Fact #21 correctly characterizes the intensity of the home-based ABA program as starting in December 2000, yet beginning consistently in February 2001.
8. The IHO gave proper weight and deference to both parties' expert testimonies concerning the validity of the scientific research supporting ABA/DTT in Finding of Fact #22.
9. The Petition for Review mischaracterizes Finding of Fact #23 as "stating that ABA and DTT are the same thing." Instead Finding of Fact #23 merely describes ABA as "a broad field of research and practice... ." Whereas, DTT is a more specific "method of instruction."
10. In Finding of Fact #27, the IHO correctly based his finding on the record wherein the expert witnesses and ABA providers did not recommend any specific number of hours that could be specifically tailored to the Student's educational needs. Instead the ABA providers merely recommended a general range of ABA hours based on experience or reports from programs with other students.
11. In Finding of Fact #28, the IHO correctly found that the 2001-02 IEP "was very different from the earlier one ... proposed.... ." This corresponds to the IHO's Conclusion of Law on p. 28 that states, "[t]here is ample evidence that the Student has shown progress... . Because the proposed IEP for 2001-02 addresses similar needs, ..."

12. Finding of Fact #30 is supported by the evidence.
13. The Petition for Review's criticism of Finding of Fact #32 is the same as the criticism of Finding of Fact #27, and the School's response is provided above.
14. The record does not support the Student's allegation that Finding of Fact #39 and Finding of Fact 20 are contradictory.
15. The School offers the testimony of Mary Beth Cochran as support for the IHO's Finding of Fact #43.
16. There is no basis to conclude that the IHO's Finding of Fact #44 is contrary to law, arbitrary or capricious, or unsupported by the record.
17. Finding of Fact #45 is supported by the record and is neither contrary to law or arbitrary or capricious. A reversal of this Finding of Fact would be contrary to law since it cannot be substantiated by evidence other than hearsay.
18. Finding of Fact #46 has no reference to ESY service, however, the specific language cited in the Petition can be found in Finding of Fact #49.
19. With regards to #21 [#24] in the Petition for Review, there is no Finding of Fact or Conclusion of Law that the School did not perform its duties as to charting and logging.
20. The IHO's Conclusion of Law [3.] under Issue #3 are consistent with his Findings of Fact specific to the Student's progress. There is no basis to conclude that this Conclusion of Law is unsupported by the record, arbitrary or capricious, or obviously erroneous.
21. Although the School does not agree with the IHO's Conclusion of Law [3.] under Issue #4, since it is inconsistent with the record, the dispute between the parties concerning this issue is impossible to resolve within the IHO's framework. The record supports a Conclusion of Law that the number of hours of speech therapy for ESY 2001 services was clearly appropriate. The Student experienced no regression in skills in the Fall 2000 and benefitted from the 8 hours of ESY service. The proposal for ESY 2001 services to increase the speech therapy to 12 hours would be appropriate and supported by the record. The School claims that "Petitioners refused all services for ESY 2001." Since the Student was not enrolled, the IHO appropriately determined this issue moot. On appeal "Petitioners seek to enforce the Respondents to perform an impossible act given the refusal of service." A reversal would contradict law, since it would require the School to engage in a useless and impossible act.

22. The IHO's Conclusion of Law [3.] Issue #6 demonstrates that the Student has shown progress in many areas and derived benefits from the current IEP and that the 2001-02 IEP is appropriate is consistent with law, supported by the evidence and is not arbitrary or capricious.
23. Finding of Fact #23 is neither arbitrary or capricious or contrary to law and should therefore be affirmed on appeal. There is no support in the record that the IHO lacked an understanding of the basic terminology or the effectiveness and appropriateness of the methodology for the Student.
24. The IHO's Order #1 is consistent with law, supported by the evidence, and neither arbitrary or capricious.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The BSEA convened on Monday, October 15, 2001, to review the Petition for Review and the Response thereto in consideration of the record as a whole. All members were present and had reviewed the record.

In consideration of the record, the Petition for Review, and the Response thereto, the BSEA now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-30-4(j).
2. In regard to Order Regarding Parties' Motions to Observe Student, dated March 26, 2001, by the hearing officer, the BSEA upholds the hearing officer in allowing the testimony of Claire Thorsen to be considered.
3. The BSEA accepts Finding of Fact #6 as written by the hearing officer.
4. The BSEA accepts Finding of Fact #7 as written by the hearing officer.
5. The BSEA accepts Finding of Fact #11 as written by the hearing officer.
6. The BSEA accepts Finding of Fact #20 as written by the hearing officer.
7. The BSEA accepts Finding of Fact #21 as written by the hearing officer.
8. The BSEA accepts Finding of Fact #22 as written by the hearing officer.
9. The BSEA accepts Finding of Fact #27 as written by the hearing officer.
10. The BSEA accepts Finding of Fact #28 as written by the hearing officer.
11. The BSEA accepts Finding of Fact #30 as written by the hearing officer.
12. The BSEA accepts Finding of Fact #32 as written by the hearing officer.
13. The BSEA accepts Finding of Fact #39 as written by the hearing officer.
14. The BSEA accepts Finding of Fact #43 as written by the hearing officer.

15. The BSEA accepts Finding of Fact #44 as written by the hearing officer.
16. The BSEA accepts Finding of Fact #45 as written by the hearing officer.
17. The BSEA accepts Finding of Fact #49 with the insertion “of speech therapy” after “60 minutes.”
18. The BSEA accepts Finding of Fact #17 as written by the hearing officer.
19. The BSEA accepts Conclusion of Law 3 of Issue #3 as written by the hearing officer.
20. The BSEA accepts Conclusion of Law 3 of Issue #4 as written by the hearing officer.
21. The BSEA accepts Conclusion of Law 3 of Issue #6 as written by the hearing officer.
22. The BSEA accepts Finding of Fact #23 as written by the hearing officer.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. The BSEA accepts Order #1 as written by the hearing officer.
2. The BSEA accepts the hearing officer’s decision as modified.
3. Any other matters not specifically addressed by the BSEA in this written decision are hereby deemed denied or dismissed.

Date: October 17, 2001

/s/Raymond W. Quist
Raymond W. Quist, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with

jurisdiction, as provided by I.C. 4-21.5-5-5.