BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of T.G.,	)	
MSD of Wabash County, and	)	
Wabash-Miami Area Program	)	
For Exceptional Children	)	**Article 7 Hearing No. 1245.01**
	)	
Appeal from a Decision by	)	
Lon C. Woods, Esq.,	)	
Independent Hearing Officer	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

Procedural History

T.G. (hereafter, the Student) is five years old (d/o/b April 11, 1996). His parents sought to enroll him in the kindergarten program operated by the Metropolitan School District of Wabash County and the Wabash-Miami Area Program for Exceptional Children (hereafter, collectively referred to as the School). Although the Student was chronologically old enough to enter kindergarten,[1] the School proposed an early childhood program. There is no disagreement regarding the Student's eligibility for special education and related services; however, there is a disagreement as to the Student's exceptional needs.

The Parents requested, on October 2, 2001, a due process hearing under 511 IAC 7-30-3 ("Article 7," the Indiana State Board of Education's rules and regulations for special education and related services). Lon C. Woods, Esq., was appointed as the Independent Hearing Officer (IHO) that date. The parties were so notified by correspondence of that date. The IHO, by letter to the parties dated October 4, 2001, advised the parties of their respective hearing rights. He also advised that he would be in telephone contact with the parties in order to arrange for a pre-hearing conference. On October 5, 2001, the IHO sent to the parties a Notice of Pre-Hearing Conference for October 15, 2001, indicating the purpose for the pre-hearing conference, including the establishment of issues.[2]

[1]See I.C. 20-8.1-3-17.

[2]See I.C. 4-21.5-3-18.

The pre-hearing was conducted on October 15, 2001. The IHO issued on October 19, 2001, a Pre-Hearing Order entitled "Summary of Pre-Hearing Conference."[3] The IHO established four (4) issues for hearing:

1. Whether the Student is eligible for special education services due to autism;
2. Whether an independent evaluation for autism should be conducted at the public agency's expense;
3. Whether the least restrictive placement for the Student, as one with a communication disorder, would be in kindergarten during which he would receive speech and language therapy and occupational/physical therapy; and
4. Whether the case conference committee which met on May 23, 2001, and September 24, 2001, was properly constituted.

The hearing was set for November 15 and 16, 2001. The parties were provided additional guidance as to the exchange of exhibit and witness lists. The Parents requested that the hearing be closed to the public. The Student was expected to be present for the hearing. Although the Student was represented by counsel at the hearing in this matter, at the time the pre-hearing had been conducted, the Student's interests were being represented by the Parents. At some point thereafter, the Student was represented by counsel, but the record does not indicate when this occurred.

The IHO also provided official notice of the hearing to the parties by correspondence of October 19, 2001.

The hearing was conducted on November 15 and 16, 2001. The IHO's written decision was issued on November 29, 2001. Both parties were represented by counsel.[4] The School believes the Student is within the autism spectrum disorder (511 IAC 7-26-2) and that his appropriate educational placement would be in the School's early childhood program. The Parents represent the student is delayed developmentally in his speech and physically, that he has a communication disorder (511

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[3]See I.C. 4-21.5-3-19.

[4]511 IAC 7-30-3(i) requires a written decision to be issued "not later than forty-five (45) calendar days after the request for a hearing is received," although an IHO "may grant specific extensions of time beyond the forty-five (45) day timeline at the request of a party." In this case, the forty-fifth day would have been on or about November 15, 2001, the first day of the actual hearing. Neither party requested an extension of time, although the hearing date, time, and place were established for the convenience of the parties. 511 IAC 7-30-3(p). The IHO noted this procedural anomaly in his written decision, but later–in Conclusion of Law No. 1–stated that an extension of time had been requested and granted, making the issuance of his decision timely. This last statement is not supported by the record and contradicts the earlier written statement that no such requests were made. As neither party alleges any error in this respect, the timeliness of the issuance of the written decision is moot.

IAC 7-26-3), and that the appropriate placement for him would be in the kindergarten class.

The IHO's Findings of Fact

The IHO's written decision contains nineteen (19) Findings of Fact. The IHO noted the Student is chronologically eligible for kindergarten. However, evaluations conducted by the School indicate the Student has needs within the autism spectrum disorder. His scores were in the mild to moderate mental disability range, while his receptive language on the Peabody Picture Vocabulary Test III was at the level of two years, nine months. Visual-Motor Integration indicated a performance level at two years, zero months. The Pre-School Language Scale 3 for auditory and expressive language skills, although not completed for articulation skills, indicated a full-scale performance at two years, four months.

The IHO determined these performance levels consistent with the results of a psycho-educational evaluation conducted by a previous public agency when adjusted to account for the Student's age at the time of the School's evaluation. At the time the Student was evaluated by the previous public agency, he was three years, four months of age.

Based on the evaluative data, the IHO found the Student does not recognize shapes and colors and is unable to count. He is delayed more than two (2) years below his chronologically age in language and motor skills. The Student demonstrates delays in all areas.

Several meetings of the Student's Case Conference Committee (CCC) have been convened to address various issues. A CCC was convened on August 20, 2001. A one-half day placement in the School's early childhood program was proposed, which the Parents agreed to. After approximately eight (8) days, the Parents withdrew the Student. He has not attended school since. The CCC reconvened on September 24, 2001, following his withdrawal from the early childhood program. The Parents expressed a preference for the Student to be enrolled in the kindergarten class, a placement the School did not deem appropriate. The CCC reconvened on October 11, 2001, but the Parents continued to insist upon the kindergarten program. The School represented the Student would be better served in the early childhood program where he could obtain the readiness skills necessary for kindergarten.

On October 29, 2001, the CCC reconvened to discuss the Student's Individualized Education Program (IEP) and the results of an occupational/physical therapy evaluation. The School proposed the Student receive one-half hour direct occupational therapy (OT) a week and one-half hour direct physical therapy (PT) a week. The Parents rejected the proposal as inadequate.

The kindergarten teacher at the Student's home school participated in the CCC meetings, identifying five readiness skill areas necessary for success in kindergarten (language, visual discrimination, auditory discrimination, gross motor skills, and fine motor skills). It was her opinion that the Student lacked sufficient readiness in these areas and would likely not be successful in kindergarten. Measurable short-term and annual goals for receptive/expressive language skills were proposed by

the speech pathologist following the last CCC. A teacher of record (TOR) was not present during the May 23, September 24, and October 11, 2001 CCC meetings.[5]

The IHO also found that the Parents did not pursue, prior to the hearing, an independent evaluation regarding the Student's purported autism.

The IHO's Conclusions of Law and Orders

Based on these nineteen (19) Findings of Fact, the IHO determined five (5) Conclusions of Law. He found that evidence and testimony supported a finding that the Student has autism due to the significant adverse affects upon the Student's verbal and nonverbal communication and social interactions. The observations of School personnel and the use of the autism checklist support a conclusion the Student is autistic.

The IHO noted that "least restrict environment" (LRE) concerns militate in favor of educational placements with peers without disabilities "to the maximum extent appropriate," 511 IAC 7-27-9(a)1), and that removals to more restrictive settings would occur only when it is documented that lesser restrictive placements, with supplementary aids and services, cannot be achieved satisfactorily. 511 IAC 7-27-9(a)(2). Although the Parents expressed a preference for the kindergarten class, the testimony and evidence indicate that the Student is more than two (2) years' behind in the necessary readiness skills for successful completion of kindergarten. The IHO specifically concluded:

> Early childhood education programs are designed for students three (3) to five (5) years of age and not eligible for kindergarten who are developmentally delayed one and a half to two standard deviations below the mean in gross and fine motor development, cognitive development, receptive and expressive language development, social or emotional development, or self-help or other adaptive development. 511 IAC 7-26-5. Evaluations obtained on the student attending another school district, and those elicited by the public agency, lead one to the conclusion the student [is] developmentally delayed in one or more of the enumerated criteria.

The IHO also concluded that a TOR is not required at the initial CCC meeting (May 23, 2001), and the TOR's absence thereafter "was an oversight and harmless error." He also noted that the issue

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[5]A TOR is defined at 511 7-17-72. This term is "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 [see 511 IAC 7-17-73 for definition of "teacher of service"] and must be appropriately licensed to work with the student, or where appropriate state licensure is not available, appropriately trained." The regulation continues with the specific duties of a TOR. Someone who qualifies as the student's TOR is a required participant at all CCC meetings. See 511 IAC 7-27-3(a)(2).

of an independent evaluation regarding possible autism was moot because the Parents did not seek such an evaluation.

Based on the foregoing, the IHO ordered the Student's primary disability to be "autism" with a secondary disability of "developmental delay."[6] The LRE for the Student would be in the early childhood program. The Student's IEP is to include one-half hour a week of OT and one-half hour a week of PT, with "[t]he revised short-term and annual goals developed by the speech pathologist...incorporated into the student's IEP," although these short-term objectives and annual goals are nowhere evident in the IHO's written decision.[7] He also determined there was no error in the constitution of the Student's CCC meetings, presumably of May 23 and September 24, 2001, the two dates listed as at issue. He also denied the Parents "reimbursement for any expenses incurred for an independent evaluation."

The IHO notified the parties of their right to seek administrative review.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Petition for Review

On December 10, 2001, the Parents, on behalf of the Student, initiated an appeal of the IHO's written decision. The Parents are no longer represented by counsel. In the Petition for Review, the Parents do not challenge the IHO's determinations regarding the student's exceptionality areas (autism, as a primary disability; developmental delay, as a secondary area), nor have the Parents challenged the IHO's determination that the Parents are not entitled to reimbursement for any independent evaluations. The Parents do challenge the IHO's determination that the CCC meetings of May 23 and September 24, 2001, were properly constituted, and assert that the Student is eligible for kindergarten based upon his chronological age.[8]

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[6]"Developmental delay" is defined at 511 IAC 7-26-5 as part of early childhood.

[7]The IHO's written decision does not indicate that the parties, during the pre-hearing conference on November 15, 2001, stipulated that the intensity of OT services was also an issue.

[8]These two challenges are gleaned from the Petition for Review. Under 511 IAC 7-30-4(d), a Petition for Review must be, in part, "specific as to the reasons for the exceptions to the independent hearing officer's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken..." Although the Petition for Review does not identify any specific findings or conclusions, the two exceptions noted here were stated sufficiently. Because the determinations of exceptionality areas and the issue of reimbursement for an independent evaluation have not been objected to, the Board of Special Education Appeals accepts the IHO's determinations in these regards.

The primary thrust of the Petition for Review is a claim of a denial of due process due to the alleged partiality of the IHO. The Parents attached a copy of their phone records that demonstrate the Parents made telephone calls to the IHO on the following dates, all in 2001: October 9, October 11, October 18, and November 11 (twice). There is no indication what the gist of these conversations were, and it is not clear from the Petition for Review, what the nature of these telephone calls were. The Parents also allege the IHO apparently breached confidentiality by revealing some unspecified information to the School. However, review of this element is precluded because the Parents do not state what information was allegedly shared or why the Parents believe such information was confidential.

The Parents also allege the IHO had a "special meeting" with the School on the day of the hearing. The Parents also assert the IHO indicated that they "could not loose [sic]" the hearing due to the Student's age. They also represent that they did not pursue the independent evaluation because the IHO stated the evaluation "really does not matter, and not to waste our money on it." The parents do not state when this conversation occurred. The Parents also stated the IHO encouraged them not to fire their attorney "because he was judge and he would rule in our favor." He also allegedly discouraged the Parents from settling "out of court because he would not get paid and he would rule in our favor any ways [sic] and not to worry."

The Parents ask for attorney fees and also ask for a new hearing.

Response to the Petition for Review

On December 18, 2001, the School requested an extension of time, pursuant to 511 IAC 7-30-4(i), in order to prepare and file a Response to the Petition for Review. The Board of Special Education Appeals (BSEA) granted the request on December 19, 2001, and issued an Order to that effect the same day. The School timely filed its Response on December 31, 2001.

The School noted that it was not privy to the substance of any of the telephone conversations that may have occurred between the Parents and the IHO. However, the Parents did not obtain counsel until sometime after the pre-hearing conference on October 15, 2001. It is possible, the School opines, that the Parents were seeking explanations from the IHO regarding procedural matters, which is not proscribed by law.

The School represents that its counsel was contacted by the IHO and advised of the time change for the conduct of the pre-hearing and hearing on November 15, 2001. The time change resulted in the proceedings beginning one hour later than originally scheduled. The School's counsel arrived after Parents' counsel, who arrived earlier, based on the original time for the hearing. The School has no knowledge how the IHO contacted the Parents' counsel.[9]

[9]The BSEA notes that the IHO did not send out an amended Notice of Hearing, as he should have. Nevertheless, neither party objected to the proceeding, and the one hour delay in beginning the

The School is unaware of any information shared with the School by the IHO that was derived from conversations with the Parents. The School notes the Parents do not say what this purported protected information might be, preventing any means of replying to this allegation. The School likewise has no knowledge of any conversations regarding the Parents' intention to dismiss their attorney nor does the School believe the IHO would make a representation as to how he would rule in advance of the conduct of the hearing. The School does state that the Parents decided not to pursue the independent evaluation, and indicated this decision at the October 15, 2001, pre-hearing conference.

The School acknowledges the TOR was not present at the May 23, 2001, and September 24, 2001, CCC meetings, but the "teacher of service" was present. When the School learned the TOR had not been present, it offered to reconvene on October 11, 2001, with the TOR present. This CCC occurred, and the TOR was present.

The School also defends its position regarding the need to complete the OT and PT evaluations, and denies the IHO coerced the Parents to agree to the evaluations. The School also denies the IHO was attempting to protect the School from any allegations regarding "improper testing."[10]

Review by the BSEA

The BSEA decided to review this matter without oral argument and without the presence of the parties. 511 IAC 7-30-4(j). A Notice of Review Without Oral Argument was issued on December 20, 2001, notifying the parties the BSEA would review this matter on January 7, 2002.

All three members of the BSEA appeared on January 7, 2002, to review the instant matter. The BSEA members had received previously complete copies of the record in this matter, as well as all subsequent correspondence and pleadings. 511 IAC 7-30-4(e). All three members reviewed the record in its entirety prior to the review.

Based upon a complete review of the record as a whole, the BSEA now makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is created by 511 IAC 7-30-4(a) and charged with the responsibility to review

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hearing did not affect the rights of either party.

[10]The Parents' statements regarding the PT and OT evaluations do not challenge their adequacy. Accordingly, any issue regarding the adequacy of the PT and OT evaluations is waived. The Parents' statements are read as being a part of the overall thrust of their argument that the IHO was not impartial and that they should have a new hearing.

timely appealed final written decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. A Petition for Review from the final written decision of an IHO has been timely filed with the BSEA. The BSEA has jurisdiction in this matter.

2. The BSEA, when conducting a review, is required to review the entire record of the due process hearing to ensure the procedures of the due process hearing were conducted in accordance with 511 IAC 7-30-3. See 511 IAC 7-30-4(j). In essence, the BSEA's review must look to see whether the parties were afforded their due process rights. The Student in this case has raised a number of instances that allegedly denied him the due process rights under 511 IAC 7-30-3. Many of the substantive hearing rights are found at 511 IAC 7-30-3(l), including, *inter alia*, the right to legal counsel; the right to present evidence, confront, cross-examine, and compel the attendance of witnesses; object to the introduction of certain evidence not timely disclosed; a separation of witnesses; obtain a written or electronic verbatim transcript of the proceeding. 511 IAC 7-30-3(n) also permits, *inter alia*, the Parents to have the Student attend the hearing, close the hearing to the public, and obtain a copy of the IHO's written decision at no cost. The record indicates that the Parents received adequate notification of their hearing rights and exercised them by obtaining counsel, introducing evidence and securing testimony, by cross-examining adverse witnesses, by closing the hearing to the public, by electing the format for receiving the written decision and the transcript, and by ensuring the witnesses who were not parties were separated from each other during the hearing. The record demonstrates that the parties–including the Parents–were afforded their procedural due process rights under 511 IAC 7-30-3.

3. A party is also entitled to an impartial hearing officer. 511 IAC 7-30-3(e),(g); 34 CFR §300.508.[11] The Parents contend that the IHO appointed to their dispute was biased, although it is readily apparent from the Petition for Review that the Parents expected the IHO to be biased, albeit in their favor. Nowhere in the record do the Parents or their attorney raise any objections to the IHO presiding over this matter. No requests that he recuse himself were made. The record does not include any untoward statements or actions by the IHO that would indicate any bias or partiality. The telephone records provided by the Parents with the Petition for Review indicate telephone calls that *they* made to the IHO. Because it is not clear when the Parents obtained legal counsel, it is not uncommon that telephone contacts will be made between IHOs and unrepresented parties in an attempt, *inter alia*, to arrange for pre-hearing and hearing dates. The IHO indicated that such telephone contacts would be necessary in his letter of October 4, 2001, to the parties. Bias and partiality cannot be inferred from a unilateral document that does not indicate anything of probative value other than the Parents contacted the IHO on certain occasions prior to the

[11]Although Indiana law refers to an "Independent" Hearing Officer rather than an "Impartial" hearing officer, the terms are interchangeable. The same criteria are applied.

conduct of the hearing in this matter.[12] The telephone records do not demonstrate any bias or partiality on the part of the IHO.

4. The hearing was originally slated to begin at 9:30 a.m. on November 15, 2001. For reasons not otherwise explained in the record, the hearing did not begin until 10:30 a.m. The hour delay was communicated to counsel for the School. Apparently, Parents' counsel did not receive the message. An Amended Notice of Hearing was not prepared and mailed to the parties. The Parents allege a "special meeting" occurred between the IHO and the School, but offer no proof beyond this vagrant observation. The Parents and their attorney appeared at the original time; counsel for the School did not arrive until after the Parents and their attorney arrived, having been aware of the time change. A "special meeting" could not have occurred as the Parents assert. They were there first. There being no proof other than an unsubstantiated belief, the BSEA will not infer bias or partiality on the part of the IHO based on this subjective belief.

5. The Parents assert the IHO informed them that he would rule in their favor, and that, due to the Student's age, they could not lose the hearing. At no time during the proceedings did the Parents or their attorney raise any objections regarding the bias or partiality of the IHO, for certainly such statements would indicate such bias or partiality. The fact that the IHO did not rule in favor of the Parents leads one to two conclusions: (1) The IHO never made such representations; or (2) The Parents expected the IHO to be biased and partial in their favor and now object that he was not. The latter conclusion is an uncomfortable one, and the BSEA will not adopt it because it is possible, even likely, the Parents do not mean for this conclusion to be made. As a consequence, the former conclusion will be made. The IHO did not make the unsubstantiated statements of bias or partiality attributed to him.

6. The Parents assert the IHO discouraged them from settling "out of court because he would not get paid..." First, there is no evidence that any settlement acceptable to the Parents was ever made. Second, the costs of the hearing–including the IHO's costs–are borne by the public agency whether a hearing is actually conducted or not. See 511 IAC 7-30-3(q) ("The public agency shall bear all costs pertaining to the conduct of a hearing whether or not a hearing is ultimately held..."). The Parents offer no support for this statement. Because it flies in the face of regulatory reality, the BSEA finds and concludes that no such statement was made by the IHO.

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[12]The communications between an attorney and the attorney's client are privileged communications. I.C. 34-46-3-1(1). Although the Parents' contend the IHO discouraged them from dismissing their attorney, and attached confidential communications between the Parents and their attorney that would typically be privileged, the IHO could not have known of the Parents' attorney's misgivings regarding the likelihood of succeeding in the hearing and the Parents' subsequent intention to dismiss their attorney unless the Parents informed the IHO of this. This letter has no probative value, nor do the Parents' argument the IHO coerced them to retain their attorney have any merit.

7. The Parents represent the IHO coerced them in some fashion to agree to OT and PT evaluations. The School's recollection is quite different. In any case, the Parents were represented thereafter by legal counsel, who could have objected. No objection was ever made, by either the Parents or their attorneys. Coercion is an inherently subjective consideration. Without some independent means to adjudge whether coercion occurred, the record as a whole supports a finding and a conclusion that such coercion did not occur. The BSEA so finds and concludes.

8. The Parents also ask for attorney fees. The BSEA does not have jurisdiction to determine whether a party is entitled to attorney fees. This is solely the province of a civil court. See 511 IAC 7-30-5(p). Accordingly, the BSEA cannot entertain the request for attorney fees.

9. Evidence and testimony support the IHO's determinations that the Student's primary disability is within the autism spectrum disorder, and that his secondary disability is a developmental delay. The early childhood program proposed for the Student, with the attendant speech-language services and OT and PT services, is appropriate to the Student's needs. Although statute creates a cut-off date for admittance to kindergarten, the Student's CCC determined that, due to the Student's lack of readiness skills, such a placement at this time would be inappropriate. This decision is supported by evaluative data and testimony. The decision of the CCC will not be disturbed.

10. The School acknowledges that it did not have a TOR at the September 24, 2001, CCC meeting, but offered to reconvene–and did reconvene–on October 11, 2001, with the TOR present. The failure to include the TOR at the September 24, 2001, CCC meeting was determined to be "harmless error" by the IHO. The BSEA finds and concludes that any error was corrected by the reconvening of the CCC, and will order nothing further.

ORDERS

1. Based upon the foregoing, the BSEA upholds the Orders of the Independent Hearing Officer.

2. The BSEA finds that the IHO did provide the parties procedural due process.

3. The BSEA does not find that the IHO engaged in any improper *ex parte* communications.

4. The BSEA finds that the IHO was impartial, as required by State and Federal law.

5. The BSEA does not have the authority to rule on a request for attorney fees.

6. The BSEA finds that no new hearing is warranted.

7. Any exception to the IHO's written decision not specifically addressed above is deemed

denied or overruled, as appropriate.

Date: January 7, 2002

Richard Therrien, Chair
Indiana Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Indiana 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).