

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 L.W., Valparaiso)
Community Schools, and the Porter) **Article 7 Hearing No. 1246.01**
County Education Interlocal)

The parent's request for hearing was received by the Division of Special Education, Indiana Department of Education, on October 3, 2001. The Independent Hearing Officer (IHO) was appointed on October 5, 2001. A prehearing conference was held on October 29 and November 9, 2001. The Student was represented by his parent, and the School¹ was represented by counsel. The IHO issued a written order, dated November 9, 2001, setting the hearing for November 30, 2001 with a final prehearing conference to be held just prior to the commencement of the hearing, and the decision to be rendered by December 15, 2001.

The issues for hearing were identified as:

1. Did the Student's January 17, 2001 and May 24, 2001 IEPs provide a free, appropriate, public education (FAPE) in the least restrictive environment (LRE)?
2. Is the Student entitled to compensatory education from 9/18/00 to 1/17/01 and from 8/22/01 to 10/29/01?
3. Did the School appropriately deny the Student's request for an independent evaluation?

At the conclusion of the testimony on November 30, 2001, the parties agreed to an additional day of testimony to be scheduled for December 10, 2001, with the decision to be due by December 28, 2001. On December 10, 2001, the parties agreed to submit written closing arguments by December 24, 2001, and further agreed that the IHO's order would be due by January 5, 2002.

The School's Exhibits Volumes I-IV, pages 1-916, page 461B, pages 636B-E, and pages 94B-E were specifically admitted, as were Petitioner's Exhibits A through FFFF. The witnesses were separated and the hearing was closed. The Student did not attend the due process hearing.

¹Throughout this decision, the local school corporation and the special education interlocal are referred to collectively as the "School."

The IHO issued his written decision on January 5, 2002. From the testimony and evidence presented at the hearing, the IHO determined twenty-two (22) Findings of Fact and reached sixteen (16) Conclusions of Law from which he issued four (4) Orders.

The IHO's Findings of Fact

The Student is a sixteen (16) year old 11th grade student at the local high school. The Student attended a local school since kindergarten. The Student was determined eligible for special education services in the 3rd grade. On October 18, 2001, it was determined the Student was no longer eligible for special education services under Article 7 as Emotionally Handicapped. In March, 1999, a previous IHO entered an order directing that the Student be placed all day in a segregated, structured self-contained class for the emotionally handicapped and that the parties participate in a case conference committee (CCC) meeting to develop an individualized education program (IEP) for the Student. On April 7, 1999, the CCC developed an IEP for the Student continuing the segregated placement for the remainder of the school year and providing extended school year (ESY) services for 4 to 5 hours per day for six weeks during the summer of 1999 to address any academic skill deficits that might impact the Student's schedule for Fall, 1999.

On June 1, 1999, a CCC was held to review the Student's behavior and performance in the self-contained classroom. The Student had fluctuations in behavior, such as sometimes cursing, making threats to staff, or being non-compliant or disrespectful to staff. The Student's 1999-2000 program and placement were principally the same as the April, 1999 IEP, with discussion about a general education setting in the future. All participants agreed to the Student's IEP. At a November 19, 1999, CCC it was noted that Student's grades were good but the Student's behavior needed improvement. A functional behavior assessment was done with a behavioral intervention plan being developed.

A May 10, 2000, CCC reviewed the Student's progress and developed an IEP for the 2000-2001 school year. The Student's grades were B's and C's. The Student's behavior remained a problem, but the Student was making progress. The Student's mother raised the issue of eligibility for special education under Other Health Impairment (OHI) based upon the Student's attention deficit hyperactivity. The CCC reviewed materials from prior evaluations and determined no assessment was necessary. The Student was determined to continue to be eligible as emotionally handicapped. The Student's IEP included the majority of the day in the segregated, self-contained emotionally handicapped class, but with two class periods at the local high school. The Student's mother agreed to the IEP on August 16, 2000.

There was a new teacher for the Student in the segregated, self-contained emotionally handicapped class for the 2000-2001 school year and the Student's behavior problems escalated. On September 1, 2000, the CCC discussed the problems with the new teacher as well as the Student's performance at the local high school. The Student was not participating in class or doing homework. The Student's schedule was changed to replace life saving with pre-algebra.

The Student's mother agreed to this change on September 18, 2000.

During September, 2000, the Student had discipline problems. A CCC meeting was held on September 18, 2000, to address the Student's disciplinary problems. The behavior intervention plan was reviewed and modified, and all members of the CCC agreed that the Student was not ready to be a full-time Student at the high school. On September 22, 2000, the Student's mother agreed to placement recommendations, but conditioned upon various changes she made to the IEP. On September 29, 2000, the Student's mother agreed that no evaluation of the Student was needed.

On November 13, 2000, another CCC meeting was held to review the Student's failing grades in English and pre-algebra. The Student was not showing his math computations and not doing all of his homework in both classes. In the segregated, self-contained emotionally handicapped class the Student's behavior was improving, but the Student's language and respect for others continued to be problems.

A CCC meeting was convened on January 17, 2001, to comply with a complaint investigation order from the Department of Education, Division of Special Education to develop an agreed upon IEP. This was due to the mother's conditional acceptance of the September 18, 2000 IEP. The Student's performance was reviewed. The Student was failing English and was receiving in the D to F range in history in the segregated, self-contained emotionally handicapped class. In the classes at the high school he was receiving C's and was completing most work and was generally cooperative. In the segregated, self-contained emotionally handicapped class, the Student continued to be disrespectful and use bad language, but was improving and accepting consequences. An Interpersonal Relationship class at the high school was added in lieu of a similar class in the segregated setting. The Student's mother agreed with this January 17, 2001, IEP. From January 17, 2001, through May, 2001, the Student did better academically and behaviorally. On April 4, 2001, the Student's schedule was changed, with lunch at the high school rather than at the segregated site.

On May 14, 2001, a CCC meeting was held to review the Student's performance and to develop an IEP for the 2001-2002 school year. Based upon the Student's performance and history, School personnel believed the continued slow transition to a general class schedule at the high school was the appropriate way to proceed. The proposed IEP called for the Student to have four classes at the high school for the first semester (one general education class and the other three being with special education support). For the second semester a second general education class was to be added. The CCC was to reconvene on May 24, 2001, so the Student and his mother could review and consider. The Student's mother believed placement full time at the high school was the appropriate placement, based upon the Student's performance and wishes.

The reconvened CCC took place on May 24, 2001. The Student's mother left prior to the conclusion of the meeting as no agreement concerning the Student's 2001-2002 IEP appeared imminent. The Student's mother did not agree with the proposed IEP, believing full-time placement at the local high school was the appropriate and least restrictive environment. After

the Student's mother left the CCC meeting, the remaining participants discussed compensatory educational services for the Student for the period from September 18, 2000, to January 17, 2001. In the complaint investigation, the Indiana Department of Education ordered the parties to discuss compensatory education based upon the mother's conditional acceptance of the September 18, 2000, IEP. The participants did not believe compensatory educational services were needed as the Student received educational services and there was no change of placement. The Student's mother stated prior to leaving that she was not prepared to discuss compensatory services and another CCC meeting would need to be scheduled to address that issue.

On June 6, 2001, the CCC meeting was held to discuss compensatory educational services. The Student's mother wanted an English class (due to the Student failing English during the first semester) and a physical education class (due to not getting credit for one taken at the segregated setting, apparently as part of his behavior intervention plan) as compensatory education services. School personnel believed any compensatory services should be in areas of disability in his IEP, such as anger management or social emotional skills, and not academic areas. The School offered assistance in summer football conditioning (assist football staff by advising them of the contents of the IEP and ways to handle the Student's anger and other behavioral problems). No agreement on compensatory education services was reached.

When classes commenced for the 2000-2001 school year, the Student did not attend the segregated, self-contained, emotionally handicapped class in the afternoon as set forth in his IEP, but did attend the classes at the local high school. There were various discussions and letters concerning this unilateral change in placement and possible disciplinary action by the School against the Student. On September 5, 2001, a CCC meeting was held to develop an agreed IEP for the 2000-2001 school year. There were discussions about the Student not attending afternoon classes in the segregated setting, but the Student's mother did not believe this placement was appropriate. The Student's mother requested the Student be evaluated for eligibility as OHI. There was again discussion concerning compensatory education. The parties failed to reach agreement on compensatory education services or on the prior May, 2001, proposed IEP. The parties did agree that the Student would be evaluated and the CCC would be reconvened. The School agreed to provide the Student's mother with a copy of the evaluation report five days prior to the CCC meeting. The Student continued to attend classes at the high school but not at the segregated, self-contained class. The School threatened disciplinary action, but never started the procedure. On October 5, 2001, the Student's mother requested this hearing.

The Student was evaluated during September and October, 2001. The School psychologist found that the Student was not exhibiting characteristic behaviors and emotional conditions of students classified as emotionally handicapped. The Student had the ability to make choices and control the Student's decisions and actions. The Student was no longer depressed or suffering anxiety as in the past. The Student's problems were determined to be behavioral and not due to an emotional disability. Further, the Student did not qualify under the OHI category.

On October 18, 2001, the reconvened CCC meeting was held. The CCC reviewed the evaluation and the Student's performance in his classes at the local high school. The CCC determined and agreed that the Student no longer was eligible for special education services as emotionally handicapped. The Student's mother did not receive the evaluation report five days prior to this CCC meeting, but did receive it a few days prior to the meeting. The Student is currently attending the local high school full time with services through a Section 504 Plan.

The IHO's Conclusions of Law

Based on the foregoing, the IHO concluded that the School complied with the procedures set forth in the Individuals with Disabilities Education Act (IDEA) and Article 7. The January 17, 2001, IEP provided for a FAPE in the LRE. The incremental addition of classes at the local high school was appropriate. The proposed IEPs of May 14 and May 24, 2001, were appropriate and were reasonably calculated to provide a FAPE in the LRE. The Student is not entitled to compensatory education services. Although the School failed to provide the mother with a copy of the evaluation report five days prior to the CCC meeting, the mother did receive the report prior to the CCC meeting, which negates this minor violation. The School's evaluation conducted in September and October, 2001, was appropriate and there is no need for an independent evaluation.

The IHO's Order

The IHO issued four orders:

1. The Student is not eligible for special education services under Article 7 and IDEA, but clearly is entitled to an appropriate 504 plan. IDEA is an entitlement law using a categorical approach whereas 504 is an equal opportunity law using a functional approach.
2. The IEPs dated January 17, 2001, May 14, 2001, and May 24, 2001, were appropriate in providing the Student with a FAPE in the LRE.
3. The Student is not entitled to compensatory education for the periods of September 18, 2000, through January 17, 2001, or August 22, 2001, through October 29, 2001.
4. The School's evaluation was appropriate and complied with the requirements of Article 7 and an independent evaluation is not necessary.

Procedural History of the Appeal

On January 8, 2002, the parent requested an extension of time in which to file her Petition for Review. That same day, the Board of Special Education Appeals (BSEA) granted this request, such that the parent's Petition for Review was to be filed by February 22, 2002. The time for the BSEA to review the petition and issue a written decision was extended to March 22, 2002. The parent filed her Petition for Review on February 22, 2002. The parent also submitted an

additional filing, parent's exhibit "A" to replace parent's exhibit "B" which was attached to the Petition in error. On February 26, 2002, the School requested a thirty day extension of time in which to file its reply. The parent objected to the length of the School's requested extension of time. On February 26, 2002, the BSEA granted the School's request for an extension of time, but also sustained the parent's objection to the length of the requested extension, such that the School's reply was due to be filed on or before March 20, 2002. The School's Reply was timely filed on March 20, 2002.

Parent's Petition for Review

The parent, in her Petition for Review, takes exception to Findings of Fact (FF) Nos. 3, 4, 5, 6, 7, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20 and 22. The parent objects to Conclusions of Law Nos. 1, 2, 3, 6, 7, 8, 9, 10, 11, 13 and 16. The parent also takes exception to Orders Nos. 2, 3 and 4. In her Petition for Review, the parent argues that findings 3 through 6 and number 10 do not address issues currently before the hearing officer. As a result, these findings are irrelevant and should not be part of this decision. The parent also notes that she requested this hearing on October 3, 2001, and not on October 5, 2001, as found in FF # 19. The parent makes general arguments throughout her petition and disagrees in general with the ultimate determination of the hearing officer.

School's Reply to Petition for Review

The School argues that the IHO's findings accurately report the Student's progress and are supported by the evidence. The School notes that the parent, in her Petition for Review, fails to demonstrate how the findings, conclusions or orders are unsupported by substantial evidence, contrary to law, an abuse of discretions, arbitrary or capricious, in excess of the IHO's jurisdiction, or a violation of an established procedure. As a result, the BSEA should uphold the IHO's decision as written.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on April 8, 2002, to conduct its review of the above-referenced matter without oral argument. All three members were present and had reviewed the record, the petition for review, and reply. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-30-4.
2. The BSEA shall not disturb the findings of fact, conclusions of law, or orders of the IHO

unless the BSEA finds the IHO's decision to be:

- a. arbitrary or capricious.
- b. an abuse of discretion.
- c. contrary to law, contrary to a constitutional right, power, privilege, or immunity.
- d. in excess of the jurisdiction of the IHO.
- e. reached in violation of an established procedure.
- f. unsupported by substantial evidence.

511 IAC 7-30-4(j).

3. The Petition for Review takes general exception to Findings of Fact (FF) Nos. 3, 4, 5, 6, 7, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20 and 22; Conclusions of Law Nos. 1, 2, 3, 6, 7, 8, 9, 10, 11, 13 and 16; and to Orders Nos. 2, 3 and 4.
4. The parent requested this hearing on October 3, 2001. FF # 19 should be amended to reflect this technical correction.
5. The IHO's decision is not arbitrary or capricious, an abuse of discretion, contrary to law, constitutional right, power, privilege, or immunity, in excess of the IHO's jurisdiction, reached in violation of an established procedure, or unsupported by substantial evidence.
6. With the exception of the technical correction to FF # 19, the IHO's decision should be upheld as written.

ORDERS

1. Finding of Fact # 19 is amended to read as follows:

The Student continued to attend his classes at the local high school but did not attend classes at the segregated, self-contained, emotionally handicapped class. The School threatened disciplinary action but never started the procedure. On October 3, 2001, the Student's mother requested this due process hearing.

2. After making the technical correction above, the IHO's decision is upheld as written.

All other Motions not specifically addressed herein are hereby deemed denied.

Date: April 8, 2002

/s/ Richard Therrien
Richard Therrien, 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 and 511 IAC 7-30-4(m).