BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of N.W., and	)	
Fayette County School Corporation and	)	
East Central Special Services	)	
	)	**Article 7 Hearing No. 1301.02**
Appeal from the Decision of	)	
Kristin L. Anderson, Esq.,	)	
Independent Hearing Officer	)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History

N.W. (hereinafter, the "Student") is a student eligible for special education and related services due to learning disabilities within the areas of expressive and receptive language, oral and written, for which he received services through the Fayette County School Corporation and East Central Special Services (collectively hereinafter, the "School"). The request for this hearing was filed by parent[1], on July 16, 2002, on behalf of the Student. In the request for the hearing, the Student asserted the School has not provided and cannot provide the intensity of services the Student needs to make meaningful educational progress. More specific disputes included, *inter alia*, reimbursement for expenses incurred when the parents enrolled the Student in a private school because he had not made significant progress despite five years of special education programming in the School, as well as payment for private school tuition as part of the Student's free appropriate education.

Kristin L. Anderson, Esq., was appointed as the Independent Hearing Officer (IHO) on July 16, 2002. The Indiana Department of Education contacted the parties to advise them of her appointment. The parties were also advised of their due process rights, including the right to compel the attendance of a witness. The initial decision deadline was August 29, 2002. The parents obtained counsel, and a telephone pre-hearing conference was held with the IHO and parties on August 19, 2002. At that time, the parties scheduled a hearing date of October 9, 2002, and extended the hearing decision deadline to October 28, 2002. The parents requested the hearing be open to the public.
The IHO ordered the exchange of witness lists and copies of evidence between parties by 6 p.m. October 1, 2002. The parties were also to provide copies of each to the IHO by the same date.

[1] The grandparents formally adopted the Student in December of 2000. Consequently, the grandparents are acting in role of the "parent" for the purposes of 511 IAC 7-17-57. All references to the "Parent" or "Parents" in this discussion shall refer to the grandparents.

Due to illness, counsel for the School requested a continuance of the hearing and decision deadline. The Student did not object and the parties agreed to reschedule the hearing for December 16, 2002. The decision deadline was extended to January 2, 2003. The deadline to exchange witness lists and evidence was reset to December 6, 2002.

The IHO issued a subpoena, on October 25, 2002, ordering the Director of the Language Skills Academy to produce all of the Student's records to the School's counsel. Thereafter, the IHO issued a protective order on November 21, 2002, stating that "all materials . . . [of the Director for the Language Skills Academy] will not be re-released to any individual who is not acting in a judicial capacity and who is not a witness or lawyer/paralegal in this the proceeding". Moreover, "any individual receiving any portions of the file will not re-release to any third party". Subsequently, on December 2, 2002, the IHO issued an order amending the protective order. The amended order was issued to clarify the protective order by stating "all materials . . . will not be re-released to any individual who is not acting in a judicial capacity OR who is not a witness or lawyer/paralegal in this proceeding." The IHO additionally ordered a copy of the protective order be included with any materials disclosed. The person receiving the materials shall sign on the order that he/she has read the order and agrees to abide by it. At the close of the hearing, all copies of the materials disclosed (including releases) would be collected by the IHO.

Before the second hearing date, the Student experienced some emotional difficulties at the private school and counsel for the Student requested a continuance of the hearing and decision deadline dates or, in the alternative, a dismissal without prejudice. The parties agreed that the Student should undergo psychological testing. Another pre-hearing conference was set for February 14, 2003, and the decision deadline was reset to March 3, 2003.

The case conference committee (CCC) discussed the findings of the Student's psychological evaluators, but the hearing issues were not resolved. A telephone pre-hearing conference was held on February 14, 2003. The parties agreed upon hearing dates of April 2, 3, and 4, 2003, and an extension of the hearing decision deadline until April 21, 2003. The deadline for exchanging witness lists and evidence was reset to March 25, 2003.

A hearing was held on April 2, 3, and 4, 2003. The parties requested permission to submit post-hearing briefs by April 22, 2003. On April 17, 2003, the parties requested extensions to file briefs and to extend the decision deadline. The deadline for submitting post-hearing briefs was extended to April 28, 2003, while the deadline for the hearing decision was extended to May 9, 2003.

The three (3) issues for hearing were delineated by the IHO as follows:

1. Whether the School has provided the Student with an education program appropriate for his needs;

2. Whether the School has offered the Student an education program appropriate for his needs; and

3. Whether the School should be responsible for the parents' expense in placing the Student at a private facility.

IHO's Written Decision

Both parties were represented by counsel throughout the proceedings. The IHO attended to each motion and objection, ruling accordingly. The IHO, based on the evidence and testimony of record, determined forty-two (42) Findings of Fact, which are reproduced in relevant part below, with slight amendments for continuity purposes:

1. The Student is of normal intelligence and qualifies for special education services under Article Seven due to severe deficits in the areas of expressive and receptive language, oral and written. Outside testing of the Student finds him to be severely dyslexic. The Student also has severe auditory processing problems. When tested in 2002, his listening skills were at a Kindergarten level.

2. The Student has attended the school corporation for six years, five of them as a special education student. In the fall of his sixth grade year, he was placed in a private school by his grandparents who have incurred expenses including $9,500.00 for tuition and transportation costs relating to the placement.

3. At the time the Student left the public school, he had only reached a beginning 2nd grade reading level.

4. As the Student has aged, the gap between age-appropriate academic material and his ability to read such material has widened. It is becoming increasingly difficult to adapt such material for the Student.

5. The Student's inability to read has impacted his progress in virtually every other area of his education and severely limits his ability to be mainstreamed with his non-disabled peers. The development of this Student's ability to read is a critical skill.

6. The Student was referred for evaluation when he was in Kindergarten due to his short attention span and behavioral difficulties. A CCC met in April 1997 to discuss the results of the Student's evaluation. Initial testing did not reveal a specific learning disorder but test scores placed the Student just above the cut-off for a mild mental handicap. The CCC decided that based on all available information, the Student qualified as having a mild mental handicap (MiMH) and placed him in an MiMH classroom.

7. The Student's grandmother saw signs of letter reversal and noted the Student attempted to read from right-to-left when he was in Kindergarten. She began questioning school personnel about the possibility of the Student being dyslexic at that time.

8. The presence of dyslexia can be established by testing as early as Kindergarten.

9. Teachers responded to the grandmother's concerns by telling her that testing indicated the Student was mentally handicapped, not dyslexic. The grandmother continued to express her concerns and enrolled the Student at a Sylvan Learning Center in February 1999. The School took no action on the grandmother's concerns about possible dyslexia until the CCC meeting of April 1999. At that time the School agreed to have the Student re-evaluated and specifically address the issue of dyslexia.

10. The School personnel attempted to schedule the re-evaluation for the summer of 1999 but the grandmother claimed not to have received the correspondence. The School did not pursue the matter of testing when school reconvened in the fall of 1999.

11. The School re-evaluated the Student in April of 2000 when he was due for his triennial evaluation. The issue of dyslexia was not specifically addressed. The testing indicated that the Student had a specific learning disability and language disorder (communication handicap) and was not, in fact, mentally handicapped. The School psychologist found that the Student's significantly depressed language skills appeared to be affecting all areas of the Student's academic performance and were at the root of the Student's inattentive and noncompliant behaviors.

12. The Student's CCC met in April 2000, but the test results were apparently not available at that time. The grandmother continued to express her belief that the Student was dyslexic. The CCC did not discuss the results of the April testing until September 19, 2000.

13. The failure of the School to do the testing agreed upon in the April 1999 CCC meeting in a timely manner resulted in the Student receiving no services for either the language disorder or specific learning disability for the 2000-2001 school year.

14. The School's response to the information that the Student was not mentally handicapped but instead had a learning disability (LD) and language impairment was to offer 20 minutes of speech and language therapy twice a week and LD consultation once each nine-week grading period. The rest of the Student's special education instruction (60%) was to be provided by the MiMH teacher in the School's self-contained MiMH classroom. There is no evidence to show that the CCC discussed whether more intensive services in the area of his learning disabilities and severe reading difficulties might be appropriate for the Student.

15. As agreed in the April 1999 CCC meeting, the testing done in April 2000 did not directly address the issue of the Student's possible dyslexia. In October of 2000, the grandmother obtained an independent evaluation for dyslexia at a cost of $750.00. The test results were consistent with those of the School and found the Student to have severe developmental dyslexia. The grandmother enrolled the Student in tutoring for dyslexia at the Language Skills Academy at that time.

16. At the January 2001 CCC meeting it was reported by the speech and language pathologist that the Student had reached his goals and that he would be better served by programming for his learning disabilities. The School's response to this information was to offer direct LD services for 30 minutes four times a week even though they found that being in the Resource Room for 60% of the day would not provide enough support for the Student. The CCC rejected additional LD services in favor of increased time in the MiMH class.

17. The CCC met again in April 2001. Despite the grandmother's expression of concern about the Student's reading level, direct LD services continued at 30 minutes four times per week .

18. At a CCC meeting in January 2002 it became evident that the Student was making only minimal, if any, progress. The school then offered to increase his time with the LD teacher to one hour five times per week. This was time that the Student shared with other students. During that hour, approximately 40 minutes were spent on "phonics", five (5) minutes on "sight words," and 15 minutes on "reading."

19. At the hearing, the learning disabilities teacher testified that she had one student in her Resource Room for 2 ½ hours per day. She also testified that she was qualified to teach all academic subjects to children with learning disabilities. In April 2002, the IEP offered contained only one hour of LD services five times per week. The CCC did not discuss whether more intensive LD services for the Student might be appropriate to address his learning disabilities and severe reading deficits. The School recommended placement in the MiMH classroom for 70% of the instructional day.

20. The special education cooperative has not had a self-contained LD classroom for eight or nine years. All references in the Student's IEPs to "self-contained" classes referred, in fact, to a class for children with a mild mental handicap (MiMH).

21. At all times relevant to this hearing, the only place where the School provided direct LD services was in a Resource Room where children were coming and going throughout the day. Had the Student been placed full-time in the Resource Room, he would have been the only child so placed. An all-day Resource Room placement would not meet the Student's need for structure and continuity, would further isolate him from other children in the school, and would impede his social development.

22. The grandparents gave notice on May 6, 2002, of their intent to place the Student in a private school in August 2002 and cited numerous reasons for their decision. The School did not respond with an offer of different or more intensive services.

23. The grandparents incurred expenses relating to their placement of the Student at the private school. The expenses include $9,500.00 in tuition for the 2002-2003 school year and transportation costs.

24. In January 2003, six months after the hearing request was filed, the School made an offer of "Full time (or any spectrum of services) from LD (Learning Disabilities) Full day or all portion [sic] of the day, 5 X week; Behavior Consultation 1 hr. per week." At the time this offer was made the School did not have a self-contained LD classroom.

25. The Student's grandmother signed permission to place the Student in the MiMH class for five (5) years because the only other alternative offered or available was that of a general education classroom. All parties agreed that a general education classroom did not provide enough support for the Student. Numerous communications to school staff and CCC meetings clearly indicated that the grandmother did not believe the School was offering appropriate services for the Student's suspected dyslexia.

26. The Student's teacher in the MiMH classroom in which the Student spent the majority of his school day for Grades 3, 4, and 5 was licensed only in the area of mild mental disability. No other child in the MiMH classroom had normal intelligence.

27. The Student's placement in the MiMH classroom has resulted in the Student being called "stupid," "idiot," and "dumb-butt" by his non-disabled peers. This has added to the low self-esteem and lack of confidence that hindered his educational process.

28. That MiMH teacher used a modified "Four Blocks" reading program and a basal reader in the MiMH classroom. The LD teacher who staffed a "Resource Room" stated she used the "Herman Method" to teach reading and language skills.

29. It was not reasonable for the school to expect the Student to adjust to the differing teaching methods and materials of the LD and MiMH teachers.[2]

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[2] Statements regarding what is or is not reasonable and purported shortcomings in service delivery appear throughout the IHO's Findings of Fact. These are interpreted more as Conclusions of Law than Findings of Fact.

30. The Student had virtually no confidence in his ability to do school work even though the MiMH and LD teachers believed he could successfully do the work that was presented to him. When asked to demonstrate what he supposedly knew, the Student would frequently "shut-down" and refuse to attempt the work.

31. At the hearing, the LD teacher stated that she expected her students to "take responsibility" and apply the principles she was teaching them in the LD Resource Room to their other schoolwork. It was not reasonable for the teacher to expect such initiative from the Student.

32. It is the opinion of the school psychologist and the Student's LD teacher that the Student's ability to read will "top off" at the completion of a third grade reading level no matter what services he receives. Educators at the private special school are of the opinion that the Student, with proper services, will eventually be able to read at his age level.

33. Every IEP for the Student indicates that no extended school year (ESY) services were to be provided to the Student. The testimony indicated that the School staff did not believe the Student regressed any more than many other children and therefore no further consideration of ESY services was necessary. The CCC has failed to consider the unique needs and educational circumstances of the Student with respect to ESY services. Such unique needs and circumstances include his extremely low reading level, the extended time that it has taken to reach a beginning 2nd grade reading level, the fact that any regression robs him of time that could be devoted to improving his reading skills, and the fact that ESY services provide a "window of opportunity" to develop emerging, critical skills for the Student. Those factors establish that the ESY services were important and appropriate for the Student's special education. The evidence supports the conclusion that ESY services were never discussed in a meaningful fashion.

34. The Language Skills Academy offers tutoring that is consistent with the special education the Student has received at the private school. It is an appropriate place for the Student to receive ESY services. Before the Student was withdrawn from the School, the School provided direct LD services for five hours per week. Services at that level would be appropriate for summer tutoring for the Student.

35. Because of his severe disabilities, the Student needs an educational program in which all areas of instruction are integrated, highly structured, systematic, sequential and multi-sensory.

36. While there are certain similarities in the approaches used by the elementary school's LD Resource Room teacher and the private school, the private school provides direct services for the Student's learning disability, i.e., dyslexia, the entire school day. Language development is the focus of the entire curriculum. In their program, all other instruction is presented to the Student

in the context of the language skills which the Student has "secured," i.e., mastered, during individual tutoring sessions. The private school instruction is highly structured, systematic, sequential, multi-sensory, and integrated. The audiologist who most recently tested the Student is of the opinion that the private school's program is geared to assist the Student with his severe auditory processing deficits. The private school is an appropriate placement for the Student.

37. The Student is making progress, is showing confidence and interest in the private school program, and is receiving educational benefit from that program.

38. In the fall of 2003, the Student will be entering 7th Grade. In his school district, he would be transferred from an elementary school to a "middle school." The school district's middle school currently has four LD teachers, three of whom "team teach" with general education teachers. The middle school has a "Resource Room" in which staff and children come and go throughout the day. The Student's need for continuity makes an all-day Resource Room placement in 7th Grade inappropriate to meet his needs.

39. The assistant director of the School's special education cooperative testified that the cooperative could set up a self-contained LD class for the Student for the 2003-2004 school year, but she did not know how or when. It is also not known what method(s) the person(s) who would teach that class would utilize nor whether the teachers' programming would be compatible with each other or with the instruction the Student has received in the past. The uncertainties of the program the School has offered make it an inappropriate option to meet the Student's needs for structure, continuity and a comprehensive, integrated approach in his educational program.

40. The Student has had behavior problems, including "shutting down," throughout his schooling. The behavior problems have expressed themselves only at school and are due in large part to his severe auditory processing deficits and chronic frustration with his educational program. The Student has been under the care of a psychologist since December 2002. The Student is in need of continued psychological counseling to deal with the emotional/behavioral issues that have continued to negatively impact his special education instruction.

41. The Student is Afro-American and his family strongly believes that the Student has been singled out in a negative fashion by School staff and other students because of his race. The Student needs another person "of color" to assist him in resolving his emotional/behavioral issues. The Student's current psychologist is a person "of color" who already has a good rapport with the Student and his family and can provide continuity of care. He is an appropriate professional to meet the Student's needs for psychological services.

42. The Student's auditory processing problems impede the effectiveness of his educational instruction. An assistive learning device, namely, an "FM system," would allow the Student to process his special education instruction more efficiently by filtering out background noise.

From these forty-two (42) Findings of Fact, the IHO determined ten (10) Conclusions of Law, restated below in relevant part.

1. The procedures for educational evaluations are set out in 511 IAC 7-25-7 and by reference in 511 IAC 7-25-4. The School is required to perform the evaluation and convene a CCC meeting within sixty (60) instructional days after the request. The grandparent requested dyslexia testing at the April 1999 CCC meeting. The School did not perform any evaluation for nearly one year and failed to specifically address possible dyslexia as agreed in the April 1999 CCC meeting. The re-evaluation was performed ten days after the regular triennial re-evaluation was due. The School violated the provisions relating to both additional and triennial re-evaluations.

   As a result of that delay, the Student's true disabling conditions, i.e., the specific learning disability and communication disorder, were not discovered and programming for those conditions was not addressed for over a year. The delay deprived the Student of the opportunity for an appropriate education. The Student is therefore entitled to compensatory education for that year period.

2. To provide a free, appropriate public education, pursuant to 511 IAC 7-27-9 (d), the public agency must have a continuum of services for children with disabilities including a separate classroom in a general education school building. The separate classroom must be one appropriate to the Student's disability and needs. The evidence shows that even after having been identified as learning disabled and language impaired and having normal intelligence, the Student remained placed in an MiMH classroom because there were no other placements available for children with learning disabilities besides the Resource Room or the general education classroom. The teacher staffing the MiMH classroom was not licensed in learning disabilities. Because of the severity of the Student's language and reading deficits, a full-time placement in an LD classroom (not a Resource Room) would have been the appropriate and least restrictive setting for the Student's individualized education program (IEP). Respondents have failed to provide a continuum of services to the Student, and that failure resulted in the Student not receiving an appropriate education during his 4th and 5th Grade years. The Student is entitled to compensatory education for the School's failure to offer a continuum of appropriate educational placements to him.

3. The law requires the IEP for the Student to be reasonably calculated to confer educational benefit. The vast majority of the services provided to the Student were delivered by a teacher not licensed in the area of the Student's identified disability. It was unreasonable for the School to expect the Student, who has had a long history of being overwhelmed, discouraged, and frustrated by his school experiences, to adjust to the teaching methods and materials of different teachers and

take the initiative to apply the learning strategies presented in his brief time in the LD Resource Room to the rest of his schoolwork. Given the severity and long-standing nature of the Student's learning disabilities and the fact that Respondents did not consider whether more direct LD services or services in a self-contained LD classroom might be necessary for the Student, the Student's IEP's were not reasonably calculated to confer educational benefit.

4. The law does not impose upon the public agency any greater substantive educational standard than is necessary to make access to public education meaningful. While in an absolute sense it cannot be said that the Student learned *nothing* during the six years spent in Respondent's school system, relatively speaking, he has fallen farther behind his non-handicapped peers each year. Grade and age-appropriate materials have become increasingly inaccessible to the Student. A reading level of beginning second grade prevents this Student of normal intelligence from meaningfully participating in a total educational experience. The benefits he has received from five years of special education in the public school system are not significant.

5. Special education and related services provided through the IEP beyond the limits of the normal school year are ESY services. All students who are eligible for special education and related services must be considered for ESY services. ESY services must be offered to students with disabilities if those services are necessary for a free appropriate public education.

In May 2001, the Indiana Department of Education published a technical assistance document entitled, "Guidelines for Determining the Need for Extended School Year Services." This document sets out three criteria for determining a student's need for ESY services: "Critical Skills" Criterion, "Regression-based" Criterion, and "Special or Unusual Circumstances" Criterion.

"Critical Skills" represent knowledge or performance of tasks that are essential to the progress of the Student and lead to independent functioning and the enhancement of integration with non-disabled peers. Acquisition or maintenance of a critical skill will significantly enhance the student's ability to function. Lack of a critical skill represents a barrier to continuous progress or self-sufficiency. This child has severe deficits in expressive and receptive language skills. The lack of these skills prevents the Student from reading independently above beginning second grade level and severely limits instruction at a level appropriate for his age and mental ability. His severe reading difficulties have prevented his integration with his non-disabled peers.

"Regression" means a substantial loss of a skill. Because of the severity of the Student's disabilities and the slow pace at which he is able to process his special education instruction, even minimal regression deprives the Student of time needed to master essential skills.

"Special or unusual circumstances" may also provide a basis for providing ESY services. Such circumstances may include the nature and severity of the student's disability, the interruption of skill

development at a critical stage, or the loss or compromise of a "window of opportunity" to develop an essential skill. The nature of the Student's learning disability, a severe deficit in receptive and expressive language, impacts his entire educational program. The Student is still struggling with very basic essential skills. In addition, ESY services provide an irreplaceable opportunity to assist the Student in narrowing the substantial gap between his age and his reading level.

The Student should have received ESY services for the summers of 2001 and 2002. The Student is therefore entitled to compensatory education.

6. The U.S. Supreme Court in Burlington[3] recognized the right of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in a private school and receive reimbursement when the private placement is appropriate and the IEP proposed by the public agency was not. 511 IAC 7-19-2 (c) allows a hearing officer to require the public agency to reimburse the parents under such circumstances.

   The services provided in the IEP proposed by the CCC meeting of April 2002 were not adequate to meet this Student's needs. It is the public agency, not the parents, that must provide an appropriate education in the least restrictive environment. The private school program has met the Student's needs. The grandparents are therefore entitled to reimbursement for the Student's tuition at the private school and reasonable transportation expenses through January 2003.

7. The School's January 2003 offer of full-time LD services was not capable of being implemented in an appropriate setting, i.e., a full-time LD classroom (not Resource Room), at the time of the offer. The School could not have provided a free, appropriate public education for the Student. The grandparents are therefore entitled to reimbursement for the Student's tuition at the private school and transportation expenses for the remainder of the 2002-2003 school year.

8. The school corporation has not met its burden of showing that it will be able to provide the appropriate education, i.e., full-time LD services in a self-contained LD classroom (not Resource Room), for the Student for the 2003-2004 school year. The grandparents would therefore be entitled to reimbursement for the Student's tuition and reasonable transportation expenses until the appropriate education is, in fact, available to the Student.

9. Compensatory education cannot be achieved by ordering the school to provide prospectively services they should have provided for the Student in the first place and would still be required to provide for the Student. The only meaningful way to provide compensatory education is for the Student to be provided a more intensive educational experience than would otherwise be available

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[3] Sch. Comm. of Burlington v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985).

to him in the public school setting. The intensive and appropriate services provided by the private school makes it a suitable provider for the compensatory education due this Student.

10. 511 IAC 7-28-1 requires the public agency to provide related services if the student requires the services in order to benefit from special education. The student has an auditory processing disorder and, when last tested, had the listening skills of a Kindergarten student. He also has difficulty in maintaining his attention in the classroom. An FM system would filter out background noise and enable the Student to concentrate on his special education instruction. He is entitled to an FM system as a related service.

    The Student has a long history of being frustrated, discouraged, and overwhelmed by his class work. This has led to inattentiveness, noncompliance, and "shutting down" in the special education setting. The Student needs psychological services to help him cope with academic and emotional demands in order for him to benefit from his special education. He is entitled to these services.

    Transportation to and from the private school and summer tutoring is necessary for the Student to benefit from his special education. The grandparents are entitled to be reimbursed for their reasonable expenses incurred in transporting the Student to his special education.

The IHO then issued the following seven (7) orders:

1. Respondents are ordered to reimburse the child's grandparents for the cost of tuition at the private school and reasonable transportation expenses for the 2002-2003 school year.

2. Respondents are ordered to pay for the cost of tuition at the private school and reasonable transportation expenses for the 2003-2004 school year as compensatory education for the child.

3. Respondents are ordered to pay for the continued services of the child's current psychologist for the 2003-2004 school year.

4. Respondents are ordered to provide the child with an FM system for his use at the private school.

5. Respondents are ordered to pay for five hours per week summer tutoring (2003) for the child at the Language Skills Academy as compensatory education.

6. Respondents are ordered to reimburse the grandparents $750.00 for the dyslexia testing provided by the Language Skills Academy.

7. Upon completion of any appeals in this matter, the testing materials of the Language Skills Academy Director are ordered sealed and are not to be released to any person.

APPEAL TO THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The School, pursuant to 511 IAC 7-30-4(i), timely filed its Petition for Review on June 9, 2003. By letter dated June 18, 2003, the Student requested an extension of time to file a response. The School had no objection to the extension. On June 18, 2003, the BSEA granted the request for extension, permitting the Student until the close of business on June 20, 2003, to file his Response. The Student timely submitted a response to the Petition for Review on June 19, 2003.
The complete record from the hearing was photocopied and provided to the BSEA members on June 24, 2003.

The BSEA, on June 20, 2003 notified the parties it would review this matter without oral argument and without the presence of the parties. Review was set for July 1, 2003, in the State House offices of the Indiana Department of Education.

Petition for Review

The School, in its Petition for Review, alleged generally the IHO did not base her decision on substantial evidence in the record. The School contends there is no actual evidence directly relating to the Student that shows that racial mistreatment by school personnel, or that other students played any significant role in his school difficulties, much less acted as the indispensable requisite justifying the need for private placement or for a psychologist at the School's expense. The specific objections are noted as follows:

Finding of Fact No. 1: Only the Student's performance score falls within the average range of intelligence. Other than the optimal mental ability quotient on the aptitude test given by the Learning Skills Academy, the Student's IQ/aptitude scores fall primarily in the mild deficit to low average range, with a verbal ability– the usual predictor of school success– in the mildly deficit range. The finding of "normal intelligence" is not based on substantial evidence in the record.

The auditory processing evaluation of March 5, 2003, shows a mild to moderate disability, not a severe disability. No evidence was offered to contradict the result of this evaluation.

Finding of Fact No. 11: The School takes exception to the IHO's finding that the dyslexia was not addressed during the re-evaluation of the Student in April of 2000. The School Psychologist did assess the Student's reading ability, reporting the Student's reading abilities to be within the MiMH range, with difficulty in reading words of four or more letters, inability to use sounds to decode words, poor language and vocabulary skills, and comprehension skills at the first grade level. The private evaluation results and the School's evaluation results generated parallel scores. 511 IAC 7-17 *et seq.* ("Article 7") does not require a student with a learning disability to be labeled as "dyslexic," as this concept is included within the framework of LD's definition.

Finding of Fact No. 13: The IHO's determination that the School's failure to conduct a requested evaluation until April of 2000, a year after it was requested, did not deny the Student services during the 2000-2001 school year.[4] The Student did begin to receive LD consultation and direct speech/language services in September of 2000 and continued to receive these throughout the 2000-2001 school year. The Student's IEPs have included goals directly addressing his reading difficulties since he was first identified as eligible for special education and related services. Specifically, the Student's IEP developed on September 19, 2000, contained reading goals that continued to stress the decoding of words, increased word identification, and increased comprehension skills.

Finding of Fact No. 15: The School maintains that the Student's dyslexia was addressed by the School's evaluation in April of 2000. The private testing obtained by the grandparents was performed in October of 2001 and not October of 2000 as indicated by the IHO's Finding of Fact.

[4] The School notes, and the BSEA agrees, that this part of the IHO's Finding of Fact should have referred to the 1999-2000 school year and not the 2000-2001 school year. The context of the IHO's Finding of Fact indicates this was the intent.

Finding of Fact No. 16: The School takes exception to the IHO's interpretation of a report by the speech/language pathologist. The speech/language pathologist's report indicated the student would benefit from language support "within the curriculum" analogous to services provided in an LD program. The speech/language pathologist stated in the report that providing both speech therapy and LD services for the Student would be "a duplication of services." The School does acknowledge that the speech/language pathologist reported the Student had reached his speech/language goals, but takes exception to the IHO's determination that the eventual LD services were based on this report or in reaction to it. In addition, the decision to maintain the Student in the MiMH classroom was made by the Student's CCC at the September 19, 2000 meeting. The LD teacher had frequent communication with the MiMH teacher. The educational placement was reviewed again on January 19, 2001, where it was determined the separate placement met the Student's needs and increased time in the LD resource room would not provide enough support. The CCC meeting in January of 2001 did not increase the Student's time within the MiMH classroom.

Finding of Fact No. 19: The record does not support the IHO's determination that the School did not discuss more intensive LD services for the Student to address his reading difficulties. The IHO's Finding of Fact No. 18 indicates just the opposite. The April 2002 CCC meeting also indicates the need for more intensive services was discussed.

Finding of Fact No. 21: The School takes exception to the IHO's finding that movement from one room to another or other students entering or leaving the room interfered with the Student's educational programming. The MiMH classroom was reviewed and selected because it provided the structure and continuity the Student required. There also was no evidence to support the IHO's determinations that full-time placement in the LD Resource Room would isolate the Student or impede his social development.

Finding of Fact No. 25: The School disagrees that the only alternative educational placement offered was a general education classroom. Full-time LD Resource Room services were considered as well as a general education placement with LD assistance.

Finding of Fact No. 27: There was no first-hand testimony regarding the purported name-calling the Student experienced. The only testimony to this effect came from the Student's grandmother, who did not hear or otherwise observe these statements. The School also takes exception to the IHO's conclusions that placement in the MiMH classroom has "added to the low self-esteem and lack of confidence" that hindered the Student's academic progress. The record does not contain any evidence

or testimony from anyone who worked with the Student in the school setting that name-calling occurred or that he suffered from low self-esteem and a lack of confidence based upon his educational placement.

Finding of Fact No. 29: The testimony indicates the Student, after initial difficulties, did adjust to his educational program in the MiMH and LD classrooms.

Finding of Fact No. 30: The School disagrees the record supports the finding that the Student "shuts down" based on his lack of confidence to do school work. The testimony indicates the Student did act in this fashion on two isolated occasions in the LD classroom but was redirected. This behavior did not recur. The MiMH classroom teacher reported the Student occasionally would refuse to work. This usually occurred when the Student returned from an outside activity. This would also occur when the Student was faced with a challenging assignment, but it did not always occur. This behavior was addressed in the Student's IEP.

Finding of Fact No. 31: The School asserts the IHO mischaracterized the testimony of the LD classroom teacher. Although the teacher did discuss the level of responsibility she expected of her students, the Student in this matter required more one-to-one assistance, which was provided.
Findings of Fact Nos. 33 and 34: The IHO erred, the School maintains, by relying upon an unofficial document disseminated as a "field study" that was not submitted into evidence. The document could not be officially noticed by the IHO because it does not meet the requirements of I.C. 4-21.5-3-26(f).[5] The need for ESY services based upon the "opportunity to develop emerging critical skills" is negated both by public and private evaluations and services that indicate the Student is unable to make significant gains in the area of reading. The School does not dispute that reading is critical to the Student, but it is not an "emerging skill" for ESY analysis. There also is no evidence in the record, the School maintains, that indicates what progress the Student makes in reading has regressed during the summer. As a consequence, there is no demonstrable need for ESY services to be provided through a private agency.

Findings of Fact Nos. 36 and 37: The School takes exception to the IHO's determinations regarding the appropriateness of the private school placement and the educational program provided to the

[5] The School did not reference this code citation. The BSEA includes it in this instance because this is the controlling provision for administrative hearings, including Article 7 hearings. See 511 IAC 7-30-3(p).

Student. The Student continued to pose difficulties for the private school such that he was removed from the private school and completed the school year on a part-time schedule.

Findings of Fact Nos. 38 and 39: The School disputes the IHO's findings regarding the middle school programming, or lack thereof. The record supports a finding that the Student can move from classroom to classroom. There is also testimony that LD teachers available at the middle school are trained in several reading methodologies, including the one favored by the private school he attended for the remainder of his sixth grade year. The precise details of the Student's educational program at the middle school would have to be determined through the CCC process.

Finding of Fact No. 40: The Student did not exhibit behavior problems solely at school. He also exhibited such problems at home. The Student's emotional and behavioral problems began before he enrolled in school, and there is no substantial evidence in the record to support the IHO's determination that his behavioral problems are "due in large part to his severe auditory processing deficits and chronic frustration with the educational program."

Finding of Fact No. 41: The School asserts the IHO contradicts earlier findings regarding the source of the Student's behavioral problems by ascribing them to his race in this Finding of Fact. However, the record does not support a finding that the Student was singled out in a negative fashion because of his race. The only testimony to this effect was the subjective impressions of the Student's grandmother. There is no nexus, the School argues, between the Student's race and behavioral problems on the one hand and the need for a psychologist of the Student's same race on the other hand.

Conclusion of Law No. 1: The School disagrees that it failed to conduct an evaluation in a timely fashion. The School attempted to do so but sent the evaluation permission request to the Student's biological father rather than his grandmother, who, at that time, had not yet adopted the Student. The biological father did not respond. As a result, the School did not conduct the evaluation. The School also continues its objection to the IHO's finding that the School failed to address the Student's dyslexia. The School acknowledges that the results of the triennial evaluation were ten (10) days delinquent, but maintain that there is insubstantial evidence to support a finding the Student was denied services and thus entitled to compensatory educational services.

Conclusion of Law No. 2: The School denies that the Student remained in the MiMH classroom because there were no other educational placements available other than the LD Resource Room or a general education classroom. The multi-categorical classroom approach was determined appropriate

by the Student's CCC. Further, such placements are permitted by Article 7, the School maintains, relying upon 511 IAC 7-27-9(f). The Student did demonstrate progress in the classroom, both academic and behaviorally. There is no substantial or reliable evidence to the contrary. Accordingly, the School argues there is insufficient evidence to conclude the Student was denied a FAPE during his fourth and fifth grade years, entitling him to compensatory educational services.

Conclusion of Law No. 3: Although the School acknowledges the Student's primary teacher was not licensed in his identified disability (LD), the Student's Teacher of Record (TOR) was licensed in this area and did provide direct services. The School also maintains the Student did not experience any particular difficulty from having two different teachers, and he was not expected to generalize what he learned to all settings without support. The Student's educational placement was determined by his CCC.

Conclusion of Law No. 4: The School acknowledges the Student has fallen further behind his peers without disabilities, and that grade appropriate materials are less accessible to him. This belies the IHO's determination the Student is of "normal intelligence." The evidence in the record, the School argues, indicates that very few of the Student's skills are within the normal range. His functioning ability coupled with his reading difficulties preclude him from achieving grade-level work, especially as most of his school work requires reading. The private school asserts the Student can achieve at grade level, but standardized test scores indicate otherwise, as well as the inability of past public and private school services to produce any appreciable gain.

Conclusion of Law No. 5: The School restates its objections to ESY services and the IHO's basis for determining the need for same. See Petition for Review, Findings of Fact Nos. 33 and 34, *supra*.

Conclusion of Law No. 6: The School asserts that it has satisfied the requirements of Burlington by providing an appropriate program in April of 2002. The School also argues that the private school placement was not shown to be appropriate, assuming the School's program was not. The private school nearly dismissed the Student for his behavior, placed him on a half-day program, and employed a methodology that for years has proven ineffective in addressing or remediating the Student's reading difficulties. Private services have not provided any significant increases in the Student's achievement.

Conclusions of Law Nos. 7 and 8: The School disputes the IHO's conclusions that full-time LD services in a resource room would be inappropriate and that the Student requires a full-time, self-contained LD classroom.

Conclusion of Law No. 9: The School disagrees that more intensive services would have benefitted the Student. Services provided by both public and private entities have not resulted in substantial gains by the Student.

Conclusion of Law No. 10: The School does not dispute the IHO's conclusion that an FM system might benefit the Student; rather, the School notes the Student has not yet used an FM trainer and there is no evidence as to whether he will benefit from the use of such a device. A trial period is recommended. Also, as noted *supra*, the School disagrees with the IHO's characterization of the frequency and cause of the Student's "shutting down" behavior. The School does acknowledge the Student requires assistance for his behaviors and offered to provide assistance during the March 2002 CCC meeting. The assistance was declined. Should the Student require counseling or psychological services, these are available from or through the School. The School objects to the basis for the IHO's conclusion, and not necessarily with the Student's possible need for services.

The School objects to the IHO's orders Nos. 1, 2, 3, 5, 6, and 7 but not to Order No. 4. With regard to Order No. 4, the School recommends a trial period with the FM trainer and then convention of the Student's CCC to determine the need for the FM trainer as a related service. The School also questions the need to order the sealing of certain materials provided by one of the Student's witnesses.

Response to the Petition for Review

The Student timely filed a Response to the School's Petition for Review. The Student maintains the School has not disputed the fact that he has severe dyslexia or that his educational program needs to be "integrated, highly structured, systematic, sequential and multi-sensory." The Student also argues that the IHO's decision is not based primarily on his race. The IHO's Finding of Fact No. 41 indicates the family's belief that race was an issue not that the racial animus existed or occurred.

The Student is of normal intelligence but has severe dyslexia and auditory processing difficulties. Although the School apparently concedes this point now, it was the failure to identify him earlier that prevented appropriate services to be provided in the earlier grades. The Student also takes exception to the School's argument that identifying his learning disability was sufficient because dyslexia is an included category within this "nomenclature." The Student argues that LD is a general descriptor, and that a more specific identification of a student's LD is necessary in order to program appropriately, given that learning disabilities can be manifested in a variety of ways.

The evaluation requested in April of 1999 was unduly delayed. The Student made little or no progress in school, despite a reading goal in each of his IEPs. He was not receiving services from an appropriately licensed person. In addition, the Student argues, the services provided by the MiMH and LD teachers were based on two different approaches (Flour Block and Herman), which likely contributed to the Student's lack of progress as well as his adjustment difficulties. The IHO also correctly interpreted the report of the speech/language pathologist regarding the Student's need for LD services. The School's failure to provide increased LD services in favor of more MiMH services, the Student argues, was more a matter of administrative convenience than individual need. The Student also maintains the IHO was correct in her determination the School's continuum of placement options involved the MiMH placement or general education, as the LD Resource Room was not an actual classroom and did have students coming and going throughout the day. A full-time placement in the LD Resource Room would not be appropriate.

The Student maintains that the name-calling, whether based on his continuing placement in the MiMH classroom or his race, is not the real issue. The "real issue," the Student asserts, is the inappropriate MiMH placement and its effect on his self-esteem. The MiMH teacher acknowledged that race is an issue, but School personnel have failed to consider the advice of the private psychologist that the minority status of the Student is a factor.

The IHO correctly found the Student would frequently "shut down." The MiMH teacher, with whom the Student spent most of his instructional day, reported numerous instances. The Student concedes there were few such instances with the LD teacher. The Student also urges the BSEA not to disturb the IHO's findings regarding the LD teacher's expectations that the Student would apply what he learned in her class to all other situations. To reverse the IHO, the Student argues, would be to re-determine the credibility demeanor assessment made by the IHO, which the BSEA is not in a position to do.

The Student also argues the IHO did not commit reversible error in relying upon guidelines when assessing the Student's need for ESY services. The guidelines were developed by the State Educational Agency (SEA) and constitute the "standards" of the SEA. 511 IAC 7-17-35(2). Notwithstanding, the School had never considered ESY services for the Student, even though his reading difficulties were pronounced. ESY was not considered for the 2003 summer, even though there was testimony that the Student could take as much as six weeks to recover reading and language skills after a summer break. His ability to read is "clearly an emerging skill." The School provided no

evidence of the Student's ability to sustain a level of ability through the summer, the results of one assessment notwithstanding.

Neither the School nor the Student dispute the fact the Student requires a program that is highly structured, systematic, sequential, multisensory, and integrated (Finding of Fact No. 35). The Student maintains the IHO correctly identified the private school as offering a program with these elements, even though the Student's initial behavioral problems at the private school resulted in suspension. His behavioral problems, the Student represents, were the result of the School's failures to provide him a FAPE and do not reflect upon the appropriateness of the private school's educational program. The private school demonstrated more individual attention to the Student's needs (referral to a psychologist, provision of aide, use of adjusted schedule). The Student has demonstrated progress in the private school setting, both behaviorally and academically. His social needs are being met at the private school through its relationship with the private psychologist. In addition, the Student argues, credible evidence supports the IHO's determination that his behavioral problems occur only in the school setting.

The Student states that the IHO's Conclusions of Law should be sustained. The School cannot shift the blame to the grandparents for the failure to conduct the evaluation in a timely fashion. The School had an affirmative responsibility to investigate who was responsible for the Student's welfare.

The School failed to provide a FAPE, the Student argues, in its maintaining his educational placement in the MiMH classroom where his social skills and academics suffered. The Student also disputes the School's representation there is available a qualified person in the Orton-Gillingham method within the school system. The Student acknowledges there is a person knowledgeable but this person is not certified in this methodology.

The IHO correctly applied the Burlington analysis by finding the School did not provide a program that provided the Student with meaningful educational benefit. The Student also disagrees with the School's assessment that his ability to read will plateau. He maintains that he can learn, especially if the method is tailored to his learning style. The private school provides the Student with an appropriate education. Both prongs of the Burlington analysis are satisfied, justifying the IHO's orders of reimbursement and continuing placement. In addition, the School delayed the requested evaluation for a year and failed to recognize his dyslexia, nor did it recognize his need for assistive technology. The grandparents provided the School unequivocal notice of their intent to enroll the Student in the private school.

The Student also maintains the IHO correctly determined he is in need of ESY services. The IHO applied the correct standards. The School did not demonstrate the Student would not regress over the summer without continuing services. The Student's regression is not limited to academic concerns but includes emotional and behavioral areas as well. The regression-recoupment analysis is not the sole means for determining the need for ESY. There are other areas of concern that may have an impact on the need for ESY services.

The Student also questions the School's belated request to conduct a trial use of the FM system. The School was aware of the Student's central auditory processing difficulties prior to the hearing but presented no evidence to suggest a trial should be conducted. The Student's witness testified to the need for such assistive technology.

REVIEW BY THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The Board of Special Education Appeals (BSEA) convened on July 1, 2003, in the State House Offices of the Indiana Department of Education. All three members were present.[6] The record had been reviewed in its entirety, as well as the School's Petition for Review and the Student's Response thereto. In consideration of the arguments of the parties and the record as a whole, as well as the standard for administrative review of an IHO's written decision, the following Combined Findings of Fact and Conclusions of Law are determined.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

[6] BSEA member Richard Therrien, in the course of reviewing the record in this matter, noted that his son-in-law attended one of the Case Conference Committees involving the Student herein. Mr. Therrien was unaware of his son-in-law's involvement. He has not had occasion to discuss this matter with his son-in-law, and his son-in-law's involvement was brief and not at issue in the hearing. The son-in-law did not testify or otherwise participate in the hearing. The representatives of the parties were notified of this by telephone and by facsimile transmission on June 27, 2003, and offered the opportunity to request Mr. Therrien recuse himself from participating in this review. The Student, by counsel, did not object or request recusal, electing instead to defer to the BSEA. The School, by counsel, had no objection. After consideration, Mr. Therrien determined that the involvement of his son-in-law was minimal, remote and not in controversy. Accordingly, in the absence of any request for recusal from the parties, he does not believe he has a personal or professional conflict that would preclude him from participating in this review.

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The School timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. Although the School objects to its belief the IHO found racial animus as a factor, a review of the record and the IHO's decision does not support this belief. The IHO at Finding of Fact No. 41 stated that it was the belief of the Student's family that he had been singled out in a negative fashion. This is an accurate statement. The IHO did not make a finding, nor will the BSEA, that School personnel acted in such a fashion. The record does not support such a finding or conclusion.

3. The IHO was authorized to issue the protective order, pursuant to I.C. 4-21.5-3-22(a)(3). The protective order applies only to the administrative proceedings and the record. It does not apply to the educational records maintained by the School with respect to the Student. These records will be governed by Article 7 and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, 34 CFR Part 99, as incorporated in the Individuals with Disabilities Education Act through 20 U.S.C. § 1417(c).

4. The School takes exception to the IHO's finding (Finding of Fact No. 1) that the Student has "normal intelligence." This is understandably a critical element. However, the School's arguments attempt to raise a new issue on administrative review that was not raised below, *i.e.*, the identification of the Student's disability or disabling conditions. 511 IAC 7-30-4(g) provides that "Only matters raised in the initial due process hearing may be raised in a petition for review." There was no issue raised as to the proper identification of the Student as having a specific learning disability, which presumes intelligence at near or normal ranges. Although the BSEA has reservations regarding the level of intellectual functioning of the Student, the parties

did not dispute his exceptionality area and the standards for review do not permit the BSEA to disturb this finding.

5. The IHO's finding that dyslexia was not "specifically addressed" during the reevaluation of the Student in April of 2000 is an accurate statement and is supported by the record (Finding of Fact No. 11). The issue was generally addressed but was not specifically addressed.

6. The record indicates that the IHO in Finding of Fact No. 13 meant to refer to the 1999-2000 school year. This Finding is amended to reflect the 1999-2000 school year but is in all other respects sustained.

7. The record indicates the IHO in Finding of Fact No. 15 should have indicated the grandmother obtained the independent evaluation in October of 2001. The Finding is amended to reflect this date but is in all other respects sustained as written.

8. The IHO's Finding of Fact No. 16 is supported by the record and is sustained.

9. The IHO's Finding of Fact No. 19 is incorrect insofar as it indicates the CCC did not discuss whether more intensive LD services for the Student might be appropriate. The CCC did discuss whether more intensive LD services for the Student might be appropriate to address his learning disabilities and severe reading deficits. This Finding is amended to reflect this, but is in all other respects sustained.

10. The IHO's Finding of Fact No. 21 contains the following: "An all-day Resource Room placement would not meet the Student's need for structure and continuity, would further isolate him from other children in the school, and would impede his social development." At first blush, this appears to be a Conclusion of Law inserted into a Finding of Fact, a frequent occurrence in this written decision. However, the record indicates that this sentence reflects concerns expressed by the School. Accordingly, this sentence is revised to indicate the School expressed such concerns regarding an all-day placement in the LD Resource Room. This would be an accurate statement based on the record.

11. In Finding of Fact No. 25, it is not entirely accurate that the Student's grandmother signed permission for the MiMH class "because the only other alternative offered or available was that of a general education classroom." The record indicates the general education class was "the

only other *viable* alternative offered or available," but it was not the only alternative offered. The Finding of Fact is amended to reflect this change but is in all other respects sustained.

12. The grandmother believes the Student's placement in the MiMH classroom resulted in the name-calling by his peers without disabilities, and that this resulted in low self-esteem and lack of confidence. However, there is no objective evidence the name-calling occurred or that School personnel had any direct knowledge of same. Finding of Fact No. 27 is amended to reflect that this is a subjective impression of the grandmother. As such, its relevancy is doubtful but will remain as amended.

13. As in Finding of Fact No. 27, *supra*, Finding of Fact No. 29 reads as a Conclusion of Law when in fact it is a subjective impression of the Student's grandmother. There is no objective proof in the record that it was unreasonable to employ two reading strategies. The Finding of Fact No. 29 is amended to indicate this is the grandmother's impression. As such, the Finding's relevancy is doubtful but will remain as amended.

14. There is no support in the record for the first part of Finding of Fact No. 30. Accordingly, the words "The Student had virtually no confidence in his ability to do school work even though" are deleted so that the first sentence will now read: "The MiMH and LD teachers believed he could successfully do the work that was presented to him." The remainder of the Finding of Fact No. 30 remains as written.

15. In Finding of Fact No. 31, the last sentence ("It was not reasonable for the teacher to expect such initiative from the Student") is stricken. There is no support for this Conclusion; notwithstanding, it should not appear as a Finding of Fact.

16. Finding of Fact No. 33 and Conclusion of Law No. 5 both address ESY services. The IHO apparently relied upon an unofficial document. The BSEA cannot review the document because the IHO did not include it with the official record as she should have. The BSEA will accept the School's characterization that this document is an unofficial document with no legal effect. Although the IHO may have erred in her reliance on this document and compounded it by not including it in the record, the IHO could have taken official notice of the requirements of 511 IAC 7-17-35, 7-27-6(a)(8), and 7-21-3(b), as well as 34 CFR § 300.309. In addition, the federal comment and analysis for § 300.309 supports the statements of the IHO. Although severe regression/recoupment analysis is the primary tool for assessing the need for ESY

services, it is not the only one. The federal regulation is also based upon other factors, especially those arising from case law, notably Johnson v. Bixby (OK) Independent School District No. 4, 921 F.2d 1022, 1027-28 (10th Cir. 1990), rejecting regression/recoupment as the only measure to be employed for this purpose. Other factors could include the degree of impairment, the ability of the child's parents to provide the educational structure at home, the child's rate of progress, his behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with peers without disabilities, the areas of the child's curriculum that need continuous attention, and the child's vocational needs. Predictive data based upon the opinion of professionals in consultation with the child's parents, as well as circumstantial considerations of the child's individual situation at home and in his neighborhood and community should also be considered where warranted. See Vol. 64, No. 48 **Federal Register** at p. 12576 (March 12, 1999). Notwithstanding the IHO's apparent reliance upon an unofficial document, her statements are supported by existing requirements of the law and the record, and, accordingly, will be sustained.

17. The last sentence in Finding of Fact No. 34 ("Services at that level would be appropriate for summer tutoring for the Student") is deleted because it is a Conclusion of Law and is moved to Conclusion of Law No. 9 where it should appear.

18. The last sentence in Finding of Fact No. 36 ("The private school is an appropriate placement for the Student") is deleted because it is a Conclusion of Law and is moved to Conclusion of Law No. 9 where it should appear.

19. Finding of Fact No. 37 is actually the impression of the private psychologist rather than a Finding of Fact by the IHO. Accordingly, this Finding is amended to indicate the private psychologist reported the Student's progress, increased confidence and interest, and educational benefit from the private school program.

20. The last sentence in Finding of Fact No. 38 ("The Student's need for continuity makes an all-day Resource Room placement in 7th Grade inappropriate to meet his needs") is deleted because it is a legal conclusion and not a finding of fact.

21. The last sentence in Finding of Fact No. 39 ("The uncertainties of the program the School has offered make it an inappropriate option to meet the Student's needs for structure, continuity,

and a comprehensive, integrated approach in his educational program") is deleted because it is a legal conclusion and not a finding of fact.

22. Finding of Fact No. 40 is amended by deleting the second sentence ("The behavior problems have expressed themselves only at school and are due in large part to his severe auditory processing deficits and chronic frustration with his educational program") because the record does not support such a finding. The last sentence ("The Student is in need of continued psychological counseling to deal with the emotional/behavioral issues that have continued to negatively impact his special education instruction") is deleted as it is a legal conclusion and not a finding of fact.

23. In Finding of Fact No. 41, the second sentence is amended to reflect that it is the family's belief the Student needs another person "of color" to assist him in resolving behavioral issues. There is no support for a naked finding otherwise. This was a subjective impression of the family with no collateral support. The last sentence ("He is an appropriate professional to meet the Student's needs for psychological services") is a legal conclusion and not a finding. Accordingly, this sentence is deleted.

24. The IHO's Conclusion of Law No. 1 is sustained as written. The School recognized the grandmother as the legal guardian well in advance of the April, 1999, request for an evaluation to address the Student's suspected dyslexia. The School, instead, forwarded the form for written permission to the biological father. The School conducted no follow-up, even though the parties convened a CCC meeting in September of 1999. The School had an affirmative duty that it cannot delegate to the biological father. Its failure to conduct the evaluation in a timely fashion may have been reasonable given the confusion of the address change, but it is not reasonable in light of the subsequent events and lack of follow-up. It knew the grandmother was the legal guardian and had been treating her as such for more than three years prior to her request in April of 1999 for the evaluation.

25. The record supports the IHO's Conclusion of Law No. 2.

26. The record supports the IHO's Conclusion of Law No. 3 except for the statement "It was unreasonable for the School to expect the Student, who has had a long history of being overwhelmed, discouraged, and frustrated by his school experiences, to adjust to the teaching methods and materials of different teachers and take the initiative to apply the learning strategies

presented in his brief time in th LD Recourse Room to the rest of his schoolwork." There is no support in the record for this Conclusion. It is therefore deleted.

27. Although the BSEA has reservations regarding the level of intellectual functioning of the Student, the issue was not raised in the hearing below. Accordingly, the BSEA is obliged to accept that the Student has a specific learning disability and that, by application, has near or normal intelligence. The IHO's Conclusion of Law No. 4 must be sustained as it is supported by the record and the uncontested inferences that must be drawn from the presentations of the parties, including the framing of the issues in dispute.

28. The IHO's Conclusion of Law No. 5 is addressed *supra* at Combined Finding of Fact and Conclusion of Law No. 16.

29. As noted in Combined Finding of Fact and Conclusion of Law No. 27, the BSEA must accept the record as it is. There is support for the IHO's Conclusion of Law No. 6.

30. The IHO's Conclusions of Law Nos. 7 and 8 are sustained as written.

31. The IHO's Conclusion of Law No. 9 is amended by adding the deleted sentences from Findings of Fact Nos. 34 and 36. See Combined Findings of Fact and Conclusions of Law Nos. 17 and 18 *supra*.

32. The IHO's Conclusion of Law No. 10 is sustained as written. The BSEA will not order a "trial" period because it is unnecessary. Should the FM system not prove to be effective or it is an unnecessary service, the Student's CCC would convene to discuss this and adjust the IEP accordingly.

33. Because of the foregoing and in consideration of the standards for administrative review, the Orders of the IHO are sustained as written.

ORDERS

Based on the Foregoing, the Board of Special Education Appeals now issues the following Orders by unanimous agreement:

1. The Orders of the IHO are sustained as written.

2. Any other issue or assertion not otherwise addressed above is deemed overruled or denied, as appropriate.

DATE: July 1, 2003 /s/ Cynthia Dewes, Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from the receipt of this decision to seek review in a civil court with jurisdiction, as provided by 511 IAC 7-30-4(n) and I.C. 4-21.5-5-5.