BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of B.W.	)	
And	)	
MSD of Lawrence Township	)	**Article 7 Hearing No. 1322.02**
	)	
Appeal from a Decision by	)	
Curtis L. Leggett, Ph.D.	)	
Independent Hearing Officer	)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

It should be noted from the outset that any references to the "Student" or the "Student's representative" include the Parent or Parents of the Student. It should also be noted that MSD of Lawrence Township will be referred to as the "School."

On December 3, 2002, the Student filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed on December 4, 2002. A Prehearing teleconference was held on December 17, 2002. At the Prehearing, the issues, date and location of the Hearing were agreed upon. The date for rendering the final decision was originally set as January 16, 2003. A request was received from the School for an extension of the decision date until January 28, 2003. With the agreement of counsel for the Student, this extension was granted. On January 27, 2003, a request was received from the School with the agreement of the Student to hold the Hearing on March 13 and 14, 2003, with the final decision to be issued on or before March 31, 2003. The IHO granted this extension request. A Notice of Hearing, dated March 1, 2003, was mailed to the parties by the IHO which indicated that the hearing would be held on March 13 and 14, 2003.

The due process hearing was held on March 13, 2003. The parties defined the issues for determination as follows:

1. Could the School implement an appropriate education program to meet the Student's educational needs?

2. Does the School bear any responsibility for reimbursement or funding of this Student's

placement in a private educational setting?

The Written Decision of the IHO

The IHO's written decision was issued on March 29, 2003. The IHO determined twenty-one (21) Findings of Fact. The IHO's Findings of Fact are reproduced, in part, as follows.

> The student is a male, 13 years and 10 months, and, is the adopted son of the petitioners. The student first experienced emotional problems in school in the early grades (one through four), but, that the problems became critical during the fifth grade period. The student was hospitalized for psychological reasons during this period. Following this hospitalization and evaluation period, the student was declared eligible for Special Educational programming services. The student was enrolled in a non-traditional school program for a period of months during this later fifth grade year. This program was judged to [be] unsuccessful in structuring and/or controlling the student. The student was involved in a serious emotional incident in the home and was placed in an intensive day treatment program. He was subsequently re-enrolled in a non-traditional school program. This program was again cited as not sufficient to meet the student's needs. Following a case conference recommendation, an application for residential placement was made with the Indiana Department of Education. That application was approved and a full time residential/educational placement was made at an out of state location. The student continued his residency at this location for a period of two years. Issues for the student during this period included, but were not limited to: self control, anger management, personal responsibility, interpersonal relationships, and family dynamics. During this period the student's academic progress was also directed by the school. Up to and including the time at the private residential placement, the student had (at various times) been labeled as Attention Deficient Hyperactive Disordered, Oppositional Defiant, Dysthymic Disorder, and Bi Polar Disorder. This lat[t]er is the current diagnosis.
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> During the second half of year two of the student's residency at the private school, discussions began as to the possibility of returning him to the Indiana area. The main focus of the discussion was around the perceived need to have the student bond/rebond with his parents. The final decision to have the student return to the Indiana area evolved over the months of February, March, and April of his second year of residency (2002). A final plan was developed in case conferences in March and April. At that time, the agreed upon plan was for the student to continue his enrollment in the private residential school until the end of their summer term in August of 2002, at which time he would return to Indiana. A decision was made by the staff of the private school to discharge the student as of May of 2002 rather than continue his enrollment until the earlier agreed upon August date. The discharge decision was based on the fact that the student was at a critical time for rejoining the family unit and because the private school believed that the relationship between the school and the student was no longer offering a positive partnership between them and the student. During the April, 2002 period, the

parents (and the student) visited a number of Indiana school programs in an effort to become aware of the possibilities available for his return to Indiana for his education. The programs included both public and private educational programs.

The testimony and evidence record shows some ambiguity as to the full nature of the student's projected return to Indiana. Various documents and testimony cite a range of possibilities from return to his family residence, return to a different institutional residence in Indiana, or assignment to foster placement. The one constant report was that the placement needed to be closer to the parents and to allow for greater inclusion of the student in the life of the family. The family made the decision that the student would return to full time residency with the nuclear family. The final dismissal from the private residential school was dated May 30, 2002.

A meeting was held between the parents and public school staff in June of 2002 in an attempt to deal with the issue(s) of the student's return to the community. Some evidence and testimony characterized this meeting as a "case conference" and other evidence and testimony characterized this meeting as just a meeting between parties. In either case, no Individual Education Program was developed at this meeting. During the June "*meeting*" the parents expressed their belief that the local public school could not meet the needs of the student and requested that he be placed in a more intensive private program and that the public school agency pay the associated fees/costs related to his enrollment. That request was subsequently refused by the school agency.

In July 2002, the parents sent a written communication to the local school agency citing that they intended to enroll the student in a private school program and asked that the local school agency pay the associated fees for the student's participation. That request was refused. On August 13, 2002, a case conference was held to establish an Individual Education Program for the student. At that time the only Individual Education Program for the student on record was the one designed to continue his enrollment in the private residential school (out of state) through the August period. That Individual Education Program was no longer applicable following the student's discharge from the private school in May of 2002. That meeting did culminate in the development of an Individual Education Program for the student. Following the case conference meeting in August and the development of an Individual Education Program at that meeting, the parent noted their disagreement with the Individual Education Program and stated so in writing as part of the case conference documents. Testimony cited that they did not believe the plan provided the environment, structure, or resources needed to meet their son's needs. They specifically noted the absence of a 'behavior intervention plan' directed at the documented social and emotional needs of the student. No written behavior management plan was a part of the Individual Education Program developed for the student at the August case conference. It was the intent of the school staff to develop one at a later time. The student has been enrolled in a local community private school program for the current academic year. His progress and performance has been appropriate during this period when compared to his

needs.

From these Findings of Fact, the IHO reached the following Conclusions of Law, which are reproduced verbatim.

No. 1:
Testimony and evidence available at the hearing provide clear justification for the continuing eligibility of the student for Special Education services under 511 IAC 7-26-6 Emotional disability. The student continues to demonstrate significant social and emotional needs even following his two years of residential placement. Much data was available which noted that the student's transition for such a restrictive setting back to the community would require notable resources and planning to avoid either exacerbating the current condition(s) of the student or potentially negating his past gains.

No. 2:
The local school agency was clearly aware that the student was returning to the local area and would be in need of services. They also were clearly aware of the past and current needs of the student in the area of social and emotional programming and support. This awareness should have called for the implementation of planning for the development of a behavioral intervention plan for inclusion into his Individual Education Program. The local educational agency did not meet its obligations under 511 IAC 7-27-4,(18)[1] in a timely manner.

No. 3:
The Individual Education Program developed at the August 13, 2002, case conference was deficient in varying degrees in each of the following areas: 511 IAC 7-27-6 Individual Education Program, (2,c), (3), (8), and (12).[2]

No. 4:
The parents have exercisable rights under 511 IAC 7-19-2(c), dealing with 'reimbursement for parent's unilateral enrollment of student in private schools or facilities when the public agency's provision of a free appropriate public education is in dispute'. No clear reason can be found for denying reimbursement as noted in 511 IAC 7-19-2(d).

Based on the foregoing, the IHO issued two (2) Orders, which are reproduced below:

Order No. 1:

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[1]The correct citation is 511 IAC 7-27-4(a)(8).

[2]The correct citation is 511 IAC 7-27-6(a)(2)(C), (3), (8), and (12).

The local school agency is to undertake the reimbursement of the school related costs (tuition and fees) expended by the parents for the enrollment of the student in the private school program for the period starting with August 14, 2002, until such time as a free and appropriate special education program is developed (See 511 IAC 7-19-2).

Order No. 2:
The local school agency is to undertake the reimbursement of the transportation related costs expended by the parents for the participation of the student in the private school program for any participation days starting August 14, 2002, until such time as a free and appropriate special education program is developed (See 511 IAC 7-21-7)

The IHO provided all parties with the appropriate notice of their right to seek administrative review.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Petition for Review
On April 25, 2003, the School timely requested an extension of time to file the Petition for Review. The BSEA, by order dated April 25, 2003, granted an extension of time to May 28, 2003, to file the Petition for Review. The timelines for review and issuance of a written decision by the BSEA were also extended to and including June 28, 2003.

The School filed on May 28, 2003, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review is reproduced, in part, as follows:

> **A. The IHO erred in concluding that the School failed to develop a behavioral intervention plan.** In the Hearing Decision, the Independent Hearing Officer ("IHO") concluded that the "local educational agency did not meet its obligations under 511 IAC 7-27-4(a)(8) in a timely manner." 511 IAC 7-27-4(a)(8) provides:
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> > A case conference committee shall convene in the following circumstances: . . .To develop a plan for assessing functional behavior, or to review and modify an existing behavioral intervention plan, to address behavior for which disciplinary action was proposed or taken in accordance with 511 IAC 7-29-5 or IC 20-8.1-5.1, or both.
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> The evidence at the hearing established that the case conference committee *did* convene for that purpose on more than one occasion, including the last case conference held on August 13, 2002. The Individualized Education Program ("IEP") developed during that case conference makes numerous references to behavior goals, issues and needs. With respect to a specific Functional Behavioral Assessment and Behavior Intervention Plan, the IEP states, "Hold on development until he arrives and participates in that process."
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> The evidence established that the student was not included or present at any of the conferences. In the opinion of the educators and School witnesses, it would have been fruitless

to attempt to design a behavior plan for an eighth grade student without observing him and perhaps including him in the process of implementing a behavior strategy. . .The Hearing Decision places an unrealistic and unnecessary burden upon schools to attach a generic "behavior plan" to an IEP which may or may not be appropriate for the individual student simply to satisfy a requirement which is not specifically spelled out in the regulation at issue. The regulation only requires a plan for *assessing* functional behavior. The case conference committee's actions and plans to wait until the student was in school to more specifically address behavior issues was appropriate and could have (if given the opportunity) resulted in a more workable, individualized strategy for the student.

The lack of a formalized behavior plan is less significant in light of the record which indicated few, if any, school-related behavior problems while the student was in private placement in Colorado during the previous two school years with no formalized behavior plan in place. The reports from the Colorado placement reveal that the only school-related issue was a concern about classroom size. Instead, the Colorado reports focused on the student's home situation and recommended a foster home or residential facility. The School would have had no reason to address an immediate need for a behavior plan when behavior at school had not been an issue in the student's previous placement. Academy Plus, Brian's current private school placement, did not consider Brian to be a "severe" case with respect to behavior, based upon the reports from the Colorado private placement.

Appropriate supports were in place at the proposed placement (Craig Middle School) to address behavioral issues in the context of providing a free appropriate public education. . .the evidence demonstrated that there would be two (2) ED teachers with a caseload of thirteen (13) total students supporting the student. Full-time classroom assistants were there to make sure that supports followed students into inclusionary settings. The student was scheduled to spend part of his day in the ED classroom and part of his day in classes with a general education teacher for instruction with the full-time support from a special education teacher for the four (4) to six (6) special education students in the class. . .

While perhaps not in the formalized format apparently required by the IHO, the August 13, 2002 IEP did contain immediate behavior supports for the student listed in the Adaptions section on page seven (7). . .

For all of the foregoing reasons, the IHO's Conclusion of Law No. 2 was arbitrary or capricious, an abuse of discretion, contrary to the enumerated regulation, and unsupported by substantial evidence.

B. The IHO erred in concluding that the 8/13/02 IEP was deficient. In the Hearing Decision, the IHO concluded that the 8/13/02 IEP was deficient in varying degrees in each of the following areas: 511 IAC 7-27-6(a)(2)(C), (3), (8), and (12). The referenced regulation describes the various components that must be contained in an IEP. First of all, the technical sufficiency of the IEP was not the hearable issue in this matter. The issue put before the IHO was: "Can the school implement an appropriate program to meet the child's educational and emotional needs?" More succinctly, the issue in this case was whether or not the School could

provide a free appropriate public education (FAPE).

With respect to any alleged deficiencies in the IEP itself, the evidence at the hearing established that the parents made no objection during the preparation of the IEP during the case conference and merely refused to sign it. . .

The parents clearly made a unilateral decision in this case to enroll the student in private school (as they had previously done in sending him to the Colorado placement). . . While the parents have every right to enroll the student wherever they choose, the School and its taxpayers do not have to bear the costs of that decision so long as the School can provide FAPE (511 IAC 7-19-2(c)(1).

. . .The School, however, contends that the IEP was sufficient for the reason that the regulations do not require the degree of specificity in an IEP required in the Hearing Decision. . . To the extent there were deficiencies in the IEP, the school cannot be solely to blame. The school was attempting to design a program for a student who had been out of the state in a private placement for two years. There was little, if any, input from the parents at the final case conference. In spite of those hurdles, the school made every commitment to adapt the IEP if it was not successful. Unfortunately, the school was never given the opportunity to implement the IEP. (Tr. 165).

For all of the foregoing reasons, the 8/13/02 IEP was not deficient, and the IHO's decision regarding the IEP was arbitrary or capricious, an abuse of discretion, beyond the scope of the issues raised by the parents, and unsupported by substantial evidence.

C. The IHO erred in ordering reimbursement of private school tuition. The Hearing Decision contained a specific order requiring the School to reimburse the parents for their school related costs for the enrollment of the student in Academy + private school. That decision could have only been reached by finding that the School had failed to offer FAPE (511 IAC 7-19-2(c)(1)). . .In this case, the School's witnesses, drawing on their vast experience and education, made certain recommendations and testified that they could provide the student with educational benefit. The IHO's decision was, therefore, contrary to law, arbitrary or capricious, an abuse of discretion, and/or unsupported by substantial evidence.

The Response to the Petition for Review

On May 29, 2003, the Student timely requested an extension of time to prepare and file a Response to the Petition for Review. The BSEA, by an order dated May 29, 2003, granted an extension of time to June 16, 2003, to file the Response to the Petition for Review. The timelines for review and issuance of a written decision by the BSEA were also extended to and including July 16, 2003. A copy of the record was prepared and provided to each member of the BSEA on June 2, 2003. The Student filed on June 17, 2003, its Response to the Petition for Review. The Response to the Petition for Review is reproduced, in part, as follows:

In Issue A of MSD Lawrence Township's petition, the School alleges that the IHO erred in

concluding that the School failed to develop a behavior intervention plan for the Student in a timely manner. As the August 13, 2002 IEP states, the behavior plan would be put "on hold" until the Student arrived for the 2002-03 school year. Issue A also alleges that the Colorado placement did not have such a plan in place, the supports offered by the School were appropriate, and also suggests that the plan could not be written since the Student was not present at the case conferences in order to provide input for the construction of said plan.

At no time was the School denied records, information, or access to the teachers or therapists at Forest Heights Lodge thus having access to integral information needed to formulate a behavior plan. For the School to assert that they could not write a behavior plan without the Student's input is blatantly absurd. While the Student's suggestions may be of some value, they certainly do not dictate the construction of the plan. . .

Perhaps the most important and disturbing issue was the School's willingness to place the Student in a regular school building without constructing a transition plan, or behavior plan in order to support the Student. The Student had been placed in a highly structured residential placement, and to place the Student in the MSD Lawrence Township without regard to a transitional/behavioral support structure may well have resulted in serious regression. This was noted on the part of the School as early as the March 14, 2002 case conference. (Page 6)

The School also attests that Forest Heights Lodge had no behavior plan in place for the Student. What the School fails to keep in mind is that Forest Heights is, in itself, a highly specialized behavioral and psychiatric facility which is entirely programmed for children with severe disorders. It is not the same caliber as a public school which due to its nature, must alter its environment in order to deal with children such as the student in question.

The School also blatantly attempts to mislead the Board by stating that the Colorado placement was a unilateral placement by the parents. The placement was facilitated by the Special Education Director's predecessor, reviewed and funded by the Indiana Department of Education, and the contract was signed by Suellen Reed, Glenn Lawrence, and Stephen Carter.

The School alleges in Issue B that the Parents had in some way "neglected" to work with the School in developing the IEP. Contrary to this allegation, the exhibits show that the Parents were in constant communication with the School in order to develop a program for the Student. When the Parents disagreed with the program options presented to them, the School then blamed the inability to program on the fact the Student had been out of the district for two years. The School is ultimately responsible for the development of the IEP, and while parents certainly have a role in the process, parents are not professional educators with specific knowledge of educational planning, or the ability to modify the educational environment. The School clearly wants to abdicate its responsibility by blaming other factors for its own

negligence.

Finally, Issue C claims that the IHO erred in ordering reimbursement for the private school tuition. The Parents followed the construct of the applicable statutes in notifying the School of their decision to place the Student in a private setting. The Parents also have the legal right to disagree with the School, and seek reimbursement. . .Nowhere in the IEP, nor in testimony can the School show that the proposed program conferred educational benefit. To the contrary, the lack of programming would have possibly conferred harm to the child, and eradicated two years of intensive educational, behavioral, and psychological progress on the part of the Student. . .

The School further alleges that the Parent's disagreement with the School concerns "precise methodology." To the contrary, methodology was not an issue in the hearing. The Parents never questioned methodology, but were concerned with the school environment, the lack of appropriate support services offered, and the lack of contingency planning which would enable the Student to have a smooth transition from the structured residential setting into a more normalized setting with non-handicapped peers.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated June 11, 2003. Review was set for June 24, 2003, in Room 225 State House, Indianapolis. All three members of the BSEA appeared on June 24, 2003. After review of the record as a whole and in consideration of the Petition for Review and the Response to the Petition for Review, the BSEA makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The School timely appeals from the decision of the IHO. The Student filed his response. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-30-4(j).

2. Neither party asserts that the procedure employed by the IHO denied due process. Accordingly, the parties were provided their respective due process rights by the IHO in the conduct of this matter.

3. The IHO correctly concluded that the School failed to develop a behavioral intervention plan as required by 511 IAC 7-27-4(a)(8). 511 IAC 7-27-4(a)(8) provides:

> A case conference committee shall convene in the following circumstances: . . .To develop a plan for assessing functional behavior, or to review and modify an existing behavioral intervention plan, to address behavior for which disciplinary action was

proposed or taken in accordance with 511 IAC 7-29-5 or IC 20-8.1-5.1, or both.

4. The IHO correctly concluded that the 8/13/02 IEP was deficient in the areas required by 511 IAC 7-27-6(a)(2)(C), 3, 8, and 12. The IEP did not contain a behavioral intervention plan or a transitional plan taking the Student from a highly restrictive environment to a less restrictive environment.

5. The IHO correctly ordered reimbursement of private school tuition. Since the School did not provide FAPE, as required by 511 IAC 7-19-2(c), in the form of a correctly formulated IEP, the School is required to reimburse the parent for the Student's placement.

6. The definition of Issue #1 was vague. Issue #1 used the word "could," but the IHO's decision and the Petition for Review were based on "Can the school implement an appropriate program to meet the child's educational and emotional needs?"

7. 511 IAC 7-30-4(d)(3) requires that any Petition for Review filed with the BSEA be "specific as to the reasons for the exceptions to the independent hearing officer's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken[.]" The School's Petition for Review is deficient in this regard, except for identifying Conclusion of Law #2.

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals now issues the following Orders:

1. The decision of the Independent Hearing Officer is hereby affirmed.

2. Any additional issues or motions not specifically addressed herein are deemed denied or overruled, as appropriate.

Date: June 24, 2003

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

APPEAL STATEMENT

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