

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of M.P.)	
And)	
Noblesville Community School Corp., and)	Article 7 Hearing No. 1342.03
Hamilton-Boone-Madison Special Services)	
Cooperative)	
)	
Appeal from a Decision by)	
Thomas J. Huberty, Ph.D.)	
Independent Hearing Officer)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

M.P. (hereinafter, “Student”) is a thirteen-year-old student. Noblesville Community School Corporation and Hamilton-Boone-Madison Special Services Cooperative will be referred to as the “School.”

Procedural History

The Student filed a request for a due process hearing dated April 2, 2003, which was received by the Indiana Department of Education, Division of Exceptional Learners, on April 3, 2003. The Independent Hearing Officer (IHO) was appointed on April 3, 2003, and assumed jurisdiction over all matters. The IHO contacted counsel for both parties to arrange a prehearing conference, which was convened on May 23, 2003, due to significant difficulties with arranging the parties’ schedules. At the joint request of both parties, an Extension of Time until June 30, 2003, was granted. April 15, 2003, counsel for the School issued a request for the Student to complete interrogatories and production of documents for purposes of discovery. On April 22, 2003, counsel for the Student replied to the School’s counsel, stating that she would not respond to the request, because it was not required under law. The School’s counsel issued a second request to the IHO for the Student to complete the interrogatories and produce documents, and the IHO granted the motion on May 16, 2003. During a second prehearing conference on May 23, 2003, the Student agreed to complete the request within thirty (30) days, which was agreeable to the School. An extension of time was requested verbally by both parties, with hearing dates of July 16 and 17, and August 13, 2003 being established. The extension of time was granted to and including September 8, 2003 in the prehearing order dated May 28, 2003. Two subpoenas requiring testimony of two school employees were issued, and the witnesses responded. Because the conclusion of the hearing and rendering of the decision would occur after the beginning of the new school year, the parties agreed that the Student would receive homebound services.

The due process hearing was held on July 16 and 17, and August 13, 2003.

The fifteen (15) issues determined for the hearing were as follows:

1. Has the School in the past provided and is currently providing a free appropriate public education?
2. Did the School provide appropriate Extended School Year services from 1998-2002?
3. Is the proposed Extended School Year program for 2003-04 appropriate?
4. Did the School complete a timely and appropriate functional behavior assessment?
5. Did the School develop and implement an appropriate intervention plan?
6. Has the School developed and implemented appropriate Individualized Education Plans for school years from 1997-1998 through 2002-2003?
7. Is the proposed Individualized Education Plan for 2003-2004 appropriate?
8. Have teachers, staff, administrators, and parents properly been trained in the areas of the Student's needs and disabilities?
9. Has the School appropriately shared information with the family?
10. Has the School violated confidentiality by disclosing information without parental consent?
11.
 - (a) Did the School appropriately evaluate the Student?
 - (b) If not, are the parents entitled to reimbursement of their expenses for an independent educational evaluation?
12. Did the School fail to share information with the parents within five days before a case conference?
13. Are the parents entitled to reimbursement for transportation for the Student?
14. Is the Student entitled to compensatory educational services?
15. Should the Student be placed in a private, non-public school at public expense?

The Written Decision of the IHO

The IHO's written decision was issued on September 6, 2003. The IHO' written decision is reproduced, in part, as follows:

The hearing was open to the public and commenced at approximately 8:30 a.m. on July 16, 2003. A prehearing conference was convened to address exhibits and procedural matters. Respondents objected to Issue #11(b), asserting that the request for reimbursement for a 1997 educational evaluation was too dated. The Petitioner agreed with the objection and the issue was deleted from consideration. Respondents also objected to litigating issues that referred to past IEPs, asserting that they were agreed to by the parents and that they should not be addressed in this hearing. After much discussion, the IHO ruled that the issues could be addressed in testimony and evidence with regard to implementation of the IEPs, but the content should not be pursued. Therefore, content of former IEPs was not considered, although evidence and testimony about implementation were permitted. During the course of testimony, the following exhibits were added:

Petitioner:	P11:	Transcript of Petitioner's Copy of audiotape of Case Conference held on March 26, 2003
Respondents:	R8:	One (1) Page from Student's assignment book
	R9:	Resume, Training History, and Teacher's License of Student's former teacher (5 pages)
	R10:	Pages from Student's assignment book and various class assignment pages, etc. (140 pages)
	R11:	Transcript of Respondents' copy of audiotape of Case Conference held on March 26, 2003
	R12:	Respondents' copy of audiotape of Case Conference held on March 26, 2003

Respondents' Exhibit 12 was forwarded to the IHO after the hearing was completed with agreement of the Petitioner. The parties asked the IHO to listen to both copies of the tape, because it was stated that there were some differences between them in auditory quality. The IHO listened to both copies and compared them to the transcripts in the exhibits. Although there were some differences between the tapes and the transcripts and some inaudible discussion, the IHO concluded that the tapes and transcript were essentially equivalent and accurate records of the case conference and of sufficient content to consider them in the decision. Therefore, they were given due weight.

The Student did not attend any part of the hearing, and both parents attended all days and participated fully and testified. All witnesses were sworn by the IHO to oath to tell the truth and were instructed not to discuss their testimony with others or permit others to discuss their testimony with them until the hearing was completed. Representatives for both parties made opening statements, and the hearing was completed at approximately 6:30 p.m. on Wednesday, August 13, 2003. The parties agreed to submit closing briefs by August 22, the date established by the IHO. The contents of the briefs were considered fully by the IHO prior to

rendering the decision. The parties were given information about obtaining copies of the transcript, the appeal process, and that the decision would be forward to the parties' counsel via U. S. Certified Mail.

The IHO determined sixty-five (65) Findings of Fact. The IHO's Findings of Fact are reproduced as follows:

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, which give the IHO the authority to hear and rule upon all matters presented.
2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. It was determined that all due process procedures were in compliance with requirements of 511 IAC 7-30-3 and IC 4-21.5 *et seq.*
4. The Student is twelve (12) years of age and had completed the sixth grade in the school corporation at the time of the hearing and was determined eligible to begin seventh grade for the 2003-04 school year.
5. The Student was described by several witnesses as being intelligent, bright, verbal, and having interests in mathematics and science.
6. At the time of the hearing, the parties agreed that the Student required special education services. He had been most recently determined to be eligible for services as a student with an emotional disability (primary disability) and a learning disability (secondary disability).
7. The Student has had a history of behavioral difficulties since entering the school corporation in kindergarten in the 1996-97 school year. These problems have included high activity level, short attention span, speaking loudly, interrupting others, oppositional, distractibility, poor interactions with peers, difficulty following directions, and anxiety.
8. The Student was evaluated by a developmental pediatrician in February, 1996, who issued a psychiatric diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and medications were prescribed to address the behaviors.
9. The Student was re-evaluated by the same physician in March, 1997, at the age of five years, one month. The physician reported continued difficulties with attention and impulsiveness. Measures of picture vocabulary, visual-motor integration, drawing, and readiness skills indicated performance in the average range. Concerns about the Student having pervasive developmental disorder were noted.

10. The Student was identified as having a communication disorder by the School in kindergarten and services were provided that were consistent with his needs.

11. The Student was evaluated by the School in February, 1997. The evaluation included measure of cognitive ability and achievement, social and developmental history, teacher observations, student interview, a rating scale for behaviors associated with autism, and behavior ratings scales completed by the teacher and parents. Performance on the cognitive and achievement measures were in the average range, with some indications of mild to moderate symptoms of autism. Continued concern about the Student's behaviors in the school setting were noted, including attention problems, anxiety, social problems, and thought problems. Similar ratings were reported by the parents. Suggestions of signs of autism were noted.

12. In October of his first grade year (1997-98) he was determined to be eligible as a student with an emotional handicap¹ and was transferred to another elementary school in the school corporation, because the case conference committee concluded that the program there would be more appropriate to meet his needs. The parents testified that they were told the home school was understaffed and could not meet the Student's needs, which was denied by School witnesses.

13. In third grade, the Student was attacked by a boy on the school bus, although he was not seriously injured. The Student continued to think about it, however, to the extent that he did not want to ride the bus. Although the School offered to provide a special bus, the parents elected to transport him to school, which has continued to the present. There is no evidence that the School offered to reimburse the parents for their transportation costs.

14. The Student was attacked a few months later by the same student while they were alone together in a classroom. Prior to the second attack, the School assured the parents that the two boys would not be left alone together.

15. The Student was the victim of ongoing sexual abuse from about November, 2000, to January 2002, although neither the School nor the parents were aware of it. Evidence and testimony indicates that the Student's behavioral problems increased during that time and that his classroom performance decreased. He received private psychotherapy at parents' expense. The School offered about 15-20 minutes per week of counseling, but stipulated that it was to address social problems at school and not for significant emotional difficulties.

¹ Until June 21, 2000, Indiana Article 7 used the term "emotional handicap". At that time, the term was changed to "emotional disability", which is current as of the date of this decision (see 511 IAC 7-26-6). Therefore, both terms are used, and reflect the language used at that time. The eligibility criteria (511 IAC 7-26-6(a)) and requirements for identification (511 IAC 7-26-6(b)) are identical for both terms.

16. At about the same time, the Student was feeling stress and anxiety about personal matters in the home.

17. The Student also learned more details about his adoptive status, which appeared to be upsetting emotionally to him, because he talked about it at school, despite suggestions by his teacher not to do so.

18. The parents sought an independent educational evaluation from a private psychologist group, which was completed in November, 1997. The report indicates that the adoptive parents informed the evaluators that the Student had been adopted by them at three days of age and that he had no prenatal care until the seventh month of pregnancy. The parents had given the School information about the Student's adoptive status January, 1997, which were recorded on various School documents. The Student's teacher from first through fourth grade testified that he was told by the adoptive mother that his biological mother was the daughter of his adoptive parents, who, in fact, are his grandparents.

19. The results of the independent evaluation in 1997 indicated that the Student had average cognitive ability and that his achievement level also was in the average range. Difficulties with fine-motor skills were noted when using a pencil, as well as in the area of written expression, which was consistent with parents' reports of a history of fine motor difficulties.

20. Evidence and testimony established that the Student continues to have difficulty with writing and that his written work often is difficult to read or is illegible. School personnel and the Student's parents testified that if the Student writes more slowly and takes more time to do a task, legibility improves.

21. Behavior rating data from parents indicated that the Student showed difficulties with social interactions, attention, concentration, impulsiveness, appearing confused, some externalizing problems, poor reality contact, being resistant, poor social conformity, excessive dependency, poor reality contact, and feelings of persecution. His classroom teacher rated him as having difficulties with attention, concentration, impulsiveness, "fidgety", following directions, engaging in repetitive acts, strange behaviors and ideas, conduct problems, and hyperactivity. Behaviors consistent with pervasive developmental delay and autism spectrum were noted. Several recommendations were made, with the majority emphasizing the Student's social and behavioral difficulties.

22. The Student remained in the program for students with an emotional handicap as the primary disability and communication disability as a secondary disability.

23. In a written notification dated July, 29, 1999, the School informed the parents that the Student would be re-evaluated in the 1999-2000 academic year, as per requirements of Indiana Article 7. Parents had given their consent to the re-evaluation on March 28, 1999.

24. The School completed the re-evaluation in January, 2000. The evaluation included measures of cognitive ability and achievement, review of records, parent and teacher interviews, teacher input/observations, student interview, parent social/developmental history, and a behavioral/social/emotional assessment, the latter of which consisted of behavior rating scales to be completed by a teacher and the parents. The parents did not return the rating scale given to them.

25. In the January, 2000, evaluation, the Student's cognitive ability was significantly higher than the previous evaluation in 1997, indicating above average to superior cognitive ability. His achievement scores were in the low average range, with grade equivalents reported at early to middle second grade levels. Written expression was indicated as being below average, and was described as being "...generally incoherent, with performance placing him at a pre-first grade level". The school psychologist indicated that his achievement scores were below expectations, based on the results of the cognitive ability measure.

26. Evaluation of the Student's social and behavioral functioning indicated that he viewed himself as having few difficulties and was popular with his peers. Teacher ratings indicated significant difficulties with internalized emotional problems (withdrawal, somatic complaints, anxiety/depression), social problems, thought problems, and attention problems. Delinquent and aggressive behaviors were noted. The school psychologist recommended that the case conference committee consider adding learning disability as a secondary condition and address academic remediation and modifications in his IEP. She also expressed concern that the Student was not making progress in her report section "*Weaknesses*" [italics original].

27. Following the evaluation, the case conference committee met on May 15, 2000, and added learning disability in the area of writing, maintaining his eligibility as a student with emotional handicap. He was determined to have met his pragmatic language goals and was dismissed from speech therapy services. Goals and objectives for his behavioral and academic needs were written and were appropriate and measurable. Several discussion points were included in the IEP, with specific reference to the parents obtaining a software program, "PAWS", over the summer of 2000, as well as possible tutoring. There is no evidence in the notes that Extended School Year (ESY) was discussed as a needed service over the summer. Placement in the program for students with Emotional Handicap program was indicated to be less than full time (less than 49% of the instructional day). The parents consented to the implementation of the IEP.

28. Some regression in academic skills was noted in the School's documents in 1999 and 2001.

29. The School notified the parents in writing on July 1, 2002, that the Student's next three-year evaluation would be conducted in the 2002-2003 academic year. The parents signed consent for the evaluation on July 17, 2002.

30. A notebook was used during the 2002-2003 school year to record assignments for the Student and to communicate between parents and home. The notebook was used and some notes and comments were recorded, although the father testified that it came home sporadically.
31. There was a provision in the Student's 2002-2003 IEP that the parents were to receive written reports every 4½ weeks, which the parents testified had not been done. Evidence and testimony from the Student's teacher provided specific dates indicating that reports were sent home with the Student at the determined 4½ weeks. Therefore, there is conflicting evidence on this point, but the preponderance of the evidence indicates that the reports were sent as scheduled.
32. At times, the Student was removed from the classroom or isolated in "cubby" areas (as told to the father) for misbehavior, which the parents believed was inappropriate and led to worsened behavior. There was no provision for these disciplinary measures in the Student's IEP.
33. The Student was removed from his physical education class in sixth grade due to behavior problems, but no alternative plan or accommodations were developed, and the parents were not notified by the School about the change in his program.
34. The Student's IEP stated that he was permitted to participate in extracurricular activities. However, there were occasions (e.g., swimming, movie, a dance, and a field trip) when the parents were told that one of them must accompany the Student if he were to be permitted to attend.
35. On one occasion, the Student was prevented from attending a speech therapy session so that he could complete an assignment that he should have finished. The teacher and the aide testified that they are confident the session was made up as a typical practice, although they could not verify it.
36. The School had completed a functional behavior assessment in the Fall of 2002. Behaviors of concern were talking out, raising hand with dramatic gestures and noises, interrupting lessons, loud, off task, asking off topics questions, inappropriate interaction with peers, invading personal space, touching, joking, repeating word over and over, silly noises and gestures. The parents were not aware that this assessment had been completed until the case conference in March, 2003, when the results were presented to them.
37. The evaluation was conducted in January of 2003 when the Student was in the second semester of sixth grade, and included an abbreviated measure of cognitive ability, subtests from two measures of achievement, a survival skills questionnaire, a teacher report behavior rating scale, a self-report behavior scale, social and developmental history, teacher input/ observations, review of records, and an interview with the Student. There is no evidence that

parental input was solicited with regard to the Student's behavior as had occurred with prior evaluations.

38. Results of the January, 2003, evaluation indicated that the Student's cognitive ability was in the average range, as were Passage Comprehension, Word Reading, and Math Reasoning. Numerical Operations was below average, and Written Expression was at the early kindergarten level, essentially unchanged from the 2000 evaluation. The cognitive ability score was significantly lower than the above average to superior scores he received in 2000. The teacher rated the Student's behavior at being "At-Risk" in Externalizing Problems and School Problems, and "Clinically Significant" ratings in Internalizing Problems and Behavioral Symptoms Index. Adaptive Skills were in the average range. The Student's self-report scores all were in the average range. She testified that the high IQ scores in 2000 indicates that he has higher ability than he demonstrated at the time she evaluated him. His behavior problems continued, despite the use of behavior modification techniques.

39. The school psychologist recommended psychiatric or psychological evaluations to determine if a possible psychotic disorder was present, review of medications, and increased effort to get the Student to school every day. She testified that the results of the evaluation were a "good picture" of the Student's classroom performance.

40. The director of the cooperative testified that the re-evaluation completed in January, 2003, was mailed to the parents on March 7, 2003, before the case conference on March 26, 2003. The father testified that the report could have arrived five (5) days before the case conference, but did not recall seeing it.

41. Another case conference was convened on March 26, 2003, to conduct the annual case review and develop the IEP for 2003-2004. The results of the January, 2003, educational evaluation were discussed. The Student's strengths were good verbal skills and sense of humor. Concerns were staying on task, completing work, difficulties with listening due to hyperactivity and impulsivity that interfere with learning, weak group cooperation skills, social skills, and conflict-resolution management. Observable behaviors that affected educational performance were pulling out hair; picking at scalp, skin, ears, and fingernail; impulsive, hyperactive-constantly moving; distracting others around him by talking and picking at skin disrupts class by talking out and asking questions unrelated to topic. Educational needs were 1:1 instruction and small group, as well as academic, emotional, and social support.

42. The proposed IEP contained annual goals of improving social behaviors and maintaining a "C" average. Specific objectives for improving social behaviors were: remaining on task for 10 of 30 minutes per class period without redirection, have the necessary materials for assigned activities on 8 out of 10 trials, perform written tasks in a legible manner on 8 out of 10 trials, raise his hand appropriately and wait quietly to be called on in 6 out of 10 incidents without prompting, interact with others in an appropriate manner, make comments relevant to the situation 7 out of 10 trials, settle minor conflicts with peers during 8 out of 10 interactions, and

arrive to school on time and remain at school 96% of the year.

43. Specific objectives for the second objective of maintaining a “C” average were to complete and turn in modified homework assignments 100% of the time, complete and turn in classroom assignments 100% of the time.

44. Adaptations and accommodations included small group instruction, 1:1 instruction, allow for oral response, reduce amount of work, seated away from distraction, use of calculator when knowledge of concept is shown, and spelling words given the Friday before the week tested. A behavior management plan was developed to address behaviors of concern for talking out, off task, and demanding immediate attention. Alternative behaviors to be taught were self-control of impulsive behavior, staying on topic, and waiting turn. Reinforcements to be used were verbal praise, token economy system, and improved peer relationships.

45. A behavior management contract was developed, but was not specific as to the behaviors to be addressed and the reinforcement and punishment intervention strategies to be used for each behavior. The behaviors to increase were raising his hand before talking, completing assignments, and slowing down and taking time.

46. The parents prepared a list of sixteen requests for the case conference, which included placement in a private school, believing that the School could not provide a free appropriate public education for the Student. Requests for private placement and other requests were considered to be “tabled” by the School, although the parents testified that they were rejected. Testimony indicated that the School agreed to the majority of the requests, and others were “tabled”, pending further evaluation and an anticipated reconvening of the case conference. They wanted increased emphasis on academics, such as the use of a laptop computer, “advanced organizers”, and working with the Student’s creativity.

47. In the case conference of March 26, 2003, the parents expressed concern that the School did not know how to work with the Student and they wanted private school placement and counseling and therapy to address self-esteem issues. They also expressed concern that School personnel were asking them what they should do, and the parents responded that the School is in the best position to know how to educate him.

48. The director of the special education cooperative testified that the proposed IEP of March 26, 2003, was a significant “bump” (increase) in services.

49. As of March 24, 2003, the Student had been absent 29.5 days and tardy 23 days of 142 days of school. The parents testified that absences were due to illness or medical appointments. Tardy behavior was due to difficulties with sleeping problems of not being able to go to sleep at night and then having difficulty waking up in the morning to prepare for school, as well as extended time in the bathroom. The School did not attempt to contact the parents or make adjustments to his program to address the absences and tardies.

50. School personnel testified that they believed it is essential for the Student to be on time and present to receive benefit from school.
51. Extended school year (ESY) services had not been discussed prior to the March 26, 2003 case conference. Tutoring was to be at the parents' expense, and school policy did not permit a private tutor to come into the school.
52. Extended school year services for the summer of 2003 were offered, with emphasis on math concepts, basic math facts, written expression, attention to task, staying on topic, and self-control for one hour three times per week for six weeks.
53. The School's recommended placement for 2003-2004 was in a resource room for 21% to 60% of the school day. The parents did not feel that the proposed program was appropriate and did not sign it and requested a due process hearing. Tutoring during the summer was offered during the case conference.
54. The parents have hired a tutor who has worked with the Student for about five to six sessions using the Orton-Gillingham instructional approach, which they believe is helpful. They testified that they believe it to be appropriate and requested reimbursement for the program.
55. During testimony, the Student's mother requested that he be placed in a private school at public expense. The father opined that an appropriate program was to be placed in general education with a full-time 1:1 instructional aide. During testimony, it was determined that the School had agreed to the request for general educational placement with the full-time instructional aide.
56. The Student's fifth grade special education teacher testified that the general education sent written reports home with the Student in his backpack. Notes also were sent home in the notebook frequently. She testified that she used a study "carrel" to help the Student be less distractible, but it was not effective. She also testified that a separate day school program would be beneficial, except for the lack of social interaction with peers.
57. The Student's mother testified that counseling services were not offered and that they were ignored when mentioned by the parents.
58. The Student was sent home frequently because he was sleeping in class and not participating. The School stipulated that the Student did receive "in school study" for sleeping, which is a form of in-school discipline for misbehavior. Also, he was removed from class frequently for misbehavior that were consistent with his disability and should not be used.
59. The teachers required the Student to frequently re-write assignments because they were illegible.

60. The Student's ISTEP scores were invalidated by the teacher because he did not respond appropriately to the questions by marking randomly.

61. The director of special services for the school corporation testified that the PAWS software program was available at the school, which was consistent with the teacher's testimony about its availability. Although the School has a separate day school program, he believe that the Student can be served in general education with an instructional aide.

62. The Student's fourth grade teacher testified that the Student continued to have behavior problems and struggled with language arts and reading comprehension. She was discouraged about his lack of progress in his behavior and academics.

63. The School has teachers and related staff who are appropriately licensed and participate in continuing education activities pertinent to their respective areas of training and expertise. No testimony was sought or provided with regard to specialized training in specific disabilities.

64. The director of special education for the cooperative testified that she provided copies of records requested by the Student's father on March 6, 2003. He reviewed the Student's records and indicated which documents he wished to have copied. The director mailed those records to the parents, which the father testified he received about April 15, 2003.

65. Some documents were produced at the hearing that were not in the records reviewed by the father, including the assignment notebook.

From these sixty-five (65) Findings of Fact , the IHO determined seventeen (17) Conclusions of Law. The IHO's Conclusions of Law are reproduced as follows:

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented
2. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law.
3. **Issue #1: Has the School in the past and is currently providing a free appropriate public education?**

The testimony in this matter clearly established that the Student has a long history of behavioral difficulties that have affected his educational performance. Further, he has been determined to have a learning disability in the area of written expression. The parties have agreed that his primary disability is Emotional Disability, which has been demonstrated by more than a preponderance of the evidence. Testimony about prior IEPs was limited by the IHO to implementation, and not content. The IEPs were agreed to by the parents and the evidence

indicates, that, for the most part, they were implemented according to the stated plan. Although the parents may disagree in retrospect with the prior IEPs, they were developed and implemented appropriately based on the available information. The IEP in effect at the time of the March 26, 2003, was appropriate and was being implemented. When the parties were unable to agree on a new IEP to begin on March 27, 2003, and the request for a due process hearing was begun, the current IEP remained in effect, as required by 511 IAC 7-27-7(d) and 34 CFR § 300.342.

4. Issue #2: Did the School provide appropriate Extended School Year services from 1998-2002?

Extended school year services are required to prevent regression of skills over the summer months, and not to increase skills. There is was not sufficient evidence presented to indicate that the Student showed or would be expected to show significant regression over the summer months from 1998-2002. Therefore, the School was not required to provided Extended School Year Services and was in compliance with 511 IAC 7-21-3(b) and 34 CFR § 300.309.

5. Issue #3: Is the proposed Extended School Year program for 2003-04 appropriate?

The School agreed to Extended School Year services to provide tutoring for one hour per week, three times per week, for six weeks. The evidence suggests that this amount of time is appropriate.

6. Issue #4: Did the School complete a timely and appropriate functional behavior assessment?

A public agency is required by Article 7 to complete a functional behavior assessment under four conditions: (1) either before but not later than ten (10) business days after either first suspending the student for more than ten (10) cumulative instructional days in a school year; (2) placing the student in a interim alternative educational setting, (3) expelling the student, or (4) otherwise commencing a removal that constitutes a change of placement (511 IAC 7-29-5(a); 34 CFR § 300.520(b)(1)). Therefore, because none these conditions were applicable to the Student, the School was not required by law to conduct a functional behavior assessment. In an effort to gain more information, however, the School did perform a functional behavior assessment in the Fall of 2002. The parents were not made aware of this assessment, however, which required parental consent because it was not listed in the IEP. Therefore, the School should have notified the parents of the proposed need for additional evaluation to obtain their consent (511 IAC 7-25-7(a)(b)(c); 34 CFR § 300.520(b)(1)). The evaluation as described in evidence and testimony was done in an appropriate manner.

7. Did the School develop and implement an appropriate intervention plan?

The School did develop and implement a variety of classroom-based interventions over time, as well as a behavior intervention plan subsequent to the functional behavior assessment in 2002-03. The intervention plan emphasized raising hand, waiting quietly, staying on task listening to directions, slowing down , and staying on topic. The plan included a plan for scheduled review dates. The plan was presented at the case conference in March, 2003. There was no evidence to suggest that the plan, per se, was not appropriate (511 IAC 7-29-5; 34 CFR § 300.520(b)(1)(I)). .

8. Has the School developed and implemented appropriate Individualized Education Plans for school years 1997-1998 through 2002-2003?

Testimony was limited by IHO ruling to implementation of IEPs prior to the proposed one for 2003-2004, rather than the content. The parents had signed permission to implement the IEPs. There is no evidence to suggest that the IEPs were not implemented as stated. However, evidence and testimony indicated that specific instructional methods were not effective and that the Student was being given disciplinary consequences similar to other students for behaviors that were a manifestation of his disability, e.g., classroom insolation, removal from physical education without consulting the parents. Testimony indicated that some of these strategies were not effective and may have increased his behaviors at times. Therefore, although the specific IEPs were implemented, some instructional and behavioral strategies were not appropriate (511 IAC 7-27-6; 34 CFR § 300.347)).

9. Issue #7: Is the proposed Individualized Education Plan for 2003-2004 appropriate?

The proposed IEP for the 2003-2004 academic year can be examined for appropriateness for both content and plans for implementation. The evidence and testimony indicates that the goals and objectives listed for the Student are appropriate, i.e., the Student has needs in the areas addressed. Behaviors not addressed that interfere with educational performance, such as pulling out hair, picking at scalp, skin, ears, and fingernails are not addressed. The evidence indicates that the Student has continued to have difficulty over several years, despite a variety of interventions (511 IAC 7-27-6; 34 CFR § 300.347)). The IHO concludes that the goals, objectives, and implementation may not be sufficiently thorough.

10. Issue #8: Have teachers, staff, administrators, and parents properly been trained in the areas of the Student's needs and disabilities?

The teachers were properly licensed in their respective disciplines. There was little testimony whether they had specific training about the Student's needs and disabilities. Therefore, the IHO concludes that school personnel were properly trained. The parents did not participate in any parent training and none was offered directly by the School. One of the teachers did make some suggestions about where the parents might obtain information. No evidence was presented to suggest that the parents needed such training. Therefore, the School is not found

to be in violation of 511 IAC 7-28-1(7) or 34 CFR §§ 300.24(b)(7).

11. Issue #9: Has the School appropriately shared information with the family?

The evidence indicates that the School provided information about the Student's progress as provided in the IEP through reports sent home and in his assignment book. Therefore, the School met the provisions of the IEP as provided by 511 IAC 7-27-7.

12. Issue #10: Has the School violated confidentiality by disclosing information without parental consent?

The School shared information about the Student's adoptive status and victimization within the teaching and professional staff, and did not disclose information to persons outside the School. To provide appropriate services, school personnel must be able to communicate about information that might affect a Student's education. Further, the parents had provided this information to the School. Therefore, the School has not violated confidentiality in a manner as described at 511 IAC 7-23-1 and 34 CFR § 300.571.

13. Issue #11: (a) Did the School appropriately evaluate the Student?

The School conducted evaluations in all the identified areas of Emotional Disability and Learning Disability as required by 511 IAC 7-26-6(b) and 511 IAC 7-26-8(b), respectively, for the current and proposed IEPs.

Issue #11: (b) If not, are the parents entitled to reimbursement of their expenses for an independent educational evaluation?

This issue was removed by the Petitioner at the beginning of the hearing.

14. Issue #12: Did the School fail to share information with the parents within five days before a case conference?

This issue refers to the parents obtaining a copy of the January, 2003, evaluation prior to the case conference of March 26, 2003. The report was mailed on March 7, 2003, although the Student's father could not recall seeing it. Given the testimony about when it was mailed, there is no evidence that the parents did not receive the report. Further, receiving a copy of an educational evaluation is required only for initial evaluations (511 IAC 7-25-4).

15. Issue #13: Are the parents entitled to reimbursement for transportation for the Student?

The parents elected to transport the Student after he was attacked on the bus, because he continued to be somewhat fearful for a time. Attempts were made to arrange bus

transportation, but the parents declined. The School did not require the parents to transport the Student. If the parents do transport the Student and a written agreement is made with the School, then they are to be reimbursed at the same rate as employees of the public agency (511 IAC 7-21-7). However, there is no evidence that the parents were given this information by the School. The father testified that he did not know about this provision in Article 7. Counsel for the Respondents opined in the post-hearing brief that, although Article 7 and IDEA have no limitations on when such claims can be made, there is case law suggesting that a year is a reasonable period of time for such claims. Therefore, under the circumstances of the transportation matter and the pertinent case law, the IHO determines that the parents should be reimbursed for transportation for the 2002-2003 school year at prevailing school employee rates and up to the date of this decision.

16. Issue #14: Is the Student entitled to compensatory educational services?

The School implemented appropriate IEPs until the impasse on March 26, 2003. There is no evidence that the School failed to meet its responsibility to implement signed IEPs. A school may not be held accountable if a student does not make progress as projected in the IEP (511 IAC 7-27-8(b)). The goals and objectives were agreed to by the parties and there is no evidence that the IEPs were not implemented as written. Therefore, the Student is not entitled to compensatory educational services.

17. Issue #15: Should the Student be placed in a private, non-public school at public expense?

The record in this matter is very clear that the Student needs special education services to benefit from his education, due to behavioral and academic problems. He also needs to improve his social and emotional functioning with typical peers. Although he might derive some benefit from a non-public school setting with non-disabled peers, a lack of special education services would not be appropriate. Therefore, to place him in a non-public setting without those supports would not be appropriate to provide a free appropriate public education (511 IAC 7-17-36; 34 CFR § 300.13).

Based upon the foregoing, the IHO then issued the following six (6) orders:

1. The Student is to be placed in the School's Public Separate Day School Facility for a diagnostic period of no less than sixty (60) instructional days. The time may be extended, depending on the information gained and upon the recommendation of the case conference committee. The proposed IEP is to be implemented to the extent possible, with adjustments made for the setting. During that time, school personnel are to conduct necessary behavioral evaluations, detailed assessment of academic and instructional needs, and development of behavioral and therapeutic interventions to address social and emotional needs. Consideration is to be given to the possibility that the Student has more cognitive ability than he is able to demonstrate and that academic modifications must be adapted for him. At the time and in the

manner deemed appropriate by the case conference committee, the Student is to begin a transition period back to the general education environment with as much assistance as is needed, perhaps including the full-time instructional aide approved by the School previously. The parents are to make every reasonable attempt to assure that the Student attends school regularly and on time.

2. The case conference committee is to obtain the services of an independent licensed mental health professional who is knowledgeable about special education issues and social, emotional, and behavioral problems of students. This professional will provide input to the case conference committee in developing the IEP during the diagnostic period, the IEP for transition back to general education, and provide consultation to the program, as needed. The selection of this professional shall be a collaborative effort of the school and the parents and the parties shall arrive at a mutually acceptable agreement in the final selection. The School will be responsible for all costs of this professional.

3. The School is to reimburse the parents for transportation costs described in Conclusion of Law # 15 within thirty (30) days of receipt of this decision.

4. At a time deemed appropriate by the case conference committee, the Student is to be given the opportunity to re-take the ISTEP with appropriate modifications and accommodations.

5. The School is to implement the list of parental requests agreed to at the case conference upon the Student's attendance in class.

6. The Student is to be provided counseling services for school-related matters as recommended by the case conference committee after consultation with the mental health professional.

The IHO notified the parties of their appeal rights.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Petition for Review

On October 6, 2003, the School timely requested an extension of time to file the Petition for Review. The BSEA, by order dated October 6, 2003, granted an extension of time to November 5, 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 December 5, 2003.

The School filed on November 5, 2003, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review is reproduced, in part, as follows:

In a decision handed down on September 6, 2003, the independent hearing officer found in favor of the School and the Co-op on fourteen of the fifteen issues. On the single issue where he found in favor of the parents, Issue No. 13 the transportation issue, he only awarded compensation for one year, the 2002-03 school year, an amount totaling in the area of \$350.00. Because this was a minor issue, a nominal award, and the P[.] lost on the other fourteen issues, the logical question for the Board of Special Education Appeals to ask is why is the School appealing over \$350.00. . . First, although the School concurs in 99% of the IHO's decision, the simple fact is that he made an error of law on Issue No. 13. Second, although the P[.] lost on fourteen out of fifteen issues and lost on 6/7ths of that issue in terms of a remedy, and did not appeal those decisions, they have filed suit against the School and the Co-op seeking their legal fees as a prevailing party based in part on the IHO's ruling on Issue No. 13. . .

In the present appeal the School and the Co-op do not challenge any of the IHO's Findings of Fact. . .

3rd Grade: The 1998-99 School year. According to the sole finding of fact by the IHO on the transportation issue: "In third grade, the Student was attacked by a boy on the school bus, although he was not seriously injured. The Student continued to think about it, however, to the extent that he did not want to ride the bus. Although the school offered to provide a special bus, the parents elected to transport him to school, which has continued to the present. There is no evidence that the School offered to reimburse the parents for their transportation costs."

According to the agreed upon IEP dated April 30, 1998, for the 1998-99 school year, his second grade year, M[.P.]'s home school was Forest Hill Elementary School but because of his severe behavioral problems he attended a centralized program at Hinkle Creek Elementary school. . .The School provided transportation to Hinkle Creek . . Sometime in mid-November or early December of 1998, another emotionally handicapped student on the bus, D[.S.], without provocation grabbed M[.P.] and began choking him. The bus driver quickly separated the two and M[.P.] was not injured although his glasses were broken. . .Notwithstanding the fact that D[.S.] was removed from the bus, Mrs. P[.] refused to permit M[.P.] to ride the bus and instead chose to transport M[.P.] herself. She indicated in her testimony that "I felt that that was a good way of keeping M[.P.] clear of any trouble." . . . Ms. P[.] did this despite the fact that Tom Ryan, the Director of Special Education, specifically offered her an aide on the bus and a special bus. . .

Since that time the School consistently offered to provide transportation to the parents, which they consistently declined. . .

Turning to the 2002-03 school year, the School again offered to provide a special education bus with an aide to transport M[.P.] during the case conference of November 11, 2002. (R2(I)1-11) This time the P[.] accepted the offer (Trans. Vol. II 155-157) M[.P.]'s teacher, Debbie Geller began looking into arranging for an aide on the bus and the special bus, and four days later on November 15, 2002, sent a note home in M[.P.]'s daily planner that "I'm still

working on transportation. I'll let you know next week what day it will begin and what time he will be picked up and dropped off. Thanks. Mrs. Geller.” (R5(C)65; Trans. Vol II 155-157 In response to this note, Mr. P[.] sent a note back that said “We have decided not to use bus service at this time. Thank you for the offer.” (Id.) As a consequence the Case Conference report was modified by Mrs. Geller to show that “Parents changed their minds about transportation.” (R2(I)10) When asked about the change, Mr. P[.] stated that “after thinking about it and talking to M[P.], M[P.] felt very uneasy about riding the bus again, so we just continued [transporting him]. (Trans. Vol. I, 155). The P[.] never shared their reasoning for rejecting the transportation offer with the School or the Co-op beyond the handwritten note on November 15, 2002, nor did they ever request any compensation for transportation, or seek alternative transportation. (Id., p. 155)

The School challenges the IHO's decision on Issue No. 13 and claims it is arbitrary and capricious, contrary to law, an abuse of discretion, and should be overturned as it seems to seek to create a legal obligation where Article 7 and specifically 511 IAC 7-21-7 do not. The only portion of the Order under Issue 13 that the School appeals from is the finding at page 25 of the Order under Issue 13 that the School was obligated to reimburse the Student for private transportation for the 2002-03 school year because “there is no evidence that the parents were given this information [about reimbursement for parentally provided] transportation.” (IHO Order, p. 25).

The School claims that the undisputed facts in the record are that for the 200[2]-03 school year and every year prior to that the School offered free and appropriate transportation to and from school which has been consistently declined. The School also claims that the IHO's award appears to be based on the proposition that even though a school has offered free appropriate transportation for the Student that a parent rejects, the parent is still entitled to reimbursement for that transportation if it fails to tell the parent about the provisions of 511 IAC 7-21-7.

The School requests the Board of Special Education Appeals (BSEA) overturn the IHO's decision on Issue No. 13, and find that the Student is not entitled to reimbursement for transportation for the 2002-03 school year.

The Response to the Petition for Review

The Student filed on November 12, 2003, its Response to the Petition for Review. The Student claimed that the IHO's decision is not arbitrary and capricious, nor an abuse of discretion, nor contrary to law. The Response to the Petition for Review is reproduced, in part, as follows:

[T]he Petitioners would state that the hearing officer's order does not merit reversal because it does not fit any of the criteria for reversal laid out in 511 IAC 7-30-4(j). . . .

According to the finding of fact by the hearing officer on the transportation issue: “In third grade, the Student was attacked by a boy on the school bus, although he was not seriously injured. The Student continued to think about it, however, to the extent that he did not want to ride the bus. Although the school offered to provide a special bus, the parents elected to

transport him to school, which has continued to the present. There is no evidence that the School offered to reimburse the parents for their transportation costs.” . .

The hearing officer based his decision on 511 IAC 7-21-7(d), which governs transportation and reads as follows: “(d) The parent of a student with a disability shall not be required to provide transportation. If the parent does transport the student, pursuant to a written agreement with the public agency, the public agency shall reimburse the parent at not less than the per-mile rate at which employees of the public agency are reimbursed.” . . .The hearing officer noted in his decision that there was no evidence presented “that the parents were given this information by the School. The father testified that he did not know about this provision in Article 7.” . . .That furthermore, the case conference documents indicate that although transportation was offered to the parents that everyone knew that the school was relying on the parents to provide transportation, and everyone apparently agree with that arrangement. . . That examples of the existence of documents that bear this out are contained in the case conference documents, which are written and signed by the parties and therefore constitute an agreement. . .That these examples are found as follows: Respondent’s exhibit book, page R2(E)3 and R2(F)1, which both state “Transportation: Parent.” for the student’s fourth-grade year and fifth-grade year. In addition, see R2(E)17, R2(F)17 and R2(H)11, which all ask, “Does a written justification of special transportation need to be documented,” with a checkmark “No.”. . .

Significantly, the school noted, in writing, that the parents had changed their minds about transportation, see R2(I)10, and the case conference document was modified at that time to indicate that the parents would be providing transportation and that the school was apparently in approval of this, without the reconvening of the case conference and without an offer of reimbursement to the parents. . .Furthermore, the Petitioners would point out that although the school offered some method of transportation, it did not offer a SAFE method of transportation for the child because of a lack of adult supervision.... This was a lack of safe transportation for a child with significant emotional problems who had been attacked on the bus, suffering emotional harm and physical harm such that his glasses were battered and had to be replaced (See Tr. Aug. 13, 2003, page 15) and parents’ exhibit book 2, page 437-439 and 445. . .Relevant excerpts from the transcripts as to the incidents in which the student was injured due to lack of appropriate supervision and the harm stemming therefrom are found as follows:

- ? Tr. July 16, 2003, page 59-63, page 154-158, page 193
- ? Tr. July 17, 2003, page 104-105, page 265-266.
- ? Tr. Aug. 13, 2003, page 14-19 and pages 156-159.

Review by the Indiana Board of Special Education Appeals

A copy of the record was prepared and provided to each member of the BSEA on November 14, 2003. 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 November 17, 2003. Review was set for November 21, 2003, in Room 225 State House, Indianapolis. All three members of the BSEA appeared on November 21, 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 in his Conclusion of Law #15 that there is no evidence that the parents were given information as to reimbursement by the School for transportation as a related service. The School’s IEP form did not document specific information about transportation as a related service. The only reference to transportation on page R2(I)10 of the IEP was ambiguous.
4. The IHO correctly ordered reimbursement for transportation in his Order #3.

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: November 21, 2003 _____

/s/Cynthia Dewes _____

Cynthia Dewes, Chair
Board of Special Education Appeals