BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of N. M. P., the Valparaiso Community School Corporation, and the Porter County Education Interlocal	)))	ARTICLE 7 HEARING NO. 1366.03
	)	
Appeal from a Decision of Dennis D. Graft, Esq., Independent Hearing Officer	)))	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW. AND ORDERS

Procedural History

The Student,[1] by counsel, requested a due process hearing on June 13, 2003, pursuant to 511 IAC 7-30-3.2.[2] Dennis D. Graft, Esq., was appointed on June 16, 2003, as the Independent Hearing Officer (IHO). The IHO conducted a pre-hearing conference on July 3, 2003. Both parties were represented by legal counsel.[3] The IHO issued a pre-hearing order that same date, ordering, *inter alia,* (1) the Student be more specific as to the issues he is raising; (2) an extension of time for the conduct of the hearing and the issuance of a written decision; (3) exchange dates for the witness and exhibit lists; (4) the opening of the hearing to the public and the separation of witnesses; and (5) the making available the educational record to the Student. Subsequent to the Pre-Hearing, the Student requested an extension of time to prepare and specify the issues for the hearing. The IHO granted the request by an Order issued July 22, 2003, giving the Student until July 25, 2003, to specify the issues.

On July 25, 2003, the Student filed with the IHO a 76-page document. However, the document did not detail the issues for hearing. On July 28, 2003, the IHO issued an Order, noting the 76-page document was non-responsive to the IHO's previous Orders, and directed the Student to comply with the previous Orders by August 10, 2003. The Student requested additional time to respond, which the IHO granted by an Order dated August *5,* 2003, granting an extension of time to August 18, 2003. The Student filed his statement of the issues by letter dated August 15, 2003.

The parties were advised of their respective due process hearing rights. The procedures employed were in concert with Article 7 and Indiana law.

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[1]"Student" shall refer to the Student and the Student's Parents, unless otherwise indicated.

[2]The hearing request invoked a number of federal laws besides the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* as implemented in Indiana through the State Board of Education's rules and regulations for special education, 511 IAC 7-17 *et seq.* ("Article 7"). However, all relief sought was pursuant to Article 7.

[3] Valparaiso Community School Corporation and the Porter County Education Interlocal will be referred to collectively as the "School."

The hearing was conducted over four days: September 3, 4, *5,* and 22, 2003. Because the hearing would extend past the date established for the conduct of the hearing and the issuance of a written decision, the parties moved for an extension of these time lines to and including October 15, 2003. The IHO granted the extension of time by order dated September 9, 2003. At the conclusion of the presentation of evidence, the parties moved to supply closing briefs in lieu of closing argument and to submit affidavits. This necessitated another extension of time. The IHO granted the request and established November 17, 2003, as the date by which the written decision would be issued.

The specific issues for the hearing were as follows:[4]

A. Since 1995 did the School fail to provide a free, appropriate public education (FAPE) to the Student in violation of 511 IAC 7-2-3 *5* [sic] and specifically:

1. Did the School expel the Student without a hearing in October, 2002, without notice of any kind to the Parents, without a manifestation determination, without any educational services offered to the Student?

2. Did the School fail to provide a FAPE to the student in the least-restrictive environment (LRE) and fail to offer a continuum of placements, in violation of 511 IAC 7-21-36 [sic]?

3. Did the School fail to timely and accurately identify the Student's areas of special need, in violation of 511 IAC 7-25*,* including the Student's attention deficit needs, learning disabilities and behavioral disorders?

4. Did the School fail to provide a FAPE by assuring that the Student's services were provided in conformity with an Individualized Education Program (IEP) that met the requirements of Article 7, in violation of 511 IAC 7-17-36(4), specifically:
   (a) Did the School fail to provide a timely and appropriate functional behavioral assessment (FBA) and fail to implement an appropriate behavioral intervention plan (BIP) but instead punish the Student for actions and inactions that were manifestations of the Student's disabilities, in violation of 511 IAC 7-17-38 and 7-29-5;
   (b) Did the School fail to allow the Student to participate in extracurricular activities that were offered to his non-disabled peers, in violation of 511 IAC 7-27-1(o) [sic] & 2 and 511 IAC 7-27-9(b);
   (c) Did the School fail to ensure that proper personnel attended the case conference committee (CCC) meetings, in violation of 511 IAC 7-27-3(a);
   (d) Did the School fail to conduct evaluations requested by the Parents in a timely fashion and without notice of the reasons for the denial, in violation of 511 IAC 7-25-3, 4, and 5; and
   (e) Did the School fail to devise appropriate and measurable goals and objectives, in violation of 511 IAC 7-27-6?

[4]The IHO's statement of the issues and his written decision have been amended for format purposes. No substantive changes have occurred.

6. Were the teachers, staff, administrators and Parents adequately trained in the areas of the Student's needs and disabilities in violation of 511 IAC 7-20-3 and 511 IAC 7-28-1(h) [sic]?[5]

7. Did the School fail to provide appropriate Extended School Year (ESY) services for the Student in violation of 511 IAC 7-21-3(b)?

8. Did the School ignore the recommendations of the Parents and their experts as to the educational and related needs of the Student, in violation of 511 IAC 7-27-3(f) and 7-27-4 (c) (1)?

9. Did the School fail to provide educational and related services to the Student because of budgetary or staffing problems, not based on the Student's individual needs, in violation of 511 IAC 7-2i-4(c) (1-8) and 511 IAC 7-17-66?

The IHO's Written Decision

The IHO issued his written decision on November 12, 2003. In his decision, he determined thirty-three (33) Findings of Fact relative to the stated issues *supra.* These Findings of Fact are reproduced below.

The IHO's Findings of Fact

1. The Student is a fifteen (15)- year-old who was an 8th grade student at a public school during the first semester of the 2002-2003 school year and home-schooled beginning in October, 2002.

2. While in the 1st grade, the Student had a staffing on October 10, 1995. The reason for the staffing was the Student's inability to stay on task, weak sound/letter recognition and vocabulary, severe problems in reading comprehension, sight word vocabulary, word attack skills, forgets vocabulary and alphabet, and poor work habits. As a result of this staffing, the Parents consented to an evaluation by the School to determine eligibility for special education services.

3. The Student was evaluated in October and November, 1995. The student was administered the Stanford-Binet Intelligence Scale: 4th Edition. The Student scored in the average range in all four standard areas: (1) verbal reasoning-96; (2) abstract/visual reasoing-95; (3) quantitative reasoning-96; (4) short-term memory-104, but the Student's scores may have been lowered due to his behavior. [According to] [t]he Bender Visual-Motor Gestalt test, the Student was in the average to high-average range. In the social/behavioral/emotional area, the Achenbock was given to the Student's Parents and 1st grade teacher. The Parents both saw the Student as anxious and depressed. The teacher saw some behavior problems due to academic frustrations. The Student was also observed in the classroom. The Student was also administered the Woodcock-Johnson Psychoeducational Achievement Battery, Revised. The Student obtained the following standard scores:

[5] Actually, adequate training would not be a violation. The issue should have been stated that the training was "inadequate."

(I) Word identification- 74
(2) Passage Comprehension- 64
(3) Calculation- 99
(4) Applied problems- 84
(5) Dictation- 83
(6) Writing Samples- 89

The Student displayed significant deficits in reading.

On the Test of Early Reading Ability (TERA-2), the Student had a standard score of 72. On the Test of Early Math Ability (TEMA-2), the Student had a standard score of 76. On the Test of Early Written Language (TEWL), the Student had a broad reading standard score of 65.

4. The Student's initial CCC was held on November 21, 1995. The Student was determined to be eligible for special education services, with a primary handicap of Learning Disabled (LD) with concerns in focused attention and low frustration level. This determination was based upon the Student's learning expectancy of 98, with a score of below 80 on testing showing a severe discrepancy in basic reading, reading comprehension and written expression. Goals and objectives were developed in those three areas. The Student's LRE was determined to be general instruction for *65%* of the day and special education instruction or related services in resource room for 35% of the day in the three areas. ESY services was not marked due to this being the Student's initial CCC and it was then unknown if there would be a need for ESY in the following summer.

   The Student's mother was given a rights' advisement and agreed with the placement and the Student's IEP.

5. The Student's annual case review was held on November 14, 1996, to determine placement and programming for the remainder of the Student's second grade and for the third grade through November 14, 1997. The Student's present levels of performance were reviewed. The Student was determined to continue to be eligible for special education services with a primary handicap of LD in the areas of basic reading, reading comprehension and written expression. Goals and objectives were developed in these three areas for the balance of the 2nd grade and for 3rd grade through November 14, 1997. The Student continued to receive instruction in a general education setting for 65% of his day and 35% of his day in special education direct services in three areas of his learning disability.

   The need for ESY was not indicated on the Student's IEP, but the CCC's notes indicate it was discussed and not deemed necessary, since there was no loss of progress or any regression over the summer.

   The Student's Parent was given a rights' advisement and agreed with the Student's IEP.

6. On November 12, 1997, the Student's annual case review conference was held. ESY services were determined to not be necessary. The Student's present levels of performance were noted as that the Student did not attend well to whole group instruction. The Student continued to be

determined eligible for special education as LD in basic reading, reading comprehension and written expression. Goals and objectives were developed in these three areas. For the balance of the 3rd grade, the Student remained in special education class for 35% of his day and 65% in general education classes. For the 4th grade through 11/14/98, the Student's LRE was changed to 20% special education direct services and 80% in general education.

The Student's mother was given a rights' advisement and agreed with the Student's IEP.

7. On November 11, 1998, a CCC was held. Pending the completion of the Student's re-evaluation, the Student's current IEP was extended to December 14, 1998, with two changes: (1) The Student would receive 30 minutes per day of written expression instruction in the LD resource room; and (2) The Student would have averaged report card. The Student's mother agreed to this extended and amended IEP.

8. On December 1, 1998, the Student's re-evaluation CCC was held. The results of the Student's evaluations were discussed. The Student had been administered the Weschler Intelligence Scale for Children, Third Edition, (WISC III) on October 28, 1998. The Student had a Verbal IQ of 102, Performance IQ of 112, a Full Scale IQ of 107, and a Learning Expectancy of 105. Also, administered to the Student was the Wechsler Individual Achievement Test (WIAT). This test was administered on October 29, 1998. The Student scored as follows:

Subtest	Standard Score	Grade Equivalent
Basic Reading	87	3.2
Reading Comprehension	101	4.5
Numerical Operations	92	3.8
Mathematics Reasoning	97	4.0
Spelling	90	3.4
Written Expression	83	1.2
Reading Composite	93	3.7
Math Composite	95	4.0
Writing Composite	83	3.2

The Student was also administered the Woodcock-Johnson Psycho-Educational Battery. The Student obtained a standard score of 105 and Grade Equivalent of 5.3 on Passage Comprehension.

The Student was significantly discrepant in basic reading and written comprehension when compared to his learning expectancy.

The Student's present levels of performance were reviewed. The Student was now receiving instruction in the regular education class using 4th grade curriculum. The student was in the LD resource room for written language and spelling. He was using 4th grade materials with adaptations. The Student was in general education for his other subjects using 4th grade curriculum. The Student learns best with a multi-sensory approach but prefers auditory. The Student was using a daily assignment [book], which was checked at the end of each day. The Student continued to need structured guidelines.

The Student was determined to remain eligible for special education as LD, with goals and objectives in basic reading and written expression (reading comprehension was dropped as a need based upon the Student's test results). The Student's IEP included direct services of 15 minutes of each day in the LD resource room in basic reading and 30 minutes each day for written expression. His general education teachers could modify writing assignments as needed with the Student's special education teacher proof-reading any lengthy writing assignments. Accommodations included the continued use of the daily assignment book and an averaged report card.

ESY was determined to be not needed. The Student's mother was given a rights' advisement and agreed with both the reevaluation and the Student's IEP.

9. The Student's next CCC was the November 3, 1999, annual case review. The Student's mother agreed no new evaluations or testing were needed. The CCC did not deem that ESY services were needed. The Student's present levels of performance were reviewed. In reading the student was using the Houghton-Miffin reading series and novel studies. The student continued to read slower than his peers with better comprehension when the materials were read to the Student. The Student continued to have problems putting answers on papers. The Student continued to need to be redirected during time given in class to do homework. The Student's organization skills remained weak but adequate in a structured setting.

   The Student continued to be eligible for special education services as LD with goals and objectives in basic reading and written expression. The Student's IEP for the balance of the 5th grade included:

   (1) access to LD resource room for up to 30 minutes per day;
   (2) high-lighted text in content classes;
   (3) taped novels;
   (4) averaged report card;
   (5) tests read as necessary; and
   (6) daily assignment book.

   Included for the start of the student's 6th grade were:

   (1) access to LD resource room for consultation 3-4 times per week for assistance in reading and writing;
   (2) team-taught science 5 days per week;
   (3) high-lighted text in content classes;
   (4) tests read as necessary; and
   (5) daily assignment book.

   The Student's mother was given a rights' advisement and agreed with the Student's IEP.

10. The Student started middle school (6th grade) in August, 2000, with numerous different teachers and moving to different classrooms.

11. The Student's special education teacher, who was his teacher of record (TOR), for the 1st through 5th grades opined that the Student did well with very good progress in reading comprehension, which was during the 4th grade dropped as a handicapping condition, good progress in basic reading and progress in written expression [sic]. This teacher accommodated the Student's inability to transfer print to page, being more concerned with content rather than doing something a certain way. This teacher provided a lot of one-on-one or very small group assistance in the resource room.

    Also, during the 3rd through 5th grades, the teacher, with the Student's mother, developed contracts between the Student, the teacher and the mother to coordinate assistance and punishments for academic and behavior (inattention and disorganization) problems. This TOR was certified in both LD and ED.

12. The Student's 6th grade year started well. The Student's mother was providing a lot of assistance to the student and was asked by the School to back off to allow the Student to do the homework more independently. The Student did not like his 6th grade TOR and did not like to go to the study lab. The Student opined that he did not receive any one-on-one instruction or any real assistance from this teacher, while in the study lab. As the year progressed the Student's grades dropped and his attitude became more negative.

13. The Student's annual case review was held on November 6, 2000. ESY services were deemed unnecessary. The Student's mother agreed that no additional testing was needed. The Student's present levels of performance were reviewed. The Student was in all general education classes with predominately "C" grades. The Student's academic problems continued in poor spelling, inability to answer in writing in complete sentences, and reading. Also noted were attention and homework problems in some classes. The Student was not using the resource room for consultation in reading and written expression. In general, the Student's transition to the middle school had been good.

    The Student was deemed to continue to be eligible for special education services as LD, with the same two areas of need (basic reading and written expression). Goals and objectives were developed in these two areas. Accommodations for the balance of the 6th grade included:

    (1) high-lighted text for science and social studies; and
    (2) study lab in a special education setting for 30-40 minutes per day for four days each week in reading and writing.

    Accommodations at the start of the 7th grade included:

    (1) extended time for major writing assignments as needed; and
    (2) same provision concerning study lab.

    The Student's mother was given a rights' advisement and agreed with the Student's IEP.

14. During the fall of the Student's 7th grade year, on October 30, 2001, the Student's annual case review was held. The start of the 7th grade had not been as good as the 6th grade. ESY services were not recommended, since the Student did not appear to have lost previously acquired skills

from the end of the 6th grade. The Student's present levels of performance were reviewed. The Student's grades were in the C to D range. The Student's attitude ranged from a moderate problem to a severe problem. Attention, motivation, and behavior were also problem areas. The mother agreed that further testing or evaluations were not needed.

The Student again was determined eligible for special education services as LD with needed areas of basic reading and written expression. Goals and objectives were developed in these two areas. Behavior impeding learning was marked but no individual BIP was developed nor an FBA performed. Behavior interventions would be through the general education process.

For the balance of the 7th grade, the Student was placed in all general education classes with access to study lab four times per week for one period, modified to at the Student's discretion, unless his grades fell below C level. If so, the Student would then attend the study lab in the LD resource room. The Student's placement for the start of the 8th grade was to be the same.

The Student's mother was given a rights' advisement and agreed with the Student's IEP.

15. During the Student's 7th grade year, he had thirty-plus disciplinary referrals, ranging from 10th hour (extra hour at the end of the school day) to do missed homework, missing 10th hours, missed detentions, behavior in the lunch room, bullying other students, fighting, theft, disrespect of a teacher, throwing paper airplanes, spreading rumors, problems on the bus and destruction of property. The TOR stated she had no behavior issues in the study lab but noted this was a structured setting. The TOR was not aware of the various disciplinary referrals nor of any behavior problems in the general education classrooms.

    This TOR acknowledged that the Student did have behavior problems which were discussed at the October 30, 2001, CCC, as was the need for an FBA, although one was not done. Further, it was marked that the Student's behavior impeded his learning or that of others, but no FBA or BIP was done. The TOR testified she marked this in error since the forms had changed from prior years, but the forms were identical. Also, the TOR's superior contacted her about this being marked but no CCC took place to correct this alleged error.

    The TOR believed the Student's negative behaviors were such as incomplete homework, not accepting responsibility, keeping his locker clean and organized, getting materials to and from home, and having the right materials and text books with him in various classes. The TOR also saw the Student's behavior as very inconsistent, like a roller coaster ride.

    The Student's grades at the end of the 7th grade were predominately F's.

16. A CCC was held on January 11, 2002, to amend the IEP to correct the Student's reevaluation date from 11/5/04 to 11/6/03. The Student's mother agreed to this amendment.

17. For the 8th grade, the Student's TOR, who had endorsements in both LD and ED, saw the Student in the study lab twelve times from the start of school through October 7, 2002. This TOR did provide assistance or support services to the Student in the study lab. By September 9, 2002, the Student's grades were below C's. This teacher, when [sic] subsequently administered the Conner Rating Scale, rated the Student as atypical in inattention and ADHD but opined that

these problems were due to the Student's choices or lack of interest. In this teacher's teacher log, it was noted on November 1, 2002, that the Student's goals were mailed, but the subsequent [sic] entry dated October 7, 2002, indicated this was the date the Student commenced being home-schooled. The teacher had no explanation for this order of the entries. Further, this teacher testified that she was informed by the principal some time after October 11, 2002, that the Student was being home-schooled. Further, this teacher, nor any other 8th grade teachers, were officially informed by the administrative personnel that the Student was being home-schooled, with the Student being counted absent by various teachers based upon their attendance records.

18. On October 4, 2002, the Student sent an instant message to his ex-girlfriend in which he spoke of possible acts he may do at School or to other students.

19. On October 7, 2002, the ex-girlfriend and her mother, at the start of school, delivered a copy of the instant message to the assistant principal. The assistant principal contacted the principal and showed him the instant message. The Student was brought to the principal's office. The Student and his locker were searched for weapons. None were found. The principal contacted the assistant superintendent concerning this matter. The School's resource officer (a local city police officer assigned to this middle school and another middle school) was notified of the situation. The assistant principal and principal questioned the Student to verify whether he had composed the instant message. The Student admitted that he had. The resource officer was then advised of these facts, and he contacted his supervisors and a local juvenile probation officer. A local judge with juvenile jurisdiction subsequently, at approximately 1:00 P.M., entered a detention order. The Student was subsequently transported by the resource officer to the local juvenile detention center where the Student was detained for two days until released to the care of his Parents. The principal, in the late afternoon of October 7, 2002, notified the Student's mother of these events.

20. Early the next morning (October 8, 2002) and throughout the day, the Student's father's administrative assistant attempted to set up a meeting between the Student's Parents and the principal and/or assistant principal. At approximately 2:45 P.M., the assistant principal, or someone on his behalf, notified the administrative assistant that the Parents could meet with him and the principal at the end of the school day. The Parents hurried to make this meeting and did meet with the principal and assistant principal. The principal explained what had occurred, possible punishments, including expulsion. The Parents interpreted the principal's words to mean the Student was expelled immediately.

21. On October 11, 2002, the Parents' housekeeper, as directed by the Student's mother, who called the School, received the Student and his brother's books and assignments. Based upon the current atmosphere at the School, the Parents did not believe it was in the Student's brother's best interest to then be at the School, i.e., comments of other students and teachers about the Student and the instant message, which was common knowledge among the other students. A secretary at the principal's office, who spoke to the Parents' housekeeper, believed the housekeeper said the Parents were going to home-school both young men, which the housekeeper denied. The principal's secretary then informed the principal. No one from the school ever contacted either Parent to ascertain if it were true that they intended to home-school the Student and his brother. Further, the School allowed the housekeeper to take the property of

the School, the text books, but supposedly the boys were no longer students of the school and the school had never previously allowed someone no longer a student to keep School text books.

22. Prior to October 11, 2002, the assistant principal started preparation of paper work needed to commence the possible expulsion of the Student. There were two possible basis for the expulsion: (1) intimidation, and (2) committing a criminal act. The assistant principal stated he did not then complete the paper work because he needed to know from the juvenile authorities whether or not the Student had committed a criminal act. Subsequently, on October 15, 2002, a local juvenile probation officer supposedly informed the assistant principal that the Student had not committed a criminal act but had been determined to have committed a juvenile act. The statement makes no legal sense because a juvenile (someone under the age of 18) does not commit a crime unless waived to adult court. A juvenile may be adjudged to have committed a delinquent act, which is an act which is an offense if one is an adult. Further, although the principal and assistant principal each testified that they each believed the student was being home-schooled after October 11, 2002, and there was no reason to proceed to an expulsion meeting after the assistant principal received the October 15, 2002, message from the probation officer, he crossed off "committed a criminal act" from his rough draft of the expulsion documents. If the Student were being home-schooled, there then existed no reason to consider possible expulsion after October 11, 2002, and the assistant principal had no explanation why he would have crossed it off if there were no reasons to consider expulsion after October 11, 2002.

23. After October 11, 2002, the Student's Parents (with the father's administrative assistant making the telephone calls) attempted to set up another meeting with the assistant principal to discuss the Student's expulsion. This was due to the father being informed by a probation officer that the Student had not committed a "criminal act" and the father wanted to know how the Student was expelled. The assistant principal never again met with the Parents.

24. On or about October 24, 2002, the Student's 8th grade TOR contacted the Student's mother to schedule the Student's annual case review. The mother questioned the need to have the CCC since the Student had been expelled. The TOR informed the mother that she believed the Student could not have been expelled since the special education department had never held a "committee meeting" (manifestation determination to determine whether there was a causal relationship between the student's disability and the instant message act).

25. Based upon this information, which was communicated to the father by the mother, the father had his local corporate/family attorney draft a letter to the School inquiring how the Student had been expelled without this meeting being held. The letter was dated October 25, 2002, and was FAX'd and sent to the School that day. The principal received the letter, reviewed it and filed it away, never responding to the letter. The principal testified he could not respond to the attorney since he did not have a release executed by the Parents authorizing him to discuss confidential matters about the Student with the attorney. However, the principal never contacted the attorney to advise him that he needed a release, nor did he contact the Parents to respond to the inquiries in the letter nor inform them he needed such a release. Further, he never informed the School's legal counsel concerning this letter. The Parents, not having heard any response in a few days, had a copy of the letter hand-delivered to the School. There was no response.

26. On October 28, 2002, the student's annual case review was held. The Student's present levels of performance were reviewed. The Student was failing four of his five classes, with a D in the other class. The Student's teachers opined that the Student was not failing due to his learning disability. The Student had attended the study lab 11 times through October 2, 2002. The Student, prior to October 7, 2002, had been having problems in completing his homework, in his attitude, motivation and attention.

    The mother supplied to the School a letter from the Student's psychiatrist diagnosing the student with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder and Dysthemic Disorder (depression), using the DSM-IV. Further, the School was informed that the Student had been prescribed Wellbrutrin and Depakote.

    The Student had first seen this psychiatrist on July 23, 2002. Based upon a clinical interview and meeting with the Student's Parent, the Student was diagnosed. The Student was also prescribed Zypiexa in addition to Wellbrutrin and Depakote. The Student initially started on the Wellbrutin on August 27, 2002, with then Depakote and finally Zyprexia prescribed. The Student had been taking all three medications approximately one week prior to October 4, 2002. Although apparently not included in the information provided to the School, the psychiatrist also diagnosed the Student with signs of a bi-polar disorder. The psychiatrist did not review any of the School's records or evaluations of the Student.

    The Student's mother reiterated that the Student had been expelled. The Director of the local special education interlocal stated that that was not possible since a manifestation determination was never held. The Parents continued to believe the Student had been expelled, since neither the principal nor the assistant principal (an administrative person with such authority) ever advised them to the contrary.

    An IEP was developed at this CCC for the balance of the 8th grade and start of the Student's freshman year at the local high school. The Student continued to be determined to be labeled LD with goals and objectives in the two areas of need: basic reading and written expression.

    The LRE continued to be predominately in general education and part of the day in the special education resource room, specifically, in the 8th grade the Student was to attend the study lab one period for four days each week at the discretion of the Student and his TOR.

    For the start of the 9th grade, the LRE was the same as 8th grade but the Student would attend study lab three times per week at his or the TOR's discretion. Further, the Student would attend the special education Interpersonal Relations Self Improvement class for one class period each day.

    At the conference the mother personally, for the first time, informed the School that she "is" going to home-school the student, not that they already were home-schooling the student. The School's guidance counselor's notes also indicate that the mother "is" going to home-school the student. Further, these notes indicated that home-school paperwork was FAX'd and mailed to the Parents (the first time anything in writing was requested from the Parents to verify they were home-schooling the student). Although all school personnel testified the Student was, from October 11, 2002, home-schooled and not expelled, this IEP did not address whether the

Student returned to the School forthwith (any punishment or safeguard for the Student's actions in drafting the instant message). Further, based upon the guidance counselor's notes of the CCC, the principal, supposedly for the first time, authorized the Student to keep his school books, whereas the principal testified he authorized this on October 11, 2002. The Student's mother also requested further testing and evaluations be performed, based upon the Student's academic behavior problems, specifically, the Student's poor organizational skills, inattention and low self esteem.

27. In late October or early November, 2002, the Parents hired an individual to home-school the Student and his brother. Although this person did not have a degree or teaching license, he had substituted for teachers at a neighboring school corporation, had attended college and also had been a private music instructor for a number of years. The home-school instructor predominately used the School's textbooks for the Student's instruction. The Student and his brother, who had been in the 6th grade, were each instructed individually, with the other to do homework when the other was being instructed. The Student's home-school day was from 10:30 a.m. to at least 1:30 p.m., initially not every day each week, since the instructor had prior commitments. Further, the Student usually had 30 to 60 minutes of homework each day. Neither the home-school instructor nor the Student's Parents ever registered as a home school with the Indiana Department of Education.

28. On November 15, 2002, the Student entered into a program of informal adjustment of the delinquency charges. An informal adjustment is an agreement between a juvenile and the State of Indiana, which agreement provides if the juvenile does certain required terms, the juvenile delinquency charge is dismissed. This is a diversionary program.

    The terms of the Student's program of informal adjustment were:

    a) successfully complete three (3) months of unsupervised probation;
    b) assessed a monthly probation fee of $15.00 (total of $45.00); and
    c) continue in counseling with a therapist of his and his Parents' choice.

    The Student successfully completed the informal adjustment and the case was closed.

29. On January 13, 2003, a CCC was held after the completion of various testing by the School. The WISC III was administered to the student on November 18, 2002. The Student obtained the following scores: Verbal IQ-93; Performance IQ-106; Full Scale IQ-99; Verbal Comprehension-93; Perceptual Organization-109; Freedom From Distractibility-96; and Learning Expectancy-99.

    Further, in Adaptive Behavior Rating Scales, on the home version, there was a standard score of 86 and on the teacher's portion there was a standard score of 79.

    The Student also was administered the Woodcock-Johnson III Tests of Achievement. The student scored as follows:

Subtest Area	Standard Score
Letter-Word Identification	86

Reading Fluency	5
Passage Comprehension	103
Reading Fluency	82
Calculation	89
Writing Fluency	88
Applied Problems	99
Broad Reading	83
Spelling	81
Broad Math	93
Writing Samples	97
Broad Written Language	86

Conner Rating Scales and other behavior ratings of the Student by 7th and 8th grade teachers were also completed. The Student did show atypical problems in attention and other areas, but the problems were not in all classes nor at all times. The evaluator did not believe the Student qualified for special education services as Emotionally Disturbed (ED) or Other-Health Impaired (OHI).

At this CCC the mother informed the School that she had previously hired a person to home-school the Student. The Student's mother again raised that the Student had been expelled. The School reiterated that he could not have been expelled since there was never a manifestation determination. The Student's mother did not agree to the IEP from October 28, 2002.

30. The Student's Parents expended a total of $29,816.11 for the cost of home-schooling the Student (and his brother). This amount included:

    a) home-school teacher's salary- $18,900.00, which did not include 1-2 weeks payment prior to being on salary;
    b) car- $3,600.00;
    c) car insurance- $434.00;
    d) health insurance- $4,030.60; and
    e) books and supplies- $2,851.81.

31. The Student's attorney in her written closing argument raised for the first time two new issues:
    (a) Attorney fees for the School's attorney being late on two occasions for the start of two sessions of the hearing; and
    (b) The School's failure to timely provide the Student's complete educational record.

    Due to the failure to raise these issues at the hearing itself, the issues are summarily denied. However, this Hearing Officer notes as to the educational records, it is not clear whether the various documents were in fact educational records or not, but this Hearing Officer will not rule on this issue due to the untimeliness of the request.

    The Student's teachers of record and other staff did attend various in-service and other training.

33. The School offered training for Parents but the Student's Parents never attended any such training. The Parents were not aware of such training. For notification of such training the

School used the special education students, public notice in the newspaper, or posting of notice at a public site.

The IHO's Conclusions of Law

Based on the thirty-three (33) Findings of Fact, the IHO reached sixteen (16) Conclusions of Law.

1. The School, commencing with the student's 7th grade year, did not provide a FAPE to the Student. Under the Individuals With Disabilities Education Act (IDEA) and Article 7, a FAPE is an educational program specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. *Board of Educ. of LaGrange School District vs. Illinois State Board of Education* 184 F3d 912, 915 (7th Cir.1999). A FAPE, however, is not necessarily the best possible education or one that maximizes the potential of each child with disabilities or one that is in some sense equal to the education provided to children without disabilities. See *D.F. vs. Western School District,* 921 F. Supp. 559, *565* (S.D. Ind., 1996), *Board of Educ. Of Hendrick Hudson Cent. Sch. Dist. vs. Rowley,* 458 U.S. 176 (1982).

   See also *Heather S. vs. Wisconsin,* 125 F. 3d 1045, 1058 (7th Cir. 1997) (school district not required to provide best possible education). Review of action under the IDEA is limited to two inquiries: (1) whether the School has complied with the IDEA's administrative procedures; and (2) whether the IEP is reasonably calculated to provide educational benefits to the child. *Rowley,* 458 U.S. at 206-07; *Johnson vs. Duneland Sch. Corp.,* 92 F.3d 554, *557* (7th Cir. 1996). If these requirements are met, a School has complied with the IDEA's obligations. The School herein did so until October 8, 2002, as concluded hereinafter.

   The Parents of the Student opined that the School could not provide a FAPE because the School failed to identify the student as ED or OHI.

   With respect to identifying the student as ED or OHI, the Parents stated that the School did not address the Student's emotional problems, such as attention problems, disorganization and behavior incidents, and, therefore, did not provide him with a FAPE. In reviewing the record, it is clear that the School did not identify the student as ED or OHI.

   From this Hearing Officer's review of the record, it does not appear that the Parents and the School disagree concerning the Student's inattention or disorganization; rather, they essentially disagree on what such difficulties should be called, how they should be treated, and the extent thereof. However, the Office of Special Education Programs (OSEP), which is charged with enforcing the regulations,[6] has emphasized that there is no federal requirement to identify a child's handicapping condition with a label. *Letter to Presto,* EHLR 213:121 (OSEP 1988) ("There is no Federal requirement to identify a child's handicapping condition with a label... A determination of the child's needs can be made without agreeing upon a label for the handicapping condition.")' *See also Heather S.,* 125 F.3d at 1055 ("The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education.").

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[6]See 20 U.S.C. § 1402.

Accordingly, this Hearing Officer finds the Parents' argument regarding the School's failure to identify the student as ED or OHI as required to provide a FAPE was unpersuasive.

From 11/21/95 through the start of the student's 7th grade, the School did provide a FAPE to the Student. Though the Student did have attention and disorganization problems, until the start of 7th these behavior problems did not appear to be significant. Further, from the 1st through 5th grades the Student had a special education teacher certified in LD and ED who worked diligently with the Student to accommodate his inattention and disorganization deficits.

In start of 7th grade the Student's behavior problems increased, including bullying other students and failing to do homework and assignments, with such problems adversely affecting education and learning. Further, based upon the reports of numerous 7th grade teachers, the Student's inattention was a substantial problem.

The Student did receive a FAPE and benefit from his educational program through the sixth grade. Maybe the Student did not receive the best possible education, but neither IDEA nor Article 7 requires one that maximizes the child's potential. However, commencing in the Student's 7th grade year, the Student did not receive a FAPE.

2. Based upon the testimony, written documents and the findings herein, the School did expel the Student in October, 2002 without the required hearings (expulsion or manifest determination), and subsequently failed to provide appropriate educational services, with the parents required to expend funds to home-school the Student and provide needed services.

   The evidence presented and reasonable inferences therefrom, and based upon the credibility of the witnesses, the Student was expelled on October 8, 2002. Whether or not the principal specifically stated the student was expelled, the Parents reasonably believed he was expelled. Although the principal lacked the legal authority to expel the student, his actions and inactions, including the failure to clarify the situation when specifically questioned by the Parents' attorney, made this a *de facto* expulsion. It was unreasonable for the School to rely upon the oral statements of the Parents' housekeeper that the Student was going to be home-schooled, assuming she ever made such a statement, which she denied, and the School's own documents place this into question. These documents include:

   (a) the form prepared by the School, which the housekeeper signed on October 11, 2002, which made no mention the Student was being home-schooled;
   (b) the assistant principal's notes, including the crossing off of "criminal act" subsequent to October 15, 2002, when he was advised by a probation officer that the student had not committed a criminal act, which was after the date (October 1, 2002) the School stated the Student was being home-schooled, with no reason to go back and then cross it off, since the School was apparently no longer looking at expulsion of the student;
   (c) the guidance counselor's notes of October 28, 2002, indicating that the mother "is going to home-school the student" and a written home-school form was FAX'd and mailed to the Parents that day and on that date the principal allowed the student to keep his textbooks, compared to his testimony and the testimony of one of the School's secretary that the principal approved this on October 11, 2003.

The Parents attempted to meet with the assistant principal after October 15, 2002, when they became aware of the fact that the Student had not committed a criminal act (based upon determination by the prosecutor and the probation department). Such a meeting never took place with a person with the authority to inform the Parents whether the Student was or was not expelled.

When the Student's 8th grade TOR contacted the mother on October 24, 2002, to schedule the Student's annual case review, the mother stated and the TOR acknowledged that the mother believed the Student was expelled. The TOR only stated that the Student could not have been expelled, since a manifestation determination was never held. The TOR did not then contact the principal or assistant principal and inform either that the Parents were mistakenly believing the student was expelled and to contact the Parents to correct this supposed misunderstanding.

The Parents, based upon the TOR's comments, then had their attorney draft the letter to the principal inquiring about the Student's status. The principal acknowledged he read the letter and filed it away, rather than take any steps to clarify the situation (i.e., forward the letter to the School's legal counsel, call or write the Parents or the attorney). The principal's only response was that he did not have a release to contact the attorney. Contrast this with the situation on October 11, 2002, when the principal relied upon the supposed oral statement of the housekeeper that the Student was being home-schooled.

The record is replete with instances prior to the October 28, 2002, CCC where the principal or assistant principal could have clarified the situation, if the Student truly were not expelled, but they did nothing. When the rights and education of a student are involved and a School is put on notice that a parent is questioning whether the student is expelled or not, such inaction by a School is incomprehensible to this Hearing Officer.

3. Prior to October, 2002 the School did provide a FAPE in the LRE and the appropriate continuum of placements were considered by the CCCs. A full-time general education classroom was not structured enough but ful- time special education classroom would have been too restrictive for the Student. Predominant general education classes with resource room for reading and writing were appropriate. Further, the mother agreed to such placements. 511 IAC 7-21-36 [sic]. Home-schooling of the Student is not a FAPE in the LRE.

4. The School since 1995 timely and accurately identified the Student as a special needs student, specifically as LD, but did not believe or determine that he was ED or OHI as a secondary disability. The Student's disabilities were primarily due to his learning disability and pursuant to 511 IAC 7-25 and 511 IAC 7-26-6. The School properly so identified the student as LD. However, the School did not appropriately address the Student's numerous disciplinary referrals in the 7th grade, and his inattention and disorganization. A functional behavior assessment, behavior intervention plan and accommodations should have been developed to address these needs. The Student's qualifying needs for special education were reading and written expression. Further, the Student's mother accepted such determination of his handicapping condition.

The Student was diagnosed with ADHD, bipolar disorder, oppositional disorder and dysthemic disorder by a private psychiatrist. Although such DSM-IV diagnoses do not *per se* qualify a student for Article 7 services, such a diagnosis coupled with the observations of teachers established that the Student's behaviors, disorganization and inattention were adversely affecting his education, although his primary handicapping condition was LD and not ED or OHI.

5. The School from 1995 to the start of the Student's 7th grade year (October, 2001), devised appropriate IEPs for the Student, which were reasonably calculated to provide educational benefit, and the Student did make educational progress. Under the IDEA and Article 7, an IEP must include statements regarding the child's present level of educational performance, the student's measurable annual goals, the special education services to be provided, the extent, if any, to which the child will not participate with non-disabled children in the general class, and the projected date for the beginning of the services and duration of those services. 20 U.S.C. § 1414 (d) (1) (A); and 511 IAC 7-17-44 and 511 IAC 7-27-6.

   Upon review of the Student's IEPs through October, 2001, it is clear that each IEP through the 6th grade satisfied these requirements. The IEPs detailed the Student's history, present academic performance and his social and emotional skills. The IEPs included both goals and objectives and detailed the evaluation procedures to be used. The IEPs further detailed the services to be provided to the Student and the extent to which he was able to participate in general education programs. Specifically, the IEPs included the various services and accommodations as set forth in the Findings herein. Finally, the IEPs included both the projected dates for initiation of services and the anticipated ending dates.

   The Supreme Court has made clear that schools are required to provide personalized instruction with sufficient support services to permit the student to "benefit educationally from that instruction." *Rowley,* 458 U.S. at 203. The Court, however, has not set out a test for determining the adequacy of educational benefits. *Id.* at 202.

   In *Rowley,* the Court stated that grades and advancement were an important factor for determining educational benefit when a disabled child, who was receiving specialized instruction and related services, was performing above average in the regular classroom of a public school system. *Id.* at 202-203. The Court noted, however, that not every disabled child who was advancing from grade to grade in a regular public school system was automatically receiving a FAPE. *Id.* at 203 n.25. Here the Student was advancing grade to grade with passing grades until the end of his 6th grade year. However, the IEP of October 30, 2001 and October 30, 2002 were not appropriate due to the Student's significant inattention and disorganization problems. The School failed to address these problems by not performing an FBA, not preparing a BIP, or accommodating these problems in the IEP's.

6. The School did fail to perform a required FBA in October, 2001 when it was marked that the Student's behavior was impeding his learning or the learning of others. Based upon a review of the record, this failure and subsequent failure to prepare a BIP did deprive the Student of a FAPE. Further, there was evidence presented that the Student was punished for actions or in-

actions that were manifestations of his disability, as set forth in 511 IAC 7-29. It is unclear whether the instant message was a manifestation of his disability, since a manifestation determination never occurred. Also, due to the Student's inattention and disorganization, an FBA should have been performed in the fall of 2002.

7. The evidence established that the Student did participate in wrestling during the 7th grade. The evidence was not clear whether he may have been unable to wrestle in some matches due to his failing grades. However, the Student was not treated differently from his non-disabled peers. Further, the Student was not allowed to try out for football in the 7th grade due to not timely turning in a parent permission slip. There was no evidence that during the Student's 8th grade year that he ever attempted to access any extracurricular activities and was denied by the School. Further, after the Student was clearly being home-schooled (after November, 2002), a School can decide whether it will allow a non-public student to attend or participate in extracurricular activities.

   Now that the student is in high school, his participation in the School's athletic extracurricular activities is subject to the Indiana High School Athletic Association rules and regulations.

8. There was no evidence that the School failed to ensure that proper personnel attended CCC meetings.

9. The School did evaluations of the student when requested by parents. The School did in fact evaluate the Student during his 1st, 4th and 8th grade years. Issues of testing were discussed at the other CCC and the Parents [did] not request any additional testing. The evidence presented did establish that the School did conduct evaluations of the student upon the request of the Parents. The evaluations by the School were appropriate under the requirements of Article 7, and there was no evidence that such evaluations were not performed timely. Further, the private psychiatric evaluation did not comply with the requirements of an [educational] evaluation under Article 7.

10. Through October, 2001, the School did devise appropriate and measurable goals and objectives, but needed accommodations to address the Student's inattention and disorganization were not provided thereafter and giving the Student discretion as to whether he should attend the study lab was not appropriate.

11. The School did offer programs in various special education matters for Parents. However, notices to the parents appear inadequate. The Student's Parents never received notice of such programs. Notice of such programs were either through newspaper advertisements, public postings or through the special education student. There was no evidence of any direct contact or mailing to the parents. The School did not comply with Article 7, specifically 511 IAC 7-20-3 and 511 IAC 7-28-1(h). Based upon the evidence presented, the School's teachers and staff were adequately trained in the areas of the Student's needs and disabilities, in compliance with 511 IAC 7-21-2 and 511 IAC 7-20-3, with the Student's various special education teachers having attended numerous in-service training.

12. Based upon the evidence, ESY services for the Student were considered by each of the CCC meetings for the Student and rejected because he had not shown either regression during school vacations or an inability to progress towards mastering the general education curriculum and his IEP goals from year to year, nor was there a subsequent failure to recoup lost skills within a reasonable period of time. The Student's 1995 IEP during his 1st grade was not checked as to whether ESY was needed or rejected. However, as explained by the School, at this CCC the Student's initial IEP was developed. Therefore, the School had no prior knowledge of the Student's prior regression or failure to recoup lost skills in earlier years. Further, this CCC meeting was in November, 1995, which was over six months before the next summer vacation. Customarily, the decision for ESY is not made that early in any given school year. Although the committee should have marked whether ESY services were considered, pursuant to the provisions of Article 7 in 1995, specifically, 511 IAC 7-12-1(k)(11), this procedural violation [is] of little consequence based upon the specific facts in this case. Further, the student and his mother opined that ESY services were not needed.

13. The case conference committee did consider the recommendation of the parents and their expert, pursuant to 511 IAC 7-27-3(e) and (f) and 511 IAC 7-27-4(c). Their one expert, a psychiatrist, did not make any educational recommendations but did diagnosis the student as ADHD, ODD and depressed, pursuant to DSM-IV. However, such diagnoses alone do not meet Article 7's requirements for eligibility.

    The School evaluated the Student in late 2002 to determine whether the Student had any educational disabilities. The January 31, 2003, CCC did not add ED or OHI as a secondary disability, even though the Student had various attention and disorganization problems, which appear to have negatively impacted his learning. The Student remains eligible for special education as LD. Until the Student's 8th grade there was no evidence presented of any evaluation or recommendations by any experts of the parents. Further, the Student's mother agreed to all of the Student's IEP's prior to January, 2003.

14. The evidence established that the School did not fail to provide education and [related] services to the Student, due to budgetary or staff problems. There was no evidence presented concerning the School's budgetary or staffing problems. The School did provide an appropriate education and [related] services, based upon the Student's individual needs, through the end of his 6th grade year. 511 IAC 7-27-4 (c) and 511 IAC 7-17-66.

15. As the School did fail to provide a FAPE to the student since the start of his 7th grade, based upon the failure to address the Student's significant inattention and disorganization problems by not doing an FBA, not developing a BIP, and not accommodating these needs, and the expulsion, or *defacto* expulsion, the Parents are entitled to reimbursement for 2/3 of the home-schooling expenses for the period from early November, 2002 through the end of the 2003-2004 school year. The Parents' younger son was also being home-schooled by the same instructor as the Student and it would be inappropriate and inequitable to not reduce the total home-school expense due to the benefit received by the Student's brother.

16. A CCC should be held forthwith to develop an appropriate IEP for the Student for the balance of the 2003-2004 school year unless the Parents decide to continue to home-school the Student but without reimbursement thereof.

The IHO's Orders

Based upon the Findings of Fact and the Conclusions of Law, the IHO issued the following three (3) Orders:

1. The School shall reimburse the parents the sum of $19,977.40 for 2/3 for the home-school expenses incurred through the end of the 2003-2004 school year.

2. A CCC shall be held immediately to develop an IEP for the Student to address his learning disabilities and any necessary accommodations to address the Student's inattention and disorganization problems by doing an FBA and developing a BIP, unless the Parents decide to continue to home-school the student; however, if so, they are not entitled to any further reimbursement of such home-school expenses.

3. The School shall establish a procedure or policy to insure parents of special education students are given personal notice (mailed or delivered in person) of any parent training and not rely upon delivery by a special education student, publication [of] notice or posting in a public place or places.

The IHO appropriately advised the parties of their respective appeal rights.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The School, by counsel and within the time frame for seeking review by the Indiana Board of Special Education Appeals (BSEA), requested an extension of time within which to prepare and file a Petition for Review. This request was received on December 2, 2003. The BSEA granted the request and issued an Order that same date, extending the time line to the close of business on December 31, 2003, within which the School must prepare and file its Petition for Review.[7] The Student, by counsel and on December *5,* 2003, asked the BSEA to reconsider its Order granting the School an extension of time within which to file its Petition for Review. In the Motion, the Student argued, in part, that "there have already been far too many delays with this case, all caused by the [School]." The BSEA notes that this is not supported by the record. The Student caused initial delays by failing to be specific as to the issues for hearing, and joined in requests for extensions of

[7] The request for an extension of time prior to the filing of a Petition for Review is permitted by 511 IAC 7-30-4(1). However, such a request and subsequent Order granting same does not vest jurisdiction in the BSEA. If the party so requesting fails to file the Petition within the time frame of the Order, the BSEA may be without jurisdiction as the Petition would be untimely. See L.M. by Mauser v. Brownsburg Community School Corporation, 28 F.Supp. 2d 1107,1111 *n.* 6 (S.D. Ind.. 1998).

time. The Student's arguments were unpersuasive. The BSEA, on December 8, 2003, denied the Student's Motion and issued an Order to that effect.

The Student's Petition for Review

The Student, by counsel, filed his Petition for Review on December 8, 2003. The Student's Petition does not take exception to any Finding of Fact or Conclusion of Law. Rather, the Student indicates his belief the IHO made a computation error in Order No. 1 ("The School shall reimburse the parents the sum of $19,977.40 for 2/3 for the home-school expenses incurred through the end of the 2003-2004 school year"). The Student believes the IHO intended to order reimbursement for two distinct periods, November 2002 through May 2003 as well as August 2003 through May 2004. The Student bases this upon the IHO's language in Conclusion of Law No. 15.[8] Based upon the Student's mathematical calculations, assuming the IHO did err, the Student claims reimbursement should be $49,943.50 rather than $19,977.40.

Although the School was advised of its right to prepare and file a Response, the School did not respond.

The IHO's Attempt to Clarify

On or about December 29, 2003, the IHO directed to the counsel of record a document entitled Corrected Conclusion of Law and Order, wherein he attempted to correct Conclusion of Law No. 15 and Order No. 1, apparently based upon his reading of the Student's Petition for Review.[9] The IHO knew that the BSEA had jurisdiction as of December 8, 2003, when the Student filed his Petition for Review, but failed to supply this document to the B SEA. The BSEA did not receive the document until January 5, 2004. The Student, by counsel, filed a written objection to the IHO's document and moved that it be stricken. The BSEA, in consideration of this Motion, granted it the same date and issued an Order striking the IHO's subsequent attempt to amend his final written decision.

The School's Petition for Review

The School, by counsel, filed its Petition for Review on December 31, 2003. The School takes exception to the Finding of Fact No. 4, but mischaracterizes the IHO's finding as the Student "was identified *in conjunction with* concerns in focused attention and low frustration levels" (emphasis added). (Petition, p. 26). The IHO noted there were "concerns in focused attention and low frustration level."

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[8] As will be seen, the Order and the Conclusion of Law do appear, at first reading, to be inconsistent. The Student could have—and probably should have—requested the IHO to clarify his Order while the IHO continued to have jurisdiction. The IHO retains jurisdiction until thirty (30) calendar days after the receipt of his final written decision or the filing of a Petition for Review with the BSEA, whichever comes first. There was sufficient time to do so, although it is not error to utilize the BSEA process. It is just awkward.

[9] Although State law does not require the BSEA to do so, the BSEA has always provided the IHO with copies of all pleadings and correspondence relating to the IHO's decision that is under administrative appeal.

The School also disagrees with Finding of Fact No. 9, Finding of Fact No. 11, Finding of Fact No. 12, Finding of Fact No. 13, Finding of Fact No. 14, Finding of Fact No. 15, Finding of Fact No. 17, Finding of Fact No. 21, Finding of Fact No. 22 (as to legal conclusions made by the IHO based upon his knowledge of juvenile justice proceedings and the IHO's purported misunderstanding of school-based disciplinary proceedings), Finding of Fact No. 23, Finding of Fact No. 29 (as to statement the Parent did not provide written consent), and Finding of Fact No. 30 (as to Parents' costs).

The School objected to Conclusion of Law No. 1 (on the core issue of FAPE) and Conclusion of Law No. 2, arguing that the IHO's determination the School engaged in a "de facto" expulsion of the Student exceeded his jurisdiction. The School also objected to Conclusion of Law No. 4, Conclusion of Law No. *5,* Conclusion of Law No. 6, Conclusion of Law No. 7 (relationship between the Student's failing grades and his involvement in extracurricular activities), Conclusion of Law No. 10, Conclusion of Law No. 11 (parental notification requirement exceeded IHO's authority), Conclusion of Law No. 13, and Conclusion of Law No. 15. The School also objected to all three (3) of the IHO's Orders.

There was no established pattern of untoward behavior, the School argues, that would have warranted the conduct of an FBA and the development of a BIP. The IHO's determinations to the contrary, the School argues, are not supported by the weight of the evidence. The psychiatric diagnoses did not place the School on notice the Student required any greater degree of special education or related services. The Student in this case did not have significant disabilities and his behavior was chiefly confined to his failure to complete homework assignments. The Student's failing grades are not indicative of a failure to provide a FAPE. To the extent the IHO found the Student's behavior to be a manifestation of his disability, this was error.

The School also argues that its parent-training initiatives are adequate, and that past decisions of IHOs have so held. The IHO's reliance upon 511 IAC 7-20-3 (Comprehensive System of Personnel Development)is misplaced. CSPD plans are more global, the School argues, and are not intended for any specific need of any particular student. The Student's needs in this case were not so significant that parent training as a related service was warranted.

The School also appears to object to the IHO's credibility determinations as well as his determinations of relevant evidence.

Conclusion of Law No. 15 and Order No. 1, the School argues, fail to satisfy Florence Co. School Dist. No. Four v. Carter, 510 U.S. 7, 114 S. Ct. 361 (1993).[10] The School argues that it provided

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[10]In Florence Co., a unanimous Supreme Court reiterated its decision in School Comm. of Burlington v. Department of Education of Massachusetts, 471 U.S. 359, 105 S. Ct. 1996 (1985), and added that the private school selected by the parents need not meet the standards of the State educational agency (SEA) in order for reimbursement to be awarded. This would include teacher certification and accreditation. Reimbursement would be contingent upon a finding the public agency violated IDEA while the private school placement was proper. 114 S.Ct. at 365-66. The School in this case attempts to make a distinction between a "private school" in Florence Co. and a home school in Indiana. Applicable federal law and Indiana law do not define "private school," and Indiana law does not make a distinction between accredited and non-accredited private schools for Article 7 purposes. Many of the Florence Co. determinations are now located at 511 IAC 7-19-2.

the Student a FAPE, thus satisfying the Florence Co. initial inquiry and defeating the Student's reimbursement claim. In addition, the School argues, the home school was unreasonable as to cost, not appropriate, and not the LRE for the Student. The IHO determined in Conclusion of Law No. 3 that the "Homeschooling of the Student is not a FAPE in the LRE," thus precluding an award of the educational expenses. The School also argues the Parents failed to provide timely notice of their intent to educate the Student privately.[11]

The Student's Response

The Student, by counsel, timely responded on January 8, 2004. The Student asserts the School mischaracterized the Parents' position in the hearing and attempts to reargue their case rather than identify errors purportedly made by the IHO. The Student also asks the BSEA to strike the lengthy introductory portion of the School's Petition for Review.[12] Credibility and relevancy determinations by the IHO should not be overturned except in accordance with the BSEA's standards for review at 511 IAC 7-30-4(j). Where the parties offered testimony that conflicted, it was within the province of the IHO to determine credibility and relevancy. His determinations should not be disturbed, absent any of the criteria for doing so (determination was arbitrary or capricious; abuse of discretion; contrary to law; contrary to a constitutional right, power, privilege or immunity; in excess of jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence).

The Student also alleges the School is attempting to raise issues on appeal that were not raised in the hearing.[13] The Student also asserts the School was on notice of the Parents' intent to seek reimbursement for the costs of providing a home-school education for him.

The School's reference to other due process hearing decisions regarding staff training is misplaced, the Student states. Decisions as to adequacy are made based on the unique needs of a student. Decisions regarding other students are not applicable. In addition, BSEA decisions do not have precedential value because of the individualized nature of each decision.

In addition, the Student argues the School misrepresented the standard for reimbursement by indicating the private placement must be appropriate and satisfy LRE requirements. In this case, the Student represents, the Parents reasonably believed the Student was expelled, which left them few alternatives to ensure an education. The IHO's determination the School failed to provide a

[11] The School cites to the federal statute. For BSEA purposes, this same language appears at 511 IAC 7-19-2. The BSEA will refer to Article 7 whenever possible.

[12]The BSEA is not inclined to do so. Petitions for Review—as well as Responses and any briefs filed by an attorney in a representational capacity—are recognized as argument and not evidence. Parties are likely to view evidence and testimony differently as to relevancy and credibility. So long as a party does not go so far as to deliberately mislead the BSEA, such legal pleadings will be taken for what they are—an attempt to persuade through legitimate means—and not what they are not (evidence). Neither the School nor the Student have engaged in any deception.

[13]The Student is actually more concerned about the attempt to introduce additional evidence not provided during the hearing, notably additional information on DSM-IV criteria.

FAPE with the concomitant finding the Parents were entitled to reimbursement are supported by the record and by relevant case law.

To the extent the Parents may not have provided the requisite notice contemplated by 511 IAC 7-19-2, the School's actions with regard to the apparent expulsion of the Student vitiated any need on the Parents' part to provide such notice.

The Student also asserts the record contains sufficient detail to support the IHO's determinations with regard to the Student's behaviors and the adverse impact they had upon his education, and were not minor behaviors or incidental occurrences as the School represents. This was contradicted by the School's own documents.

There was no error on the IHO's part to rely upon his own legal knowledge of juvenile justice procedures. Except to the extent the Student argued in his Petition for Review that the IHO miscalculated the amount of reimbursement, the Student urges the BSEA to uphold the IHO's decision.[14]

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The entire record of the proceedings below were photocopied and supplied to the BSEA members on January 6, 2004. On January 16, 2004, the BSEA notified the parties that it would conduct its review without oral argument and without the presence of the parties. This review was scheduled for Friday, January 30, 2004, in Indianapolis.

On January 30, 2004, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petitions for Review, and the Response thereto, the BSEA now decides as follows.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

[14]The School attempted to file a document entitled "Reply to Response to Petition for Review' by sending this document via facsimile transmission after business hours on January 29, 2004. Accordingly, it was not deemed filed until the following business day, January 30, 2004, which is also the day of the BSEA's review. The School did not advise the BSEA or counsel for the Parents that such a Reply would be filed. Article 7 does not provide a right to do so, although the BSEA has never declined such responses except when they are filed on the day of the review, which this one is. In accord with its practice in this regard, the filing is not timely and the BSEA will not consider the School's Reply.

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 Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. The Student is eligible for special education and related services due to a learning disability. The Student is of compulsory school-age. On or about October 4, 2002, the Student, through instant messaging, indicated that he contemplated a school shooting, including "what guns, what angels [sic] to shoot, were [sic] to shoot from and who [sic] to shoot," as well as what to wear, "how long it would take," "what classroom to do the hits," where to shoot people (head or chest), "what and how hard to press with a knife," "what kind of knife," what tipe [sic] of explosive," where to place the explosives," and whom to warn to stay away from school that date. In a separate message, he indicated that "people will be sorry" and that they "will all pay" and that he is about "to go phyco [psycho]." He also wrote that he could "kill 10 grown men in under 1 min. Think what i can do to littel [sic] kids[.]" (Exhibit R-24). The School was informed of the instant messages and initiated expulsion proceedings.

3. The School never definitively informed the Parents whether the Student would be expelled from School. The Principal received a letter from an attorney indicating unequivocally his representational capacity, inquiring directly as to whether the Student had been expelled. (Exhibit R-36). The Principal never responded to the attorney's letter. The Principal's proffered reasons for not doing so were not deemed credible by the IHO. The Student's CCC never conducted a manifestation determination, as seemingly required by 511 IAC 7-29-6.

4. The Student's conduct constituted "unlawful activity" under I.C. 20-8.1-5.l-9.[15] "Unlawful activity" does not require any type of adjudication by a court for application of this statute. In Sherrell v. Northern Community School Corporation of Tipton County *et al.*, __ N E.2d ___ (Ind. App., January 16, 2004),[16] the student indicated he intended to obtain his father's gun, go to school, and "start with the seventh grade, and work his way up." School officials learned of the threat and interviewed the student. The prosecutor declined to bring charges.

   The student was eventually expelled from the school. The student argued the school was without authority to determine whether his off-school comments constituted "unlawful activity," and thus could not expel him. The Court of Appeals disagreed.

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[15]**IC 20-8.1-5.1-9 Unlawful activity by student**

Sec. 9. In addition to the grounds specified in section 8 of this chapter, a student may be suspended or expelled for engaging in unlawful activity on or off school grounds if:

(1) the unlawful activity may reasonably be considered to be an interference with school purposes or an educational function; or

(2) the student's removal is necessary to restore order or protect persons on school property; including an unlawful activity during weekends, holidays, other school breaks, and the summer period when a student may not be attending classes or other school functions.

As added by P.L. 131-1995, SEC. 10.

[16]The Court of Appeals has indicated this opinion is "For Publication." It is presently located at http://www.state.in.us/judiciary/opinions/archive/01160401 .srnb.html.

> Indiana Code Section 20-8.1-5.1-9 does not say that a prosecutor must determine whether a student engaged in unlawful activity. At oral argument, [the student] conceded that a school may determine under that statute whether a student's unlawful activity "may reasonably be considered to be an interference with school purposes or an educational function" or whether "the student's removal is necessary to restore order or protect persons on school property." *See* Ind. Code § 20-8.1-5.1-9. It would defy logic, common sense, and the plain language of the statute to hold that a prosecutor must determine in the course of a school disciplinary proceeding whether a student engaged in unlawful activity. [The student's] argument is without merit.
>
> We acknowledge that the term "unlawful" is not defined by statute, but we need not attempt to define it here. [The student's] contention that he did not engage in unlawful activity is based on the faulty premise that a prosecutor must make this determination, rather than on a cogent argument asserting that this threat to shoot his schoolmates does not constitute unlawful activity. As such, [the student] has failed to establish that the Board's decision to expel him was arbitrary and capricious.

Id., footnotes omitted. In sum, the Student engaged in "unlawful activity" for which he could have been expelled. In the absence of any affirmative action on the part of the principal to respond to the Parents' concerns, it was reasonable for the Parents to believe the Student was, in fact, expelled from the School.

5. The BSEA sustains the IHO's Findings of Fact Nos. 4, 9, 13, 14, 15, 17, 21, 23, and 30 as supported by the record.

6. The BSEA sustains the IHO's Finding of Fact No. 11, although the BSEA notes that the IHO's use of the descriptor "punishments" is unfortunate. The record does not indicate that "punishments" were intended. Rather, what was intended was for the Student to realize responsibility and consequences. Nevertheless, quibbling with the use of a single word in isolation is insufficient to alter this Finding of Fact.

7. The BSEA sustains Finding of Fact No. 12. The IHO reported what the Student stated. As far as the Student's grades, they did decline. The IHO did not qualify what he meant by "grades dropped," but he didn't indicate this was a precipitous decline. The grades merely "dropped," and the record sustains this.

8. The BSEA sustains the factual determinations in Finding of Fact No. 22 but also notes the IHO's legal conclusions in this Finding of Fact should have appeared, if at all, as a footnote rather than embodied in the fact-finding process. In addition, the BSEA has the advantage of the decision of the Court of Appeals, *supra,* that was issued after the IHO wrote his decision. The Court of Appeals' decision determines "unlawful activity" for the purpose of school-based disciplinary actions.

9. Finding of Fact No. 29 does contain a factual error ("The Student's mother did not agree to the IEP from October 28, 2002"). This last sentence is amended to read: "The Student's mother provided written permission for implementation of the IEP from October 28, 2002, but her subsequent actions indicate the Parents rejected the proposed IEP and educational placement."

10. The BSEA sustains the IHO's Conclusion of Law No. 1. While in isolation, difficulty in completing homework does not appear to be a significant matter, what behavior constitutes an "adverse affect upon educational performance," 511 IAC 7-17-4, is a matter of degree and judgment. No behavior is automatically included or excluded from such a consideration. When this persistent failure is coupled with the School's past acknowledgments that the Student lacks individual responsibility and performs better when provided structure, it cannot be said to be an error on the part of the IHO to conclude as he did in this matter.

11. As noted *supra,* it was reasonable for the Parents to believe the Student was expelled from School. The School's inconsistent procedures and failure to communicate with each other supports this reasonable inference by the IHO. Accordingly, Conclusion of Law No. 2 is sustained.

12. Conclusion of Law No. 4 is sustained. The need to conduct an FBA and, if warranted, develop a BIP, is not dictated by any particular exceptionality area but by the individualized behaviors demonstrated by a given student. The IHO could conclude that the identified behaviors constituted an adverse impact upon the Student's educational performance. As noted *supra,* such considerations are wholly individualized, are a matter of degree, and do require the exercise of some judgment. The IHO's judgment in this regard is supported by the record.

13. The record and the law support the IHO's Conclusions of Law Nos. 5, 6, 7, and 10. These Conclusions of Law are sustained.

14. The IHO's Conclusion of Law No. 11, however, is reversed. The Student's needs were never such that there was any necessity to conduct student-specific in-service training. The School and the Parents were also free to discuss parental services as a related service within the framework of the CCC. Neither did so. The law does not require the discussion of every conceivable or potential related service. There is no indication the School prevented discussion of such services. The School's procedures for notifying parents of potential training or informational sessions satisfies the minimal requirements of Indiana law.

15. Conclusion of Law No. 13 is amended in the last sentence to read, "Further, the Student's mother agreed to all of the Student's IEP's prior to January, 2003, although the Parents' actions indicate that they rejected the IEP and educational placement offered at the October 28, 2002, CCC meeting."

16. Conclusion of Law No. 15 is sustained. In addition to the legal conclusions of the IHO, the principal's actions and inactions could reasonably lead to a conclusion that the Student was expelled from the School. The concomitant failure to communicate this to the CCC compounds the error because no manifestation determination was conducted, as should have been. In addition, when notified the Parents would provide for the Student's education privately, the School did not make available services to a private school student as it is required to do under 511 IAC 7-19-1. Federal and Indiana special education law do not define "private school." Indiana has long included "home schools" within the special education application for "private school" for this purpose. When combined with the failure to conduct an FBA and, if appropriate, develop a BIP, it can be fairly concluded the School did not provide a FAPE to the Student. As noted *supra,* reimbursement is appropriate where a School has failed to provide a FAPE and the Parents provided an appropriate educational program under Indiana law. The Parents' actions were not unreasonable, given that they reasonably believed the Student was expelled. Under I.C. 20-8.1-3-34,[17] the Parents are required to either send the Student to the School or provide "equivalent instruction." The School has not argued—and there is no reason to so hold—that the educational program provided by the Parents through their own means did not constitute "equivalent instruction." Accordingly, the IHO concluded and the BSEA agrees that the School failed to provide a FAPE and that the educational program provided by the Parents was proper. The educational program satisfies Indiana law. The lack of certification of the home-school teacher does not negate this. 511 IAC 7-19-2(f).

17. The BSEA will not second-guess the calculation of reimbursement by the IHO as found in Order No. 1. Irrespective of whether the IHO meant the reimbursement to be only for one school year or for both school years, he evidently decided full reimbursement is not warranted. Accordingly, the figure that he used—$ 19,977.40—is sustained.

18. Order No. 2 is sustained as written but amended to read: "If the Parents elect to continue to provide educational services to the Student through private means, the School shall make available to the Student services as contemplated under 511 IAC 7-19-1."

19. Order No. 3 is reversed because it is not supported by the record, by Indiana law, and exceeds the IHO's authority.

ORDERS

Inconsideration of the foregoing, the Board of Special Education Appeals rules as follows:

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[17]**IC 20-8.1-3-34 Compulsory attendance for full term; duty of parent**

Sec. 34. Compulsory Attendance for Full Term; Duty of Parent. It is unlawful for a parent to fail, neglect or refuse to send his child to a public school for the full term as required under this chapter unless the child is being provided with instruction equivalent to that given in the public schools. This section does not apply during any period when the child is excused from attendance under this chapter. *(Formerly: Acts 1973, P.L.218, SEC.1.) As amended by Acts 1978, P.L.2, SEC.2004; Acts 1979, P.L.87, SEC.* 7.

1. The IHO's decision is sustained *in toto,* as amended, except as to Conclusion of Law No. 11 and Order No. 3 which are hereby reversed.

2. Any allegation of error in the Petitions for Review not specifically addressed above is deemed denied.

DATE: January 30. 2004

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Board of Special Education Appeals

APPEAL RIGHT

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