Indiana Board of Special Education Appeals

Room 229, State House - Indianapolis, IN 46204-2798
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BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of A.D.	)	
And	)	
Clay Community Schools	)	**Article 7 Hearing No. 1373.04**
	)	
Appeal from a Decision by	)	
Lon C. Woods, Esq.	)	
Independent Hearing Officer	)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

The Student[1] is a fourteen-year-old student. Clay Community Schools will be referred to as the "School." The Student, by counsel, requested a due process hearing dated August 1, 2003, pursuant to 511 IAC 7-30-3. Lon C. Woods, Esq., was appointed on August 4, 2003, as the Independent Hearing Officer (IHO). A Joint Motion for Recusal of Hearing Officer was filed by the Student and the School, which was received by the Indiana Department of Education, Division of Exceptional Learners, on August 18, 2003. On August 18, 2003, the IHO issued an Order Denying Recusal. On September 2, 2003, the IHO issued a Notice of Pre-Hearing Conference that he would conduct a pre-hearing conference on September 8, 2003. The IHO conducted a pre-hearing conference by conference call on September 8, 2003. On September 15, 2003, the IHO issued a Pre-Hearing Order which described the issues for the hearing and indicated that the decision would be issued to the parties on or before October 25, 2003, unless otherwise ordered. During the pre-hearing conference, the Student requested an extension of time. On September 15, 2003, the IHO issued a Notice of Hearing which indicated that the hearing would be held on October 8, 9, and 10, 2003. The deadline for the exchange of proposed exhibits and witness lists was set for October 1, 2003. Requests for subpoenas were to be made no later than October 1, 2003. On September 15, 2003, the IHO issued an Order granting the extension of time up to and including October 24, 2003. On October 1, 2003, the IHO issued an Addendum to Pre-Hearing Order dated September 15, 2003 which indicated that the Student had been enrolled by his parents in a private school, the Hutson School in Indianapolis, and that the Student shall remain in this placement until this proceeding is concluded. Responsibility for payment of the expenses incurred by virtue of said placement would be determined by the IHO in his decision. The Addendum to Pre-Hearing Order also indicated that responsibility for payment of the expenses

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

incurred by this placement would be determined by the IHO in the IHO's decision. On October 6, 2003, the IHO issued an Order on Request for Extension of Time in response to the parties having stated a need for two additional hearing days. The IHO granted a period of twenty (20) days up to and including November 13, 2003. On October 6, 2003, the IHO issued an Amended Notice of Hearing scheduling the hearing for October 8, 9, 10, and 29, 30, 2003. On October 13, 2003, the IHO issued a Second Amended Notice of Hearing with the additional hearing dates of October 28, 29, and 30, 2003. A pre-hearing conference was held prior to the beginning of the hearing on October 8, 2003.

The due process hearing was held on October 8, 9, 10, 28, and 29, 2003.

The specific issues for the hearing were as follows:

1. Whether the School accurately and timely identified the Student's areas of special needs;

2. Whether the School failed to comply with the parents' request for an evaluation of the Student without written advisory notice of its decision, and, as a result, is obligated to reimburse the parents for expenses incurred in obtaining an evaluation;

3. Whether the School failed to adequately train the teacher, staff, administrators, and parents as to the Student's disability and educational needs;

4. Whether the School failed to follow the provision of the Student's IEP;

5. Whether the School failed to provide the Student appropriate social skills training and tutoring;

6. Whether the provision of Extended School Year services (hereinafter referred to as "ESY" services) requested by the parents would have prevented the Student's regression;

7. Whether procedural safeguards were violated by the School when notice of the reasons for denial of other services was not given;

8. Whether the School failed to provide a free, appropriate public education by not providing services enumerated in an Article 7 conforming IEP;

9. Whether the School failed to timely provide the parents with the Student's academic and performance records when requested;

10. Whether the School failed to enable the Student to participate in extracurricular activities offered to non-disabled students;

11. Whether the goals and objectives contained in the Student's IEP were appropriate and

measurable;

12. Whether the School failed to properly intervene by providing a safe learning environment and, therefore, protect the Student from assaults;

13. Whether the School provided a timely and appropriate functional behavioral assessment and implement an effective behavioral intervention plan; and

14. Whether the Student experienced any harm from the alleged procedural errors by the school.

The Written Decision of the IHO

The IHO's written decision was issued on November 29, 2003. In his decision, he determined fourteen (14) Findings of Fact. These Findings of Fact are reproduced below:

The IHO's Findings of Fact

1. The student's primary disability is a learning disability in reading and written expression, and the secondary is Other Health Impaired due to ADHD.

2. The school did not provide written notice of the reasons for not conducting a speech language evaluation requested by the parents on two separate occasions.

3. Opportunities were provided by the school for school personnel and the parents to attend in-service training in ADHD and other behavior workshops. School personnel having contact with the student did not attend these workshops.

4. During the student's fifth grade year, the school did not comply with the provisions of his IEP, particularly in regard to accommodations to be provided and utilization of the resource teacher.

5. The school did not provide social skills training during the student's fifth grade year as enumerated in his IEP. The student is currently receiving social skills training through a private practitioner at the parents' expense.

6. There is insufficient evidence that the student regressed due to the school's failure to provide adequate ESY services.

7. Numerous requests by the parents for related services and accommodations for the student were denied either during case conference committee meetings or conferences with teachers for which written notice explaining the reasons for denial such services were

not being provided.

8. Following the student's fourth grade year in parochial school, a case conference committee convened to review the student's evaluations, make an initial determination of eligibility, and to develop an IEP for the fifth grade. While the parents chose the school he was to attend, and the committee acquiesced, the related service of transportation was not included the committee having cited a school policy proscribing transportation when a student attends school outside the home district.

9. During the student's seventh grade year, his achievement test results, performance records, and daily behavior records were not being timely provided to the parents.

10. The student was not provided the opportunity to continue his participation in non-academic extra-curricular activities the same as general education students, to wit: cross country and track and field during his seventh grade year due to a failing grade. He was permitted to practice with the team, but not allowed to participate in meets.

11. The goals and objectives contained in the student's IEP were not appropriate for the reason they were vague and not measurable. In addition, specific academic skill areas were omitted.

12. The student was the subject of bullying and physical confrontations with other students, particularly during less structured parts of the day such as passing periods, lunch time, and bus loading.

13. An appropriate Functional Behavior Assessment on the student either didn't exist, or no one knew an Assessment existed and the Behavior Intervention Plan did not satisfy the required components of a Plan.

14. The student experienced harm proximately caused by procedural errors as evidenced by the decrease in his achievement levels and lack of success of the ISTEP.

The IHO's Conclusions of Law

Based on the fourteen (14) Findings of Fact, the IHO reached fourteen (14) Conclusions of Law.

1. A learning disability is characterized by severe deficits in perceptual, integrative, or expressive processes which impair learning efficiency. The criteria to determine eligibility for special education is a severe discrepancy between a student's normal or near normal cognitive potential and in at least one of several cognitive skill areas. **511 IAC 7-11-7 et seq (May, 1995)** and **511 IAC 7-26-8 et seq (June, 2002)**. The psychoeducational evaluations performed on this student portrayed a student with at least normal intelligence,

but severe discrepancies in reading and written expression. Hence, there exists a learning disability.

The student was incorrectly classified as having a secondary disability of communication disorder. Characteristics of ADHD were noted during his assessment in kindergarten at the parochial school, then confirmed by medical diagnosis at which time Ritalin was prescribed. These characteristics continued to be exhibited when he attended the public school in the fifth grade to the present. The secondary disability should have been classified under Other Health Impaired due to ADHD. **511 IAC 7-26-12 et seq (June, 2002)**. As a result, goals and objectives in the student's IEP were misguided. In other words, the goals and objectives could not have fulfilled the student's educational and behavior needs.

2. On several occasions the parents requested of the case conference committee or the school's staff a speech/language evaluation be done, to wit: in February, 2000; April, 2000; and May, 2000. These requests were denied. The school is required to provide parents written notice and full explanation understandable to the parents prior to initiating, changing, or refusing to initiate or change the identification; evaluation; or educational placement of the student. **511 IAC 7-7-1(a)(2)(A)(B)(C) (May, 1995)**. The parents should have been advised of the circumstances under which an independent evaluation could be obtained at public expense.

   Following refusal without any notice or advisement of rights from the school, the parents obtained a speech/language evaluation at their own expense. They are entitled to be reimbursed by the school for these costs.

3. The school did present professional training sessions on the subject of ADHD, and a behavior workshop during the student's sixth and seventh grade years. However, few, if any, of the student's teachers and support staff attended these sessions. There are provisions for parent counseling and training which may be included in the IEP **[**see **511 IAC 7-28-1(h) (June, 2002)]** but none for teachers and support staff except for case conference committee participants. **511 IAC 7-12-1(t) (May, 1995)**. There are several E-mails and other communications between the school's staff which reveal either a lack of understanding or ambivalence on the subject of the student's behavior issues. These communications provide substantial support of the need for in-service training to bolster teachers' understanding of this unique behavior characteristic. Except for professional incentive and school policy there is no requirement for in-service training of professionals in Article 7. Yet the school should have paid the teachers' expenses for appropriate and meaningful training.

4. During the student's fifth grade year, the school did not comply with provisions of his IEP by not acknowledging the accommodations enumerated therein and by not utilizing the

assigned resource teacher. ". . . . the proposed placement may be implemented as soon as the necessary arrangements are completed, but in no case more than fifteen (15) instructional days from the date consent for the placement is obtained." The term "placement" is in reference to the student's IEP and its components. **[**see **511 IAC 7-12-1(r) (May, 1995).** Therefore, the school failed to implement the IEP within the required time frame; accordingly, the student was denied services authorized under Article 7.

5. The parents had requested the student receive appropriate social skills training and tutoring. While members of the staff expressed the belief they had no time or knowledge to provide such training, this attitude is irrelevant as to the student's behavior issues. Emphasis should have been placed on the need for a Functional Behavior Assessment (to identify patterns of student behavior) and a Behavior Intervention Plan. See paragraph #13 for analysis of the student's behavior and the legal conclusion.

6. The parents had requested extended school year (hereinafter referred to as "ESY") services be included in the student's IEP in order to prevent regression. The school's position is there was no regression; the parents state there was. The evidence of the need for ESY services is inconclusive.

7. Numerous requests by the parents for services were denied as either being unnecessary or impractical. The several requirements for the school to recognize and comply with procedural safeguards, including the reasons for denial of services, are set forth at **511 IAC 7-22-1 et seq (June, 2002)**. The school is required, and should henceforth, establish, maintain, and implement procedures to ensure parents receive written notices in regard to the provision of a free, appropriate public education. **511-7-22-1(a) (June, 2002)**.

8. When the student left the parochial school and enrolled in the public school's fifth grade in the fall, 2000, the evidence indicates the parents visited three elementary schools before deciding upon a school which was not in their home district. The case conference committee met and developed an initial IEP for the student. The IEP did not include a provision for transportation costs, and the parents were advised they would be responsible for the student's transportation as a matter of school policy since he was not attending his home school. Article 7 provides at **511 IAC 7-6-6(a) (May, 1995)** in pertinent part, to wit: "The public school corporation of residence is responsible for transportation for a student identified as disabled under this article if transportation is necessary for the student to receive special education and related services. . . ." Further, it states, "A parent of a disabled student shall not be required to provide transportation. If a parent does transport the student . . . . , the parent is entitled to reimbursement at no less than the per mile rate at which employees of the public agency are reimbursed." **511 IAC 7-6-6(g) (May, 1995)**.

9. Procedural safeguards enumerated in **511 IAC 7-8-1(a) (May, 1995)** require the school

to adopt policy and procedures allowing parents, or their representative to inspect and review educational records. This obligation is also addressed in **511 IAC 7-23-1 et seq (June, 2002)**. In at least one instance, the parent learned of the student's failing grade on or about the date it was to be issued precluding any corrective action that could have been initiated, and was not advised of any accommodation not being followed in order to avoid the failure (in this case test administration through the resource teacher).

10. The course failure referred to above resulted in the student's exclusion from participation in an extra-curricular activity available to general education students. **511 IAC 7-12-2(f) (May, 1995)** and **511 7-27-9(a)(8) (June, 2002)**. The specific activity was cross country which offered the student at least two advantages: (1) self-esteem and acceptance by his peers and (2) a reduction in ADHD symptoms. According to the student's physicians and counselors, running is desirable for the reason it burns off energy and is a more desirable activity than a team sport due to lower distractibility.

    The reason cited for the student's exclusion from cross country was school policy. Since middle school sports are not governed by the rules and regulations of the Indiana High School Athletic Association, the decision to exclude the student was entirely an internal matter thereby violating the student's right to engage in a non-academic school activity.

11. A student's IEP shall include "A statement of measurable (emphasis added) annual goals that describe what the student can be expected to accomplish within a twelve (12) month period, including benchmarks or short term objectives. . . ." It goes without saying that if a stated objective is vague, it is not measurable and of no value to the student or his instructors.

    The student is currently attending a private school in Indianapolis at the parents' expense. This placement is not the least restrictive environment for the student, and the decision to enroll him was solely the parents'. Therefore, the school is not obligated to reimburse the parents for, or to pay future, tuition and related expenses related to the student's attendance at a private school. **511 IAC 7-19-2 et seq (June, 2002)**.

12. It is recognized that non-disabled students dislike ADHD students. Much of the ADHD student's unacceptable behavior is misguided and unintentional, yet misunderstood and annoying to other students. These students will likely retaliate unsuccessfully in an effort to quell the disabled student's behavior. The best solution is to adhere as closely as possible to the discussion which follows below.

13. A Functional Behavior Assessment is not required by Article 7 for all disabled students with behavior issues unless the disabled student is suspended for more than ten (10) cumulative instructional days in a school year. **511 IAC 7-9-5(a)(1)(2).** However, a school may exercise the opportunity to conduct a Functional Behavior Assessment. While

this student had not been suspended, there had been a history of behavior issues dating back to parochial school. Much of his unacceptable behavior was exhibited by making inappropriate comments to other students which ultimately led to conflict, retaliation, ostracization, and the like.

By definition, a Functional Behavior Assessment is to include a collection and analysis of the student's behavior, and shall identify patterns and function (emphasis added) of the behavior. **511 IAC 7-17-38 (June, 2002)**. Most unacceptable behavior is designed to attract attention, demonstrate power, or to defy authority. But is this the function of the behavior? It's not a question of "why" the student engaged in the behavior, but rather the purpose or function of the behavior. Individual behavior is a form of communication or expression; it is not random, and is done for a reason. The challenge is to understand the behavior's function and determine what the student is trying to convey. Once this is achieved, replacement behavior that is more pleasant, but which serves similar functions, may be identified, encouraged, and taught according to the behavior intervention plan prepared in accordance with the results of the assessment and included in the student's IEP by authority of the above-cited regulation. Producing a Functional Behavior Assessment, and, from that, designing a Behavior Intervention Plan may require the assistance of mental health and other professionals familiar with a child's ADHD issues.

This student's interaction with other students was a form of communication, it was not random, and was done for a reason (probably to seek acceptance or recognition), but he most likely did not realize it was unacceptable behavior. So the witnessed behavior was his unacceptable interaction with other students; the function was to gain social acceptance or recognition. This requires the use of techniques to develop more pleasant replacement behavior, all of which should be included in the Behavior Intervention Plan and included in the IEP. It is important that emphasis in the Behavior Intervention Plan be placed on positive reinforcement rather than the negative. Admonitions directed at the student "to stop that" or "don't be a pest" create conflict resulting in the drawing of battle lines. Instead, ask questions such as "how could you have handled that differently?" All teachers, administrators, and other support personnel could benefit from reading the transcript of the testimony of Sydney S. Zentall of Purdue University.

14. The school has not met its burden of establishing the student did not experience any harm from the alleged procedural errors.

The IHO's Orders

Based upon the Findings of Fact and Conclusions of Law, the IHO issued the following eight (8) Orders:

1. The parents shall be reimbursed by the school for the actual cost of obtaining a

speech/language evaluation through the Indiana University Speech and Hearing Clinic, along with their transportation expenses commensurate with the rate paid to school employees at that time.

2. The parents shall submit an itemized claim, and the school shall remit payment, as reimbursement for transportation expenses incurred by them during the student's fifth grade school year at a rate commensurate with the rate being paid to employees of the school at that time.

3. The parents shall submit an itemized claim to the school for the actual expenses incurred for the student's social skills training through a private practitioner including transportation expenses payable at the yearly rate commensurate with that paid to school employees.

4. The parents' claim for reimbursement for expenses incurred for tutoring, transportation, and the additional costs for ESY services during the past three years is denied.

5. The parents' claim for reimbursement for tuition and transportation expenses incurred, and to be incurred, by virtue of the student's enrollment in a private school is denied.

6. The school shall conduct a Functional Behavior Assessment and develop a Behavior Intervention Plan for the student consistent with the requirements of Article 7, and include said Plan in the student's subsequent IEP's.

7. Social skills training shall be incorporated into the student's IEP, and the school shall continue to reimburse the parents' expenses for transportation and professional services through a private practitioner.

8. The case conference committee shall reconvene to develop and recommend an IEP which includes specific and measurable goals and benchmarks/objectives consistent with the student's specific educational needs, including, but not limited to, appropriate instructional accommodations and participation in non-academic and other extra-curricular activities.

The IHO advised the parties of their 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. The request was received on December 5, 2003. The BSEA granted the request and issued an Order that same date, extending the time line to the close of business on January 16, 2004,

within which the School must prepare and file its Petition for Review. The timelines for review and issuance of a written decision by the BSEA were also extended to and including February 16, 2004. On January 6, 2004, an Amended Order Granting Extension of Time was issued by the BSEA extending the time line to the close of business on January 16, 2004, within which the School must file its Petition for Review and the Response to the Student's Petition for Review. On January 13, 2004, affidavits completed by the parents were filed with the BSEA.

The Student's Petition for Review

The Student timely filed on January 2, 2004, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review is reproduced, in part, as follows:

> Petitioners are submitting this Petition for Review in regard to the failure of the hearing officer to rule on all the issues, the denial of reimbursement for private school and tutoring costs and a few inaccurate findings of fact.
>
> **I. Failure to decide all the issues**
> Specifically, the relevant issue at hearing on which he failed to rule stated, "8. Whether the school failed to provide a free, appropriate public education by not providing services enumerated in an Article 7 conforming IEP." Although, this question was clearly listed as an issue to be decided by the hearing officer, nowhere in the decision is there a statement by the hearing officer about whether the child was denied FAPE.
>
> Article 7's definition of FAPE is found at 511 IAC 7-17-36. We would ask the BSEA to determine whether the hearing officer's findings of fact and conclusions of law indicated a sufficient failure to comply with that statute in order to determine whether the child was denied FAPE. Because the school did not provide FAPE as required by Article 7, in the form of a correctly formulated IEP, the school should be required to reimburse the parent for the student's private placement.
>
> **II. Error in stating that the child is not entitled to reimbursement for costs of private placement and tutoring**
> In this matter, the hearing officer erred because, first, he stated, incorrectly, the standard for whether the child's private school placement should be reimbursed and, second, because he wrongfully denied reimbursement.
>
> The hearing officer's order #4 states: The parents' claim for reimbursement for expenses incurred for tutoring, transportation, and the additional costs for ESY services during the past three years is denied." Additionally, the hearing officer's order #5 states: "The parents claim

for reimbursement for tuition and transportation expenses incurred, and to be incurred, by virtue of the student's enrollment in a private school is denied."

It appears that this denial of reimbursement is based on two conclusory statements in his decision that are not explained or substantiated by either the evidence presented at hearing or by even one of the findings of fact or conclusions of law.

The first possible basis is found at the end of his orders, on page 10 of 10, that states in relevant part simply: "Note: The student belongs in his home school among his peers." The other possible basis is found on page 7 of 10 in which the hearing officer states: "The student is currently attending a private school in Indianapolis at the parents' expense. This placement is not the least restrictive environment for the student, and the decision to enroll him was solely the parents'. Therefore the school is not obligated to reimburse the parents for, or to pay future, tuition and related expenses related to the student's attendance at a private school."

Finally, the BSEA must reject the suggestion that LRE considerations bar reimbursement for Hutson School. . .Imposition of the LRE requirement on private school placements would, in effect, completely vitiate the parental right of unilateral withdrawal. . .Parents must give notice before they place their children privately so that the school corporation can have some time to develop a better proposal, and thus not incur the expense of a private school placement. Accordingly, the [parents] gave advance notice of their intent to place A[.] in private school.

Another factor weighing in favor of the parents in regard to the Hutson School is its appropriateness. . .The evidence showed that there are NO LD classes at North Clay that specifically address reading and writing disabilities.

Furthermore, in his decision, Mr. Woods states A[.] was subject to bullying, physical confrontations and ostracism at North Clay, the harm for which should be obvious. . .Despite these findings, Mr. Woods has ordered no corrective action, (anti-bullying programs, or proper training for staff), so how can Mr. Woods say A[.] belongs in his home school with his peers if he has this history there and if Mr. Woods is issuing no remedy for that problem?

The private school program and tutoring clearly has met the Student's needs. The Clay County program clearly has NOT met the Student's needs NOR provided FAPE because of all of the procedural and substantive errors.

The Petitioners submit that the hearing officer in this case appears to be personally predisposed not to order reimbursement for private school expenses in any case under any circumstances.

IHO ordered student to remain at Hutson and therefore should have ordered reimbursement for that.

During the course of the proceedings, IHO Woods issued an order that the child remain in his placement at Hutson School. See Order dated 10-01-03. . .If the hearing officer took it upon himself to order a specific placement for a child that obviously would incur costs for the parents, then it logically follows that he should have ordered reimbursement for that placement in his final order.

For the reasons stated above, the hearing officer's orders denying reimbursement for tutoring, transportation (Order #4) and tuition and transportation for private school (Order #5) should be vacated and an order reimbursing the parents should be issued.

III. IHO misstated the law as to required teacher training

The hearing officer's order is contrary to law in regard to the status of the law as to teacher training, and, as a result, he failed to issue an order remedying that problem because of his lack of understanding of the status of the law.

Specifically, in Conclusions of Law #3, the hearing officer states in relevant part: "Except for professional incentive and school policy there is no requirement for in-service training of professionals in Article 7." In reality, Article 7 states in 511 IAC 7-21-2(a-c), which is entitled "Special Education Program Personnel," and in 511 IAC 7-20-3, which is entitled, "Comprehensive system of personnel development," the levels and types of training required. We would request that the BSEA look at both of those provisions in determining whether to overturn the IHO's Conclusion of Law #3.

Furthermore, the hearing officer states in his Conclusion of Law #1: "The student was incorrectly classified as having a secondary disability of communication disorder . . .The secondary disability should have been classified under Other Health Impaired due to ADHD. . ." If that is indeed the case, then the school's duty to the student should have been heightened because 511 IAC 7-26-12(c) states that for children who are categorized as being in need of services due to OHI: "Professional and paraprofessional staff serving students with an other health impairment shall receive specialized inservice training in this area."

Because of the IHO's misstatement of the law, because of his findings that the staff lacked adequate training and because of the importance of such training, the Petitioners are asking that the BSEA vacate the Conclusions of Law #3 and issue and order requiring appropriate inservice training to teachers and staff.

Other errors in IHO's decision

1. The Student claims that corrections need to be made to page 1 in the Introduction.
2. The Student claims that corrections need to be made to page 3.
3. The Student claims that changes need to be made to Finding of Fact #3.

4. The Student claims that changes need to be made to Finding of Fact #5.
5. The Student claims that changes need to be made to the Findings of Fact on page 4 because the IHO does not address physical and emotional harm.
6. The Student claims that corrections need to be made to Conclusions of Law on page 5 because the IHO incorrectly states that the Student does not have a communication disorder.
7. The Student claims that corrections need to be made to Conclusions of Law on page 6.
8. The Student claims that corrections need to be made to Conclusions of Law on page 7.
9. The Student claims that corrections need to be made to Conclusions of Law on page 8.
10. The Student claims that corrections need to be made to Order on page 9.

On January 13, 2004, the Student filed with the BSEA two affidavits.

The School's Petition for Review and Response to the Student's Petition for Review

The School timely filed on January 16, 2004, a Petition for Review and Response to the Student's Petition for Review.[2]

1. The School claims that corrections need to be made to the Introduction.
2. The School claims that corrections need to be made to Finding of Fact #1, because at the time of the hearing, the Student's primary disability was OHI, based upon his ADHD and his secondary disability was LD, based upon written expression difficulties. The School claims that there is no basis in the record for the IHO to find that the Student had a learning disability in the area of reading.
3. The School claims that Finding of Fact #2 should be deleted since there was no need to provide a written notice of reasons for not doing a speech/language evaluation because there was no refusal on the part of the School to conduct an evaluation as the School adopted the outside evaluation and provided services accordingly.

[2]Attached to this Petition as "Exhibit A" was an Affidavit signed by the School's attorney in this matter delineating an ex parte conversation directed to her by Mr. Woods.

4. The School claims that Finding of Fact #3 is erroneous when it states that "School personnel having contact with the student did not attend these workshops." The School claims that the record shows that the Student's teachers attended workshops, including ADHD workshops. The School claims that a list of workshop attendees is based on sign-up sheets which are part of Respondent's Exhibit 8.
5. The School claims that there is not sufficient evidence in the record to serve as a foundation for Finding of Fact #4.
6. The School claims that Finding of Fact #5 is not based upon the evidence in the record and should be deleted.
7. While the School agrees that "there is insufficient evidence that the student regressed due to the School's failure" (Finding of Fact #6), the School claims there was no failure to provide appropriate ESY services.
8. The School claims that Finding of Fact #7 makes it appear as if the School frequently denied parental request without any explanation of those denials when the evidence in the record does not support such a conclusion. The School admits that the Case Conference did not always agree with every request that the parents made, it claims it is not true that Article 7 requires that "written notice explaining the reasons for denial" need to be provided. The School also claims that every request of a parent, which is not agreed to by the School, does not require written notice containing all of the provisions of 511 IAC 7-22-2. The School claims that Finding of Fact #7 is erroneous and should be deleted.
9. The School is not completely clear on what the IHO means by "performance records" that were not timely provided to the parents (Finding of Fact #9). The School requests that Finding of Fact #9 should be deleted, as the record does not show a failure to supply anything required by the Student's IEP.
10. The School claims that a portion of Finding of Fact #10 should be deleted, which states that the Student was not provided the same opportunity as general education students to participate in non-academic extra-curricular activities. The School claims it is incorrect and not based upon the evidence in the record.

11. The School claims that given the evidence in the record, Finding of Fact #11 is not accurate when it states that the Student's goals and objectives were vague and not measurable. The School requests that Finding of Fact #11 be deleted.
12. The School requests that the words "bus loading" be removed from Finding of Fact #12, and add "that school staff addressed the bullying as they were made aware of it."
13. The School requests that Finding of Fact #13 be amended to state that a functional behavioral assessment was performed and a compliant behavior intervention plan was developed.
14. The School requests that Finding of Fact #14 be deleted because there are no major procedural errors in the record. The School claims that the IHO failed to accurately identify procedural errors which could be responsible for producing a decrease in the Student's achievement levels.
15. The School requests that Conclusion of Law #1 be amended to remove the word "reading" from the second to the last sentence of the first paragraph. The School requests that paragraph 2 of Conclusion of Law #1 be stricken in its entirety. The School claims that: the Student's eligibility under Other Health Impaired was included in his IEP as a primary disability by May 2001; and that it is erroneous to conclude that previous IEP's were deficient because the Student was not classified under a category for which he did not qualify until June 2000.
16. The School requests that Conclusion of Law #2 be deleted in its entirety. The School claims that the parents first requested a speech/language evaluation at the May 23, 2000 case conference and there is no record of any denial by the School regarding this request.

17. The School requests that Conclusion of Law #3 be deleted in its entirety. The School claims that it is not a conclusion based on either the evidence in the record or any legal requirement in Article 7 which requires the School to pay for expenses for "appropriate and meaningful training."
18. The School requests that Conclusion of Law #4 be deleted in its entirety. The School

claims that there is no basis in fact or in law for this Conclusion.

19. The School claims that Finding of Fact #13 discusses the fact that a functional behavioral assessment and a behavior plan were accomplished for the Student, so since these measures were implemented the School requests that Conclusion of Law #5 be deleted.
20. The School claims that Conclusion of Law #6 is not based on the facts in the record and should be deleted as erroneous. The School claims that ESY was offered and implemented by the School for each summer that the Student was enrolled, with the exception of the summer between the Student's 7th and 8th grade year. The School claims that during the summer of the Student's 7th and 8th grade year, the parents chose not to involve the Student in the offered ESY activities.
21. The School claims that Conclusion of Law #7 should be deleted in its entirety because it is based on a misunderstanding of the notice requirement in Article 7.
22. The School claims that the parents unilaterally decided to place the Student in a School other than his home school and thereby obligated themselves to provide transportation. The School claims that this was not a violation of the School's obligation under 511 IAC 7-6-6, but was the result of a parental choice. The School requests that Conclusion of Law #8 be reworded so that it is clear that the requirements of Article 7 do not obligate the School to reimburse the parents for transportation during the Student's 5th grade year.
23. The School requests that Conclusion of Law #9 be stricken. The School claims that the IHO had no grounds to conclude that the School violated the parents' right to inspect records in this case.
24. The School requests that Conclusion of Law #10 be deleted in its entirety. The School claims that Conclusion of Law #10 is erroneous and is not based upon any requirement of Article 7.
25. The School has no objection to paragraph 1 of Conclusion of Law #11. The School agrees with paragraph 2 of Conclusion of Law #11 which states that it is not obligated to pay for private placement, but believes that this conclusion should be based on grounds which include both its provision of FAPE as well as placement of the Student in the least

restrictive environment. The School claims that this conclusion of law should cite to 511 IAC 7-19-2, which covers the School's responsibility to pay for a private school placement unilaterally made by the Student's parents.

26. The School requests that Conclusion of Law #12 be stricken. The School claims that it is not a conclusion of law.
27. The School request that Conclusion of Law #13 be deleted. The School claims that it is not a conclusion of law.
28. The School requests that Conclusion of Law #14 be stricken. The School claims that there is no evidence of the School committing any significant procedural errors and that the IHO made no specific finding concerning specific procedural errors that were committed.

29. The School requests that Orders #1 through #3 be stricken since it claims that they are based on erroneous findings and conclusions.
30. The School requests that Order #6 be stricken since it claims a functional behavior assessment has already been performed and a behavioral intervention plan is part of the School's proposed IEP.
31. The School requests that Order #7 be stricken since it claims it is not supported by evidence in the record and is not based on correct findings of fact or conclusions of law.
32. The School claims that Order #8 is unnecessary because requirements of Order #8 are already met by the Student's proposed IEP for 8th grade.
33. The School claims that if the School has offered an appropriate placement, through its proposed IEP for the Student's 8th grade year, it is under no obligation to pay tuition for an outside placement. The School claims that the Hutson School is organized around the principles of the Orton-Gillingham method, and that this method is primarily aimed at children with dyslexia. The School claims that there is no evidence in the record that this Student is dyslexic. The School claims that there are no certified LD teachers at the Hutson School. The School claims that the Hutson School is not an appropriate placement for a Student whose primary disability is due to his ADHD and whose

secondary disability is due to a learning disability in the area of written language. The School requests that the BSEA amend the IHO's decision to bring it in compliance with both the record and the requirements of Article 7 and order the School to provide services under the proposed 8th grade IEP should the parents choose to return the Student to the local public school.

The Student's Response

The Student filed on January 23, 2004, its Response to the School's Petition for Review. The Student claimed that the School's Petition for Review does not state under which category of 511 IAC 7-30-4(j) that the IHO's alleged errors fall. The Student requests that the BSEA strike any and all arguments made by the School that do not cite one of the above bases for their objections to the decision. The Student's Response to the School's Petition for Review is reproduced, in part, as follows:

> **Finding of Fact 1**
>
> The parents would disagree with the Respondent's assertion that there was no basis to find that the child had a learning disability in reading. . .The Respondent's 1st paragraph, 4th sentence, page 2, states: "At the case conference of June, 2000, the case conference removed the disability of CD and designated the student's primary disability as OHI with a secondary disability of LD.". .However, the Petitioners would note that the Respondents may intend to refer to May 31, 2001, not June 2000, because no case conference occurred in June 2000.
>
> **Finding of Fact 2**
>
> . . .the Respondents state: "There is no record of the School ever having refused to perform a speech/language evaluation." What the Respondent doesn't mention, and which is significant, is that there is no evidence of an acceptance of this request, either. Nor was there a request for a due process hearing filed by the school after the parent's request for this independent evaluation. Lack of a response, as occurred here, has the same effect as a denial, which is why the parents sought their own evaluation. . .
>
> **Finding of Fact 3**
>
> The Respondents incorrectly argue that the hearing officer's finding was incorrect as to teacher attendance at the trainings. . .
>
> **Finding of Fact 4**

Respondents object to the broad sweep of this finding, stating that it is incorrect for the Hearing Officer to make a general statement that the school did not comply with the provisions of the student's IEP. First, there is no reference to any law or provision of Article 7 that prohibits the hearing officer from making a general statement, so the basis for this argument is unclear. Second, this statement is supported by the record and by the Respondent's own argument in Finding of Fact 4, which states: "The testimony clearly shows that although there was an initial problem with compliance by the general education teacher in 5th grade, it was taken care of by Mrs. Yocom and Mr. Freeman." This is a plain admission that the IEP was not followed. The IHO doesn't state that it wasn't followed and wasn't corrected. He said it wasn't followed. Period. This is a fact supported by the evidence and admitted by the Respondent. . .a tape of the 05-10-01 case conference at Van Buren, which was introduced into evidence at the hearing, contains the following verbal exchange showing that the school admitted to using the child's resource time in 5th grade for unfinished classroom work, in contradiction to the requirements of his IEP. . .

. . .Respondents point out the "almost harassing nature of the Hearing Officer's questions to Mrs. Yocum," saying that those questions show "considerable prejudice on his part.' The Petitioners would point out that it's unclear which questions or what nature the Respondents are referring to because they are not cited in the Petition for Review. Furthermore, the Petitioners would point out that the IHO is entitled, *and in fact required*, to form opinions about the witnesses' previous actions, credibility and demeanor. . .This is not grounds for reversal, no matter how strongly the Respondents might disagree. Finally, the Respondents argue that a blanket statement by the hearing officer outside the hearing such as "She makes too many excuses," is one that is supported not only by Mrs. Yocom's testimony but also by the parents' testimony.

Finding of Fact 5

The School takes exception to the IHO's findings as to social skills training. Evidence in support of the IHO's finding on that point include: Mrs. Yocom's statements to A[.] such as, "A[.] you cannot get in other people's space all the time because that's something that becomes very annoying and the kids just don't deal with it well." (Oct. 10. Tr. p. 877), is not an example of APPROPRIATE social skills training. . .Furthermore, in 7th grade it is apparent from reading the transcript of the 3/11/03 Case Conference that the staff does not have an understanding of appropriate social skills training. . .

Finding of Fact 6

As to the Respondent's statements on this finding, the Petitioners would simply state that although the School DID agree to ESY, nowhere in the record does it show that transportation costs for ESY were covered, as they should have been.

Findings of Fact 7

In response to the Respondent's arguments in this section, the Petitioners would point out the following references to the record where the parents requested a change in the identification, evaluation placement or provision of a free appropriate education to the student and did not receive prior written notice as required. . .Clearly, this does not fulfill the requirement for PRIOR WRITTEN notice, as delineated in 511 IAC 7-22-2.

Finding of Fact 9

Performance records not given to parents include progress reports, report cards, copies of evaluations, and NWEA. . .

Finding of Fact 10

Respondent's argument here states correctly that a school is allowed to devise its own rules. However, the whole point seems to be lost in this discussion that a school may not devise rules that result in discriminatory action against a student with disabilities BECAUSE the student has a disability. Here, the student was disallowed from participation in cross country meets because he received a failing grade. He received this failing grade because of his disability and because of the school's failure to follow his IEP (i.e. his teacher failed to give him notes, as specified in his IEP in science class, the one he failed) in October 2002, in essence not allowing him to participate because of his disabilities. . .Also, in April 2003, A[.] was not allowed to go on a two-day field trip to McCormick's Creek because of infractions tied to his disabilities. See parents exhibits page 520-525. . .Finally, in the Respondent's Petition for Review, p. 10, last sentence, the Petitioners believe that she intends to reference Mr. Linton, not Mr. Martin.

Finding of Fact 11

Here, the IEPs in evidence speak for themselves. The goals and objectives are plainly vague and not measurable. If the BSEA determines that there is a need to review those for the child's 5th, 6th, 7th and 8th grades, we would suggest a look at the goals and objectives pages found on the following Petitioners pages 140-146, 273-284, 331-342, 503-516. The 5th grade IEP, which was never approved by the parents, is found on pages p. 199-209.

Finding of Fact 12

The Petitioners would point out the first sentence on page 15 that states: "The Hearing Officer mentions nothing about the fact that the staff addressed the bullying as they became aware of it." In regard to this, what the hearing officer chooses to state in his decision is clearly his choice, and there was nothing improper about his choosing to leave that statement out, *if he even believed that assertion to begin with.* Page 14 of the Respondent's Petition for Review refers to "bus loading." However, A[.] didn't ride a bus, so perhaps the Respondent refers to a pickup area?

Finding of Fact 13

Clearly, there WAS no FBA. Although Ms. Miller cites some "data" that were gathered, that is not sufficient to fulfill the requirements of a functional behavioral assessment, which 511 IAC 7-17-38 defines as: "A functional behavioral assessment means a systematic collection and analysis of data that will vary in length and scope depending on the severity of a student's behavior. Results and analysis of the data collection are used in developing the student's behavioral intervention plan. A functional behavioral assessment shall identify patterns in the student's behavior and the purpose or function of the behavior for the student." It's clear that the "data" cited as to Respondent's Exhibit p. 344-361 do not fulfill the definition of FBA. Furthermore, where is the analysis? Where are the results and analysis used to develop the student's behavioral intervention plan? Where does it identify patterns in the student's behavior? And where does it identify the purpose or function of the behavior for the student? Furthermore, there was no document cited that the Respondents purported to be an FBA or labeled as such. Obviously, the hearing officer's finding of fact 13 is supported by the evidence and should be upheld.

Finding of Fact 14

The Respondents state on page 17 that the hearing officer failed to accurately identify procedural errors which could be responsible for producing a decrease. The Petitioners would point out that the hearing officer's findings of fact and conclusions of law offered a *cornucopia of procedural AND substantive violations* and would assert that the hearing officer is not required to point out exactly which of the multiple violations resulted in which amount of harm, and would ask the BSEA to read the hearing officer's decision to find those violations existed and that harm resulted to the child. . .Furthermore evidence of harm to the child is found throughout the record. . .On page 17, last paragraph, the Respondents state: "Finally, the student, who was not enrolled in the public school in the 3rd grade, had not previously taken the ISTEP. Therefore, it is not possible to say that procedural errors committed by the school district cause a lack of success on the ISTEP, since there is no previous ISTEP testing with which to compare the student's 7th grade performance. . .A[.] DID take the ISTEP, in 3rd grade at Annunciation School. See (Parent's Ex. p. 63). He scored above the Indiana Academic Standards in both English/Language and in Math. However in 6th grade he scored 72 points BELOW the Standard on the English/Language portion and 16 points BELOW on the Math portion of the ISTEP (Parent's Ex. p. 291-315.) This also shows harm. . .

Conclusion of Law 1

The Petitioners would point out that a significant discrepancy is not the only means of showing a learning disability for a child. . .Furthermore, on the bottom of p.18, the Respondents should say that "The changes in the ADHD definition occurred in Article 7 in JUNE 2000," not JUNE 2001. The next sentence is correct, however, because A[.] was finally made eligible under OHI in May 2001. However this case conference (May 2001) was not the first time that A[.]

could have become eligible because there was a Case Conference on Sept. 28, 2000, at which time "Communication Disorder" and OT Services were added, along with LD status. Therefore, he could have been classified OHI at that Sept. 28, 2000, Case Conference. (Parent's Ex. p.165-170).

Conclusion of Law 2

The Respondents say that the parents requested a speech/language evaluation at the May 2000 case conference. Actually, they requested a Speech/Language evaluation in February, April and May 2000. . .These requests were denied or ignored, and no due process hearing was requested by the school to determine if the school's evaluation was appropriate. Therefore, the parents were left to their own devices and were rightfully ordered to be reimbursed for this.

Conclusion of Law 3

. . .the Respondent states on page 20 "Finally, there is nothing in Article 7 which requires the School to pay for expenses for 'appropriate and meaningful training' ". Although the hearing officer's word choice was not correct, the meaning behind it was. Clearly, Article 7 requires specialized inservice training for teachers and staff. . ., and the Petitioners would argue that if the hearing officer's Conclusion is to be changed here, it should be changed only to substitute the words "specialized inservice training" for the words "appropriate and meaningful training."

Conclusion of Law 4

Here, Petitioners would agree that the school implemented the IEP at the beginning of 5th grade, BUT by Sept. 28, 2000, they stopped the individual written expression instruction and replaced that time with one-on-one work with a teacher's assistant (Mrs. Weaver) to complete unfinished classroom work. The classroom teachers also were inconsistent in providing the accommodations and modifications throughout the entire school year as noted throughout the record.

Conclusion of Law 5

The Petitioners disagree with the argument made by the Respondents in this section for the same reasons cited in our discussion of Finding 13.

Conclusion of Law 6

Please see Petitioners' discussion under Finding of Fact 6.

Conclusion of Law 7

See discussion as to Finding 7 above.

Conclusion of Law 8

. . .the parents would point out that they did NOT unilaterally place the student in a school other than his home school. The parents were offered three options by the school, none of which was particularly attractive to either them or to the school. The parents said OK to a placement that was the lesser of the evils and which was not his home school. Therefore, reimbursement for transportation was proper. . .

Conclusion of Law 9

. . .the Respondents argue that "There is no obligation in Article 7 that a student's parents be informed when a student's grade begins to drop below the passing level." In response, the Petitioners would point out that early in A[.]'s 6th grade year the teachers and mother decided to reduce the daily behavior sheets to once weekly behavior sheet. They made a verbal agreement stating the teachers would notify the parents immediately if there was any problem with behavior or academics. In addition, see e-mails between Mrs. Yocum and mother, where Mrs. Yocum assured the parents that A[.] was doing great - even though at that time he was failing. (Parent's Ex. p.376-378, 380). Finally, Clay Community DID NOT give the parents 2002-2003 NWEA results. . .See also Parent's Ex. p. 31G letter dated July 29, 2003 requesting all records.

Conclusion of Law 10

Please see the discussion above in Finding 10.

Conclusion of Law 11

The Petitioners would ask the BSEA to review the Petitioners' previously filed Petition for Review as to the subject of least restrictive environment and payment for placement of the child at Hutson, due to the school's denial of FAPE.

Conclusion of Law 12

The Petitioners would agree with the assertion by the Respondents that Conclusion of Law 12 is not actually a conclusion of law. The Petitioners would disagree that the items should be stricken, however, and request that it merely be relabeled as a Finding of Fact.

Conclusion of Law 13

Please see discussion as to Finding 13 above. Also although it may not be properly identified as a Conclusion of Law, the Petitioners would ask that it be modified and relabeled as a Finding of Fact.

Conclusion of Law 14

See discussion under Finding 14.

Orders 1-3

These orders should be upheld, as they are supported by the evidence in the record and because the Respondents have not met their burden of proof to have them vacated or modified. . .

Order 6

This order should be upheld, as it is supported by the evidence in the record and because the Respondents have not met their burden of proof to have it vacated or modified. . .

Order 7

This order should be upheld, as it is supported by the evidence in the record and because the Respondents have not met their burden of proof to have it vacated or modified. . .

Order 8

This order should be upheld, as it is supported by the evidence in the record and because the Respondents have not met their burden of proof to have it vacated or modified.. . Finally, the Respondents state on Page 27, 2nd paragraph: "There are no certified LD teachers at the Hutson School." This is incorrect. See testimony of all 3 Hutson teachers. . .Also, it must be pointed out that the evidence clearly showed that the Hutson school uses the Orton Gillingham approach in teaching ALL students with specific language-base learning disabilities, not just dyslexic students. Written language is covered under this disability. . .

The Student request that the IHO's findings of fact, conclusions of law and orders be affirmed, with the exception of the revisions requested by the Student in their Petition for Review.

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 January 30, 2004. 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 February 9, 2004. Review was set for February 13, 2004, in Room 225 State House, Indianapolis. All three members of the BSEA appeared on February 13, 2004. 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 BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The School timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. The BSEA sustains the IHO's Findings of Fact Nos. 2, 3, 6, and 7.

3. The BSEA finds the IHO's other Findings of Fact were unsupported by substantial evidence.

4. The BSEA finds that Finding of Fact 1 should read: "The Student's primary disability is Other Health Impaired due to ADHD and a secondary learning disability (written expression)."

5. The BSEA finds that Finding of Fact 3 should read: "Opportunities were provided by the School for school personnel and the parents to attend in-service training in ADHD and other behavior workshops. Although some school personnel having contact with the Student did not attend these workshops training was available through staff meetings and sharing of materials."

6. The BSEA finds that Finding of Fact 4 should read: "During the Student's fifth grade year, the School complied with the provisions of his IEP."

7. The BSEA finds that Finding of Fact 5 should read: "The School provided social skills training during the Student's fifth grade year. The Student is currently receiving social skills training through a private practitioner at the parents' expense."

8. The BSEA finds that Finding of Fact 8 was not disputed by either party, however, it should read: "The parents chose the School he was to attend against the advice of the School. The School advised the parent that reimbursement for the related service of transportation was not available if the parent chose a school outside the home district in which appropriate services were available."

9. The BSEA finds that Finding of Fact 9 should read: "During the Student's seventh grade year, some of his achievement test results, performance records, and daily behavior records were not being timely provided to the parents."

10. The BSEA finds that Finding of Fact 10 should read: "The Student was provided the opportunity to participate in non-academic extra-curricular activities the same as general education students. He was permitted to practice with the team, but not allowed to participate in meets."

11. The BSEA finds that Finding of Fact 11 should read: "The goals and objectives contained in the Student's IEP were appropriate."

12. The BSEA finds that Finding of Fact 12 should read: "The Student was the subject of bullying and physical confrontations with other students, particularly during less structured parts of the day."

13. The BSEA finds that Finding of Fact 13 should read: "An appropriate Functional Behavior Assessment and Behavior Intervention Plan for the Student were developed and implemented by the School."

14. The BSEA finds that Finding of Fact 14 should read: "The Student experienced no harm caused by alleged procedural errors."

15. The IHO's Conclusion of Law 1 is reversed. The Student's primary disability is Other Health Impaired due to ADHD and a secondary learning disability (written expression).

16. The IHO's Conclusion of Law 2 is reversed. The parents are not entitled to reimbursement for the speech/language evaluation because they were not denied an evaluation by the School. Furthermore, they did not dispute the accuracy of the School's evaluation.

17. The IHO's Conclusion of Law 3 is reversed. The BSEA finds that Conclusion of Law 3 should read: "The School did present professional training sessions on the subject of ADHD, and a behavior workshop during the Student's sixth and seventh grade years. Professional and paraprofessional staff serving students with an other health impairment shall receive specialized inservice training in this area. 511 IAC 7-26-12(c)."

18. The IHO's Conclusion of Law 4 is reversed. The IEP formulated on May 23, 2000, was implemented in compliance with 511 IAC 7-12-1(s) (May, 1995).

19. The IHO's Conclusion of Law 5 is reversed. The BSEA finds that Conclusion of Law 5 should read: "The evidence supports that the Student received appropriate social skills training and tutoring."

20. The BSEA sustains the IHO's Conclusion of Law 6 as the record supports Conclusion of Law 6.

21. The IHO's Conclusion of Law 7 is reversed. The BSEA finds that Conclusion of Law 7 should read: "Article 7 does not require that parents receive written notice when their requests for

services are denied during a Case Conference Committee meeting."

22. The IHO's Conclusion of Law 8 is reversed. The BSEA finds that 511 IAC 7-6-6(a) does not apply because the parent chose a school outside the home district when appropriate services were available at the home school.

23. The IHO's Conclusion of Law 9 is reversed because any errors in records not being timely provided to the parent did not effect the provision of FAPE.

24. The IHO's Conclusion of Law 10 is reversed because the Student was provided the opportunity to participate in non-academic extra-curricular activities the same as general education students. The failure which led to his being denied participation in track meets was not due to his disability.

25. The IHO's Conclusion of Law 11 is reversed because the goals and objectives contained in the Student's IEP were appropriate.

26. The BSEA finds that the IHO's Conclusion of Law 12 is an opinion of the IHO and not a Conclusion of Law and is therefore being rejected.

27. The IHO's Conclusion of Law 13 is reversed. The BSEA finds that the Student's Functional Behavioral Assessment and Behavioral Plan followed the requirements of 511 IAC 7-17-38.

28. The IHO's Conclusion of Law 14 is reversed. The BSEA finds that the School has met its burden of establishing that the Student did not experience any harm from alleged procedural errors.

29. The BSEA adds Conclusion of Law 15 and determines that the School did provide FAPE.

30. Orders 1, 2, 3, 6, 7, and 8 are stricken.

31. Orders 4 and 5 are sustained.

ORDERS

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

1. The Independent Hearing Officer's Orders 4 and 5 are sustained.

2. Any allegation of error in the Petitions for Review not specifically addressed above is deemed denied or overruled, as appropriate.

Date: February 16, 2004

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

APPEAL STATEMENT

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