Indiana Board of Special Education Appeals

Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of S.K., the School Town of Munster, and the West Lake Special Education Cooperative	)	**Article 7 Hearing No: 1461.05**
Appeal from a Decision of Joseph R. McKinney, J.D., Ed D., Independent Hearing Officer	)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

The School[1] requested a due process hearing dated September 16, 2004, pursuant to 511 IAC 7-30-3. It was received by the Indiana Department of Education, Division of Exceptional Learners on the same day. On September 16, 2004, Joseph R. McKinney, J.D., Ed.D., was appointed as the Independent Hearing Officer (IHO).

On September 23, 2004, the IHO sent the parties a Notice of Pre-Hearing Conference, set for September 27, 2004. By a letter dated September 23, 2004, counsel for the Student[2] notified the IHO of his involvement and requested an immediate order directing the School to provide a copy of the September 15, 2004 document[3] on an expedited basis, as well as a complete copy of the Student's educational records. In another letter dated September 23, 2004, counsel for the Student contacted the Indiana Department of Education, Division of Exceptional Learners and requested a copy of all records regarding the Student.

On September 27, 2004, the IHO conducted a telephonic pre-hearing conference. On October 1, 2004, the IHO issued a Pre-Hearing Order which described the issues for the hearing and indicated

[1]"School" shall refer to School Town of Munster and the West Lake Special Education Cooperative, unless otherwise indicated.

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

[3]A case conference committee (CCC) was held on September 15, 2004, which prompted the School to request a due process hearing. The "Septemeber 15, 2004 document" refers to the copy of the record that the Parent asserts she did not receive.

that the hearing would be held on November 9, 10, and 24, 2004. The deadline for the exchange of proposed exhibits and witness lists was set for November 1, 2004. The IHO also ordered the School to provide the Student's attorney with school records as soon as possible but no later than October 4, 2004. Additionally, it was ordered that the parties provide the IHO with a copy of the disputed Settlement Agreement. The issues were identified as:

1. The appropriate placement for the student in the least restrictive environment.
2. The extent, if any, that a settlement agreement controls issues relevant to this matter.

During a status conference on October 8, 2004, it was determined that the hearing would be open to the public and that the Student would not attend. On October 8, 2004, the IHO issued an Order Regarding Observation indicating that he would conduct a hearing on the matter of observation on October 14, 2004. Additionally, the IHO ordered that until further notice, the School's expert was not authorized to observe the Student at Heartspring[4].

Another pre-hearing and status conference was held on October 14, 2004, at the West Lake Special Education Cooperative. An Order on Motion for Extension of Hearing Decision and Deadline was issued on October 14, 2004, in which the IHO granted the School's request for an extension and set the decision deadline for December 17, 2004. At the October 14, 2004 pre-hearing conference, counsel for the Student sought issuance of two subpoenas. On October 14, 2004, the IHO ordered the subpoenas. On October 19, 2004, the IHO ordered that the School immediately provide to the Student all of the Student's records.

On October 17, 2004, after considering the School's Motion for an Order Clarifying the Involvement of the School's Expert and for an Order for a Stay-Put Placement, the IHO ordered that the School's consultant can observe the Student at Heartspring. Furthermore, Heartspring was ordered to be the Student's stay-put placement with Indiana Department of Education (IDOE) providing continuing funding for the placement during the pendency of these proceedings. On October 20, 2004, the IHO issued an order to vacate the Order for Stay-Put Placement dated October 17, 2004, correcting that the local educational agency (LEA) is responsible for maintaining the Student's current educational placement during the pendency of the due process hearing[5].

---

[4]Heartspring is the student's current educational placement. It is a private, out-of-state residential setting.

[5]After considering letters from the IDOE, General Counsel and Associate Superintendent, the IHO vacated the previous order. The order dated October 20, 2004 corrected that the local educational agency (LEA), the actual party, rather than the IDOE, a non-party, was responsible for maintaining the Student's current educational placement during the pendency of the due process hearing. The letters explained that "the expiration of the contract will not affect the Student's stay-put as the LEA, a party over which [the IHO has] jurisdiction, would be financially responsible after the expiration of the contract absent an approved application for extraordinary funding." (See letter from General Counsel.) Furthermore, the School was given notice of the appropriate steps to take to apply for extraordinary funding.

On October 21, 2004, legal counsel for the IDOE filed a Motion to Quash or, in the Alternative, for Protective Order. It was requested that the IHO quash the two subpoenas issued to IDOE employees, arguing that the subpoenas failed to comply with the rules of procedure governing depositions and subpoenas in a civil action as required by the Indiana Administrative Orders and Procedures Act (I.C. 4-21.5-3-22). In an order dated October 21, 2004, the IHO found the subpoenas to be unreasonable and contrary to Indiana Rules of Trial Procedure 45(D)(2)[6] and (G)[7]. Therefore, the IHO ordered the subpoenas to be quashed[8].

On October 21, 2004, the Student filed an Emergency Motion for Stay of Order requesting that the order (dated October 17, 2004) issued by the IHO granting the School's request for an observation at Heartspring be temporarily stayed. Due to the IHO previously indicating that he lacked authority to stay the proceedings in the absence of a judicial order, the Student filed a complaint for this purpose in the United States District Court for the Northern District of Indiana, as well as motions for Temporary Restraining Order (TRO), Preliminary and Permanent Injunction on October 20, 2004. However, since the IHO retained jurisdiction unless or until the case is stayed by the federal court, the Student requested the IHO to order the School not to conduct the observation until all pending motions are resolved. In an order dated October 25, 2004, the IHO denied the Student's Emergency Motion for Stay of Order.

By an order dated October 26, 2004, after considering the School's Motion to Submit Application for Extraordinary Funding, the IHO ordered the School to submit or pursue funding approval from the IDOE without the parent's signature as part of the "stay-put."[9] Then, in an order dated October 29, 2004, the IHO directed the School to execute a contract with Heartspring to maintain the Student's "stay-put" placement.

In a letter dated October 28, 2004, the Student, through counsel, requested a due process hearing

---

[6] Indiana law requires depositions from non-party deponents to be taken in the county of residence or employment of the deponent, or other convenient place. The subpoenas issued by the Student required the deponents to travel out-of-state.

[7]Indiana law requires the tender of witness fees and mileage.

[8]The IHO stated in his order that the depositions "must be conducted at a place and time reasonably convenient to each deponent, and within Marion County, Indiana, as required by Indiana law, or the depositions could be conducted pursuant to written questions." On November 1, 2004, the IHO issued an order to quash another attempt by the Student to subpoena the educational consultant from the IDOE. The IHO reasoned that the deponent was not served pursuant to the requirements of T.R. 45 (G) and the Student failed to accommodate the deponent's schedule.

[9]Applications for such extraordinary funding typically require parental consent. Although I.C. 20-1-6-19 and 511 IAC 7-27-12 do not specifically require parental consent for the funding application, the IDOE's application process does require parental consent. An IHO can order an application to be made by an LEA without parental consent.

regarding the issue of the Student's placement in a least restrictive environment pursuant to the Settlement Agreement dated March 15, 2004. The Student requested an enforcement of the agreement. By a letter dated October 28, 2004, the IDOE referred the issue to the IHO since he already had jurisdiction of the matter involving the parties. On October 29, 2004, the IHO ordered that the following issue regarding the Settlement Agreement be added to the list of issues. After considering the School's request (in a letter dated October 25, 2004) to add two issues, the IHO, in an order dated October 28, 2004, granted the request. However, the IHO denied the School's request to re-evaluate the Student in the areas of speech language therapy, occupational therapy, and physical education. After the October 28 and 29, 2004 orders, the issues for the hearing were as follows:

1. The appropriate placement for the Student in the least restrictive environment (LRE); and the extent, if any, that a Settlement Agreement controls issues relevant to this matter. (Order dated October 1, 2004.)
2. What are the appropriate related services necessary for the Student to educationally benefit from his I.E.P. specific to evaluation/assistive technology services, speech language therapy, occupational therapy, physical therapy, equestrian therapy and/or aqua therapy? (Order dated October 28, 2004.)
3. Whether any "free appropriate public education" (FAPE) services or placements including residential services and/or community-based services requiring staff to be trained or to implement "Rapid Prompting" in order to ensure that the Student educationally benefits from his I.E.P. (Order dated October 28, 2004.)
4. Whether the School has violated the terms of the Settlement Agreement dated March 15, 2004 with respect to the Student's placement in the least restrictive environment, thus depriving the Student of a free appropriate public education (FAPE). (Order dated October 29, 2004.)

By an order dated October 29, 2004, the IHO, after considering the School's Motion for Limited Extension of Document Exchange Date, granted their request to submit the School's outside consultant's report by the close of the second business day after School's receipt of the same but no later than November 3, 2004, and to submit the Heartspring School records by the close of the business on the third day after receipt. However, after considering the Student's objection to the School's previous motion, the IHO ordered that both the consultant's report and the Heartspring records be submitted no later than November 2, 2004[10].

In an order dated November 8, 2004, the IHO clarified the Settlement Agreement issue. Since the Federal Court[11] ruled that the IHO had jurisdiction over the Settlement Agreement dispute,

[10]At the prehearing conference, the parties agreed that the exchange date would be November 1, 2004. However, in accordance with Article 7, November 2, 2004 actually represents five (5) business days before the first day of the due process hearing.

[11]Judge Rudy Lozano of the U.S. District Court ruled on this matter on October 27, 2004. Judge Loranzo found the Student's claims were not merely contractual in nature, but were substantially

regardless of the language of the agreement purportedly bestowing jurisdiction on a court, the IHO accepted jurisdiction over this matter. Judge Lozano found that a claim of breach of settlement agreement must first be presented in a due process hearing under IDEA to comply with the IDEA's stringent exhaustion of remedies mandate. The Court specifically noted the "Seventh Circuit's stringent application of the exhaustion requirement" under the IDEA. (Pg. 13 of Judge Lozano's decision.) Furthermore, the Court cited two cases[12] that were on point, holding that claims of breached settlement agreements cannot be considered by the courts until they have been presented through a due process hearing.

The Article 7 hearing was open to the public at the request of the Parent and witnesses were separated. The due process hearing was conducted over 19 days: November 9, 10, 11, 23, 24; December 8, 9, 10, 13, 14, 2004; January 12, 13, 14, 19, 20, 21, 27; and February 3, 4, 2005.

Numerous motions and responses were made throughout the due process procedure, and the IHO ruled on all these motions. On January 14, 2005, after considering the School's Motion for Extension of the Hearing Decision Deadline, the IHO granted the deadline until February 15, 2005. In a letter dated February 11, 2005, the IHO again granted an extension for the hearing decision deadline till February 28, 2005. After considering the Student's Motion for Extension of Hearing Decision Deadline, the IHO granted the extension until March 7, 2005.

During the due process hearing, admissibility of exhibits were determined and made part of the record. The parties did not stipulate to the admissibility of any evidence prior to the due process hearing. Exhibits admitted were the School Exhibits Vol. 1 through Vol. 28, pages 1-7016, Exhibit 1548a, Exhibit 1549 (a deposition), Group Exhibit 1550 (videotapes), and Exhibit 1551 (pictures).

The Student moved to have the testimony of Claire Thorsen be stricken from the record because of an alleged violation of Indiana Rules of Evidence, Rule 615 (separation of witnesses). The IHO denied the motion.

The IHO's Written Decision

The IHO issued his written decision on March 7, 2005. The IHO determined one hundred nineteen

---

intertwined with providing the student with FAPE in the LRE under the Individuals with Disabilities Act (IDEA). He denied the Parent's request for injunctive relief because IDEA's administrative remedies had not been exhausted, and the Parent had not demonstrated any emergency or other exigency that would excuse exhaustion as futile. The Parent also sought unsuccessfully to enforce the settlement agreement through a state court proceeding.

[12]See W.L.G. v. Houston County Bd. of Education, 975 F. Supp. 1317, 1327-29 (M.D. Ala 1997); Steward v. Hillsboro Sch. Dist. No. 1J, No.CV 00-835-AS, 2001 WL 340 47100

(119) Findings of Fact.[13]

The IHO's Findings of Fact

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 et seq. and 511 IAC 7-30-3, which gave the IHO the authority to hear and rule upon all matters.

2. All Findings of Fact (FOF) that can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact.

3. The Student is thirteen years and one month old (date of birth: January 25, 1992).

4. The Student was conceived through in vitro fertilization.

5. The Mother was hospitalized for pregnancy- induced hypertension during the end stage of the pregnancy. Labor was induced at 37 weeks gestation.

6. The Student was cyanotic at birth and sustained an intra-ventricular hemorrhage (IVH) in the neonatal period; both conditions were resolved without apparent residual problems per follow-up evaluation.

7. The Student's parents are both physicians. The Mother is a psychiatrist and the Father a geriatric physician.

8. The parents were divorced when the Student was approximately four years old. The father remarried and does not see his son.

9. The Student has an older one-half brother who is in medical school.

10. The Student's lawyer requested the Mother be referred to as Dr. Khan and not as "the mother" during the due process hearing (which was an open 19-day hearing).

11. At about fifteen months old, the parents became concerned about the Student's development, as he was not responding to his name, seldom looked at them, and seldom smiled.

12. At about eighteen months of age, the Student's parents had him evaluated by the following professionals or programs on August 4, 1993: a Psychiatric Evaluation by Lillian Spigelman, M.D., which suggested the possibility of an autistic disorder; on August 11, 1993, a Psychological Evaluation by Anita Stauffer, Ph.D., Northwestern Memorial Hospital

[13]The IHO's decision is reproduced in its entirety. It is edited only as to format. The substance of the IHO's decision remains intact.

Developmental Evaluation Clinic, which yielded a clinical impression of pervasive developmental disorder (PDD); and on August 18 and August 20, 1993, a Multidisciplinary Evaluation by Catherine Lord, Ph.D., and Bennett Leventhal, M.D., University of Chicago Department of Psychiatry and Pediatrics, Developmental Disorders Clinic, which concluded the Student demonstrated many behaviors associated with autism. A more specific diagnosis of autism was subsequently provided by the University of Chicago.

13. At the time of these evaluations (#12 above) results showed the Student had cognitive and adaptive functioning skills characterized as that of "mild to moderate delay." It was noted that age and near-age level skills were found in perceptual, visual-spatial, and gross motor skills. His atypical pattern of development was further substantiated by noted significant delay in language development and socialization.

14. Dr. Lord and Dr. Leventhal were concerned about differences in the Student's parents' point of view regarding the Student and strongly suggested they see a clinical social worker. Dr. Lord also noted the Student "has been raised by a babysitter who does not speak English and is quite passive."

15. The Student was enrolled in Special Start Academy in Hammond at nineteen months of age. He received private occupational therapy at Kids Can Do in 1993.

16. The Student began an extensive Lovaas program in the home beginning in November 1993 after Dr. Khan sought Lovaas training. Dr. Khan employed individuals trained in the Lovaas method to provide therapy to the Student.

17. The Student enrolled in the West Lake Early Childhood Program (WL) at age three as a child with autism. The Student went to school five days per week with related services.

18. In January 1995 the Student ate finger foods and drank independently.

19. In February 1996, Dr. Khan took the Student out of the WL program and enrolled him in an East Chicago early childhood program.

20. At a May 13th and June 3rd 1996 follow-up case conference committee (CCC) meeting, Dr. Khan made several demands of the East Chicago School noted in the CCC summary report.

21. On June 12, 1996, when the Student was four and one-half years old, WL was notified in writing by Dr. Khan's attorney that she would like to meet with WL personnel to discuss the Student's return to WL.

22. A CCC meeting was held on August 14, 1996. WL personnel were joined by Dr. Khan's attorney and other individuals who had been working with the Student.

23. Communication procedures were established at the August 14th CCC meeting. The teacher

of record (TOR) was to communicate with Dr. Khan's secretary and "caregiver" to the Student, Ava, for the Student's daily needs and emergencies, and with Krista (therapist employed by Dr. Khan) for "program" concerns.

24. A CCC meeting was held in October 9, 1996, and an I.E.P. was written that provided a full day early childhood program with related services of speech and language therapy, occupational therapy, physical therapy and transportation for the Student. It was noted that Dr. Khan's attorney would write a letter of dissent on her behalf by October 14, 1996.

25. Dr. Khan's attorney wrote the WL special education director at that time, Mr. Michael Livovich, a letter criticizing his behavior at the October 9th CCC meeting. The attorney said that of "particular concern was your admonishment of my client in a raised voice, that my staff are not your personal secretaries."

26. Dr. Khan's attorney attended an October 22, 1996, meeting where goals and objectives were added to the I.E.P.

27. In December 1996, the School established a visitation schedule with Dr. Khan. The schedule set every Thursday between 1:00 p.m. and 3:30 p.m. as the time Dr. Khan would observe the Student at school.

28. Dr. Leventhal attended a January 8, 1997, CCC meeting and provided input regarding the Student.

29. On February 27, 1997, Dr. Khan wrote a letter to Mr. Livovich that was very critical of the School and particularly limitations on her visits (and Ava's visits) to the School. Dr. Khan concluded that the School staff had not been working with her, Ava, or the home staff and said it had been "an utter failure."

30. Dr. Khan ended her February 27th letter by saying: "As I see, our visits to the School are only wasting valuable business time, a major part of our day, only to become frustrated, irritated and feel as if this is a no win situation."

31. On March 4, 1997, Dr. Khan wrote Mr. Livovich a letter very critical of the Student's main classroom teacher. Mr. Livovich responded to the letter on March 11, 1997.

32. On April 1, 1997, Dr. Khan's attorney responded to Mr. Livovich's response letter. The attorney wrote: "The main concern of my client is that the defensive posture and reactions to her presence by your staff directly and indirectly affect the educational program being offered to her son."

33. On July 11, 1997, Dr. Stephen Luce, Ph.D., wrote Mr. Livovich after observing the Student for one hour at Elliot School on May 28, 1997, and reviewing the Student's records and videotape on behalf of Dr. Khan.

34. Dr. Luce asserted in his letter, "She [Dr. Khan] is very knowledgeable with the kind of research support for intensive behavioral programming that I have cited above and I can envision some difficult and litigious contact from the Student's family that may unnecessarily drain your resources. Dr. Khan seems willing to discuss a number of program options outside your district that may compare favorably to a placement in-district."

35. A CCC meeting was held on August 19, 1997, and the Student was placed in an Early Childhood Program, five full days per week with related services. Dr. Khan's attorney, who attended the meeting, indicated she would be sending a letter of dissent on behalf of Dr. Khan.

36. On September 2, 1997, Dr. Leventhal of the University of Chicago wrote Mr. Livovich and indicated that despite the School's "very good efforts the Student had made only modest gains and continued to require a very high level of structure and staffing to maintain an appropriate educational program." He also indicated that there were significant differences in the perceptions of Dr. Khan and the School as to the quality and success of the School's program, with Dr. Khan believing the School's program not to be successful.

37. Dr. Leventhal went on to say "at the present time, it would appear that the relationship between the School staff and the parent has actually become counterproductive." Dr. Leventhal concluded: "Therefore, in order to provide an appropriate educational program for the Student, a program that has enough structure, consistency and follow-through it would now appear necessary that a residential placement is the only viable option."

38. On September 14, 1997, Dr. Khan sent a 4-page letter to the CCC team of WL outlining her criticism of the School and school personnel. She maintained that "the school staff continues to see the Student as capable of performing at a much higher level which is not true at all.At this time, we seem to see the Student as two different children with two different levels of functioning."

39. Dr. Leventhal documented his recommendations of January 8, 1997 (after observing the Student and reviewing records, etc.) in a report dated September 14, 1997. Dr. Leventhal said: "This is a kid who has potential. This is a kid that could be included. I think he could be included without a full time assistant. I think this is a kid who has potential for inclusion certainly in the primary grades."

40. On September 15, 1997, the Student was five years and eight months old. Dr. Khan referred the Student to Raleigh Wolfe, a licensed clinical psychologist for an evaluation. He conducted some testing but focused on Dr. Khan's problem with WL. He concluded that because of "the current atmosphere of tension and contention" the Student should be placed in a residential center for the treatment of autistic disorder.

41. A CCC meeting was held on September 16, 1997. The Wolfe report (See #40) and several

other reports were submitted to the CCC. The School's attorney, Mrs. Miller, accepted the two dissenting opinions (one from Dr. Khan's attorney) from the previous CCC and said those would be attached to the previous CCC report. Mrs. Miller said the team did not agree with the dissenting opinions. She stated that there was a difference of opinion in methodology for the Student.

42. The CCC, on September 16, 1997, recommended alternative programming in a residential facility for the Student.

43. The Student's present levels of educational performance as of September 16, 1997, were found: Academics-rote learned readiness skills to be a relative strength; cognitive-cognitive performance suggests moderate to severe delay; Emotional/Behavioral – his behaviors suggest the need for close supervision, behavioral characteristics associated with autism: Physical/Motor-Visual-Motor Integration measured near the 3-year 6-month level; Communication-skills continue to show delay and disorder; Adaptive-skills show significant delay in all areas.

44. CCC notes from the September 16th meeting indicated that the School "feels that they have done an appropriate job" with the Student.

45. The Student was placed at Bancroft School, a private residential facility in New Jersey, on November 19, 1997. A Bancroft diagnostic summary indicated the Student had moderate to severe deficits in language, play and social skill development (he was five years and 11 months old at this time).

46. On January 15, 1998, an incident occurred at Bancroft that involved the Student as a possible victim of sexual abuse. Bancroft said they could not substantiate sexual contact but moved the Student's roommate (the alleged perpetrator) to another residence.

47. A CCC was held on February 20, [1998] with Dr. Khan, her attorney, and Mr. Livovich traveling to Bancroft.

48. The CCC decided that discrete trial instruction would begin on a trial basis while the Student was in the apartment (residence).

49. In a letter dated June 16, 1998, from Dr. Khan to Bancroft, she outlined several criticisms of the Student's program and care. She expressed concern over the level of supervision and mentioned several incidents.

50. On September 29, 1998, Dr. Khan wrote Mr. Livovich a seven (7)-page letter about her extreme concern over a lack of adequate supervision at Bancroft. Dr. Khan indicated that Bancroft staff changed the Student's supervision level from "regular level" to five (5) feet distance (closer than "regular level") after she repeatedly complained about an aggressive student in the Student's apartment.

51. The Student was making progress at Bancroft during the period of July 1, 1998 to September 30, 1998. The Student had one (1) toileting accident in the month of October. He engaged in aggressive behavior six (6) times per school day. He engaged in self-injurious behavior three (3) times per school day. A "current targets and mastered items" report of October 26, 1998 showed that he had mastered several items across categories.

52. A CCC meeting was held at Bancroft on October 26, 1998. Dr. Khan provided WL personnel with a list of issues to discuss at the meeting, including instructions to Bancroft staff about how to communicate with her.

53. After the October 26th CCC meeting, Dr. Khan wrote Mr. Schooley, the Residential and Educational Supervisor at Bancroft, and was "very upset, frustrated and angry" about what he said at the CCC meeting. Mr. Schooley indicated at the CCC that Dr. Khan had a pattern of not getting along with staff. She had requested that (2) two staff members (including the social worker) not work with the Student or her. Mr. Schooley also said that Dr. Khan called Bancroft staff too often.

54. The Student entered the New England Center for Children (NECC) in Massachusetts on January 5, 1999. Dr. Khan had been interested in NECC for some time. She wrote Mr. Livovich a letter dated January 11, 1999, in which she criticized him for making comments to her that made her uncomfortable and which she believed to be untrue.

55. On April 29, 1999, Dr. Libby, Ph.D., Lead Clinical Program Director for NECC, wrote Dr. Khan asking her to "cease telling teachers how to work with him, what consequences to provide and how to give prompts." Dr. Libby also said, "I am concerned that many of your recommendations promote excessive prompt dependence." The Student had been at NECC less than four months at the time the letter was written to Dr. Khan (copied to Mr. Livovich and others at NECC).

56. NECC conducted a January 2000 evaluation of the Student, which showed the Student made progress in his first year at NECC. Communication, personal hygiene, and toileting skills improved over the year. The Student averaged less than one (1) toileting accident per day over the year.

57. The AAMR Adaptive Behavior Scale-School (ABS-S:2) was completed by NECC personnel who had worked with the Student for one year. He was eight years old. He scored: Independent Living – 3 yrs. 6 months; Physical Development, 7 yrs. 6 months; Numbers and Time, 4 yrs; Prevocational/Vocational Activity, 3 yrs. 9 months; Language Development, Socialization, Responsibility and Self-Direction – all at 3 years old.

58. A CCC meeting was held on May 24, 2000, and it was determined that the termination date for the Student's program at the NECC would occur at the end of December. In a letter dated October 24, 2000 from NECC to Marlene Sledz, the new special education director

at WL, Mr. Strully explained the reasons for the termination of the contract.

59. Mr. Strully said, "Dr. Khan made unrealistic demands on our staff, including the expectation that she would be called as late as 10:00 p.m. and would expect to remain on the phone for as long as two hours. Content of the calls routinely included negative comments, dismissiveness or inattention to progress reported, and a focus on her personal issues rather than the Student's programs." He went on to say that Dr. Khan's inappropriate behavior with staff drained resources, and that no other parent out of the 200 families at NECC demanded as much of staff as Dr. Khan.

60. The School asked NECC for an extension of the Student's contract. NECC insisted that Dr. Khan adhere to a communication protocol. A meeting was held on November 9, 2000, and NECC agreed to extend the contract through the end of the 2000-01 school year.

61. NECC provided WL a narrative summary of the Student's progress from May 24, 2000 through February 21, 2001. The Student met several objectives and made insufficient progress on other objectives.

62. An April 2001 I.E.P. (Student is nine years and three months of age) reported the Student had made gains in the areas of communication, daily living, basic discrimination and leisure/APE domains. He made variable progress in the areas of social behavior and community domains.

63. WL applied to the State for residential services for the Student at NECC for the 2001-2002 school year. The Student was receiving 52 hours per week of 1:1 assistance.

64. In July 2001, NECC prepared and sent Dr. Khan its guidelines for contact between NECC and Dr. Khan. Meanwhile NECC and WL were in contact regarding whether WL had located an alternative program or wanted to extend the contract. Again, in a July 9, 2001 letter, NECC emphasized that Dr. Khan's behavior had to conform to the NECC guidelines or no extension of the contract would be considered.

65. In September 2001, the extended contract with NECC was approved by the Indiana Department of Education (IDOE). The Student did have an Autism Waiver through FSSA. Ann Robertson was the case manager.

66. A CCC meeting was held on April 24, 2002. The Student was 10 years and 3 months old at this time. The CCC notes indicated that Dr. Khan and the School had been in contact with NECC staff and discussed his possible return to a less restrictive environment. The Student was on a waiting list at Melmark. CCC notes stated the Student was making progress at NECC and the CCC recommended he remain at NECC.

67. On January 28, 2003, Dr. Khan consented to transferring the Student to Melmark, New England located in Massachusetts from NECC (and the continuation of his program).

68. The Student entered Melmark in March 2003. His occupational therapist described him as an 11-year and 3-month old boy who "is a very engaging student who enjoys listening and singing to music as well as playing a keyboard and completing puzzles." He received 64 hours of one-to-one assistance.

69. The Student's March 2003 enrollment documents for Melmark indicated the Student could toilet independently (may need help getting there on time) and required some assistance with dressing, bathing and tooth brushing. He could drink, and use a spoon and fork independently. The enrollment documentation indicated the Student engaged in self-injurious behavior, PICA, hand flapping, aggression, bolting, food stealing, echolalia and spit play. The report also said the student was verbal and would let his needs be known using a combination of speech and gestures.

70. An August 2003 progress report from Melmark indicated the Student was making progress toward his I.E.P. goals in English, Math, Language Arts, Behavior, Occupational Therapy, Activities of Daily Living, Community and Gross Motor Skills.

71. In a September 2003 letter from Rita Gardner, Executive Director of Melmark, she reported the Student was doing very well in the program and was making gains every day.

72. In the same September 23, 2003 letter (above), Melmark notified Dr. Khan and Ms. Machuca (assistant WL special education director) that it was discharging the Student within 90 days. The Melmark Executive Director said, "We cannot stand by and have an external person [Dr. Khan] demoralize them [staff] and cause a situation where they are on the verge of quitting with consideration of leaving the field."

73. The Melmark Executive Director said that Dr. Khan had been argumentative, raised her voice at staff, demeaned the staff, and made unreasonable requests for clinical infrastructure modifications.

74. Dr. Khan's attorney (Mr. Weigle) wrote Ms. Machuca on October 16, 2003, and asked WL to intervene to stop the discharge of the Student from Melmark. He said Dr. Khan strongly believed that the September 23rd assertions about her were unfounded.

75. On November 19, 2003, Dr. Khan wrote Frank Bird, Clinical Director of Melmark, about trying a new methodology with the Student called Rapid Prompting. In this letter Dr. Khan referred to herself as "Being a clinician treating children with autism…" She said she used the methodology with the Student. At this time, there is no empirical support to validate Rapid Prompting methodology.

76. Melmark agreed to extend the Student's placement through January 31, 2004, only if Dr. Khan agreed to follow a new communication protocol.

77. In a December 11, 2003, discharge summary document report from Melmark, it was stated that the Student met five of eleven admission goals and partially met the other six goals.

78. A CCC was held on December 16, 2003, and continued on January 15, 2004, to discuss the Student's discharge from Melmark, to review his needs, I.E.P. and make recommendations for continued placement in a residential facility. Heartspring, a residential facility in Wichita, Kansas, accepted the Student and his I.E.P. Dr. Khan signed that she did not agree with the placement at Heartspring.

79. On November 19, 2003, Dr. Khan, through her attorney, requested a due process hearing (Article 7 Hearing No. 1395.04) against WL, School Town of Munster, and IDOE. Dr. Khan demanded that WL take action to keep the Student at Melmark and establish a communication protocol with Melmark.

80. On November 26, 2003, Dr. Khan filed an amended request for a due process hearing adding Melmark as a Respondent. On January 29, 2004, Lon C. Woods, the IHO, issued a "stay-put" Order against Melmark.

81. Dr. Khan selected Ann Robertson as her private case manager when the Student was at Bancroft. Ms. Robertson has regularly attended I.E.P. meetings in the capacity of case manager since that time. She described her company's (she is owner) goal as to provide for students with disabilities so they do not have to be institutionalized. Ms. Robertson assists families to bring children who are in residential facilities closer to their local communities. She has assisted the Student with securing Medicaid waiver services since 1997.

82. Ms. Robertson discussed the possibility of the Student moving back to his home community several times over several years with Dr. Khan. Dr. Khan indicated she was not ready for the Student to move home (community).

83. During the fall of 2003, Ms. Robertson tried to convince Dr. Khan that it was time to bring the Student home and that she would assist with planning a supported living arrangement for the Student outside of Dr. Khan's home.

84. In spite of Ms. Robertson's pressure to attempt to bring the Student back to his home community in November 2003, Dr. Khan wanted to delay as much as possible the Student's return to Indiana. Dr. Khan was hoping to keep the Student at Melmark (and filed for due process in November).

85. Ms. Robertson attended meetings on October 28, 2003, and November 12, 2003, with school officials and Claire Thorsen, a state-wide autism specialist and consultant. These meetings involved discussions about the Student's background, his needs and next steps, including his return to Indiana in January 2004.

86. Claire Thorsen, who has served and planned programs for approximately 400 autistic

students, was asked by Bob Marra, Associate Superintendent, to get involved in the Student's case in September 2003 and help resolve the situation. As mentioned above, she met with Dr. Khan, Ann Robertson and WL personnel in October and November. She also observed the Student for two days in late November 2003 at Melmark.

87. Claire Thorsen held an "exploratory meeting" with School officials, Dr. Khan and Ann Robertson on December 4, 2003. Ms. Thorsen prepared a long agenda of items that were discussed at this meeting. Moving the Student to Indiana or to the home community was discussed. Ann Robertson discussed Medicaid funding for an assisted living arrangement. Dr. Khan said she was exploring buying a duplex where the Student could live in the home community.

88. On March 15, 2004 on the eve of the due process hearing, No. 1395.04, a Settlement Agreement (Agreement) was reached between Dr. Khan, WL, School Town of Munster and Melmark. Dr. Khan signed the Agreement on March 15th and Ms. Sledz and the Melmark representative on March 16th. The Superintendent of Munster Schools signed the Agreement on March 18, 2004. Dr. Khan agreed to release, discharge, and dismiss the Article 7 hearing and any claims against the School arising out of the matter. She also agreed to the interim placement of the Student at Heartspring.

89. The Agreement provided that the Student would be placed at the Heartspring Facility as an "interim placement" that would continue until July 1, 2004, but no longer than December 31, 2004. The Agreement stated that it was the desire and intent of the parties to transfer the Student to a local community-based program in the general vicinity of Dr. Khan's home.

90. The Agreement was conditioned upon [funding] approval of the IDOE in several clauses. It was also contingent upon securing Medicaid waiver funding which would be exhausted to provide the Student's residential needs. The School was to give "best efforts" to gain approval from IDOE for payment of costs in excess of Medicaid waiver funding. The School was obligated to "undertake meetings and activities designed to transition the Student to a community-base program…" It was also to hold a timely case conference for the purpose of finalizing any community-based program, which would serve as the basis for an application for a Community Supported and Residential Services Agreement with IDOE. Further, the School was to "assist Dr. Khan to secure the identity of a supported living arrangement to accommodate the Student's alternative residential needs."

91. Ann Robertson (Dr. Khan's case manager and agent), Marlene Sledz, and Joan Machuca all agreed and understood that the funding for the residential services included in the Student's community-based program would be provided by Medicaid Waiver funds to be obtained by Dr. Khan.

92. During the months of April through August, 2004, WL was in communication with the IDOE, attempting to gain approval of an educational program that would allow the Student to be transitioned back to Indiana. WL worked closely with Dr. Khan and Ann Robertson

between April and July to develop a placement for the Student and a budget.

93. WL held meetings on April 29, 2004, and August 19, 2004, and submitted an application to the IDOE for community-supported services on July 15, 2004.

94. Ann Robertson learned in late April that she would not be able to obtain the Medicaid Waiver funding to fund the supported living arrangement contemplated by the Agreement. Ann Robertson informed Dr. Khan and the School. The School did not know until after the Agreement was signed that Medicaid would not pay for any portion of the residential costs of the supported-living arrangement.

95. Dr. Khan failed to obtain Medicaid Waiver funding, which must be exhausted under the terms of the Agreement in order to pay for the Student's residential services.

96. Ann Robertson admitted that Dr. Khan (through Robertson) had not exhausted Medicaid funding and never submitted an application for increases in services. She never exercised any right of appeal.

97. Dr. Khan was not forthcoming with the School regarding her purchase of a duplex, and plans to have the Student live on one side of the apartment duplex while she would live on the other side. She told Ann Robertson not to discuss her plans with the School and was less than open to Ms. Machuca about the situation. Prior to the July 13, 2004, CCC, the School had a conference with the staff at Dungarvin (potential service provider) and Ms. Robertson. The only information given relative to questions about housing for the Student was that Dr. Khan had purchased a home within WL.

98. After WL submitted the application for a community-supported placement to IDOE, it had several contacts with staff at IDOE about the fact that the placement sought was in a home or apartment purchased by Dr. Khan. Through these conversations, WL learned that IDOE would not fund the community-based program as planned.

99. On August 3, 2004, IDOE wrote WL and requested justification for the placement and budget.

100. On August 19, 2004, the CCC convened and discussed the community-based program outlined in the IEP submitted to IDOE and determined the placement at Dr. Khan's home (a separate living unit for the Student) was not available. Dr. Khan was still in the process of seeking zoning approval from the Town of Schereville.

101. On September 15, 2004, the CCC reconvened in an effort to discuss the concerns listed by IDOE in the August 3, 2004-letter. Dr. Khan and WL could not agree on reducing the number and intensity of services specified in the application to IDOE. The CCC concluded that a consultant would be needed to assist the School in exploring whether an in-staff residential facility would be appropriate. School personnel began questioning whether all

of the Student's needs were educational.

102. The School hired Richard Van Acker, Ed.D., as educational consultant to assist in determining the Student's needs and appropriate placement. Dr. Van Acker has been a special education professor at the University of Illinois at Chicago for eighteen years. He has had a wide range of experience working with children with autism. Dr. Van Acker was qualified as an expert in autism.

103. Dr. Van Acker observed the Student in his classroom and in his residence at Heartspring on November 28th and 29th, 2004. He reviewed the Student's extensive school records, directly observed the Student, and interviewed his current educational and placement staff.

104. Dr. Van Acker interviewed a number of the members of the educational staff serving the Student including: Shonda Hayes (Assistant Director of Heartspring), Jeanette Kelly, Theresa Bahns, Lorui Gore, Lori Hewitson, Julie Clark, Lloyd Streplin (behavior specialist) Vicky Holcomb (special education teacher) and Kelly Peterson. He asked all of them if they thought the Student could be programmed for within a special education program of a regular public school, each member of the team indicated that they felt he could. They all indicated that they provide minimal consulting services to the direct care staff in a manner similar to what might be provided a parent or caregiver in a natural home. Each participant felt the nature of the programming necessary within the home for the student to obtain educational benefit could be reasonably carried out by a parent with natural supports. He noted that each indicated that they knew of a multitude of children with greater needs than the Students who were living within their natural homes and receiving educational services within their local schools.

105. Dr. Van Acker made several observations: 1) The Student is in the moderate autism range; 2) The Student is verbal, but intelligibility is a problem; 3) Aggression and self-injurious behavior are often the result of noise or behavior by other students in his residence and would not be seen in typical home environment; 4) The Student is the least aggressive student at Heartspring; 5) He could go to a public school and be taught in a small group classroom; 6) He has too many functional academic goals; 7) He does not need to live in a residential facility; 8) He could live at home; 9) He could transition to home in a 2-month period with a "stepping down" service plan at Heartspring; 10) A PECS System would help support him in the home; 11) A transition plan to assist the Student return home is essential; 12) The Student is in an extremely restrictive setting and has become too dependent on adults; and 13) Safety is always an issue with the Student.

106. Vickie Holcomb, the Student's current special education teacher at Heartspring, testified the Student could live in a less restrictive environment with his natural caregiver and in his home. She does not believe he needs 24-hour care to implement his I.E.P. She believes he could transition to a home setting and would need strong visual supports at home. She also contends that his one-to-one paraprofessional could move 2-feet back from him, and not be directed to be at "arm's length."

107. Vickie Holcomb testified the Student is: 1) partially verbal; 2) had only one incident of aggression in the classroom; 3) asks for things; and 4) has the 2nd highest level of cognition in her class.

108. Vickie Holcomb testified about the Student's present levels of performance and educational needs. She believes the September 15, 2004 I.E.P. goals and objectives are appropriate but agrees with Dr. Van Acker that I.E.P. goals should be reduced. She also testified the Student does well with dressing, bathing, tooth brushing, toileting and wiping.

109. Jeanette Kelly, the Heartspring home coordinator for the Student, testified that the Student's self-care skills are good with some prompting. He can dress himself and he sleeps "pretty well" unless he is sick.

110. Dr. Baines, who has a Ph.D. in educational psychology (psychocultural), has worked for five and one-half years at Heartspring. He testified that the Student's educational programming does not need to go beyond the school day. He said the Student enjoys playing with balls, enjoys walks, videos, music, and the company of adults. He believes a staff person (adult) should be within 5 feet of the Student when in the community. An adult needs to hold his hand near streets or water because he is not aware of danger.

111. Dr. Baines described the Student as having "more than a mild level of autism." His behavior is not as intense as others at Heartspring.

112. Julie Clark has been at Heartspring for one year and has 24 years experience in special education. She is also a home coordinator for the Student. Julie Clark testified to the following regarding the Student: 1) He can feed himself; 2) He tells people when he needs to go the restroom; 3) He can toilet on his own, sometimes needs prompting; 4) He dresses himself well; 5) He can bathe himself; 6) He needs to "wind down" to go to sleep; 7) He does not like the noise of others; 8) He does not need all of his goals "run after school"; and 9) She is concerned about Dr. Khan because she "doesn't really know him."

113. Claire Thorsen concluded that "the Student's educational needs appear to be within the scope of public school programming." She believes it is appropriate to transition the Student to his home. She said Dr. Khan has the background and has demonstrated she can support her son when he comes home for visits.

114. The Student's expert, Dr. Louis Krause, M.D., is a pediatric psychiatrist with Rush University Medical Center who also has his own private practice. Dr. Krause has a great deal of experience working with children with autism. He was qualified as an expert witness. Dr. Krause evaluated the Student in his Chicago office, reviewed records and interviewed Dr. Khan, her son, and the Student's special education teacher by phone. He did not observe the Student at Heartspring.

115. Dr. Krause testified that the Student needs 2:1 care much of the time during his waking hours primarily for safety issues, redirection, and aggressive behavior. Dr. Krause also testified that he would be "hard pressed" to say that Heartspring is not an appropriate placement in the least restrictive environment for the Student. Dr. Krause describes his involvement in the Hearing this way, "My role really was as a child psychiatrist to talk about what I think would be in the best interest and allow his educational needs to be met." Dr. Krause did not believe it would be appropriate for the Student to live at home with Dr. Khan after school.

116. Most of the time the Student's self-injurious behavior can be appropriately dealt with by redirection. Occasionally he must be restrained in a one or two arm restraint hold and he calms down by counting to twenty. The MANDT procedure is used for physical restraint. Elopement was not seen as a major concern by Heartspring personnel.

117. Dr. Khan has expressed her disagreement with having the Student live with her many times to Joan Machuca, Marlene Sledz, Ann Robertson and Maria Chinanello. She has maintained that she is too busy and has a grueling schedule, including evening visits to see patients at the hospital. She told Joan Machuca that "over my dead body" the Student would come and live with her.

118. The School has an appropriate program for the Student currently at Homan Elementary School, and in the fall of 2005, will be located at the Grimmer Middle School. The Student would be in the upper end of cognitive ability in a class of five or six students with at least three (3) adults in the classroom. The primary focus of the class is on autism and the teacher and paraprofessionals use different methodologies, including ABA, Project Treatment and Education of Autistic and Communication Handicapped Children (TEACH) and visual oriented methods. All personnel are trained in CPR.

119. A review of the five video tapes, with special attention to the most recent tapes, showed a happy, playful, singing child. He was compliant with instructions and completed tasks. He completed his physical exercises. He was easily redirected in the tapes and followed instructions with some prompting. The Student's behavior and level of supervision were similar to that needed by a primary age child.

The IHO's Conclusions of Law

Based upon these Findings of Fact, the IHO reached five (5) Conclusions of Law.

1. The appropriate placement for the Student is the structured autism program within the WL boundaries at Grimmer Middle School for the 2005-2006 school year.

2. The appropriate related services necessary for the Student to educationally benefit are listed on his September 15, 2004 I.E.P., including speech language therapy, occupational therapy and assistive technology services.

3. The staff working with the Student does not need to be trained nor do they need to implement "Rapid Prompting" in order to ensure that the Student educationally benefits from his I.E.P.

4. The parties did enter into a Settlement Agreement dated March 15, 2004. IDOE funding and Medicaid Waiver funding were material terms and conditions precedent to the performance of the Settlement Agreement. Medicaid Waiver funding and IDOE funding were not approved. Thus, the Settlement Agreement fails under the doctrine of impossibility.

   Dr. Khan did not exhaust Medicaid Waiver funding as required by the Settlement Agreement. Thus, the failure to perform the duties of the Settlement Agreement excuses any duty to perform by the School. Therefore, the School has not breached the Settlement Agreement.

   Finally, the School gave its "best effort" to secure IDOE funding approval for the Student's supported living arrangement. Therefore, the School did not violate the Settlement Agreement. The Settlement Agreement does not control the issues in this Article 7 hearing.

5. Article 7 requires that the educational needs of children must take precedence over the perceived needs of parents.

The IHO's Orders

Based on the Findings of Fact and the Conclusions of Law, the IHO issued the following fifteen (15) orders:

1. That the Student be placed in the Grimmer Middle School autism-structured program on a full-day basis beginning with the regular start of the fall 2005-2006 school year. This represents the least restrictive environment for the Student.

2. That the Student shall be placed in an extended school year program at WL beginning on or about July 15, 2005.

3. That a transition step-down program at Heartspring designed to transition the Student back to the WL public school program and to live with his mother commence immediately. The Student will return to his community and live with his mother after the school day ends.

4. That the transition step-down program at Heartspring will end on July 7, 2005.

5. The School shall make a new application to IDOE requesting an extension of time at Heartspring to July 7, 2005, to fund the transition step-down program.

6. The September 15, 2004 I.E.P. represents the Student's present levels of performance and shall be integrated into the Grimmer classroom. The I.E.P. goals and objectives are excessive and shall be modified and implemented as follows: Functional academic goals will focus on 1.1, 1.2, and 1.3 (the other goals are eliminated). The writing goals will be eliminated and the computer goals shall remain (9.1, 9.2, and 9.3 in the School setting, not residence) including 10.1-10.3. The math goals should be kept. All of the Household Management and Living Skills goals and objectives shall be eliminated. It should be noted that most of the goals and objectives that have been eliminated may be addressed in the public school structured program. The modified I.E.P. will provide the Student with a free and appropriate public education.

7. The Student shall continue to receive the related services as set forth in the September 15, 2004 I.E.P. for the extended school year and 2005-2006 school year. These related services will be provided during the regular school day. The Student shall also be provided with adapted physical education at school.

8. The goals that have been eliminated (not including the writing and reading goals) and those covered in the Individualized Support Plan (ISP) of July 7, 2004 fall in the area of daily living skills and should not be considered as educational needs for the Student.

9. Parent training should be made available to Dr. Khan. The School shall provide Dr. Khan with behavioral support in her home from July 15, 2005 to September 15, 2005 every day after school for 3 hours (during the transition to home from Heartspring and to Grimmer Middle School).

10. A part-time Qualified Mental Retardation Professional (QMRP) or otherwise suitably trained professional should be available to work with Dr. Khan (provided by School) for a minimum of five hours consultation per week to help establish the supports and accommodations needed by the mother and others in the home environment. This service shall end on October 15, 2005.

11. Heartspring personnel, WL personnel, and Dr. Khan should meet to plan the Student's transition to the community and to her home. School personnel should definitely visit with Heartspring staff and observe the Student.

12. Heartspring should begin to implement programs to increase the Student's ability to function independently. This will require increased efforts to promote extended engagement within recreation and leisure activities. Efforts should be made to promote his interaction with peers.

13. Once the Student returns to WL, Dr. Khan has a right to stay involved with the education of her child. She should be allowed to observe the Student at Grimmer Middle School once per week. A daily log shall be kept of the Student's activities, progress, etc., and shared with Dr. Khan.

14. The School shall issue an amended I.E.P. in accordance with this DECISION within 30 days of this ORDER.

15. Heartspring may continue using the September 15, 2005 [sic] I.E.P. as it refers to residential living. Heartspring may choose to focus on the areas described in the modified I.E.P. (See above.).

The IHO properly notified the parties of their respective administrative appeal rights.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Procedural History of the Appeal

On March 8, 2005, after reviewing the IHO's decision, the School asked the Student to agree to an extension of the residential contract until July 7, 2005**.** By a letter dated March 10, 2005, the Student agreed to extension of the Heartspring contract. Additionally, the letter requested an electronic copy of the due process hearing transcript.

On March 18, 2005, the School requested clarification from the IDOE or the IHO regarding the amended IEP. (See Hearing Decision 1461.05, Order No. 14). In an order dated March 28, 2005, the IHO clarified the IEP issues. The IHO stated that "the IEP did not need to be amended through a CCC meeting because the IHO amended the IEP in his decision and order; therefore, the School was ordered to perform a clerical function of issuing an amended IEP in accordance with the decision and order." Then, on April 4, 2005, the IHO issued an order finding the School's amended IEP to be in compliance with his orders. However, in a letter dated April 11, 2005, the Student objected to the amended IEP[14]. Since the Student did not receive a copy of the amended IEP until April 6, 2005, the Student did not have an opportunity to review the IEP before the IHO entered his order. On April 25, 2005, the School responded[15] to the Student's April 11, 2005 letter. Subsequently, on May 3, 2005, the Student responded to the School's April 16, 2005 letter. The Student's letter refuted the School's allegations over the Student's parent's character. Furthermore, since the Student will be transitioning home in the near future, the letter reiterated the parent's need be able to communicate with school personnel to understand the Student's current levels of functioning and his needs. Finally, the letter reminded the School to send updated records as soon

[14]The Student requested that the IHO modify his order to require the School to: 1) add back Alpha Smart as assistive technology; 2) require the self help goals to be worked on in the Grimmer classroom; 3) reinstate the deleted reading goals; 4) clarify that swimming is a necessary component of the Student's leisure goals; and 5) develop an appropriate communication protocol with Heartspring and the student's parent until the student transitions home.

[15]The School's response mainly addressed the communication issues between the Student's parent and Heartspring staff.

as possible.

The Board of Special Education Appeals (BSEA) timely received the Student's completed Petition for Review and a Motion for Oral Argument on April 6, 2005. On April 7, 2005, the School requested an extension of time in which to file its Petition for Review[16]. By letter dated April 8, 2005, the Student filed an objection to the extension of time. The BSEA granted the request for an extension of time by an order dated April 11, 2005. The School had to file its Response to the Petition for Review by May 9, 2005. In a corrected order dated April 14, 2005, the BSEA determined that its written decision would be due by June 8, 2005. On May 3, 2005, the BSEA denied the Student's Motions for Oral Argument[17]. The complete record from the hearing was photocopied and provided to BSEA members on April 14, 2005. On May 9, 2005, the School timely filed its Response to the Petition for Review. The BSEA, on May 10, 2005, issued a Notice of Review without Oral Argument, setting the Review date for June 1, 2005. The Student filed on May 17, 2005, a Response to the School's Response to the Student's Petition for Review, asserting misstatements by the School in its Response.

Student's Petition for Review

As noted *supra*, the Student filed his Petition for Review on April 6, 2005. The Student took exception to the following Findings of Fact: Nos. 4, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 44, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 64, 65, 68, 71, 72, 73, 74, 75, 76, 79, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, and 119. The Student objected to the following Conclusions of Law: Nos.1, 2, 3, 4, and 5. The Student also objected to the following Orders: Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 14, and 15.

The Student criticized the IHO for wrongfully perceiving this hearing to be about the Student's parent rather than the Student. Additionally, the Student alleged that the IHO exceeded jurisdiction by: 1) deciding issues that were not in dispute; 2) denying the Student due process by failing to allow cross-examination on topics that became findings, conclusions, and orders that where not supported by substantial evidence; 3) failing to address the school's FAPE violations; and 4) made problematic credibility determinations.

The Student argues that the IHO exceeded his jurisdiction by ruling on issues not in dispute. The

[16]The School requested an extension of thirty (30) days, or until May 9, 2005, to reply to the Petition for Review.

[17]By letter sent on May 2, 2005, the Student again requested a response to the previous Motion for Oral Argument (dated April 6, 2005).

Student claims that the IHO abused his discretion by adding two issues not in dispute.[18] Further, the Student argues that the issue concerning placement was not ripe for the hearing. The Student maintains that although school witnesses throughout the hearing recommended that the Student be sent home with no services, the Student argues that the School never held a CCC at which this recommendation was given. Moreover, the most current IEP (dated September 15, 2004) recommends continued services at Heartspring. In addition, the Student claims that the School gave the IHO several possible options for the Student's placement, rather than taking a position on what an appropriate placement for the Student should be[19]. Therefore, since the asserted issues do not involve actual, concrete injury, the issues are not ripe[20].

The Student represents that the IHO denied the Student due process by failing to follow his own ruling. Because the IHO ruled that testimony about events that occurred prior to 2000 would not be heard, Student's counsel could not cross-examine about any documents or events that occurred prior to 2000. However, the Student denotes that the IHO's first 55 Findings of Fact concern events prior to 2000, to which the Student objected to their admission but was overruled. Therefore, the Student claims that since Article 7 requires that a party have the opportunity to cross-examine witnesses, the IHO denied the Student's right to due process after using such documents as evidence.

The Student maintains that the IHO's decision as to the Settlement Agreement is unsupported by substantial evidence and his findings are arbitrary. The Student argues that there was a "meeting of the minds" in that the Student would be placed in a community-based program outside the Student's parent's home. In fact, the Student claimed that the CCC never discussed anything other than residential services for the Student. Furthermore, since the additional Medicaid funding was not obtained, the IHO concluded that the agreement failed due to impossibility. However, the Student claims that even after the Medicaid funding was denied, the School continued to act in furtherance of that Agreement by pursuing DOE funding for the agreed placement, as well as maintains that the Agreement was not contingent on the Medicaid funding. Subsequently, the Student argues that the School's actions in this situation fail to support the IHO's conclusion (See Conclusions of Law No. 4)[21].

---

[18]The two issues referred to were ordered by the IHO in an order dated October 28, 2005. The issues concerned appropriate related services and the implementation of "Rapid Prompting." However, the Student did not disagree with the related services in the IEP nor request the School to provide "Rapid Prompting."

[19]The Student cites to T.H. v. Board of Ed. of Palantine CCSD 15, 55 F.Supp.2d 830 (N.D. Ill 1999) in which the court describes the problems of a school not defining a placement and concludes that a parent is not required to accept such a placement.

[20]The ripeness doctrine is cited from Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

[21]The Student states that "it is well settled Indiana law that the actions of a party during the course of a contract may be used to determine the intent of the parties." (See Sharp v. Jones, 497 N.E. 2d 593

Additionally, the Student claims that the School breached the Agreement. Even though the IHO determined that the School used its "best efforts" to secure funding for the Student's placement with the IDOE, the Student maintains that the School failed to complete the request for funding[22]. Further, the Student argues that instead of working with the Student and IDOE to come to a conclusion about funding of a supported living arrangement, the School repeatedly extended the Student's stay at Heartspring and requested a hearing. Because of the School's promises to secure and fund a community supported living arrangement, the Student waived his right to bring claims for the denial of FAPE. Therefore, the Student refers to "equity and public policy" to require that the School keep its promises, ensuring that the Student "receive[s] the benefit of the bargain made on his behalf." The Student feels that the IHO should have and had the authority[23] to enforce the Agreement, reasoning that: 1) the substantial weight of the evidence establishes that there was an agreement; 2) the School acted in furtherance of the agreement by submitting a budget; and 3) an IEP and an application for community supported living was developed, despite the fact that no additional Medicaid funding was available.

The Student argues that the Student requires a community supported living arrangement to receive a FAPE in the LRE. The Student maintains that the Student over the last seven years has had an IEP that requires residential placement. The Student cites to Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981) and Ash v. Lake Oswego School District No,, 71, 766 F. Supp. 852 (D. Or. 1991) as authority to support why the Student requires residential placement. Furthermore, the Student argues that Heartspring witnesses' testimony, as to the needs of the Student, support the conclusion that the Student needs residential placement, instead of placement in his parent's home with limited, temporary support.

The Student claims that the IHO ignored the School's FAPE violations. After an application of the test found in Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the Student argues that the test indicated that the Student was denied a FAPE. Under the procedural prong of Rowley, the Student's parent argues that she was denied meaningful participation in her child's educational program and the School failed to take necessary procedural steps. Furthermore, the Student claims that the second prong of Rowley was not met because the IEP was not based on the Student's needs.

The Student argues that the IHO's decision should be overturned because the record does not support his credibility determinations. First, the IHO ignored the testimony of the Student's expert,

---

(Ind. Ct. App. 1986).

[22]Specifically, the Student notes that the School never responded to the IDOE's August 3rd application return.

[23]Student cites, in party to Mr. J. v. Board of Education, 98 F. Supp. 2d 226 (D. Conn. 2000). The Student also cited to administrative decisions from other states, but these decisions have little, if any, value.

a child and adolescent psychiatrist with significant experience in autism, but followed the recommendations of the School's expert, a professor without a medical degree and without significant autism experience. The Student refers to Blount v. Lancaster-Lebanon Intermediate Unit, 2003 WL 22988892 (E.D. Pa. 2003) in concluding that the IHO's conclusions hold little weight because he dismissed the Student's expert testimony without explanation. Second, the Student holds that the IHO gave undeserved credibility to another School's witness. The Student argues that the School's witness violated the IHO's separation order by speaking to the School's attorney in the midst of her cross-examination.

The Student represents that the IHO's personal attack on the parent is contrary to law. The Student claims that 46 out of 119 Findings of Fact are "arbitrary, an abuse of discretion and show the IHO's personal bias[24]." Additionally, the Student claims that the "IHO's blame game" is contrary to law, claiming that the School, not the parent, is responsible for providing a child with a FAPE. Finally, the Student feels that the IHO should consider the School-Parent hostility[25] in making determinations regarding placement and the extent to which such hostility could prevent the child from receiving educational benefit from the School's placement.

The Student argues that the IHO's order is entitled to less deference due to additional evidence. The Student claims that the Student's parent received additional information regarding the autism waiver. After the case manager applied for additional services on the basis that the Student lost his IDOE funding through the IHO's orders, FSSA denied the funding because of cost containment and the IHO's decision that the Student did not need additional services. Subsequently, the Student alleges that the IHO's ruling is preventing the Student from receiving funding from DOE or FSSA; therefore, the IHO's findings regarding the exhaustion of Medicaid waiver funding should be discontinued.

School's Response to the Petition for Review

The School timely filed on May 9, 2005 its Response to the Student's Petition for Review. The School argued that the IHO's Findings of Fact, Conclusions of Law, and Orders should be given deference and upheld.

The School argued the IHO correctly perceived the hearing to be about the Student's parent, rather than the Student. In fact, the School claims that all Findings of Fact were supported by the record, which correctly reflected the Student's parent's involvement in this matter. The School maintained

---

[24]Specifically, the Student claims that the IHO portrays the Student's parent "as a demanding parent, shielded with attorney, and wedded to her profession," further asserting that the parent "is the reason that the Settlement Agreement failed."

[25]Student refers to Board of Education CCSD No.21 v. Bronzer, 938 F.2d 712 (7th Cir. 1991). The Seventh Circuit Court of Appeals determined that a student would not be able to obtain educational benefit from the district's proposed placement due to the parent's rejection of that placement, and the history of the parents' relationship with the district.

that the IHO's function was to make credibility determinations. Subsequently, the IHO made credibility determinations based on the parent's input regarding the current issues of the dispute.

The School argued that the IHO properly framed the issues. Disputing the Student's claim that there was no conflict over the amount of related services, the School points out that this is contrary to evidence presented. Since the Student suggested that an issue cannot be framed if disagreement over the issue exists between the parties, the School reiterates that the IHO, not the parties, determined the issues in a way "he believes promotes an orderly and prompt hearing."[26] The School, regarding the issue of placement, argued that the IHO had proper jurisdiction and the issue was ripe for review. After the September 15, 2004, CCC, the School did, in fact, make a recommendation that the Student continue his placement at Heartspring. However, the Student's parent (who was fully aware of her placement options) did not agree with the placement recommendation and would only agree to a supported living arrangement in a duplex that she purchased. Therefore, the issue of placement was ripe; and subsequently, the School had to seek a due process hearing. Furthermore, this disputes the Student's claim that "the school IEP team never made a recommendation such as that advocated by school staff at the hearing."

The School argued that the IHO was not precluded from making Findings of Fact concerning events that occurred prior to 2000. The School recognized that the parent failed to prevent the admission of numerous documents dated before 2000 and ignored the IHO's specific overruling of the Parent's relevance objection to all documents prior to 2000. The School argued the Student's three arguments contesting the Findings of Fact to events prior to 2000 fail. First, the School asserts that the Student's statement that the IHO barred any evidence prior to 2000 grossly overstated the record.[27] The School referred to the full context of the proceeding to reflect that the IHO did not bar all evidence prior to 2002 or 2000; "he merely exercised discretion regulating time spent with this particular witness's testimony and avoiding testimonial evidence that duplicated the documentary evidence." Moreover, the IHO admitted into evidence the documents the Student suggested the IHO bar. Second, the School asserted that the Student's due process rights assertions are vague. The Student alleges that the IHO violated her right to cross-examine; however, since the objection to the evidence did not occur at the time of the hearing, the Student's due process rights were not violated. In addition, the School further argued that the alleged due process violation is an untimely hearsay argument and is not supported by the record. Finally, the School took exception to the Student's allegation that the IHO's Findings of Fact, based on past events, are unfair because the Student is

---

[26]The School refers to 511 IAC 7-30-3(m)(3); I.C. 4-21.5-3-19(c) and I.C. 4-21.5-3-20(c)(7).

[27]The IHO's language in dispute is as follows: "Let's just go ahead and fast forward to 2002. Can you pick up your notes there, [School's Counsel], and resume your questioning the witness? I'll sustain the objection about going back to 2000." This argument stemmed from the Student's attorney's objection to the testimony provided by the assistant director of special education. The School argues that the objection was asserted for that specific testimony and not in a broad context. However, this objection led to discourse regarding the effect of past events such as: the Settlement Agreement on the hearing proceedings; the issues before the IHO; placement decisions made prior to the hearing; and the authority of the IHO to review the Student's placement. (T. 173-183).

prohibited by the Statute of Limitations and the waiver of claims in the Settlement Agreement. The School argued that the fact that the Student is prohibited from bringing claims against the School concerning past claims does not affect the IHO's ability to consider these events nor render Findings of Fact based upon the same[28].

The School argued that the IHO properly determined that the Settlement Agreement does not control the issues in dispute. The School maintains that it did not breach the Agreement. The School reasons that there was no meeting of the minds, and that the placement agreed upon in the Agreement was contingent upon DOE and Medicaid funding[29]. Therefore, the Agreement failed under the doctrine of impossibility.[30] Furthermore, the School addressed the appropriateness of the residential placement[31]. The School argues that a parent's resistance for a child to live at home and attend a program in his home school does not require the School to place the Student in a more restrictive placement. In this case, it was determined that the Student did not require 24-hour a day, 7-day per week residential placement. In fact, it was determined that the appropriate FAPE within LRE was at his parent's home with attendance at a structure autism program during the school day. Furthermore, the School argued that there was no evidence to suggest the parent lacked the ability to care for her child at home.

The School argued that a denial of FAPE did not occur by the School by its requesting a due process hearing. Referring to the Student's claim that the School denied the Student a FAPE because of alleged procedural and substantive violations of the IDEA, the School denied this occurred. First, the School argued that the IHO properly determined the School developed an appropriate IEP. Additionally, in his decision, the IHO made proper modifications to the Student's IEP based on the substantial weight of the evidence presented at the hearing[32]. Next, the School argued the Student's parent's claim that she was denied participation in IEP meetings is unfounded. Although an agreement regarding placement was not reached, the parent did attend and participate in the September 15, 2004 CCC meeting**.** Further, the parent was not denied participation and received proper notice regarding the due process hearing.

---

[28]The Student claims the Student should continue the placement and level of services because the Student has been in a residential setting for seven years.

[29]The Medicaid funding was the responsibility of the Student's parent. Since the Student's parent failed to appeal her denial of the Medicaid funding and the School gave its "best efforts" to secure IDOE funding, the School argues that it is excused from any duty to perform under the Agreement. The Settlement Agreement will be discussed in more detail by the BSEA *infra*.

[30]The School refers to Kraus, Krus, Miklosko, Inc. v. Beedy, 335 N.E.2d 524, 528 (Ind. Ct. App. 1976) as authority regarding the doctrine of impossibility.

[31]The School referred to an administrative decision from another State. As noted *supra*, such decisions have little, if any, relevance to an Indiana dispute.

[32]The School referred to Roy and Anne A. v. Valparaiso Community Schools, 951 F. Supp. 1370, 1376 (N.D. Ind. 1997) as authority.

The School argued that the determinations of credibility can only be made by the IHO[33]. The School disputes that the Student's expert's testimony was ignored. In fact, the School cites to Findings of Fact[34] in which the IHO specifically discussed the Student's expert's experience in autism and his recommendations for the Student's placement. In addition, the School argued that the IHO did correctly determine the credibility of the School's witness. Furthermore, the School claimed that it did not violate the separation of witness order in that an attorney may prepare a witness.[35]

The School also argued that the IHO did not make personal attacks on the parent. However, the School pointed out that the parent has distracted the educational staff from focusing on the Student. The decision does focus on the parent's over-insistent demands to have input and direction over the daily programming of the Student, as well as findings that some of her demands were unrealistic; however, the IHO never criticized her for being a single parent, having a professional career, or hiring outside help to care for her child. The School argued that the IHO correctly factored in the parental hostility in deciding placement for the Student[36].

The School argued that the additional evidence is too late and has nothing to do with FAPE. The School stated that "a parent must make a specific motion before the BSEA to introduce documents as 'newly discovered evidence.'"[37] Therefore, any document inappropriately presented to the BSEA cannot be considered upon review. However, if the request is considered, the School claims that the request for additional services are not related to the Student's educational services (since the application refers to respite care services) and the findings and conclusions concerning the exhaustion of Medicaid funding should be given deference.

REVIEW BY THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The BSEA reviewed this matter on June 1, 2005, without oral argument and without the presence of the parties. All three members of the BSEA participated. Each had received and reviewed the record from the due process hearing below, including the Petition for Review, the School's

---

[33]The School relied in part on Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 104 (4th Cir. 1991).

[34]Reference to Findings of Fact No. 114 and 115.

[35]The School refers to Roser v. Silvers, 698 N.E.2d 860, 865 (Ind. Ct. App. 1998); Jiosa v. State, 605, 608 (Ind. 2001) as authority in stating "a separation of witness order is to prevent witnesses form sharing testimony given at the hearing, not to prohibit an attorney from preparing a witness."

[36]The School cites to Greenbush Sch. Committee v. Mr. and Mrs. K., 949 F. Supp. 934 (D. Me. 1996) regarding the validity of factoring the parent's hostility toward the school district when considering a child's placement. The court in Greenbush explains the focus was, and should be, on the child while also making findings particular to the parent.

[37]See I.C. 4-21.5-3-31(c).

Response thereto, and the Student's Response to the School's Response to his Petition for Review. In consideration of same, the BSEA now determines the following Combined Findings of Fact and Conclusions of Law.

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 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 Findings 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 BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. Numerous objections are made to the IHO's conduct of the hearing. The BSEA, after exhaustive review of the record, including review of the video cassette tapes and photographs, can find no fault with the IHO's conduct of the proceedings. The hearing occurred over nineteen (19) days; both parties were able to raise issues, pose objections, and cross examine adverse witnesses; both parties were able to present testimony and documentation; both parties requested and received subpoenas and the ability to engage in discovery; and numerous pre-hearing conferences were conducted and documented in subsequent pre-hearing orders. No party was denied any procedural due process rights.

3. The Student asserts the IHO erred by according more credibility to the School's primary witness than to his. Although the Student asserts his witness was more qualified to diagnose the Student's medical condition, this was not an issue in the hearing. The issue was primarily what would constitute FAPE and the LRE for the Student. The record indicates the School's primary witness was more actively engaged in observation of the Student and interviewing of the Student's teachers and care-givers. The School's primary witness was better prepared to testify as to the Student's educational needs. The role of the IHO is to determine relative credibility and demeanor. The IHO's decisions in these regards will not be disturbed absent any support that the IHO made such determinations contrary to 511 IAC 7-30-4(j). There is no such support that he reached such determinations contrary to 511 IAC 7-30-4(j).

4. Although numerous objections were made by the Student as to the Findings of Fact of the IHO, including objections to characterizations of the Parent, the BSEA finds that all of the IHO's Findings of Fact were reasonable, were based on the record, and did not denigrate the Parent or place her in a false light.

5. The Student complains the IHO erred by accepting evidence and testimony that exceeded the limitations period the IHO established. However, the information provided was relevant to the resolution of current issues rather than discussion of matters long past and irrelevant. The IHO did not err. The information supplied is relevant to the issues raised that require resolution presently. The IHO did not abuse his discretion in this regard.

6. The BSEA finds no fault with Conclusions of Law Nos. 1, 2, 3, and 5. These Conclusions of Law are based upon Findings of Fact that are, in turn, supported by the record. As to Conclusion of Law No. 4, the IHO is correct in that the parties entered into what is purported to be a "Settlement Agreement" on or about March 15, 2004. However, the BSEA finds the remainder of Conclusion of Law No. 4 misplaced. The "Settlement Agreement" was void *ab initio*. The School explicitly conditioned the provision of FAPE upon the availability of funding from third parties.[38] The "Settlement Agreement" also tends to pre-determine future placement and restrict disagreements to court intervention without recourse to procedural safeguards and due process under IDEA and Article 7. This situation is analogous to Woods v. New Jersey Department of Education, *et al.*, 796 F.Supp. 767 (D. N.J. 1992), where a "Settlement Agreement" was contingent upon obtaining funding from a third party, which did not occur. When the parents sought to litigate the issue, the federal district court refused to honor the Settlement Agreement because it tended to enable the local school district to avoid its responsibility to comply with IDEA and State law in providing a FAPE to an eligible student. Neither party could rely upon this Settlement Agreement. The School certainly did not, presenting the subsequent disagreements to an IHO rather than attempting to rely upon the Settlement Agreement. The IHO had jurisdiction to decide the issues before him, and did so. There could be no breach of a Settlement Agreement that was not in concert with public policy and law at its inception.

7. The BSEA finds that the Orders objected to by the Student are appropriate as written. The BSEA declines the School's suggestion that the time frames should be altered or adjusted to reflect potential litigation. If the parties can reach accord, they can meet the time frames established by the IHO. The BSEA is not inclined to adjust the time frames absent any compelling reason to do so, and no such compelling reason is apparent.

8. Although no objection has been made to the IHO's Order No. 13,[39] the record as a whole indicates that additional clarification is necessary in order to avoid past instances that have undermined educational programming for the Student. While the Parent shall have the right to observe the Student once a week as ordered, such weekly observation shall be scheduled

---

[38]"This placement [at Heartspring] will be contingent upon funding approval from the Indiana Department of Education." Rhetorical ¶ 1, p. 3

[39]The IHO's Order No. 13 reads as follows: "Once the Student returns to WL, Dr. Khan has a right to stay involved with the education of her child. She should be allowed to observe the Student at Grimmer Middle School once per week. A daily log shall be kept of the Student's activities, progress, etc., and shared with Dr. Khan."

in agreement with School personnel and in accordance with the School's visitor policies and procedures.

9. The BSEA declines to accept the additional documents supplied by the Student. The Student did not meet the requirements of I.C. 4-21.5-3-31(c) in the submission of the additional documents. In the alternative, the BSEA found the documents to be irrelevant based on the foregoing.

ORDERS

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

1. The IHO's Findings of Fact are upheld as written.

2. The IHO's Conclusions of Law are upheld as written, except as to Conclusion of Law No. 4. The BSEA finds that the Settlement Agreement was void *ab initio* as contrary to public policy as well as federal and state law.

3. The BSEA upholds the Orders of the IHO, including the time frames established, except as to Order No. 13, which the BSEA has upheld but provided clarification as to the weekly visitations to the Student's classroom.

4. Any and all other objections not specifically noted above are overruled or denied, as appropriate.

DATE: June 1, 2005

/s/ Cynthia Dewes, Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has the right to seek judicial review in a civil court with jurisdiction withing 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).