

# Indiana Board of Special Education Appeals



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## BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

*In the Matter of R.C.,* )  
*Hanover Community School* )  
*Corporation And the Northwest* )  
*Indiana Special Education Cooperative* ) **Article 7 Hearing No. 1555.06**  
)  
Appeal from the Decision of )  
James A. Jacobs, Ph.D. )  
Independent Hearing Officer )

### Procedural History and Background

The request for this due process hearing was filed by the Student,<sup>1</sup> on December 22, 2005, to resolve disputes with the Hanover Community School Corporation (hereinafter, "School") about Student's identification, evaluation, placement, and services. The hearing request was received by the Indiana Department of Education on December 30, 2005. On January 3rd, 2006, Joseph McKinney was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO). The School responded to the hearing request on January 12, 2006.

On January 6, 2006, the IHO received a request from the parent's representative that the IHO remove himself from the case. The IHO responded to parent's representative's request for recusal on January 10, 2006, indicating that the parent's representative lacked standing to make such a request. On January 13, 2006, the Student sent the IHO a letter requesting that he recuse himself due to potential conflict or bias.

On January 17, 2006, the IHO responded to the parent's representative's request stating that he had yet to make a decision whether to recuse himself. January 20, the original IHO recused himself to avoid any perceptions of bias against the parent's representative. The same day, the Student sent the original IHO a request for an emergency hearing to determine an interim placement for the Student during the due process hearing. This interim placement request was also included in the Student's original due process hearing request.

A new IHO was appointed on January 23, 2006. On January 24, 2006, the Student's father requested permission to be allowed to attend any and all hearings concerning the Student. The IHO sent the parties on January 25th, 2006, a Notice of Pre-Hearing Conference, set for February 3, 2006. In the Notice of Pre-Hearing Conference the IHO stated that both parties could provide data to support or deny the Student's request for an interim placement. On the same day, the IHO was notified of contact information for the Student's Guardian Ad Litem and Notice was sent to this person as well.

<sup>1</sup> Any references to the "Student" include the Student and the Student's parent, unless otherwise indicated.

The School filed a Motion for Extension of Hearing Dates and Hearing Decision Deadline on January 26, 2006. The IHO granted this motion. On February 2, 2006, the IHO received the School's Motion to Enforce Last Agreed to Placement as Stay-Put Placement. The Student, by way of his representative sent the IHO an updated list of issues on February 3, 2006, prior to the pre-hearing conference.

The parties participated in a telephonic pre-hearing conference on February 3, 2006. Pursuant to I.C. 4-21.5-3-19, the IHO issued a Pre-Hearing Order on February 6, 2006. The order identified eight (8) issues. These were:

1. Did the School fail to provide the Parent with appropriate prior written notice of the case conference committee (CCC) meetings of December 1 and December 14, 2005?
2. Did the CCC meetings of December 1 and December 14, 2005 contain all required parties?
3. Did the School provide written notice to the Parents of a proposal to change concerning the identification, evaluation, placement, or provision of a free appropriate public education (FAPE) for the Student prior to CCC meetings held on December 1 and December 14, 2005?
4. Did the School provide written notice to the Parents of a refusal to change the identification, evaluation, placement, or provision of FAPE to the Student prior to the CCC meetings held on December 1 and December 14, 2005?
5. Did the School fail to consider independent evaluation data obtained by, and at the expense of, the Parent prior to recommending the least restrictive educational environment (LRE) for the Student at the CCC meetings of December 1 and December 14, 2005?
6. Did the School fail to consider the Student's developmental history provided by the Parent prior to recommending the LRE for the Student at the CCC meetings of December 1 and December 14, 2005?
7. Did the School fail to provide the Parent with timely reports from the CCC meeting of December 1 and December 14, 2005?
8. Did the School develop an individual education program (IEP) for the Student that provided for appropriate instruction and services in the LRE based on evaluation data available at the CCC meetings of December 1 and December 14 2005?

The Pre-hearing Order established the hearing dates, along with specific times and dates by which the parties were to exchange exhibit and witness lists. At the Student's request the hearing was closed to the public and witnesses were to be separated. Moreover, the Schools' January 26, 2006 request for extension of time for the hearing to be conducted and written decision to be issued in this matter until March 31, 2006, was granted. The IHO addressed the School's Motion to Enforce Last Agreed to Placement as Stay Put Placement, giving the Student until February 10, 2006 to respond. The parties were advised of their rights.

The Student, through his representative, responded on February 10, 2006, requesting an in-district placement rather than the out-of-district placement that the Student argues is more restrictive. The IHO granted the School's Motion to Enforce Last Agreed to Placement as Stay-Put Placement on February 14, 2006.

On February 24, 2006, IHO received the School's motion for a second resolution session. The Student filed a response on February 27, 2006. Pursuant to a verbal Notice of Pre-hearing Conference, a second telephonic prehearing conference was held on February 27, 2006. The IHO ordered that a second resolution session would be held on March 1, 2006. The parties were to discuss the eight (8) issues previously stated and notify the IHO of any resolution of the issues identified for the hearing. The issues were not resolved during the second resolution session.

On March 2, 2006, the father of the Student notified the IHO that he had not received the exhibits or witness list from the School by the February 27, 2006 deadline, as required by the February 6 Pre-hearing Order. He requested that the IHO prohibit this evidence from being introduced at the hearing. The IHO denied this request on March 5, 2006.

The School moved on March 1, 2006, for a continuance of the March 6 and 7 hearing dates. The father's counsel joined in this motion. The Student responded to this motion the following day, stating the motion should be denied and the hearing move forward as scheduled. The IHO denied the School's request for a continuance on March 3, 2006. Later the same day, the IHO received correspondence from the Father, by counsel, to reconsider the IHO's denial of Respondents' Motion to Continue Hearing Dates. The IHO did not respond to this correspondence.

The hearing was convened on March 6, 2006, and continued through March 7, 2006. The above stated eight (8) issues were considered and resolved.

### **The IHO's Written Decision**

The IHO's written decision was issued on March 27, 2006. The IHO's written decision is reproduced, in part, as follows:

The hearing was convened on March 6, 2006, and began with a pre-hearing conference wherein exhibits and witness lists, and issues for hearing were discussed. Respondent objected to Petitioners' exhibit 1, pages 1-29, and an audio compact disc (CD) with an alleged transcription of that disc. The IHO admitted the disc and alleged transcription of this disc as "Parent's Notes from 12/14/05 CCC Meeting," thereby clarifying that neither the CD nor the alleged transcription thereof constituted an official transcription of the CCC meeting in question. Petitioner objected to Respondent's exhibit identified as the ISTAR report summary, dated February 23rd, 2006, located at Tab 67 in Respondents' exhibit book. Subsequent to response from both parties, this document was admitted into evidence. There being no further objections to either party's exhibits or witness lists same were admitted into evidence.

Based on the evidence and testimony of the record, the IHO determined thirty-seven (37) relevant Findings of Fact.<sup>2</sup>

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 et seq. and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.
2. All Findings of Fact, which can be deemed Conclusions of Law, are hereby deemed Conclusions of Law. All Conclusions of Law, which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. It was determined that all due process procedures were in compliance with requirements of 511 IAC 7-30-3 and IC 4-21.5 et seq.
4. The student is nine years, six months of age.
5. Case conferences have determined that the Student has been identified as eligible to receive special education and related services due to a mental disability.
6. The most recent case conference determined the student's mental disability to be in the moderate range. Previous CCC meetings reached the same conclusion. The student has a moderate mental disability and requires the services of a teacher of record licensed in the area of "Intense Interventions."
7. The Student attended Hanover Community School Corporation in December of 2004.
8. Prior to enrollment in the Hanover Community School Corporation the Student had been home schooled by his mother.
9. The Student was first referred for evaluation for possible special education eligibility at the time of enrollment.
10. On September 27, 2004, a CCC meeting was held which resulted in the Student being placed at Oak Hill Elementary School which constituted an out of district placement.
11. The Oak Hill placement was primarily designed to serve students with moderate-to-severe disabilities.
12. An additional CCC meeting was held on November 30, 2004, subsequent to completion of additional evaluations of the Student. The CCC agreed that the Student should continue in the Oak Hill Elementary School placement.
13. The Parent signed the November 30, 2004, IEP indicating agreement with the Students' eligibility and placement.

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<sup>2</sup> The restatement of the IHO's Findings of Fact, Conclusions of Law, and Orders have been edited for format purposes.

14. In August of 2005 the Student began attendance at Piefer Elementary School in the Lake Central School Corporation. Piefer Elementary School's special education programs are serviced by the West Lake Special Education Cooperative.
15. West Lake Special Education Cooperative held a CCC meeting on August 19, 2005, wherein the November 30, 2004, IEP was reviewed and accepted by West Lake and the then current goals and objectives were continued.
16. The CCC meeting conducted by West Lake Special Education Cooperative recommended that the Student receive full-time programming for students with moderate mental impairments.
17. This same CCC determined that the Students' needs could not be adequately served in his home school and instead specified that services would be provided at Piefer Elementary School.
18. The Parent agreed with this placement along with the goals and objectives contained in the Student's IEP at that time.
19. In November 2005, an issue of residency was raised and it was subsequently determined that the Student was not a legal resident of the service area of the Lake Central School District.
20. The Northwest Indiana Special Education Cooperative (NISEC) conducted a CCC meeting for the Student on December 1, 2005, during which the Student's eligibility and placement were discussed. This meeting was described as a "move-in" CCC meeting. The goals and objectives from the Lake Central School District were accepted by the CCC.
21. The NISEC conducted a second CCC meeting for the Student on December 14, 2005. During this meeting the CCC recommended placement and services for the Student be provided at Oak Hill Elementary School. The majority of special education and related services (twenty seven of thirty clock hours per week) were to be provided in an environment designed for students needing "Intense Interventions."
22. Testimony from the director of special education and the district supervisor of special education of NISEC and the Parent established that the Parent received adequate notice of both the December 1, and December 14, 2005, CCC meetings, and as such, attended both meetings. Proposals for intended actions by the CCC were contained in both notices.
23. Testimony by the director of special education and district supervisor of special education of NISEC along with the Parent and Respondents exhibit 51, page 318 established that the Parent received a written summary of the findings and recommendations of the December 1, 2005, CCC meeting on December 2, 2005.
24. Testimony by the director of special education and district supervisor of special education of NISEC along with the Parent established that the Parent received a written summary of the findings and recommendations of the December 14, 2005, CCC meeting on January 10, 2006.

25. Testimony by the district supervisor of special education of NISEC revealed that the district supervisor of special education of NISEC is currently licensed to teach special education in the area of Intense Interventions.
26. Documents and testimony established that the CCC meeting of December 1, 2005, was attended by the following: conference chairperson, teacher of record (district supervisor fulfilling this role), general education teacher, educational diagnostician, home school principal, parents (mother), school psychologist, and the district supervisor of special education for NISEC.
27. Documents and testimony established that the CCC meeting of December 14, 2005, was attended by the following: superintendent of schools, conference chairperson, teacher of record (district supervisor fulfilling this role), general education teacher, educational diagnostician, home school principal, parent (mother), school psychologist, parent advocate, and the district supervisor of special education for NISEC.
28. Documents supplied by both parties and further supported by testimony of the director of special education for NISEC, the district supervisor of special education of NISEC, and the Parent established that the primary purpose of the December 1, 2004, CCC was to facilitate the Student receiving initial special education services by adopting the IEP previously developed by the “sending” school district (West Lake Special Education Cooperative), with modifications as deemed appropriate which were to be developed during this meeting of the CCC. The School did not propose to change the identification, evaluation or placement where services would be provided prior to this meeting of the CCC; nor were any changes considered beyond those required to facilitate the Student’s change of school districts and the school in which the Student would be placed. Some modifications of services to be provided and clarification, or re-wording of goals and objectives for services to be rendered, were made. A draft IEP was developed during this meeting and presented to the Parent on December 2, 2005, as reflected in Respondent’s exhibit 50, pages 300-317, and exhibit 51, page 318.
29. The West Lake IEP developed on August 19, 2005, which was approved by the Parent on the same date, specified that the Student was eligible for special education services according to Indiana’s Article 7 as a student with a mental disability, moderate range (Respondent’s exhibit 42, pages 276-279). Further, the least restrictive environment (LRE) was listed as “100%” special education services provided in either a resource room or separate classroom in a general education school building. The Parent was notified that this IEP was to be considered as the move-in IEP at the December 2, 2005, meeting of the CCC.
30. On December 5, 2005, the Parent was notified in writing (Respondent’s exhibit 54, page 312) of a CCC meeting to be held on December 14, 2005, the purpose of such meeting along with anticipated participants.

31. Testimony by the Parent, school psychologist, and district supervisor of special education for NISEC, reveal that the Parent supplied an independently obtained psycho-educational evaluation to the CCC for its consideration at the December 14, 2005, CCC meeting (Respondent's exhibit 56, pages 343-347). Testimony further revealed that three pages were missing from this evaluation. These pages were later provided to the School by the Parent. The school psychologist testified that the School did not consider this evaluation in its decision making at the December 14, 2005, CCC. Reasons given through testimony of the school psychologist were 1) the evaluation was incomplete, 2) the evaluation report was issued on January 2, 2003, making the data almost three years old, and 3) the School had no prior knowledge of this assessment.
32. An additional assessment was provided to the School by the Parent, previously obtained at parental expense. This assessment was conducted by the Porter-Starke Services, Inc., and dated November 2003. The date this assessment was provided to the School was not clearly established, however, it was not presented to the School prior to the December 14, 2005, CCC. This evaluation contained, in part, a developmental history for the Student. Testimony from the school psychologist established that the School did not consider this evaluation prior to making its recommendations at the December 14, 2005, CCC meeting.
33. The last complete psycho-educational evaluation for the Student was conducted during the month of November, 2004, and was conducted by the local education agency of record at that time.
34. The teacher from Oak Hill School, testifying for the School, stated that the Student could participate in general education with his non-disabled peers of the same grade level with the assistance of adult supervision in the following subjects or activities: lunch, music, recess, physical education, homeroom, and silent reading. It was further stated by this witness that full-time adult supervision would not be necessary in order for the student to participate in these activities. She also testified that she did not see any reason that the Student could not use the School's transportation system. Additionally, this witness testified that the Student would benefit from instruction in social skills and toileting.
35. The School's educational diagnostician testified that the Student should be able to participate in a general education setting with his non-disabled peers of the same grade level in the academic areas of reading, writing and math utilizing a modified curriculum.
36. The IHO has had considerable difficulty in interpreting the proposed IEP (Respondent's exhibit 55, pages 325-342) which was based on the "move-in" IEP from West Lake Special Education Cooperative, dated August 19, 2005, which in turn was based on a previous IEP from NISEC. During hearing, terms were used interchangeably and were said to mean different things in different places within this proposed IEP by the School's witnesses. Additionally, at least two of the School's witnesses had significant difficulty in reconciling the different terms used within this document which were purportedly meant to communicate the same or similar meanings in some instances and quite different meanings in other

instances. Repeatedly, the IHO was told that what was recorded in this IEP did not mean what a literal interpretation would suggest.

37. The IEP from West Lake Special Education Cooperative, dated August 19, 2005, was used as the “move-in” IEP for the December 1, 2005, CCC by NISEC. This IEP lists only a single annual measurable goal (Respondent’s exhibit 42, page 282). While on page 277 of this same exhibit, the CCC concluded that the Student should participate in general education homeroom, recess, cafeteria ...”as deemed appropriate”.... Later in this same document (page 278) it specified that “100%” of the Students Special Education Services “...will be provided in a separate classroom in a general education building with special education and related services provided outside the general education classroom during the instructional day.” This IEP was presented to the Parent as the proposed IEP which was developed as an outcome of the December 2005 CCC meetings (Respondent’s exhibit 55, pages 325-342). However, this proposed IEP had been modified to include five measurable objectives (Respondent’s exhibit 55, pages 329-337). Again, referring to this proposed IEP (Respondent’s exhibit 55, page 327) a statement is entered specifying that the Student “...can participate in general education with modifications, accommodations, and pull out for services.” This was identified as “typing glitch” by two of Respondent’s witnesses. On page 339, same document, one finds that the CCC recommends the Student spend twenty seven of the thirty hour school week in a “separate class” specifically designed for students with intense special education needs. An additional thirty minutes per week are scheduled for speech/communication intervention, leaving approximately 2 1/2 hours per week for inclusion in a general education setting. Any further clarification for this inclusion in a general education setting is not specified. Multiple confusing and contradictory entries are found within the IEP that was developed as a result of the December 1 and December 14, 2005, CCC meeting and is referred to as the proposed IEP (Respondent’s exhibit 55, pages 225-242).

From these thirty-seven (37) Findings of Fact, the IHO determined Conclusions of Law. The IHO’s Conclusions of Law are reproduced as follows:

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 et seq. and 51IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.
2. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact which can be deemed Conclusion of Law are hereby deemed Conclusions of Law.
3. The issues presented in this hearing are presented below and are ruled upon accordingly.
4. **Issue 1: Did the School fail to provide the Parent with appropriate prior written notice of the case conference committee (CCC) meetings of December 1 and December 14, 2005? No.**



Parents of students with disabilities "...shall be given adequate notice of the case conference committee meeting in the parents native language or other mode of communication early enough to ensure that one (1) or both parents have the opportunity to attend." [511 IAC 7-27-2(c)] In this matter only the mother alleged that she had not received appropriate prior written notice of the CCC meetings of December 1, 2005, and December 14, 2005. The father, who testified that while he did not attend either of these CCC meetings, stated that his lack of attendance was not due to insufficient notice. Rather, he testified that he chose not to attend. The record and testimony reveal that the mother did attend both of these CCC meetings. Therefore, testimony and documents provided the IHO clearly establish that the mother was given adequate written notice of these CCC meetings.

**5. Issue 2: Did the CCC meetings of December 1 and December 14, 2005 contain all required parties? Yes.**

A CCC meeting of the type previously described shall have the following individuals in attendance:

- A. A representative of the public agency, other than the student's special education teacher, who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of students with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the public agency.
- B. The student's current teacher of record (or in the case of a student with a communication disorder only, the speech-language pathologist) or, for a student whose initial eligibility for special education and related services is under consideration, a teacher licensed in the area of the student's suspected disability.
- C. One (1) of the student's general education teachers, if the student is or may be participating in the general education environment.
- D. The parent of a student less than eighteen (18) years of age, or the student, if the student is at least eighteen (18) years of age and has not been adjudicated incompetent. [511 IAC 2-27-3 (a)].

At the December 1, 2005, CCC meeting the Student was being considered as a "move-in" student whose individualized education program (IEP) was being received from another in-state local education agency. Eligibility for services was not at issue. Therefore, at that time it had not been determined what new, or modified, special education services were to be provided the Student; only that the prior services provided the Student from the "sending" local education agency (LEA) would be evaluated and modified as necessary and a proposed, or draft, IEP developed. The School's failure to specify by name, a teacher of record, may by literal interpretation constitute a procedural error. However, in this case the district supervisor of special education was in attendance and was licensed to provide special education services to the students who required intensive

interventions, as was previously determined to be the case for this Student by the sending LEA, and later by the NISEC. Even if such omission did constitute a procedural error on the part of the School, such error would not have had any substantive effect on the outcome of this CCC meeting or resulting services or educational placement of the Student. The above logic and interpretation of cited statute would also apply to the December 14, 2005, CCC meeting. Would it have been more appropriate for the School to specify a teacher of record (TOR) at this second CCC meeting in that the School had, as reflected in its draft IEP generated during the December 1, 2005, CCC meeting, confirmed the student would require intensive special education services in an educational setting which afforded the Student minimal exposure to the general education population? Certainly. However, such failure did not result in a denial of the Student's educational needs being represented by a teacher licensed in the area of the Student's suspected disability or level of services required. As such, it is determined that the CCC meetings of December 1 and December 14, 2005, contained all required parties.

6. **Issue 3: Did the School provide written notice to the Parents of a proposal to change the identification, evaluation, placement, or provision of a free appropriate public education (FAPE) for the Student prior to CCC meetings held on December 1 and December 14, 2005? No.**

Article 7 is quite clear regarding the required content of notices to parents regarding CCC meetings (511 IAC 7-27-2). The CCC meeting of December 1, 2004, was designed to serve as a "move-in" CCC meeting, wherein the student's prior IEP was to be implemented pending a diagnostic teaching evaluation by NISEC, pending any modifications determined as appropriate by both parties. It was apparent to all parties that some changes to the then current IEP may, by necessity, be made at this meeting of the CCC, such as the location of the school where the Student would receive services in that the Student was changing local education agencies. At this December 1, 2005, CCC meeting the School did not propose to change the identification, evaluation, placement, or provision of a free, appropriate public education for the Student beyond that which was administratively necessary in order to facilitate the Student's enrollment in the receiving education agency along with specifying some additional instructional goals for the student. These changes did not result in substantive changes to the services or least restrictive environment contained in the move in IEP. The CCC meeting held on December 14, 2004, was held for the purpose of discussing any revisions or modifications to the move-in IEP. Prior notice to the Parent was received, as verified by parental signature, on December 2, 2005. Proposals for changes in this IEP were presented to the Parent at that time.

7. **Issue 4: Did the School provide written notice to the Parents of a refusal to change the identification, evaluation, placement, or provision of FAPE for the Student prior to the CCC meetings held on December 1 and December 14, 2005? No and Yes.**

The School did not receive notice of the Parent's request for a change of identification or special education placement of the Student until the December 1, 2005, CCC meeting. Therefore, the issue of "prior" notice is moot regarding that meeting of the CCC. However,

during that meeting the CCC did not consider a change of identification or placement of the student even though the Parent requested the CCC do so based on this newly presented assessment. The minutes of the December 1, CCC meeting, which were received by the Parent on December 2, 2005, reflected that no change of identification or placement was to be considered at the December 14, 2005, CCC meeting. The CCC clearly intended to retain the recommended identification (moderate mental disability) and placement (Oak Hill Elementary School) at the December 14, 2005, CCC meeting and did so without modification of the draft IEP composed at the December 1, 2005, CCC meeting.

8. **Issue 5: Did the School fail to consider independent evaluation data obtained by, and at the expense of, the Parent prior to recommending the least restrictive educational environment (LRE) for the Student at the CCC meetings of December 1 and December 14, 2005? Yes.**

“If the parent obtains an independent evaluation at the parent’s expense, the results of the evaluation: (1) shall be considered in any decision made with respect to the provision of free appropriate public education to the student if the independent educational evaluation complies with agency criteria for an evaluation; and (2) may be presented by the parent as evidence at a due process hearing.” [511-IAC-7-25-5(c)]. The School’s district supervisor of special education testified that the CCC did not consider either of the evaluations provided to the CCC by the parent, which the parent had obtained at parental expense. One of these evaluations not considered was a single page document dated July 8, 2003. This document appears to be the cover page to a “complete psychological testing of Bobbie.” (Respondent’s exhibit 1, page 1). Respondent’s exhibit 2, pages 2 through ten, comprise the remainder of this psychological evaluation which was conducted by the Porter-Starke Services, Inc. The Parent also provided the CCC with a psychological evaluation conducted Caryn Brown, Psy.D. HSSP, of ASSOCIATES IN CLINICAL PRACTICE dated January 2, 2003, (Respondent’s exhibit 56, pages 343-347). Testimony by the district supervisor and school psychologist suggest that the School did not consider this psychological report due to 1) lack of availability prior to the December 1, 2005, CCC meeting, and 2) it being over 2 years old.

9. **Issue 6: Did the School fail to consider the Student’s developmental history provided by the Parent prior to recommending the LRE for the Student at the CCC meeting of December 1 and December 14, 2005? Yes.**

The district supervisor testified that the CCC did not consider the developmental history of the Student as provided by the Parent at either the December 1 or December 14, 2005, CCC meeting. This document, purported by Petitioners to be evaluative data, is titled Northwest Indiana Special Education Cooperative Initial Social and Developmental History (Respondent’s exhibit 25, pages 139-150). The form was completed by the Parent on September 28, 2004 and, according to testimony of the Parent and school psychologist, was first provided to the CCC at the December 1, 2005 CCC meeting.

10. **Issue 7: Did the School fail to provide the Parent with timely reports from the CCC meetings of December 1 and December 14, 2005? No and Yes.**

The Parent and School stipulated that the School provided the Parent a report of the December 1, CCC meeting on December 2. Thus, the School provided the Parent a timely report of this CCC meeting. The Parent and School further stipulated that the School provided the Parent a report of the December 14, 2005, CCC meeting on January 10, 2006. Thus, the School did not provide the Parent with a timely report from the CCC meeting of December 14, 2005.

**11. Issue 8: Did the School develop an individual education program (IEP) for the Student that provided for appropriate instruction and services in the LRE based on evaluation data available at the CCC meetings of December 1 and December 14, 2005? No and No.**

No doubt the central issue involved in this hearing is the Parent's allegation that the School's recommended placement is overly restrictive and that the services provided in or originating from, that placement are not likely to afford the Student meaning[ful] benefit. Article 7 is quite clear regarding the content of a student's IEP (511 IAC 7-27-6). Likewise, the Individuals with Disabilities Education Improvement Act of 2004 (PL 108-446) specifies that the IEP must include a statement of the present levels of academic achievement and functional performance. The statement should cover the academic and non-academic areas as appropriate for the student. It should be written in objective terms to the extent possible, typically with the data from the child's evaluation included. Deficiencies indicated by the present levels of educational performance should be addressed in both the goals and objectives and by the special education and related services listed on the IEP. A statement of measurable annual goals including both academic and functional goals should also be included. Additionally, when a student is designated to take alternate assessments aligned to alternate achievement standards, the IEP must include a description of benchmarks or short term objectives. [614(d)(1)(A)(d)(I)]. While neither the Individuals with Disabilities Education Improvement Act (PL 108-446) nor Indiana's Article 7 (511 IAC Rules 17-31) assure any student with a disability the best education possible both do assure that a student with a disability will receive an education that will provide more than "de minimus", or minimal, benefit. The proposed IEP is significantly deficient in its' content and specificity. The omissions and errors together constitute significantly more than procedural error and, as written, the proposed IEP is not reasonably calculated to confer meaningful educational benefit upon the Student.

All students with disabilities are to be educated with their non-disabled peers to the maximum extent appropriate and that special school classes, separate schooling, or other removal of students from the general education environment occurs only when it is documented that education in general education classes using supplementary aids and services cannot be satisfactorily achieved [511 IAC 7-27-9(1,2)]. Unless the individualized education program requires some other arrangement, the student's placement is as close as possible to the student's home school, and is in the school the student would attend if not disabled [511-IAC-7-27-9(3)]. Neither state nor federal statute requires that each local education agency have available the full range of services for every student with every

possible disability in each school located in the agency's geographical area of responsibility. The School has well documented that the Student in this case has a level of disability that requires intense educational and social intervention. The existing population of students with intense instructional or behavioral needs that would normally attend the Student's home school is insufficient to warrant the provision of services required by the Student at his home school. It has also been documented that the Student has made minimal educational and social progress during the last two academic years. Worse yet, testimony and exhibits provided demonstrate that the Student has experienced regression in some areas, most particularly social behavior including toileting. One significant factor which, without doubt, has contributed to this lack of progress, and in some cases regression, is the Student's inexcusable rate of absence from school. It is most difficult for any educational agency to demonstrate educational or social growth for any student when the student is chronically absent from school as is the case here. It is clear through testimony and evidence presented that it is possible that the Student could be maintained, full-time, in a general education setting with the assistance of a full-time instructional assistant. However, there is no doubt that even if one was to determine that such arrangement was to be in the best interest of the Student, and may then constitute the best educational arrangement possible, schools are not required to provide a level of education beyond that which is reasonably calculated to provide the student with a disability meaningful benefit, roughly equivalent to that of his non-disabled peers. Likewise, what approximates a near total removal of the Student from the general education setting, and therefore non-disabled peers as currently proposed by the School, is neither in the best interest of the Student nor appropriate. The near complete removal of the student from the general education setting as reflected in the School's proposed IEP (twenty eight and one-half of a thirty hour school week) does not constitute the most appropriate least restrictive environment for the Student.

In summary, the proposed IEP does not provide for appropriate instruction and services in the LRE.

Based on the foregoing, the IHO issued the following two (2) Orders:

1. The case conference committee is to re-convene within ten school days of the date of this order and incorporate the following into a revised IEP for the Student.
  - A. The Student's educational placement shall remain at Oak Hill Elementary School.
  - B. The Student will continue to be assessed using the ISTAR state assessment.
  - C. The goal stated on page 331 (Respondent's exhibit 55) regarding remaining in seat is to be retained in the Student's IEP.
  - D. The goal stated on page 333 (Respondent's exhibit 55) regarding number sense and geometric objects is to be retained in the Student's IEP
  - E. The goal stated on page 335 (Respondent's exhibit 55) regarding writing upper and lower case letter is to be retained in the Student's IEP.

- F. The goal stated on page 335, Respondent's exhibit 55, regarding basic sight words is to be retained in the Student's IEP.
- G. A measurable goal for the teaching of social skills will be added to the Student's IEP.
- H. A measurable goal for the teaching of self-care (toileting) will be added to the Student's IEP.
- I. A measurable goal for instruction in art will be added to the Student's IEP.
- J. A measurable goal for instruction in music will be added to the Student's IEP.
- K. A measurable goal for instruction in physical education will be added to the Student's IEP.
- L. A measurable goal for recess (social interaction) will be added to the Student's IEP.
- M. A measurable goal for meal independence (self-feeding) will be added to the Student's IEP.
- N. A measurable goal for increasing speech fluency/intelligibility will be added to the Student's IEP.
- O. The IEP will specify at least one class period per instructional day in which the Student will be included in a general education class for the purpose of attaining the previously stated goal regarding the development of social skills. The IHO recommends that daily homeroom would be a good place to consider the accomplishment of this goal.
- P. The IEP will specify a schedule by which the Student will participate in art class(es) with non-disabled peers in a general education setting.
- Q. Specify a schedule by which the Student will participate in music class(es) with non-disabled peers in a general education setting.
- R. Specify a schedule by which the Student will participate in physical education class(es) with non-disabled peers in a general education setting.
- S. Specify a schedule by which the Student will participate in recesses with non-disabled peers in a general education setting.
- T. Specify a schedule by which the Student will participate in lunch periods with non-disabled peers in a general education setting.
- U. Specify a schedule by which the student will receive speech therapy services.
- V. The School will be responsible for determining when an instructional assistant will be

necessary for the Student to attain those goals most likely to be attained in a general education setting, and will provide and specify such in the Student's IEP.

W. Specify a process and monthly schedule by which the School will provide a written summary report to the Parent(s) of the Student's progress on all goals contained in the IEP.

X. The remaining academic and social skills instruction not specifically addressed above, including toileting, will be provided in the classroom located at Oak Hill Elementary School designed to serve students with intensive intervention needs.

2. These Orders are to be implemented as stated unless this decision is appealed to the Indiana Department of Education.

The IHO notified the parties of their appeal rights.

### **APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS**

The Student, pursuant to 511 IAC 7-30-4(i), timely filed a Petition for Review on April 27, 2006. On May 4, 2006, the School requested an extension of time to file a response. On May 5, 2006, the Board of Special Education Appeals (BSEA) granted the request for extension, giving the School until the close of business May 22, 2006 to file its Response. The School timely submitted its Response on May 22, 2006.

The complete record from the hearing was photocopied and provided to the BSEA members on May 22, 2006. The timeline for the BSEA to render its written decision was similarly extended until June 21, 2006.

The BSEA, on May 30, 2006 notified the parties that it would review this matter without oral argument and without the presence of the parties. Review was set for June 15 2006, in the State House offices of the Indiana Department of Education.

#### ***Student's Petition for Review***

The Student, in his Petition for Review, alleged generally that the IHO erred in his placement decision for the Student. The Student argues that the proper placement would be in the Least Restrictive Environment (LRE) of the home school. The specific objections are noted as follows:

The Student argues that the IHO was correct when he stated that the Student could be maintained in a general education setting with a full-time assistant. The IHO allegedly erred in his Conclusion of Law No. 11 by placing the Student out-of-district in a segregated, separate special education classroom as opposed to permitting the Student to be in a full-time general education classroom in his district home school. The Student also argues that the IHO failed to cite any IDEA or Article 7 laws to support his conclusion. The Student asserts that the IHO ignored the law in determining the Student's placement the LRE.

The Student ultimately contends that the IHO erred in Order No. 1 (A-X), when he concluded that the Student should remain at his current school. The Student argues that the current school is farther than other available schools and that the current school does not place the Student in "general education classes using supplementary aids and services" as required by Article 7. The Student argues further that the School fails to provide documentation as to why placement in general education classes cannot be achieved satisfactorily.

### ***School's Response to the Petition for Review***

The School filed its Response on May 22, 2006, as noted supra. The School maintained that the BSEA must uphold the findings of fact, conclusions of law, or orders of the IHO.

In response to the Student's argument that the School ignored the law regarding the LRE, the School asserts that law requires that the LRE determination be balanced with what is most appropriate for the student to receive a meaningful education. The School argues that although the Student could have a full-time assistant and be placed in a general education setting, this would not provide the Student with FAPE.

The LRE determination begins with first analyzing a student's individual needs. There is no mandatory right to a neighborhood placement, which is what the Student requested. Based on the Student's needs, the School contends that the IHO's determination that the Student be placed in a predominantly special education classroom was proper.

## **REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS**

On June 15, 2006, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows.

### **COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its



review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a 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. A party to a due process hearing has the right to be accompanied and advised by legal counsel and by individuals with knowledge and training with respect to special education or the problems of children with disabilities. 511 IAC 7-30-3(l)(1). A party may be advised and represented in an administrative hearing by counsel or by another representative. I.C. 4-21.5-3-15; 511 IAC 7-30-3(p). There is no requirement that a motion for recusal must be made by a party personally rather than through the party's representative.
3. All students with disabilities are to be educated with their non-disabled peers to the maximum extent appropriate and that special school classes, separate schooling, or other removal of students from the general education environment occurs only when it is documented that education in general education classes using supplementary aids and services cannot be satisfactorily achieved. 511 IAC 7-27-9(1), (2). Unless the individualized education program requires some other arrangement, the student's placement is as close as possible to the student's home school, and is in the school the student would attend if not disabled. 511-IAC-7-27-9(3).
4. Petitioner argues that the IHO's Conclusion of Law No. 11, indicating "it is possible that the Student could be maintained, full-time, in a general education setting with the assistance of a full-time instructional assistant," requires that the Student be educated in his home school in general education classes. The Student's reliance on this one sentence, taken out of context, in the IHO's decision is misplaced.
5. In the IHO's written decision, Conclusion of Law No. 11 is over two and one-half pages in length. The IHO correctly states the requirements for the provision of educational services to students with disabilities in the least restrictive environment contained within Article 7. The IHO further concluded that the School has well documented that the Student's level of disability requires intense educational and social intervention. Although the Student *could* be placed in a general education setting, such a setting would not be appropriate to meet the Student's needs.
6. Conclusion of Law No. 11 is consistent with the law, and is supported by the testimony, evidence, and findings of fact.
7. Order No. 1 is supported by the conclusions, and is not contrary to law.-

## **ORDERS**

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

1. Conclusion of Law No. 11 and Order No. 1 are upheld as written.
2. The IHO's decision is affirmed in its entirety.
3. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: June 15, 2006

/s/Rolf W. Daniel

Rolf W. Daniel, Ph.D., 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 within thirty (30) calendar days from receipt of this written decision, as provided by I.C. 4- 21.5-5-5 and 511 IAC 7-30-4(n).