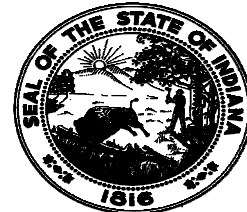


Indiana Board of Special Education Appeals



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

In the Matter of Q.J., the Evansville-)
Vanderburgh School Corporation, and the)
Evansville-Vanderburgh Special Education)
Cooperative)
)
Appeal from a Decision of)
Kristin Anderson, J.D.,)
Independent Hearing Officer)

Article 7 Hearing No: 1595.07

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

The Student¹ requested a due process hearing in a letter dated July 10, 2006, 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 July 11, 2005, Kristin Anderson, J.D., was appointed as the Independent Hearing Officer (IHO).

On September 1, 2006, the School requested an extension of time until October 25, 2006, for the hearing decision to be rendered. The IHO conducted a telephonic pre-hearing conference on September 8, 2006. On September 11, 2006, the IHO issued her pre-hearing order in which three issues were identified as being raised by the Student in the request for hearing.: (1) Whether residential services are appropriate and the least restrictive environment to provide educational services to the Student; (2) Whether the School failed in any duty to provide educational services to the Student while he was incarcerated in the Muncie Diagnostic Facility from June 2005 to April 2006; and (3) Whether it was improper for the Student's probation officer and court liaison to the School to attend the Student's case conference committee meeting in January 2005. The School objected to Issues One and Two and indicated it would be filing a motion to dismiss. The IHO declined to hear Issue Three because the Student could have filed a complaint on that issue but did not do so within one year of the alleged violation as required by 511 IAC 7-30-2. The IHO's pre-hearing order provided that the School would file its Motion to Dismiss by September 25, 2006. The Student's response was to be filed by October 15, 2006. The IHO granted the School's request for extension of time, extending the hearing decision date to October 25, 2006.

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

The School filed its Motion to Dismiss Request for Due Process Hearing on September 25, 2006. The School argued that it has no ability or authority to remove the Student from incarceration to educate him elsewhere, and is therefore limited to providing services at the facility in which he is incarcerated. The Student has been incarcerated at Muncie and Kokomo juvenile facilities. The Kokomo facility works in conjunction with the Howard County Special Education Cooperative. The Student did not file a response to the motion to dismiss.

The Written Decision of the IHO

The IHO issued her Order Dismissing Hearing Request Without Prejudice on October 18, 2006. The IHO's decision provided as follows:

The student was arrested on four felony charges after this hearing request was filed. The Parent-petitioner has informed this hearing officer that the student remains detained as an adult by criminal justice system as of this date and his release date is not know. Pursuant to the Prehearing Orders issued in this matter on September 12, 2006, Respondents filed a Motion to Dismiss Request for Due Process Hearing on September 25, 2006. Petitioners were given until October 15, 2006 to file their response to Respondent's motion and show cause why their hearing request should not be dismissed. Petitioners have not filed any response to Respondent's motion.

As a result of the foregoing, this hearing officer makes the following findings of law and fact:

1. This hearing officer has no authority to order any change in placement for the Student until he is released from custody and the date of his release cannot be determined at this time.
2. It cannot be ascertained at this time if the Student will be eligible for special education services when he is released. Even were the Student to remain eligible, appropriate services and placement at the time of his release cannot now be determined.
3. Even were the requested residential placement ordered or agreed upon by the parties, it would not be possible for Respondents to secure a placement for a student whose release date is not known.
4. If the Student is released prior to his 22nd birthday, he will be able to file another hearing request if he so desires.

The IHO's Order

Based on the above, the IHO's order provided: It is therefore ordered that this hearing is dismissed *without prejudice*.

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 October 26, 2006, the Student submitted a Petition for Review in a timely manner to the Indiana Department of Education (IDOE) on behalf of the Board of Special Education Appeals (BSEA). The School timely filed its response on November 6, 2006.

Student's Petition for Review

The Student's Petition for Review was filed on October 26, 2006. The Student requested the appeal to resolve the Student's placement and special education needs until he reaches the age of 22. The Student indicated that a dispute has arisen within the case conference committee about getting the Student out of jail. The Student alleges the School is not working this out with the courts. The Student further makes reference to an expedited due process on placement. Further, the petition indicates: "guardianship still pending over him in court. all under IDEA and Article 7. the agencies not following procedures with the law enforcement." The Student also indicated that the Student had never received the School's motion to dismiss this due process hearing.

School's Response to the Petition for Review

The School filed its response on November 6, 2006, indicating that it stood behind the arguments raised in its Motion to Dismiss filed before the IHO on September 25, 2006. The School also enclosed a copy of its October 18, 2006, letter to the IHO describing the return of its mail properly addressed to the Student, which was returned marked "DOES NOT LIVE HERE." The address on the envelope was the same as the address listed by the Student on the return envelope for the Student's Petitioner for Review. The School also addressed the ongoing complaints about the Student not receiving educational services, and stated that it had hired a teacher to serve the Student while he was incarcerated in the Perry County jail awaiting trial or other proceedings. That teacher was notified that the Student had been moved, and the Student's mother has not provided guidance as to where the Student is. The School has been unable to ascertain where, within the department of correction or local county juvenile detention facilities, the Student is being held.

REVIEW BY THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

On November 13, 2006, the BSEA issued to the parties a Notice of Review Without Oral Argument, setting this matter for review on November 27, 2006. On November 27, 2006, the BSEA convened in Indianapolis to review this matter. This review was conducted 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 and the Student's Response to the Petition for Review.

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. In his request for hearing, the Student sought a determination as to his appropriate educational placement and whether he should be placed in a residential educational placement. Since the request for hearing was filed, the Student has been arrested on four felony charges. He is currently being detained as an adult by the criminal justice system. His current location, and release date, are unknown.
3. The IHO dismissed the due process hearing finding that the IHO lacked the authority to order any change in placement for the Student until he is released from custody.
4. In this appeal, the Student argues there is a dispute within the case conference committee about getting the Student out of jail. The case conference committee has no authority to get the Student out of jail.
5. Neither the IHO nor the Board of Special Education Appeals has any authority over the courts in this state to order a release of an individual held by the criminal justice system. The BSEA has no authority to order an individual's release from incarceration either while the individual is awaiting trial or after sentencing.
6. Should the Student be released before his twenty-second (22nd) birthday, he may still be eligible to receive services from the School. Should a dispute arise at that time within the case conference committee, the Student will be able to file another hearing request if he so desires.

ORDERS

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

1. The decision of the IHO is upheld in its entirety as written.
2. Any additional issues or motions raised in the Petition for Review not specifically addressed herein are deemed denied or overruled, as appropriate.

DATE: November 27, 2006

/s/ Cynthia Dewes

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 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).