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 T.G.,	)	
Concord Community School Corporation,	)	
and Elkhart County Special Education	)	**Article 7 Hearing No. 123-2007**
Cooperative	)	**Article 7 Hearing No. 1603.07**
	)	
Appeal from the Decision of	)	
Joseph R. McKinney, J.D., Ed.D.	)	**Status: Closed**
Independent Hearing Officer	)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History and Background

The request for this due process hearing was filed by the School on August 31, 2006, to resolve disputes with the Parent about the appropriate educational placement for the Student. On September 1, 2006, Joseph R. McKinney, J.D., Ed.D., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO).

A telephonic pre-hearing conference was scheduled for September 13, 2006, but was vacated at the request of the Parent to allow her time to get an attorney. The pre-hearing conference was rescheduled for September 29, 2006. The Parent could not be reached at the scheduled time for the pre-hearing conference. The pre-hearing conference was rescheduled for October 6, 2006. Pursuant to I.C. 4-21.5-3-19, the IHO issued a Pre-Hearing Order on October 23, 2006. The order identified the following issues for hearing.

(1) Whether the Student's needs are most appropriately met in a residential placement due to the Student's needs for behavioral programming?
(2) Whether the Student has been properly identified under Article 7?

Hearing dates of November 6 and 9 were established. The parties were advised of their hearing rights.

On October 26, 2006, the Parent requested another continuance in order to get an attorney. A status conference was held on October 27, 2006. The Parent's request for a continuance was denied; dates for the exchange of evidence and witness lists were modified, and it was determined the Student's doctor may testify. The due process hearing was conducted on November 6 and 9, 2006. On November 8, 2006, the School sought and obtained from the IHO a subpoena to obtain records from Oaklawn Psychiatric Center. The hearing was not concluded by

November 9, 2006, and additional dates were needed to take more testimony. The date of November 29, 2006, was established to continue the hearing. On November 29, 2006, the Parent contacted the IHO and informed him she was ill. A Notice and Order of Extension was issued on December 6, 2006. The IHO ordered the hearing continued until December 21 and 22, 2006, with the date for the written decision extended until January 12, 2007. On December 21, 2006, the IHO informed the parties that he was ill and ordered both hearing dates vacated. After consultation with the parties, new hearing dates of January 9 and 15, 2007, were scheduled.[1] On December 27, 2006, the School filed with the IHO a Request for an Expedited Hearing.[2] The IHO conducted a telephonic pre-hearing conference on January 3, 2007, in response to the School's request for an expedited hearing.[3]

The Oaklawn Psychiatric Center records, which had been subpoenaed on November 8, 2006, were never timely received. The last day of the hearing was conducted on January 15, 2007. The Parent had objected to the admission of the records due to physician-patient privilege. The IHO overruled the objection, but determined the records would be submitted directly to the IHO to determine whether the information was confidential or prejudicial. The documents never were submitted to the IHO. The Oaklawn records were submitted to counsel for the School after the IHO's decision was rendered.

On January 16, 2007, the IHO entered an order extending until February 5, 2007, the deadline for the IHO to issue the written decision. Although the order indicates that the extension was pursuant to the School's motion, the record reflects otherwise. The IHO noted on January 15, 2007, at the conclusion of the hearing, that the decision deadline, which at the time was January 12, 2007, would need to be extended. Counsel for the School indicated the School would agree to extend the decision date. The Parent neither agreed nor disagreed to an extension of time and was not asked whether she had any objection. On February 5, 2007, the deadline for the decision was again extended until February 13, 2007. The order indicates the extension is pursuant to motion of the school, although the IHO did not include the motion in the record. The IHO contacted the office of the School's counsel seeking the extension of time. The requested motion was submitted, indicating the School had no objection to the extension.[4] The IHO did not similarly contact the Parent, nor did he advise the Parent of this communication with the School's counsel.

The Student was represented by his Parent. The School was represented by counsel. The hearing was closed at the request of the Parent.

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[1]The decision deadline was not similarly extended.

[2]The Request for Expedited Hearing was not filed with the Indiana Department of Education as required by 511 IAC 7-30-5(b) and 511 IAC 7-30-3(c)(5).

[3]No written pre-hearing order was issued as a result of this conference, although it appears that homebound was established as an interim alternative educational placement for the Student.

[4]Counsel for the School provided a copy of this motion to the BSEA at the conclusion of oral argument.

The IHO's Written Decision

The hearing was convened on November 6, 2006, and began with a pre-hearing conference wherein exhibits and witness lists, and issues for hearing were discussed. Subsequent hearing dates were held as outlined above. On February 7, 2007, after the hearing had concluded, the School, by counsel, submitted an additional exhibit and asked that it be introduced into the record. The Parent objected. The IHO sustained the Parent's objection and did not allow the introduction of the exhibit.

The IHO did issue his final written decision on February 13, 2007. He determined sixty-six (66) Findings of Fact, two (2) Conclusions of Law, and three (3) Orders. The decision, in relevant part, is reproduced below.[5]

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 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. The Student was born on June 19, 1995 and is almost 11 years, eight months old.

4. The Student was born to a mother who was very immature and neglected him and was removed from her care when he was 5 months old.

5. The Student was ultimately placed with the sister of the father of the Student, and she adopted him when he was 3 years old (references to the Student's mother, herein are references to his adopted mother).

6. The Student had a noticeable speech delay by the time he was 18 months old, but seemed sociable at that time.

7. The Student was involved in "First Steps" for speech therapy beginning at age 1.

8. In June of 1998, the Student underwent a pediatric neurology evaluation and saw Dr. DeMeyer at Riley Children's Hospital.

9. In September of 1998, Dr. DeMeyer described the Student using the following terms: moderate developmental disorder with attention deficit hyperactivity, and moderately severe

[5]The restatement of the IHO's Findings of Fact, Conclusions of Law, and Orders have been edited for format purposes.

expressive language dysfunction. Dr. DeMeyer said he wished we had more effective formulas to apply to children born with a brain disorder.

10. In May, 2000, Dr. Garg (M.D.), a professor of pediatric neurology at Riley Children's Hospital evaluated the Student.

11. Dr. Garg concluded the Student had developmental delay, ADHD, and probably pervasive developmental disorder. MRI scans done in 1998 and 2000 with Dr. Garg show several areas of cystic white matter change that are mostly peri-ventricular in the posterior portion of the brain.

12. Dr. Garg stated that the Student has some features that suggest autism but these are not classic features. Dr. Garg noted the Student does have inter-personal relationships. The Student enjoys parallel play.

13. Several medical evaluations describe the Student's development difficulties and behavior problems. The medical reports indicate the Student has always been very active and impulsive. His development has been delayed since birth.

14. The Student has received special education services and support through the School since kindergarten.

15. He was found eligible for special education services as a student with a Traumatic Brain Injury and Communication Disorder.

16. A neuropsychological evaluation of the Student was conducted in late July 2002. The Student was diagnosed (DSM-IV) with ADHD, mixed receptive-expressive language disorder, mathematics disorder, and cognitive disorder NOS (Dysexecutive Syndrome).

17. The School conducted evaluations of the Student in 2001 and 2003. The March, 2001 evaluation of intellectual assessment indicated that his overall level of intellectual functioning fell within the borderline range with verbal abilities below non-verbal abilities. Results of visual-motor and motor skills fell within the range of mild disability.

18. The January, 2003 School evaluation results indicated a nonverbal score of intellectual functioning to be within the low average range, with a standard score of 82.

19. Autism scales completed by his teacher and mother in January, 2003 produced standard scores below average for Autistic Children. There was a difference between parent and teacher, with parent scales slightly more supportive of an Autism Spectrum Disorder.

20. The Student's medication at the time of the January, 2003 evaluation included Concerta 9mg., Ritalin 25mg after school, Depakote 375mg. a.m. and p.m. and two medications to help with sleep.

21. In 2003, the case conference committee (CCC) determined the Student's eligibility to be Multiple Disabilities.

22. Prior to the 2005-2006 school year, the Student had received special education services in a general education setting, a multi-categorical setting, and also in a residential setting at Silvercrest Children's Developmental Center.

23. The Student was discharged from Silvercrest in the spring of 2005.

24. The Student finished the 2004-2005 school year pursuant to an IEP in the functional skills classroom.

25. During the fall of 2005 the Student's aggressive behavior became a major issue with his teacher and the School.

26. On September 24, 2005 the CCC met because the Student's behaviors had become very difficult to manage.

27. A behavioral intervention plan was developed by the CCC.

28. The CCC also called for Crisis Prevention Intervention (CIP) training for the paraprofessional and classroom teacher.

29. On October 2, 2005 the Student was placed by his mother for a 10-day placement at Michiana Behavioral Health Care Center in Plymouth. The Center developed a medical management plan for his behavior through medication interventions.

30. The CCC convened on October 13, 2005 to discuss the Student's return to School. Because of the Student's behavioral difficulties the CCC recommended a reduced day and a full time paraprofessional to work with him.

31. During a 20-day school day period, from November 22 to December 22, 2005 the Student's classroom teacher, along with the School's behavioral consultant, documented the Student's behavior from 9 a.m. to 11:15 a.m. as follows: physical aggression – kicking others – 24 times, hitting others – 76 incidents, head butting others – 3 times; property abuse – throwing objects – 12 incidents, pushing objects over – 27 times, slamming doors – 5 times, kicking objects – 5 incidents, hitting objects – 6 times, verbal aggression – screaming – 6 times, profanity – 25 times, crying – 6 times, running – 17 times.

32. The School's behavior documentation (same chart as number 31, above) for 16 days between January 20 – February 16, 2006 during the school day, 9 a.m. to 12:30 p.m. shows: kicking others 53 times, hitting others – 234 times, head-butting others – 66 times; throwing objects – 34 times, pushing over objects – 29 times; profanity – 37 times, screaming – 29 times.

33. The CCC reconvened on March 3, 2006 because of the escalating behaviors. The behaviors had caused other students and staff to be frightened and students were often removed from the room during the Student's outbursts.

34. The CCC recommended a more restrictive, highly structured education program at Bashor Alternative School.

35. On April 27, 2006, the CCC met and discussed educational options for the Student, including continuation at Bashor or placement at Oaklawn.

36. On June 16, 2006 another CCC was held to discuss placement options.

37. The CCC reviewed the Student's placement at Bashor. Although the Bashor placement was quite restrictive, the Student engaged in aggressive behavior. He became frustrated and kicked, hit people and threw objects.

38. At the June 16, 2006 CCC, the Mother indicated that she preferred that he Student attend Oaklawn's Day School Program. Although School personnel thought a residential placement would be appropriate they agreed with the Mother and recommended Oaklawn with a behavior coach, expressive and recreational therapy, case management, medicine management, and family therapy.

39. The Mother did not return the June 16, 2006 IEP and pushed to retain the Madison Center psychiatrist, case manager, and family therapist.

40. The Oaklawn placement became unavailable as of August 17, 2006 because they believed that for the Student to benefit from his placement at Oaklawn that all services would have to be provided by them.

41. The Madison Center was not an appropriate placement for the Student because they did not provide an educational component.

42. The CCC reconvened on August 21, 2006 to discuss placement options. The CCC discussed residential services. The Mother indicated she did not want a residential placement for the Student.

43. The CCC recommended placement at Bashor Alternative School with two adults for 30-45 days, while appropriate placements were explored.

44. On October 6, 2006 during a prehearing conference the Mother stated that she believed the Student's proper identification was a child with autism (she had told the School this previously) and that he should be reevaluated.

45. The School agreed to have the Student evaluated by an independent evaluator, Dr. Julie Steck. The Student was evaluated by Dr. Steck in October, 2006 while the School pursued a residential placement.

46. The Student was evaluated on October 13, 2006 by Dr. Steck to determine whether the Student has an Autism Spectrum Disorder.

47. Dr. Steck found the Student's profile to be consistent with an individual with overall functioning being in the range of a mild mental disability; however language development, academic skills and adaptive behavior were more in the range of a Moderate Mental Disability.

48. Dr. Steck also confirmed the Student's diagnosis of ADHD, combined subtype.

49. Dr. Steck concluded the Student does not have an Autism Spectrum Disorder. Rather the atypical behaviors noted are felt to be consistent with his cognitive abilities.

50. Dr. Steck stated that the Student would benefit from medical, therapeutic, and an academic environment that is geared towards improving attention and mood regulation and preparing him for increased independence for adulthood.

51. The School is recommending residential placement for the Student. All School personnel, including the special education director, the teacher of record, the behavioral consultant, the school psychologist, and the principal recommend residential placement.

52. The School has thoroughly looked at the Indiana Developmental Training Center (IDTC). IDTC provides services to students with developmental and emotional/behavioral problems. It is located in Lafayette, Indiana.

53. The Oaklawn program is no longer available to the Student because they no longer have an elementary program. The average age of students at Oaklawn is 15.

54. Placement at Bashor is also no longer available according to Bashor personnel. There is no classroom available for the Student at Bashor.

55. While the Student was at Bashor he showed some academic gains. The number of restraints used on the Student because of his behavior also decreased.

56. The gains at Bashor are a result of the Student being served and supervised by 2 adults with no interaction with other children.

57. Dr. Dean Smith who is a psychiatrist evaluated the Student in March, 2006 and has seen him monthly since then. Dr. Smith diagnosed the Student with autism.

58. Dr. Smith diagnosed the Student with autism based on a parental report and matched it against the criteria of the DSM-IV for autism.

59. Dr. Smith's diagnosis was made for treatment purposes and he was adamant that it was not made for educational purposes.

60. Dr. Smith's role in working with the Student is to provide medicine management.

61. The IDTC residential setting serves children who have been diagnosed with a developmental disability, and also emotional and behavioral problems.

62. Several of the children in the unit where the Student would be served have been identified as autistic, as well. The Student would be in a unit where the average age of children is around 11 or 12 years old.

63. IDTC is a behavioral facility with an educational component.

64. The Student's IEP dated August 21, 2006, could be implemented at the facility, according to IDTC and School personnel. All services needed by the Student can be met "under one roof."

65. Dr. Valentinjin who is a pediatrician, general practitioner, has been involved with the Student primarily taking care of his physical needs. He did diagnose the Student with autism and brain damage. He has little knowledge of the Student's behavior at School.

66. Since January 9, 2007 the Student has been served on 2-adults to 1 child basis at Riverview Alternative School. The teacher is a licensed special education teacher and the paraprofessional is CPI trained. The principal is CPI trained.

CONCLUSIONS OF LAW

1. The Student's needs are appropriately met in a residential placement due to the Student's needs for behavioral programming. Specifically the Indiana Developmental Training Center is an appropriate placement for the Student. Other options for placement discussed by the parties are not appropriate to meet the Student's behavioral needs.

2. The Student has been properly identified under Article 7.

ORDERS

1. The Student shall be placed residentially at the Indiana Developmental Training Center (if it is not available the CCC will need to find another appropriate residential placement).

2. The CCC will convene within the next 10 school days and develop an IEP for the Student's residential placement. The IEP shall provide for ongoing (at least monthly) consultation between the School, the residential facility and the Parents.

3. The Student's interim alternative educational placement remains homebound[6] with the School providing special education and related services at a setting selected by the School. This is an appropriate interim alternative placement because a less restrictive placement is substantially likely to result in injury to the Student or others.

The IHO provided an appeal statement; however, the appeal statement was for an expedited administrative appeal under 511 IAC 7-30-5. The advisement of rights was contrary to the appeal statement provided at the close of the hearing on January 15, 2007.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The Parent submitted her Petition for Review on February 19, 2007, objecting that there was no resolution session and information was provided to the IHO after the hearing that hadn't been disclosed 5 days prior to the hearing. The Parent also argued the IHO disregarded the evidence that the Student has autism. The Parent argued the School changed the Student's educational records. The Parent also complained about the shortened time in which to file the Petition for Review. The appeal statement in the IHO's decision indicated the appeal was expedited, and, as such, a petition for review had to be filed within three (3) business days of receipt of the decision.

The BSEA[7] received and read copies of the following documents: (1) the written decision of the IHO dated February 13, 2007; (2) the Petition for Review filed by the Parent on behalf of the Student, dated February 19, 2007; and (3) the School's "Request for an Expedited Hearing to Seek An Interim Alternative Educational Setting (Amended Due Process Hearing Request)," filed with the IHO on December 27, 2007. The BSEA conferred by telephone on February 21, 2007, and issued that same date a *per curiam* document entitled "Entries and Orders." In this document, the BSEA noted the history of the proceedings, the lack of service on the Department of Education of the request for an expedited hearing, and the failure to conduct the due process hearing in an expedited manner. Although the IHO provided an expedited appeal statement, the appeal is not expedited. The Parent was afforded thirty (30) days, or until March 19, 2007, in which to file an Amended Petition for Review should she so chose. Either party had the right to ask for an extension of time. The parties were advised the BSEA would conduct oral argument in this matter. Finally, the BSEA ordered that the IHO's Orders Nos. 1 and 2 are stayed until completion of this review. Order No. 3 shall remain in effect.

[6]It appears that the interim alternative educational placement was determined at the pre-hearing conference held on January 3, 2007, although there is no written order to that effect and the IHO does not mention the pre-hearing conference or any resulting order in his written decision.

[7]Thomas J. Huberty, Ph.D., was appointed by the State Superintendent of Public Instruction to serve in the stead of BSEA member Raymond W. Quist, Ph.D., who could not participate in this matter due to illness.

On March 15, 2007, the Parent requested an extension of time in which to file her Petition for Review. This request was granted by the BSEA on March 16, 2007, extending the time for the Parent to file her Petition for Review until April 3, 2007, and extending the decision deadline until May 3, 2007. On March 26, 2007, the School filed a Motion to Submit Evidence. The additional evidence consisted of documents from Oaklawn Psychiatric Center. The Parent had a continuing objection to testimony from the Student's psychiatrist, who created many of these documents. On April 2, 2007, the Parent filed her objection to the submission of these documents, as they had not been provided five days prior to the hearing, had not been submitted to or considered by the IHO, and the documents are confidential. The Parent argued that she didn't have the opportunity to review the documents to pose any objections nor to offer testimony concerning the information contained in the documents. The BSEA conferred, and on April 2, 2007, issued *per curiam* Entries and Orders wherein the BSEA denied the School's Motion to Submit Evidence. The Parent also requested the return of the Oaklawn documents. The BSEA ordered the return of the documents, but stayed that part of the order until the completion of this administrative review.

The Parent filed her Petition for Review on April 18, 2007. On April 23, 2007, the School requested an extension of time in which to file its Response to Petition for Review. The BSEA granted this request on April 23, 2007, granting the School until May 7, 2007, in which to file its response. The deadline for the decision was extended until June 6, 2007. The School requested an additional extension of time on May 3, 2007. On May 4, 2007, the BSEA granted this request such that the School's response was to be filed by May 21, 2007, with the decision of the BSEA to be issued by June 20, 2007. The School filed its Response to Petition for Review on May 21, 2007. Also on May 21, 2007, the School submitted a Motion to Consider Additional Evidence. The Parent was given seven days in which to respond. She requested an extension of time and also raised concerns about extended school year (ESY) services. On June 4, 2007, the BSEA granted her request, directing that her response be filed no later than June 8, 2007. On June 6, 2007, the School responded to the Parent's concerns about ESY. On June 8, 2007, the Parent filed her response to the School's Motion to Consider Additional Evidence arguing that additional evidence would show the Student no longer required a residential placement. On June 11, 2007, the BSEA conferred and issued its *per curiam* Entries and Orders denying the School's Motion to Consider Additional Evidence. The BSEA also ordered the School to convene the case conference committee (CCC) to arrange for the provision of ESY services for the Student. The School was ordered to provide ESY services within ten days. On June 12, 2007, the BSEA received from the Parent another letter and a packet of additional documentation. The BSEA reviewed the Parent's letter, but not the documents. After conferring, the BSEA issued *per curiam* Entries and Orders denying the Parent's request to submit additional evidence on June 12, 2007. The Parent sent another letter to the BSEA, by facsimile transmission, on June 13, 2007, again requesting the BSEA consider additional evidence, and also requesting a continuance of the oral argument scheduled for June 14, 2007. The BSEA issued an additional *per curiam* Entries and Orders upholding its previous determinations denying the request to consider additional evidence and denying the request for a continuance.

The complete record from the hearing was photocopied and provided to the BSEA members on March 13, 2007.

The BSEA, on June 4, 2007, notified the parties that it would review this matter with oral argument. Review was set for June 14, 2007, at 10:00 a.m. in Elkhart. On June 5, 2007, the parties were notified that the time of the review had been changed to 9:00 a.m.

Parent's Petition for Review

The Parent filed her Petition for Review on April 18, 2007. The Parent did not identify any specific findings of fact, conclusion of law, or orders to which she objected. The Parent did identify several issues, and provided argument and citation to testimony in the transcript with which she disagreed. The Parent raised the following issues in her petition: False Police Reports Filed by School; Evidence Requested from School Not Released Accordingly; Inappropriate Proceedings and Objections; Procedural Errors; Claims that School has Exhausted Local Efforts; School Not Following ADD and Article 7; Diagnoses; Michiana Behavioral Health Center; Quiet and Calming Area; Lack of Training; and Other Areas to Address. For the most part, the Parent either disagreed with the testimony presented, or offered further information to supplement or explain the testimony given during the due process hearing.

During oral argument, the Chair of the BSEA asked the Parent to state her objections to the IHO's order with specific reference to the findings of fact, conclusions of law, and orders with which she disagreed. The Parent first noted her objection to the IHO's indication in the procedural history that she requested a continuance of the December 22, 2006 hearing date. Although the Parent did initially request a continuance of that date, the request was later withdrawn. The withdrawal of the request for continuance should also be noted in the procedural history. The Parent objects to findings of fact Nos. 4 and 5, noting that the Student was removed from his birth mother at age three months. He was placed with the Parent at age six months, and the adoption was final on the Student's third birthday. The Parent objects to Finding of Fact No. 15, as it does not indicate that the determination of eligibility occurred in the Elkhart school district, rather than Concord, and the finding doesn't indicate the Parent disagreed with the identification. The Parent objects to Finding of Fact No. 21, as it fails to identify the reason for the determination of multiple disabilities (communication disorder and ADHD). In Finding of Fact No. 31, each slap, kick, or action was counted as a separate incident even if all actions occurred together. The Parent argues this gives a misleading impression as to the number of aggressive acts on the part of the Student. The Parent objected to Finding of Fact No. 38, as the School put in a request for medication management, case management, and counseling even though the Parent didn't want those services provided from Oaklawn. The Parent disagreed with Finding of Fact No. 39, indicating she had returned the IEP, identifying those areas with which she disagreed. For Finding of Fact No. 41, the Parent noted that the Student was not placed in the Madison Center for education. The placement at the Madison Center was for the Student's behavior. As to Finding of Fact No. 43, the Parent argued the Student needed a teacher and not just a paraprofessional. The Parent also objected to Finding of Fact No. 45, objecting to the testimony of Dr. Steck as she frequently testifies in due process hearings and the

Parent claims the IHO favors her testimony. Finally, the Parent seeks correction of Finding of Fact No. 65, noting that the Student's pediatrician is female rather than male.

The Parent also took exception to each of the three orders. The Parent disagreed with placement at the Indiana Developmental Training Center (IDTC), arguing that the Student should have been provided with a behavior coach, a highly qualified teacher, and a calming area. If the Student had been provided appropriate services there would not have been the need for the hearing. The Parent disagrees with the second order, as that order is to develop an IEP for placement at IDTC. The third order provides for homebound instruction as an interim alternative educational placement. The BSEA considers the Parent's objections to the IHO's orders to also mean the Parent objects to the IHO's conclusions of law as the conclusions support the IHO's orders.

In conclusion, the Parent argues the Student is making progress towards his goals. He is not showing the physical aggression previously shown at the time of the hearing. At the conclusion of oral argument, the Parent again renewed her request that the BSEA consider additional evidence.

School's Response to the Petition for Review

The School filed its Response to the Parent's Petition for Review on May 21, 2007. The School noted that the Parent failed to identify any findings of fact, conclusions of law, or orders with which she disagreed in her Petition for Review. Although the School responded to each argument raised by the Parent, the School noted that in the Petition for Review the Parent failed to identify any findings of fact, conclusions of law, or orders with which she disagreed. The School also argued that issues that were not before the IHO could not be raised for the first time on appeal. Therefore, allegations of procedural violations on the part of the school were waived.

During oral argument, the School responded to each of the Parent's allegations of error in the IHO's findings of fact and orders. The School argued that each of the IHO's findings of fact are supported by evidence in the record. The School agreed that the placement at Madison Center was not an educational placement, but that supports the IHO's Finding of Fact No. 41. Each of the Findings of Fact is supported by evidence in the record. The IHO's findings support the conclusions of law. The IHO's orders are appropriate and should be upheld.

The School requested additional time to comply with the BSEA's Entries and Orders dated June 11, 2007, requiring the School to convene the CCC to arrange for, and implement the provision of, ESY services for the Student. The School advised the BSEA that a CCC had been scheduled for June 21, 2007. School personnel were not available to do so earlier, and the personnel currently working with the Student were not available to provide ESY services. Therefore, staff would need to be hired and trained to provide services to the Student. The School would not be able to be ready to implement those services by June 21, 2007, as the BSEA had ordered. The School requested an additional seven (7) days in which to implement the ESY services.

The Parent responded by noting that the Student had always received ESY services, with the exception of one summer when the Parent wanted to give the Student some time off. Further, the

Parent made inquiry about ESY services to the School on May 9, 2007. The School failed to respond to her inquiry or take any steps to begin to make arrangements for ESY services. The lack of time to arrange for the provision of ESY services is caused by the School's own delay and failure to take appropriate steps to provide ESY services in a timely manner.

Additional Proceedings

The entire record from the hearing was photocopied and provided to each member of the BSEA. Oral argument was established for June 14, 2007, at a time and place convenient to the parties. 511 IAC 7-30-4(k). The Parent elected to have the oral argument closed to the public. The Parent also elected to receive the written decision of the BSEA in electronic format. The parties received official Notice of Oral Argument on June 4, 2007. An amended notice was provided on June 5, 2007, changing the time of oral argument from 10:00 a.m. to 9:00 a.m.

On June 14, 2007, the parties appeared before the BSEA[8] and provided oral argument and rebuttal, in accordance with the procedures detailed in 511 IAC 7-30-4 and in the Notice of Oral Argument. Following oral argument, the BSEA deliberated without the presence of the parties to review the issues raised in the Petition for Review, the Response thereto, and the arguments presented with reference to the record as a whole.

The BSEA first considered the Parent's renewed motion to consider additional evidence and the School's motion for additional time in which to begin providing ESY services. In response to these motions, the BSEA issued Entries and Orders dated June 15, 2007. The BSEA denied the Parent's request to submit additional evidence. The BSEA found that both parties sought to submit additional evidence, each claiming that evidence of the Student's behavior since the hearing supported their position. The School had argued that evidence since the hearing supported the IHO's determination that the Student required a residential placement while the Parent argued that evidence since the hearing showed an improvement in behavior such that a residential placement was no longer required. The BSEA determined that none of the proffered evidence is relevant ad none of it addresses the Student's behavior in a classroom interacting with other students. The Student has been in a homebound placement with two adults and no other students.

The BSEA did grant the School's request for an additional seven (7) days in which to provide ESY services for the Student, as, at the time the request was made, it would be impossible to meet the deadline in the BSEA's previous order. However, the BSEA agrees with the Parent's assertion that the delay in arranging for the provision of ESY services was caused by the School not making arrangements earlier and refusing to address such when requested by the Parent. The BSEA therefore ordered that the CCC arrange for compensatory services for the delay in providing ESY services.

[8]Because of the continuances requested by, and granted to, the parties in this matter, BSEA member Cynthia Dewes was unable to participate due to a previously scheduled vacation.

Based on its review, 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[9] 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. **Expedited Hearing.** The School, on December 27, 2006, requested an expedited hearing to determine an interim alternative educational setting (IAES) for the Student. The School maintained that the Student was a danger to himself or others, and that his current placement at Bashor was ending. An alternate placement was required expeditiously. The request for an expedited hearing was not served on the superintendent of public instruction or the division of exceptional learners as required by 511 IAC 7-30-3 and 7-30-5. The IHO did conduct a pre-hearing conference to address the IAES, however, he failed to issue a written pre-hearing order as required by I.C. 4-21.5-3-19(c). Further, he failed to address the expedited nature of the request with the parties at all, either indicating the hearing was, or was not, to be conducted in an expedited manner. His written decision makes no mention of the request for an expedited hearing nor does it mention that the resulting IAES was ordered as a result of the pre-hearing conference. The IHO did not conclude the hearing and issue a written decision within ten (10) business days of the date of receiving the request for an expedited hearing. The IHO extended the deadline for the issuance of the decision on at least two occasions after the filing of the request for an expedited hearing. The IHO did not require the School to provide notice of its request for an expedited hearing to the division of exceptional learners. The failure to specifically address the School's request for an expedited hearing has led to confusion. On January 15, 2007, at the conclusion of the hearing, counsel for the School inquired about the request for an expedited hearing. The IHO's response indicated that he didn't think the request was properly made and didn't consider the matter an expedited hearing. Then, when issuing his written decision, he indicated that it was an expedited hearing and notified the parties of the expedited timelines for appeal. The IHO erred in not issuing a pre-hearing order, in not specifically addressing the School's request for an expedited hearing (and notifying the division of exceptional

[9]Appeals may be heard by two members rather than the full panel. All decisions rendered by a two member BSEA panel must be unanimous.

learners if an expedited hearing request was made), and in giving an appeal statement for an expedited hearing when the hearing was not expedited.

3. **Admissibility of Documents.** On November 8, 2006, the School obtained a subpoena for records from the Oaklawn Psychiatric Center. The Parent objected, but the IHO issued the subpoena over the Parent's objection. The Parent's objection to the subpoena is considered a motion to quash rather than an objection to the admissibility of the documents. The documents were not received by the School, nor admitted into evidence during the course of the hearing. It appears the IHO determined the documents would be admitted into evidence even though the Parent objected as to confidentiality, physician-patient privilege, and the fact the documents had not been provided to the Parent five days prior to the hearing. The record indicates that after the hearing, the documents were to be provided directly to the IHO, with the IHO determining whether they were confidential or prejudicial. The documents were never provided to the IHO. After the IHO's decision was rendered, Oaklawn provided the documents directly to the School's counsel. The School tendered the documents to the BSEA on March 23, 2007, and requested they be admitted into evidence. The BSEA denied the School's request to submit the documents as evidence, by its Entries and Orders dated April 2, 2007. The Parent did not have the opportunity to review these documents and pose any objections to their introduction, or to offer any testimony regarding same. Admitting documents into evidence that have not been provided to the other party and without affording other party the opportunity to object, cross-examine, and offer testimony or rebuttal, is error. In this case, the IHO's ruling that the documents were admissible is harmless as he never received them.

4. **Extension of Time.** The last request for an extension of time that was initiated for the benefit of a party was on November 29, 2006. On December 6, 2006, the IHO issued a Notice and Order of Extension establishing January 12, 2007, as the date by which the written decision would be issued. Thereafter, he scheduled additional hearing dates of January 9 and January 15, 2007, without further extending the date for the decision. By the last day of the hearing, the IHO had already missed the deadline for issuing a decision. At the conclusion of the hearing on January 15, 2007, he advised the parties the deadline for the decision would need to be extended. The IHO indicated he would have the decision by February 5, 2007. The School indicated it had no objection. The Parent was not asked whether she objected. The IHO's written order indicates the School requested the extension of time, but there is no written request for an extension and the transcript reflects not that the School requested the extension, but that the School indicated it had no objection to the IHO extending the time. As February 5, 2007, approached, the IHO initiated an *ex parte* communication by telephoning the office of the School's counsel seeking an extension of time. The School complied, filing a motion requesting an extension of time, noting that it had no objection to the extension. No similar call was made to the Parent, nor was the Parent advised the IHO solicited the extension from the School. The IHO's decision issued on February 15, 2007, was untimely , even given the later orders of continuance. The IHO missed the January 12, 2007, deadline for issuing his decision. Parties may request an extension of time. 511

IAC 5-30-3(I). It is inappropriate for an IHO to encourage the parties to make such a request, and inappropriate for an IHO to contact the parties to request an extension. The *ex parte* contact initiated by the IHO is particularly troublesome. Contacting a party to encourage the party to request an extension of time for the benefit of the IHO is inappropriate.

5. **Final Appeal Right.** Although the BSEA addressed this at the outset of this appeal, the IHO's utilizing an expedited appeal statement on an already untimely written decision seriously misinformed the parties as to their actual administrative appeal rights. This is particularly so as the IHO had advised the parties on January 15, 2007, that the typical timeline for administrative appeal would be available. The IHO never considered the School's request for an expedited hearing to have been properly made, never advised the parties the hearing would be conducted in an expedited fashion, without extensions of time, and, in fact, did not conduct an expedited hearing. The IHO should have known that the hearing he conducted could not possibly constitute an expedited hearing subject to an expedited appeal notice. The BSEA resolved this in its Order of February 21, 2007.

6. The Parent has objected to a statement in the IHO's procedural history that indicates the Parent requested a continuance of the December 22, 2006, hearing date due to employment concerns. While the statement is correct, the IHO fails to further indicate that the Parent later advised the IHO that she would be available after all for hearing on December 22, 2006. The record supports the Parent's statement. The December 22, 2006, hearing date was continued due to the illness of the IHO, not at the request of the Parent. Although the procedural history has no bearing on the findings of fact, conclusions of law, and orders, the IHO's procedural history is corrected as indicated.

7. The Student was removed from his birth mother at three months of age. He was placed with his adoptive mother at six months of age, and the adoption became final on the Student's third birthday. Finding of Fact No. 4 is amended to indicate the Student was removed when he was three months old. Finding of Fact No. 5 is supported by the evidence.

8. Although some of the findings of fact could have included additional information or explanation, an IHO is not required to include all possible facts in his findings. Only those facts which the IHO determines to be relevant to the issues are required.

9. The IHO's Findings of Fact Nos. 15, 21, 31, 38, 39, and 41 are supported by the evidence in the record.

10. Finding of Fact No. 43 is supported by the evidence, but is amended to clarify the CCC "on August 21, 2006."

11. Finding of Fact No. 45 is supported by the evidence.

12. The Student's pediatrician is female rather than male. Finding of Fact No. 65 is amended to reflect the appropriate gender.

13. The evidence supports the need for a residential placement for the Student to address not only his behavioral needs, but also his educational needs. Conclusion of Law No. 1 is amended to indicate the Student's needs are appropriately met in a residential placement due to the Student's educational needs and for behavioral programming. The IHO's Conclusions of Law are otherwise supported by the evidence and the findings of fact and are consistent with the applicable law.

14. The IHO's Orders are consistent with the law and are supported by the findings of fact and conclusions of law.

ORDERS

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

1. The IHO's orders are upheld as written.

2. The IHO's procedural history, findings of fact and conclusions of law are amended as indicated above.

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

DATE: June 20, 2007

/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).