

BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of N.M., and)	
MSD of Warren Township)	
)	Article 7 Hearing No. 1337.03
Appeal from the Decision of)	
Jerry L. Colglazier, Esq.,)	
Independent Hearing Officer)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History

N.M. (hereinafter, “Student”) is a thirteen-year-old student (d/o/b 9-23-90), who is eligible to receive special education and related services in three exceptionality areas: Autism Spectrum Disorder, Communication Disorder, and Mild Mental Disability. Services are provided through the MSD of Warren Township (hereinafter, “School”) and the Autism Waiver Program.¹ The parents, by counsel, and on behalf of the Student, requested a Due Process Hearing on March 3, 2003, which was received by the Indiana Department of Education, Division of Exceptional Learners, on March 6, 2003.

At the time of the request for a hearing, the Student was a 6th grader at the Raymond Park Middle School. The request represented that the Student was voluntarily withdrawn from the School by the parents in February 2003 due to the Student experiencing anxiety from two incidents where the School utilized “holds” to control acting-out behavior, allegedly resulting in injuries to the Student. The parents of the Student believe the School failed to provide adequate explanations regarding the incidents and resulting injuries, or to establish remedies to protect the safety of the Student while using the physical restraints. Consequently, the request sought an alternative placement at another middle school within the School. Throughout the proceedings, the Student and the School were represented by counsel.

Jerry L. Colglazier, Esq., was appointed as the Independent Hearing Officer (IHO) on March 6, 2003. The Department of Education, Division of Exceptional Learners, also contacted the parties by letter on March 7, 2003, and advised them of the IHO’s appointment. The parties were advised by the IHO of their due process hearing rights. The initial deadline for the hearing and submission of the written decision to the parties was April 18, 2003. On March 12, 2003, the IHO contacted the parties and issued notice

¹ This is an independently provided service and is not an educational funding source. Refer to Finding of Fact No. 12.

that a Prehearing Conference was to be held on March 20, 2003, by telephone with each party being represented by counsel or their designated representative. The purposes and issues to be addressed in the Prehearing Conference were outlined. The Prehearing Conference took place as scheduled on March 20, 2003, and an order was issued on March 21, 2003, as required by I.C. 4-21.5-3-19(c). The parties were ordered to exchange all records and witness lists by April 1, 2003. A Final Hearing was scheduled for April 8 and 9, 2003, with a Final Prehearing Conference to be held immediately before the Final Hearing to resolve any pending matters. At the time, the parties also agreed to an extension of the hearing and decision deadline to May 12, 2003. The parents requested the separation of witnesses and that the hearing be closed to the public.

The final hearing commenced on April 8, 2003, at the Administrative Offices of the School. On the second day, the parties agreed to a continuance because of illness of one of the attorneys. Final hearing was rescheduled for May 12 and 13, 2003. In addition, a request was granted to file post-hearing briefs. The deadline for final decision was extended to June 13, 2003.

The hearing resumed on May 12, 2003, and concluded on May 13, 2003. On May 29, 2003, the parties were granted an extension of time to June 2, 2003, to file their briefs. The time for issuance of a final decision was extended to June 20, 2003. The IHO issued the Final Written Decision on June 21, 2003.

The seven (7) issues determined for hearing were as follows:

1. Whether there should be an immediate order for homebound services to begin as soon as possible.²
2. Has the staff of the School interceding in the Student's behaviors received appropriate training in the use of physical restraint, and/or are they utilizing appropriate use of time-out and physical restraint?
3. Must the School conduct a behavior analysis and write an appropriate behavior plan to meet the Student's needs?
4. Must the School conduct autism and physical restraint training sessions for school security officers, as well as independent law enforcement officers (i.e., Marion County deputy sheriffs) who may intercede with the Student?
5. Must the School staff working with the Student be provided with an in-service on autism and accompanying behavioral issues?

² This issue was resolved by mutual agreement between the parties prior to the Final Hearing and, consequently, was withdrawn. The parents had unilaterally withdrawn the Student from the School for purported safety reasons prior to application for a hearing. Following the Prehearing Conference, the parties agreed upon an interim homebound placement, which would remain in effect until the end of the current placement. Thereafter, the Student's current educational placement ("stay put") would revert to the placement prior to the application for hearing or as entered in the Final Decision.

6. Should the Student's IEP be revised to include academic issues?
7. Has the relationship between the parents and the staff at Raymond Park Middle School been irretrievably broken to the point that the parents and the School can no longer work together in a trusting and cooperative manner in order to provide an appropriate program for the Student, thus granting the parents' request that the Student be transferred to another middle school in Warren Township?

IHO's Written Decision

The parties were represented by counsel throughout the proceedings. The IHO considered each motion and objection, ruling accordingly. Based on the evidence and testimony of record, the IHO determined twenty-seven (27) Findings of Fact, which are reproduced in relevant part below, with slight editing for continuity:

1. This matter is properly before the IHO pursuant to Indiana Code, IC 4-21.5 *et seq.* and 511 IAC 7-30-3 ("Article 7"), and the IHO has the authority to rule upon all matters presented herein.
2. All Findings of Fact that can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. The Student is 12 years of age with a date of birth of 9-23-90.³ Prior to the unilateral removal of the Student in February 2003, the Student was in the sixth grade at Raymond Park Middle School.
4. Prior to age three when the Student began participating in the School's Early Childhood Special Education Program, he was diagnosed at Indiana University Medical Center with Pervasive Developmental Disorder NOS [Not Otherwise Specified], with developmental delays of unknown etiology.
5. The annual case conference report of April 16, 2002, revealed the Student was eligible for special education and related services with a primary disability of Autism Spectrum Disorder and a secondary disability of Mild Mental Handicaps (MiMH). The case conference committee found the Student's disability required more individual instruction than the regular classroom can provide and required functional life skills which the general education curriculum did not address.

The Least Restrictive Environment (LRE) was special education 88% of the time for functional academics, social skills, recreation/leisure, vocational, personal management, and related arts. General education was also noted for related arts.

³ As of the date of this review, the Student is now thirteen years old.

Placement options considered but rejected noted “Part time special education MIMH were [sic] rejected because they [sic] do not meet his educational needs.” Related services included a full-time instructional assistant on the bus and in school for behavioral management and functional academics; speech/language therapy 20 minutes each for 2 times per week; and occupational therapy 90 minutes per month. Augmentative communication modifications included PEC’s⁴ Communication System, Picture Schedule, and Communication Boards.

6. Psychological testing in 1994 (non-school testing) revealed Stanford-Binet Intelligence Scale standard age scores of abstract visual reasoning of 68, quantitative reasoning of 90, and a partial test composite of 77.

Psychological testing in February and May 1996 revealed a Stanford-Binet Intelligence Scale Test Composite of 52. Woodcock-Johnson Revised reported age-equivalent scores of 2-0 to 3-9 with a percentile ranking generally below 1%.

The Winnie Dunn Sensory Profile noted that the Student needs constant supervision for safety and has the ability to express his needs; however, he does not understand why he cannot do activities when he wants, can be aggressive, is difficult to redirect at times, and becomes easily frustrated or upset.

7. A case conference was convened September 25, 2002, and an IEP addendum was prepared. A behavior intervention plan prepared by the Student’s private behavioral specialist was adopted with the following notations: “Additional behavior interventions have been put in place to assist student success with his academic program; [the] behavior plan [was] implemented as instructed by ...Behavior Specialist for [the Student]; [and] community-based instruction participation will be per teacher discretion.”
8. The School administered psychological testing in May 2002. The referral reported three disability areas in order of perceived severity to be Autism, Communication Disorder, and Mild Mental Disability.

Stanford-Binet scores revealed a composite score of 39 (1996 was 52). Peabody Individual Achievement Revised reported grade equivalent at kindergarten and percentile below 1 in math and spelling. Woodcock-Johnson III reported grade equivalent at 1.3 for letter word identification and below kindergarten in applied problems. Developmental Test of Visual Motor Integration reported an age equivalent of 3-10.

The summary reflected Stanford-Binet scores in the intellectually deficient range at a moderate level. An attempt to assess quantitative reasoning was not successful as no score was obtained due to the Student’s lack of meaningful response.

⁴ “PECS” refers to the Picture Exchange Communication System, a process that allows children and adults with autism or with other communication deficits to initiate communication.

The school psychologist recommended special education identification from Mild Mental Disability to Moderate Mental Disability (MoMH) in order to more appropriately address the Student's educational and individual needs.

9. A review of the 2002 IEPs did not reflect an actual written notation of the change from MIMH to MOMH, but the placement of the Student was consistent with a Moderate Mental Disability placement.
10. The Student has a history of incidents of aggressive and destructive behavior in the school, the home, and the community that could be injurious to himself and others, and which resulted in destruction of property. The IEP included a Behavioral Intervention Plan containing calming techniques, leaving the immediate area under supervision, and, if those techniques were unsuccessful, the Student would be restrained by an adult trained in nonviolent crisis intervention.

The restraint to be utilized was a therapeutic hold known as a "basket hold" wherein the restrainer would hold the Student opposite crossed arms from behind and to the side [such that the] Student could not successfully hit, kick, or head butt. The hold was developed or recommended by the Student's private behavioral specialist who was one trainer of the School's personnel.

11. A crisis plan was developed for the remainder of the 2002-2003 school year. The plan generally called for up to three persons for implementation, and contained nine levels as follows (the plan was apparently developed in response to parental concerns raised in January 2003):

Level 1. Person 1 removes Student from his special education classroom to room A105 (a specific room designed for Student's de-escalation).

Level 2. Person 2 assists person 1 using calming cue cards, green/yellow/red cards in room A105.

Level 3. Person 1 and 2 use cue cards, counting, ABC's, cassette tape of father's voice, and a rocking chair to calm Student.

Level 4. Person 1 places Student in a therapeutic hold if aggressive towards person or things.

Level 5. Person 2 assists with calming techniques and alerts person 3 if continued escalation.

Level 6. Person 3 calls parents to talk to Student and alerts school administration of episodes lasting over ? [sic] (suggested time of 10 minutes) minutes or when the Student is extremely aggressive.

Level 7. Administration assists with calming/therapeutic holds when needed and makes decision to remove Student from school.

Level 8. Person 3 calls parents to come to school and take Student home.

Level 9. Person 1 completes a behavior assessment report if a therapeutic hold is used. A copy faxed to special education office and report sent home to the parent.

Room A105 is a separate de-escalation room and has sensory application facilities, including a rocking chair, therapy balls, a place for stretching, massage, etc.

12. In addition to special education and related services provided by the School, the Student has a variety of independent services in the home and the community, with collaboration among the three environments.

A Medicaid Waiver targeted Case Manager is employed by an independent case management agency.... The waiver is a state-funded service for individuals with developmental disabilities, and the agency provides advocacy, as well as coordination of services in the home and the school.

The Student also has in-home occupational therapy ... funded through Medicaid and the Medicaid Waiver Program. Services are provided primarily in the home 3 to 4 times per month for an hour to hour and a half sessions. Much of the therapy is to provide ways for the Student to calm down and be “at that ready state to learn so that he’s ready to accept what the school [is] going to be trying to teach him.” Compensation techniques are developed to get Student in the best mode for learning.

The Student also receives assistance in the home and the community from [another agency]. The community program involves horseback riding, Special Olympics, roller skating, museum visits, game machines at the mall, etc.

The Student also has a behavior specialist through the Medicaid Waiver Program [from another agency]. The Behavior Specialist developed the School Behavior Support Plan for the Student, which was integrated into his IEP. The Plan details target behaviors, behavior goals, proactive strategies, red/yellow/green cards, and reactive strategies. The reactive strategies culminate in the basket hold.

The Behavior Specialist was involved in training the School’s personnel in the specifics of the behavior support plan.

13. During the hearing, three major concerns of the Parents formulated:
 - a. The perceived decline in academics in the Student’s program;
 - b. The apparent increase in the number of “holds” occurring in the school as opposed to incidents resulting in holds in the home and community, and

the institution of a hold by an administrator, which was different from or beyond the single hold stipulated in the behavior plan; and

- c. The parents' perceived failure of the School to provide plausible explanations of what circumstances or behavior preceded, or triggered, the explosive incidents leading to the holds, and what caused the bruising of the arm and the bloody nose.
14. Prior to the end of the first semester of the 2002-2003 school year, there did not appear to be any concern over the provision of academics to the Student. The placement in an MOMH program rather than MIMH program continued from the prior school placement to Raymond Park. Although the long-time and dedicated instructional aide expressed concern over the decline in her teaching of academics,⁵ there is nothing in the record, including the IEPs, [that indicate] this [concern] was brought to the attention of or discussed in the case conference.

In addition, the IEPs do not reflect discussion in any change, or delivery, of the academic component of the Student's IEP. The Record reflects that in December 2002 and January 2003, the behavior specialist and the primary teacher noted progress and success.

The notes of the case manager of the April 14, 2002, School case conference noted "Curriculum goals – Community Based Instruction."

15. The parents further questioned at the hearing the validity of the 2002 psychological testing and report. Although questions were raised, there was no evidence at the hearing to support a finding or conclusion the testing was invalid and not appropriate. In addition, the parents have not sought, or at least did not present, an independent educational evaluation with results legitimately questioning the Moderate Mental Handicap finding or the academic component of the Student's IEP.

Notes from "Review For Triennial Assessment" in the re-evaluation of February 15, 2002, discusses a "summary of findings from the collection of information which has been reviewed by qualified professionals," and states "[p]er the teacher, current individual education goals focus on developing functional skills necessary for independent living during adulthood." And, "Questions are raised regarding continued identification as a student with a Mild Mental Disability. An updated evaluation to assess current cognitive functioning, academic achievement and adaptive behavior skills may wish to be considered."

The case manager reported on the case conference of September 25, 2003, "meeting to discuss [Student's] psychological evaluation." The Notes state,

⁵ The IHO's statement could be misleading. The record indicates the Student had a properly licensed teacher assigned to him. The instructional aide was not the Student's teacher. The IHO's statement also meant to refer to purported decline in academic instruction to the Student and not to a decline in the instructional aide's ability to teach.

“Functional curriculum is suitable for [Student] due to his level.” “Academically, [the Student] is successful at 20-minute intervals for functional reading and math.”

16. A calendar of therapeutic holds at the school reveals the following:

August 2002 (school started August 16):	No holds.
September 2002:	Two holds.
October 2002:	Four holds.
November 2002:	Six holds.
December 2002:	Two holds.
January 2003:	Two holds.
February 2003:	Three holds.

17. A behavioral assessment was prepared, discussing date of behavior, the antecedent/classroom environment, description of student behavior, interventions/outcomes, timeframe of hold, and timeframe of entire incident. Reports from 1-24-03 through 2-13-03 were introduced and report, in part, as follows:

1-24-03.

Antecedent / environment: Classroom A103. Eczema on skin, irritating, extremely uncomfortable.

Behavior: Agitation, getting louder, yelling, biting thumb, flapping hands. Calming unsuccessful. Removed from A103 classroom to A105 (de-escalation classroom). Personal assistant placed Student in hold with Student head butting, kicking, and scratching. After 15 minutes, Administration called. Administrator ...relieved assistant and continued hold. Took approximately 30 minutes in hold between 2 persons before calm.

Interventions: Calm cards, red/green yellow card, counting ABC's, redirection, and therapeutic holds.

Timeframe of holds: [Special education] Assistant ... 15 minutes, Administrator ... 10-15 minutes.

Timeframe entire incident: Approximately 1 hour.

Although not reported on the exhibit document, the Administrator first continued the therapeutic basket hold followed by a leg crossover hold, taking the Student to the floor. This hold was not an approved hold, and there was no indication that the Administrator had received prior instruction of the approved hold for Student.

2-4-03

Antecedent /environment. Room A105 following lunch.

Behavior: Asked if wanted to use massage equipment. Yelled very loudly, “Put it back,” rocking, pacing, biting thumb. After 15 minutes kicked at [special education] Assistant [Assistant] asked Student to sit in chair, complied, kicking. Placed in hold.

Intervention: Calm cards, green/red/yellow card, counting.

Timeframe of hold: 10 – 15 minutes.

Timeframe of incident: 40 minutes.

2-13-03.

Antecedent/Environment: In A103 cooking class, in final steps of cooking activity. No other students in room.

Behavior: Student stated, “Want valentine treat.” Told it wasn’t all the way made. Redirection, asking student to listen to tape in sitting in rocker. Lunged with arm swinging, legs kicking at assistant. Put in hold sitting at desk, head butting, yelling, screaming, kicking.

Interventions: Green/yellow/red cards, calm cards playing Dad’s tape, redirection.

Timeframe of holds: Assistant One – 7 minutes; Assistant Two – 8 minutes.

Timeframe of Incident: 30 minutes.

2-18-03

At 2:15 PM. A103 removed to A105. Rec/leisure class, students in room playing.

Behavior: Walking around room laughing, playing. Started crying, biting thumb, flapping hands. Escorted to A105. Returned to room for cookies, Student ran to A105 throwing cookies, screaming. Lunged at [special education] Assistant ... with arms swinging, legs kicking. Head butting, kicking, yelling, nose bleed.

Interventions: Calm cards, Green/yellow/red cards redirection, counting, hold. Administrators were called into room including nurse called because of nose bleed.

Timeframe of hold: Incident started at 2:25 PM. In hold from 2:26 to 2:42, parent called at 2:35, came at 3:15. Out of hold at 2:42 sitting on floor, crying stating, “Watch Barney Christmas, Movies closed, You’re done for the day.” Pacing, biting thumb. .

Timeframe of incident: 1 hour.

18. Neither the exhibit documents nor testimony identified when or how the nose bleed occurred.
19. The incident of February 13, 2003 occurred in the morning and followed a reported incident of the Student striking his music therapist the preceding evening at home. A parent note of February 17, 2003 reported, that the evening before the February 18 incident, that (Student) “went to Washington Square. He behaved well all weekend. We reduced [the Student’s] Clonidine to ¼ of a tablet in the morning to reduce sleepiness.”

Of note, parent testimony at the hearing indicated the medications Clonidine was to control anxiety, agitation, and aggression, while Zyprexa was to help control some impulse.

There is nothing in the record to find or conclude the reduction of medication triggered the incident or contributed to the nose bleed.

20. There was no evidence of probative value in the record to find or conclude that bruises on the Student’s arm was [sic] caused at school or at home.
21. Following the February 18, 2003, incident, the Student did not return to school as a result of the Parents’ unilateral decision to remove him from school based upon their concerns for the Student’s safety.
22. Hold Training. As stated earlier, the Student’s teacher and teaching assistants have received training in the therapeutic basket hold from the Student’s independent expert. In addition, school-wide personnel have received hold training. The [School] Administrator ...has reportedly received “Therapeutic/Crisis Intervention Hold Sessions for 1989 through 2003 from Community North Hospital (annually 1989-1992), Butler University (1991), Warren Central High School (1996) and Raymond Park Middle School (2003).”

Following meetings with the parent and School personnel in January 2003, the School retained an outside consultant to conduct in-service training on therapeutic/crisis intervention holds. The training was attended by several personnel of the School, and not restricted only to the three key personnel working with the Student on a daily basis. As part of the training, a document was presented entitled “Presentation of the Human Hold.” The document contains an explanation of many holds that are not reflected in the Student’s IEP. The School denied the holds were presented to be used against the Student, and that the document was a table handout not prepared for use against the Student. Although scheduled earlier, the training occurred March 7, 2003, after the Student had been removed from school.

23. Functional behavior assessment reports were prepared by the School from August 26, 2002, through February 18, 2003, describing the date, time (AM or PM), location, description of behavior/incident, and why the behavior occurred.
24. In the latter part of January 2003, the parents, the Director of Special Education, and the School's behavior coordinator/counselor met in the morning to discuss concerns of the parents of why behaviors were occurring, what were triggers or causes, and who was involved. A meeting was held in the afternoon attended by the parents, the Student's personal professionals, the school teacher, the teaching assistant, the special education director, the behavior coordinator, and the assistant principal.

A follow-up conference occurred, leading to construction of the behavioral assessment (referenced above in Finding of Fact No. 17) and the crisis plan (referred to in Finding of Fact No. 11).
25. The School's director of special education discussed the evolving program in the development of facilities at Raymond Park Middle School to accommodate children with moderate to severe disabilities. The facilities are not replicated at other middle schools.
26. As the Student was removed from school following the February 18, 2003, incident, the parties have met in conference to discuss/resolve parental issues and concerns, or to develop alternative strategies for documentation, initiation of strategies, or possible additional modification to Student's program, including availability of a male teaching assistant as requested by the parent.
27. Raymond Park Middle School is the Student's "home school."⁶

From these twenty-seven (27) Findings of Fact, the IHO determined thirteen (13) Conclusions of Law, restated below in relevant part:

1. This matter is properly before the IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, and the IHO has the authority to hear and rule upon all matters presented herein.
2. All Findings of Fact that can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. The Student is severely impacted by his Autism Spectrum Disorder, which affects his cognitive abilities, his communication skills, his socialization, and his aggressive, potentially injurious and destructive behavior.

⁶ "Home school" refers to the school the student would typically attend based on the Student's residence and the attendance boundaries established by the school district.

4. Because of the Student's qualifications for professional assistance through the Indiana Medicaid Waiver Program, the Student receives services in the home (including respite services) and the community, in addition to the services provided by the School. Behavioral incidents at school, home, and the community are a common concern. As such, the Student's parents, independent specialists, and school personnel have worked collaboratively to establish appropriate IEPs for the Student, including integrating and implementing plans of the independent specialists that included training of therapeutic holds.
5. Psychological and educational testing support the change of disability identification from Mildly Mentally Handicapped to Moderately Mentally Handicapped. Placement of the Student in a Moderate Mental Handicap placement has not been questioned prior to the hearing and is appropriate in light of Student's aggressive discipline issues and test results.
6. The Student's IEPs and behavioral plans support a single therapeutic hold – a basket hold. The assistant principal administered an additional hold placing the Student on the floor on one occasion when the length of basket hold was longer than usual and not effective in resulting in calming. Although this technique was not in the IEP, there is no evidence of probative value that the Student was harmed or suffered a deprivation of a free and appropriate education (FAPE) as a result of the incident.
7. The record reflects that the staff of the School interceding in the Student's behavior received appropriate training in the use of the physical restraint and was utilizing appropriate use of time-out and physical restraint.

The record indicates calming devices have been employed prior to removal from A103 to A105, and that calming devices were continued in A105 before a hold was initiated at which time calming techniques continue.

8. The School has in place as a result of collaboration by the School and independent specialists of the Student, a behavioral analysis and behavior plan. The program was developed in April and September 2002, and procedures were in place to further access the plan following the January 2003 meeting.

Prior to a return of the Student to the School, these issues should be addressed along with the development of a transition plan.

9. There was not sufficient evidence of probative value at hearing that the School [personnel] required additional in-service training in autism issues.
10. The record reflects that parties were in agreement relative to the curriculum that the Student was receiving until the issue was raised in hearing. There was no

sufficient evidence of probative value at hearing to find or conclude that evaluation of the Student or a functional curriculum was inappropriate.

11. The issue of whether the relationship between parents and the staff at Raymond Park Middle School has been irretrievably broken to the point that the parents and the School can no longer work together in a trusting and cooperative manner in order to provide an appropriate program for the Student, thus granting the parents' request that the Student be transferred to another middle school in Warren Township, is unclear and is ambiguous as related to the record.⁷

The record reflects that the parents, the Student's independent specialists, and the School have worked closely in the Student's best interests. It appears from the record that two incidents have triggered this issue. Although a change in middle school might result in a different classroom teacher, the special education staff at the School will still be required to service the Student. In addition, the physical accommodations at Raymond Park Middle School are the most [sic] appropriate for the Student, and cannot be replicated at another site without considerable modification and resources.

Clearly, parties need to conference relative to curriculum components, the behavioral analysis, and behavioral plan, including expanding required documentation of all aspects of behavior incidents and exploration of other preventive and affective deceleration techniques, and to develop appropriate transitions for the Student. However, there is no evidence of probative value that the parents and the School cannot work together to develop an appropriate program for the Student, or that the Student cannot be successfully transitioned to Raymond Park Middle School.

12. Pursuant to the agreement of the parties and counsel, and as recited in the Prehearing Order, the interim placement terminated at the end of the 2002-2003 school year. Stay put reverts to that placement prior to the application for due process hearing or as may be entered in the final decision herein.
13. The School, by counsel, during the Due Process Hearing and in Briefing, raised questions of jurisdiction of the IHO concerning specified issues, and inferred some issues were more in the nature of complaints about the implementation of the IEP than about matters usually the subject of an Article 7 hearing, and that "in the current climate, where costs of complaint investigation have been shifted to the local school by turning complaints into hearings."

IDEA defines the complaint referral process, which includes state educational agency (SEA) enforcement and Due Process Hearings. Indiana's Article 7 further

⁷ It is the IHO's responsibility to ensure that issues for a due process hearing are clearly delineated. 511 IAC 7-30-3(m)(3). Although the IHO's Conclusion of Law is subject to varying interpretations, the Board of Special Education Appeals interprets the IHO's statement to mean the Parents failed to provide substantial and reliable evidence to support this allegation. I.C. 4-21.5-3-27(d).

refines the Complaint Investigation Process and Due Process Hearing Process, which are implemented through the Division of Exceptional Learners to complaint investigations or to Due Process. This objection, or concern, is not an issue under the jurisdiction of an IHO, and should be addressed to other forums, including the State Educational Agency, Division of Exceptional Learners.⁸

Based upon the foregoing, the IHO then issued the following three (3) decisions or orders:

1. Issue 1. This issue is moot. Stay-Put reverts to the Prehearing Placement, subject to grade advancement, consistent with this Decision and Order.
2. Issues 2 through 7. The School has met its burden of proof in regard to each issue.
3. Parties shall immediately convene a case conference to develop the implementation of this Order, including consideration of appropriate modifications of the IEP and to include a plan of transition returning the Student to Raymond Park Middle School.

The IHO notified the parties of their appeal rights.

APPEAL TO THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

Pursuant to 511 IAC 7-30-4(i), the Student on July 21, 2003, by letter and through counsel, requested an extension of time to prepare and file a Petition for Review. The Indiana Board of Special Education Appeals (BSEA) granted the extension to August 5, 2003. In addition, the BSEA extended the timelines for review and the issuance of a written decision to and including September 4, 2003. The Petition for Review was date-stamped by the U.S. Postal Service on August 5, 2003, and received by the Indiana Department of Education (IDOE), Legal Section, as agent for the BSEA, on August 7, 2003. By letter dated August 11, 2003, the School requested and was granted an extension to file a Response to the Petition for Review to and including August 29, 2003, with timelines for review and issuance of a written decision extended to September 29, 2003. The School timely filed its Response to the Petition for Review on August 29, 2003.

⁸ The School did not seek review of the IHO's conclusion, such as it is. The IHO's statement could have addressed the School's contention more thoroughly. The School is directed to the federal regulatory language at 34 CFR § 300.661(c), which indicates the SEA is not to investigate issues pending in the administrative due process hearing process. The Office of Special Education Programs (OSEP) elaborated upon the relationship between the SEA's Complaint Resolution Process (CRP) and the IDEA's due process hearing procedures in Memorandum to Chief State School Officers 00-20, 34 IDELR ¶ 264 (OSEP 2000), indicating that a so-called "complainable" issue can be addressed through the IDEA's due process procedures so long as the issue alleges a violation of Part B of the IDEA as it relates to the child's identification, evaluation, or educational placement, or the provision of a FAPE to the child.

The BSEA was provided with copies of the complete record on August 11, 2003, and was forwarded on August 29, 2003, a copy of the School's Response to the Petition for Review.

On August 19, 2003, the BSEA issued a notice that, pursuant to 511 IAC 7-30-4(j), it will conduct a review on September 26, 2003, in the State House offices of the IDOE without oral argument and without the presence of the parties.

The Student's Petition for Review

The Student's Petition for Review generally alleged that the School failed to fully understand the Student's autism and how to address it within the school environment. Furthermore, the School failed to timely act with regard to the Student's injuries or to inform the parents what it knew concerning how and in what manner the injuries occurred. In addition, the School failed to fully account for its rationale in reducing the Student's academics in favor of a life skills curriculum. The Petition alleged that the parents have become distrustful of the School and believe that the School can no longer insure the Student's safety. The specific allegations are indicated in relevant part as follows:

In relation to Issues #2, #3, #4, and #5 addressing the behavioral issues, the Student represents the School's testimony was inconsistent and vague regarding its understanding of the triggers precipitating the Student's behavior, the appropriate uses of time-out and physical restraint, and how the Student's autism affects his functioning and behavioral responses within his environment. The Student further alleged that the School could not pinpoint what occurred in the behavior training sessions for the staff or confirm who was present at these sessions.

The Student contended that only after the injuries occurred and were brought to the School's attention did it reevaluate and attempt in-service training. Furthermore, while the restraining holds were increasing in frequency and duration, the School failed to formally address and analyze the situation. The Student contends it was only until after the parents became alarmed and brought the bruises to the attention of the School was action forthcoming. The Student asserted that because the School failed to share the circumstances regarding the injuries, the parents have become distrustful of the School, believing it has mishandled the Student's behavior and, consequently, that it can no longer insure the Student's safety.

In relation to Issue #6 dealing with the lack of academics in the Student's program, the Student alleged the School unilaterally changed the Student's classification from MiMH to MoMH, thereby cutting back on the degree of academics in the IEP. Supporting this allegation was the IHO's notation that the change from MiMH to MoMH was never noted in any IEP or related documents (Finding of Fact No. 9). The special education assistant testified that she was the only person who provided academic instruction to the Student while in elementary school and expressed her concern about the lack of

academics due to the change in classification.⁹ In addition, the school psychologist testified that he never tested the Student and was relying on third-party information when he participated in the Student's case conference in the fall of 2000.

Despite the School's contention that the Student could not benefit from academic instruction under an MOMH classification, the Student was not tested for non-verbal intelligence. The Petition alleged that an autistic child with impaired oral communication should be tested for non-verbal intelligence in order to measure actual intelligence.

Consequently, the parents believe the School both failed to implement a behavioral program for their child and currently does not know how to do so. The Student further alleged that the IHO became lost in the quagmire of testimony and did not fully understand the scope of the issues involved. It is also the Student's contention the IHO's decision is vague and does not reflect the testimony presented by the School's witnesses.

The School's Response to the Petition for Review

The School, in its Response to the Petition for Review, stated the following:

Issue 2 (appropriate use of physical restraint): Three staff members of the school were involved in utilizing 17 holds during the school year without incident. Only two holds—those occurring on February 13 and February 18, 2003—were questioned by the parents when the Student was allegedly bruised and suffered a bloody nose. The relationship between the holds and the bruises and bloody nose is conjecture by the parents and not established fact. Although it was stipulated at the hearing that the "basket hold" was the only appropriate hold to be used with the Student, there was no evidence that any other hold was used with the one exception when the School administrator had to move the Student to a hold on the floor in order to regain control of him and keep him from injuring himself or others. If it is assumed that the administrator's hold was inconsistent with the behavior plan, the School argues, nothing in the IEP, behavior plan, or other documents diminishes the inherent authority of the School to take measures that are required in order to protect the Student and others from injury. It is also noted the parents never claimed that the administrator's hold occurring in late January caused any bruises, bloody noses, or other injuries.

Issue 3 (need for behavioral analysis and behavioral intervention plan): The School does not believe this is a viable issue. A behavioral analysis and plan was included as part of the April 2002 case conference. The Student's behavioral specialist provided through waiver services presented her behavioral plan to the case conference committee in September 2003 [sic], which was accepted. The parents alleged that the School utilized holds not allowed in the behavior plan. This is inconsistent with their argument in that the School failed to act in accordance with the plan and, at the same time, argue that no plan existed.

⁹ This is not an accurate statement from the record. As noted in Footnote 5, *supra*, the IHO's fact-finding could have been interpreted as determining the Student's academic instruction was provided by an instructional aide. The testimony and documentary evidence do not support this interpretation.

Following an escalation in the use of holds and to address the Student's growing size in relation to the current effectiveness of the behavioral plan, the School's special education director held a meeting to refine the behavioral analysis and plan to be considered at a case conference to be held in February 2003. However, the parents unilaterally removed the Student from the School and declined to participate in the case conference.

Issue 4 (autism and physical restraint training for security and law enforcement officers): The School asserted that nothing in this issue indicates the School violated Article 7. The impetus behind this issue, the School maintains, was the parents' belief that a school security officer, who may have also been a Marion County deputy, might have been interceding with the Student while returning from a field trip. The parents were also concerned that an "Officer Clark" was listed on the Student's proposed crisis plan that was developed but never implemented in anticipation of the February 2003 case conference. At the parents' request in January 2003, the School developed a list of all personnel who would have contact with the Student as part of its crisis plan. The School agrees that all persons designated to intercede with the Student should receive training on the appropriate use of holds. The School is prepared to provide the training when the Student returns to Raymond Park Middle School.

Issue 5 (autism in-service training of school personnel): Ample evidence was given at the hearing to show that the Student's current teacher has had extensive training and background in the dynamics of autism, the School argues. In addition, the two aides working with the Student have received training. The School is prepared to provide training to all persons who become a part of the Student's behavioral or crisis plan.

Issue 6 (revision of IEP to address academic issues): The School asserted that there was no evidence that this issue was raised by the parents prior to their unilateral decision to remove the Student from the school. Rather, the notes of the behavioral specialist and case manager reveal no questions as to the efficacy of the Student's curriculum. In fact, the School represents, when the curriculum was discussed at the September 2002 case conference, the case manager noted that the functional curriculum was appropriate for the Student in light of his level. Furthermore, the School asserted that there was no possibility of a misunderstanding as to the Student's curriculum in that the curriculum was discussed in detail at the April 2002 case conference, as noted by the case manager. The parents agreed to the curriculum when they provided written consent for the IEP to be implemented. The School represents that treating the Student as MIMH by increasing traditional academic subjects would be a disservice to the Student. Additionally, the change, under new regulations, would require the Student to undergo standardized tests, which no one would agree would be a good idea.¹⁰

¹⁰ Although not raised as a specific issue in the hearing or on administrative review, the statement by the School that a change in exceptionality area would result in his participation in standardized assessments is incorrect. There are no regulations, federal or state, that alter the requirement that a student's case conference committee determine whether an eligible student will participate in statewide or district-wide standardized assessments. The BSEA acknowledges that statements and federal regulations issued by the U.S. Department of Education in implementing the No Child Left Behind Act of 2001 (NCLB) could lead to this impression. However, the NCLB has not altered this requirement under the IDEA, 20 U.S.C. §

Issue 7 (deterioration of Parent-School relationship): The School believes that this issue reflects the parents' desire to dictate the location of the Student's educational program. Location should be the prerogative of the School. There is no evidence that any other middle school in school district could meet the program needs of the Student. In fact, the School states, no other middle school has the space and facilities available to provide the Student with the time-out room, an MoMH class, and the required services that all agree are needed. Nothing in Article 7 requires the School to create space or a class for the Student in any other facility besides Raymond Park Middle School, the School argues.

Despite the parents' assertion that the Student was traumatized by the alleged events occurring at Raymond Park and seek to present expert opinion in support of same, no evidence was presented. In fact, the School maintains, the evidence tended to show that the Student was never reluctant to attend Raymond Park and continues to come without incident in order to participate in Special Olympics. All that was reported by the aide riding the bus with the Student was that he always appeared anxious to go to school.

The School is uncertain why the parents may want the Student to attend another school within Warren Township, where the Student's program will be under the supervision of the same special education director, a person the parents declined to meet with in a case conference to discuss the Student's programs as well as the plans made in response to the parents' requests. Raymond Park has provided and will continue to provide an appropriate educational plan for the Student, the School represents, but the parents should not have the right to dictate where the Student will attend school if he remains in the School's district. To grant such a request, the School argues, will open the door to every parent who has become unhappy with his/her child's placement and who wishes, for whatever reason, to place the child at another school. In addition, granting such a request would place the IHO in a position to usurp the School's legitimate authority to determine the location of its special education programs. Nothing in Article 7 justifies such an intrusion, the School states.¹¹

1412(a)(17), 34 CFR § 300.138, as implemented in Indiana through 511 IAC 7-21-9. It simply is not true that participation in standardized assessment is dictated by exceptionality area.

¹¹ Although it may be accurate to state that, in Indiana, a parent does not have the right to dictate a student's attendance in a particular school, it is not accurate to state that an IHO could not order a specific location where the facts warranted. The School cited for support two administrative decisions from Alabama, a published federal district court decision from Colorado, and an unpublished federal district court decision from Tennessee. Under "least restrictive environment," a student's case conference committee will determine the placement for the student, 511 IAC 7-27-9(a)(4), but such a decision is not beyond review. "Placement" is an issue that can be raised in a due process hearing, 511 IAC 7-30-3(a)(3). What constitutes an appropriate placement for any eligible student can involve a number of variables. See, generally, 34 CFR §§ 300.550-300.553 and 511 IAC 7-27-9. However, this has not been raised as an issue in this matter and need not be addressed any further than this clarifying footnote.

REVIEW BY THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The Board of Special Education Appeals (BSEA) convened on September 26, 2003, in the State House Offices of the Indiana Department of Education. All three members were present. The record had been reviewed in its entirety, as well as the Student's Petition for Review and the School's Response thereto. In consideration of the arguments of the parties and the record as a whole, as well as the standard for administrative review of an IHO's written decision, the following Combined Findings of Fact and Conclusions of Law are determined.

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 Petition for Review is required to be specific as to the exceptions taken with the IHO's written decision, "identifying those portions of the findings, conclusions, and orders to which exceptions are taken." 511 IAC 7-30-4(d)(3). The Student's Petition for Review did not adhere to this requirement. A Petition for Review that does not comply with this requirement can be dismissed in whole or in part at the discretion of the BSEA. 511 IAC 7-30-4(g). Because the School did not raise any objections, the Petition for Review will not be dismissed outright. However, as no exceptions have been taken with respect to the IHO's Findings of Fact, Conclusions of Law, or Orders, the BSEA adopts same and includes them in this decision as though fully stated herein.
3. The Petition for Review argued that "no one could pinpoint what was contained within the behavioral training sessions, nor confirm who was present." The record indicates otherwise. There is testimony in the record—and reflected in the IHO's decision—that certain critical School personnel did receive behavioral training, including training from the Student's behavioral specialist. The training was continuing in nature.
4. The Student also asserts the School did not address the escalating behaviors and need for adult intercession, in a formal manner, until after the bruises appeared. Although the School did conduct a formal training after the Student was

- withdrawn from School, this training would have occurred even had the Student remained in the School. There is also no nexus established between the appearance of the bruises and any actions on the part of School personnel. There is no merit to this contention.
5. Although one of the Student's exceptionality areas was changed from MiMH to MoMH, there is no testimony that supports that this resulted in any substantive change in the Student's educational programming. His educational programming did not change in any substantive manner.
 6. The Student also appears to assert that the School failed to employ non-verbal measures of intelligence. This was not raised as an issue before the IHO. Only issues raised in the due process hearing may be raised in a Petition for Review. 511 IAC 7-30-4(g). Notwithstanding, the record demonstrates that standard measures of intelligence are inadequate with the Student. There is nothing in the record to indicate that non-verbal measures would have supplied any more accuracy. There is sufficient testimony and documentation to indicate that a number of qualified people, both School officials and outside providers, conducted observations and shared anecdotal information and suggestions regarding programming for the Student, both in educational and behavioral contexts. By way of example, the school psychologist's testimony beginning in the Transcript at p. 493 indicates the limitations of certain assessment instruments when employed with the Student, including non-verbal assessment instruments.
 7. The Student also seems to raise a due process claim by asserting the "IHO became lost in the quagmire of testimony and did not fully understand the scope of the issues," and that the IHO's decision "is vague and [does] not reflect the testimony as presented by the [School's] witnesses." A due process claim can be raised independently of any specific objections to the Findings of Fact, Conclusions of Law, and Orders. See 511 IAC 7-30-4(j) ("The board, in conducting an impartial review, shall review the entire record of the due process hearing to ensure the procedures of the hearing were consistent with the requirements of [511 IAC 7-30-3] of this rule."). The Student, however, fails to indicate in any specific manner how the IHO became lost and what part of his written decision is vague. In the absence of any specificity, the BSEA's review of the written decision and the record as a whole does not reveal any denial of due process or other procedural errors that could be construed as denying a party any hearing right.

ORDERS

Based on the Foregoing, the Board of Special Education Appeals now issues the following Orders by unanimous agreement:

1. The written decision of the IHO is sustained in its entirety.
2. Any other issue or assertion not otherwise addressed above is deemed overruled or denied, as appropriate.

DATE: September 26, 2003

Raymond W. Quist, Ph.D., Chair
Board of Special Education Appeals

APPEAL RIGHT

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