

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of A.S. and)	
the Richmond Community School Corporation)	Article 7 Hearing No. 1055.98
)	
)	Appeal From The Written Decision
)	Of Jerry L. Colglazier, Esq.,
)	Independent Hearing Officer

Following several unsuccessful attempts by the parties to resolve program differences through the Case Conference Committee (CCC) procedures, the Parents of A.S. (hereafter, the “Student”) requested a due process hearing under 511 IAC 7-15-5 on July 17, 1998. The Parents alleged in their written request for a hearing that the proposed program of the Richmond Community School Corporation (hereafter, the “School”) would not provide the Student with any “meaningful educational benefit.” The Student, the Parents stated, needed a focused, intense program that stressed consistency and repetition utilizing a “discrete trial format.”¹ The Parents also requested occupational therapy (OT) services through a sensory integration approach, and asserted the School had not individualized the Student’s programming and would only allocate a given amount of funds to provide the Student with educational services.

¹A “discrete trial format” or “discrete trial training” is a series of distinct, repeated lessons with clear beginnings and endings. Multiple trials are repeated over and over again until the child demonstrates mastery. The training usually occurs in a one-to-one setting with as little distraction as possible. Positive reinforcement is used to encourage compliance with any task. Tasks are broken down into small, learnable segments (task analysis). Data collection and record keeping are an integral part of this method. The data indicate when the child should move on to new tasks. This is a form of behavior modification. There are variations of this practice, such as “Compliance Training,” “Clinical Prescriptive Method,” “Applied Behavioral Analysis,” “Functional Analysis of Behavior and Positive Behavior Supports,” “Priming,” and “Lovaas,” the latter named for O. Ivar Lovaas, the best-known practitioner of this method. See “Discrete Trial Training: Finding the Balance” (Donnelly, 1997) and “Lovaas Revisited: Should We Have Ever Left?” (Indiana Resource Center for Autism *Newsletter*, Vol.8, No. 3, Summer 1995).

Jerry L. Colglazier, Esq., was appointed as the Independent Hearing Officer (IHO) the same date. By letter to the parties dated July 23, 1998, the IHO advised the parties of their relative hearing rights and responsibilities. He also set July 29, 1998, as the date for a prehearing conference by telephone, although this was later rescheduled to August 4, 1998.

Following the prehearing conference on August 4, 1998, the IHO issued on August 7, 1998, a prehearing order as required by I.C. 4-21.5-3-19(c). The prehearing order established dates for the hearing and addressed necessary procedures and logistics for the conduct of the hearing. The parties also agreed to waive the time for issuing the written decision to and including November 23, 1998.² From the prehearing conference, the IHO determined the following issues:

1. The School's 1998-1999 proposed Individualized Education Program (IEP) does not constitute a free appropriate public education (FAPE) in that it will not confer upon the Student a meaningful educational benefit.
 - a. In order for the Student to receive a meaningful educational benefit, the Student requires consistency, repetition and intensity in his instruction, a discrete trial format, one-on-one teaching, and an analysis of the effectiveness of his program. He also requires OT services by a therapist trained in the area of Sensory Integration to provide techniques that allow the Student to remain focused and calm in order to receive benefit from the other services. His current proposed IEP does not provide these elements.
 - b. The instruction being proposed for the Student fails to take into consideration his unique learning style and has not been tailored to meet his needs; therefore, he will not benefit from this instruction to any meaningful way. The School has failed to develop appropriate methods to facilitate the Student's learning.
 - c. The School has stated several times that it has approximately \$3,400.00 to spend on the Student's special education services. This is a clear violation of the Individuals with Disabilities Education Act (IDEA) in that services are to be based upon the Student's unique needs and the appropriateness of services and not upon arbitrary financial constraints.

²The parties later agreed to waive the time to November 30, 1998, for the written decision, but the IHO's decision was released on November 23, 1998, as noted *infra*.

2. The Case Conference Committee did not contain individuals licensed or knowledgeable in autism.³
3. Reimbursement for the costs of the home program from age three (3) of the Student, including the costs of OT and costs of speech therapy.

The IHO also set October 5-8, 1998, as potential hearing dates. On September 28, 1998, the IHO amended his prehearing order to indicate the Parents elected to open the hearing to the public. The hearing was conducted October 5-8, 1998, with the final written decision issued on November 23, 1998.

The IHO's Written Decision

The IHO's written decision contained twenty (20) Findings of Fact and eleven (11) Conclusions of Law. The IHO determined the School's proposed program would provide educational benefit to the Student and was appropriate. The IHO properly notified the parties of their appeal rights.

In summary, the IHO found the Student is three years of age (D/O/B 4/15/95) and is eligible for special education and related services under IDEA and 511 IAC 7-3 *et seq.* ("Article 7") due to his autism. In May of 1997, the Student began participation in the Rutgers University program for children with autism utilizing Applied Behavioral Analysis (ABA). The ABA program consists of intensive one-to-one or two-to-one attention using "discrete trial training" in the home. The "discrete trial training" consisted of cued commands directed to the Student that are intended to elicit an appropriate response. Commands continue in multiple trials until the desired behavioral response is achieved. ABA sessions were initially about twenty (20) hours a week, with a goal of expanding the sessions to forty (40) hours a week by the fall of 1998. The ABA program is similar to the Lovaas method. In-home therapists, which include the Parent, receive initial training for two and one-half days in the Parents' home. A representative of Rutgers meets with the therapists about one-half a day every six-to-eight weeks. Videotapes of home sessions are forwarded to Rutgers for periodic review. Replacement trainers are trained by the Parent and the current in-home therapists. The ABA program was not developed with or implemented through an Individualized Family Service Plan (IFSP) pursuant to Part C of the IDEA.⁴

³In Indiana, the Case Conference Committee is the "IEP Team" responsible for determining a Student's eligibility for special education and related services; developing an appropriate IEP; and determining a placement that would be the least restrictive environment where the IEP would be implemented.

⁴Part C of the IDEA was previously known as "Part H" until the IDEA was amended in 1997. Part C programs address the needs of infants and toddlers with disabilities under the age of three. Part C programs are implemented in Indiana through the First Steps Early Intervention System ("First Steps") and not through the Indiana Department of Education or public school corporations.

The School has an Autism Team composed of ten (10) individuals licensed in different specialty areas but with training in autism through six (6) days of training in workshops by the Indiana Resource Center for Autism, Institute for the Study of Developmental Disabilities, of Indiana University. The State of Indiana does not offer or require any specific licensure for teachers of students with autism, nor does Indiana require licensing of OTs in sensory integration instruction or require specific training in this area as a means of providing educational services to students with autism.

The Student would become eligible for Part B, IDEA (special education) services on April 15, 1998. In preparation for the Student's third birthday and concomitant eligibility for Part B, IDEA, services, a transition conference was conducted on March 4, 1998. The transition conference involved the Parents, the Part C agency representative (First Steps), and a school psychologist from the School. The Student was evaluated by the School's OT, speech-language therapist, and school psychologist during March of 1998. A CCC was convened on March 11, 1998, and reconvened on April 1, 1998. The eventual IEP proposed by the School was rejected by the Parents. The First Steps' representative also indicated reservations with the proposed IEP. The Parents proposed the in-home ABA program at thirty (30) hours a week, performed by paraprofessionals, with in-home speech therapy (three-four sessions of 45 minutes a week) and OT services (one hour a week) with the OT trained in sensory integration techniques. The Parents also proposed a community preschool program for the fall of 1998 with an adult assistant, but this would be in conjunction with the in-home ABA program, the latter reduced as necessary to accommodate the educational placement.

The Parents obtained an independent evaluation from the Ohio State University. The CCC was convened on July 2, 1998, to consider the Ohio State report, albeit in draft form. However, an agreed-upon IEP did not result from this meeting. The School proposed a community-based preschool program for three (3) one-half days a week with a full-time adult assistant, although witnesses for both parties testified the program should be for four (4) or five (5) days a week. The School's three-day program was an accommodation of the Parents' stated intention to continue the in-home program.

The School created an "action plan" in September of 1998 to implement the Student's IEP. This action plan included placement, transition services, in-service training for preschool staff, a plan of implementation (especially for speech-language and OT services), and positive behavioral supports for changing behavior. The School's OT is properly licensed and is knowledgeable in sensory integration methods.

Although the Student would be likely to experience some regression in the transition process from the in-home program to the preschool setting, the School's action plan was considered appropriate in addressing the transition needs.

The IHO also found the School's CCC procedures compliant with state and federal law, and determined the School did not attempt to limit the Student's program based upon available funding. The IHO also found no basis for ordering the School to reimburse the parents \$12,745.76 for the implementation of their in-home program during the pendency of this dispute.

The IHO concluded the School proposed an appropriate program that was calculated to provide educational benefit to the Student. Although the Parents may prefer a different educational program or approach, the Parents do not have the right to compel the School to provide a specific program or employ a specific methodology. In addition, the preschool setting, the IHO found, constituted the "least restrictive environment" (LRE) for the Student.

Procedural History of the Appeal

Parents, by their counsel, timely filed a Petition for Review on December 23, 1998. Thereafter began a series of extensions of time requested by both parties. The Indiana Board of Special Education Appeals (BSEA) found that the requests, numerous as they were, nonetheless were justified. Without undue elaboration, the following orders were issued by the BSEA.

- January 4, 1999: The School timely requested an extension of time to respond to the Petition for Review. The BSEA granted the request on this date.
- January 4, 1999: The School requested a second extension of time due to the illness of its counsel. The BSEA granted the request.
- January 8, 1999: The Parents moved for permission to amend their Petition for Review. The School did not object. The BSEA granted the Parents' request this date.
- January 11, 1999: The Parents moved for an extension of time due to the illness of their counsel. The BSEA granted the request this date.
- January 19, 1999: The Parents requested a third extension of time to file their amended Petition for Review due to the continued illness of their counsel. The BSEA granted the request this date, requiring the amended Petition for Review to be filed on January 25, 1999, with the School's Response to be filed on February 8, 1999. The BSEA also extended the time to complete the review and issue a final written decision to March 7, 1999.

- January 25, 1999: The Parents timely filed their amended Petition for Review.
- February 5, 1999: The BSEA, after consultation with the parties, set the matter for oral argument on February 26, 1999, at a time and place convenient to the parties.
- February 8, 1999: The School timely filed its Response to the amended Petition for Review.
- February 16, 1999: The Parents advised the BSEA that they wish for the BSEA review of February 26, 1999, to be open to the public. The BSEA, through its counsel, advised the parties in writing and posted notice of the appeal, as required by I.C. 5-14-1.5 *et seq.* and Executive Order No. 98-26, the latter regarding publication of public notices on the statewide computer network.

The Parents' Amended Petition for Review

The Parents' Amended Petition for Review is fairly straight-forward. The Parents contend that the record would support different conclusions than those reached by the IHO. That is, the Parents argue the record supports a finding that the proposed placement is inappropriate for the Student in that there are older students in the preschool class, the IEP is not calculated to confer educational benefit to the Student, the IEP is not designed to consider the Student's "unique needs," and the IHO failed to consider the Indiana educational definition for "autism" at 511 IAC 7-11-1. The Parents also contend the IHO erred by considering the "action plan" to be a part of the Student's IEP because it was not developed through the CCC process. In addition, the Parents argue the IHO erred by permitting the amended IEP to be introduced into evidence because it was not developed through the CCC procedures.

The Parents assert the IHO inappropriately interpreted the decision in *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir. 1988) in holding that parents may not dictate methodology to a public school district. In addition, the Parents believe the IHO incorrectly determined the proposed placement was appropriate for the Student when the "manifest weight of the evidence," including testimony, would indicate otherwise. The Parents also contend the IHO incorrectly determined the School's "Autism Team" contained persons knowledgeable in autism. The Parents also believe the IHO misrepresented the training and supervision requirements for the in-home ABA program.

The remainder of the Parents' assignment of errors challenge primarily the fact-finding by the IHO, specifically with regard to the lack of facts addressing the incorporation into the IFSP by First Steps of elements of the in-home ABA program and the funding of same, as well as the IHO's use of selective facts with regard to expected regression should transition occur, the instructional school week for the student (whether it is three, four, or five half-days), and by

discounting the testimony of the Parents' witnesses. The Parents deny the School's proposed three half-day program was an accommodation for their benefit. The Parents also believe the IHO erred by not awarding them reimbursement for the in-home ABA program.

Notably, the Parents do not contend on appeal that the School failed to follow federal and state procedures. Rather, they contend that the IEP is not reasonably calculated to provide educational benefit to the Student.⁵

The School's Response to the Petition for Review

The School responded to the Parents' assignment of errors by asserting the IHO correctly found the IEP appropriate, as well as the placement, and did not misapply the holding in *Lachman*. The School also maintains the IHO correctly considered the Action Plan in conjunction with the IEP, is required to assess credibility of witnesses and accord weight to their testimony, and was correct in finding the Autism Team is composed of knowledgeable people.

In addition, the IHO, according to the School, did not commit error by determining that the use of ABA principles in the school setting would provide the Student with a FAPE. The School also challenges the Parents' representation of First Steps' involvement and the extent to which First Steps obligated itself through the IFSP for the in-home therapy.

Review by the Indiana Board of Special Education Appeals

The BSEA convened at 10:05 a.m. on Friday, February 26, 1999, in Richmond, Indiana, at the administrative offices of the School. The time, date, and place were in agreement with the parties and at their convenience. 511 IAC 7-15-6(l). All three members of the BSEA were present. The parties were represented by legal counsel and were afforded the opportunity to present oral argument and rebuttal. 511 IAC 7-15-6(m).

Based upon a review of the record as a whole, oral argument and rebuttal, and in consideration of the requirements of State and Federal law, the BSEA now makes the following determinations.

⁵Review of this decision was hampered by the Parents' Petition for Review not complying with the requirements of 511 IAC 7-15-6(e)(3). The lack of specificity as to which Findings of Fact and Conclusions of Law were objectionable to the Parents made it difficult for the School to respond and for the BSEA to conduct its review.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This matter is properly before the BSEA pursuant to a timely filed Petition for Review. The BSEA has jurisdiction to review this matter.
2. All due process procedures were followed by the IHO. All parties had the opportunity to present evidence and testimony, and were properly advised of their hearing and appeal rights.
3. The School did not commit any procedural violations.
4. The School's "Autism Team" has received adequate training within the requirements of Indiana law, and, as such, would be considered knowledgeable in the area of autism, as the law requires, with the proviso that there are continuing training opportunities for the Autism Team to remain knowledgeable.
5. Adherence to the minimum federal requirements of IDEA are deemed to provide an appropriate education. "Minimum legal requirements" does not mean minimal programming. The federal standard is to provide a "free appropriate public education" (FAPE). Although a state may establish standards higher than the minimum federal requirements, Indiana has not done so.
6. The IHO's written decision did not address the strengths of the Student. To that end, the BSEA amends the IHO's written decision to add as Finding of Fact No. 21 the following:

According to testimony, the Student was beginning to engage in some group activity while in the First Steps program. The Student exhibits characteristics of autism (e.g., lack of eye contact, lack of responsiveness to others, self-stimulation). However, the Student also exhibits marked strengths: he can manipulate books, possesses some computer skills, can work puzzles, name and touch items, and has gone from matching to recognition. His eye contact and responsiveness to others is improving. His gross motor and fine motor skills are delayed but functional. His self-help skills are improving, but limited. He can recognize the first name of one of his siblings.
7. In all other respects, the Findings of Fact and Conclusions of Law of the IHO are upheld.

ORDERS

In consideration of the foregoing, the BSEA, by unanimous voice vote, now issues the following orders:

1. The Findings of Fact and Conclusions of Law of the IHO in his written decision of November 23, 1998, are upheld.
2. The written decision of the IHO is amended to add Finding of Fact No. 21, detailing the strengths of the Student, as indicated by Combined Findings of Fact and Conclusions of Law No. 6, *supra*.
3. The Order of the IHO in his written decision of November 23, 1998, is hereby upheld.
4. Any other Motion before the BSEA not specifically addressed above is considered dismissed or denied.

Date: March 3, 1999

/s/ Richard L. Therrien, Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Indiana 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.

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