

BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of N.H.,)	
And)	
South Vermillion Community School Corporation and Covered Bridge Special Education District)	Article 7 Hearing No. 1262.01
)	
Appeal from a Decision by)	
Jerry L. Colglazier, Esq.,)	
Independent Hearing Officer)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

It should be noted at the outset that any references to the “Student” or the “Student’s representative” include the Parent or Parents of the Student. It should also be noted that South Vermillion Community School Corporation and Covered Bridge Special Education District will be referred to collectively as the “School.”

On December 14, 2001, the Student filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed on December 17, 2001. The IHO advised the parties of their rights on December 21, 2001, and also served notice on the parties that a pre-hearing conference would be conducted on January 8, 2002. A pre-hearing conference was conducted by telephone on January 8, 2002, and a pre-hearing order was issued on January 9, 2002, notifying the parties that a second pre-hearing conference would be conducted on January 28, 2002, at which time the issues would be determined. The hearing was scheduled for February 25, 2002, and various time lines were established to review records, confer and exchange witness and exhibit lists. The IHO entered an order reflecting the agreement of the parties for an extension of time such that the decision would be due by April 2, 2002.

A second pre-hearing/status conference was held by telephone on January 28, 2002, with a corresponding report issued by the IHO on January 29, 2002. A third pre-hearing conference was scheduled for February 5, 2002. The Student filed an amended due process request on January 31, 2002. The IHO issued a report on the pre-hearing/status conference held on February 5, 2002, setting forth the issues for hearing and scheduling another pre-hearing conference for February 8, 2002. The parties agreed to another extension of time for educational testing to be completed. By order dated February 8, 2002, the IHO extended the time line for rendering a decision to April 15, 2002. The

report on the pre-hearing/status conference of February 8, 2002, indicates the new hearing dates of March 7, 8, and 9, 2002. Another pre-hearing conference was scheduled for March 4, 2002.

On February 28, 2002, the Student requested a continuance of the hearing dates. A report on the pre-hearing/status conference was issued on March 5, 2002. The IHO granted the Student's request for a continuance, rescheduling the hearing for April 4, 5, and 8, 2002, with the decision to be due by May 13, 2002. Another pre-hearing conference was scheduled for March 12, 2002. The IHO issued his First Amended Pre-hearing Order on March 12, 2002. The issues for hearing were identified as follows:

Parent/Student Issues:

1. Did the local educational agency (LEA) deny Student a free appropriate public education by:
 - a. Forcing Student to wear a helmet and use a wheelchair against the advice of his treating physician and under protest from his parents?
 - b. Failing to appropriately evaluate Student?
 - c. Failing to appropriately identify Student as a student with an "other health impairment" (OHI)?
 - d. Failing to consider the least restrictive environment (LRE) when determining placement and programming for Student?
 - e. Failing to adequately address Student's academic deficits on his individualized education program (IEP)?
 - f. Failing to adequately address Student's socialization needs on his IEP and through the programming provided to Student?
2. Did the LEA violate Article 7 by suspending Student for not wearing a helmet?
3. Did the LEA fail to address Student's medical needs by excluding his treating physician in the development of the medical plan, and by failing to provide appropriate training to administrators and other school personnel involved in the development and implementation of Student's program with regard to current best practices related to persons with epilepsy?

LEA Issue:

4. Whether the LEA's draft IEP provided to Parent on March 1, 2002, is appropriate to meet the Student's educational needs?

On April 4, 2002, the Student requested a continuance of the hearing and the School filed a Partial Motion to Dismiss. By orders dated April 5, 2002, the IHO denied the Partial Motion to Dismiss, granted the continuance, and rescheduled the hearing for May 20, 21 and 22, 2002, with the decision due by June 24, 2002.

The Written Decision of the IHO

The IHO's written decision was issued on June 24, 2002. The following information is a summary of the 27 Findings of Fact determined by the IHO.

The Student is 11 years of age with his last placement in the fourth grade receiving special education

services under the eligibility categories of Moderate Mental Handicap (MOMH) and Communication Disorder. The Student is in a special education setting for most of the day and in the general education setting for specials and lunch. The Student's epilepsy seizure disorder began at approximately 22 months of age. At one point estimates of seizure occurrences were over 700 per day. The Student is on medication described as high dosage. Seizures are reasonably controlled at this time and occur largely at night during sleep. Day time seizures appear to involve less intense seizures of staring and limited muscular involvement.

The Student's last agreed upon IEP was developed on November 28, 2001 and included goals and objectives to improve skills in the self help, vocational, recreation/leisure, and functional academic domains. The report of present levels of performance indicated the Student needed constant help, supervision and one-to-one assistance to complete most tasks, and needs directives and prompts to interact with others. The Student received 60 minutes per week of speech/language therapy integrated into the special education classroom setting.

The Student's initial psycho-educational evaluation was completed by the School in August, 1994, indicating cognitive functioning in the moderately mentally handicapped range with global developmental delays. The Student received early childhood special education services including preschool classroom experience, speech therapy, physical therapy, and occupational therapy. A second psycho-educational evaluation, completed in February, 1997, again indicated cognitive functioning in the moderately mentally handicapped range. Language skills were at the early two-year-old level. A diagnostic evaluation by the Cincinnati Center for Developmental Disorders was completed on December 13, 2000. The Riley Child Developmental Center evaluated the Student on April 26, 2001. Results of these evaluations indicated intellectual functioning in the severe cognitive deficit range. Performance on the Developmental Test of Visual-Motor Integration yielded an age equivalency of 2 years, 11 months. Adaptive skills were determined within the severe deficit range with most significant delays in self-help skills.

The School's last psycho-educational evaluation was February, 2002, with results consistent with the 2001 evaluations. The evaluation was reportedly "to assist in determining the impact of seizures on learning and daily life functioning in the school environment." The summary reported cognitive ability consistent with the diagnosis of severe mental disability. Functional skills were consistent with cognitive skills. Adaptive behavior skills were consistent with severe disability in the area of communication and daily living skills. Social skills were identified as a strength, with scores in the mildly handicapped range. The evaluation did not discuss "the impact of seizures on learning and daily life functioning in the school environment."

A speech/language evaluation was completed as part of the comprehensive evaluation completed in February, 2002. The summary reported moderate to severe receptive/expressive/pragmatic language and articulation difficulties. The primary goals of therapy have been to increase the Student's receptive language skills and verbal expression skills.

The Parents and School have conflicting versions of demands by either party as to the necessity of the

Student wearing a helmet, using a wheelchair, and the degree of assistance by an aide or other personnel during mobilization. The March 20, 1997 case conference committee (CCC) report indicated the Student should wear a safety helmet and that extra precautions should be taken with hard surfaces and heights. The CCC discussed the helmet in August, 1997, with the school personnel requesting the Student wear the helmet all day except for rest periods. It was noted the Student may need to be pushed in a stroller for long distances. In May, 1998, the CCC noted that the helmet must be worn to protect the Student's head from injury and that an assistant is to be with the Student at all times. The April 14, 1999 IEP required protective head gear and a wheelchair when needed as special equipment. The December 6, 1999, case conference notes contained the following: "Dad talked about drop seizures." "Student needs to wear a helmet; he doesn't like helmet and is resistant." "Teacher stated Student is allowed to remove helmet if he asks and is seated." "Mr. Schad said he should wear helmet." "Parents agreed to allow helmet off if seated and has an assistant with him." The School proposed moving the Student from his placement at Central Elementary to Montezuma because of a new program developed due to an increase in the number of students. The Parents disagreed with the proposed placement location and elected to home school the Student.

In January, 2000, the School addressed health issues in a letter to the Parents, indicating the Student should only use a travel chair to and from the bus and on field trips. The Student should wear his helmet the majority of the school day. He may ask for it to be removed during seated classroom activities, but must wear it when riding the school bus. If the Parent does not think the Student needs the helmet on the bus, the Parent can request a CCC and make her request in writing accepting responsibility for the Student's safety during transit.

A CCC was held on March 9, 2001, to address the return of the Student to the school setting. The CCC notes indicate the helmet would be required. Another CCC meeting was held on March 21, 2001, but no decision could be reached. At a CCC meeting on April 27, 2001, the School recommended a medical homebound placement, and noted that such placement would need a doctor's statement. The Parent requested placement at Central Elementary School in Clinton. The Parent continued to home school the Student.

The CCC report from November 28, 2001, indicated the Student's doctor noted the Student requires an environment that can respond quickly to the Student's medical needs and recommended an on-site nurse, a nearby medical facility, and supervised transportation. Special equipment listed "wear protective helmet, wheelchair when needed." Conference minutes recorded by the principal noted "Helmet must be worn on bus and at school at all times." "Mother said he does not need to wear helmet all the time – only on playground or any dangerous area if he falls." "Student does wear his helmet at school."

The Student stipulated that one-on-one nursing care was not an issue. A letter from the Student's doctor discussing the need for the availability of intense medical staff on-site contributed to the School's caution and insistence of a qualification letter concerning recommended needs, and contributed to the discord between the Parent and the School.

Pursuant to the Student's IEP, the Student attended Central Elementary during the 1999-2000 school year, with transportation provided as a related service. The Parent filed a complaint with the Division of Special Education on September 1, 1999, alleging the length of the instructional day was shortened due to transportation times. The Division of Special Education determined that the transportation schedule resulted in a shortened instructional day.

Due to an increase in the number of special education students from the Student's home school, the School began a program for students with severe disabilities at the Student's home school. A CCC convened on December 6, 1999, recommended the change of placement from Central Elementary to Montezuma. The Parents expressed concern as to the lack of experience of the teachers, lack of close proximity of a hospital, and lack of a full-time nurse on staff. The Parents filed a dissenting opinion. The Parents elected to home school the Student.

During the 2001-2002 school year, the Student moved from the Southwest Parke School Corporation to the South Vermillion School Corporation. The Student enrolled in Central Elementary on September 24, 2001. The Student attended until September 27, 2001, when the Parents were advised the Student could not return until proof of residence was received by the superintendent. The Student was home schooled until November 14, 2001. The Division of Special Education found South Vermillion Community School Corporation in violation of 511 IAC 7-18-2(2), and ordered the corporation and Covered Bridge to convene a CCC to determine the need for compensatory education. The CCC does not intend to convene to address compensatory education until the conclusion of this hearing.

The CCC of November 28, 2001 noted the Student will continue at school until December 5, 2001, at which time the School would need a letter that modified the previous doctor's letter regarding the need for an on-site nurse and a nearby medical facility. A notice of CCC was issued on December 7, 2001 for a conference to convene on December 10, 2001, for discussion of medical information.

On December 5, 2001, the Student's mother went to school, asked for and was given the Student's helmet, and then left the school with the helmet. The principal, by letter dated December 10, 2001, suspended the Student for two school days. The principal determined that the Student violated his IEP by not wearing his helmet. The Student's suspension was based upon the action of the Parent in removing the helmet from school and not for any action by the Student. The Student's physician issued a letter dated December 7, 2001, that recommended the Student not wear a helmet at school, and stating that he does not need a medical plan. The Student returned to school, with his helmet, on December 17, 2001.

During the pendency of this hearing, the School requested an evaluation by Dr. Hudson, a clinical neuropsychologist at Riley Hospital. The evaluation was conducted on February 19, 2002. Dr. Hudson indicated the Student's seizure disorders are fairly well controlled and there does not appear to be a need for the intensive degree of professional nurse monitoring required earlier. There also does not appear to be a need for the use of the helmet. In fact, the helmet will likely further alienate the Student and deter efforts to increase appropriate socialization. Dr. Hudson recommended education for the Parents and school personnel of the Student's neuropsychological strengths and weaknesses, a visual-

communication program, a MOMH environment with academic goals modified in ways that emphasize functionality as opposed to scholarship.

The School submitted a proposed IEP dated February 27, 2002. The Parent was invited to participate in the development of the IEP but declined pending results of this hearing. The proposed IEP lists MOMH as the primary disability, with communication disorder and other health impairment as secondary disabilities with an apparent “check or mark” beside multiple handicap. The IEP provides the Student will participate in a special education setting for much of the day, and will participate in the general education setting for cafeteria, art, music, recess, media center, convocation, and field trips. The IEP provides for integrated speech/language services of 60 minutes per week. Related services include occupational therapy (1 time per week for 20 minutes), physical therapy (1 time per week for 20 minutes), and a health care plan to be modified as needed. Health care considerations note that a wheelchair will be available for use if the Student has seizure activity or fatigue, no helmet at school, and diastat will be available at school at all times for administration by trained staff. A seizure information document is included but is outdated.

The Student’s seizure disorder is reasonably controlled by medication, and there is little evidence to suggest the seizures themselves have any significant impact on the Student’s education. However, the Student’s physician’s input was not considered in developing the IEP and there was considerable evidence that medications, nighttime seizures, and fatigue, all can negatively affect the Student in achieving academic gains. In addition, the Student’s doctor reported the possible need for brain surgery this summer to address the seizure disorder.

The School’s training of staff relative to epilepsy has been irregular, not in depth, and not current. There was no evidence of current in depth training addressing a student with epilepsy or classmates particularly relative to the social elements and peer acceptance, or attitudinal barriers relative to seizures.

From these Findings of Fact, the IHO reached 21 Conclusions of Law.

The Parents and the School have wanted the Student to wear a helmet since approximately initial enrollment in the school environment when the Parents expressed concerns of hard surfaces. The helmet became a part of the IEP and the School declined meaningful consideration of the Parents’ insistence that the helmet was not needed. The School’s consideration of the use of the helmet included not only safety but liability issues. The continued inclusion of the helmet violated LRE requirements, created unnecessary independence, and stigmatized the Student. The School ignored addressing the concerns of the Parents, which culminated in the Parent removal of the helmet in December, 2001.

The suspension of the Student did not result from any actions or violations by the Student, but emanated solely from the actions of the Mother. The suspension resulted in a denial of a free appropriate public education (FAPE) to the Student. Although the December 10, 2001, suspension was for two days, the School failed to advise the Parents of ramifications if the Student returned after two days without the helmet. The IHO concluded the Student was denied a FAPE for a period of five days until the Parent

returned the Student to school with the helmet on December 17, 2001.

The School determined in 1999 that it could not implement the IEP in the home school and the parties agreed to placement at Central Elementary. The School subsequently developed a moderate/severe program at the Student's home school and recommended placement in the home school. The Parent disagreed with this placement due to concerns about the proximity of medical care and chose home schooling.

Although MOMH and communication disorder are proper disability considerations, OHI is required. The Student's epilepsy is an impairment that affects his educational performance and is manifested by limited strength, vitality, and alertness. The classification requires IEP input/participation by the Student's primary physician dealing with epilepsy. The OHI classification requires that professional and paraprofessional staff serving the student with OHI shall receive specialized in-service training in this area, which requires inclusion of the Epilepsy Foundation of America. The School's staff were not adequately trained in current and best practices in the education of students with epilepsy, and in meeting the social needs of all students, not just students with epilepsy. Training of staff was insufficient.

The draft IEP of February, 2002, is fundamentally appropriate in some areas, including present levels of educational performance, occupational therapy, physical therapy, and speech and language. A CCC needs to reconvene to finalize the IEP with eligibility areas of MOMH (primary) and OHI and communication disorder (secondary). The IEP team shall include those individuals best knowing the Student's health and effects of his epilepsy, i.e., Dr. Strawsberg, for development of the IEP and health care plan. The CCC is required to review goals and objectives to consider appropriate academics. The IEP must address goals and objectives in light of the Student's academic abilities and possible life time prospects.

The IHO concluded the School denied the Student a FAPE on issues 1, 2, and 3. The IHO further concluded the draft IEP presented by the LEA is not appropriate to meet the Student's educational needs.

Based on the foregoing, the IHO issued ten (10) orders, which are reproduced below:

1. The School failed to provide the Student with a FAPE under issues 1, 2, and 3.
2. The February, 2002, draft IEP was not appropriate to meet the Student's education needs.
3. The School shall initiate a case conference to develop an IEP to address findings and conclusions herein. The Parent's request of specific health care professionals to participate in the IEP meeting is appropriate and required.
4. The IEP shall eliminate the use of the helmet and wheelchair unless it is later recommended by the Student's treating physicians and considered in case conferences.

5. The IEP shall identify the Student as moderately mentally handicapped, other health impaired, and having a communication disorder.
6. The IEP shall not restrict the Student's mobility in the school setting except as required under his disability. Although the Student requires the assistance of an aide, provision should be made to limit the Student's dependency on the aide forcing him to be more independent. It is proper to have an aide accompany the Student, however, his independence shall be encouraged.
7. The IEP shall address the goals and objectives to include consideration of academic potentials in addition to functional goals. This is of particular importance to address the best judgments of Medical Professionals relative to the Student's potential in life in regard to future independence. The CCC shall continue the degree of one-to-one assistance by the Teacher and paraprofessional to meet the goals and objectives of the IEP.
8. The School shall provide in-service training as required by the OHI impairment, and include best practices as recommended by the Epilepsy Foundation of America.
9. The IEP shall include compensatory services of five days for the December 10, 2001, suspension, and shall consider compensatory education as directed in the December 6, 2001, Order of the Division of Exceptional Learners.
10. The School shall timely request medical authorization/consents and parents shall timely give the necessary consents for all medical providers of the Student.

The IHO provided all parties with the appropriate notice of their right to seek administrative review.

Appeal to the Board of Special Education Appeals

The School requested a twenty-three (23) day extension of time in which to file its petition for review on June 27, 2002. By order dated July 1, 2002, the request for extension of time was granted by the Board of Special Education Appeals (BSEA) such that the petition was to be filed by August 16, 2002, with the decision by the BSEA due by September 16, 2002. A second request for extension of time until August 23, 2002, was requested on August 14, 2002. The BSEA granted this extension over the Student's objection. The petition was to be filed by August 23, 2002, with the final decision due by September 23, 2002. The School made a third request for extension of time due to network problems. The Student objected to this request. No ruling was made by the BSEA and the School's Petition for Review was filed on August 23, 2002.

On August 26, 2002, the Student requested an extension of time in which to file its reply to the School's petition. By order dated August 27, 2002, the Student was granted an extension until September 16, 2002, in which to file his reply. The timeline for BSEA's decision was extended until October 7, 2002. The Student requested a second extension of time on September 16, 2002. The Student's request was granted by the BSEA such that the Student's reply was to be filed by September

18, 2002, with the BSEA decision to be rendered by October 9, 2002. The Student timely filed his Response to Petition for Review on September 18, 2002.

Petition for Review

The School objects to Findings of Fact Nos. 5, 7, 22, 25, and 27 as not being supported by substantial evidence, or as being incomplete in failing to consider all of the evidence presented. The School argues that the IHO's determination that Dr. Hudson's evaluation did not discuss the impact of seizures on the Student's learning and daily life is unsupported by the evidence. The School maintains that the IHO failed to note that the use of the helmet was incorporated into the last agreed upon IEP and couldn't be unilaterally changed. In finding that Dr. Hudson recommended education for the parents and school personnel as to the Student's neuropsychological strengths and weaknesses, the IHO failed to include that this would be helpful in setting realistic goals and decreasing the likelihood the Student will be subjected to unnecessary frustration and failure. In response to the IHO's finding that Dr. Strawsberg's medical input was not directly considered by the Student's IEP participation, the School argues that the Parents never identified Dr. Strawsberg and didn't give consent for release of medical records. The School also maintains that the IHO's finding that the epilepsy training provided to school staff was irregular, not in depth and not current was erroneous and not supported by the evidence.

The School objects to Conclusions 3, and 5 - 21 as being unsupported by the evidence, arbitrary and capricious, and contrary to law. The IHO's conclusions that the School declined meaningful consideration of the Parents' insistence that a helmet was not needed is not supported by the evidence as there is no evidence the Parents had insisted a helmet was not needed. In fact, just one week prior to the Student's Mother coming to school to remove the helmet, she signed her agreement to an IEP requiring that the Student wear a helmet. The IHO's conclusions that the School failed to provide a FAPE to the Student in the LRE when it offered a placement in the Student's home school, and then a homebound placement, omits a number of facts which support the School's offer of services. The Parents disagreed with the School's offer of placement in the home school and chose to withdraw the Student from school and home school him. After multiple CCC meetings, the School finally offered homebound placement as the Parents insisted the Student's medication condition prohibited placement at the Student's home school and the medical concerns raised implicated the Student's safety while in transit to Central Elementary.

The School argues the IHO's conclusions concerning the OHI designation are contradictory. The IHO appears to fault the School for failing to recommend adding the OHI classification prior to February, 2002, then later appears to find the School did not have the appropriate medical input to add the OHI designation. There was sufficient evidence to support the OHI designation at the time the proposed IEP was drafted. However, the Student's classification as OHI does not affect his eligibility for special education and related services.

The IHO's conclusions that the proposed IEP offered by the School is inappropriate is contradicted by the evidence and contrary to law. The IHO found that because the IEP was developed without direct input from Dr. Strawsberg and did not include academic goals and objectives other than functional

academic goals and objectives, it was not appropriate to meet the Student's needs. The School maintains the IEP contains specialized instruction and related services designed to meet the Student's needs.

The School takes exception to the IHO's conclusions that training is required. The IHO's conclusion that staff was inadequately trained was based upon the log prepared by a bus aide in 1999. The aide is no longer employed by the school and was not instructed to keep records in that fashion. The conclusions are contrary to the overwhelming weight of evidence, which demonstrates that staff working with the Student received frequent in-service training on epilepsy. The only complaint the Parents expressed about staff training was when the School proposed placement in the Student's home school. The IHO's conclusions impose a "best practices" standard not required by Article 7. Further, there was no evidence to establish those

“current best practices” or to show that the school’s training did not meet those requirements. Further, there was no evidence the Student’s peers were in need of training.

Finally, the IHO exceeded his authority in considering the Student’s removal from school for legal settlement reasons. Further, awarding 5 days compensatory educational services for a two day suspension is not supported by the evidence and is arbitrary and capricious.

Response to Petition for Review

The Student argues that the IHO’s factual findings are supported by substantial evidence and testimony. The IHO correctly found that the School’s last psychoeducational evaluation did not specifically discuss the impact of seizures on daily life functioning in the school environment.

The IHO correctly concluded the Parents and School have conflicting demands as to the necessity of the Student wearing a helmet. Over the years, the wording in the IEP’s has been ambiguous and vague, using wording such as “as necessary,” or “when needed.” The School’s use of the helmet increasingly became more restrictive over time as the Parents argued for less use of the helmet. The IHO correctly concluded that Dr. Hudson’s recommendations were for a MOMH environment with academic goals modified in ways that emphasize functionality as opposed to scholarship. This is consistent with the Parents’ requests. The IHO correctly found little, if any, evidence exists to suggest that the seizures themselves have any significant impact on the Student’s overall functioning and academics in the school setting. The side effects of the seizures and medications used to control them result in the Student’s limited alertness. The School should have identified the Student as OHI. While the School argues the Parents provide the School with the name of the Student’s physician, the records reflect otherwise. The Student’s medical information card gives the name of the physician (Dr. Strawsberg) as well as his toll-free telephone number. Further, the Parents completed and signed a Consent to Release Information in April of 1999 for the School to obtain medical information. The IHO correctly concluded the training of staff has been irregular, not in depth and not current.

The Student argues the IHO’s Conclusions of Law are supported by substantial evidence and are consistent with both Article 7 and IDEA. The IHO correctly concluded the School’s continued use of the helmet without meaningful consideration for the Parents’ insistence that it was not needed violated LRE requirements and created unnecessary dependence and stigmatized the Student. The IHO correctly concluded the School failed to provide a FAPE with regard to the Parents’ decision to withdraw the Student. By not considering in any meaningful way the provision of an on-site nurse, the School violated the procedural requirements of Article 7 and IDEA. By not providing the nursing service, it violated the substantive provisions.

The IHO correctly concluded the School violated Article 7 and IDEA by failing to identify the Student as OHI and in failing to consider input by the Student’s primary physician dealing with epilepsy. Numerous school records document the Student’s epilepsy as a chronic health problem with the associated side effects from the seizures and medications that adversely affect his educational performance and is manifested by limited strength, vitality or alertness. By not considering the input of Dr. Strawsberg, the School did not adequately assess his medical and educational needs.

The IHO's Conclusions of Law 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 are Consistent with Article 7 and IDEA. The proposed IEP does not offer a FAPE to the Student. School staff received training in first aid for seizures using videos from the Epilepsy Foundation of America, but the videos were out dated. Contrary to the School's assertions, the Student's removal from school for legal settlement reasons is not a "pending" complaint. It has already been investigated and corrective action ordered.. As such, it can be considered as part of a pattern of suspensions, so that the additional two days when the Student was suspended for his mother's removal of the helmet was a change of placement for purposed of determining whether he is entitled to compensatory education.

Reply Brief

On September 27, 2002, the School filed a Reply Brief with the BSEA to address factual assertions in the Response which Respondent claims are not supported by the record, and to address arguments which Respondent asserts are contrary to law.

Motion to Strike

On September 30, 2002, the Student filed a Motion to Strike, arguing that Article 7 did not provide for the filing of a reply to the response to the petition for review. The Student requested either that the BSEA strike the Reply Brief or grant the Student an additional three days in which to respond to the reply.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated September 6, 2002. Review was set for October 1, 2002, in Indianapolis, in the offices of the Indiana Department of Education. All three members of the BSEA appeared on October 1, 2002. After review of the record as a whole and in consideration of the Petition for Review, the Response thereto, the School's Reply Brief and the Student's Motion to Strike, the BSEA makes the following determinations

Combined Findings of Fact and Conclusions of Law

1. The School timely appeals from the decision of the IHO. The Student timely responds. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-30-4.
2. The BSEA shall not disturb the findings of fact, conclusions of law, or orders of the IHO unless the BSEA finds the IHO's decision to be:
 - a. arbitrary or capricious.

- b. an abuse of discretion.
 - c. contrary to law, contrary to a constitutional right, power, privilege, or immunity.
 - d. in excess of the jurisdiction of the IHO.
 - e. reached in violation of an established procedure.
 - f. unsupported by substantial evidence.
- 511 IAC 7-30-4(j).

3. The Petition for Review takes exception to Findings of Fact Nos. 5, 7, 22, 25, and 27 and Conclusions 3, and 5 - 21.
4. The Student is eleven (11) years of age and in the fourth grade. The last agreed upon IEP, developed on November 28, 2001, showed the Student as being eligible for special education and related services under the categories of MOMH and communication disorder. The IEP indicates the Student is to wear a protective helmet and use a wheelchair when needed.
5. The evidence did not indicate the School failed to appropriately evaluate the Student.
6. The School's proposed IEP adds OHI as an additional area of eligibility for the Student. The designation of OHI is appropriate for the Student.
7. The School's proposed IEP is appropriate to meet the needs of the Student.
8. The School suspended the Student for not wearing his helmet after his Mother removed the helmet from the school. The suspension denied the Student a FAPE in violation of Article 7.
9. Although the School did not invite Dr. Strawsberg to participate in the development of the Student's medical plan, the School did not exclude Dr. Strawsberg from participation. No request was made to include Dr. Strawsberg in the IEP process, and the Parents did not offer or provide any documentation or medical records from Dr. Strawsberg which the School failed to consider.
10. The School provided training to appropriate staff concerning epilepsy.
11. The School's draft IEP is appropriate to meet the educational needs of the Student.
12. The IHO's Findings of Fact Nos. 5, 7, 22, and 25 are supported by substantial evidence.
13. The IHO's decision is arbitrary and capricious, an abuse of discretion, or unsupported by substantial evidence to the extent it is inconsistent with the findings and conclusions of the BSEA and to the extent it fails to recognize that the use of the helmet was pursuant to an agreed upon IEP, the Parents did not request that the School include Dr. Strawsberg in the IEP, therefore, the school did not exclude his participation, and the School's draft IEP is appropriate. Finding of Fact No. 27 and Conclusions of Law Nos. 3, 5, 7, 8, 9, 10, 11, 13,

16, 17, 20 and 21 require modification or deletion to correct these deficiencies.

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals now issues the following Orders:

1. Finding of Fact No. 27 is modified to read as follows:

The LEA¹ trained its staff relative to epilepsy. Videos produced by the Epilepsy Foundation of America and handouts have been used. There was evidence of annual training addressing a student with epilepsy or classmates particularly relative to the social elements and peer acceptance, or attitudinal barriers relative to seizures.

An aide kept journal notes relative to the Student from February, 1999, through September, 1999. Although the reasons for the notes reputedly were for transportation consideration, the entries of the aide suggest a lack of knowledge about seizures.

The cost to train LEA professionals and the staff working with Student by an organization such as the Epilepsy Foundation of America is minimal (estimated at \$175 per day).

2. Conclusions of Law Nos. 3, 7, 8, 9, 10, 11, 13, 16, 17, 20 and 21 are re-written as follows:
 - a. Conclusion of Law No. 3:

It appears that Parents and the LEA have wanted Student to wear a helmet since approximately initial enrollment in the school environment when Parent expressed concerns of hard surfaces. The helmet became a part of the IEP. As stated by Dr. Hudson, the parents definitely wanted the helmet off, and the school questioned whether or not he really needed it (Tr. Vol. II, p. 300).
 - b. Conclusion of Law No. 7:

Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), established a two prong test to consider if an LEA provided a Free Appropriate Public Education (FAPE): Whether the school has complied with the procedures set forth in IDEA, and whether the IEP is reasonably calculated to provide educational benefit. The LEA has met the burden of the *Rowley* two prong test.
 - c. Conclusion of Law No. 8:

Although Moderate Mental Handicap and Communication Disorder are proper disability considerations, OHI is required. Student's epilepsy is an impairment that affects his educational performance and is manifested by limited strength, vitality, and alertness.

¹LEA refers to local educational agency. LEA is synonymous with "School" in this decision.

The OHI classification requires that professional and paraprofessional staff serving the student with OHI shall receive specialized in-service training in this area. 511 IAC 7-26-12.

- d. Conclusion of Law No. 9:
Although the Parents may include such knowledgeable persons as Dr. Strawsberg in the case conference, they did not do so. The LEA cannot limit their responsibilities to properly constitute the IEP team, but they were not required to include Dr. Strawsberg in the case conference.
 - e. Conclusion of Law No. 10:
LEA professional and paraprofessionals were adequately trained in the education of students with epilepsy.
 - f. Conclusion of Law No. 11:
The continued inclusion of the helmet did not violate least restrictive environment requirements because it was part of an agreed upon IEP.
 - g. Conclusion of Law No. 13:
The suspension of the Student did not result from any action or violations by the Student, but emanated solely from the actions of the Mother. The reasons for suspension, Indiana Code due process requirements for hearing, without the benefit of an expulsion hearing, resulted in denial of FAPE to the Student.
 - h. Conclusion of Law No. 16:
The draft IEP of February, 2002, is appropriate.
 - i. Conclusion of Law No. 17:
Inclusion of disability classification of OHI will require specialized in-service training of professional and paraprofessional staff serving Student.
 - j. Conclusion of Law No. 20:
The LEA denied Student a FAPE in issue 2. The LEA did not deny the Student a FAPE in issues 1 and 3.
 - k. Conclusion of Law No. 21:
The draft IEP presented by the LEA is appropriate to meet the Student's educational needs.
3. Conclusion of Law No. 5 is deleted in its entirety. Subsequent conclusions are re-numbered to reflect this deletion.
4. Orders Nos. 3, 5, 6, 7, 8, and 10 are eliminated in their entireties. Orders Nos. 1, 2, and 4 are

amended as indicated below. Order No. 9 is accepted as written, and the orders are re-numbered to reflect the deletions. The IHO's Decision and Order, in its entirety, is modified to read as follows:

- a. Order 1:
The LEA failed to provide the Student with a free appropriate education under issue 2.
The LEA provided the Student a free appropriate public education under issues 1 and 3.
- b. Order 2:
The February, 2002, draft IEP is appropriate to meet Student's educational needs.
- c. Order 3:
The IEP shall eliminate the use of the helmet and wheelchair unless it is later recommended by the case conference committee.
- d. Order 4:
The IEP shall include compensatory services of five days for the December 10, 2001, suspension, and shall consider compensatory education as directed in the December 6, 2001, Order of the Division of Exceptional Learners.

All other Motions not specifically addressed herein are hereby deemed denied.

Date: October 2, 2002

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

Appeal Right

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