BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

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| In the Matter of R.B., and | ) | |
| Bartholomew Consolidated School | ) | |
| Corporation and Bartholomew County Special | ) | |
| Services | ) | |
| | ) | **Article 7 Hearing No. 1290.02** |
| Appeal from the Decision of | ) | |
| Jerry L. Colglazier, Esq., | ) | |
| Independent Hearing Officer | ) | |

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

**Procedural History**

R.B. (hereinafter, the "Student") is a student eligible for special education and related services within the Autism Spectrum Disorder, for which he receives through the Bartholomew County School Corporation and Bartholomew County Special Services (collectively hereinafter, the "School"). The request for this hearing was filed by counsel, on June 4, 2002, on behalf of the Student and his Parents. In the request for the hearing, the Student asserted generally the Individualized Education Program (IEP) offered by the School was not calculated to provide him a free appropriate public education (FAPE) in the least restrictive environment (LRE). More specific disputes included, *inter alia*, a need for continuing the Applied Behavior Analysis (ABA) program; staff training specific to the Student's needs; request for a meaningful opportunity for parental participation in the case conference committee (CCC) decisions; experts' recommendations were essentially ignored; failure to provide a program that meets the Student's needs in the least restrictive environment; and decisions were based on administrative issues rather than the Student's needs.

Jerry L. Colglazier, Esq., was appointed as the Independent Hearing Officer (IHO) on June 6, 2002. The IHO contacted the parties to advise them of his appointment. By order dated June 11, 2002, he set June 13, 2002, for a pre-hearing conference. The pre-hearing conference was held as scheduled. The pre-hearing conference was conducted via telephone. The Student did not attend. The IHO issued a Pre-Hearing Order on June 18, 2002. Hearing dates were established. A date was established for the exchange of witness and exhibit lists. Witnesses at the hearing were to be separated. The parties were also advised of their other due process rights, including the right to compel the attendance of a witness.

The Parties moved for an Extension of Time for the conduct of the hearing and the issuance of the decision, which was granted by the IHO on June 18, 2002.

The IHO, by the Pre-Hearing Order dated June 18, 2002, ordered counsel for the Student to develop specific issues for consideration in this matter and to do so by June 23, 2002. The issues for hearing were submitted by Student's counsel in a letter dated June 20, 2002, and agreed to by counsel for the School through letter dated June 21, 2002.

The Student, by motion dated July 10, 2002, requested a continuance of the hearing. The School did not object to the continuance. The IHO, on July 10, 2002, granted the Student's request for a continuance.

The hearing eventually required six (6) days. Pursuant to IHO's letter of July 25, 2002, the dates for hearing were set for August 20, 21, and 22, September 4, 5, 6 with a *caveat* that should the Student's counsel not be able to reschedule a court conflict on September 6, 2002, the September session would begin September 3. The Student's counsel advised his September 6 conflict was not resolved and acknowledged the September session would need to begin on September 3. The School's counsel responded that the local director of special education had a conflict on September 3. The IHO recollected that the conflict of the local director was previously discussed, and it was nevertheless agreed that if the September 6 conflict could not be changed, the hearing would revert to September 3 as originally agreed. Therefore, the IHO, by Order dated August 10, 2002, advised the parties that preference would be to begin the September session on September 3. Per the IHO's letter of July 25, 2002, *supra*, the rescheduling of the hearing required an extension of time for briefing prior to issuance of the decision. The date for issuance of the decision was extended to October 28, 2002.

The hearing was conducted over the following dates: August 20, August 21, August 22, September 3, September 4, and September 5, 2002. Per the order entered on record September 5, 2002[1], the IHO issued revised transcript, briefing, and decision dates. Per order entered December 1, 2002,[2] the IHO issued an extension of time to prepare briefs and issue a decision because the court reporter became ill and was unable to complete the transcript. The IHO's written decision date was extended to February 15, 2003, while the date for simultaneous exchange of briefs was extended to January 15, 2003. The School moved, per letter dated January 8, 2003, for an extension to file Post-Hearing Briefs. The Student had no objection to the School's request for extension. The IHO granted the extension on February 5, 2003. The new date for submission of Briefs was extended to January 22, 2003, and the date for the Decision was extended to February 22, 2003. The IHO was unable to complete the decision by that date, but the parties agreed to an extension. The date for Decision was extended to March 10, 2003. The IHO issued his written decision on March 10, 2003.

The three (3) primary issues for hearing were delineated by the IHO as follows:

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[1]The IHO's Report On Status Order On Transcript, Briefing, And Decision Dates was entered of record September 5, 2002, and prepared September 20, 2002 with no further explanation detailing the significance of the two dates.

[2]The IHO's Order On Extension Of Time For Briefing And Decision was entered December 1, 2002, and prepared December 5, 2002 with no further explanation detailing the significance of the two dates.

1. What are student's continuing rights of pendency and stay put under statute, regulation, decisional law and the express written settlement agreement between the parties?[3]

2. Under a Rowley/Burlington/Carter[4] analysis, does the evidence show that the School, procedurally and/or substantively, failed to offer student an IEP which was appropriately tailored to meet student's unique educational needs, i.e., offering student a FAPE within student's LRE?

3. To the extent that the evidence demonstrates that the School failed, either procedurally or substantively (or both) to offer student a FAPE in his LRE, does the evidence show that the educational program and components student currently is receiving are appropriate for student?

The IHO also identified six (6) sub-issues for hearing:

1. In offering an IEP for the 2002-2003 school year, did the School impermissibly exalt the concept of least restrictive environment over the threshold and paramount requirement of "appropriateness"?

2. Is there evidence that the School impermissibly predetermined, as a *fait accomplis*, student's IEP for the 2002-2003 school year before student's IEP meeting took place?
3 Was the student's IEP developed and fixed by the School without parental participation and input from the student's professional experts?

4. Is there evidence that, in framing the student's proposed IEP for the 2002-2003 school year, the School failed to properly take into account the student's demonstrable resistance to "transition" and the fact that Congress has expressly recognized in the implementing regulations defining "autism" that children with autism spectrum disorders can be expected to have great difficulty and resistance transitioning between new environments and settings?

5. Was the IEP proposed by the School framed to meet the School's administrative or fiscal convenience rather than student's individual needs?

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[3] This issue was resolved by the parties prior to the hearing. Accordingly, it was withdrawn.

[4] The IHO's references are to three U.S. Supreme Court cases that have an impact on special education. These are Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), the seminal case on FAPE; Sch. Comm. of Burlington v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985); and Florence Co. Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993). Burlington and Carter are chiefly concerned with reimbursement where FAPE had not been provided.

6. Did anyone on behalf of the School communicate to the School's expert witness, prior to performing his evaluation, what educational components, program and placement the district intended to offer the Student at the May 17, 2002, IEP meeting?

**IHO's Written Decision**

Both parties were represented by counsel throughout the proceedings. The IHO attended to each motion and objection, ruling accordingly. The IHO, based on the evidence and testimony of record, determined forty-one (41) Findings of Fact, which are reproduced in relevant part below, with slight amendments for continuity purposes:

3. The Student is seven years of age (date of birth: March 28, 1996), and continues as a half-day kindergarten student supplemented by the in-home Applied Verbal Behavior (AVB) program. (See *infra*.)

4. The Student was referred for special education consideration at approximately two years of age through First Steps[5] because of concerns with developmental delay and speech delay. The School Occupational Therapist suggested that parents pursue a diagnosis and evaluation for Autism.

5. The Student was evaluated August 4, 1998 (chronological age 2 years, 4 months), by Indiana University Hospitals, Riley Child Development Center, and found to have "sufficient behaviors" for a diagnosis of Autism. Features were delayed language, limited gestural language, poor eye contact, stereotyped behaviors (rocking), preference for parts of objects (wheels), lack of play skills, lack of interest in adults or peers, abnormal comfort seeking, and severe language delay.
Recommendations included, in part, First Steps' services, speech language therapy two times per week for 30-minute sessions, continued use of augmentative and alternative means of communications with the same techniques at home, transition to Early Childhood Special Education at age 3, and to consider participating in a developmental preschool program in addition to regular preschool.
LEA Ex. 1-A, p. 1-10.

6. The School evaluated the Student, pursuant to parental referral and consent, on April 2, 1999, and Student was determined to be a good candidate for early childhood special education. A case conference was convened April 9, 1999, and the Student was determined to be eligible for special education with a primary disability of Autism and secondary disability of Communication Disorder.

   The case conference committee noted communication and social/behavior needs continue to be priorities. The IEP provided for special education and related services in communication, socialization, language, self help, and cognitive skills to address significant developmental delay.

   The Student would attend early childhood services three days per week, receive speech/language

[5] "First Steps" is a provider of early intervention services to children with disabilities under three (3) years of age.

therapy two times per week for 30 minutes per session, and receive occupational therapy one time per week for 30 minutes.
LEA Ex. 1-G, p. 27-35.

7. The Parent unilaterally recruited Janet Rumple in February 2000 (hereinafter "Rumple") to work with the Student on how to use the restroom. Rumple received training in Applied Behavior Analysis (ABA) at the Princeton Child Development Institute in New Jersey.[6]

8. A case conference was convened 4-27-00. Special Education and related services agreed upon included Early Childhood class 4 times per week, 3 hours 10 minutes per day, speech/language therapy 2 sessions per week, 30 minutes each session, and occupational therapy 1 session per week for 30 minutes. LEA Ex. 2-A, p. 41.

   The IEP noted that to meet the Student's educational needs, the Student "will need individualized programming with small group and individualized instruction. In addition to the classroom teacher, speech therapy and occupational therapy will address communication, self help, sensory, and fine motor needs." LEA EX. 2-A, p. 40.

9. Rumple was not available to the Student during the summer of 2000. The Parent secured trained ABA Aides through Professional Assessments of Indiana (PAI) in Indianapolis. Tr. 887. A PAI Aide provided ABA during the day and went to the preschool with Student. The PAI Consultant oversaw the program and personally observed the Student every two weeks. The Aide and Consultant worked with Student from August 2000 until January 2001.

   Libby Springmeyer (hereinafter "Libby") began working with Student in August 2000. Libby worked with Student at his home in the evenings, and observed PAI personnel to learn more about ABA as

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[6] The Board of Special Education Appeals (BSEA) initially discussed variations of the ABA program in **Article 7 Hearing No. 1055.98** (*In the Matter of A.S. and the Richmond Community School Corporation*). In a footnote to that decision, the BSEA wrote: A "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).

Libby did not have ABA training or experience.
Tr. 887-888, 201-203.

10. A case conference convened August 21, 2000, to revise the IEP following involvement of PAI with the Student's home program. Because of the involvement of the PAI home program, occupational therapy and fine motor skills services through the School were eliminated.
LEA Ex. 3-A, p. 64-74.

11. A case conference convened September 20, 2000, to develop an Application for Alternative Services. The Application indicated the Student displayed significant difficulty in five major behavioral areas preventing him from learning in the school and home. The areas of significant concern included fecal smearing, temper tantrums, physical aggression, self-injurious behaviors and safety issues. The Application was submitted to the Indiana Department of Education requesting approval for funding for the program being provided by PAI. LEA Ex. 3-C.

    The Department of Education denied the request by letter dated October 13, 2000, for alternative services in the Student's home program, stating "It does not appear that the severe behaviors described in the application are now occurring at school, and the student is not at risk for residential placement for educational reasons," and, "There is not evidence that the school has utilized its available resources, such as longer school hours than 12.5 hours per week and one-on-one assistance, prior to requesting additional funding from DOE."
    LEA Ex. 3-J, p. 136.

12. The case conference reconvened November 27, 2000. The committee noted that: "(Student) will need individualized programming with small group and individualized instruction. (Student's) level of success will be commensurate with the amount of one on one assistance and behavioral intervention. (Student) is in need of a full time aide to provide necessary assistance. . . . Assistant will be provided training in methodologies commensurate with (Student's) needs to meet the established goals and objectives."
    LEA Ex. 3-K, p. 137-160, at 139.

    Parent did not agree to the proposed IEP and filed a dissenting report along with proposed additions. Parent stated that the "treatment team at school will be unable to successfully meet his IEP goals and objectives because they have not received ABA training and (Student) would need 1:1 attention throughout his entire day." Parent proposal included modification of goals and objectives to include participation in structured one-on-one teaching sessions 8 hours per day, five days per week by Professional Assessments of Indiana. Parent further expressed concern that services are not coordinated and collaborative enough to maintain the level of consistency necessary to provide Student educational benefit.
    LEA Ex. 3-K, p. 156-159.

13. A Student Progress Report was issued for the 2nd grading period dated January 10, 2001, completed by School's teacher of record. The Progress Report addressed progress in self help skills, gross motor skills, fine motor skills, social skills, language skills, and pre-academic skills. Under self help toilet skills, the rate of accomplishment was 70% of time. Using utensils to eat and sit at table demonstrated skill at 90% of time. Gross motor at appropriate play on playground equipment listed demonstrated skill 75% of time. Fine motor skill in pre-academic, self help and leisure play was demonstrated at

75% consistency. Social skills in appropriate play was demonstrated at 50% skill level. Appropriate classroom behavior was demonstrated at 76% with the assistance of his aide (Melanie). Cognitive pre-academic skills were demonstrated at 50%. Language skills were not rated in the progress report.
LEA Ex. 3-L, p. 161-163.

14. The case conference reconvened January 12, 2001. The committee recommended early childhood classes of four full days, 27 hours per week, speech/language of two 30-minute sessions weekly, and occupational therapy consultation as needed. Extended school year was recommended. Individualized programming with small group and individual instruction with a full-time aide were recommended. The Aide and early childhood team would be provided Discrete Trial Training.
LEA Ex. 3-M, p. 180-182.

Parent rejected the proposed programming as inappropriate. Parent's proposed alternatives included one-to-one teaching sessions daily; 3 hours before school with trained ABA aide provided by PAI; 2 hours 55 minutes Monday through Friday attending school with LEA [sic] with ABA Aide from PAI; 2 hours after school transition from school to home with ABA PAI; 6 hour one-on-one home program on Friday.
LEA Ex. 3-M, p. 184-189.

15. Student was re-evaluated by the Riley Child Development Center on January 16, 2001 "for assistance with program planning." The report noted Student attends developmental preschool with a full-time aide paid by the parent; speech/language therapy was in a group setting at pre-language skill level; discrete trial training services of 40-60 hours per week at home with discrete training beginning August 2000. The Evaluator noted Student has made improvements since last evaluation, including increased vocalizations, ability to follow some verbal commands, and ability to make requests. The Evaluator stated that Parents were "specifically interested in using discrete trial training" because "they feel their records document it has been the most effective approach" for Student. The Evaluator recommended a discrete trial approach should be considered "as a component of his treatment."

The August 4, 1998 evaluation (chronological age 2 years, 4 months) at Riley noted the following: 5-21-98 Columbus Regional Hospital speech/language evaluation of Receptive-Expressive Emergent Language (REEL) resulted in an age equivalent of 7-8 months for auditory comprehension, and expressive skills at the 4-5 month level. Riley test results of motor skills were at a 21-month level with demonstrated gross motor skills at 2 ½ to 3-year level during play. Cognitive and speech findings were assessed overall at just over an 11- month level with skills within the summary scores ranging from age-appropriate gross motor skills to significantly delayed language and socialization skills.

The January 16, 2001 evaluation (chronological age 4 years, 11 months) at Riley did not relate age equivalents, but under diagnosis/clinical impressions, noted that Student "has made improvements since the last evaluation, which include increased vocalizations, ability to follow some verbal commands, and ability to make requests.
LEA EX. 1-A, p. 1-10, 3-N, p. 190-196, P. Ex. 40, p.1011-1014.

The Riley Clinical Psychologist did not discuss or provide a comparison of age equivalencies during

her hearing testimony, but did state that she believed the ABA interventions were "very appropriate" and that she observed improvements in eye contact, attention span, vocalization and use of words, and that she "was very excited that he was able to attain some of these skills."
Tr. 661-665, at p.664.

16. Janet Rumple had now resumed services for Student and began training Aide Libby.
Tr. 202.

17. A case conference reconvened 1-24-01. The proposed IEP recommended placement in early childhood (at prior school – Smith) from January through May 2001, and in a regular elementary classroom (at Richards) from August 2001 through January 2002. No agreement was reached. LEA Ex. 3-O.

18. Parent had filed a Due Process Hearing request, which was pending at the January 24, 2001 conference. Parties resolved the due process matter by entering into a Settlement Agreement dated February 20, 2001, which included the services recommended in the January 24, 2001 IEP. The due process settlement agreement provided for 3 hours one-to-one ABA services at home in the mornings, 2 hours 55 minutes of ABA services at school which would include two 30-minute speech therapy sessions per week, and then 2 hours of one-to-one ABA services at home after school. In addition, 6 hours of ABA services would be provided at the home on Friday. The same hours would be provided in the summer except all services would be at home. The School would hire a consultant, Janet Rumple, to train Aides to be employed by the School to serve as the ABA one-to-one Aides. The School would pay the Student's attorney fees and consultant fees from June 2000.
LEA Ex. 3-P, p. 232-236.

19. Pursuant to the Due Process Settlement Agreement, the School entered into a service contract with Janet Rumple from 1-25-01 through 1-25-02. Total hours for services were not to exceed 470 and costs not to exceed $50,000.00.
LEA Ex 3-P, p. 228.

Contracts were entered into with Libby and Sara as the one-to-one ABA-trained Aides for services at school and home. Total hours were to be divided between Libby and Sara at their discretion not to exceed 38 hours per week.
LEA Ex. 3-P, p. 229.

In addition to these services, the settlement agreement provided for ABA training to be provided to the Smith Elementary early childhood teachers. LEA Ex. 3-P, p. 235.

An Agreed Judgment was entered in the Marion County Superior Court on March 16, 2002, for payment by the School to Student/Parent of $64,085.50 consisting of $839.92 for school supplies, $7,924.95 for attorney fees, and $55,320.63 for outstanding bills of vendors who provided educational services to Student from June 2000 to March 16, 2001.
LEA Ex. 3-P, p. 231.

20. Janet and Libby were working with Student in February 2001 when Sara was retained. Sara did not

have any ABA training and did not have experience working with autistic children. Tr. 38, 144, 154, 179. The ABA Therapists currently working with Student are Libby and Sara.

Sara is an undergraduate student in elementary education, and a minor in psychology. She testified at hearing of receiving "several hundred hours" (Tr. 33-34) of training with Dr. Carl Sundberg focusing on individualized interventions to assist Student to learn and communicate. In addition, she received "hundreds of hours" with Janet Rumple (Tr. 38), and attended four "intensive" sessions from Dr. Vincent Carbone who lectures on the Applied Verbal Behavior (AVB) variant of Applied Behavior Analysis (ABA). Tr. 30.

The record does not reflect that Sara has received any training for working with autistic children other than from experts specializing in the ABA or AVB methodologies. In addition, the record does not reflect that Sara has received any training in autistic methodologies other than ABA and AVB.

21. Libby is an undergraduate student in psychology. Libby had limited if any training when she began working with Student in August 2000. Tr. 201-202. Libby has received over 300 hours training from Dr. Sundberg, Dr. Carbone, Dr. McGreevy, and Dr. Mulick. Tr. 193-195.
The training in autism were in the ABA and AVB methodologies. The record does not reflect that Libby has received any training in autistic methodologies other than ABA and AVB.

22. With the decline in the hours available by Janet Rumple because of other personal and professional commitments, the Parents retained the services of Dr. Carl Sundberg to work with Student in June 2001. Dr. Sundberg began using the Assessment of Basic Language and Learning Skills (ABLLS) curriculum with Student. The ABLLS has 26 skill sets with each skill set broken down into approximately 10 to 52 steps. Tr. 348. The goal is not to teach every skill but to teach a child how to learn from every day experience. Tr. 348.

Student was at the approximate mastery level of 10% at his initiation into the program and had developed to approximately 30% level at the time of the hearing. Tr. 352. These skills are "basic rudimentary, the foundation skills." "He doesn't have a whole lot of skills yet that are functional kid skills, social skills, conversational skills." Tr. 353-354. Dr. Sundberg estimated an approximate skill level of 70% would be applicable and recommended for kindergarten entry. Tr. 352. He further stated that approximately half way through ABLLS, you "start seeing kids learning things on their own." Tr. 352.

23. Dr. Sundberg worked with Janet Rumple for approximately three months in the summer of 2001 to transition Student's program from ABA to AVB. Rumple continued to oversee the program, and arranged training for School personnel, including Nancy Conner, the School Autism Coordinator; Sandi Owens, the School speech therapist; and the School occupational therapist, Sheri Dewar.

Dr. Sundberg discussed the "difference in language terms" between the technique that Janet used and what he was doing as "I guess the best way that I can describe it is that they're both behavior analysis, they're both ABA, and as far as I know, the principles in behavior analysis as far as procedures, 80 percent is the same. There are ten or so subtle differences, little things."

Tr. 442-443.

Dr. Sundberg stated that AVB is more directed to breaking down the functional aspects of language, includes a focus to eliminate careless learning to try not to permit the student to make mistakes, and creates a positive rather than an adversive learning situation. Tr. 443-444.

24. In July 2001 the parties began corresponding to arrange a case conference, which was held August 13, 2001, to transition the student from early childhood to kindergarten. The School proposed transition from the early childhood classroom at Smith Elementary to a half-day kindergarten at Smith Elementary. The transition proposal was for attendance the full half-day by the end of the first semester. Parent left the conference with the proposal under advisement. Tr. 494-495, 891-892. By letter of August 15, 2001, Parent declined the Smith Elementary program and chose enrollment at Richards Elementary. LEA Ex. 4-L, p. 321.

    The School noted in a letter to the Parent of August 20, 2001, that the August 15th case conference participants, including Janet, Libby and Sara, were in concurrence with the initial early childhood program at Smith with "gradual integration" into kindergarten at Smith.
    LEA Ex. 4-M, p. 323.

    There was no preparation for the kindergarten teacher at Richards prior to the Student's arrival August 21, 2001 with his Aides. The classroom consisted of 21 students, one teacher, and one teaching assistant in addition to Student's Aides.

25. Parties next met in case conference October 26, 2001. Additional goals and objectives were proposed by Janet Rumple and were accepted. The comments from the conference notes indicated "Per parent request, services from the special education learning resource teacher was denied and the teacher of record's role is observation only." The notes report "The teaching Assistants (Libby and Sara), Janet Rumple, and the speech and language pathologist will implement the goals and objectives. Progress on goals and objectives will be reported by Janet Rumple and the speech and language pathologist." The kindergarten teacher, who attended the conference, was left out of IEP implementation and reporting.
    LEA Ex. 4-DD, p.399.

26. As the Student's three year re-evaluation was due April 2002, evaluations were initiated pursuant to a case conference agreement of December 17, 2001, to continue the current program and begin the evaluations. The Vineland Adaptive Behavior Scale completed by Parent rated Student in the low range in all areas when compared to same-aged peers. Speech and language assessment scores were lowest in pragmatics (how the child uses language to communicate with others) with an age equivalent score of 6-9 months. Interaction between child and care giver, 15-18 months. Gestures, 18-21 months. Play, 15-18 months. Language comprehension, 9-12 months. Language expression, 9-12 month.
    LEA Ex. 4-RR, p. 532.

    Occupational therapy evaluations using the Peabody Developmental Motor Skill, Second Edition,

resulted in scores in the 1st percentile for fine motor skills with an age equivalent of 37 months for grasping and 36 months for visual motor integration. Student also had difficulty utilizing both upper and lower extremities at the same time.
LEA Ex. 4-SS, p. 552-554.

27. Additional evaluations were conducted by outside evaluators hired by the School and the Parent. School evaluators included Dr. John Umbreit, an Applied Behavior Analysis Expert and Professor of Special Education at the University of Arizona, and Claire Thorsen, an Indiana Autism practitioner with school associations and employment. The Parents obtained evaluations from Dr. James Mulick, Professor of Pediatrics and Psychology with The Ohio State University and the Children's Hospital of Columbus, Ohio. Dr. Mulick is an autism expert specializing in ABA. Dr. Carl Sundberg also evaluated the Student.

28. Dr. Umbreit reviewed records provided by the School, conducted observations of the Student at the home and school programs, and conducted interviews with Parent/Mother, an Aide, the kindergarten teacher, the speech/language pathologist, the occupational therapist, a resource special education teacher, and, the School's autism coordinator. The evaluation was in January 2002.

    Dr. Umbreit prepared a report with 8 recommendations:

    1. Student's entire program and IEP should concentrate on teaching him functional skills through the use of age-appropriate activities and materials. Teaching functional skills wherein Student could operate as independently as possible and improve his quality of life. Areas that should be addressed include communication, self care, fine motor skills, and pre-academic skills.

    2. Student should attend Richard Elementary kindergarten program both in the morning and afternoon.

    3. Student should have an instructional aide for most of the school day.

    4. Whenever possible, the functional skills should be embedded within typical activities that are provided to other students in his general education class. Specialist should teach the Aide and school staff how to embed curricular goals into typical activities.

    5. Participate in the general class activities whenever possible. When the class is working on material providing little benefit to student, the Aides should shift to an area within the class room to receive direct instruction of material appropriate for him.

    6. The school district should hire a consultant to provide training on the development of verbal behavior skills in young children with autism. The current curricular emphasis on the development of verbal behavior skills may be very appropriate and the consultant would contribute by teaching staff about verbal behavior approach and instructional methods.

7. Instruction should be provided in ways that facilitate skill generalization.

8. The reinforcement program should emphasize the use of secondary reinforcers and an appropriate reinforcement schedule as primary reinforcement appear over used.
LEA Ex.4-VV, p. 558-560; LEA Ex 4-RRR, p. 651-655.

29. Claire Thorsen observed the Student in the classroom and in the home in February 2002. Ms. Thorsen presented a series of recommendations for the classroom and home for establishment of goals and objectives, peer interaction, ABA instruction, reinforcements, increasing verbal, vocalization, signing and communication skills, and behavioral changes.
LEA. Ex 4-ZZ, p. 588-598.

30. Dr. Mulick observed the Student in the school and home setting in December 2001. Dr. Mulick concluded the home program and classroom program were appropriate and of benefit to Student, and stated that "there is no programmatic or instructional reason to change any program element." Recommendations also included keeping current staff in place, continue the AVB and ABLLS curriculum, extended school year, and emphasis in vocabulary and fluency in the ABA program.
LEA Ex. 4-BBB, p. 608-609.

31. Dr. Mulick testified at hearing of his expectations for the Student. Dr. Mulick stated that "At this point in my expectations are extremely guarded for (Student). He is now six and a half. As of the last psychometric evaluation his language was minimal. . . . I have not been able to examine his rate of progress in the ABLLS curriculum but I suspect that even if I were I would still be able to exam [sic] that I would still be guarded still. I haven't heard that he is able to carry on conversation or answer questions directly.

"I have heard in this hearing that receptive lags behind his expressive and so he may not understand even what he's saying. And that suggests that short of very rapid increase in language learning he will have a significant language deficit for life, probably functioning within the mentally retarded range as well." Tr.1046-1047.
Dr. Mulick further testified concerning his report, which stated that half-day kindergarten was currently appropriate, and his present (at hearing) discussion of the appropriateness of the half-day program by stating:

> "I now believe that he needs probably less inclusion and more individualized instruction regardless of the setting in which it takes place. In part, I was attempting to join the parents or respect the parent's wishes to negotiate and compromise with the school. And inclusion services were needed for socialization. And they do provide access to a setting which is appropriate for learning some social skills. And so tho [sic] that extent they are appropriate. What I left . . . unclear was my reservation that should have been derived from the observation in the early section of the report that he was just not engaged when I looked at him in the classroom." . Tr. 1048

Dr. Mulick stated that ABA-trained Aides generally come from college students or graduates, but "I

have actually suggested that . . . responsible high school seniors or high school graduates could be used in such a program." Tr. 1053.

"In other words, a two or three-day workshop consisting of information about autism, information about behavior modification and introduction to the methodologies that will be used to document and assess the child's responsive treatment in a three-day training ." Tr. 1054.

In discussing the amount of training and whether it would be "unusual" for an ABA Aide to have three to five hundred hours of training, Dr. Mulick stated:

> "When they start it is usual they have however much college that they have completed which may or may not be relevant at all. They tend to be recruited . . . from psychology, speech pathology, OT majors. So, they might have relevant training there. But behavior modification courses are not that available in most colleges and universities. . . . So, the training that they get will be how to implement fairly simple procedures that will be used directly with the child. Now, everyone would prefer a more experienced tutor." Tr. 1054-1055.

32. There was conflicting testimony at the hearing relative to the "documents" Dr. Umbreit had during the home visit in January 2002. Parent/Mother classified the notes as a prepared IEP of what the School was going to offer, and that she had asked for a copy of the IEP which Dr. Umbreit declined to provide. The School denied any IEP was prepared for the Umbreit home/school review and evaluation.

    Dr. Umbreit stated that what the Parent requested was a copy of his notes written on the back of "potential goals and activities and measures," and that "it wasn't an IEP". Dr. Umbreit stated in an e-mail (undated) to Conner [school's autism coordinator] confirming his arrival January 26, 2002, that he wanted to see Student at school on Thursday morning and at home in the afternoon. He further stated, "If you want to meet later Thursday, that's fine. Friday morning works too. While there, I'll need to talk with you and interview each staff member who (a) works with (Student), (b) would work with him in the proposed IEP, or (c) even contributed to the IEP." P. Ex 47, p. 1221. The document does not identify what IEP is referenced.

    An undated memo from Nancy Conner to "Team Players" is in the Parent Exhibits at P. Ex. 47, p. 1230. The exhibit is with February March 2002 material. The document references the 3-year re-evaluation reports which were completed in early 2002 and states no conference dates had been set. The document states:

> "Our next move is to generate functional goals and objectives from (Student's) present level of performance. Please review goals and objectives written for December – many of these are still appropriate, but all of you need to be comfortable with the presented goals/objectives. . . . I met with Dr. Sundberg and he will be recommending goals and objectives based on the ABLLS. I have asked to have those before the conference, BUT there is no guarantee that this request will occur. THUS – we need to proceed by coming up with goals and objectives that we feel will be appropriate for (Student).

"Since we are almost into March – we need to consider what we think would be good programming for (Student) for the next school year. Full day Kindergarten. Two half day kindergartens. At this point I don't think anyone is thinking first grade???? I have no idea at what point we will go to conference, but we need to be ready. . . . Within a couple weeks we should meet as a team to see what we have come up with."

33. Dr. Sundberg began working with Student in June 2001. Parent testified at hearing that he was paid, by Parent, $125 per hour and that she had paid him approximately $33,000.00.

34. The LEA corresponded with Dr. Sundberg on several occasions by e-mail.
a. December 17, 2001, from Nancy Conner, Autism Coordinator, provided in part:
"(Parent) has requested you (Sundberg) oversee (student's) program in the schools. I have told Dr. Van Horn (special ed director) about the verbal behavior approach. After attending Dr. Partington's and Dr. McGreevy's workshops and reading Teaching Language book, I see many possibilities in the approach. Although you will be working directly with Sara and Libby in helping (Student), one of our main goals is to assist (Student) in using his skills across people, materials, and settings. I know that you have worked with educational facilities and we are interested in what we can do to help. Sandy Owens, the SLP, is open to suggestions. Dr. Van Horn would like for me to work with you in order to be able to coordinate (Student's) program locally. Please let me know how I can facilitate."
P. Ex. 47, p. 1215.

b. January 2, 2002 from Conner:
"I sent the following message on Dec 17th and am unsure if you received it. Could you please let me know if you received it—if not I will re-check my email address?"

c. Dr. Sundberg responded January 3, 2002 expressing he was happy the School was interested in the verbal behavior methods, that Student had learned a lot in the past 6 months, but has a long way to go, and a meeting in January 25-26 in Columbus would be okay.
P. Ex. 47, p. 1219.

d. January 24, 2002 Sundberg to Conner. "Sorry for this late notice, I have been trying to figure a good time with (Parent/Mother) to meet with you. As it turns out (Mother) has a full agenda set up for this trip. Perhaps we could correspond more over email. Please let me know if you have any specific questions. I hope to find out more this trip." P. Ex 47, p. 1219.

Conner responded the same date advising "many of the school staff will be attending the 3 day Carbone conference in March and hope to learn even more about the verbal approach. We would like to work with you more cooperatively and would like for (Student) to be able to work with more school staff so that he can generalize skills across people, materials, and settings. The speech therapist would like to be able to do more than what she is allowed to do. We are more than willing to work with you in any way that we can."
P. Ex. 47, p. 1225.

e. January 30, 2001 from Conner. "I was sorry that we were unable to meet to discuss (Student's) program on your last visit. I trust your visit went well. As a school team, we feel it would be beneficial for us to meet with you regarding (Student's) programming before his upcoming case conference on February 18th. We are willing to pay your expenses to come meet with us or if preferable, I could come to Michigan. We are interested in knowing your views on the schools' role in (Student's) programming. . . . We would also like to include the ABLLS in the information on his 3 year re-evaluation since it would accurately describe (Student's) current level of performance."
P. Ex. 47, p. 1226.

f. February 3, 2002 from Conner. "We would like for as many staff that might be working with (Student) to be present. . . . Yes, the meeting has been cancelled and we are working on a new date. Looking forward to hearing from you or (Mother) on the time."
P. Ex. 47, 1229.

g. February 11, 2002 from Van Horn. "My name is George Van Horn and I am the director of special education with (the School). You are presently working with one of our students and set up an initial meeting with Nancy Conner on February 18. I want to thank you for taking the time to begin the development of a collaborative relationship with the school by meeting with Nancy on the 18th. I think that meeting is a good beginning to a possible future working relationship. In addition to that meeting, I would like to arrange a date when you can spend a full day with the school staff. The purposes of that day would be to provide the school staff some information on verbal behavior skills and also spend some time specifically talking about the student you are currently working with. As we look toward the possibility of working with you on an ongoing basis, I would like for you and the school staff to get to know each other. Through the development of a collaborative relationship it can better be determined how we can incorporate your recommendations into the school program if appropriate. I look forward hearing from you."
P. Ex 47, p. 118.

35. Dr. Sundberg testified at the hearing that there were no meetings conducted with the School.
Tr. 443.

36. Parties met in case conference on May 20, 2002. Attending the conference representing the School were George Van Horn, Special Education Director; Ercell Cody, Principal; Nancy Conner, teacher of record and autism coordinator; Christie Shaff, special education teacher; Arlene Cooper, general education kindergarten teacher; Parents (Mother and Father); Kathy Wippert, Psychologist; Sheri Dewar, Occupational Therapist, Dr. Carl Sundberg; personal Teaching Aides Libby Springmeyer and Sara Miller; and Attorneys, Doreen Philpot, Gary Mayerson, Christina Thiverge, and Margaret Bannon Miller.
LEA Ex. 4-SSS, p. 659.

The IEP case conference documents reflect detailed discussion of present levels of educational performance and proposed goals and objectives for the 2002-2003 school year. The record reflects the goals and objectives were formulated with input from all participants. Dr. Sundberg testified that the goals and objectives were a blend and "We came off with a good package of goals that we all

agreed upon . . . . (and) I was satisfied with the goals, yes."
Tr. 438.

37. Least Restrictive options that were considered were kindergarten half-day and home program half-day, kindergarten full day, and first day.
LEA Ex. 4-SSS. P. 674.

38. The School proposed placement for the 2002-2003 school year to be kindergarten at Richards Elementary Kindergarten room, Monday through Friday, 8:10 to 2:30. Extended school year was recommended for "15 hours weekly programming at Student's home with his present teaching assistants (Libby and Sara) under supervision from June 3, 2002 through August 9, 2002. Transitioning to train new teaching assistants for the 2002-2003 school term would occur during this time." Reasons for the selection and ESY are reported at LEA Ex. 4-SSS, p. 674-677.

The proposed programming was participation in full-day kindergarten; participation in all kindergarten activities with support from teaching assistant, special education staff, and kindergarten teacher; learning resource teacher – 60 minutes daily in kindergarten classroom; speech therapy 2 times per week for 30 minutes per session in the speech room and 1 time per week for 30 minutes in the classroom; occupational therapy 2 times per week for 30 minutes per session, 1 session during art and the other session in the kindergarten classroom; teacher of record 40 minutes weekly in kindergarten classroom; and teacher of record minimum of 30 minutes weekly consultation with staff.
LEA Ex. 4-SSS, p. 680

Although the proposed IEP does not so state, the School proposed ABLLS would be the basis of Student's curriculum.

39. The proposed IEP does not contain specifics of transitioning Student from the half-day school, half-day home program. Dr. Sundberg stated that with the full-day, five-day-a-week kindergarten proposal, "To tell the truth I think at that point the meeting ended right there and everybody left."
Tr. 384.

The parties never discussed transitioning as attorneys on both sides indicated that the parties had reached disagreement. Van Horn stated "the reason there were no transitions provided, you folks ended the case conference at that point. . . . . There were no conversations early about transitioning, new staff for old staff or this to that is when that recommendation came up I believe it was you (Attorney Mayerson) said that, 'I think we have a difference of opinion and this conference probably is ended,' and we said, 'Okay.'"
Tr. 293.

40. The primary providers for the Student's program at the half-day kindergarten class at Richards Elementary were Libby and Sara. The kindergarten teacher, who was not experienced in working with autistic children, testified that she believed the interactions of the Aides to her in the classroom were unprofessional and inappropriate.

The record does not reflect concerted collaboration of the AVB Aides with school personnel; the working relationship/environment was not positive. In addition, the record reflects that Parent was extremely concerned with the training and knowledge of school staff in autism, and the fact that the school staff did not have ABA training, which concern weighed heavily on the Parent's election to pursue private services involving the ABA/AVB methodology. Pursuant to the Parent's demands, involvement of School personnel with the Student was extremely limited.

41. The School has proposed a program to include the ABLLS curriculum and to incorporate one-on-one instruction techniques of ABA/AVB.

The Parents advocate a more restrictive environment, including a combination of school and home-based programs.

From these 41 Findings of Fact, the IHO determined 21 Conclusions of Law, restated below in relevant part.

3. The Student is severely impacted by his Autism Spectrum Disorder, which affects communication skills, socialization, and behavior. The Student has experienced gains from his educational environment which includes First Steps, Early Childhood, kindergarten and his home-based ABA/AVB program. Prognosis for the future is guarded with concerns of significant language deficit and mental retardation.

4. Pursuant to the IDEA and implementing Regulations, Free Appropriate Public Education, has been defined by Indiana Article 7 at 511 IAC 7-17-36, in part, as follows:

> "Free appropriate public education means special education and related services that:
> (1) Are provided at public expense, under public supervision and direction, and at no cost to the parent;
> (2) Meet the standards of the state educational agency, including requirements of this article;
> (3) Include early childhood education, elementary education, or secondary education;
> (4) Are provided in conformity with an individualized education program that meets the requirements of this article;
> (5) Are provided to ensure students identified as eligible for special education and related services under this article have an equal opportunity to participate in activities and services available to all other students."

5. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court held that schools meet the requirement of providing a FAPE by providing a handicapped child personalized instruction with sufficient support services to permit the child to receive "educational benefit." The Court noted that "the intent of the act was more to open the door of public education

to handicapped children on appropriate terms than to guarantee any particular level of education once inside." (Id. at 192).

Pursuant to *Rowley*, there are two basic issues that must be addressed in determining whether a FAPE has been provided:

A. Whether the school complied with the procedural requirements of the IDEA; and
B. Whether the challenged IEP was "reasonably calculated to enable the child to receive educational benefits." (Id. at 206-207).

6. The Issues in this hearing refer to the IEP of May 2002 for the school year 2002-2003.

7. Student's sub-issues one and two revolve around the assertion that the School impermissibly predetermined the student's IEP for the 2002-2003 school year before the May 2002 case conference committee meeting, and was developed without parental participation and input from the student's experts. The allegation apparently initially arose when the Parent/Mother reviewed "notes" and a "document" that Parent/Mother described as an IEP in the possession of Dr. Umbreit in January 2002.

The School and Dr. Umbreit deny the document was an IEP. Umbreit described the document as "potential goals and activities and measures."

Three-year evaluations were prepared in the spring of 2002 after the Umbreit visit. In February-March Nancy Conner issued a memo to the School personnel referencing the evaluations, and "our next move is to generate functional goals and objectives and requesting a review of the December 2001 goals and objectives." She also stated that Dr. Sundberg will be recommending goals and objectives based on the ABLLS, but that there was no guarantee that the request for copies would occur. The memo also requested consideration for a good programming concerning kindergarten. Finally, the document recommended meeting later "to see what we have come up with." Conner testified that in addition to the School staff she sought input from the Parent, Dr. Sundberg, and Janet Rumple.

Dr. Sundberg testified that he brought goals and objectives to the conference and the members went through each of the goals and objectives and developed a blend that all parties agreed upon.

8. It is common for case conference participants to draft proposed IEP's including present levels of performance, and goals and objectives. Here both the School, Parent, and Parent experts had drafts. This is acceptable as long as parties are willing to review, discuss and compromise considering input from all participants.
511 IAC 7-27-4(e) provides:

It is not necessary for a case conference committee to be convened in order for public agency personnel to discuss issues such as teaching methodology, lesson plans, or coordination of service provisions if those issues are not addressed in the student's individualized education program. **Public agency personnel may engage in preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later case conference committee meeting**. (Emphasis added.)

9. There is no evidence of sufficient probative value that the School violated IDEA or Indiana Article 7 in the preparation of a draft IEP prior to the case conference of May 2002.

A violation of the IDEA's procedural provisions is not *per se* a violation of the Act. *Doe v. Metropolitan Nashville Public Schools*, 31 IDELR 181 (M.D. Tenn. 1999). Before an IEP is found invalid on the basis of procedural flaws, "there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990), reh'g and reh'g *en banc* denied (1990), *cert. den.* 499 U.S. 912, 111 S. Ct. 1122 (1991).

10. After the parties agreed upon goals and objectives, the parties were at an impasse at the case conference. The School was proposing a full-day kindergarten program consisting of either a full-day program or two half-day programs. The Parent was proposing continuation of the current program of half-day kindergarten and the continuation of the full home-based ABA/AVB program. Both parties were represented by attorneys who declared an impasse and all discussion terminated.

11. A sub-issue emanating in the hearing was the School's consideration of replacing the two Aides, Libby and Sara. Parents and their experts strongly urge these two assistants continue. The record reflects that the Aides are highly trained, are motivated and extremely dedicated to the Student, and have been a considerable source of the Student's progress.

However, the record also reflects that Libby and Sara's dedication stems from loyalty to the Student, Parent, Parent experts and the specific methodology that the Parent has chosen. The IHO finds and concludes that Libby and Sara either have not been supportive of or demonstrated limited support to the School personnel, have been critical of the School personnel, and have not expressed a willingness to work in collaboration with the School personnel. In addition, the IEP amendments of 10-26-01 further segregated any collaborative working arrangement by limiting School involvement. (See Finding Number 25).

12. Although the experience of Libby and Sara may very well be beneficial to Student, it is well

established that a School has the right to determine whom it will employ unless there is a clearly established need of unusual and unique necessity. See *Chattahoochee County Bd. of Educ. v. Tremaine S.*, 508 EHLR 295 (SEA Ga. 1987); *Tuscaloosa County Brd. Of Educ.*, 27 IDELR 469 (D.C. Minn. 1997); *Freeport Sch. Dist. # 145*, 34 IDELR 104 (SEA Ill. 2000).

Dr. Mulick highly recommended retaining Libby and Sara, but he also described an acquisition and training process that is not burdensome or complicated. In addition, if the school is responsible for the compensation of the Aides, they should have the benefit to employ personnel that may be longer term employees and available to the School as necessary full or part time.

Although it may be in Student's immediate best interest for Libby and Sara to be retained, they will need to include the School in their dedication. The record does not reflect transitioning difficulties changing from PAI to the current aides, or from PAI to Janet Rumple, or the transition to Dr. Sundberg. The record does not reflect the "unique and unusual necessity" as discussed above.

The May 2002 proposed IEP provided for Extended School Year of 15 hours weekly programming in the home with his present teaching assistants under the supervision of the teacher of record from June 3, 2002, through August 9, 2002. Transitioning to train new teaching assistants for the 2002-2003 school term would occur during this time.
LEA Ex. 4-SSS, p. 677.

The Student has been working with Dr. Sundberg who has created the ABA/AVB program and ABLLS curriculum presently in place. The record reflects the School has demonstrated an interest in continuing the AVB approach and to adopt [sic] the ABLLS program to the kindergarten classroom. The School experts stated that the School "should hire a consultant to provide training on the development of verbal skills in young children with autism. The current curricular emphasis on the development of verbal behavior skills may be very appropriate and the consultant would contribute by teaching staff about verbal behavior approach and instructional method."

The School has demonstrated considerable interest in contacting Dr. Sundberg and working with him. Therefore, he would be an excellent candidate for consideration. However, it is noted that Dr. Sundberg has exhibited restraint in working with the School.

Retention of this consultant is again covered by the principle above of the School's right to determine whom it will employ.

13. It is recognized as stated in sub-issue 4 that students with Autism Spectrum Disorder often demonstrate resistance to transition and can be expected to have great difficulty transitioning between new environments and settings.

The Student has been in the half-day kindergarten setting in excess of a year. The record did not reflect great difficulty in the transition to the half-day kindergarten classroom. The opposition to a full-day program stemmed more from the loss of the home-based ABA/AVB program than expressions of concerns of the difficulty in moving from a half-day to full-day program.

14 Transitioning the Student from his current program to a full-day school setting will require planning and collaboration between the parties and will need to be phased in over a reasonable period of time measured by the level of Student's acceptance.

The IEP as proposed by the School at the May 2002 case conference did not contain a transition plan. However, parties and their counsel declared an impasse wherein all further negotiation or consideration by the full case conference team of a transition plan was not available.

Parent cannot allege the School had a predetermined IEP but challenge its sufficiency because it did not contain a transition plan when the parties were at impasse to proceed further.

15. The record reflects that the Student is significantly below his kindergarten peers in areas of cognitive ability, his lack of communication skills, self-help skills and interpersonal relationships. However, the record also reflects that despite these deficiencies, the Student did obtain a degree of educational benefit in the kindergarten setting.

Dr. Mulick, in discussing the receptive language lagging behind expressive language, noted "that short of very rapid increase in language learning he will have a significant language deficit for life, probably functioning within the mentally retarded range as well."

Therefore, it is reasonable to assume that as the Student grows older and his peer classmates gain skills beyond the Student's abilities, he may require a more restrictive environment. However, the record does not reflect that the kindergarten setting is not an appropriate environment at the present time.

Clearly, as the experts testified, there will be a time when the material presented to the general education kindergarten students exceed Student's ability to benefit. However, as hearing experts noted, this creates the opportunity for the direct one-to-one AVB interventions that will be more beneficial to Student.

The proposed placement for school year 2002-2003 is full-day kindergarten in a general

education classroom in the Student's home school with full-time ABA/AVB trained Aides. Placement in a general education classroom with appropriate supports and modifications is preferred unless there is evidence that Student cannot make progress there. The evidence reflects that the half-day kindergarten program was considered appropriate. However, as the School has not had the opportunity to implement a full-day program with appropriate supports and modification (following development of a structured and balanced transition plan), it is not known whether the program is appropriate and the Student will progress. The program will require close scrutiny to determine progress and the need for changes and modifications.

As the half-day kindergarten program was considered appropriate, there can be no finding or conclusion that the full-day regular kindergarten classroom would have to be adapted beyond recognition to fit Student's needs as was found in *D.F. v. Western School Corporation*, 921 F.Supp. 559 (S.D. Ind. 1996).

As noted in the Transcript and Briefs of Counsel, the Student was present in the hearing room on two occasions. The hearing was beyond the Student's ability to generalize his ABA/AVB skills to the hearing setting. However, the Student was not disruptive to the hearing process, and his Mother and Father, his Aides, and other acquaintances present were able to redirect him without incident. Indeed, the only adverse behavior demonstrated was during the break in the hearing where it was discovered the Student had defecated in the back of the hearing room.

16. *Lachman v. Illinois State Bd. Of Educ*., 852 F.2d 290 (7th Cir. 1988), *cert. denied*, 488 U.S. 925, established the right of the School to select the specific program or methodology to provide a FAPE.

Pursuant to the Due Process Settlement Agreement of 2-20-01 and subsequent agreements, the School has 'bought into" the ABA/AVB methodology and the ABLLS curriculum, and it would not be appropriate to change this methodology while progress is demonstrated. The methodology may be appropriately implemented pursuant to the May 2002 proposed IEP following development of the transition plan.

17. Sub-issue 5 questions whether the IEP proposed by the School was framed to meet the School's administrative or fiscal convenience rather than Student's individual needs.

The record reflects that prior to the proposed May 2002 IEP, the School met their financial obligations created by the February 20, 2001 Settlement. The record does not demonstrate any fiscal convenience or financial savings that would result from implementation of the proposed IEP.

18. *J. P. v. West Clark Community Schools*, 230 F. Supp 2d 910 (S. D. Ind. 2002) has been referenced by both counsel in their post-hearing Briefs. Counsel for the Student does not dispute

the holding of *Popson* but urges caution in applying *Popson* to the current issues because of factual contrasts. See Petitioner's Brief at p. 27.

The Court in *Popson* noted:

"Taking financial or staffing concerns into account when formulating an IEP or when providing services is not a violation of the IDEA. A School District is not obligated by law to provide every possible benefit that money can buy. A school district need only provide an "appropriate" education at public expense. Therefore, it may deny requested services or programs that are too costly, so long as the requested services are merely supplemental. *Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 517 (6th Cir. 1984).

"It follows that, in order to state a claim for violation of the IDEA based upon improper consideration of costs, the Popsons first must identify some service that was either essential for J.P. to obtain meaningful benefits from his IEP or else deemed by his Case Conference Committee to be an integral part of his IEP. But which was denied to him because of costs."

230 F. Supp. 2d at 945. As in *Popson*, the services that the parent thought were improperly denied was the entire home-based ABA/AVB methodology. Like *Popson*, the home-based services wanted by the Parent must be the only legitimate methodology to teach Student. There is not sufficient evidence of probative value that the proposal of the School cannot be structured in the school setting.

19. Although the Parent disagreed to the proposed IEP and would not be satisfied with less than the current program including a home-based ABA/AVB component, the IHO is concerned that the School, following the May 2002 conference, did not pursue searching and acquiring potential candidates for the teaching Aide positions or the Autism Consultant recommended by Dr. Umbreit. The School should have recruited candidates, which would have included Libby, Sara, and Dr. Sundberg, among others, and convened a case conference for consideration of the candidates.

20. The School has proposed a program to include the ABLLS curriculum and to incorporate one-on-one instruction techniques of ABA/AVB.

The Parent's advocate a more restrictive environment as the best program for Student. The program proposed by the Parent and supported by their experts "may" be the best program for Student. However, IDEA, Indiana Article 7, and supporting case law do not require the best program or the program the Parent prefers.

The program presented by the School meets the standards of IDEA, Article 7, and relevant case law.

21. Courts and Hearing Officers are not permitted to substitute their views of what may be sound educational policy in lieu of those of the local school officials. Courts and Hearing Officers are to give deference to the School to choose the educational methodology that is appropriate to the Student's needs. The Court or Hearing Officer should only intervene where a preponderance of the evidence is adverse to the School's proposal.

## DECISION AND ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,
**IT IS HEREBY DECIDED, ADJUDGED, AND ORDERED THAT:**

1. Issue One. Pursuant to stipulation by Parties and Counsel, Stay Put was in place during the pendency of this proceeding and this issue was withdrawn from consideration.

2. Issue Two. The IEP proposed in May 2002 was appropriate to meet Student's unique educational needs by providing a FAPE in the Least Restrictive Environment. Although the Parent rejected the proposed IEP, the School should have proceeded to develop a transition plan and initiated a search for prospective Teaching Aides and Autism Consultant as suggested by Dr. Umbreit, and presented the proposal to Parent for consideration at a subsequent conference. However, this lapse did not render the proposed IEP inappropriate.

3. Issue Three. As the ruling in Issue Two is adverse to the Parent, it is not necessary to determine the appropriateness of the home-based program.

4. Sub-Issue One. The May 2002 IEP proposal was appropriate in regards to Least Restrictive Environment.

5. Sub-Issue Two. The preponderance of the evidence supports that the School developed the May 2002 IEP in accordance with IDEA, Article 7, and Court decisions.

6. Sub-Issue Three. The May 2002 case conference was attended by Parents and Parent experts with input from them in developing the IEP with the exception of placement and services that were offered.

7. Sub-Issue Four. The record reflects the history of transitioning of the Student. The IEP for school year 2002-2003 provided transitioning over the summer and for transition of teaching assistants. The IEP did not contain an appropriate transition plan. However, the Parent's position of demanding nothing less than the status quo preempts any claim for relief on this issue.

8. Sub-Issue Five. The IEP was not framed to meet the School's administrative or fiscal convenience

rather than the Student's needs.

9. Sub-Issue Six. Because of the efforts of the School to prepare goals, objectives, and consider placement options, including seeking recommendations for the Parent and Parent Expert, and the development of the goals and objectives at the May 2002 conference, there is not sufficient probative evidence to support a finding or conclusion that the School communicated to its experts the components that the School intended to offer Student.

10. Parties shall immediately convene a case conference to develop the implementation of the May 2002 IEP, which may include amendments as deemed necessary following consideration of the Students present level of performance, the appropriateness of the goals and objectives, and any amendments or modifications as may be appropriate.

    Six months have elapsed since the conclusion of the hearing. Assuming the same personnel are involved, the team for transitioning the ABLLS curriculum with ABA/AVB components to the classroom and training of one-to-one aides (if determined necessary) and the School personnel should include Dr. Sundberg and Janet Rumple as may be required and subject to their availability.

    The IEP should include specific transition for the remainder of the school year, which will include extended school year. The case conference should reconvene in May 2003 to discuss amendments necessary for implementation in the 2003-2004 school year.

The IHO provided the parties with a comprehensive statement of their administrative appeal rights.

## APPEAL TO THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The Student, pursuant to 511 IAC 7-30-4(i), timely filed his Petition for Review on April 7, 2003. On April 9, 2003, the School requested an extension of time to file a response. On April 10, 2003, the BSEA granted the request for extension, granting the school until the close of business on April 28, 2003, to file its Response. The School timely submitted their response on April 28, 2003.

The parties were notified on April 14, 2003, that a member of the BSEA was formerly employed by the Respondent school district. The parties were advised that any objection to the BSEA member participating in the review would result in a recusal. The parties were further advised should a recusal occur, the State Superintendent of Public Instruction may designate a person to sit in place of the BSEA member. The parties were also provided with an objection deadline of April 25, 2003. Pursuant to letter dated April 23, 2003, the Parent requested the BSEA member recuse himself. The parties were informed on April 30, 2003, that the BSEA member recused himself from participation in the review. The State Superintendent of Public Instruction designated Rolf W. Daniel, Ph.D., an Independent Hearing Officer, to serve in place of the BSEA member.

The complete record from the hearing was photocopied and provided to the BSEA members on April 15, 2003. Dr. Daniel was provided a photocopy of the complete record on May 2, 2003.

The BSEA, on May 9, 2003, notified the parties it would review this matter without oral argument and without the presence of the parties. Review was set for May 27, 2003, in the State House offices of the Indiana Department of Education.

**Petition for Review**

The Student, in his Petition for Review, alleged generally the IHO did not consider substantial evidence favorable to the Student and applied erroneous and inapplicable legal standards, amounting to an abuse of the IHO's discretion in considering substantial evidence presented via testimony and in the documentary record. The specific objections are noted as follows:

Finding of Fact No. 4: It was the Student's private occupational therapist and not the School's occupational therapist who first suggested the Parents have the Student tested for possible Autism.

Finding of Fact No. 7: The representation the Parent "unilaterally recruited Janet Rumple" is purportedly misleading as the School later contracted with Rumple to be the Student's ABA consultant in both the home-based and school-based programs.

Finding of Fact No. 9: The Student's objection seems to be this Finding of Fact did not indicate the School lacked any personnel trained in ABA. There does not appear otherwise to be any objection to what the IHO wrote.

Finding of Fact No. 13: As in FOF No. 9, *supra*, the Student objects the IHO did not refer to an unfortunate incident during the hearing where he soiled himself. The record, however, indicates that the IHO did refer to this incident. See Conclusion of Law No. 15, *supra*.

Finding of Fact No. 14: The Student does not object to the Finding of Fact so much as the conclusions that are drawn in part from it, to wit: There is a fundamental dispute between the Parent and the School over methodology to be employed. The Student asserts there is no dispute over methodology; rather, the dispute centers on the ability of the School to provide a FAPE in the LRE using consistent behavioral interventions. The Parent asserts that full-time placement in a general education kindergarten is inappropriate for the Student.

Finding of Fact No. 20: The Student objects to the IHO's purported characterization of Sarah Miller as having no ABA training or experience working with children with autism. The BSEA notes the Student quotes the IHO out of context. Finding of Fact No. 20 does not make such a general statement.

Finding of Fact No. 21: The Student objects to a statement by the IHO that appears in this Finding of Fact that, when combined with Finding of Fact No. 20, lead the Student to believe the IHO has found that there are methodologies effective with children with autism that are other than ABA and AVB. This, the Student states, is inconsistent with later statements of the IHO and inconsistent with the Student's view that this dispute does not involve methodology.

The Student also objected to Finding of Fact No. 23, Finding of Fact No. 24, Finding of Fact No. 26, Finding of Fact No. 28, Finding of Fact No. 29, Finding of Fact No. 30, Finding of Fact No. 33, Finding of Fact No. 34, Finding of Fact No. 35, Finding of Fact No. 37, Finding of Fact No. 38, Finding of Fact No. 39, Finding of Fact No. 40, and Finding of Fact No. 41. Most of the Student's objections relate to the weight the IHO accorded certain evidence and the credibility he assessed with respect to certain of the witnesses.

As to the IHO's Conclusions of Law**,** the Student objects to Conclusion of Law No. 3 to the extent the IHO relies upon this to support the School's proposed educational placement. The Student also believes the IHO failed to apply correctly the two-pronged standard for assessing FAPE as enunciated in Conclusion of Law No. 5. The Student maintains the record supports a conclusion the School "predetermined" the Student's IEP and educational placement, and the evidence is lacking for Conclusion of Law No. 7 and Conclusion of Law No. 9. The Student asserts there were significant procedural lapses on the School's part which the IHO should have found, and that these procedural errors have denied him a FAPE in the LRE.

The Student also objected to Conclusion of Law No. 10, asserting that no impasse occurred at the CCC meeting, and that if such occurred, it was created by the School because it had not predetermined a transition plan as it had predetermined all other aspects of the Student's program and placement.

The IHO allegedly erred in his Conclusion of Law Nos. 11 and 12 by permitting the School to dismiss the trained aides without assessing the impact on the Student. The Student also disputes the characterization of the relationship of the aides vis-a-vis the School personnel. The Student also objects to Conclusion of Law No. 12 specifically to the extent it addresses a methodological dispute, which the Student asserts did not and does not exist. The Student also objects to the extent the IHO defers to the educational judgment of the School in determining whom it will employ. The Student also takes exception to Conclusion of Law No. 13, primarily because of the IHO's conclusion the Student would not experience great difficulty in a transition to the school-based program.

The Student also objects to Conclusion of Law No. 14 to the extent it fails to address the difficulties of creating a transition program, the School's failure to develop and implement one, and the lack of such a program in the Student's disputed IEP. The Student objects to the IHO determining the School's proposed IEP acceptable but then identifying the areas not addressed in the IEP to be implemented.

The Student references Conclusion of Law No. 15, objecting to the representation there was substantial evidence to support the educational placement proposed by the School. The Student also asserts the IHO applied the wrong standard in determining whether the IEP was reasonably calculated to provide a FAPE. Objection is made to the extent the IHO made his determination on the appropriateness of the IEP and the educational placement based on the fact the Student was not disruptive.

The Student also contends the IHO erred in Conclusion of Law Nos. 16, 17, 19, 20, 21, but most of these contentions involve disagreements over the evidence upon which the IHO relied. Specifically, the Student asserts the School did act out of administrative convenience, denies the Parents wish to have solely a home-based program, and the references to any methodological dispute. The Student also asserts the IHO applied the wrong standard when determining whether the IEP was appropriate to the Student's needs. The Student did not say what standard he believes the IHO did employ.

The primary procedural error the Student alleges the School committed–which, the Student asserts, the IHO did not accord sufficient weight–was the lack of a transition program for the Student.

**The Response to the Petition for Review**

The School filed its Response on April 28, 2003, as noted *supra*. The School disagreed there were no methodological disputes, noting that the School's willingness to incorporate parts of the Student's home-based program in the School program did not negate such a dispute. The School noted there are marked differences between the parties. In addition, it is not a question of whether one program is "better" than another; the standard to be applied is whether the School's program is appropriate.

As to the Student's specific objections, the School acknowledges the occupational therapist referenced in Finding of Fact No. 4 was not employed by the School. However, the School represents the record supports the IHO's Findings of Fact Nos. 7, 9, 13, 14, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 33, 34, 35, 37, 38, 39, 40 and 41.

The School also maintains the IHO applied the correct standards and that substantial evidence in the record supports the IHO's Conclusions of Law Nos. 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 20 and 21. The School also believes the IHO's Conclusion of Law No. 16 is a correct statement of applicable law, the IHO may have caused some confusion by his choice of words. The School urges clarification of this Conclusion of Law, with reference to Conclusions of Law Nos. 18 and 21. To the extent the Student has objected to Conclusion of Law No. 19, the School represents the Conclusion is based upon substantial evidence.[7]

The Student had objected to that portion of the IHO's Order (No. 7, Sub-Issue No. 4) regarding the denial of any relief to the Parent for the lack of a transition plan because the impasse that occurred was occasioned by the Parent's insistence on the *status quo*. The School maintains the IHO's statement in this regard is accurate, and takes into account the School's past efforts to engage in transition activities and the Student's demonstrated ability to transition from activities.

## REVIEW BY THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The Board of Special Education Appeals (BSEA) convened on May 27, 2003, in the State House Offices of the Indiana Department of Education. All three members were present.[8] 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;

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[7]Conclusions of Law Nos. 8 and 18 are referenced by the Respondent in its Response to the Petition for Review, in part because it appeared the Petitioner may have objected to them. It is not altogether clear the Petitioner did object to these Conclusions of Law. Accordingly, the BSEA sustains the referenced Conclusions as not being specifically objected to.

[8]As noted *supra*, Rolf W. Daniel, Ph.D., is sitting by designation for BSEA Member Richard Therrien.

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 School timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. Although a major portion of the Student's argument on administrative appeal asserts there is no dispute regarding methodology, the BSEA finds that, after review of the entire record in these proceedings, there is an unquestioned dispute over the appropriate methodology to be employed for the Student.

3. The Student's Petition for Review and supporting memorandum also argue the IHO failed to appropriately evaluate the "expertness" of the witnesses offered by the School. The Student significantly misunderstands the function of an IHO. No witness must be declared an "expert" in such a proceeding, nor is it necessary to offer a witness an expert. It is the IHO's function to assess the relative credibility of each witness, including those who have developed a certain expertise in a given field. The IHO did this. His Findings of Fact and Conclusions of Law reflect the degree of credibility he accorded various "expert witnesses"offered by both parties. This is an exercise of discretion, which will be set aside only upon a showing that such discretion was abused. The Student fails to demonstrate how the IHO abused such discretion. Accordingly, the BSEA will not disturb the IHO's determinations in this regard.

4. The IHO attended to every detail necessary for the conduct of a due process hearing under 511 IAC 7-17 *et seq*. ("Article 7"), including the consideration and granting of various extensions of time and advising the parties of pre-hearing and hearing dates. The IHO's conduct of the hearing is consistent with the requirements for due process under both Article 7 and the Individuals with Disabilities Education Act (IDEA).

5. Neither party disputes that the IHO's Finding of Fact No. 4 should have indicated the occupational therapist who recommended the Parents have the Student evaluated for possible autism was a private occupational therapist and not the School's therapist. This correction is noted. This is not, however, considered a substantive change but merely a clerical one.

6. The IHO's Finding of Fact No. 7 is based upon substantial evidence from the record and is not misleading, as the Student asserts. The Parent did unilaterally recruit Janet Rumple in February of 2000; the School did not contract with Rumple until nearly a year later (January of 2001). Finding of Fact No. 9 is likewise supported by substantial evidence from the record and is a correct recitation of same.

7. Finding of Fact No. 13 is correct as written. The IHO did not, as the Student asserts, ignore the fact the Student soiled himself during the hearing process. This incident was mentioned in Conclusion of Law No. 15. The allegation is immaterial and irrelevant.

8. The IHO did not fail to consider the effects of a transition of the Student to the school-based program. Finding of Fact No. 14 is a correct statement based on substantial evidence from the record.

9. The IHO did not make the sweeping generalization that there are "autistic methodologies other than ABA and AVB" that would be demonstrably effective" for the Student. The Student, in his Petition for Review, quotes the IHO out of context. Even accepting the Student's version of the IHO's Findings of Fact Nos. 20 and 21, the result is cosmetic and would not alter the ultimate determinations. However, the BSEA finds the IHO's Findings of Fact Nos. 20 and 21 are based upon substantial evidence from the record.

10. The Student does not object to Finding of Fact No. 23 other than it is perceived by the Student to be moot. This is an insufficient reason to alter an IHO's findings. It is also irrelevant. The record supports the IHO's Finding of Fact.

11. The Student's objection to Finding of Fact No. 24 is more argumentative than substantive. The IHO did not fail to consider potential negative impact of a transition to a school-based program. The IHO's finding is supported by substantial evidence in the record.

12. The IHO's Finding of Fact No. 26 is sufficiently based on the record. The objection is irrelevant to the issues.

13. As noted *supra*, it is within the discretion of the IHO to determine the credibility of witnesses. There is no demonstration the IHO abused this discretion by according greater weight to one witness over another. Accordingly, Finding of Fact No. 28 is upheld.

14. While it is accurate that Claire Torsen did not make recommendations for the home-based program of the Student but, rather, centered her recommendations upon a school-based program, this objection is not to a substantive issue and is largely irrelevant. The IHO's Finding of Fact No. 29 is sustained.

15. The IHO's Finding of Fact No. 30 is based upon substantive evidence in the record and is, therefore, sustained.

16. The Student's objection to Finding of Fact No. 33 regarding the costs of the Student's witness, is irrelevant to any issue in the hearing. The factual information supplied is accurate. Accordingly, the IHO's Finding of Fact No. 33 is sustained.

17. While the Student objects to the IHO's selective use of documentary evidence, particularly with regard to Finding of Fact No. 34, it should be noted that any adjudicator–administrative or judicial–must, by necessity, rely upon selected documentary information. As noted previously, credibility determinations must be made by an adjudicator. This will require an adjudicator to accord greater weight to some documents and testimony than to others. This is an exercise of discretion that will not be disturbed absent a showing such discretion was abused. In this case, no such showing has been made. The IHO's Finding of Fact No. 34 is sustained.

18. Finding of Fact No. 35 is a straight-forward, uncontradicted statement from the record. It does not affix blame, as the Student represents. It is sustained.

19. The Student objects to Finding of Fact No. 37 in that it does not state other potential educational placements, none of which were raised as issues in this hearing. The IHO's finding is based upon the record and the issues raised by the Student. It is a correct statement based on the record and will be sustained.

20. The record does not support the Student's contention the School was not "ready, willing, and able" to implement its recommendations (Finding of Fact No. 38). The testimony credited by the IHO supports the finding that the School was "ready, willing, and able." Accordingly, the finding will be upheld.

21. The School, contrary to the Student's assertion, did have a transition plan to discuss at the aborted May 2002 CCC meeting, but an impasse occurred, followed closely by the request for this hearing.

Finding of Fact No. 39, as written by the IHO, is supported by substantial evidence from the record and is sustained.

22. The record indicates the relationship between the two aides and School personnel was not positive. Finding of Fact No. 40 is sustained.

23. To the extent the Student has objected to Finding of Fact No. 41, the objection is overruled. The IHO's statement is supported by substantial evidence in the record.

24. The IHO's Conclusion of Law No. 3 is based upon substantial evidence in the record and relevant Findings of Fact. Although the Student disputes this Conclusion of Law, the Conclusion is based upon credible evidence and will be sustained.

25. The Student asserts the IHO ignored the two-prong test established by Rowley for determining whether an IEP is reasonably calculated to provide educational benefit, including whether there were procedural defects so substantive as to presuppose a FAPE could not be provided. The written decision of the IHO indicates unequivocally that he not only stated the requisite test but applied it as well. Conclusion of Law No. 5 is sustained.

26. The record does not support the Student's representation that the School predetermined either his IEP or his educational placement. The IHO correctly noted that School personnel may meet to discuss a student's needs and even devise draft goals, objectives, and benchmarks. The Parent has not entitlement under either Article 7 or IDEA to attend such meetings. There is no showing that School personnel failed to discuss within the CCC framework elements of the Student's educational program or his possible educational placement. Conclusions of Law No. 7, 9, and 10 are sustained.

27. Although the two aides were dedicated to the Student and were articulate at the hearing in this matter, they were wedded to a particular methodology and inflexible, particularly in their interactions with School personnel. There is no legal basis that would require the School to retain the services of the two aides, and the Student has not articulated any legal basis. Accordingly, the IHO's Conclusions of Law Nos. 11 and 12 are sustained.

28. The BSEA will sustain the IHO's Conclusions of Law Nos. 13 and 14. There is sufficient information in the record to indicate the School did have a transition plan that it intended to discuss within the ill-fated May 2002 CCC meeting. The impasse that occurred at the May 2002 meeting prevented this discussion from completion; the resulting request for a due process hearing filed shortly thereafter established a *status quo ante* that left the transition plan as an issue for the IHO to address. The record amply supports the IHO's legal conclusions.

29. The IHO's Conclusion of Law No. 15 is a correct statement based on the record and will be sustained. Contrary to the Student's assertions, the IHO was adequately specific regarding the educational placement for the Student. The Student admits as much in his Petition for Review.

30. The Student is incorrect in denying this dispute involves a methodological dispute. It obviously does. Conclusion of Law No. 16 is a correct statement of the law.

31. There is no proof the School's actions were motivated by administrative convenience, nor is the testimony of the local director of special education regarding "extended day" programs relevant. An "extended day" program was not at issue in this dispute. The IHO's Conclusion of Law No. 17 is sustained.

32. Conclusions of Law Nos. 19 and 20 are based upon relevant Findings of Fact and the record as a whole, and will therefore be sustained.

33. The Student misstates both the record and the IHO's written decision in maintaining the IHO found there was no dispute as to methodology. Methodology is at the core of this dispute. The IHO also applied the correct standard for assessing whether the Student's IEP was reasonably calculated to provide the Student with a FAPE.

34. The Student objected to Order No. 7 (Sub-Issue No. 4). This Order is based upon the record and is sustained.[9]

## ORDERS

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

1. Those Orders of the Independent Hearing Officer not otherwise contested are hereby sustained.

2. The IHO's written decision, except as to the clerical matter in Finding of Fact No. 4, is upheld in its entirety.

3. Any other issue or assertion not otherwise addressed above is deemed overruled or denied, as appropriate.

DATE: May 27, 2003

/s/ Cynthia Dewes, 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.

[9]Oddly enough, the Student did not object to any other Order, including Orders based on Findings of Fact and Conclusions of Law the Student did indicate objections.