BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of L.M.	)	
And	)	
Westfield-Washington Schools and	)	**Article 7 Hearing No. 1302.02**
Hamilton-Madison-Boone Special Services	)	
Appeal from a Decision by	)	
Lon C. Woods,	)	
Independent Hearing Officer	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

Procedural History

It should be noted from the outset that any references to the "Student" or the "Student's representative" include the parent or parents of the student. It should also be noted that Westfield-Washington Schools and Hamilton-Madison-Boone Special Services will be referred to as the "School."

On July 19, 2002, the Student filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed on July 22, 2002. A Pre-hearing Conference by telephone conference call was held on July 29, 2002. The parties jointly requested a thirty (30) day extension of time from August 30, 2002, up to and including September 30, 2002, which was granted. On September 3, 2002, the Student requested a continuance of the hearing, to which the School objected. On September 5, 2002, the IHO denied the request for a continuance of the hearing. On September 9, 2002, a Pre-hearing Conference was held prior to the hearing. The Student renewed his Motion for a Continuance, which the IHO denied. The parties defined the issues for determination as follows:

1. Whether the School has permitted the parents and their experts to provide input into the development of annual goals, benchmarks, and formulation of the Student's Individualized Education Program (IEP);
2. Whether the School has failed to develop an appropriate IEP for the Student during the past two school years, including extended school year services, due to financial/staffing

limitations or other unspecified factors;

3. Whether, as a result, the Student should receive compensatory education and services;
4. Whether the School has implemented all provisions of the Student's IEP during the past two school years;
5. Whether the School has complied with the following procedural safeguards, to wit:
   a. Failure to comply with notice requirements;
   b. Failure to convene a Case Conference Committee meeting when requested;
   c. Failure to provide the services listed in the IEP; and
   d. Failure to comply with state and federal requirements on the provision of records when requested by the parents; and
6. Whether the School has provided appropriate in-service education for its teachers and staff regarding effective educational techniques for disabled students with autism spectrum disorder.

The due process hearing was held on September 9, 10, and 12, 2002. Exhibits presented by the Student were admitted without objection, except Exhibit 44 consisting of six (6) audio tapes of Case Conferences which was taken under advisement until copies could be provided to the School. The School's Exhibits 1 through 11 were admitted without objection. The Student's Exhibit 44 was later admitted into the record without further objection after duplicate copies of the audio tapes were provided to the School.

The Written Decision of the IHO

The IHO's written decision was issued on September 30, 2002, and contained thirty-two (32) Findings of Fact determined by the IHO.[1] The IHO's Findings of Fact are reproduced, in part, as follows:

> The student is six years of age, dob 8-3-96, currently attends kindergarten one-half day, and resides with his parents within the public agency's school district. In November, 1999, the student, then age three (3) years, three (3) months, was determined to possess traits consistent with Pervasive Developmental Disorder, Not Otherwise Specific, a form of autism, following an

[1]On October 10, 2002, the IHO issued an Order that Findings of Fact 31 and 32 are addenda nunc pro tunc to the decision issued on September 30, 2002.

evaluation by a pediatric physician. Thereafter, the parents contacted the public agency requesting information on programs and services available through the public agency and that a case conference committee be convened in behalf of their son. Written notice of case conference committee meeting was sent to the parents on January 3, 2000.

The initial case conference committee meeting was held on January 31, 2000. . .In addition to Dr. Smith's report, the case conference committee had at its disposal the public agency's evaluation of the student conducted in early January 2000. According to the public agency's evaluation, his cognitive skills were comparable to a child twenty-five (25) months of age. The student was determined to have an autism spectrum disorder not otherwise classified with a secondary communication disorder. . . Educational placement was recommended in the early childhood education program four (4) half-days per week, a total of twelve and one-half hours weekly. Speech and language therapy was to be provided 40 to 60 minutes per week. In addition, he was to receive 20 to 30 minutes weekly each for occupational and physical therapy. Placement was to begin February 7, 2000. Extended school year services were not included in the committee's recommendations.

The student, . . . attended the public agency's early childhood education program beginning the second semester of the 1999-00 school year. There were eight students, one teacher, and one aide. The parents requested a case conference review in May, 2000, since they were implementing an in-home instructional program (the [Applied Behavior] Analysis Program) to compensate for not having extended school year services; that they wanted to integrate instructional goals and objectives and to request reimbursement for the cost of the program. The request was denied for the stated reason these were not circumstances that would warrant a case conference meeting.

An annual review of the student's IEP was done pursuant to notice to the parents on September 15, 2000. . .The case conference committee reconvened on December 8, 2000, to review the student's progress and update annual goals. . .The committee noted the need for extended school year services would be decided upon before the end of the school year. The parents objected by letter to the proposed December IEP, but agreed to a continuation of early childhood education services provided by the public agency. They also informed the public agency the student would be attending a privately operated typical pre-school program two days per week for which they wished to be reimbursed.

The parents retained a speech and language specialist and an occupational therapist to provide services in the home beginning in early 2000. In June, 2000, the parents initiated the [Applied Behavior] Analysis program in the home. The public agency administered the Peabody Developmental Motor Skills Test in January, 2000, and again in September, 2000, placing his age equivalency at 29-30 months. In January, his age equivalency was 15 months, a gain of 14-15 months in eight (8) months. The student's perseverations and self-stimming ceased soon

> after in-home instruction was implemented. . . On December 11, 2000, the public agency denied the parents' request for reimbursement of the cost of in-home instruction for the student for the reason services were unilaterally initiated by the parents without involvement of the case conference committee. . .

The IHO made five (5) Conclusions of Law.

The following IHO's Orders are reproduced verbatim from the IHO's written decision.

> 1. The parents' request for reimbursement by the public agency is denied.
>
> 2. The public agency shall modify the 4-16-02/5-9-02 IEP by including as an extended school year service the employment and assignment of a trained ABA therapist or facilitator to the student for not less than ten (10) hours weekly.
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> 3. The public agency shall develop a periodic in-service training schedule for the kindergarten teacher, aides or paraprofessionals, and parents on subject-matter related to the student's educational, social, and/or emotional needs.
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> 4. The public agency shall develop written policies on procedural safeguards consistent with the requirements of Article 7, State of Indiana, or, if they already exist, comply.

Appeal To The Board Of Special Education Appeals

Student's Petition for Review

Student filed on October 30, 2002, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Student's objections are outlined below:

1. The Student objects to the IHO's September 5, 2002 denial of the Student's September 3, 2002 request for a continuance of the hearing.
2. The Student objects to the IHO's September 9, 2002 denial of the Student's September 9, 2000 request for a continuance of the hearing.

The Student's Petition for Review includes objections to "Findings of Fact," which is reproduced, in part, as follows:

> 1) . . .The IHO neglected to include in "Findings of Fact, #8" that our Parents' report also recommended, as an appropriate portion of L.[M.'s] Education Plan, intensive one-on-one instruction. It also recommended that an extended school year, or as we called it, year around schooling, as an appropriate placement for L.[M.].

2) Regarding "Findings of Fact, #9", the IHO neglected to mention that within the goals provided us before the Case Conference Committee of 1/31/00, the acronym "E.C. Staff" was used frequently as the Persons(s) Responsible (to evaluate skill levels pertaining to specific goals). These references to the "E.C. Staff", which stands for Early Childhood Class, lead (sic) us to believe that L.[M.'s] placement had been predetermined in the Early Childhood Class, and ironically, he *was* unilaterally placed there by the public agency, much to our dismay. Also, prior to the first Case Conference Committee meeting, we asked the director of the Hamilton-Madison-Boone Cooperative, via a letter (submitted as evidence), for any and all possible placements and related services that L.[M..] could be recommended for. We did this in an effort to help us to determine what we thought would be the most appropriate placement and related services for him. The director of the Hamilton-Madison-Boone Cooperative, after balking at the request, provided us with only one program to look at. It was the Early Childhood class that L.[M.] ended up being unilaterally placed in. . .

3) Regarding "Findings of Fact, #10", the IHO wrote, "Extended school year services were not included in the committee's recommendations.." Are we not part of the committee? We certainly recommended it in our Parents' Report. It didn't make the cut on the final IEP, of course, but we certainly felt it to be appropriate for L.[M.] based on everything we learned in our research on autism.

4) Regarding "Findings of Fact, #12", where the IHO wrote that we, the parents, "were left with the perception they were being admonished for being too proactive in advocating their son's education needs." This is an understatement. . . It wasn't a "perception." It was a fact.

5) Regarding "Findings of Fact, #15", the meeting of 9/15/02 was for the purpose of updating goals. There were no placement considerations made in this meeting.

6) Regarding "Finding of Fact, #16", the IHO wrote, "Continued placement in the early childhood program was agreed upon." We agreed upon it as only a *portion* of an appropriate educational program for L.[M.] The Early childhood program offered by the public agency, if considered the sole part of L.[M.'s] education program, was woefully inadequate, inappropriate, and not individualized to fit L.[M.'s] particular needs. . .

7) Regarding "Findings of Fact, #17", the IHO wrote, "They (the parents) also informed the public agency the student would be attending a privately operated typical preschool program two days per week for which they wished to be reimbursed." The IHO neglected to point out that we testified that we brought with us three letters of recommendation to this 12/8/00 meeting. . .These letters were from our private occupational therapist, our private speech therapist, and our ABA consultant from the NJ Institute for Early Intervention. . .We didn't arbitrarily come up with this recommendation and throw it out there. It was thoroughly researched and calculated to benefit L.[M.] and his development. With that the case, we did

"inform the public agency the student would be attending a privately operated typical preschool program two days per week." And since we knew this placement was appropriate for L.[M.], we did, and still do wish to be reimbursed for it. And we feel we should be reimbursed for the shadow aide that we sent with him too. .

8) In regard to "Findings of Fact, #18", the IHO wrote "Adaptive Behavior Analysis." The name of the educational approach, mentioned by us dozens of times in the 3-day hearing, and described by our several experts in depth, is Applied Behavior [A]nalysis (ABA).

9) In regard to "Findings of Fact, #19", the gains mentioned by the IHO were without a doubt due to the ABA program, which we implemented at home, over the summer of 2000.

10) In regard to "Findings of Fact, #20", it should have also been noted here that L.[M.'s] perseverations and self-stimming did not cease or decrease at all from 2/7/00 through 6/15/00 or so, the duration of the early childhood program provided by the public agency that semester.

11) In regard to "Findings of Fact, #21", it should be noted that we attributed *all* of L.[M.'s] progress and cessation of perseverations and self-stimming to the ABA.

12) In regard to "Findings of Fact, #22", it should be noted that under the "Conclusion of Law" portion of the IHO's decision document, #5, the third paragraph, that the IHO rightfully found the public agency in violation of Article 7 for not having convened a case conference committee meeting to consider our request to coordinate the in-home (ABA) program with classroom goals and for reimbursement. . .

13) In regard to "Finding of Fact, #24", here is the whole story on trying to observe our son while in the public agency's early childhood program: . .(See pages 5-8 of the Student's Petition for Review).

14) In regard to "Findings of Fact, #25, #26, and #27", the facts listed are true. But there are many more of them brought forth in the evidence of the hearing that should be noted. First, in the 5/23/01 Case Conference Committee meeting, not one person from the public agency asked how L.[M.] did in the typical peer, private preschool, over the spring semester which was just coming to an end. . . It should be noted in "Findings if Fact, #25" that the "extended school year services" and the "continued placement in the Early Child hood education program for the 2001-02 school year" were *unilaterally* "proposed" and implemented by the public agency. We "proposed" continual ABA and placement in a typical peer preschool (either private or public), with an ABA trained shadow aide.

In the IHO's "Findings of Fact, #26", he wrote, "The parent's objection to the extended school year proposal was due to a lack of intensity which they felt necessary to avoid regression during

the summer. They (the parents) also wanted ABA therapy to be included in his program. . .We didn't "feel (ABA) was necessary to avoid regression during the summer." (as stated in the IHO's "Findings of Fact, #26). We knew ABA was necessary in order to avoid regression in L.[M.'s] skills. . .

In the IHO's "Findings of Fact, #27" . . .It should be noted that we didn't reject "*all*" of the proposed placement options. We just rejected those proposed by the public agency. It should also be noted that the public agency rejected all of our proposed placement options as well. The public agency proposed 6 placement options. . .It should be noted that not one of the public agency's placement options included any ABA. ABA was still an integral part of L.[M.'s] education plan at this time and we strongly recommended it.

. . .It should be noted that we didn't recommend a "full-time shadow aide" for L.[M.] for the duration of his typical preschool environment, as the IHO wrote in his decision. We recommended a shadow aide to be with him full time at the beginning of the fall 2001 semester, and that the shadow aide be slowly removed from the environment as L.[M.'s] support as the semester progressed and as L.[M.'s] dependency on the shadow aide decreases. . .

15) In regard to "Findings of Fact, #29", where the IHO wrote, "No mention is made of ABA therapy during the school year or as part of extended school year." It's difficult to know to what the IHO was referring, but the IEP from the 4/16/02 and 5/9/02 Case Conference Committee meetings specifically states that we recommended that L.[M.] receive 10 hours per week of ABA over the summer of 2002. . .

16) In regard to "Findings of Fact, #30" where the IHO refers to us having objected to the latest IEP. We rejected it because we knew that it was appropriate for L.[M.] to receive 10 hours per week of ABA over the summer of 2002, and this was not written into the IEP except as a recommendation made by us. His ABA program was winding down. It would be clearer to say that he was no longer in need of the intensive ABA we had given him over the previous two years. . .

17) In regard to "Findings of Fact, #32, . . .the IHO wrote, "The public agency's objections to and the subsequent ruling on the qualifications of the parents' witness, Dr. Stephen Luce, were not timely. As a result, said witness was not properly qualified as an expert for the record. No factual weight was given to the expert opinions of said witness in consideration of all other evidence presented on like subject matter." Why not throw out our testimony and opinions after the fact also? We're use to it. This is a good job of getting the truth thrown out.

The Student's Petition for Review includes objections to "Conclusions of Law," which is reproduced, in part, as follows:

1) In regard to "Conclusion of Law, #2", the IHO wrote, "They (the parents) ultimately initiated an in-home instructional program supplemental to his public school education which utilized the Adaptive Behavior Activities therapy approach." . . .The name of the educational approach, mentioned by us dozens of times in the 3-day hearing, and described by our several experts in depth, is Applied Behavior Analysis (ABA). ABA is the most important part of this case and the IHO couldn't even get it right.

2) Also under "Conclusion of Law, #2", the IHO states, "The parents noted a significant reduction in perseverations and self-stimming after a few months which they attribute to the ABA therapy." It should be noted, and was testified to under oath by us, that we *knew* the self-stimming and perseverations were significantly reduced as a result of the ABA. . .

3) In regard to the IHO's "Conclusion of Law, #3", where he states, "While their (the parents') views, as a matter of fact, might not have been disregarded, they perceived their opinions fell on deaf ears, so to speak." Whether we perceived that our views were disregarded or that we perceived that they fell on deaf ears, the results were always the same. Our recommendations and input *were* ignored. . .

While reading the subsequent examples of our views "not having been disregarded", please do so by keeping in mind the IHO also wrote the following in his "Conclusion of Law, #3"; "It would be difficult to conclude that the public agency disregarded the parents' input.". . .Every single placement recommendation and related service that we recommended were either completely rejected, or in the case of speech and occupational therapy, implemented at such trivial amount that there could be little to no benefit to our son. . .So again, how could the following statement made by the IHO be true: "It would be difficult to conclude that the public agency disregarded the parents' input.". . .

Also in "Conclusion of Law, #3, the IHO wrote, "The input of parents is, in some instances, rare, so it's appreciated when given.". . .Parental input in our case was *not* rare. We researched and documented and recommended with the utmost of ethics possible, and we did it a lot. And, contrary to what the IHO wrote, our input was far from appreciated by the public agency. . .

Also in "Conclusion of Law, #3", the IHO wrote, "The more information provided the committee, the greater the likelihood of enhancing the education of the child." This was definitely not so in our case. The more information and recommendations we provided, the more defiant, offended, and condescending the public agency seemed to get. . .

4) "Conclusion of Law, #6" states, "The parents identified compensatory education as an issue to be addressed during this proceeding, but neither was able to adequately explain their wishes. The father testified he understood this to mean reimbursement by the public agency for

expenses incurred during the student's education. Reimbursement by a public agency for expenses incurred by parents may be ordered under authority set forth in Article 7. Here, the parents incurred expenses related to an in-home instructional program, speech/language, and physical/occupational therapy, transportation, and tuition to attend a private preschool program with typical children. Reimbursement may be ordered if the parents unilaterally decide to enroll the student in a private school and such placement occurs because the public did not make available a free appropriate public education for the student. In-school instruction and therapy is not private school placement. Placement in the private pre-school program with typical children, while not inappropriate, was unnecessary. Therefore, the parents are not entitled to reimbursement from the public agency." . . .

The IHO goes from pointing out our confusion over the compensatory education point, to illogically and incorrectly concluding that we are not entitled to *any* reimbursement. First off, the IHO neglected to point out that we also incurred expenses due to the shadow aide that we provided our son while he was correctly placed, whether unilaterally or not, in the private, all typical peer preschools. It must be reiterated that not only did we recommended these placements, but several of our private experts also recommended them. . .

The IHO makes his case for denial of reimbursement based on the private pre-school in which we enrolled L.[M.]. He doesn't even acknowledge or mention the "in-home instruction". That was the crux of this whole case. The in-home ABA is what got L.[M.] to where he is at today. The pre-school placement was just a part of the puzzle. A part that pales by comparison to the ABA!

The Student's Petition for Review includes objections to "Orders," which is reproduced, in part, as follows:

. . .it appears that in #1 of the Orders, the IHO based the denial of reimbursement on only the private pre-school placement. But the IHO's intent isn't clear. What is clear is that no reimbursement, regardless of what it could be for, is ordered.

What makes Order #1 all the more confusing is that in order #2, the IHO orders the public agency to include as an extended school year service for the summer of 2002, the employment and assignment of a trained ABA therapist or facilitator to the student for not less than ten (10) hours weekly. That is fine, and we're ecstatic that the IHO saw fit to order some ABA, but the summer of 2002 was long gone by the time that these orders were issued on September 30, 2002. By then, we had already provided our son with the 10 hours per week of ABA that the IHO ordered the public agency to provide after the fact. Since the IHO specified in Order #1 that there would be no reimbursement for the parents, we have no idea how he intends this order, #2, to be implemented. Because of these two incredibly confusing and contradictory Orders, we appeal to a higher authority for clarity.

> We also appeal specifically because the IHO ordered the public agency to provide ABA over the summer of 2002, but didn't find it appropriate that the public agency provide our son with the 2 years of ABA that we provided him, prior to that. . .
>
> We also appeal due to the complete ridiculousness of Order #3. Our son is no longer in need of special education services. . .L.[M.] is now mainstreamed without the need of a shadow aide. He is in a kindergarten class, by himself, with all typical peers. He has a pittance of speech therapy, but is otherwise well on his way to complete independence. . . There needs to be no periodic in-service training schedule for the kindergarten teacher, aides, or paraprofessionals, and parents on the subject matter related to L.[M.'s] educational, social, and/or emotional needs. . .
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> Order #4 is just a hand slap. This does nothing for our son or for any other child with autism. . .

On October 23, 2002, the School filed a request for an extension of time in order to prepare and file a Petition for Review. The BSEA granted the request on October 24, 2002, issuing an Order extending the deadline until the close of business, November 11, 2002, to file its Petition for Review, and the deadline for conducting a review and issuing a written decision to December 11, 2002. On October 30, 2002, the School filed a notice indicating it had already requested and was granted an extension of time to file its Petition for Review until November 11, 2002, and wished to combine its Response to the Student's Petition for Review along with its own Petition for Review. The School's October 30, 2002, filing also requested an extension of time to respond to the Student's Petition for Review until November 11, 2002. The School on November 11, 2002, requested an extension of time to respond to the Student's Petition for Review until November 14, 2002. The BSEA granted the request on November 12, 2002, issuing an Order extending the deadline for responding to November 14, 2002, and the deadline for conducting a review and issuing a written decision to December 13, 2002. On November 21, 2002, the Indiana Department of Education, Legal Section, provided copies of the record to each member of the BSEA.

The School's Reply to the Petition for Review

The School filed on November 14, 2002, a Reply to the Petition for Review. The School's response to some of the Student's objections to the IHO's decision are reproduced, in part, as follows:

A. Finding of Fact 9.

The parents continually refer to the January 31, 2000 placement as "unilateral". Not only did the parents sign off on that placement, even though they had reservations, but their claim that the decision on an early childhood placement was made before the case conference does not match the evidence in the record. . .the parents did agree to placement of the child in the early childhood classroom, though they believed other services were also required.

B. Finding of Fact 16.

The parents seem to equate "consideration" of the information which they provided with "adoption" of their program recommendations. The obligation of the school district is to provide free appropriate public education in the least restrictive environment. School personnel have felt strongly, throughout the time that the child was in preschool, that the early childhood class was an appropriate placement for him. That does not mean that other placements might not have been appropriate, it merely means that staff assembled a program they believed met the child's learning needs. . .

C. Finding of Fact 17.

. . .The transcript shows that the school members of the case conference firmly believed that another year in the early childhood class would be appropriate for and of benefit to the child. The parents disagreed. That is their right, but it does not mean that the school has to decide, based on parent opinion, that their program is inappropriate.

The parents also claim that the school should reimburse them for a shadow aide in the community preschool. . .the testimony of the student's community preschool teachers shows that the ABA aide may well have been a hindrance and they were relieved to phase her out in December, 2001. . .It is not the responsibility of the school district to pay for an aide to teach community preschool teachers how to work with children with autism. . .

D. Findings of Fact 20 and 21.

. . .we request the State Board to refer to the parents' report submitted at the January 31, 2000 case conference. It is clear from the parents' own statement that the child had improved in the area of perseveration and self-stimming before he ever entered school in February, 2000. . .

E. Finding of Fact 22.

. . .The updating of goals and objectives, which had been set for September, 2000, was now requested by the parents in late May, 2000. The significance of that timing is that the parents

were about to start their in-home program in June, 2000 and wanted ideas which would assist them in combining things from the home program with the school program. Those ideas were provided in writing by Rita Popp, the early childhood teacher and negated the need for a case conference. The proper functions of a case conference do not include the planning of an in-home program which is not a part of the school program. As Respondents' Exhibit 12 demonstrates, the teacher, Mrs. Popp continued cooperating with what was going on in the home program throughout the 2000-2001 school year.

F. Finding of Fact 24.

The gist of the parents' narrative concerning Finding 24 seems to be that they had the perfect way to observe their son without being observed, if the school would have complied. It seems apparent from the narrative, that the parents main objective was to observe the program rather than the child. . .

G. Findings of Fact 25, 26, and 27.

The parents' comments on these Findings ignores the gains that were made by the student during his four months in the early childhood program (February to May, 2000) prior to the initialization of the ABA program, and states once again that their major objection to both the school program and the summer program that were offered was the lack of ABA. . .Again, the school's obligation is to offer FAPE, and that is what the school did. . .The parents rejection of all six options which they were offered in Spring 2001 completely overlooks the fact that the school's "eclectic approach" to educating the child contained ABA techniques, TEACCH methods, and other methods which can be used with children with autism. . .

H. Finding of Fact 30.

The parents' objection to the school's offer of ESY in the summer of 2001, and the parents' request for ten hours of ABA per week during that same time period, is once again a sign that the parents had no faith in the school program and preferred to continue with ABA services. The parents' discussion of this Finding does, however, bolster the Respondents' objection to the Hearing Officer's Order which obligates the school to offer ten hours per week of ABA as compensatory education. Although it is unclear whether this is to be in the kindergarten classroom or during the summer, the parents do not want either of these choices since the child is no longer in need of ABA services.

I. Conclusion of Law 3.

Though the parents may have felt that their opinions fell on deaf ears, the record shows the opposite. . .the case conference notes and the testimony of school personnel who attended case

conferences clearly shows that the parent report and parent goals and objectives were considered. The fact that they were not adopted as presented by the parents, does not mean that they were totally ignored. . . the school personnel had every right to rely on their past training and experience with autistic children as a basis for their recommendations. The fact that their recommendations did not slavishly follow an ABA format, does not make the program inappropriate.

J. Conclusion of Law 6.

Respondents believe that the Hearing Officer saw no need for a private school placement because the placement that the school offered, in the early childhood program, was appropriate for the child. Parents are always free to place a child in a private school, but if FAPE is offered, the responsibility of those services does not fall on the public school. .

K. Orders No. 1 and 2.

Respondents concur with the parents that these Orders by the Hearing Officer do not seem to match up. However, the Respondents believe they did make FAPE available and that neither the school nor the parents believe that, currently, the student needs continuing ABA services. . .The issue in this hearing was for reimbursement for past services. . .the Respondents would appreciate some "sorting out" of Order 2 by the Board of Appeals.

L. Order No. 3.

Neither the parents nor the Respondents believe there is a need for ongoing in-service since the child is now participating in regular kindergarten. He has an IEP, anything which needs to be added to that IEP in order to meet his needs can be done through the case conference process.

M. Order No. 4.

The Respondents already have a plethora of policies that are consistent with Article 7, and, as stated in the Respondents' Petition for Review, the record is clear that the Respondents abided by these policies in working with the child and his parents.

The School's Petition for Review

School filed on November 12, 2002, a Petition for Review with the BSEA. The Student was given written notice that pursuant to 511 IAC 7-30-4(f), he had ten (10) calendar days or until November 22, 2002, to respond in writing if he so wished. The School claims that a number of Findings of Fact are not based upon the evidence in the record, that the Conclusions of Law are, in several cases, based

not on the facts of the case nor on the law, and because of errors in the findings and conclusions, several of the IHO's orders are arbitrary and capricious. The School's Petition for Review includes objections to "Findings of Fact," which is reproduced, in part, as follows:

> A. Finding of Fact 4 and 7.
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> In Finding 4, the Hearing Officer refers to the child's diagnosis as pervasive developmental disorder, not otherwise specific, and in Finding 7 he refers to it as autism spectrum disorder, not otherwise classified. The record shows that the child was diagnosed as having pervasive developmental disorder not otherwise specified. Respondents request that correction be made in both Findings 4 and 7.
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> B. Finding of Fact 9.
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> . . .Although the facts stated in Finding 9 may be correct, it gives the impression that this was the school's **final** offer of goals and objectives, which impression is contradicted by the record. Respondents request, therefore, that the word "proposed" precede the phrase "classroom objectives and annual goals" in this Finding.
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> C. Finding of Fact 12 and 13.
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> . . .On page 56 of the transcript, the child's father testifies that following the submission of the parent's letter concerning disagreement with the IEP, they received a call from Mary Mills, Westfield-Washington's Director of Special Education, which the father described as "I think she said to hear our side." This was not a case conference meeting but an attempt by the Director of Special Education to listen to the parents' concerns and see if there was some way to come together. Since the meeting was not a case conference, there was no legal requirement that a formal notice be given to parents a specific number of days before the meeting. . .Respondents request that the phrase "without formal notice" be deleted from this Finding.
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> D. Finding of Fact 14.
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> . . .In this Finding and several others, the Hearing Officer misidentifies ABA. In this particular Finding 14, he calls it "Adaptive Behavioral Analysis". Respondents request the Board of Appeals correct this error wherever it appears throughout the decision. Also in Finding 14, the Hearing officer states that the parents requested a case conference review in May, 2000 since they were implementing an in-home instructional program to compensate for not having extended school year services. That Finding is incorrect. . . the Respondent request that this Finding be amended to show that a home program had been offered by the school and that a case conference was not warranted due to the purpose for which it was being requested, i.e., to assist the parents in devising their home program.

E. Finding of Fact 19.

The Respondents object to Hearing Officer's Finding of Fact 19. Although his notations in regard to the January and December administration of the Peabody Developmental Motor Skills ("PDMS") test is correct, he completely ignores the update on progress in the area of occupational therapy, which is what the Peabody Developmental Motor Skills test evaluates. That was recorded by the school's occupational therapist in June. The progress made from February through June, while he was in the school program and before the home program began, is delineated in the progress report dated June 2, 2000. That report can be found at Respondent's Exhibit 2, pgs. 81 and 82. . .The Hearing Officer's reference to a gain of 14-15 months in 8 months, although true, completely leaves out any reference to the progress made from February to June, before the home program was begun. The Respondents feel that leaving out this information is a crucial error. . .Respondents respectfully request that the Board amend this Finding to include a report of the progress made prior to the time the parents started their in-home program. . .

F. Finding of Fact 20.

The Respondents object to the Hearing Officer's Finding of Fact 20 in that it misstates the evidence in the record. . .The Hearing officer states that the child's perseveration and self-stimming ceased soon after the in-home instruction was implemented. This flies in the face of written material presented to the school in January, 2000. Therefore, the Respondents request that the State Board delete this Finding because it is incorrect.

G. Finding of Fact 22.

Respondents object to Finding of Fact 22 on the grounds that it does not reflect the evidence in the record. . .Respondents request that Finding 22 be amended by adding the phrase "and for the reason that the school staff considered the school program to be appropriate."

H. Finding of Fact 23.

Respondents take exception to Finding of Fact 23 in that it does not fully reflect the evidence in the record. . .Respondents request that Finding 23 be amended to add that because of the presence of other members of the autism team at the case conferences, the school saw no need to include the autism specialist.

I. Finding of Fact 27.

The Respondents take exception to Findings of Fact 27 because neither this Finding, nor any other, mentions the fact that the private school teacher testified there was no real need for an

aide and that the aide was phased out of their program. . .The Respondents request that the State Board amend Finding 27 or create a new Finding which includes the testimony of Ms. Morrell concerning the requested aide.

J. Finding of Fact 32.

Respondents object to the Hearing Officer's Finding of Fact 32, which was filed as part of the Hearing Officer's October 10, 2002 addendum. . .The Respondents are thoroughly confused by the significance of Finding 32 and ask that it be deleted. . .Their objection is just to note that Finding 32 is contradictory and for that reason should be deleted from the addendum.

The School's Petition for Review includes objections to "Conclusions of Law," which is reproduced, in part, as follows:

A. Conclusion of Law 2.

The first paragraph of this Conclusion seems to be nothing but a "rehash of facts" with which the Respondents do not agree and which do not accurately reflect the record. . .The Hearing Officer's conclusion that the staffing philosophy seems to have been "what we've got is what you get!" completely overlooks the testimony of the private preschool teacher who believed, from his entry into her program, the child did not need an individual aide. . .Conclusion 2 seems to indicate that the Hearing Officer found that the program offered by Respondents was inappropriate because it did not consider including ABA as a part of the child's IEP, yet he never finds the program to be inappropriate. First of all, the school considered total ABA; second, the school's techniques did include some of the ABA approach, and third, there is not sufficient evidence in the record to show that the absence of a "full bore ABA approach" by the school made its program inappropriate. . . Respondents ask that the Hearing Officer's Conclusion 2 be amended at the end of paragraph 1 to contain the information provided in the objection to Finding 20 concerning the reduction of perserveration and self-stemming. They also request that the second paragraph of the Conclusion be amended to delete the sentence "the reason for this is not clear." The sentence concerning the staff philosophy and the rejection of a full-time aide should be deleted as well, as should the next sentence which states that incorporation of ABA into the child's program does not seem to be evident. Finally, Respondents ask that the remainder of paragraph 2 beginning with "it seems only proper that" and ending with "failure to do so does not meet the test required by law" be deleted from the Conclusion as incorrect.

B. Conclusion of Law 3.

Respondents take exception to Hearing Officer's Conclusion of Law 3. . .The Hearing Officer concludes that the speech/language sessions which were to have been delivered in the summer

and instead were delivered the first few months of school, were not sufficient because "no type of compensatory education would supplant the submission." Respondents do not find this to be a Conclusion of Law since it is based solely on the testimony of witnesses and has no relationship whatsoever to Article 7. There is no citation from the rule to back up this portion of the Conclusion. . .It is impossible to tell whether this Conclusion has any basis in law and it definitely does not adequately reflect the facts, therefore, the Respondents ask that this paragraph be deleted.

C. Conclusion of Law 4.

Respondents take exception to the Hearing Officer's Conclusion of Law 4, which finds that there was no in-service specific to the child nor any presentations on various curriculum approaches including ABA therapy. . .Respondents believe that the phrase "specialized in-service training in this area" applies to autism spectrum disorder not to in-services that deal specifically with the child. . .The Hearing Officer opines that regularly scheduled in-service including the parents would have better enabled the parents to "cope with their concerns and frustration". This is a Conclusion based on nothing in the record nor anything in Article 7. Hence Respondents find it difficult to view this Conclusion as a "Conclusion of Law" and ask that the entire discussion in this Conclusion concerning in-service training and the lack thereof be deleted. . .At the end of Conclusion 4, the Hearing Officer states that the school's refusal to allow the parents to review the child's performance by means of a video camera and monitor was "a missed opportunity for meaningful in-service training." Nowhere in the record does it state that the purpose of the parents' request was to provide in-service training to staff. . .There is no testimony in the record showing the purpose of the taping was ever to provide in-service for the child's teachers. For that reason, Respondents request that the last two sentences of Conclusion 4 be deleted.

D. Conclusion of Law 5.

Respondents object to the Hearing Officer's Conclusion of Law 5 which deals with three procedural violations the Hearing Officer concludes the Respondents have committed. First, the Hearing Officer states the school violated the requirement for release of evaluations five days prior to a case conference. The request for the school's evaluation was made by the parents in January 2000. The version of Article 7 which requires that the reports be made available no less than five instructional days prior to the case conference was added to Article 7 effective June 2000. Therefore, this portion of the Conclusion of Law is incorrect since it binds the school to a requirement which was not in effect in Indiana until almost six months after the parents made their request. Respondents request that the first paragraph of Conclusion 5 be deleted.

The second paragraph deals with the school's not reconvening a case conference when the

> parents indicated that they would place the child in the school's recommended placement January 31, 2000, but that they were still in disagreement. There is no legal citation showing why the school would have had an obligation to reconvene the case conference. . .Respondents request based on evidence in the record and based upon the lack of citation to Article 7, this paragraph of Conclusion 5 be deleted. . .since neither the evidence in the record nor Article 7 seem to support Conclusion of Law 5, Respondents would ask that his be deleted in its entirety.

The School's Petition for Review includes objections to "orders, " which is reproduced, in part, as follows:

> A. Order 2.
>
> Respondents take exception to Order 2 that the school modify the IEP from April and May of 2002 by including employment and assignment of a trained ABA therapist for not less than 10 hours weekly as an extended school year service. This Order is not clear in that it would appear that, in contravention of the parents' wishes, the Hearing Officer is ordering an ABA therapist for not less than 10 hours weekly. . .Respondents believe there is no evidence in the record which would support either an order for an ABA therapist in the kindergarten classroom nor for ABA services during the Summer 2003. The Respondents request that Order 2 be deleted.
>
> B. Order 3.
>
> Respondents take exception to the Hearing Officer's Order 3 in which he orders periodic in-service training related to the child's educational social and/or emotional needs. There is nothing in the record which indicates an on-going need for such in-service. . .Since this order seems to flow from incorrect Findings and an incorrect Conclusion, Respondents request the Board to delete it.
>
> C. Order 4.
>
> Respondents take exception to the Hearing Officer's Order 4 which reminds Respondents to comply with their already existing policies. This would imply that the Respondents did not comply with such policies. That simply is not the case. As argued above concerning Conclusion 5, the three procedural violations noted by the Hearing Officer are not supported by the record nor by the law. For that reason, Respondents request this Order be deleted.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and

without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated November 26, 2002. Review was set for December 5, 2002, in Indianapolis, in the offices of the Indiana Department of Education.

All three members of the BSEA appeared on that date. After review of the record as a whole and in consideration of the Petition for Review, and the Response thereto, the BSEA makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-30-4(j).

2. The BSEA finds no errors in the IHO's narrative on "Preliminary Proceedings."

3. The BSEA accepts the IHO's Finding of Fact 4 with the following amendment: "Specific" is changed to "Specified" and "a form of autism" is deleted. The Finding of Fact 4 now reads as follows: "In November, 1999, the student, then age three (3) years, three (3) months, was determined to possess traits consistent with Pervasive Developmental Disorder, Not Otherwise Specified, following an evaluation by a pediatric physician."

4. The BSEA accepts the IHO's Finding of Fact 7 with the following amendment: "an autism spectrum disorder not otherwise classified with a secondary communication disorder" is deleted, and "a Pervasive Developmental Disorder , Not Otherwise Specified." is added. The last sentence of Finding of Fact 7 now reads as follows: "The student was determined to have a Pervasive Developmental Disorder, Not Otherwise Specified."

5. The BSEA accepts the IHO's Finding of Fact 8 as written.

6. The BSEA accepts the IHO's Finding of Fact 9 with the following amendment: add the word "Proposed" as the first word in this finding. The Finding of Fact 9 now reads as follow: "Proposed classroom objectives and annual goals, as well as those for speech and language and physical/occupational therapy, per the data were formulated prior to the meeting and distributed to the parents."

7. The BSEA accepts the IHO's Finding of Fact 10 as written.

8. The BSEA accepts the IHO's Finding of Fact 12 with the following amendment: delete the words "without notice" in the third sentence.

9. The BSEA accepts the IHO's Finding of Fact 13 as written.

10. The BSEA accepts the IHO's Finding of Fact 14 with the following amendments: the term "Adaptive Behavioral Analysis" is changed to "Applied Behavior Analysis" and the last sentence of the IHO's finding of fact is deleted and two new sentences are added. The last two sentences now read as follows: "A Case Conference was not necessary for planning the Student's summer program as proposed by the parents. Because the School had offered a Free Appropriate summer program, reimbursement for the Student's summer program was denied."

11. The BSEA accepts the IHO's Finding of Fact 15 as written.

12. The BSEA accepts the IHO's Finding of Fact 16 as written.

13. The BSEA accepts the IHO's Finding of Fact 17 as written.

14. The BSEA accepts the IHO's Finding of Fact 18 with the following amendment: the term "Adaptive Behavioral Analysis" is changed to "Applied Behavior Analysis."

15. The BSEA accepts the IHO's Finding of Fact 19 as written.

16. The BSEA changes the IHO's Finding of Fact 20 to read as follows: "Some of the Student's perseverations and self-stimming had ceased by the time of the Student's initial Case Conference on January 31, 2000."

17. The BSEA accepts the IHO's Finding of Fact 21 with the following amendment: delete the words "much of".

18. The BSEA accepts the IHO's Finding of Fact 22 with the following amendment: delete "without involvement of the case conference" and add "although the school offered a Free Appropriate Public Education." The Finding of Fact 22 now reads as follows: "On December 11, 2000, the public agency denied the parents' request for reimbursement of the cost of in-home instruction for the student for the reason services were unilaterally initiated by the parents, although the school offered a Free Appropriate Public Education."

19. The BSEA accepts the IHO's Finding of Fact 23 as written.

20. The BSEA accepts the IHO's Finding of Fact 24 as written.

21. The BSEA accepts the IHO's Finding of Fact 25 as written.

22. The BSEA accepts the IHO's Finding of Fact 26 with the following amendment: add the words "their belief that there was a" to the first sentence. The Finding of Fact 26 now reads as

follows: "The parents objection to the extended school year proposal was due to their belief that there was a lack of intensity which they felt necessary to avoid regression during the summer. They also wanted ABA therapy to be included in his program."

23. The BSEA accepts the IHO's Finding of Fact 27 as written.

24. The BSEA accepts the IHO's Finding of Fact 29 with the following amendment: add "in the Case Conference recommendation" to the last sentence. The last sentence now reads as follows: "No mention is made of ABA therapy during the school year or as part of extended school year in the Case Conference's recommendation."

25. The BSEA accepts the IHO's Finding of Fact 30 as written.

26. The BSEA deletes the IHO's Finding of Fact 32 as written

27. The BSEA accepts the IHO's Conclusion of Law 2 with the following amendments: change "Adaptive Behavior Activities" to "Applied Behavior Analysis"; delete part of paragraph 2 starting with "The" in the first sentence through "philosophy" in the sixth sentence; delete the last sentence in paragraph 2 which states "Failure to do so does not meet the test required by law" and add "Methodology is the responsibility of the School."

28. The BSEA accepts the IHO's Conclusion of Law 3 with the following amendments: add "were considered" to the second sentence; delete "as a matter of fact, might not have been disregarded" and "so to speak" in the third sentence; delete "The input of parents is, in some instances, rare, so it's appreciated when given. Yet, as cited above,"; delete the last paragraph. Conclusion of Law 3 now reads as follows: "The parents contend the public agency has not permitted them or their experts to provide input into the development of the student's IEP, and that not all provisions of the student's IEP were provided or implemented. During the initial case conference committee meeting in January, 2000, they presented their written narrative on what they believed were the student's performance and behavior traits along with a goal statement. While their views were considered, they perceived their opinions fell on deaf ears. The role of the case conference committee is a collective one and no one voice speaks louder than another. Article 7 at 511 IAC 7-27-4(c) dictates that the case conference committee in developing, reviewing, or revising an IEP take into consideration several factors including the concerns of the parent. This does not translate to the parent being the author or designer of an IEP. The purpose and function of a case conference committee is a collective one. The more information provided the committee, the greater the likelihood of enhancing the education of the child. It would be difficult to conclude that the public agency disregarded the parents' input."

29. The BSEA deletes the IHO's Conclusion of Law 4 and renumbers the Conclusions of Law that follow.

30. The BSEA deletes the IHO's Conclusion of Law 5 and renumbers the Conclusions of Law that follow.

31. The BSEA accepts Conclusion of Law 6 with the following amendment: delete the sentences "In-school instruction and therapy is not private school placement. Placement in the private pre-school program with typical children, while not inappropriate, was unnecessary." Add "In this case, the School offered a Free Appropriate Public Education." Close with last sentence: "Therefore, the parents are not entitled to reimbursement from the public agency."

32. The BSEA accepts the IHO's Order 1 as written.

33. The BSEA deletes the IHO's Order 2 as written.

34. The BSEA deletes the IHO's Order 3 as written.

35. The BSEA deletes the IHO's Order 4 as written.

36. All other portions of the IHO's decision not discussed are accepted as written.

ORDERS

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

1. The decision of the Independent Hearing Officer is affirmed as modified.

2. Any other motions not addressed specifically in this opinion are hereby deemed to be overruled or denied.

Date: December 6, 2002

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

APPEAL STATEMENT

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