

# Indiana Board of Special Education Appeals

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## BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of M.W., )  
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And )  
)  
New Albany-Floyd County Consolidated ) **Article 7 Hearing No. 1307.02**  
Schools )  
)  
Appeal from a Decision by )  
Jerry L. Colglazier, Esq. )  
Independent Hearing Officer )

### COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

#### **Procedural History**

On August 29, 2002, the Student,<sup>1</sup> by the Student's attorney-in-fact and mother, filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed on September 3, 2002. On September 4, 2002, the School filed a motion to dismiss arguing that as the Student was over the age of 18, parental rights transferred to the Student and the parent could not request the hearing. The Student filed a motion to dismiss on September 7, 2002. A pre-hearing conference was held on September 26, 2002, to consider the motions to dismiss as well as pre-hearing issues. After the conference, the IHO issued his pre-hearing order on September 26, 2002, indicating the pre-hearing conference would be held in abeyance pending a hearing on the School's motion to dismiss, which was scheduled for October 4, 2003. Subsequently, the Student submitted an affidavit indicating the Student's desire to proceed with the hearing and the Student's consent for the Student's mother to represent the Student. The IHO issued an amended order on pre-hearing conference indicating the Student is entitled to proceed with this hearing and that the Student's mother is the Student's representative. The hearing scheduled for October 4, 2002, was vacated and a telephone pre-hearing conference scheduled for the same time.

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<sup>1</sup>Any references to the "Student" includes the Student and the Student's representative.



As a result of the pre-hearing conference, the IHO issued a pre-hearing order on October 10, 2002. The parties were advised of their hearing rights. The hearing was scheduled for November 18, 2002, continuing daily until concluded. Deadlines were established for the exchange of evidence and witness lists. The issues for hearing were identified as follows:

1. Is Student/Parent entitled to reimbursement for costs for unilateral placement at de Paul School for grades 5 through 8?
2. Did local educational agency (LEA) provide Student a free appropriate public education (FAPE) following enrollment in LEA for the ninth grade and following?
3. Is Student entitled to reimbursement for attendance at Landmark College because LEA failed to provide Student a FAPE?
4. Is Student entitled to compensatory education at Landmark College for failure to provide Student a FAPE?
5.
  - a. Procedural Safeguards (Rule 22).
  - b. Identification and Evaluation (Rule 25).
  - c. Determination of Special Education Services (i.e., individualized education program (IEP) implementation, accountability, least restrictive environment (LRE), home instruction, chronic illness (Rule 27)).
  - d. Transition Services (Rule 28).

On October 15, 2002, the IHO issued an order granting the School's request for an extension of time, such that the final decision was due by December 16, 2002. During the latter part of September, 2002, and the early part of October, 2002, the Student submitted a number of letters or motions to the IHO. On October 21, 2002, the IHO responded to the Student's concerns.

The hearing was held on November 18, 19, 20, 21, and 22, 2002. At the conclusion of the hearing, the parties agreed to submit briefs in lieu of closing arguments, and agreed to an extension of time such that briefs were to be submitted by January 6, 2003, with the IHO's decision to be rendered by February 4, 2003. Both the Student and the School were represented at the hearing by counsel.

### **The Written Decision of the IHO**

The IHO's written decision was issued on January 31, 2003. The following information is a summary of the 58 Findings of Fact determined by the IHO.

The Student is twenty-one years of age and attended public school within the LEA during the 1990-1992 school years for grades two, three and four, and school years 1996 through 2001, attending grades nine, ten, eleven, and twelve when he unilaterally left school without formal withdrawal. The Student did not receive a diploma or earn a General Equivalency Diploma (GED) from the LEA, but did earn the Student's GED after leaving the LEA from the State of Indiana in the fall of 2001.



The Student was unilaterally enrolled in and attended The de Paul School in Louisville, Kentucky, from 1992-1996 for grades five, six, seven, and eight. The Student was unilaterally enrolled in and attended Landmark College in Putney, Vermont, during the summer and fall of 2001, and has expressed the Student's intent to continue enrollment in Landmark in January, 2003.

The Student first enrolled in the LEA in May, 1990, for the last five days of second grade. He had difficulty reading and the Student's Parent referred him for an educational evaluation. The Parent advised the School the Student had been evaluated earlier but test results and prior school records were not available. The Student was evaluated and determined to be eligible for special education services as a student with a learning disability (LD). The WISC-R revealed IQ scores of 106 verbal, 124 performance, and 116 full scale which falls within the high average range. The school psychologist conducting the test was not available to testify. However, the current school psychologist reviewed the text and detected an error in computations wherein the full scale IQ should have been 105. A case conference committee (CCC) was held on August 20, 1990, to develop an IEP for the Student. The Student was placed in third grade with special education placement for 51% of the instructional day. The Student received educational benefit from this placement. The third grade teacher used a multi-sensory learning approach and reported that by the end of the year the Student was reading at an early fluency level, the Student's language and spelling were at the 2<sup>nd</sup> and beginning 3<sup>rd</sup> grade levels, and math was at the 3<sup>rd</sup> grade level.

For the following school year, the Student was assigned to the 4<sup>th</sup> grade LD classroom for reading and language and was in general education for social studies, math, science, health, music, art, and physical education. The IEP prepared in May, 1991, contained annual goals and short term objectives including written language skills, oral language skills, reading skills including decoding, and reference skills. Adaptations included an adaptive grading policy for math, social studies, science, and health; all tests to be read orally; oral directions on most assignments; and individualized or small group instruction when reading is involved in an assignment. The fourth grade teacher used multi-sensory instruction. The IEP was amended to include "improve study/organizational skills" beginning in November, 1991. The Student had satisfactory grades in most subjects, but was "below grade level" in English and spelling.

An IEP was developed on May 7, 1992, for the Student's 5<sup>th</sup> grade year, 1992-1993. Current levels of performance reflected reading at the 1<sup>st</sup> -2<sup>nd</sup> grade level, language at 2<sup>nd</sup> grade, and math at approximate grade equivalent. Special education placement in the resource room was recommended for reading, language, and spelling, with the Student to spend 74% of the instructional day in general education (math, physical education, health, social studies, science, art, music). Accommodations included oral testing and assistance as needed, shortened work assignments as needed, adaptive grading as warranted, additional time as needed and as determined reasonable to complete assignments.

The Student was unilaterally enrolled by the Parent at The de Paul School in Louisville for 5<sup>th</sup> through 8<sup>th</sup> grades. Testing at that time indicated the Student was reading at the 1.6 grade level with comprehension at 3.4 grade level. Math skills were at beginning 4<sup>th</sup> grade level, and oral spelling at 2.9 grade level. The de Paul School is a private school specializing in serving students with learning disabilities. The program is primarily remedial and ends at the equivalent of 8<sup>th</sup> grade. At the conclusion of the de Paul enrollment the Student was at grade level 4.4 in reading comprehension, 4.7 in language, 10.2 for vocabulary, 9.3 for math comprehension, 9.3 for math application, 8.4 for social studies, and 6.2 for science.

The Parent contacted the LEA in November, 1995, concerning placement at the LEA high school for the 9<sup>th</sup> grade year in 1996-1997. LEA notes from the meeting with the assistant director of student support services and the director of middle school transition reveal discussions pertaining to de Paul credits, IEP, auditory learning, re-test, and that LD resource would be OK. The Student was enrolled in the 9<sup>th</sup> grade with the LEA. The LEA indicates the Parent did not contact the LEA special education personnel and did not inform the LEA the Student had a disability or had previously received special education services. The Student was enrolled as a full-time general education student with no testing administered and no special education services provided. The LEA did not follow up on the enrollment status of the Student following the November, 1995, meeting alleging they did not know the Student had enrolled within the school system.

The Student was absent 10.5 days during the first semester and 23.5 days during the second semester. The Student received one B, one C, two D's and one F during the first semester of 9<sup>th</sup> grade and four C's and two D's during the second semester.

In the 10<sup>th</sup> grade, the Student was absent 9 days during the first semester and 32 days during the second semester. The Student's grades for the first semester were three F's, one F+, one D and two C's. The Student passed the Indiana Graduation Qualifying Exam (ISTEP+) without accommodations during grade 10.

The Student was absent 8 days during the first semester and 16.5 days during the second semester of 11<sup>th</sup> grade. The Student's grades included two B's, one D+, one D- and one F for the first semester and four F's, one D and one C for the second semester.

In the 1999-2000 school year, the Student repeated 11<sup>th</sup> grade, receiving an F, three F+, and a B. The Student was absent 19 days. The Student attended the high school for part of the day and the Prosser School of Technology for the remainder of the day.

For the first semester of the 2000-2001 school year the Student received F's in 7 classes. The Student was absent 33 out of 87 school days.

The Student attributed absences to health problems and later to his perception that he was beat-down, was older than his peers, and that he would not be able to graduate with age appropriate peers. The Parent did not seek special education intervention. The LEA attributed the academic failures to absences, failure to do the work, failure to make up work, and failure to complete homework. The LEA did not seek referral for special education nor did the Parent request an evaluation.

The Parent obtained an independent psychological evaluation from the Children's Resource Group (CRG) in February and March, 2000. The educational history provided by the Student/Parent reflects "ninth and tenth grade were considered good years . . . , in the 11<sup>th</sup> grade student gives up easily and does not do work . . . , study habits are inconsistent, student was disorganized and missed school due to allergies and an unwillingness to go to school, and depression when he was not doing well." The psychological summary indicated overall abilities in the average range. Significant weaknesses were found in the areas of reading recognition, spelling, and written expression. The profile indicated a significant language-based learning disability which affects basic reading and spelling skills and written expression. The evaluation further indicated the Student appeared to be compensating well for reading difficulties as noted by average reading

comprehension skills.

The Parent met with the school psychologist on May 15, 2000. The parties met on May 31, 2000, to determine educational needs. The LEA suggested testing for an emotional disability because of concerns raised by the CRG report. The Parent/Student consented to only “educational testing.” The evaluation was not completed prior to the start of the 2000-2001 school year as the Student attended military training during the summer of 2000.

The Parent filed a Complaint with the Indiana Division of Exceptional Learners (Division)<sup>2</sup> on July 31, 2000. The Complaint Investigation Report (CIR) was issued on August 28, 2000. Six issues were investigated:

1. 511 IAC 7-4-4 with regard to the school’s alleged failure to provide special education services to a student enrolled in a private school;
2. 511 IAC 7-10-3(o) with regard to the school’s alleged failure to conduct a comprehensive reevaluation at least every 36 months;
3. 511 IAC 7-10-3(e) with regard to the school’s alleged failure to conduct an educational evaluation and convene a CCC within 40 instructional days from the date of the parent’s written request;
4. 511 IAC 7-3-23 and 511 IAC 7-4-1(b) with regard to the school’s alleged failure to provide the student a FAPE;
5. IC 20-1-6-3(g) with regard to the school’s alleged failure to award credit for schoolwork completed by a student with a disability on the same basis as it is awarded to non-disabled student; and
6. 511 IAC 7-12-1(g)(5) with regard to convening a case conference committee meeting when a student who has been receiving special education elsewhere moves into the geographic jurisdiction of the public agency.

The Division found no violation of 511 IAC 7-4-4, determining the school is not required to provide special education services to a student unilaterally enrolled in an out-of-state private school. There was a violation of 511 IAC 7-12-1(g)(5) as the Student was once determined eligible and received special education and related services prior to enrolling at the private school and the Student received special education at the private school. Upon re-enrollment in the LEA, the CCC should have convened. Because there had been no re-evaluation of the Student, the LEA also violated 511 IAC 7-10-3(o). There was no violation of 511 IAC 7-10-3(e), as the initiation of the 40 day instructional days required for the evaluation process to be completed did not begin until August 16, 2000, as the last day of the school year had been May 26, 2000. Written consent for the evaluation was given May 31, 2000. The LEA was also found in violation of 511 IAC 7-3-23 and 511 IAC 7-4-1(b) with respect to providing the Student a FAPE. No violation was found with respect to IC 20-1-6-3(g), as the CIR determined the Student did not earn credit in his computer programming classes due to excessive absences and the Student did not take advantage of opportunities afforded to make up missed work

The IHO adopted the conclusions of the CIR. The corrective action ordered by the Division required the LEA to complete the Student’s evaluation and conduct a CCC meeting to determine eligibility and whether the Student was entitled to compensatory services. A CCC meeting was

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<sup>2</sup>The Division of Exceptional Learners was formerly the Division of Special Education.

held on August 30, 2000, and was attended by the Student, the Parent, the Student's attorney and two advocates. An IEP was developed and agreed to at the conference. The IEP included accommodations and modifications to address difficulties in reading and writing. On September 13, 2000,<sup>3</sup> the Student requested reconsideration of the complaint. The Division declined to amend the CIR.

The parties participated in mediation on December 4, 2000, and reached agreement:

First semester. (Student) will finish as many classes as possible for the first semester 2000, by completing missed work (the list will be provided by (Student) to school). For any other first semester classes where work is not completed (Student) will be given an incomplete until (date to be agreed at case conference) with responsibilities going through (special education teacher).  
2<sup>nd</sup> Semester. Academic classes will be completed in the special education resource room. (Student) will be given a list of projects to be completed for those elective classes. (Student) will go to the appropriate classroom for electives. The same time limits will apply for (Student) on all elective classes. (Student) will be given extra time for tests. With the appropriate doctor's statement given to . . . school nurse, the school will provide home bound assistance to (Student) during extended period of absence from school. The Prosser issue of six credits and future credits will be discussed at case conference on December 18, 2000.

At the CCC meeting of December 18, 2000, the Student presented a letter to the director of special education which stated, in part:

This letter is to inform you that I have no other reasonable option but to attend a private school designed specifically to educate students with language based learning disabilities. Under Article 7 codes, the law states that I must give you 10 days advance notice in writing and this notification must be presented at the time of our case conference. I am also requesting that (LEA) pay for my private placement because I am unable to receive the needed education in the (LEA). I need a school environment that will meet my educational needs. Since my departure from The de Paul School at age of 14, a private school for dyslexic students, I passed the ISTEP. Now, I must move forward and pass the eleventh grade.

The LEA requested a meeting to incorporate the mediation agreement into an IEP, and also requested a copy of the bill for the independent evaluation for payment consideration. The CCC was convened February 1, 2001. An IEP was agreed upon which provided homebound instruction, 6 hours per week to complete first semester credit in English, government and journalism. The Student was to take the pre GED test and enroll in the GED program. Homebound teacher support would continue for 2 hours per week during GED preparation. The homebound services were to be provided at the high school after regular school hours. The Student attended only a few session.

A CCC reconvened March 15, 2001. The Student felt course work was going fine, but assistance was needed in preparing for the English writing and comprehension portions of the GED. The CCC offered to continue homebound instruction and to provide transportation. The Student did not sign the IEP and the Student did not return to school at the LEA.

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<sup>3</sup>The IHO's finding gives September 13, 2002, as the date of the request for reconsideration. This is a typographical error, and should be September 13, 2000.



The Student enrolled in Landmark College in Putney, Vermont. Landmark attracts students with specific learning disabilities. Student attended Landmark in the summer and fall of 2001, served in the military in the spring and summer of 2002, and has expressed an intent to return to Landmark in January, 2003. While the Student demonstrated academic gains at Landmark, all courses were non-credit. It is anticipated that additional non-credit courses would be required upon the Student's re-enrollment prior to entering credit courses.

The Student's grades, and ultimate academic success, during the 10<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> grades at the LEA were severely compromised by excessive absences (whether due to illness or voluntary), failure to complete work, failure to make up work, and failure to take advantages of opportunities to make up missed work. The Student earned a GED diploma from the State of Indiana on August 24, 2001.

From these Findings of Fact, the IHO reached 20 Conclusions of Law, which are summarized as follows.

The IDEA<sup>4</sup> mandate to award appropriate relief to a student denied FAPE includes the authority to order services beyond the mandated cut off age and for periods of time when a student was denied FAPE. OSEP,<sup>5</sup> in *Letter to Riffel*, 34 IDELR 292 (OSEP 2000), stated that the purpose of a compensatory education award is to remedy the failure to provide services the student should have received in high school which denied FAPE. The OSEP opinion further stated a school is not required to provide compensatory services to a graduated student once the student enters college or junior college, unless such level of education is considered "elementary and secondary education" under state law, and that IDEA does not authorize a school to provide compensatory education at the post secondary level.

The Student did not receive a diploma from the LEA or acquire his GED diploma while enrolled with the LEA, prior to his enrollment at Landmark. The Student has not demonstrated that the level of education at Landmark was considered elementary and secondary rather than education at a post-secondary level.

There was no disagreement with the educational program, IEP, or Student's academic progress for school years 1992 through 1996, the second through fourth grades. The record reflects adequate educational benefit prior to the unilateral enrollment of Student at The de Paul School for grades five through eight, and the IEPs were reasonably calculated to enable Student to receive educational benefits. Student made academic progress and received educational benefit in grades nine and ten with the LEA.

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<sup>4</sup>Individuals with Disabilities Education Act, 20 USC § 1400 *et seq.*

<sup>5</sup>Office of Special Education Programs, US Department of Education.

The Indiana Department of Education, Division of Special Education CIR of August, 2000, found that Student was denied a FAPE by not convening a CCC when Student re-enrolled in grade 9, by not providing the Student with a comprehensive re-evaluation upon enrollment, and by not determining if Student was eligible for special education and related services or should be declassified. The Division ordered the CCC to convene to determine eligibility, and if eligible, determine the need for compensatory services required to meet the needs of the Student.

The CCC developed IEPs that were appropriate to enable the Student to receive educational benefits that the Student requested, including diploma or GED diploma. The CCC and IEPs developed following the Division's mandate were appropriate to meet the corrective action ordered by the Division in August, 2000. The Student was provided remedy for the denial of FAPE. Although Student may now disagree with the remedy previously proposed and to which he agreed prior to the unilateral enrollment at Landmark, it would be improper to set aside the prior remedy and grant alternative relief. The Student unilaterally left school without withdrawal and entered Landmark College. Failure of a student to receive a diploma is not a denial of FAPE pursuant to IDEA or Article 7.

The LEA provided educational benefit and proposed IEPs to enable Student to receive educational benefit prior to enrollment at de Paul. The Student is not entitled to reimbursement for the costs of the unilateral placement at de Paul.

The Student received educational benefit for grades 9 and 10, and could have received academic benefit thereafter with the opportunities provided. However, the Student did not receive a FAPE as found by the CIR of August, 2000. The LEA offered appropriate programs, services and accommodation to provide Student a FAPE following the CIR of August, 2000. The Student declined to accept the remedy agreed upon and unilaterally left the LEA and enrolled in Landmark. Evidence does not demonstrate that Landmark offers a program that is elementary or secondary level of education as opposed to post secondary. Student is not entitled to reimbursement for attendance at Landmark nor compensatory education at Landmark.

There was no violation of procedural issues beyond the findings and conclusions of the CIR of August, 2000. An appropriate remedy was agreed upon by the parties.

Based on the foregoing, the IHO entered orders determining the Student is not entitled to reimbursement for costs associated with the unilateral placement at The de Paul School for grades 5 through 8; the Student is not entitled to reimbursement for attendance at Landmark College because Student was previously provided an adequate remedy for the denial of FAPE; and Student is not entitled to compensatory education at Landmark College (or other location or program) because Student was previously provided adequate remedy for the denial of FAPE.

### **Appeal to the Board of Special Education Appeals**

On March 10, 2003, the Student, by counsel, timely filed his Petition for Appeal. On March 11, 2003, the School, by counsel, requested an extension of time in which to file its response to the Student's petition. By order dated March 11, 2003, the School was granted an extension until March 31, 2003, in which to file its reply. The time line for the Board of Special Education Appeals (BSEA) decision was extended until April 30, 2003. On March 24, 2003, the Student, by counsel, filed an amended

appeal. On March 26, 2003, counsel for the School requested a second extension of time in which to file its response. This request was granted by order of the BSEA on March 26, 2003, such that the School's response was to be filed by April 7, 2003, with the BSEA's decision due by May 7, 2003. The School timely filed its Response to the Petition for Review on April 7, 2003. On April 7, 2003, the Student, by counsel, filed a second amended appeal.

### **Petition for Review**

The Student requests the BSEA to conduct a review de novo of the hearing, and asks the BSEA to reverse the IHO's decision and to find the following:

1. the proper definition of dyslexia embraced by the National Institutes of Health;
2. the School failed to provide the Student educational benefit in grades 3 and 4;
3. the School failed to provide appropriate, effective multi-sensory instruction;
4. the Student is entitled to reimbursement for unilateral placement at de Paul;
5. The de Paul School's gift of independent reading enabled the Student to pass ISTEP+;
6. Indiana law negates the school psychologist's theory that achievement scores were invalid for age 8 years, 10 months;
7. Landmark College addresses remediation at elementary and secondary levels;
8. the Parent did inform the School's special needs department that the Student was re-entering school as a 9<sup>th</sup> grader;
9. the Student did not receive educational benefit in the 9<sup>th</sup> and 10<sup>th</sup> grades at the School;
10. the School failed to inform the Parent of parental rights and stonewalled the Parent;
11. absences are not the root cause of the Student's failure to receive educational benefit;
12. the School's high school IEPs failed to provide educational benefit;
13. the School's mediation agreement did not provide the Student a meaningful remedy nor did it address the Student's specific learning needs;
14. the Student is entitled to reimbursement for the unilateral placement at Landmark;
15. the Student is entitled to compensatory education to attend Landmark; and,
16. the IHO failed to find the Student's special needs required specific methods not offered by the School, not included in any of the Student's IEPs, and not provided by the School.

### **Response to Petition for Review**

The School responded to the Student's petition by arguing as follows:

- A. the appeal should be dismissed as the Student has failed to cite to the specific findings of fact and conclusions of law to which the Student takes exception, contrary to the requirements of 511 IAC 7-30-4(g);
- B. additional findings concerning the definition of dyslexia are not required as the Student concedes the IHO's finding concerning the definition of dyslexia is correct;
- C. the IHO's conclusion that the School provided a FAPE in the 3<sup>rd</sup> and 4<sup>th</sup> grades is supported by sufficient evidence in the record;
- D. the IHO's findings that the 3<sup>rd</sup> grade teacher utilized a multi-sensory learning approach are supported by sufficient evidence in the record;
- E. the IHO's conclusions that the Student and Parent are not entitled to reimbursement for the unilateral placement at de Paul are supported by sufficient evidence in the record;

F. the IHO did not err in failing to find the Student passed the ISTEP+ only as a result of 4 years at de Paul;

- G. the IHO's finding that the psychological testing had an error in computations is supported by the record;
- H. the IHO's conclusions that there was insufficient evidence to find that the level of education at Landmark was at the elementary or secondary level rather than at the post-secondary level are supported by sufficient evidence in the record;
- I. the IHO's conclusions that the School complied with the corrective action ordered by the Division in August, 2000, and offered an appropriate remedy for the denial of a FAPE are supported by sufficient evidence in the record;
- J. the IHO's conclusion that the Student made academic progress and received educational benefit in 9<sup>th</sup> and 10<sup>th</sup> grades is supported by sufficient evidence in the record;
- K. the IHO's finding and conclusion that the School appropriately informed the Parent and Student of their parental rights are supported by the record;
- L. the IHO's finding that the Student's success in high school was severely compromised by his poor attendance, failure to complete work, and failure to make up work is supported by sufficient evidence in the record;
- M. the IHO's conclusion that the Student's high school IEPs were reasonably calculated to provide educational benefit is supported by sufficient evidence in the record;
- N. the IHO's conclusions that the mediation agreement, among other things, offered a remedy for the denial of a FAPE and met the corrective action ordered by the Division are supported by sufficient evidence in the record;
- O. the IHO's conclusion that the Student is not entitled to reimbursement for the unilateral placement at Landmark is supported by sufficient evidence in the record;
- P. the IHO's conclusion that the Student is not entitled to compensatory education at Landmark is supported by sufficient evidence in the record;
- Q. the IHO did not err in failing to find the NIH Study is the "premier resource" on what the Student needed to receive educational benefit or that the Student's needs required specific methods not offered by the School;
- R. the statute of limitations and Article 7 bar any remedy for 1992-1996, 1996-1997, 1997-1998, 1998-1999, 1999-2000;
- S. the equitable doctrine of laches prohibits reimbursement for de Paul and compensatory education for 1996-1997, 1997-1998, 1998-1999, 1999-2000.

### **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 April 3, 2003. Review was set for April 14, 2003, in Indianapolis, in the offices of the Indiana Department of Education. All three members of the BSEA appeared on April 14, 2003. 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 Student timely appeals from the decision of the IHO. The School timely responds. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the

decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-30-4.

2. The BSEA shall not disturb the findings of fact, conclusions of law, or orders of the IHO unless the BSEA finds the IHO's decision to be:
  - a. arbitrary or capricious.
  - b. an abuse of discretion.
  - c. contrary to law, contrary to a constitutional right, power, privilege, or immunity.
  - d. in excess of the jurisdiction of the IHO.
  - e. reached in violation of an established procedure.
  - f. unsupported by substantial evidence.511 IAC 7-30-4(j).
3. The BSEA does not engage in a de novo review of the hearing. Due process hearing appeals are governed by the provisions of 511 IAC 7-30-4.
4. The Student's petition for review fails to comply with the requirements of 511 IAC 7-30-4(d)(3). The Student has not identified those portions of the findings, conclusions and orders to which exception are taken. Although the petition could be dismissed for failure to comply with required procedures, the BSEA declines to exercise its discretion to dismiss the petition.
5. The Student is 21 years old. He was identified as a student with a learning disability in August, 1990, and received special education and related services from the LEA for third and fourth grades.
6. Although the school psychologist made a computational error in computing the Student's scores shortly before the third grade, the Student was still eligible for services as a student with a learning disability.<sup>6</sup>
7. The Student's third and fourth grade teachers used a multi-sensory learning approach with the Student. The Student received educational benefit during third and fourth grades.
8. The School offered an appropriate education and IEP for the Student's fifth grade year.
9. The Parent unilaterally enrolled the Student in The de Paul School for fifth through eighth grades. The de Paul School specializes in children with learning disabilities.
10. The Student enrolled in the public school for ninth and subsequent grades. Upon re-enrollment in the School, the Student was enrolled in general education classes and was not identified as a student with a disability.

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<sup>6</sup>The School's current school psychologist testified as to a computational error made by the psychologist who evaluated the Student just before the third grade. Counsel for the Student makes unsubstantiated allegations of perjury on the part of the current school psychologist. Such allegations are not supported by the evidence.

11. The Student received educational benefit during ninth and tenth grades. The Student took and passed the ISTEP+ during tenth grade with no accommodations being provided.
12. The Student failed to turn in work, had excessive absences at school, and failed to make up work, which contributed to his failures in high school, particularly in 11<sup>th</sup> and 12<sup>th</sup> grades.
13. There was insufficient evidence to indicate that the educational program provided by Landmark College is at the elementary or secondary school level as opposed to post-secondary education.
14. The Parent obtained an independent evaluation when the Student was 18 years old.
15. The School evaluated the Student after the Parent advised the School of the independent evaluation.
16. The Parent filed a complaint with the Division of Special Education. The resulting investigation determined the School violated Article 7 by failing to convene the CCC when the Student re-enrolled in the School in ninth grade, failing to re-evaluate the Student, and failing to provide special education and related services. The IHO adopted the findings and conclusions of the complaint investigation report. The School was ordered to complete its evaluation of the Student, convene the CCC to determine eligibility for special education, and to determine compensatory services.
17. The parties subsequently engaged in a mediation session and reached a mediation agreement.
18. The School has complied with the corrective action ordered as a result of the complaint, and has fulfilled the requirements of the mediation agreement. Several CCC meetings were held, an IEP was developed and revised, and appropriate educational services, to which the Student agreed, were offered and made available to the Student. The IEP and educational program offered to the Student were designed to confer educational benefit and to enable the Student to graduate from high school. The Student chose to stop attending school.
19. The Parent and Student are not entitled to reimbursement for the unilateral placement at de Paul.
20. The Parent and Student are not entitled to reimbursement for the unilateral placement at Landmark.
21. The Student is not entitled to compensatory education at Landmark.
22. The IHO's findings of fact are supported by substantial evidence in the record.
23. The IHO's conclusions of law are supported by the facts and law.

## **ORDERS**

In consideration of the foregoing, the Board of Special Education Appeals now upholds the decision of the IHO in its entirety.

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

Date: April 16, 2003

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

### **Appeal Right**

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