Indiana Board of Special Education Appeals

Room 229, State House - Indianapolis, IN 46204-2798
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BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of D.C.,	)	
	)	
And the	)	
	)	
Jay School Corporation	)	**Article 7 Hearing No. 1319.02**
	)	
Appeal from a Decision by	)	
Lon C. Woods, Esq.	)	
Independent Hearing Officer	)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

On November 6, 2002, the Parent filed a request for a due process hearing with the Indiana Department of Education (IDOE). An Independent Hearing Officer (IHO) was appointed on November 7, 2002. A pre-hearing conference call was held on November 18, 2002. The IHO issued a Summary of Pre-hearing Conference on December 2, 2002, indicating that the issues had not yet been formulated and the parties had stipulated to pursue an independent evaluation.

On November 23, 2002, the Parent's representative submitted a letter indicating that no agreement could be reached on the independent evaluator. The Parent was therefore requesting a pre-hearing conference to determine the necessity of an independent evaluation and also requesting that the hearing be scheduled prior to December 20, 2002. The Parent suggested dates for the hearing. The School's counsel responded on November 26, 2002, indicating counsel was not available on the suggested dates, and proposed dates during the second and third weeks in January, 2003. On December 4, 2002, the Parent's representative responded, indicating the Parent was not waiving her right to have the hearing conducted and a decision rendered within 45 days of the request for hearing, noting that neither

party had requested an extension of time, and objecting to any extension that might be requested by the school.[1]

A second pre-hearing conference call was held on December 9, 2002. The IHO issued a Summary of Second Pre-hearing Conference on December 10, 2002. The hearing was scheduled for January 23, 24 and 25, 2003. Deadlines were established for the exchange of evidence and witness lists. The issues for hearing were identified as follows:

1. Is the School providing the child with an appropriate education, reasonable and individualized accommodations, a modified program, and adaptations that will allow him to be involved in and progress in the general education curriculum?

2. Has the School made reasonable efforts to provide the child with supplementary aids and services to allow him to progress in the general curriculum?

3. Is the School providing appropriate related services?

4. Was the School's functional behavioral assessment appropriate?

5. Was the School's behavioral intervention plan successful and appropriate?

6. Is the Parent entitled to reimbursement for the services of the private behavioral consultant and other educational services that she is providing?

7. Is the School providing the child with appropriate assistive technology?

8. Is the staff that serves the child adequately trained?

9. Was the child's placement changed inappropriately?

10. Did the School provide the required written notice?

11. Is the child entitled to compensatory education?

12. Should the child be provided with an alternative assessment program?

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[1]The Student's request for hearing was received by the Indiana Department of Education on November 6, 2002. Unless the IHO granted a party's request for an extension of time, the decision was to be rendered no later than December 23, 2002.

13. Did the School give due consideration to the evaluation provided by the parent?

14. Did the School give due consideration to the items in the Parent's report to the team?

15. Has the School identified all of the child's disabilities?

16. Has the School punished the child for behaviors that are a manifestation of his disabilities?

17. Is suspension an appropriate positive behavioral intervention for this child?
The hearing was held on January 23, 24, & 28, 2003. A final pre-hearing conference was held before the start of the hearing on January 23, 2003. The Parent's exhibits 1 through 11 were admitted without objection. The School's exhibits 1 through 10 were admitted without objection. .

The Written Decision of the IHO

The IHO's written decision was issued on February 22, 2003. The following information is a summary of the 18 Findings of Fact determined by the IHO.

1. The Parent's request for a due process hearing was received by the Indiana Department of Education on November 6, 2002.

2. Confirmation of the appointment of an IHO was forwarded to the parties on November 7, 2002.

3. The Student resides with his mother. She is employed full-time. His father died a few years ago of complications from diabetes, Type I.

4. The Student is currently being treated for diabetes, Type I, by the Riley Hospital for Children in Indianapolis. His blood-glucose levels are monitored at home and at school. A student health care plan has been developed by the mother per instructions issued by the Riley Hospital for Children, and is on file at the school. It includes instructions for monitoring the Student's blood-glucose levels, a recommended snack diet, and emergency instructions in the event of unconsciousness or other trauma.

5. The Student's primary disability is autism spectrum disorder and his secondary disability is communication disorder. The evidence does not support a finding of additional disabilities, including, but not limited to, diabetes under other health impairment affecting his behavior due to low or high blood-glucose levels.

6. The Student is enrolled as a sixth grader at the elementary school in the Life Skills Program pursuant to an individualized education program (IEP) developed May 15, 2002. His placement

includes approximately two and one-half hours in the Functional Life Skills Program, with the remainder of the school day devoted to physical education, music therapy, speech and language therapy, and art. He has been mainstreamed in health, science, and social studies. He's scheduled for promotion to junior high school next year and will likely be recommended for the Functional Life Skills Program with a new teacher of record.

7. On October 4, 2002, the parent requested a functional behavioral assessment (FBA) and the development of a behavioral intervention plan (BIP). A similar analysis and plan had been developed by Behavior Interventions, Inc. Notice of a case conference committee (CCC) meeting was sent on October 21, 2002, and the CCC met on October 30, 2002. The FBA was reviewed. Modifications in the Student's placement were made, while retaining the BIP that had previously been in use.

8. The Student was suspended for three days in November, 2002, for behavior endangering himself and others. This episode occurred in a general education class. The Student's teacher of record (TOR) was called to intervene. She believed the episode was precipitated by his frustration in the general education classroom.

9. Notice of the suspension, dated November 4, 2002, was sent by the principal to the parent. The notice advised that the Student would be allowed to return to school on November 8, 2002. The principal advised the parent of the behavior leading to the suspension as well as summary of his discussions with the teachers. No meeting was held with the parent.

10. The Student has demonstrated proficiency with the use of the computer when used for recreation or play activity, and seems to resist its use when instruction is involved.

11. The Student's speech and language is primarily limited to one-word utterances. Benchmarks have been developed for the improvement of expressive language and improvement of articulation. A Dynamo talker has been recommended and ordered by Behavioral Interventions, Inc., although it has not yet been delivered. The School's speech and language pathologist disagrees with its use believing it should only be used with children who are without speech.

12. The CCC reconvened to consider modification of the Student's IEP, which essentially eliminated his attendance in general education classes except for the weekly laboratory sessions. The Parent disagreed with this modification and requested a due process hearing. The Student's placement was ordered to remain that recommended by the May 15, 2002, IEP during the pendency of this proceeding.

13. An IASEP[2] exam was administered during the Student's third and sixth grade years in lieu of the state-wide assessment commonly known as the ISTEP+. The results have not been discussed with the Parent and will not be available for analysis until the spring.

14. The Student's current TOR and classroom teacher in the Functional Life Skills Program has a Bachelor and Master's Degree in special education, and has been a special education teacher with the School for twenty-four years. She is a member of the assistive technology team and autism assessment committee.

15. Low or high blood-glucose levels have not been a direct contributor to the Student's behavior outbursts. According to his physician, behavior is not a good indication of whether the blood-glucose level is high or low. Consistently low or high levels over a period of time would give cause for concern. According to his physician, the Student's autism complicates the problem in that he is unable to verbalize any symptoms he may be experiencing.

16. The Student's most recent psycho-educational evaluation was conducted during the spring, summer, and fall, 2001. The Student's cognitive skills range from grade-level 1.2 in word attack skills to 3.2 in letter identification. Adaptive behavior skills ranged from the 59th percentile in communication to the 81st percentile in socialization on the Vineland Scale.

17. The Parent has engaged the assistance of the Jay-Randolph Developmental Services which includes a therapist who consults with School personnel, and a paraprofessional who serves as an attendant during the Student's latchkey period, snow days, vacations, and after school. While the paraprofessional is not a licensed instructor, he does spend some time with the Student on his reading program provided by the School.

18. There is some professional disagreement between the Jay-Randolph Developmental Services and the School in regard to appropriate directions for the Student. This has caused some confusion for the Parent, particularly in areas involving the Student's education and therapy.

From these Findings of Fact, the IHO reached 4 Conclusions of Law, which are set forth below.

IHO's Conclusions of Law

The Parent's goal for her son is for him to successfully attend school as a general education student. And she has labored tirelessly to see he has the opportunity to attain that goal calling upon the assistance of various professionals, agencies, and the public schools. Since he is on the threshold of transitioning from performance/skill based to language-based activities predominate in the secondary level general

[2]Indiana Assessment System of Educational Proficiencies.

education curriculum, the challenge is even more daunting. With this in mind and after consideration of all oral and documentary evidence, the following conclusions of law are tendered. Inasmuch as some issues appear to be related, I will consolidate my discussion when possible.

1. ELIGIBILITY, FAPE & COMPENSATORY EDUCATION - The findings support the conclusion the Student's primary disability is autism spectrum disorder; the secondary being communication disorders. The Parent has expressed the belief diabetes is also a disability condition since low or high blood-glucose levels affect his behavior. The opinion of the pediatric diabetologist does not support this conclusion. Further, the Parent contends the Student has been at risk when required to ambulate in his stocking feet on a field trip. This is a liability issue not within the jurisdiction of this author.

   The Student began the current school year per an IEP dated May 15, 2002, following an annual case review on that date. His grade classification was the sixth grade, this being his fifth year in the Functional Life Skills Program with his TOR, and included forty minutes per week of speech and language therapy. Related services to be provided included transportation and music therapy. His placement also included participation in social studies, health, and science general education classes with staff support. He also participated in non-academic general education activities. Extended school year services were considered, but ruled out.

   511 IAC 7-27-4 describes the numerous components required of an individualized education program, i.e., a base-line of the student's current educational performance levels, annual goals and measurable benchmarks or short term objectives, related services and supplementary aids, consideration of statewide or local assessments and any appropriate alternatives, duration of activities and services, extent of participation in general education, means of measuring and reporting the student's progress to the parents, and identification of the least restrictive placement. The Parent has actively participated in all case conference meetings, and has provided evaluative information and other helpful input insofar as goals and objectives are concerned. There is no evidence that her input has been ignored in the development of his IEP. While no adaptive or augmentative devices were identified for use, certain benchmarks and testimony referred to their use, i.e., assistive technology in speech and language, a Dynamo talker, and casual use of a computer in the classroom (mostly recreational). No other such devices were proposed by the Parent during the hearing. That aside, the Student's IEP met the requirements of 511 IAC 7-27-6.

   Given the long-term aim for the Student to succeed in language-based educational activities as he approaches the transition from elementary school to junior/senior high school curriculum requirements, an emphasis on the development of communication sills and all reading related skills should receive the highest, not equal, emphasis. An intensive reading program needs to be incorporated into his proficiency with and (sic) interest in computers as part of his daily instruction. Unless his reading skills aren't dramatically improved within a relative (sic) short period of time, his

opportunity for success in the more language-based curricula at the junior/senior high school level will be negligible. If one doesn't try, it won't happen. His teacher stated he is proficient on the computer when playing games, but resists using it for instructional purposes which he does by turning off the computer. If he does so, take away a star. If he successfully accomplishes a task, reward him with a star or prize. The Student should not be allowed on the computer to play games until he has completed his assignments. If he doesn't, then recreational use should not be allowed.

2. TRAINING AND QUALIFICATIONS OF STAFF - The Student's TOR has served in this capacity for now the fifth year. She possesses a Bachelor's Degree and Master's Degree in special education, and is now in her twenty-fourth year as a teacher. She serves on the autism evaluation team and the assistive technology committee. The speech and language pathologist, likewise, has a Bachelor's Degree and Master's Degree in her field and has practiced her profession for several years. She has set pragmatic language and increased vocabulary goals for the Student. These individuals meet the requirements of 511 IAC 7-17-12 *et seq*.

   The Parent has utilized the services of the Jay-Randolph Developmental Services for several years. A case manager, counselor, and caretaker are currently working with the Parent and the School which has included classroom observation, behavior management, and participation in case conference committee meetings. To continue to utilize these resources will result in little or no educational benefit or additional insight into the Student's behavior issues. Except for the caretaker, these resources should be discarded. The caretaker is assigned to the Student during latchkey, after school until the Parent returns from work, other days when the Student is not in school, and monitors the Student's work in the Edmark Reading Program. While little educational benefit can be expected, the Parent should continue the use of the caretaker for the assistance he provides after school while the Parent is working.

3. NOTIFICATION, CHANGE OF PLACEMENT, & DISCIPLINE - The Student was suspended from school for three days following an altercation in a general education classroom. The date of said altercation is not presented in the oral testimony or documentary evidence. A notice dated October 21, 2002, of a case conference committee meeting on October 30, 2002, was distributed to discuss behavior issues. Notice of a three-day suspension dated November 4, 2002, was issued by the principal. Therefore, the altercation apparently occurred in October, 2002. The failed written notice raised as an issue apparently relates to the suspension notice since she attended the case conference committee on October 30, 2002. There is no basis to conclude written notice was not provided.

   A principal may suspend a disabled student for a period of up to ten (10) consecutive instructional days or a patterned series of suspensions equaling up to ten (10) instructional days within the same school year without such suspension constituting a change of placement. 511 IAC 7-29-1(d)(1) &

(2). Otherwise, such suspensions in excess of ten (10) days constitute a change of placement. 511 IAC 7-29-1(j)(1) & (2). The principal's actions did not have the effect of a change of placement.

While the principal had the authority to suspend the Student, potential suspension or expulsion as disciplinary actions were not included in the Student's behavior intervention plan. Alternatives to suspension such as in-school suspension, "time-out," or removal of certain privileges should be included in the Student's behavior intervention plan. If the Student failed to recognize the relationship between unacceptable behavior and the suspension, then the suspension was of no benefit. And it doesn't appear he did understand the reason for the suspension. The Student's current behavior intervention plan is more effective as a teaching device than as a behavior management framework. The plan needs to be revised to include interventions as specified above and be applicable whether the Student is in the Functional Life Skills Program, at lunch, in the hallway, or in another classroom.

The Parent had requested in writing a case conference meeting to consider the Student's functional behavior. Immediately prior to the suspension onset, the case conference committee met to review the Student's functional behavior assessment and to modify his schedule. Rather than attend the lecture classes in social studies, science, and health, he was to attend the general education classes only when a lab or demonstration was being conducted. Otherwise, he was to be allowed use of the library or receive an adapted textbook Since these modifications affected the goals and objectives of his IEP, there was a change of placement as defined by 511 IAC 717-13(2). The Parent and her advocate raised concerns about the procedures being followed during the meeting. The Parent should have been given the opportunity to agree or disagree with the committee's recommendations. Failure to do so was in violation of 511 IAC 7-22-1(e)(2).

4. REIMBURSEMENT - The Parent's claims for reimbursement for out-of-pocket expenses are either non-education related, i.e., the Riley Hospital charges, or are barred by the doctrine of laches since they were incurred during the 1996 through 1998 calendar years.

Based on the foregoing, the IHO entered the following orders:

1. The School shall form a search committee in order to recommend the purchase and use of an intensive reading instruction program for the Student on a computer or any other technological device.

2. The School shall provide extended school year services during the summer, 2003, as compensatory education required to improve the Student's reading skills and communication skills. Use of the Dynamo Talker need not be a part of his therapy.

3. The School shall modify the Student's behavior intervention plan to include alternatives to suspension or expulsion, including, but not limited to, in-school detention, "time-out" periods, deprivation of activities he enjoys, and a "tweaking" of the star system if it appears the Student has reached saturation weakening its effectiveness.

4. The Student's participation in science, social studies, and science general education classes should be limited to lab or demonstration days until he reaches a readiness level in reading in order to reduce the potential for frustration and/or boredom.

5. The Parent's request for reimbursement of out-of-pocket expenses is denied.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

On February 28, 2003, the School, by counsel, requested an extension of time in which to file its Petition for Review. By order dated February 28, 2003, the School was granted an extension until April 23, 2003, in which to file its petition. The time line for the Board of Special Education Appeals (BSEA) decision was extended until May 26, 2003. On March 7, 2003, the Parent, by representative, objected to the BSEA granting the School's request for an extension of time for an appeal that has not yet been filed. The Parent also requested that, if the BSEA had the authority to grant the School's request for an extension of time, that the Parent also be granted an extension of time to file a cross-appeal. On April 2, 2003, the BSEA granted the Parent's request for an extension of time to file a petition, such that the Parent's petition would also be due by April 23, 2003. Both the School and the Parent timely filed petitions for review on April 23, 2003.[3] The School also requested an extension of time in which to file its response to the Parent's Petition for Review. This request was granted by order of the BSEA on April 29, 2003, such that the School's response was to be filed by May 19, 2003, with the BSEA's decision due by June 18, 2003. The School timely filed its Response to the Petition for Review on May 19, 2003. The Parent did not file a response to the School's Petition for Review

School's Petition for Review

The School argues that a number of the IHO's findings of fact are not supported by substantial evidence or are incomplete by failing to consider all of the evidence presented. The School objects to the IHO's failure to accurately reflect in FFs No. 8 and 9 and Conclusion No. 3 that the Student was suspended

[3]Both petitions were filed by facsimile transmission. The BSEA accepts pleadings and correspondence by facsimile, provided the original is sent by U.S. mail. The Parent's representative failed to mail the original until after questioned about it by the administrative assistant for the legal division. To ensure that pleadings delivered by facsimile transmission are accepted for filing, all parties appearing before the BSEA need to be sure that the original is also timely mailed to the BSEA.

for behavior that occurred on November 4, 2002. The School notes that the Student's mother came to school to pick up the Student and it was communicated to her at that time that the Student was suspended, contrary to the IHO's determination that no meeting was held with the parent. Also, the teacher discussed the incident with the Student.

The School objects to FF No.10 that the Student has demonstrated a proficiency with the use of the computer. The School argues this overstates the evidence which indicates the Student can do "low level games." Also, the Student doesn't merely resist the use of the computer when instruction is involved, he becomes aggressive, hitting the monitor, yelling, pushing the keyboard away and turning off the computer. Computer time has been used as a reinforcer along with verbal praise, stickers, and stars.

The School argues FF No. 11 does not accurately show that the School staff do not support the use of a Dynamo Talker because it would undermine the Student's progress in the area of speech development.

The School also objects to FF No. 12 that the proposed IEP essentially eliminated the Student's attendance in general education classes. Although the IEP recommended the Student's participation in science and social studies classes be reduced to activities that were labs or hands-on instruction, no changes were suggested to his placement in art, music, physical education or library.

The School objects to FF No. 16 which suggests the Student's cognitive skills are between1.2 and 3.2 grade level. The School argues that this finding is erroneous and taken out of context. The overall testing of the Student demonstrates the Student is functioning in the mental disability range and needs a functional curriculum.

The School objects to FF No. 18 indicating professional disagreement between School personnel and Jay-Randolph Developmental Services. The School argues the only area of disagreement concerns the Student's placement in general education classes.

The School takes exception to Conclusions of Law Nos. 1 through 3 as being unsupported by substantial evidence, arbitrary and capricious, or contrary to law. The School argues the conclusion in the introductory paragraph is unsupported by substantial evidence since it assumes the Student's present levels of performance can sustain a "language-based" curriculum without experiencing frustration. The second paragraph of Conclusion No. 1 ignores the Student's participation in the general education classes of art, physical education, music, and library.

The fourth paragraph of the first Conclusion of Law is unsupported by the evidence and arbitrary and capricious in its analysis concerning the most appropriate IEP for the Student. There is no support in the record that there is a long-term aim for the Student to be in a language-based curriculum. The inclusion of an "intensive reading program" into the Student's IEP was not one of the issues framed by the IHO nor remedies sought by the Parent. The IHO misapplied the concept of utilizing the computer as a

positive reinforcer for the Student's behavior. Finally, the School argues, it has identified that the Student's behavioral outbursts are related to the academic demands of general education programming.

Based upon the objections to Conclusion of Law No. 1, the School objects to Orders No. 1, 2, and 4 as being arbitrary and capricious, contrary to law, and unsupported by substantial evidence. The School objects to the these orders as being inappropriate to confer education benefits upon the Student.

The School objects to paragraph 3 of Conclusion No. 3 as being contrary to law. The School argues that Article 7 provides that a BIP should identify positive behavioral intervention strategies and specify which skills will be taught in an effort to change a specific pattern of behavior. The School further argues that the one-time use of suspension was not inappropriate in this case and is permitted under the Individuals with Disabilities Education Act (IDEA) and Article 7. The School also argues the conclusion is contrary to law as the School is not required to conduct a FBA and develop a BIP unless the Student had a pattern of behavior that caused several suspensions. Similarly, the School objects to Order No. 3.

The School objects to the fourth paragraph of Conclusion No. 3 as being contrary to substantial evidence. The School argues there is no evidence that it did not honor the May, 2002, IEP as the stay-put placement.

Parent's Petition for Review

The Parent first challenges the BSEA's jurisdiction to grant the School an extension of time in which to file its petition for review. The Parent claims this was error, and requests the BSEA to uphold the IHO's decision except for the issues set forth in the Parent's petition for review.[4]

The Parent claims the IHO erred in *sua sponte* extending the hearing process resulting in a denial of a FAPE to the Student for nearly 2/3 of the current school year. The Parent states that both federal and state regulations[5] prohibit the IHO from granting an extension of the hearing deadlines absent a motion for such extension from a party. Neither party requested an extension of time, and the Parent repeatedly requested the IHO to schedule the hearing such that the 45-day timeline could be met. The IHO's decision was not rendered until 109 days after the Parent's request of a due process hearing was received by the IDOE.

The Parent alleges the IHO made incorrect findings of fact and ignored substantial evidence in favor of the parent. The Parent takes exception to FFs No. 4 and 5 and Conclusion No. 1, and Order No. 3 for

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[4]The Parent also requested, and was granted, an extension of time in which to file her petition for review.

[5]34 C.F.R. §300.511(c) and 511 IAC 7-303(i).

finding that the School's instructions for diabetes did not include monitoring urinary ketone levels in addition to blood glucose levels. The Parent also claims the IHO erred in finding there was insufficient evident to support identifying the Student as other health impaired (OHI) due to his Type I Diabetes. The Parent requests the BSEA to modify the findings and conclusions and orders to properly reflect the Student's secondary area of disability as OHI and to require the School to change the Student's health care plan and behavior modification plan to include monitoring the Student's blood glucose levels as soon as possible following any instances of changes in behavior in order to rule out low or high blood levels being the cause of behavioral outbursts. The Parent also requests the School be required to follow the recommendations of the Student's treating physician with regard to the testing of urinary ketones.

The Parent objects to FF No. 15, Conclusion No. 1, and Order No. 3, claiming the IHO erred in finding that low or high blood glucose levels have not been a direct contributor to the Student's behavior outbursts. The Parent notes there is no evidence or testimony to support the IHO's FF No. 8 that the Student was subjected to a three-day suspension for an episode that occurred in a general education class. The Parent claims the IHO erred in finding the Parent requested a hearing because of a disagreement at the case conference held on October 30, 2002. The Parent requested a hearing because the School suspended the Student.

The Parent alleges the IHO erred in finding the May 15, 2002, IEP was appropriate as it did not meet all of the legal requirements. The IEP failed to identify diabetes as an OHI that adversely affects the Student's educational performance. Further, the IEP failed to adequately address the Student's behavior and failed to provide appropriate positive behavioral interventions, strategies and supports, leading to the Student's suspension. The IEP failed to adequately address the Student's curriculum, and failed to include general curriculum goals and objectives, including behavioral goals. The IEP must also include a statement of the special education and related services and supplementary aids and services to be provided so the Student may be involved in and progress in the general curriculum. Finally, the IEP was deficient because it failed to provide
for extended school year (ESY) services.

The IHO erred in finding the staff had received adequate training to work with the Student. Although the special education teacher and speech and language pathologist are properly certified, the IHO misunderstood the issue which stated that appropriate training had not been provided to all staff that worked with the Student.

The Parent claims the IHO erred in concluding that the Parent should discard the services of Jay-Randolph Developmental Services except for the caretaker.

The Parent further claims the IHO erred in finding that there was no basis to conclude the Parent received prior written notice when the School proposed the change in the Student's placement.[6] The Parent also claims the IHO erred in reducing the Student's right to participation in the general education curriculum until his reading level improves.

School's Response to Parent's Petition for Review

The School responded to the Parent's Petition by noting that the School appropriately considered and addressed any impact to the Student's education from his diabetes. The School has appropriately trained its staff. The School also notes that during the course of the hearing, the Parent's advocate indicated that autism was not an issue concerning the training of staff. The School appropriately developed the Student's May 15, 2002, IEP and made appropriate modifications to the IEP at the October 30, 2002, case conference. The School now objects to the Parent's issue that the School failed to provide notice as being untimely. While the issue was first raised in the Parent's request for hearing, and had always been identified as a hearing issue, the School complains the Parent did not adequately identify what notice had not been given. As a result, the School had no opportunity to present evidence on the issue.

The School argues that the Parent's objections to the appropriateness of the May 15, 2002, IEP must be rejected for failure to timely raise this as an issue. Failure to raise such issues before the IHO precludes them from being raised on appeal. Finally, the School argues that it appropriately determined at the May 15, 2002, case conference that ESY services were not needed.

Additional Proceedings and Motions

While this matter was pending before the BSEA, the Parent filed additional pleadings and requests for intervention with the Division of Exceptional Learners and with the BSEA.[7] On May 2, 2003, in

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[6]The Parent appears to misstate this objection. Later the Parent argues "[T]hus, the IHO erred in concluding that prior written notice was provided, and the parent respectfully requests the BSEA to correct this error." The statement of the IHO in the conclusions indicates "[T]here is no basis to conclude written notice was not provided." The IHO, however, was addressing written notice concerning the Student's suspension, not written notice concerning a proposed change of placement. The IHO did not address the issue of whether the School provided written notice of a proposed change of placement.

[7]When an appeal is pending before the BSEA and additional proceedings are initiated by filing with the Division of Exceptional Learners, the Division refers the new filing to the BSEA for its determination as to whether the issues raised are sufficiently related to and similar to the issues currently pending before the BSEA. If so, the BSEA may subsume the new proceedings with the appeal. If the

response to the Student receiving a suspension, the Parent filed a complaint with the Division of Exceptional Learners (DEL). The issues raised concerned the appropriateness of suspension as a disciplinary tool, the Student's diabetes, and appropriate staff training. The DEL referred this complaint to the BSEA, which, on May 9, 2003, determined that the issues involved in the complaint, and the proposed resolution, were sufficiently related to and similar to the issues involved in the current appeal and that the complaint should be subsumed with the appeal.

On May 14, 2003, the Parent filed a request for an expedited hearing with the DEL. The Parent's proposed resolution was an IEP which is appropriate and includes a behavior plan. The DEL advised the Parent that an expedited hearing is only available when there is a disagreement about a manifestation determination, or when a parent disagrees with the school's determination to place a student in an interim alternative educational setting due to misconduct involving a weapon or drugs. The Parent's request did not meet the criteria for an expedited hearing. Further, the Parent's proposed resolution addresses issues currently pending before the BSEA.

On May 15, 2003, the Parent filed with the BSEA a Request for Emergency Intervention, alleging harassment and discrimination in violation of Article 7, IDEA, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA). The BSEA directed its attorney to conduct a conference call with the representatives of the parties to seek clarification of the Parent's request. The conference call was held at 10:00 a.m. on May 16, 2003. Shortly before the conference call the School filed, by facsimile transmission, its response to the Parent's request for emergency intervention, arguing the BSEA did not have jurisdiction to hear harassment or discrimination claims. The parties were advised by counsel for the BSEA that the BSEA did not have jurisdiction over Section 504 or ADA issues. The Parent's representative also inquired as to the status of the Parent's request for an expedited hearing. Counsel for the BSEA advised that the request did not meet the criteria for an expedited hearing. The Parent's representative indicated the Parent had new issues and still wanted a hearing. Counsel for the BSEA subsequently advised the Parent, in writing, to submit a new request for hearing that clearly identified new issues that were not currently pending before the BSEA.

On May 19, 2003, the Parent filed a second Request for Emergency Intervention. The Parent alleged that the School requested the Parent attend a manifestation determination review on May 16, 2003, at 9:30 a.m. Because of the conference call scheduled with counsel for the BSEA at 10:00 a.m. on May 16, 2003, the Parent requested the School to reschedule the CCC scheduled for 9:30 such that the School and Parent could meet after that call. The School refused to reschedule the meeting and offered instead to have the Parent and her counsel participate by telephone. The Parent's attorney requested the meeting be rescheduled for 2:00 p.m. The School refused to reschedule. The Parent further states that during the telephone conference call, the Parent's representative agreed with the School's counsel

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BSEA determines the issues raised are different, the new filing will be referred back to the Division for the appointment of a complaint investigator or an independent hearing officer, as appropriate.

that it was not in the Student's best interest to remain in the current school placement and that homebound instruction was appropriate. Despite this agreement, the School insisted on pursuing injunctive relief on May 16, 2003, to prevent the Student from attending school and to determine the amount of special education services to be provided. The Parent further claims the School released personally identifying information without the written consent of the Parent.

In response to the Parent's Request for Emergency Intervention, the BSEA issued an order on May 19, 2003, directing the School to respond to the Parent's allegations. The School was also directed to provided written documentation of its attempts to schedule the CCC at a mutually agreeable time and place, and, if it hadn't already done so, the School was directed to request the court to seal the record of the judicial proceedings.

On May 27, 2003, the School filed its response to the Parent's complaint of May 2, 2003, and also its response to the May 19, 2003, order of the BSEA. The School noted that on May 13, 2003, it had provided notice to the Parent of the CCC to be held on May 16, 2003. On the morning of May 16, 2003, the Parent's attorney called and requested the conference be rescheduled for 2:00 p.m. School personnel had a conflict with the requested time. Because immediate action was necessary for the safety of the student, staff and other students, the School proceeded with the CCC. The School further provided documentation that at the time it filed for injunctive relief, the School also filed a motion to seal the court proceedings. The Court granted this motion on May 19, 2003. Further, although the court order does address type, frequency and duration of services, it also indicates the order remains in effect until otherwise directed by the court or through mutual consent of the parties.

On June 4, 2003, the Parent, by counsel, filed a request for a due process hearing with the DEL. This request was referred to the BSEA. The first issue concerned whether the school offered a FAPE in the LRE and a continuum of placements. The second issue was whether the IEP was appropriate to allow the student to make meaningful educational progress, including inappropriate levels of speech therapy and tutoring. The third issue raised was whether the school inappropriately punished the student for manifestations of his disabilities by inappropriately subjecting him to the juvenile justice system and attempting to bypass the requirement that the school exhaust its administrative remedies.

Because issues concerning an appropriate IEP are currently pending before the BSEA, and the Parent had requested the emergency intervention of the BSEA to address procedural issues of bypassing administrative procedures in seeking the intervention of the court, counsel for the BSEA asked that counsel for the School and Parent to respond by June 9, 2003, to clarify whether there are, indeed new issues. Counsel for the Parent responded on June 9, 2003, that these were new issues. Counsel for the School responded on June 9, 2003, that these issues are currently pending before the BSEA.

On June 10, 2003, the BSEA, having reviewed the Parent's request for hearing and the responses of the parties determined that the issues raised in the hearing request, and the proposed resolutions, were the

same as the issues that were, or could have been, litigated before the IHO and were currently on appeal to the BSEA. Further, the Parent had previously requested the intervention of the BSEA to address alleged violations of Article 7 in the conduct of the May 16, 2003, case conference committee meeting and the alleged circumvention of the Parent's due process rights in seeking a judicial order concerning the Student's educational placement. The Parent was not entitled to a new hearing on these same issues.

On June 12, 2003, the Parent's advocate submitted additional information to the BSEA.[8] Because this information addresses matters beyond the jurisdiction of the BSEA, and the School would not have time to respond, this information will not be considered by the BSEA.

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 May 21, 2003. Review was set for June 16, 2003, in Indianapolis, in the offices of the Indiana Department of Education. All three members of the BSEA appeared on June 16, 2003. After review of the record as a whole and in consideration of the Petitions for Review and the Response thereto, and the additional pleadings and proceedings as set forth above, the BSEA makes the following determinations.

Combined Findings of Fact and Conclusions of Law

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the findings of fact, conclusions of law, or orders of the IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of an established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j).

2. The BSEA notes that a number of so-called "complainable" issues are involved in this matter; that is, a number of allegations of procedural lapses on the School's part were raised and addressed accordingly by the IHO. The IHO had jurisdiction to decide these matters, 511 IAC 7-30-2(l), as

[8]The information submitted consisted of an order by the Jay Superior Court denying the Plaintiff's Motion for Preliminary Injunction, correspondence from the School seeking consent for evaluation, and a case conference summary and proposed IEP dated May 16, 2003.

does the BSEA by extension. It should be noted that any decision with respect to a complaint issue in this dispute is based solely upon facts in this dispute and is binding upon the parties to this extent. The decision will not apply in the general manner that a complaint investigation report issued under 511 IAC 7-30-2 will apply.

3. The Parent challenges the BSEA's jurisdiction to grant the School an extension of time in which to file its petition for review. Article 7 permits the BSEA to grant specific extensions of time. 711 IAC 7-30-4(i). The Parent argues that this regulation only applies after a party has filed a petition. The BSEA disagrees. The BSEA's interpretation has always been that this regulation, and its predecessor, 511 IAC 7-15-6(j), permit a party to request an extension of time in which to perfect an appeal. This interpretation has been cited with favor by the U.S. District Court for the Southern District of Indiana which noted that the regulation afforded the parents the opportunity to request an extension of time in order to prepare a timely appeal. L.M. ex rel. Mauser v. Brownsburg Community School, 28 F.Supp2d 1107 (S.D.Ind. 1998). It should be noted, however, that the Parent also requested, and was granted, an extension of time in which to file her petition for review. The Parent has therefore waived any objection to this alleged error.

4. The due process hearing timeline begins on the date a request for a due process hearing is received by the department of education. Due process hearings shall be conducted, a final written decision reached, and a copy of the written decision mailed to each of the parties not later than forty-five (45) calendar days after the request for a hearing is received. An independent hearing officer may grant specific extensions of time beyond the forty-five (45) day timeline at the request of a party. Any extension of time granted by the independent hearing officer shall be in writing to all parties and included in the record of the proceedings. 511 IAC 7-30-3(i). There is no record of any request for an extension of time from either party, nor written documentation of the IHO granting an extension of time. The Parent's request for hearing was received by the Department of Education on November 6, 2002. The IHO's written decision was rendered on February 22, 2003. The IHO failed to comply with 511 IAC 7-30-3(i).

5. Any Finding of Fact not contested by a party is hereby incorporated by reference from the stated Findings of Fact *supra*.

6. The Parent objects to Findings of Fact Nos. 4, 5, 7, 8, 12, 17, and 18 as being unsupported by the evidence, or made by ignoring substantial evidence in favor of the Parent. The BSEA disagrees. The BSEA does not reweigh the evidence. If there is substantial testimony and evidence to support a finding, it must be upheld. These findings are supported by substantial evidence.

7. The School objects to Findings of Fact Nos. 8, 11, 12, 16, and 18, primarily for errors of omission, arguing that these findings should have included additional information or were taken out of context.

The BSEA finds that these findings are supported by substantial evidence. There is no requirement that an IHO include all information that could be included with a finding of fact.

8. The BSEA agrees with the School's objection to Finding of Fact No. 9 to the extent it indicates that no meeting was held with the parent. The last sentence of Finding of Fact No. 9 is struck as being contrary to the evidence and testimony.

9. The BSEA agrees that while the Student enjoys the use of the computer for playing games, the Student has not demonstrated "proficiency" with the use of the computer. Finding of Fact No. 10 is therefore modified as follows:

   > The Student has demonstrated use of the computer when used for recreational or play activity, and seems to resist its use when instruction is involved.

10. While the Parent objects to the IHO's finding that low or high blood-glucose levels have not been a direct contributor to the Student's behavior outbursts, the Parent has failed to refer to any evidence to the contrary. Although the testimony indicated that high or low blood-glucose levels *can* contribute to behavior outbursts in children with diabetes, no evidence supports the conclusion that blood-glucose levels *were* a contributor to *this* Student's behavior outbursts. The IHO's finding should be modified slightly to accurately reflect that the evidence has not shown such a connection for this Student. Finding of Fact No. 15 is therefore modified as follows:

    > Evidence presented on low or high blood-glucose levels has not proven them to be direct contributors to the Student's behavior outbursts. According to his physician, behavior is not a good indication of whether the blood-glucose level is high or low. Consistently low or high levels over a period of time would give cause for concern. According to his physician, the Student's autism complicates the problem in that he is unable to verbalize any symptoms he may be experiencing.

11. The School argues the IHO's conclusion in the introductory paragraph to the Conclusions of Law is unsupported by substantial evidence and makes unwarranted assumptions as to the Student's present levels of performance. The BSEA agrees and finds that the introductory paragraph to the Conclusions of Law should be struck as it is not supported by the evidence and is speculative.

12. Both parties object to Conclusions of Law Nos. 1 through 3. Objections include that the conclusions are arbitrary and capricious, contrary to law, and unsupported by substantial evidence. The BSEA finds that the following portions of the IHO's Conclusions of Law are arbitrary and capricious, contrary to law, unsupported by substantial evidence, or beyond the jurisdiction of the IHO and should be struck:

Conclusion of Law No. 1, paragraph 1: Everything after the first sentence.

Conclusion of Law No. 1, paragraph 4: The entire paragraph.

Conclusion of Law No. 2, paragraph 1: The entire paragraph.[9]

Conclusion of Law No. 2, paragraph 2: The entire paragraph. [10]

Conclusion of Law No. 3, paragraph 1: The entire paragraph.[11]

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[9]The BSEA notes that this paragraph concludes that the TOR and speech and language pathologist are appropriately licensed and trained in their respective fields. The conclusion fails to address the Parent's issue, which she clarifies for the first time on appeal, as to whether the staff that serves the child is appropriately trained to address the Student's diabetes. To the extent that the IHO erred in failing to appropriately address the Parent's issue, such error was invited by the Parent in failing to adequately identify the issue. The Parent's issue, as stated, was "Is the staff that serves the child appropriately trained.?" During the course of the hearing, the transcript reflects the School's belief the issue concerned whether the staff was appropriately trained in autism. However, the Parent then stipulated that the staff was trained in autism and autism was not the issue. Because the Parent's issue is finally clarified to be whether the staff was appropriately trained in diabetes, and diabetes training was addressed in the hearing, additional findings of fact and conclusions will be required to address this issue.

[10]The services the Student receives through the autism waiver, and whether those services should be continued, are not within the jurisdiction of the IHO or the BSEA.

[11]The ultimate conclusion here, that there is no basis to conclude written notice was not provided, is based upon the IHO's determination that the Parent must have received notice of the CCC meeting held on October 30, 2002, as the Parent attended, and she also received notice of the Student's suspension. It is apparent the IHO did not know what "notice" the Parent complained she didn't receive. The issue raised by the Parent was simply "Did the School provide the required written notice?" Schools are required to provide notice of a number of items. The Parent identifies the "required written notice" for the first time on appeal. The Parent is referring to whether the School provided written notice of the proposed change of placement as a result of the CCC held on October 30, 2002. 511 IAC 7-27-5(c) requires the School to provide a written report of the CCC to the parent no later than 10 days after the conference. The Parent filed her request for hearing on November 6, 2002, prior to 10 days after the conference. Further, 511 IAC 7-22-2(a) requires the School to provide written notice of a proposed change in placement a reasonable time before the School proposes to change the placement. The lack of specificity in the Parent's designation of the issue, coupled with the fact that at the time the hearing request was made, the School could not have

Conclusion of Law No. 3, paragraph 3: The entire paragraph.

Conclusion of Law No. 3, paragraph 4: The last three sentences are struck as being contrary to law. The Parent requested the hearing prior to the expiration of 10 days after the CCC meeting. The School could not be found in violation for failure to provide notice prior to the expiration of the ten days. Further, once the request for hearing was made, the Student's placement would remain the last agreed-upon placement unless otherwise ordered by the IHO or agreed to by the parties.

13. Portions of the IHO's conclusions are more appropriately findings of fact and should be designated as such so that all seventeen of the Parent's issues are addressed by the findings of fact:

Conclusion of Law No. 1, paragraph 2: This paragraph is struck as being repetitious of the IHO's Finding of Fact No. 6.

Conclusion of Law No. 1, paragraph 3: The following portions are designated as findings of fact:

> The Parent has actively participated in all case conference meetings, and has provided evaluative information and other helpful input insofar as goals and objectives are concerned. There is no evidence that her input has either been incorporated or ignored in the development of his IEP.
>
> While no adaptive or augmentative devices were identified for use, certain benchmarks and testimony referred to their use, i.e., assistive technology in speech and language, a Dynamo talker, and casual use of a computer in the classroom (mostly recreational). No other such devices were proposed by the Parent during the hearing.

Conclusion of Law No.3, paragraph 4: The first 5 sentences are struck as being repetitious of the IHO's Finding of Fact No. 7.

14. The Parent raised 17 issues for this hearing. The IHO made only four conclusions of law. As indicated above, a large portion of the IHO's conclusions were findings of fact, or were unsupported by the evidence or contrary to law. An IHO's decision needs to address, through both findings and conclusions, each issue raised in the hearing. The IHO attempted to consolidate related issues, but in the process some issues were not addressed. The Parent contributed to this confusion by failing to identify the issues with sufficient clarity such that both parties and the IHO had the same understanding of the issues. Additional findings and conclusions are required to address all issues raised in the hearing.

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been in violation of Article 7 for failing to comply with notice requirements emanating from the October 30, 2002, CCC meeting, failed to apprise the School or the IHO of the Parent's concern.

15. Transportation was identified as a related service for the Student. (IEP, May 15, 2002).

16. The School provided an aide and pre-teaching as supplementary services in general education classes. (Transcript pp**.** 532, 534; IEP, May 15, 2002).

17. The IHO's Finding of Fact No. 7 requires a technical amendment to reflect that the FBA was conducted and reviewed.

18. Staff who administer the Student's health plan have been trained as directed by the Parent according to directions provided by Riley Children's Hospital. (Transcript p. 373; IEP, May 15, 2002).

19. The Parent's claim for reimbursement was not for educational services. (Parent's Exhibit No. 11).

20. The findings support the conclusion the Student's primary disability is autism spectrum disorder; the secondary being communication disorders. (Finding of Fact No. 5). The evidence does not support a finding of additional disabilities, including, but not limited to, diabetes under other health impairment affecting his behavior due to low or high blood-glucose levels. 511 IAC 7-26-12.

21. The Student's IEP met the requirements of 511 IAC 7-27-6. (Findings of Fact Nos. 7 and 8).

22. A principal may suspend a disabled student for a period of up to ten (10) consecutive instructional days or a series of suspensions up to ten (10) instructional days within the same school year without constituting a change of placement. 511 IAC 7-29-1(d)(1) & (2). The principal's actions of November 4, 2002, did not have the effect of a change of placement.

23. The School provided supplementary services and aides appropriate to the Student's functioning level to enable him to benefit from his general education curriculum.

24. The is no evidence to indicate the BIP in the October, 2002, IEP is not appropriate.

25. The Parent failed to clarify what notice the Parent alleged the School failed to provide in the statement of issues. The IHO and the School addressed notice of suspension. The Parent is precluded from changing the notice issue on appeal after failing to specify the issue below.[12]

26. The School is providing appropriate related services.

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[12]As noted, *supra*, the issue of notice concerning the change of placement proposed by the October 30, 2002, CCC was premature. The timeline for compliance had not yet expired when the Parent filed for hearing on November 6, 2002. Had the Parent properly identified this issue, the School could not have been found in violation as a matter of law.

27. There is no indication that the School's FBA was not appropriate.

28. The School has failed to appropriately identify the Student's assistive technology needs.

29. The staff that serves the Student is adequately trained.

30. Compensatory education is a remedy for a denial of a free appropriate public education. There was no determination of a denial of an appropriate public education to warrant the remedy of compensatory education services.

31. The Student was provided with an alternative assessment program. (Finding of Fact No. 13).

32. The CCC considered evaluative information and other input from the Parent.

33. The School used lawful and appropriate techniques to deal with behaviors that resulted in the Student's suspension. 511 IAC 7-29-1.

34. The IHO's Orders 1 through 4 are not supported by the findings and conclusions and are hereby struck.

35. Additional complaint issues were raised by the Parent during the course of the appeal. As the issues were related to matters before the BSEA, the BSEA has jurisdiction to determine such matters. 511 IAC 7-30-2(l). "Complainable" issues involve allegations of procedural violations and do not encompass factual disputes concerning matters of identification, eligibility, appropriateness of an educational evaluation, or appropriateness of educational services. The School was provided an opportunity to submit documentation and to respond to the Parent's complaints raised during this appeal.[13]

May 2, 2003, Complaint

36. The Student's IEP doesn't preclude suspension. Article 7 permits students with disabilities to be suspended. 511 IAC 7-29-1.

37. During the course of the hearing, the Parent stipulated that autism training for the staff was not an issue.

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[13]A summary of the complaint issues is set forth in the procedural history, *supra*.

38. The additional relief requested by the Parent is not governed by Article 7 and as such is not within the jurisdiction of the BSEA.

May 14, 2003, Request for Expedited Hearing

39. An expedited hearing is conducted when the parent disagrees with a determination that a student's behavior was not a manifestation of the student's disability; the parent disagrees with the school's decision regarding a disciplinary change of placement involving drugs or weapon; or the school requests an expedited hearing because the school maintains it is dangerous for the student to return to the current placement. 511 IAC 7-30-5.

40. The Parent's request for an expedited hearing did not meet the criteria of 511 IAC 7-30-5. Further, the Parent's proposed resolution did not raise any new issues.

May 15, 2003, Request for Emergency Intervention

41. The Request for Emergency Intervention contained allegations of discrimination and harassment. The BSEA requested its counsel to conduct a conference call with the representatives of the parties to seek clarification of the Parent's request.

42. The School argued that the BSEA does not have jurisdiction to hear complaints of harassment or discrimination, and does not have jurisdiction over Section 504 or ADA issues. The BSEA agrees and finds that it does not have jurisdiction to address the concerns raised in the Parent's Request for Emergency Intervention.

May 19, 2003, Second Request for Emergency Intervention

43. The Parent's second Request for Emergency Intervention addressed allegations of procedural violations. While the alleged violations occurred after the IHO conducted the hearing in this matter, the underlying issues still involved the appropriateness of the Student's IEP, the Student's behavior, and the use of suspension as a disciplinary tool with this Student, and the Parent's allegation that the School's actions were contrary to the orders of the IHO.

44. The BSEA directed the School to respond to the Parent's allegations that the School: failed to hold the manifestation determination meeting at a mutually agreeable time; violated FERPA and Article 7 in disclosing personally identifiable student educational records; and circumvented the Parent's and Student's rights to have CCC determine the amount of homebound educational services to be provided.

45. The School responded that it gave notice to the Parent of the CCC to be held on May 16, 2003, that the Parent requested that the meeting be rescheduled only 20 minutes prior to the scheduled start of the meeting,[14] that school personnel were not available to conduct the CCC in the afternoon, and that immediate action was necessary for the safety of the Student, staff and other students.

46. The School provided documentation indicating that it had filed a motion to seal the court records at the same time that it filed its request for injunction with the Jay Superior Court.

47. The School also noted that while the Court order does address type, frequency and duration of services, it also indicates the order remains in effect until otherwise directed by the Court or through mutual consent of the parties.

48. While the School's response indicated it gave notice of the CCC meeting, the School did not provide any documentation that any attempts were made to schedule the CCC at a time agreeable to the Parent. The School failed to comply with 511 IAC 7-27-2(a) & (b).

49. 511 IAC 7-23-1(q)(7) permits a School to disclose personally identifiable information about a student to a court where the school has initiated legal action against the parent or student. The School's disclosure of Student information to the Jay Superior Court was not in violation of Article 7.

50. The School sought injunctive relief to prevent the Student from returning to school after being suspended for aggressive behavior causing injury to staff. The Parent argued she was in agreement the Student should not return to school at this time, but it was a denial of her rights to prevent her from having input as to the length, frequency and duration of services to be provided through homebound instruction. The BSEA has determined, *supra*, that the School violated the procedures of Article 7 in not scheduling the CCC meeting at a mutually agreeable time. However, Article 7 does not prohibit a public agency from seeking injunctive relief. 511 IAC 7-29-4(c).

June 4, 2003, Parent's Request for Hearing

51. The Parent, by counsel, requested another hearing on June 4, 2003 addressing issues of a free appropriate public education, the appropriateness of the IEP, and whether the School was inappropriately punishing the Student for manifestations of his disabilities by subjecting him to the juvenile justice system and bypassing administrative remedies.

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[14]The CCC meeting was being held at the same time that counsel for the BSEA was conducting a telephone conference with the parties seeking clarification on the Parent's request for emergency intervention.

52. The BSEA reviewed the submissions by the parties as to whether any new issues were raised in the request for hearing, and by order dated June 10, 2003, determined that the issues raised in the hearing request, and the proposed resolutions, were the same as the issues that were, or could have been, litigated before the IHO and were currently on appeal to the BSEA. Further, the Parent requested the intervention of the BSEA to address alleged violations of Article 7 in the conduct of the May 16, 2003, CCC meeting and the alleged circumvention of the Parent's due process rights in seeking a judicial order concerning the Student's educational placement. The Parent is not entitled to a new hearing on these same issues.

June 12, 2003, Parent's Additional Information

53. The Parent submitted additional information to the BSEA on June 12, 2003. This submission was not timely and will not be considered.

Discussion

The evidence and testimony presented at the hearing indicated the School's FBA was appropriate, and the IEP and BIP proposed by the School at the October 30, 2002, CCC meeting were appropriate. The Parent, through her various motions and requests filed during the course of these proceedings, has questioned the School's responses to the Student's increasingly aggressive behaviors. The School's use of suspension and injunctive relief has not been found to be contrary to the provisions of Article 7. However, the changes in the Student's behaviors and the lapse of time since the October, 2002, IEP, raise concerns as to the continued appropriateness of the programs developed at that time. Although beyond the authority of the BSEA to order, the BSEA suggests the following:

1. The School should arrange for a complete independent psycho-educational evaluation.

2. The School should conduct a functional behavioral assessment.

3. After the evaluations are completed, the case conference committee should be convened to develop an IEP for the 2003-2004 school year. The IEP should include a BIP. The CCC participates should include staff who will be serving the Student during the 2003-2004 school year.

4. If the assessments are not completed prior to the start of the school year, the CCC should convene to develop an interim IEP.

5. The School should ensure that an IEP is in place for the Student prior to the start of the 2003-2004 school year. However, nothing would prohibit the School from utilizing the procedures set forth at 511 IAC 7-29-4 if appropriate.

ORDERS

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

1. The Parent's request for reimbursement of out-of-pocket expenses is denied.

2. The School shall arrange and pay for an independent assistive technology assessment to determine the Student's assistive technology needs.

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

Date: June 18, 2003

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

Appeal Right

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