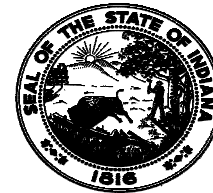


Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of H.H.,)
the John Glenn School Corporation,)
Joint Educational Services in)
Special Education (JESSE), and the)
Indiana Department of Education)
)
)
Appeal from the Decision of)
Susan M. Severtson, Esq.,)
Independent Hearing Officer)

Article 7 Hearing No. 159-2007

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History

The parents requested a due process hearing on February 26, 2007, seeking tuition reimbursement for a private school placement and asserting the John Glenn School Corporation and JESSE (hereinafter, the School) did not develop an Individualized Education Program (IEP) for the Student for the Summer or Fall of the 2006 school year. The parents also asserted a claim against the Indiana Department of Education (hereinafter, the DOE) based on the purported "lack of a communication classroom in the State of Indiana."¹ Susan M. Severtson, Esq., was appointed as the Independent Hearing Officer (IHO) that same date.

On March 14, 2007, the DOE filed a Motion to Dismiss, asserting that it was not a proper party to the hearing because there had been no application for community-supported or residential services that has been refused or denied by the DOE. 511 IAC 7-27-12(g), 511 IAC 7-30-3(q). In addition, the issue as stated by the parents "lack of a communication classroom in the State of Indiana" does not relate to a specific need of the Student. The DOE is not a direct provider of educational services to this Student. The DOE also argued that, to the extent the parents are asserting the School is an agent of the DOE, there is no such legal relationship.

The IHO conducted a pre-hearing conference by telephone on March 20, 2007. The Student, the School, and the DOE were represented by counsel. On March 27, 2007, the IHO issued a pre-

¹The parents also filed hearing requests on April 5, 2007, and May 7, 2007, while the IHO still had jurisdiction. The April 5, 2007, challenged the School's attempt to re-evaluate the Student and sought a different IHO to decide the matter. The May 7, 2007, hearing request also involved the School's request for a re-evaluation. These subsequent hearing requests were referred to the IHO. The IHO subsumed these issues as a part of the continuing hearing process.

hearing order. In the pre-hearing order, the IHO restated the issues as raised in the parents' original hearing request. The IHO also indicated the parents could respond to the DOE's Motion to Dismiss. The DOE could then reply to the parents' response. Time frames were established for these pleadings. The hearing was set to begin on May 7, 2007, and continue as need be on May 8 and May 9, 2007. Exchange dates for witness and exhibit lists were established.²

Following the pre-hearing conference but before the issuance of the pre-hearing order, the IHO contacted General Counsel for the DOE and requested certain documents, to wit: The final written decisions of the IHO and the Board of Special Education Appeals (BSEA) in Article 7 Hearing No. 1532.06, which involved the parents and the School; the proposed First Amended Complaint in *H.H., et al. v. Indiana Board of Special Education Appeals, et al.*, Cause No. 3:06 CV 0551; and the federal district court's order of January 22, 2007, staying discovery in that matter. General Counsel provided these documents to the IHO on that same day, providing copies to the counsel of record.

On March 28, 2007, the parents, by counsel, responded to the DOE's Motion to Dismiss, arguing that the Student does require "a classroom designed for 'communication disordered' children," but there is no such classroom available in Indiana, including within the School. The parents assert the DOE "bears responsibility in some measure" for the lack of a classroom for communication disordered children. The failure to ensure such a classroom exists somewhere in Indiana denied the Student a "free appropriate public education" (FAPE). The parents also argued the Motion to Dismiss was untimely, the Motion failed to satisfy certain requirements under the Individuals with Disabilities Education Act (IDEA), the DOE failed to timely challenge the sufficiency of the parents' hearing request, the DOE is estopped from doing so because the parents used the DOE form, the DOE had notice of the issue of lack of communication disordered classrooms because the issue had been raised in the First Amended Complaint in the federal action (see *supra*), the DOE had notice as the issue had been discussed in the first hearing between the parents and the School, the DOE is responsible for the general supervision of programs funded under the IDEA, and the DOE must ensure there is a continuum of educational placements within Indiana.

The DOE, by counsel, replied on April 4, 2007, arguing the DOE should be dismissed as the IHO lacks subject matter jurisdiction or, in the alternative, the parents have not stated a claim for which relief can be granted. The DOE also asserted its Motion to Dismiss was timely as a challenge to subject-matter jurisdiction can be raised at any time. In addition, failure to state a claim is a defense that can be made at any time pleadings would permit or when ordered, by motion for judgment on the pleadings, or at the trial on the merits. There is no requirement, the DOE asserts, that such a motion be made within a specified time period or it is waived. The DOE also argued the parents' hearing request does not contain well-pleaded facts, knowledge of the BSEA is not imputed to the DOE, testimony in a due process hearing where the DOE was not a party does not confer knowledge upon the DOE, the DOE did not fail to exercise its supervisory function, and there had been no finding in the previous administrative hearing that the Student requires a classroom for communication disorders such that the DOE would be

²The IHO also addressed other matters, but as the scope of this administrative appeal is relatively narrow, the other matters not contested on appeal will not be addressed.

required to enforce such a decision. In any event, the parents never complained to the DOE that the IHO's or BSEA's orders were not being implemented. The DOE did not challenge the sufficiency of the parents' hearing request; rather, the DOE asserted the lack of jurisdiction and the failure to state a claim upon which relief could be granted.³

The IHO conducted a second pre-hearing conference on April 17, 2007. The IHO indicated she would rule on the Motion to Dismiss and other issues that had been raised in the pre-hearing conference. By April 25, 2007, the IHO had not ruled on the DOE's Motion to Dismiss. On that date, the DOE filed a Request for Pre-Hearing Conference, noting the IHO had not ruled, that the issue of evaluating the Student prior to the hearing had not been resolved, and that the hearing dates were approaching.

On April 30, 2007, the DOE filed two (2) documents with the IHO. One was a Motion for Immediate ruling on Pre-Hearing Matters. The DOE represented the IHO had not ruled on the School's challenge to the sufficiency of the parents' first stated issue (development of the IEP) or the DOE's Motion to Dismiss. In addition, even though the IHO had initially permitted the School to observe the Student at her private school and to evaluate her, the IHO later stayed that order, preventing the School from completing discovery prior to the hearing. Also, there had been motions for continuance filed but not ruled upon, and the DOE's Request for a Pre-Hearing Conference had not been addressed. Lastly, a statement of definitive issues for hearing had not been made. The DOE also raised concerns about possible *ex parte* communications.

The second document filed that date by the DOE was a Motion for Summary Judgment with a supporting memorandum.

The IHO issued an Order on April 30, 2007, granting the DOE's Motion to Dismiss. The IHO, using a standard of review that would assume the parents' allegations were true, noted the parents failed to provide any legal authority for the assertion the DOE has a duty or responsibility to provide a "communication classroom." Additionally, the parents did not allege the DOE denied or refused an application for community-supported intensive services or residential services under 511 IAC 7-27-12. The DOE does not provide direct services to eligible students. The responsibility for providing a continuum of services for a specific student is not a DOE responsibility. The IHO also rejected the parents' assertion the DOE failed to implement the orders by the IHO in the previous hearing (Art. 7 Hearing No. 1532.06). The parents did not raise this as an issue in their due process hearing request. In any event, the decision is presently pending before a federal district court judge. The parents failed to state a claim upon which relief could be granted.

On May 1, 2007, the IHO issued her pre-hearing order from the April 17, 2007, pre-hearing conference.

³There were also exchanges between the parents and the School, but as the parents and the School entered into a settlement agreement and the School is not a party to this administrative appeal, these exchanges will not be included in this procedural history as they are not germane to the parents' issues on appeal.

On May 18, 2007, the parents, by counsel, moved to dismiss the pending due process hearing, based on a settlement agreement between the parents and the School on May 9, 2007. The parents did not move to dismiss as to the DOE.

The IHO granted the Motion and issued an Order to this effect on May 21, 2007.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

On May 21, 2007, the parents filed an appeal with the Board of Special Education Appeals, challenging the IHO's order dismissing the DOE as a party to the due process hearing. The parents contend the DOE⁴ should have been a party to address whether there are classrooms for the communication disordered in the State of Indiana. The parents also assert the IHO erred by finding the DOE did not have the "authority to ensure a continuum of services to students," including the Student herein. Lastly, the parents contend the IHO erred by not finding the DOE's Motion to Dismiss was untimely. The parents assert they are entitled to an evidentiary hearing "on whether or not a 'communication disordered' classroom exists anywhere in the State of Indiana."

On May 22, 2007, the Office Manager for the Legal Section, Department of Education, notified the parties of their respective rights and sought available dates for oral argument should the BSEA, in its discretion, elect to conduct oral argument. The parents were notified of their election to receive the final written decision in either written or electronic format, and of their right to have the oral argument, if conducted, opened or closed to the public. The parents did not respond.

The DOE timely filed its Response to the Petition for Review on May 29, 2007. The DOE argued the parents' initial hearing request and their Petition for Review fail to state a student-specific issue. The IHO, the DOE asserted, was correct in finding that she lacked jurisdiction because the parents did not raise an issue concerning the Student's identification, eligibility, evaluation, educational placement, any aspect of FAPE, or reimbursement. Nothing in the stated issue addresses a specific need of the Student. DOE also stated that although the parents allege the IHO misinterpreted the IDEA, the parents cited to no requirement of the IDEA that the IHO purportedly misinterpreted. The DOE also challenged the parents' representation of the IHO's dismissal order. "The IHO determined the DOE does not directly provide special education services to students," the DOE stated. The IHO found she could not create a duty for the DOE in the absence of any legal authority to do so. In addition, the DOE added, the parents have not identified what duty the DOE allegedly breached. The DOE's responsibility for supervision under the IDEA is a general one. The parents, the DOE argued, cited to no authority for their argument that the DOE's Motion to Dismiss was untimely. Additionally, lack of subject-matter jurisdiction can be raised at any time.

On June 8, 2007, the record from the hearing was photocopied and provided to each member of the BSEA. On June 13, 2007, the BSEA elected to review this matter without oral argument.

⁴The parents actually alleged the IHO erred by dismissing the "Indiana Board of Education," a non-existent entity. It is evident the parents meant the Indiana Department of Education.

The parties were notified that date by Notice of Review Without Oral Argument. Review was set for June 19, 2007, beginning at 1:00 p.m.

On June 19, 2007, the BSEA met to review the above-referenced matter.⁵ All three members were present. Based on their review of the record from the administrative proceedings below, the Petition for Review, and the Response thereto, the BSEA makes the following Combined Findings of Fact and Conclusions of Law, with Orders.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, a Conclusion of Law, or Order determined, reached, or directed 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 established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The DOE timely filed a Response to the Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. The Student is ten years old and is eligible for services as a student with an Other Health Impairment. See 511 IAC 7-26-12. There is no dispute the Student is eligible for services.
3. The parents and the School were previously involved in a due process hearing and administrative appeal under Cause No. 1532.06. The IHO in that matter issued his decision on March 9, 2006, finding, in part, that the School provided the Student with a FAPE. The parents appealed. The BSEA upheld the IHO's decision in a written decision dated July 6, 2006.
4. On February 26, 2007, the parents requested the current hearing, raising the issue of the purported lack of a communication disordered classroom in the State of Indiana. The parents filed additional hearing requests on April 5, 2007, and May 7, 2007. The final issues for a hearing were identified as Extended School Year (ESY) services, reimbursement for a private placement, the absence of a classroom for communication disorders, and educational evaluation.

⁵Kristin L. Anderson, J.D., was appointed *ad hoc* to serve in the stead of BSEA member Raymond W. Quist, Ph.D., who is ill. Thomas J. Huberty, Ph.D., was appointed *ad hoc* to serve in the stead of BSEA member Rolf W. Daniel, Ph.D., who was unavailable for the review.

5. The DOE filed on March 14, 2007, its Motion to Dismiss. See *supra*. The IHO did not rule on the Motion until April 30, 2007, when she granted the DOE's Motion. See *supra*.
6. On May 9, 2007, the parents and the School entered into a settlement agreement.
7. Thereafter, the parents, on May 18, 2007, moved to dismiss their hearing request with prejudice, as to the School but not as to the DOE. The IHO granted the Motion and issued an Order to this effect on May 21, 2007.
8. The parents filed their Petition for Review with the BSEA on May 21, 2007, challenging the IHO's dismissal order as to the DOE. The Petition for Review did not contain any cogent argument or legal citations.
9. A request for a due process hearing under 511 IAC 7-30-3(a) must address one of five issues. This regulation reads as follows:

Sec. 3. (a) A parent, a public agency, or the state educational agency may initiate a due process hearing that is conducted by an independent hearing officer when there is any dispute regarding any of the following:

- (1) A student's identification and eligibility for services under this article.
- (2) The appropriateness of the educational evaluation.
- (3) The appropriateness of the student's proposed or current level of special education services or placement.
- (4) Any other dispute involving the provision of a free appropriate public education for the student.
- (5) Reimbursement for services obtained by the parent.

The parents, in their three separate hearing requests, never raised an issue under any of the categories stated above. The parents' issue did not relate to any specific need of the Student.

10. To the extent the parents did articulate a Student-specific need for a classroom for the communication disordered, the parents are incorrect that this was the responsibility of the DOE. Under 511 IAC 7-27-9(a)(6) and 34 C.F.R. § 300.115, it is the responsibility of the public agency responsible for the student's education that must ensure a continuum of educational placements. The DOE is not the "public agency" for this Student as it is not responsible for providing direct educational services to this Student, or for any student. The DOE does not establish any sort of classroom. See definition of "public agency" at 511 IAC 7-17-60 and 34 C.F.R. § 300.33. The parents cite to no authority for this argument.
11. The DOE is responsible for the investigation of complaints that a public agency has failed to comply with state or federal law regarding the education of children with disabilities. However, the parents have never filed a complaint with the DOE alleging the public agency failed to provide such a continuum of educational placements.⁶ In addition, the parents did not file a complaint with the DOE alleging the public agency failed to comply with the final written orders of the IHO or the BSEA in Article 7

⁶Uncontested affidavit of Kim Payton.

Hearing No. 1532.06. See 511 IAC 7-30-2(n), 34 C.F.R. § 300.152(c)(3). The parents did not attempt to invoke the general supervisory authority of the DOE to investigate and resolve such issues. 34 C.F.R. § 300.151(b).

12. To the extent the parents are attempting to revisit the IHO's and BSEA's decisions in Art. 7 Hearing No. 1532.06, this would not be appropriate. The proper mechanism for challenging the final decision of the BSEA is to seek judicial review.
13. A Motion to Dismiss can be raised at any time. Such a Motion challenges the jurisdiction of the adjudicator. A Motion to Dismiss is not precluded by any timelines in the IDEA.
14. In this case, the IHO correctly found that the parents had not raised an issue over which she could exercise jurisdiction. Her dismissing the DOE from the parents' hearing request was appropriate.

ORDERS

1. The IHO's Order dismissing the DOE from the hearing in this matter was both legally correct and appropriate. It is sustained.
2. Any issue or matter not otherwise addressed is deemed denied or overruled, as appropriate.

DATE: June 19, 2007

/s/Thomas J. Huberty
Thomas J. Huberty, Ph.D., Chair
Indiana Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to seek judicial review in a civil court with jurisdiction, as permitted by I.C. § 4-21.5-5-5 and 511 IAC 7-30-4(n).