

# 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 T.K., the Hanover School )  
Corporation, and the Northwest Indiana )  
Special Education Cooperative )

Article 7 Hearing No: 195-2007

Appeal from a Decision of )  
James A. Jacobs, Ph.D., )  
Independent Hearing Officer )

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

#### **Procedural History**

The Student<sup>1</sup> requested a due process hearing in a letter dated May 24, 2007 pursuant to 511 IAC 7-30-3. The request was received by the Indiana Department of Education, Division of Exceptional Learners on May 25, 2007. On that same day, James Jacobs, Ph.D., was appointed as the Independent Hearing Officer (IHO). The parties were notified of the appointment of the IHO.

On May 31, 2007, a telephonic pre-hearing conference was conducted by the IHO. On that same day, the IHO issued a pre-hearing order in which he granted the School's<sup>2</sup> request for an extension of time to respond to the Student's request for a hearing until June 11, 2007. The IHO also scheduled a second pre-hearing conference for June 29, 2007 and established the purpose of the second conference. In the pre-hearing order the IHO further advised the parties of a prior relationship between the IHO and School's counsel and the IHO and the School's Director of Special Education. The order requested that should the parties have any concern regarding the prior relationships, they respond to the IHO by June 7, 2007. On June 4<sup>th</sup>, the IHO received a Revised Due Process Complaint Notice from the Student. On June 5, 2007, the IHO received a statement of clarification from counsel for the School regarding the IHO's prior relationship with said counsel. Neither party responded to the clarification or the IHO's prior notification within the established time line.

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<sup>1</sup>"Student" shall refer to the Student and the Student's Parents, unless otherwise indicated.

<sup>2</sup>"School" shall refer to Hanover School Corporation.

On June 11, 2007, the School submitted a Response to Petitioners' Due Process Request, which included a Request for Specificity on certain issues presented by the Student. The IHO responded on June 16, 2007 with his Response to Respondent's Response to Petitioner's Due Process Request (Complaint) and Notice of Affirmation of Timelines Previously Established. In this response, the IHO set forth a time line for the School to request a complete reevaluation. In that order, the IHO also proposed 23 issues for the hearing. On June 21, 2007, the Student submitted a response for additional specificity for the issues set forth in the June 16, 2007 order. The School requested an extension of time to respond to the request for more detail. The IHO, on June 23, 2007, granted the Student's request for an extension of time to provide additional specificity to July 3, 2007.

On June 22, 2007, the IHO received the School's notice of agreement between the Student and the School for Dr. Julie Steck to conduct an evaluation of the Student. On June 29, the School submitted fourteen (14) questions that were to be presented to Dr. Steck. The School further requested, and the IHO issued, eight (8) Subpoena *Duces Tecum*<sup>3</sup>. On that same day, a second pre-hearing conference was held and the IHO issued an Order on Prehearing Conference, Notice of Hearing, and Order Granting an Extension of Time. Pursuant to the order, the parties' joint request for a 50-day extension was granted and the date by which the matter must be heard and the IHO's decision rendered was extended to October 12, 2007. Additionally, twenty-three (23) issues were specified for the hearing.

On August 13, 2007, the Case Conference Committee (CCC) convened for the purpose of reviewing Dr. Steck's evaluation. The CCC determined that the available data was incomplete and additional observations by Dr. Steck would be necessary. The parties subsequently filed a joint request for additional time to reconvene the CCC and prepare for the due process hearing. On August 15, 2007, the IHO issued an order vacating the October 12, 2007 deadline and established a pre-hearing conference for August 17, 2007. On August 17, 2007 the IHO granted the request and extended the issuance of a written decision to November 26, 2007.

On September 29, 2007 the IHO received notice from the Student's counsel, Courtney Stillman, Esq., that she would be immediately withdrawing from the representation of the Student. On October 2, 2007, the IHO received notice of appearance that Dorene J Philpot, Esq. would be representing the student in the present matter.

On October 1, 2007, the School requested that the Parents of the Student complete and sign a Release of Health Information for the previously subpoenaed medical providers. Such releases had been requested by the medical providers in order to comply with the Health Information Privacy Protection Act (HIPPA) in order to release the requested medical records.

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<sup>3</sup>The Subpoena *Duces Tecum* were issued to eight (8) medical professionals who had previously treated T.K. The subpoenas were issued to : Dr. Elizabeth H. Magno, Neurologist; Dr. Brian Weismann of Weismann Eye Center; Dr. Larry Salberg of St. Margaret Mercy Healthcare; Dr. Smriti Wagle of Hammond Clinic; Dr. Mark Kinne of Hammond Clinic; Ms Michele Palmer of Neuropsychology Diagnostic Center; Ms. Drina Madden of Neuropsychology Diagnostic Center; and Dr. Valerie Nowinsky of Neuropsychology Diagnostic Center.

On October 4, 2007, the School cross-filed a hearing request. By order on October 5, 2007, the IHO ordered the School to provide a more definite statement as to the request made by the School on October 4, 2007, regarding the inclusion of a specific issue. On October 11, 2007, the School responded that they were cross-filing a request on the following issue: "Is the currently proposed educational placement appropriate for the Student?" On October 18, 2007, the IHO received a letter from the School requesting to add an issue regarding the appropriateness of the proposed IEP from August 2007.

On October 16, 2007, a pre-hearing conference was held. On October 18, 2007, the IHO issued an order and identified the issues for the hearing as the following :

1. Did the School fail to fully implement the Student's May 2006 Individualized Education Program (IEP)?
2. Did the School fail to provide the Student with a one-to-one aide as specified by his IEP during either the 2005-2006 or 2006-2007 school years?
3. During the effective time period, did the School fail in its duty regarding child find in that it failed to determine that the Student had a disability, in this case Autism or Asperger's Syndrome (Autism Spectrum Disorder), and therefore required special education or related services?
4. Did the Student's IEP for the 2005-2006 and 2006-2007 school years contain levels of performance stated in such manner as to allow the School to objectively measure the Student's progress toward the goals and objectives stated in these IEP's?
5. Did the Student's IEP for the 2005-2006 and 2006-2007 school years adequately address his identified physical, educational, behavioral, and social needs?
6. Did the School deny the Student's parents written requests for parent counseling or training during the effective time period?
7. Did the School, in violation of an established visitor's policy, limit, without cause, the Parent's visits to the Student's school or observations of the Student while attending school during the effective time period?
8. Did the School, without justification, deny the Parent the opportunity to converse with the instructional assistant assigned to their Student during the effective time period?
9. Did, during the effective time period established for this matter, the School deny the Parent's written requests for information regarding any evaluation of the Student?
10. As a result of the School's actions regarding Issues 7, 8, & 9 above, did the School deny the Parent's meaningful participation in their Student's educational program?
11. Did the School fail to provide the Parents prior written notice of denial of requests for services contained in a document presented to the School at the May 2006 CCC meeting?
12. Did the School fail to conduct a functional behavior analysis (FBA) of the student?
13. Did the School fail to develop and implement a positive behavioral intervention (PBI) based on a FBA?
14. Did the School fail to adequately consider an independent evaluation, obtained by the Parents at parental expense, in the development of the IEP(s) for the Student?
15. Did the School fail to adequately address the Student's sensory needs?
16. Did the School fail to provide necessary extended school year (ESY) to the Student?

17. Did the School fail to provide the Student with sufficient occupational therapy services provided by an appropriately licensed, or otherwise qualified, individual?
18. Did the School fail to provide the Student with sufficient itinerant services in the area of emotionally handicapped (EH) by an appropriately licensed or otherwise qualified individual?
19. Did the School fail to provide the Student with sufficient reading instruction by an appropriately licensed or otherwise qualified individual?
20. Did the School fail to provide the Student with appropriate speech or language services by an appropriately licensed, certified, or otherwise qualified individual?
21. Did the School's staff that provided services to the Student hold appropriate licensure, certification, and were otherwise qualified, to provide those services to a student with Autism or Autism Spectrum Disorders?
22. Is the currently proposed educational placement (LRE) appropriate for the Student?
23. As a result of substantive or procedural violations by the School as alleged in Issues 1-22 as stated above, did the School deny the Student a free and appropriate public education (FAPE)?

On October 17, the Student requested a 91-day extension of time. On October 22, 2007, the IHO issued an order granting the Student's request for a 91-day extension of time. The revised date by which a decision was to be heard and rendered was February 25, 2008. A pre-hearing conference was held on October 25, 2007. That same day, the IHO issued an order adding the following issue:

24. Is the IEP, as developed during the August 13, 2007 Case Conference Committee, appropriate for the Student including any subsequent recommendations for a Functional Behavioral Assessment and a Behavioral Intervention Plan?

On November 30, 2007, the IHO was notified that six of the medical providers previously issued subpoenas had not responded. New subpoenas were issued on December 17, 2007. On December 21, 2007, the IHO issued Response to Respondents' Request for Release of Information Pursuant to HIPPA and ordered the Parents to sign and return Release of Information forms for the medical providers to counsel for the School. On December 24, 2007, the Parents sent the IHO a written objection to the order, alleging that the order was illegal and beyond the authority of the hearing officer. The Student indicated that they did not intend to comply with the order but instead were doing so under duress. The forms were subsequently signed.

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

The hearing was held on January 14, 15, 16, 17, & 18, 2007. The IHO issued his decision on February 22, 2008. The IHO issued one hundred and twenty three (123) findings of fact.<sup>4</sup>

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<sup>4</sup>The IHO's decision is reproduced in its entirety. It is edited only as to format. The substance of the IHO's decision remains intact.

### *The IHO's Findings of Fact*

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.
2. All Findings of Fact, which can be deemed Conclusions of Law, are hereby deemed Conclusions of Law. All Conclusions of Law, which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. It was determined that all due process procedures were in compliance with requirements of 511 IAC 7-30-3 and IC 4-21.5 *et seq.*
4. The Student is eight years, three months old (DOB 11-3-99).
5. The Student was initially referred for assessment to determine eligibility for special education by the Parents on August 25, 2004.
6. The Student has been identified as being a student with a disability under the IDEA (20 U.S.C 1400 *et seq.*) or Article 7 (511 IAC Rules 17-31) as a result of a CCC meeting, dated October 29, 2004. Parents participated in this CCC which determined their Student's eligibility for special education and agreed, as evidenced by signature, for an eligibility designation of developmental delay and communication disorder and those services therein included in the Student's proposed educational plan. The Student was placed in an early childhood curriculum identified as Foundations for Young Children.
7. CC meeting was held on May 12, 2005, for the purpose of reviewing the Student's goals and benchmarks related to his exit from the Early Childhood Developmental (ECD) program. The Parents received appropriate prior written notification of this CCC meeting. The Parents attended and participated in this CCC meeting. The Parents further provided written input to the CCC as the resulting IEP was developed. The CCC noted and considered the Parent's input.
8. A comprehensive assessment of the Student's non-academic areas was conducted prior to the CCC meeting held on May 12, 2005, which included areas of Intellectual/Pre-Academic skills, Speech, Language, and Communication Skills, Emotional, Behavioral and Social skills, Perceptual or Learning Styles, Physical Abilities, and Vocational/Self Help skills. Medical information was presented by the Parent, stating only that the Student had allergies (not otherwise specified), and provided medication for allergies. All assessments were performed by personnel licensed or certified to administer such assessments. Results suggested difficulty in the areas of fine motor development, understanding complex language and reasoning, inappropriate interaction with peers, an inability to attend to classroom tasks, and the possibility that the different medicines the Student has been taking may have affected his in-class behavior.

9. A comprehensive assessment of the Student's academic performance was conducted prior to the May 12, 2005, CCC meeting which included an assessment of the following areas: reading, written expression, math, social studies, science, and PE/Art/Music.
10. An assessment of the Student's intellectual functioning was conducted prior to the May 12, 2005, CCC meeting which included administration of the Wechsler Primary Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III). Results revealed a Full Scale Intelligence Quotient (FSIQ) of 70 and a range of composite scores ranging from a low of 64 (Processing Speed) to a high of 80 (Verbal IQ). The examiner noted that these scores "support earlier notations that [the Student's] scores may be a minimal estimate of his true potential."
11. The Student's social skills were assessed using the Vineland Adaptive Behavior Scales. Results indicated mixed probability of the existence of Asperger's Syndrome (AS).
12. All assessments conducted prior to the CCC meeting held on May 12, 2005, were performed by personnel licensed or certified to administer such assessments. All assessments conducted subsequent to the 2005 annual evaluation were performed by personnel licensed or certified to administer such assessments.
13. The CCC's May 12, 2005, report determined that the Student's primary disability was a communication disorder. No secondary disability was identified.
14. The IEP resulting from this meeting included revised, behaviorally stated, objectively measurable annual goals and short-term benchmarks in all areas addressed.
15. The IEP proposed as a result of the May 12, 2005, CCC meeting contained a schedule and methods by which the Student's progress would be reported to his Parents in addition to detailed progress notes regarding the Student's progress as attained as a result of a prior educational plan. The schedule and methods by which the Student's progress was to be reported to the Student's Parents reflected a schedule of reporting that was at least as frequent as the schedule established by the School for reporting the progress of students without disabilities to their parents.
16. ESY Services were not recommended. There is no indication that the Parents requested ESY services at that time.
17. This IEP, as developed on May 12, 2005, specifically indicated that the Student did not need a Behavioral Intervention Plan (BIP).
18. The Parents noted their agreement with the CCC's report and resulting IEP as witnessed by the Parent's placing an "x" in the space indicating agreement with the change of placement decision and services to be provided by the CCC on the School's Form 210. The Parent's signature was also recorded thereon and dated May 12, 2005.

19. By mutual agreement, the Student entered kindergarten at Lincoln Elementary School in the Hanover Community School Corporation, which was his home school in the fall of 2005.
20. The Student was transferred from one kindergarten classroom to another in November of 2005 at the discretion of School's principal in consultation with the School's Superintendent.
21. A CCC meeting was held on October 14, 2005, for the stated purpose of considering additional evaluation data and amending the Student's then current IEP as appropriate. The Parents received appropriate prior written notification of this CCC meeting and the purpose thereof. The Parents attended and participated in this CCC meeting. The Parents provided written input to the CCC as the resulting IEP was developed. Specifically, a list of problems noted by the original kindergarten teacher was introduced as well as a "hand written" medical evaluation determining that the Student had Attention Deficit Hyperactivity Disorder (ADHD). The CCC noted and considered the Parent's input. Accommodations and modifications to the originally proposed IEP were made based on the information provided by the Parents. The Parent was represented by an advocate. The CCC meeting lasted approximately two hours and forty five minutes.
22. The issue of whether the Student would qualify as being autistic ensued.
23. The CCC's report determined that the Students primary disability would be changed to Other Health Impaired (OHI) and include a secondary disability of communication disorder.
24. Additional services, both educational and related services, were designed and included in the Committee's draft IEP.
25. The Parents declined to sign permission for the change of classification or additional services to begin, and asked if another CCC meeting could be held within approximately one month, to which the School responded in the affirmative. Written copies of Procedural Safeguards were provided and the Parents were told that the draft IEP would be available for them by October 17, 2005, by 3:00 p.m.
26. An evaluation for Occupational Therapy services was initiated by the Schools Occupational Therapist on September 23, 2005, but was discontinued due to vision problems demonstrated by the Student as a result of prescribed eye drops which caused dilation of the pupils resulting in blurred vision. The OT's report indicated that the evaluation was continued on September 30, 2005.
27. Parents were provided a copy of this OT evaluation at the October 14, 2005, CCC meeting. Neither documents nor testimony reveal which, if any, instruments, standardized or informal, were used as the basis for this evaluation.

28. The revisions to the Student's IEP resulting from this meeting included revised, behaviorally stated, objectively measurable annual goals and short-term benchmarks in each area addressed.
29. This IEP, as developed between October 15, 2005, and October 17, 2005, specifically indicated that the Student did not need a BIP. There is no indication that the Parents requested a BIP at this time.
30. At the request of the School, a CCC meeting was scheduled to be held on November 11, 2005, for the stated purpose of considering additional evaluation data in the area of occupational therapy. The Parents received appropriate prior written notification of this CCC meeting and the purpose thereof. The Parents declined to attend this CCC meeting, notifying the School in writing that they would not attend this scheduled meeting until the School provided the Parents "all school records as previously requested, receipt of the Occupational Evaluation five days before a scheduled conference, And (sic) receipt of your response to my request for an Independent Educational Evaluation at public expense. In addition I did not receive a copy of the Parents Rights/Procedural Safeguards with this notice of conference, nor have they been explained to me." The Parents again requested in writing on November 9, 2005, a copy of the OT evaluation dated September 23 & 30, 2005, previously provided.
31. At the request of the School, a CCC meeting was scheduled for May 4, 2006, for the stated purpose of reviewing the Student's educational records and to conduct "the annual speech conference." The Parents received appropriate prior written notification of this CCC meeting and the purpose thereof. The Parents attended and were represented by Frank Rizzo, Parent Advocate, affiliated with InSource. As recorded on the School's Parent/Guardian Reply to Notice of Conference form, the Parent noted that "this time the parents Rights/ Procedural Safeguards were sent to me, but they have not been explained to me." The Parent had previously provided the School with additional medical information from the Neuropsychology Diagnostic Center, located in Orland Park, Illinois. However, the School declined to consider this additional medical information, received on/about April 28, 2006, stating that additional school personnel, not presently available, would be necessary in order to respond to the data contained within this report. The School proposed to schedule a CCC meeting for May 15, 2006, in order to permit appropriate school personnel to attend.
32. A CCC meeting was conducted on May 15, 2006, for the purpose of reviewing the information from the Neuropsychology Diagnostic Center. Data from the Neuropsychology Diagnostic Center was considered by the CCC, resulting in revisions to the School's proposed IEP. Physicians from the Neuropsychology Diagnostic Center participated telephonically.
33. Annual goals and benchmarks were updated. The Parents were represented by Frank Rizzo, Parent Advocate, assigned from InSource.



34. The Parents did not allege the School failed to explain their Parental Rights to them at any time subsequent to this meeting of the CCC.
35. The Parents proposed a diagnostic category of Autism Spectrum Disorder as the Student's primary area of disability. The CCC accepted the Parent's proposal and Autism was determined to be the primary area of disability. Communication Disorder was selected as the secondary area of disability.
36. The Parent's advocate proposed that an additional diagnosis, specifically, Pervasive Developmental Disorder, be considered for the Student.
37. Detailed progress notes related to current assessment data were provided to the Parents as part of the proposed IEP, including a comprehensive assessment of the Student's non-academic skills, which included areas of Intellectual/Pre-Academic skills, Speech, Language, and Communication Skills, Emotional, Behavioral and Social skills, Perceptual or Learning Styles, Physical Abilities, and Vocational/Self Help skills and an update regarding the Student's medical condition.
38. Repetition and redirection was prescribed as accommodations when the Student participated in general education classes.
39. A detailed report of the Student's academic performance was provided as part of this CCC update, which included an update of the following skill areas: reading, written expression, math, social studies, science, PE/Art/Music, and a category labeled "Other."
40. The School's proposed updated IEP resulting from this meeting included then current information in all areas previously identified. The annual goals and short-term benchmarks listed were behaviorally stated and objectively measurable.
41. No mention of Extended School Year (ESY) services were included in data provided.
42. The Parents did not request a need for parental counseling at this meeting.
43. The Parents declined to provide written permission for the School to provide the additional proposed services.
44. The CCC meeting was suspended after approximately three and one-half (3 ½) hours and was scheduled to be reconvened on May 31, 2006.
45. Subsequent to prior notice, a CCC meeting was conducted on May 31, 2006, for the stated purpose of being a continuation of the CCC meeting held on May 15, 2006. The Parents attended and were represented by Frank Rizzo, Parent Advocate assigned from InSource. The meeting was conducted over a five hour time period.

46. The Parents reported that the Student had been taking the medication Depakote for approximately three weeks. The School was previously unaware of this medication being administered.
47. Representatives of the Neuropsychology Diagnostic Center informed the CCC that the Student had a seizure disorder characterized by petite mal seizures.
48. At the conclusion of this CCC meeting the Parents did not provide written permission for the School to provide the additional services suggested or implement the change of placement as proposed. However, documents show that the Parents did sign permission for the IEP to be implemented on August 7, 2006.
49. An update of all annual goals and short-term benchmarks were provided to the Parents at this meeting of the CCC. Annual goals and short-term benchmarks were written in observable, measurable terms.
50. A BIP was not determined to be necessary by the CCC at this May 31, 2006, meeting.
51. As per prior notice a CCC meeting was conducted on May 16, 2007. The stated purpose of this CCC meeting was to "...annually review [Student's] case and develop a new IEP."
52. Updated annual goals and short-term benchmarks were proposed. All annual goals and short-term benchmarks were appropriately updated based on prior assessment by the various professionals, behaviorally worded, and objectively measurable. Significant improvement in multiple academic and non-academic areas was documented.
53. Parents provided the School with information that the Student's medication had been changed since the last CCC meeting. Trofranal was currently being prescribed. The School had no prior notice of this or several other changes in the Student's medications for significant time periods subsequent to such changes in medications.
54. The Parents refused to provide the School permission to speak with the Student's privately retained physicians.
55. The School was challenged during this CCC meeting by the Parents and their advocate regarding support of an instructional assistant for the Student.
56. The School provided an instructional assistant for the Student as specified in the Student's then current IEP.
57. While the School's records, as well as data from independent assessments, demonstrate the Student had made significant gains in both academic and non-academic areas during the past two years, he continued to function below chronological age expectancy.

58. Documents and testimony revealed that is unlikely that, due to the Student's multiple difficulties, he will ever perform educationally or socially at age-appropriate levels regardless of the interventions provided.
59. Parents have made multiple suggestions at CCC meetings regarding instructional and behavioral interventions they would suggest be implemented. While the School did not adopt all of these recommendations, it is clearly documented that the Parent's suggestions were considered and many of their suggestions or recommendations presented were implemented. Multiple accommodations and modifications were made to the Student's educational program as a result of such parental input.
60. The Student does not present toileting problems during the school day in excess of those typical of his peers. Parents report consistent toileting problems in the home setting.
61. While participating in general education classes the Student has been able to display both social and academic skills within acceptable limits. The Student's attendance and participation in general education classes does not result in a situation wherein other student's educational benefit is impaired at this time.
62. The Student continues to demonstrate below age expectancy expressive language skills.
63. The CCC determined that a BIP was again unnecessary. Teachers and related services personnel were well aware of any behaviors of concern being demonstrated by the Student and understood and implemented a common set of consequences or responses to these behaviors.
64. The CCC again determined that ESY were not required.
65. The Student is generally accepted by his peers and teachers.
66. As in all previously and subsequently prepared IEP's, detailed progress notes related to current assessment data were provided to the Parents, including a comprehensive assessment of the Student's non-academic skills, which included areas of Intellectual/Pre-Academic skills, Speech, Language, and Communication Skills, Emotional, Behavioral and Social skills, Perceptual or Learning Styles, Physical Abilities, and Vocational/Self Help skills and an update regarding the Student's medical condition. Results determined that the Student could participate in general education classes with appropriate modifications and accommodations for most of the school day. The Student was to receive pull-out services for specified areas of instruction, including speech therapy.
67. A detailed report of the Student's academic performance was provided as part of this CCC update, which included an update of the following skill areas: reading, written expression, math, social studies, science, PE/Art/Music, and a category labeled "Other." Such updates were repeated in all subsequent proposed IEPs.

68. The Parents did not give the School permission to implement the IEP proposed at the May 16, 2007, CCC meeting.
69. The Student has a mild to moderate receptive and expressive language deficit. Intellectually, the Student performs approximately two standard deviations below expectancy.
70. The Student continues to make gains in all areas of performance congruent with his intellectual ability. The Student's most significant weakness is in the area of mathematics.
71. The Student has adequate vision and hearing.
72. The Student has poor visual-motor and fine motor skills.
73. The Student has significant non-verbal and visual-spatial processing deficits.
74. The revisions to the Student's IEP resulting from this meeting included, behaviorally stated, objectively measurable annual goals and short-term benchmarks in each area addressed.
75. The Student, while distractible, does not require more than a structured environment with limited external stimuli in order to perform up to his capabilities educationally or socially.
76. The Parents did not provide the School with written permission for a standardized evaluation as part of a required the three-year evaluation. The last complete educational evaluation was administered in April of 2005.
77. Subsequent to prior notification, a CCC meeting was held on August 13, 2007. The stated purpose of this CCC meeting was to review an independent evaluation completed in July 2007, by Dr. Julie Steck, and to make any necessary changes to the Student's IEP. This CCC meeting lasted approximately eight (8) hours. Parents attended and were represented by Frank Rizzo, Advocate, as assigned through InSource.
78. Parents expressed disagreement with multiple portions of the School's proposed IEP as presented and refused to give permission for the School to implement same.
79. The Student has received multiple diagnoses (currently, at least eleven, possibly twelve depending on how one interprets clinician's reports) from a variety of sources.
80. The Student was seen for evaluation by Dr. Elizabeth Mango at the age of five (5) and was diagnosed as having an Attention Deficit Hyperactivity Disorder with concurrent developmental delays.

81. The Student was seen for neuropsychological evaluation through the Neuropsychology Diagnostic Center, LLC, in Orland Park, Il, on April 18, 2006. Results of this evaluation determined that the Student had significant attention, executive function, memory, speech/language, sensorimotor and mood functions typical of a child with Pervasive Developmental Disorder. The latest categorical diagnosis was presented by the Dr. Julie Steck. Dr. Steck was retained by the School, at the School's expense to respond to thirteen (13) questions previously agreed to between the School and the Parents. Her report is dated July 27, 2007. In this report she diagnosed the Student's most likely disability as being a Pervasive Developmental Disability, Not Otherwise Specified (PDD, NOS), which is likely compounded by other factors.
82. The Student has been prescribed and taken multiple medications, all with minimal positive effect; some having produced negative effects.
83. The Student is able to "read" social cues from adults and peers, and is capable of adjusting his behavior accordingly.
84. The School has an adequate understanding of why the Student displays the behaviors he displays and how to respond to these behaviors as exemplified by testimony and documents presented at hearing. The Parents do not have an adequate understanding of why the Student displays inappropriate behaviors in the home setting or how to best respond to these behaviors.
85. The School has provided multiple opportunities for the Parents to influence their Student's education program, including, but not limited to: educational interventions, educational placements, a choice of schools the Student could attend, assessments to be conducted, and schedules and methods of reporting the Student's progress Parents.
86. The School has made staff available to the Parents to discuss the Student's progress outside of the CCC process, including the director of special education, teacher of record, teacher of service, and his school's principal. However, the School instructs all paraprofessionals who work with students with disabilities not to discuss individual students with anyone other than school employees with a need to know. The School maintains a standing policy that any information regarding individual students is to come from either the child's teacher, related services professional, or the school principal unless otherwise specified.
87. Parents were provided the same opportunities for observing their Student in his assigned classroom during the instructional day as required of all other parents, following the same procedures and guidelines for in-school observations, as applied to all other parents of students with or without disabilities. The Parents requested to observe the Student during group speech therapy sessions. Their request was denied. The School cited the need for confidentiality of identify of other students in the therapy sessions as the reason for denying the Parent's request.

88. Testimony revealed that the Parent's primary advocate, Frank Rizzo, has a long and complicated history of an acrid relationship with the School. Brenda Rizzo, kindergarten teacher for the Student during the first part of the Student's kindergarten year is the spouse of Frank Rizzo. Brenda Rizzo was quite verbal adamant when expressing her disdain for the administrators responsible for the conduct of her school and of the school corporation. Both Frank and Brenda Rizzo were most emphatic in demonstrating their acrimonious relationship with the School district and lack of respect for the special education programs therein.
89. All School staff that provided services to the Student were appropriately credentialed. Most had attained advanced training in areas related to the Student's areas of need. Staff responsible for delivering services to the Student continued to update their professional training through attendance at district sponsored inservice programs, attendance at professional conferences or other professional development activities during the past two school years while addressing the Student's then most current disability classification.
90. The Student has been able to function within acceptable limits while attending general education environments specified in his past IEPs without the necessity of a full-time one-to-one instructional assistant.
91. In order to redirect the Student's attention when participating in any educational setting, school staff have been successful providing nothing more than a verbal or physical prompt, most typically verbal, to get the Student to initiate an academic task and to remain on-task.
92. The Student responds best in structured environments wherein distracting stimuli are limited. Teachers, with the exception of Brenda Rizzo, initial kindergarten teacher, have successfully provided such structure in the general education setting. Additionally, school staff, including teachers and related services personnel, was aware of the necessary behavioral interventions required in order to successfully manage the Student's specific behavioral issues. School staff implemented appropriate behavioral interventions throughout the Student's enrollment in the school corporation with the exception of Brenda Rizzo, who served as the Student's initial kindergarten teacher for approximately two months. She testified that she was unable to successfully manage the Student's behaviors and at one point requested that the Student be sent home due to unruly and non-compliant behaviors. The school principal conducted a behavioral observation in Brenda Rizzo's classroom and determined that the Student's behaviors were not so significantly different from other students that would require exclusion from the school environment.
93. The Student has demonstrated some difficulty adjusting to highly distracting, noisy environments and unusual stimuli, such as fire drills. However, the Student has been able to successfully adjust to these environs as a result of school based interventions and consistent support from school staff.

94. Data, from both clinicians independent of the School and those data obtained by the School, demonstrate that the Student's acquisition of social skills and appropriate classroom behaviors is characterized by marked progress since kindergarten.
95. Data from both clinicians independent of the School and those data obtained by the School demonstrate that the Student's acquisition of speech and language skills is characterized by marked progress since kindergarten.
96. As the Student has progressed from kindergarten through second grade his acquisition of educational skills is exemplified by steady progress, although as stated previously, he remains behind his same-age peers in this area of development. As supported by multiple clinical diagnoses, he will likely continue to remain so throughout his school experience. None-the-less, educational assessment clearly demonstrates that the Student has made noteworthy progress in all educational areas addressed in his IEPs.
97. During the May, 12, 2005, CCC meeting, parties agreed that the Student would receive an occupational therapy evaluation. The evaluation was begun on September 23, 2005, and discontinued due to vision problems being experienced by the Student. The evaluation was continued on September 30, 2005. It was unclear from testimony whether the document contained in Petitioner's exhibits, page 94, is a completed occupational therapy evaluation or only a partial evaluation. However, this evaluation addressed the following areas: pincer grasp, fine motor (copying and writing), visual motor skills, and self help skills. This evaluation was presented to the Parents at the October 14, 2005, CCC, meeting. Areas identified as being in need of specific occupational therapy services were incorporated into the services provided to the Student as listed in his IEP. All services were not provided as direct services by the School's occupational therapist, but by the teacher of service integrating specified services into classroom instruction and activities under the direction of, and consultation with, the Occupational Therapist.
98. Based on data obtained by the School's occupational therapist and supported by multiple other school staff that have first hand knowledge of the Students physical, educational, and social needs, the Student's needs for occupational therapy have been adequately addressed by school staff.
99. Based on data obtained by the School's physical therapist and supported by multiple other school staff that had first hand knowledge of the Student's physical, educational, and social needs, the Student's needs for physical therapy were adequately addressed by school staff.
100. The Student received speech and language services as needed and as reflected in multiple IEP's. The School's Speech/Language Pathologist is a highly qualified, experienced, and appropriately licensed speech/language therapist. Speech/language services were provided by the Speech/Language therapist as either direct services or by other professionals on a consultation basis. Based on data obtained by the School's speech/language therapist and supported by multiple other school staff that have first hand knowledge of the Student's

need for speech and language therapy, the Student's need for speech and language therapy have been adequately addressed throughout the time period under consideration in this matter.

101. Testimony revealed that on multiple occasions the Student refused assistance from the instructional assistant as had been previously provided stating that he wished to be more independent and more like other students.
102. The Student has not displayed regression of educational or social skills as a result of not having been provided with ESY.
103. Although no written policy delineating and detailing visitor policy was presented, Ms. Gee, principal of Hanover School enforced the existing visitor policy without discrimination toward the Parents. Parental visits were provided additional structure only after, and in response to, the Parent's willful violation of the principal's directions concerning such visits. Additionally, the Superintendent of Schools, Dr. Michael Livovich, sent a letter to Parents dated May 15, 2006, stating the procedures for future visits to their Student's school. This letter was in response to issues which arose at the May 4, 2006, CCC meeting.
104. The School denied the Parent's request to speak directly with the classroom assistant during school hours.
105. The School provided the Parents written notification of all proposed actions regarding proposals for implementing any services not currently listed in the then current IEP.
106. The School provided the Parents written notification when the School denied requests for changes of services as proposed by the Parents at each CCC meeting, or subsequent to each CCC meeting, including the reason(s) for denial and the Parent's rights to due process should the Parents decide to pursue an override of the Schools denial.
107. The School offers, as a matter of policy, multiple in-service programs for employees throughout each school year. The School conducted an in-service training program on Autism on October 6, 2006, and invited the Parents to attend. The Parents attended. Similarly, three additional in-service training programs were offered by the School during the past two years.
108. Parents were appropriately notified of all CCC meetings.
109. Parental input has been encouraged and accepted at all CCC meetings. There were three separate CCC meetings conducted in May, 2006. Parents attended each. Social goals proposed by the Parents were incorporated into the Student's IEP.



110. The School frequently invited private practitioners, at the School's expense, including psychologists and physicians, to participate in CCC meetings in order to assist in the development of appropriate educational and related services for the Student.
111. The clock hours devoted to each CCC meeting facilitated input from all parties. CCC meetings lasted up to eight (8) or more hours.
112. All outside evaluations obtained by the Parents or the School were given in-depth consideration in the formulation and delivery of services for the Student throughout the time frame under consideration in this matter.
113. The Parents have reported that they have experienced significantly more difficulties regarding the Student's behavior and related learning problems in the home environment than other evaluators have reported being observed in clinical settings or the school environment. The single exception to this was the wide range of inappropriate behaviors displayed during the first two months of kindergarten as reported by Brenda Rizzo.
114. The Student has received outside services obtained by the Parents. The Parents withheld such information from the School on several occasions.
115. Parents received frequent reports regarding the progress of the Student by a variety of means, including, but not limited to, "daily logs" report cards, progress notes, IEP updates, telephone calls and e-mail in terms easily understood by the general public.
116. The Parents received a copy of Procedural Safeguards at each CCC meeting or before a scheduled meeting of the CCC. The Parents allege that their rights contained within this document were not explained to them at the May 4, 2006, CCC meeting. CCC notes of this meeting and testimony reflect that these rights were explained to the Parents. Additionally, Parents were accompanied by Frank Rizzo, Parent Advocate, at this and multiple subsequent meetings of the CCC. The Parents were made well aware of their rights as parents of a student with a disability.
117. During closing, Counsel for Parents stated that "The Parents aren't opposed to the Student being in the general ed setting, as proposed in the August of 2007 IEP, with pull-out for reading and math."
118. Kelly Ryan, second grade teacher stated that "I think that with pull-out for language arts and math and assistance, when needed, in other areas he would do better. He would show more growth."
119. Counsel for Parents, during closing, stated that, "As you heard the Parents testify, they believe that the IEP devised in August 2007 is the best IEP ever devised for him [the Student]."

120. Dr. Steck's testimony revealed that as students become older and advance from grade to grade, especially with baseline being the early years of school, depending on the nature and extent of their disabilities, it is not unusual for these students to require additional special education and related services in order to continue to demonstrate progress which may include services provided outside the general education classroom.
121. The School provided, and continues to provide, significant resources to parents of students with disabilities by a variety of means to include the School's website which, among other things, provides contact information for a network of parents of students with disabilities which is available to anyone wishing to contact this network, opportunities for inservice training, and additional resources available on the world wide web.
122. Beginning on August 29, 2006, and continuing throughout the 2006-2007 school year, the School provided an instructional assistant for the Student as specified in his IEP.
123. There is no consensus as to the root cause of the Student's learning and behavior issues among the multiple professionals that have evaluated this Student.
124. Hannover Community School Corporation is the Student's school corporation of legal settlement.

### *The IHO's Conclusions of Law*

Based on these Findings of Fact, the IHO reached twenty-eight (28) Conclusions of Law.

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 et seq. and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.
2. All Conclusion of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact which can be deemed Conclusion of Law are hereby deemed Conclusions of Law.
3. It has been clearly established that the burden of persuasion in IDEA hearings rests with the party initiating the matter (*Schaffer v. Weast*, 546 U.S., November 14, 2005). The Parents were the party initiating this matter.
4. The issues presented in this hearing are presented below and ruled upon accordingly.
5. **Issue 1: Did the School fail to fully implement the Student's May 2006 Individualized Education Program (IEP)?**  
**Answer: No**

Neither Article 7 (511 IAC Rules 17-31), the Individuals with Disabilities Education Improvement Act (20 U.S.C. § 1400 *et. seq.*), nor the regulations supporting the Individuals with Disabilities Education Improvement Act (34 CFR Parts 300 & 301) characterize a student's IEP as an absolute contract. Was such the case it is most likely that there exists not a single IEP that would withstand such scrutiny. Incidental deviations from a student's IEP do not necessarily constitute a violation of law. Such is the case in this matter. Any deviation(s) from the provision of any services enumerated in the Student's then current IEP, if in fact there were any, did not result in depriving the Student of having received a free and appropriate education which resulted in the provision of meaningful benefit in each area of identified need.

As such, the School did not fail to fully implement the Student's May 2006 Individualized Education Program (IEP).

- 6. Issue 2: Did the School fail to provide the Student with a one-to-one aide as specified by his IEP during either the 2005-2006 or 2006-2007 school years?**  
**Answer: No**

The School provided instructional assistance to the Student as provided each IEP that was implemented as the then-current IEP. In some cases cited, the School actually provided more one-to-one instructional assistance to the Student than the then-current IEP mandated. Deviations, if any, regarding the provision of an instructional assistant throughout the time period under consideration in no way resulted in a negative effect on the Student having received the benefits of a free and appropriate education. As such, the School clearly demonstrated that it did not fail to provide the Student with a one-to-one aide as specified by his IEP during either the 2005-2006 or 2006-2007 school years.

- 7. Issue 3: During the effective time period, did the School fail in its duty regarding child find in that it failed to determine that the Student had a disability, in this case Autism or Asperger's Syndrome (Autism Spectrum Disorder), and therefore required special education or related services?**  
**Answer: No**

The Student has never received a definitive, agreed upon, diagnosis of Autism. It was only at the Parent's insistence that the primary disability area was changed to Autism Spectrum Disorder at the May 31, 2006, CCC meeting. This Student has been diagnosed at one time or another before the effective time period under consideration in this matter as displaying characteristics of any number of disabilities including, but not limited to Other Health Impaired, Autistic, Autistic Spectrum Disorder, Asperger's Syndrome, Non-Verbal Learning Disability, Learning Disability, Mild Mental Disability, Emotional Disability, Developmental Delay, Speech Impaired, Precursor Dyslexia, Communication Disabled, and Obsessive Compulsive Disorder, Not Otherwise Specified, co morbid with any or all of the above

There are two primary purposes for assigning a disability category to any student as a result of a multidisciplinary assessment and subsequent recommendation of the CCC. The first is to ensure

that the student is eligible for special education and related services under at least one of the thirteen disability categories recognized in Article 7 or the IDEA, and the second is to serve as a reporting tool to state and national agencies. Services to students with disabilities do not emanate from a label, but rather the students individual characteristics and needs. Petitioners could have as easily claimed, with equal validity, that the School failed in its child find duty regarding any of the above listed disabilities, which at one point or another were applied to this Student.

Thus, the School did not fail in its duty regarding child find in that it did not fail to determine that the Student had a disability, in this case Autism or Asperger's Syndrome (Autism Spectrum Disorder), and therefore required special education or related services.

- 8. Issue 4: Did the Student's IEPs for the 2005-2006 and 2006-2007 school years contain levels of performance stated in such manner as to allow the School to objectively measure the Student's progress toward the goals and objectives stated in these IEP's?**

**Answer: Yes**

Indiana's Article 7 states that IEP's shall contain, "A statement of measurable annual goals that describe what the student can be expected to accomplish within a twelve (12) month period, including benchmarks or short term objectives..." (511 IAC 7 2-27-7(a)(2)). Each of the School's IEPs contained a section entitled "Annual Measurable Goal" for each area of identified need. This section was followed by a section entitled "Benchmarks" wherein a multiple listing of benchmarks, or short term objectives, were recorded (Northwest Indiana Special Education Cooperative, Goals/Benchmarks-Form 207). An example of one such "Annual Measurable Goal" states "[The Student] will identify simple emotions using pictures, using facial expressions, and identifying three of his own emotions in 4 of 5 attempts in 4 of 5 observations" (Respondents exhibit, tab 7, page 137). The School's statements of annual goals listed in the Student's IEPs were clearly measurable.

Accordingly, it is clear that the Student's IEPs for the 2005-2006 and 2006-2007 school years contained levels of performance stated in such manner as to allow the School to objectively measure the Student's progress toward the goals and objectives stated in these IEP's.

- 9. Issue 5: Did the Student's IEPs for the 2005-2006 and 2006-2007 school years adequately address his identified physical, educational, behavioral, and social needs?**

**Answer: Yes**

It could be accurately stated that every student, including students with or without a disability, could demonstrate innumerable "needs" at any time during their school-age years. A "need" that does not constitute a disability is a condition. Accordingly, schools are not required to meet every identified need of any student. Each IEP proposed by the School listed multiple areas of the Student's identified needs that required intervention in order to provide the Student with FAPE. All areas requiring intervention, including educational, social or behavioral were

identified and addressed with the specificity necessary to suggest those interventions that would be required in order to provide the Student with a free, appropriate education at public expense. Each IEP provided assessment data in the following areas: intellectual/pre-academic skills, speech/language skills, communication skills, emotional characteristics and needs, behavioral characteristics and needs, social skills, perceptual or learning styles, physical skills, vocational/self help skills, and medical and other information as appropriate (School's Form 203-Case Conference and IEP Forms). Each area listed above that was identified as requiring intervention in order for the Student to make progress in educational, social, physical, and behavioral areas were followed by a form (School's Form 204, Case Conference and IEP Forms) wherein annual goals were clearly stated and followed by short-term benchmarks. Further, the School demonstrated, by multiple updates incorporating a variety of means, including progress reports and multiple CCC meetings, the on-going progress the Student was making relative to each annual goal and benchmark.

As such, the School clearly documented that the Student's IEPs for the 2005-2006 and 2006-2007 school years adequately address his identified physical, educational, behavioral, and social needs.

**10. Issue 6: Did the School deny the Student's parents written requests for parent counseling or training during the effective time period?**

**Answer: No**

Related services are defined as being "...those services that are supplementary to the student's instructional program and are required for the student to benefit from special education." (511 IAC 7-17-62). Additionally, "A public agency shall provide related services to a student if the case conference committee determines the student requires the related services in order to benefit from special education." (511 IAC 7 2-27-7(a)(2)) Parent counseling or parent training may be incorporated into a Student's IEP as a related service as determined by the Student's CCC.

The IHO could not find any written documentation that the Parent's stated in unmistakable terms, a request for Parent counseling or training that was not addressed. None-the-less, throughout the time period under consideration, and prior to as well, the Parents were provided an abundance of information, either directly or by referral, from the School, other agencies (including InSource), various practitioners and parent advocates regarding the unique and specific characteristics of the Student, and recommended methods of intervening with the Student both at home and at school. Thus, the School did not deny the Student's parents written requests for parent counseling or training during the effective time period, and in fact, the Parents were provided multiple opportunities for additional training and counseling by a variety of professionals, some of which the Parents unilaterally rejected.

**11. Issue 7: Did the School, in violation of an established visitor's policy, limit, without cause, the Parent's visits to the Student's school or observations of the Student while attending school during the effective time period?**

**Answer: No.**

Statute, both Article 7 and the IDEA, assures each student with a disability the following rights: 1) a free and appropriate education public education; 2) an individualized educational plan; 3) services provided in the least restrictive educational environment; 4) due process, and 5) parent participation. Parents must be allowed opportunity to provide input into the development and delivery of their student's educational program. In-school observations have been determined to be one method by which parents of student's with disabilities can participate in the formulation and delivery educational services for their student.

However, a parent's right to conduct in-school observations are not without limits. Schools are entrusted to both maintain order in the schools and to protect the privacy rights of other students as the school deems necessary. When a parent causes a disruption in a school, that school then has the right to limit that parent's interaction with the school, which may include limiting classroom visits and access to designated professionals and paraprofessionals.

In this matter, the School did not provide a written visitor's policy governing parental visits to the Student's school. It was only after the Parent constituted a disruption in the school that the School placed restrictions on the Parent's visits to the school not previously enforced. Until this time the School had not placed any restrictions on the Parent's multiple visits to the Student's school or observations during these visits that were different in any way from restrictions placed on any other parental visit to the school.

Thus, the School, while not having a written visitation policy, did have an established visitor's policy which was routinely monitored and enforced by the School's principal. This policy was clearly communicated to the Parents. The Parent's visits to the School were only limited, or restricted, with cause. As such, the School, did not violate an established visitor's policy, by limiting without cause, the Parent's visits to the Student's school or observations of the Student by his parents while attending school during the effective time period.

**12. Issue 8: Did the School, without justification, deny the Parent the opportunity to converse with the instructional assistant assigned to their Student during the effective time period?**

**Answer: No**

Parents of students with a disability have an absolute right to participate in the development and implementation of their student's educational program, Such participation may include direct access to school personnel. However, these rights are not without limits. Schools may require such things as advance notice of parental visits, requiring parental visits to occur at specific days and times, restricting parental observations with cause, and denying direct contact with specific individuals as long as such limitations are applied without discrimination. In this case the School did deny the Parent's access to speak to a paraprofessional who assisted the teacher of service in providing educational services to the Student during the time the paraprofessional was at the Student's school. The School has a long standing policy of requiring paraprofessionals to limit interactions with parents and to direct parent's questions to an specified professional for reasons both obvious and justifiable. In so doing, the School's denial of the Parent's request to converse

with the instructional assistant assigned to their Student during the effective time period was justifiable and exemplified commonly accepted educational practice.

Thus, the School did not deny the Parents the opportunity to converse with the instructional assistant assigned to their Student without justification during the effective time period.

**13. Issue 9: Did, during the effective time period established for this matter, the School deny the Parent's written requests for information regarding any evaluation of the Student?**

**Answer: No**

Schools have an unquestionable duty to provide parents of students with a disability access to all educational records maintained by the School relating directly to their student. Educational records are defined as those "...records directly related to a student and maintained by a public agency or by a party acting for the public agency. The term included test protocols that contain personally identifiable information regarding the student and individualized educational programs..." (511 IAC 7-17-29). The only evaluation results alleged by the Parents to have been withheld were the results of an occupational therapy evaluation conducted on September 23, 2005, and continued on September 30, 2005. The results of this evaluation were presented at the CCC meeting dated November 14, 2005. A copy of the OT evaluation dated September 23 & 30, 2005, is included in Respondent's documents, tab 3, Page 53. The parent attended this meeting of the CCC. The Parents have not alleged that the School failed to provide a written copy of this evaluation at the time, nor have the Parents alleged by this issue that the OT evaluation previously referenced is incomplete or inaccurate. However, such allegations were made by the Parents during testimony.

None-the-less, the Parents were provided the information resulting from the OT's observations, herein described by the School as an OT evaluation at the November 14, CCC meeting attended by the Parent.

As such, the School has not denied the Parent's written requests for information regarding any evaluation of the Student during the effective time period delimiting the issues in this matter.

**14. Issue 10: As a result of the School's actions regarding Issues 7, 8, & 9 above, did the School deny the Parents meaningful participation in their Student's educational program?**

**Answer: No**

The Student's parents were provided multiple opportunities to exercise their right to meaningfully participate in their Student's educational program throughout the time period in effect in this matter, a right they frequently exercised. The limitations placed upon the Parents visits to Lincoln Elementary School was in response to the Parent's willful and acknowledged violation of reasonable requests made by the principal.

Thus, as a result of the School's actions regarding Issues 7, 8, & 9 above, the School did not deny the Parents meaningful participation in their Student's educational program.

**15. Issue 11. Did the School fail to provide the Parents prior written notice of denial of requests for services contained in a document presented to the School at the May, 2006 CCC meeting?**

**Answer: No**

Schools are to provide Parents of students with disabilities prior written notice a reasonable time before the public agency: a) proposes to initiate or change the identification, evaluation, or special education placement of the student or the provision of a free appropriate public education to the student; or b) refuses to initiate or change the identification, evaluation, or special education placement of the student or the provision of a free appropriate public education to the student. (511 IAC 7-22-2 (a)(1-2)) The contents of prior written notice are specified at 511 IAC 7-22-2 (d)(1-9). Parents allege that many of their recommendations to the CCC and other professionals outside the CCC process were not addressed in the Student's IEPs. The Parents further allege that they did not receive prior written notice when their recommendations were not to be included in their student's IEPs.

On one occasion, that being the May 4, 2006, CCC meeting, the School postponed consideration of a written evaluation conducted by the Neuropsychology Diagnostic Center which was forwarded to the School by the Parents, and received by the School on April 28, 2006. The School provided the reasoning that all personnel necessary to respond to this report were not immediately available and suggested an additional CCC meeting be held within two weeks, specifically May 15, 2006, for the expressed purpose of considering this report. This evaluation report was considered by the CCC at a meeting conducted on May 15, 2006, for the expressed purpose of responding to this evaluation. Both parents attended this May 15, 2006, CCC meeting and received in-depth benefit of explanations regarding the findings and recommendations contained therein and the School's response to them.

All recommendations made regarding diagnostic classifications, and requests for services, be they accommodations or modifications, related to the Student's educational program as presented by the Parents and other evaluators, including those evaluators independent of the School obtained at parental expense, and those independent of the School obtained at the School's expense as well as those initiated by the School's teachers and clinicians were presented at the multiple and, on occasion, very lengthy CCC meetings. Discussions ensued regarding the relative merits of each recommended diagnostic classification, accommodation or modification. The content of proposed IEP's was frequently modified based on such input. In each case Parents were provided written copies of all proposed IEPs and rather detailed CCC Notes, as recorded on the Schools Form 202, Case Conference and IEP Forms, subsequent to any action or inaction proposed to be taken by the School. These rather lengthy CCC notes provided additional data regarding the School's rationale for adopting suggested changes or refusal to change a procedure or service.



As such, the School did not fail to provide the Parents prior written notice of denial of requests for services contained in a document presented to the School at the May, 2006 CCC meeting.

**16. Issue 12: Did the School fail to conduct a functional behavior analysis (FBA) of the student?**

**Answer: Yes**

A functional behavioral assessment is defined as "... a systematic collection and analysis of data that will vary in length and scope depending on the severity of a student's behavior. Results and analysis of the data collection are used in developing the student's behavioral intervention plan. A functional behavioral assessment shall identify patterns in the student's behavior and the purpose or function for the student." (511 IAC 7-17-38) A functional behavioral assessment is required when the School places a student in an interim alternative educational setting, expels the student, or otherwise commences a removal that constitutes a change of placement. (511 IAC 7-29-5(a)) In this matter neither the Student's overt nor covert behaviors resulted in a recommendation from the School that the Student be placed in an interim alternative educational setting, be expelled or that resulted in an action that would constitute a change of placement for reasons of the Student's behavior. Additionally, the School has available to it sufficient data to understand the reasons any unusual behavior(s) occur and the necessary interventions required to limit, as much as possible in a public school setting, any negative effects that the Student's behavior(s) may have on his benefiting from instruction or that of his peers.

As such, while, examining this issue in a literal sense, the School did fail to conduct a functional behavior analysis (FBA) of the student. However, a FBA was neither required by statute nor necessary.

**17. Issue 13: Did the School fail to develop and implement a positive behavioral intervention (PBI) based on a FBA?**

**Answer: Yes**

A behavioral intervention (BIP) plan consisting of positive behavioral interventions and supports (PBIS) is, by necessity, based on the completion of a functional behavioral assessment (FBA). As discussed in response to Issue 12 above, the Student did not require a FBA and none was conducted. Although the School failed to develop and implement a BIP based on a FBA the School was under no obligation to develop and implement a BIP based on a FBA. However, the School did collect a range of data from a variety of sources that assisted the School in understanding the cause and intent of the Student's unique behaviors. As these data were obtained, the School developed and implemented a variety of accommodations and modifications to assist the Student: including, but not limited to; maintaining attention, remaining on task, continuing development of social skills, and cognitive behavior management.

As such, the School did not fail in a legal duty to develop and implement a positive behavioral intervention (PBI) based on a FBA.

**18. Issue 14: Did the school fail to adequately consider an independent evaluation, obtained by the Parents at parental expense, in the development of the IEP(s) for the Student?**

**Answer: No**

See response to Issue 11. The issues are parallel. The School considered every independent assessment provided by the Parents, regardless of the party responsible for the expense thereof, and as a result, made multiple accommodations and modifications to the Student's IEPs, both proposed and implemented. It is well documented that the School devoted an untoward amount of time in multiple CCC meetings reviewing and analyzing data supplied by the Parents emanating from a variety of sources.

As such, the school did not fail to adequately consider an independent evaluation, obtained by the Parents at parental expense, in the development of the IEP(s) for the Student.

**19. Issue 15: Did the School fail to adequately address the Student's sensory needs?**

**Answer: No**

The Student's Parents obtained and presented to the CCC an independent assessment in which a need for a "sensory diet" was identified. School personnel and multiple other clinical assessments obtained by the School concluded that the sensory needs of the Student were documented and were rather simple in nature, and not unlike many other students. The most frequently identified "sensory needs" of the Student that were recommended for accommodation in order to create an optimal learning environment for the Student were 1) limiting loud noises as appropriate, 2) providing increased structure during instructional periods, and 3) limiting external stimuli during instructional periods which would result in a relatively quiet classroom environment (general or special education) to the extent appropriate. Further, each of these "sensory" needs of the Student were adequately and appropriately addressed throughout the time period in effect.

As such, the School did not fail to adequately address the Student's sensory needs.

**20. Issue 16: Did the School fail to provide necessary extended school year (ESY) to the Student?**

**Answer: No**

Extended school year services (ESY) "...means special education services that:

- (1) are provided to a student with a disability:
  - (A) beyond the normal school year of the public agency;
  - (B) in accordance with the student's individualized education program; and
  - (C) at no cost to the parent or the student; and
- (2) meet the standards of the state educational agency." (511 IAC 7-17-35)

ESY services are required when necessary "...to provide free appropriate public education. A public agency may not limit extended school year services to particular categories of disability or unilaterally limit the type amount, or duration of those services." (511 IAC 7-21-3)

Testimony, educational evaluations, psychological evaluations, and evaluations from related services personnel document that the Student did not, and to date does not, require ESY services in order to receive an appropriate education.

Thus, the School did not fail to provide necessary extended school year (ESY) to the Student.

**21. Issue 17: Did the School fail to provide the Student with sufficient occupational therapy services provided by an appropriately licensed, or otherwise qualified, individual?**

**Answer: No**

Occupational therapy (OT) services are classified as related services under Article 7 and the IDEA. Related services have been previously defined in this Order. OT is defined "...as including: (I) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation; (ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and (iii) Preventing, through early intervention, initial or further impairment or loss of function." (34 C.F.R § 300.34(c)(6)(I-ii)(A-C)).

Multiple IEPs proposed, or implemented by the School when permission was received from the Parents to do so, contained some provision for OT services to be provided as either direct or indirect services. Direct services were provided by an appropriately licensed OT. Indirect services were provided as part of classroom accommodations or modifications implemented by an appropriately licensed teacher of service under the monitoring of the OT. All identified OT needs of the Student were identified and all specified interventions were implemented.

As such, the School did not fail to provide the Student with sufficient occupational therapy services provided by an appropriately licensed, or otherwise qualified individual.

**22. Issue 18: Did the School fail to provide the Student with sufficient itinerant services in the area of emotionally handicapped (EH) by an appropriately licensed or otherwise qualified individual?**

**Answer: No**

All staff providing services to the student in the area of emotionally handicapped were appropriately licensed, certified or otherwise appropriately qualified to provide those services. Services provided resulted in measurable and significant gains in the targeted areas.

As such, the School did not fail to provide the Student with sufficient itinerant services in the area of emotionally handicapped (EH) by an appropriately licensed or otherwise qualified individual.

**23. Issue 19: Did the School fail to provide the Student with sufficient reading instruction by an appropriately licensed or otherwise qualified individual?**

**Answer: No**

All staff providing reading services to the student were appropriate licensed, certified or appropriately qualified to provide those services. Services provided resulted in measurable and significant gains in the targeted areas.

As such, the School did not fail to provide the Student with sufficient reading instruction by an appropriately licensed or otherwise qualified individual.

**24. Issue 20: Did the School fail to provide the Student with appropriate speech or language services by an appropriately licensed, certified, or otherwise qualified individual?**

**Answer: No**

All staff providing speech or language services to the student were appropriate licensed, certified or appropriately qualified to provide those services. Services provided resulted in measurable and significant gains in the targeted areas.

As such, the School did not fail to provide the Student with appropriate speech or language services by an appropriately licensed, certified, or otherwise qualified individual.

**25. Issue 21: Did the School's staff that provided services to the Student hold appropriate licensure, certification, and were otherwise qualified, to provide those services to a student with Autism or Autism Spectrum Disorders?**

**Answer: Yes**

All staff providing services to the student subsequent to his eligibility category being changed from Communication Disorder to Autism Spectrum Disorder at the May 31, 2006, CCC meeting were at the time, and have subsequently remained appropriately licensed, certified or otherwise qualified to provide services to the Student in his primary and secondary area of disability, communication disorder. Services provided resulted in measurable and significant gains in the targeted areas.

As such, the School's staff that have provided services to the Student held and continue to hold appropriate licensure, certification, or are otherwise qualified, to provide services to a student with Autism or Autism Spectrum Disorders.

**26. Issue 22: Is the currently proposed educational placement (LRE) appropriate for the Student?**

**Answer: Yes**

The least restrictive environment (LRE) concept requires that , “...to the maximum extent appropriate, students with disabilities, including those students placed in public or private institutions by the public agency outside the public agency’s jurisdiction and those students placed in public or private institutions and other care facilities in the public agency’s jurisdiction, are educated with nondisabled students. Special classes, separate schooling, or other removal of students from the general education environment occurs only when it is documented that education in general education classes using supplementary aids and services cannot be achieved satisfactorily. Unless the individual education program required some other arrangement, the Student’s placement is as close as possible to the student’s home school and is in the school the student would attend if not disabled.” (511 IAC 7-27-9 (a)(1-3)). What constitutes the least restrictive educational environment (LREE) has generated innumerable court cases since the concept was introduced by federal statute. The current revision of the IDEA (20 U.S.C. § 1400 *et. seq.*) continues to strongly support the concept of educating students with disabilities with their nondisabled peers to the maximum extent appropriate, and stresses that any such removal from the general education classroom shall occur only when the student cannot receive an appropriate education in the general education environment even with the support of supplementary aids and services. In Indiana, the CCC makes the determination regarding the most appropriate LREE for and student with disabilities.

Testimony, documents and exhibits entered in this matter are replete with references to and documentation of the Student having made appropriate educational, behavioral, and social gains while being educated along with his nondisabled peers in a general education classroom, taught by a general education teacher, while attending Lincoln Elementary School. During the time period under consideration the Student received only related services and other short removals from outside the general education classroom as determined necessary and appropriate by the CCC. Accordingly, the LREE currently proposed by the School through the IEP presented to the Parents for their consideration during the CCC meeting of August 13, 2007, states that the Student will be educated at Lincoln Elementary School, and that he receive the majority of his academic instruction (80% or more) in a general education classroom while being provided supplementary aids and services. Supplemental reading instruction is proposed to be provided in a resource room. Direct services for speech and language therapy are proposed to be provided outside the general education classroom. Both services are to be delivered by appropriate licensed and trained professional staff.

As such, the currently proposed educational placement (LRE) is appropriate for the Student.

**27. Issue 23: As a result of substantive or procedural violations by the School as alleged in Issues 1-22 as stated above, did the School deny the Student a free and appropriate public education (FAPE)?**

**Answer: No**

Determining whether a student received an appropriate education is a matter that has been the subject of innumerable due process proceedings. The IDEA, through its’ regulations (34 CFR § 300 *et. seq.*), defines a free and appropriate education (FAPE) as follows.

Free appropriate public education or FAPE means special education and related services that-

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sections 300.320 through 300.324. (34 CFR 300.17)

Additionally, determining whether a student has received an appropriate public education requires a two prong analysis. First, the matter of any alleged procedural violations must be considered. In so doing, when considering matters alleged to be procedural violations, “a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (I) Impeded the child’s right to a FAPE; (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) Caused a deprivation of educational benefit. (34 CFR 300.513 (a)(2)(I-iii)) Further, a hearing officer’s determination of whether a child received FAPE must be based on substantive grounds. (34 CFR 300.513 (a)(1)) The School’s personnel responsible for designing and implementing the Student’s IEPs made every effort to include the Parents in the decision making process throughout the time period in question and to make available those services necessary to ensure the Student would receive a FAPE. Additionally, the CCC and other school personnel put forth a commendable effort to ensure the delivery of all services called for in the Student’s IEPs. While the implementation of the Student’s IEPs might not have been perfect, the IDEA does not require that a school maximize a student’s potential. The Parents claim that some procedural oversights by the School had the aggregate effect of constituting substantive grounds resulting in a denial of a FAPE for the Student is without merit. The Student in this matter was not prejudiced by any procedural errors which may have occurred as a result of efforts to implement his IEP(s).

Secondly, when considering whether a school district denied a student a FAPE, one must consider whether there existed substantive grounds that resulted in the Student failing to receive a FAPE. The Parents allege that the School’s IEPs were not calculated to provide educational benefit, did not contain all necessary services required by their student, and those services that were provided were not offered in such a way as to provide the Student with meaningful benefit. Much of the Parent’s disagreement with the School’s proposed IEP’s was based on their unfortunate misunderstanding that the Student’s eligibility category would dictate a specific set of services. Every subsequent evaluation provided proposed yet additional recommended disability categories to be considered. It is the CCC, not the parents of a student with a disability, that determines eligibility and services required by a student. The IDEA requires that the CCC, of which parents are to be active participants, consider any evaluations obtained by the parents or any other information provided. However, the IDEA does not require a district to implement parental preferences as long as those preferences were considered by the CCC and the resulting IEP afforded the student a FAPE. The Parents were unable to support their allegation that the

services contained in the Student's IEPs were not reasonably calculated to provide their Student with meaningful benefit, nor were the Parents able to substantiate that those services delivered failed to provide their Student meaningful benefit. To the contrary, the School demonstrated by multiple sources of data that the services contained in the Student's IEPs were calculated to provide the Student with meaningful benefit, were derived from competent assessment, and when allowed to be delivered without interference or delay, provided substantial educational benefit to the Student.

**28. Issue 24: Is the IEP, as developed during the August 13, 2007, Case Conference Committee meeting, appropriate for the Student including any subsequent recommendations for a Functional Behavioral Assessment and a Behavioral Intervention Plan?**

**Answer: Yes**

The School's proposed IEP, as developed during the August 13, 2007, CCC meeting, and as subsequently presented to the Parents, meets all the essential elements required in order to provide the Student an education, being delivered in the LRE, that would likely result in the Student obtaining meaningful benefit from its' implementation. This proposed IEP, including the eligibility categories of other health impaired (OHI) as the primary area of disability and communication disorder (CD) as the secondary area of disability, is based on multiple sources of objective data and expert clinical opinion provided to the School by a wide array of clinicians, public and private. Of note, it is well documented that the Parents were afforded continual opportunity to have significant input into the development of this IEP through the provision of data collected from these various sources.

The LRE proposed by the School; specifically, the general education classroom setting in his home school, is supported by the fact that the past two school years demonstrate unequivocally that the Student can receive an appropriate education in such setting with the use of the supplemental aids and services to be provided as stipulated in this proposed IEP. Those services that are proposed to be provided outside the general education classroom are substantiated as being necessary and appropriate.

A Functional Behavioral Assessment (FBA) was conducted by in-school observations of the Student on August 29, 2008, and September 9, 2008. A report of this FBA resulted in a Behavioral Intervention Plan (BIP), subsequently attached to the CCC's proposed IEP dated August 13, 2008. The FBA was conducted by the School's behavioral consultant who is appropriately trained and licensed to conduct such evaluations and recommend subsequent behavioral interventions. While brief, and entirely based on two in-school observations, this FBA resulted in numerous suggested interventions to be employed by the special education teacher, general education teacher, paraprofessional, and the Parents. All recommendations are consistent with behavioral interventions previously proposed by teachers and independent clinician's testimony and written reports.

As such, the IEP, as developed during the August 13, 2007, Case Conference Committee meeting, is appropriate for the Student including the subsequent recommendations emanating from a Functional Behavioral Assessment and incorporated in the Behavioral Intervention Plan dated September 25, 2007.

### *The IHO's Orders*

Based on the Findings of Fact and Conclusions of Law, the IHO issued seven (7) orders.

1. The School will complete an Occupational Therapy evaluation prior to the end of the current school year. Any data resulting from this evaluation that would suggest necessary accommodations or modifications to the Students IEP not currently included in the currently proposed IEP will be incorporated in a revised IEP by means of the CCC process and based on the recommendation(s) of the same.
2. The School will provide the Parents contact information which will allow them to contact the appropriate individuals participating in the existing Parent Support Group within the district for the purpose of allowing these Parents to participate in this existing group of parents of students with disabilities.
3. The School will continue to evaluate the possibility of limiting the time and distance of the bus transportation offered to the Student and will structure the Student's bus rides in a manner to make both as short as feasible.
4. The School will complete a tri-annual assessment of the Student not later than April 24, 2008. Results of this assessment will be presented to a CCC not later than thirty days thereafter. A physical therapy evaluation will be included as part of this tri-annual assessment. The Student's IEP will be modified as appropriate at that time as recommended by the CCC. Extended School Year services are not included in the proposed IEP, and subject to re-evaluation of data generated by the tri-annual assessment, are not required.
5. The School's behavior specialist will continue to monitor the Student's overt behaviors by means of weekly contact with the teacher of record and any teachers of service to include those delivering any related services for the purpose of continually updating the Student's current behavior intervention plan. It is strongly recommended that the Parents permit in-home observations previously proposed by the School in order to provide both the Parents and the School additional understanding of the type, frequency, duration, and purpose(s) of any inappropriate behavior(s) observed, resulting in a more complete, ecologically based, behavior intervention plan.
6. By the end of the current school year, the School will develop and publish written guidelines, or policies, regarding Parental visits to Lincoln Elementary School and provide the Parents with a copy of these guidelines or policies. Upon request of the Parents, the School will provide a staff professional to respond to any questions the Parents may have



regarding such guidelines or policies. Future visits to the School by the Parents will then be governed by these newly published guidelines or policies.

7. The IEP, as proposed by the School on August 13, 2007, including the subsequent recommendations emanating from a Functional Behavioral Assessment and incorporated in the Behavioral Intervention Plan dated September 25, 2007, will be fully implemented within ten school days from the date of this order.

### **APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS**

The Student, pursuant to 511 IAC 7-30-4(I), timely requested an extension of time to file a Petition for Review on March 20, 2008. On March 20, 2008, the Board of Special Education Appeals (BSEA) granted the request for extension, giving the Student until the close of business, May 15, 2008, to file his Petition for Review. Time lines for review and issuance of BSEA's written decision were also extended to and including June 16, 2008. On May 15, 2008, the Student filed his Petition for Review. The School timely requested an extension of time to file its Response to Petition for Review on May 21, 2008. On May 22, 2008, the BSEA granted the School's request for an extension, giving the School until the close of business June 20, 2008, to file its Response to Petition for Review. Time lines for review and issuance of the BSEA's written decision were also extended to and including July 21, 2008. The School timely submitted its Response on June 20, 2008.

The complete record from the hearing was photocopied and provided to the BSEA members on May 29, 2008.

The BSEA, on June 9, 2008, notified the parties that it would review this matter without oral argument and without the presence of the parties on June 30, 2008.

#### **Student's Petition for Review**

The Student argues that the IHO erred in his decision for the following two reasons: 1) the IHO erred in concluding that the Student was not denied a FAPE because the parents were denied the right to be equal and active participants in the case conference process, and 2) the IHO wrongfully admitted evidence over the objection of the Student.

The Student argues that the School denied the Student a FAPE because it failed to share information about the Student's behavior with the parents or involve the parents in the Student's behavioral programming. The Student argues that there was evidence<sup>5</sup> to indicate that the Student was having behavioral problems in class but that the School failed to offer to conduct a functional behavior assessment to develop a behavior plan. The Student argues that although FFs

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<sup>5</sup>The Student points to Respondent's Exhibit A-2 pg. 21-11, Respondent's Exhibit A-3 pg 53, and Respondent's Exhibit A-7 pg 132 as examples.

## 17, 29, and 50 conclude the case conference determined there was not a need for a behavior plan when developing IEPs, the IHO did not make any findings regarding how the case conference committee came to that conclusion.

Findings of Fact ## 63, 75, 84, 92, and 93, as well as CLs ## 1 and 16 show that the School discussed the Student's behaviors and came up with a coordinated way of handling them. The Student maintains that the School implemented a "common set of consequences or responses" but did not share this with the parents. Student argues this is a denial of a FAPE not because the School didn't program for behavioral issues but because they did not involve the parents in the programming. The Student claims the IHO ordered that the School offer the parents training regarding dealing with their son (Order # 2) and encouraged the parents to allow the School to conduct in-home observations of the Student to facilitate the parties working together to help the Student with his behavior. To bolster his argument, the Student argues the IHO's Orders ## 2 and 5 confirm the importance of communication between the parties and the fact the parents have needed the service all along but did not get it.

The Student argues that the student was denied a FAPE because ESY was not discussed at case conferences. Case conference notes indicated that the School found no evidence of regression but the Student maintains that the School made the decision that ESY was not necessary prior to the case conference. The Student argue that this constitutes a denial of a FAPE because determining services before writing an IEP is a violation of IDEA.<sup>6</sup> The Student claims the IHO erred in concluding the School didn't deny FAPE by deciding the Student hadn't shown regression.<sup>7</sup>

The Student further claims that the School denied the parents' right to make decisions regarding services because the School did not provide the parents with progress reports. The Student maintains that, according to Respondent's evidence, no progress reports were given to the parents during the 2005-2006 school year. The Student further argues that the progress reports that appear in Respondent's exhibit books for the 2006-2007 school year were generated for the purposes of the present litigation because it was the first time the progress reports had been seen by the parents. The Student argues this compromised the parent's ability to help the child at home and was a violation of the intent of the IDEA, which contemplates cooperation between the parents and the School.

The Student argues the IHO's conclusion<sup>8</sup> is in error because he was prejudiced by the wrongful admission of evidence over the Student's objection. The Student contends that the IHO erred in admitting evidence concerning the Student's August 2007 IEP. The parents believed the IEP was appropriate for the student, however they did not sign the IEP, allegedly because it did not

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<sup>6</sup>Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*

<sup>7</sup>The Student fails to identify which conclusion is being addressed by this argument. The IHO's Conclusion # 20 addresses ESY.

<sup>8</sup>Again, the Student fails to identify which conclusion is being addressed in this argument.

include compensatory services or a measure for accountability. The Student argues that the IHO misinterpreted the parent's reasons for not signing and believed that the parents disagreed with the IEP for the same reasons they requested a due process hearing for previous IEPs. The Student argues that the admission of the August 2007 IEP prejudiced the Student's case.

The Student further argues that the IHO erred in finding that the previous IEP's were appropriate. The Student contends that the August 2007 IEP includes much more information and covers more services. Furthermore, the Student maintains that if the August 2007 IEP is deemed to be appropriate, then previous IEP's, by comparison, should be deemed to be inappropriate. The Student argues that the August 2007 IEP was a result of the due process request and is evidence of the School's previous bad faith.

The IHO erred by forcing the parents to sign a full and unlimited release allowing the School access to all of the Student's medical information. The IHO further erred by not allowing the testimony of the Student's doctors. Indiana Code 16-39-3-3(2)

Finally, the Student maintains that the IHO erred by ordering the parents to sign medical releases of information for several of the Student's doctors. The Student argues that IC 16-39-3-3(2) applies to medical and mental health records and should pertain to this case. The Student argues that, pursuant to that statute, medical and mental health records may be released, without consent, by a court order following a hearing. The IHO's order was too broad. The Student's doctors refused to comply, which prohibited the Student from using their testimony at the hearing, prejudicing the IHO's perception of the Student.

### **School's Response to the Petition for Review**

The School maintains that the IHO reviewed all of the evidence and based his after considering all of the evidence. The Student's Petition for Review does not follow the legal standard set forth at 511 IAC 7-30-4(d). The School claims that the Petition for Review, although taking exception with certain IHO findings, did not cite to the record to support the contention that the IHO's decision was in error. The School also claims the Student failed to demonstrate the IHO's findings were outside his jurisdiction or were reached inconsistent with established procedure.

The School maintains that the IHO properly determined that the parents were provided meaningful participation in the case conference process, in accordance with Article 7<sup>9</sup> and IDEA. The School argues that parents, and often an advocate, were present at all of the nine case conferences over three years. The record indicates the School considered evaluations submitted to the CCC by the parents.

The School maintains that the IHO properly determined that the parents were provided the opportunity to participate in the decision making process concerning programming for the

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<sup>9</sup>511 IAC 7.

Student's behavior. The School argues that the IHO's finding that the Student did not need a BIP was supported by testimony and case conference notes.

The School argues the parents were provided the opportunity to participate in the decision-making process concerning ESY services for the Student. There is no evidence to support the Student's allegation that the School predetermined that ESY services were not appropriate for the Student.

The School claims the Student's progress was regularly reported to the parents by use of "daily logs" report cards, progress notes, telephone calls and e-mail. The School notes that the Student fails to cite any testimony or evidence to support his allegation that the School "created" progress reports for purposes of litigation. The parents were provided the opportunity to participate in the decision-making process as they were fully informed of the Student's progress.

The IHO properly admitted evidence as required by Article 7, the Administrative Orders and Procedures Act (AOPA), and the IDEA. The Student failed to object to the admission of the August 2007 IEP into evidence. Therefore, any objection is waived. The Student's Petition suggests the IHO was prejudiced by the admission of the IEP developed in August 2007 after the due process hearing was requested. The IHO's decision indicates he carefully reviewed the IEPs prior to August 2007. The substantial evidence in the record supports the IHO's decision. The Student's suggestions that the August 2007 IEP prejudiced the IHO is based upon conjecture and unsupported by the evidence. Although the Student now claims the parents didn't sign the August 2007 IEP because it didn't include compensatory services, such services were not indicated when the Student has continually demonstrated progress in his current program.

The School asserts the IHO complied with Article 7 and other applicable laws when he ordered the parents to sign medical release authorizations to assist the School in obtaining medical documentation. Indiana Code 16-39-3-3(2) pertains to mental health records and not medical records. Once the Student placed a condition at issue, he waived any privilege related to that condition. Further, the IHO did not forbid the testimony of the Student's doctors. At no time prior to or during the hearing did the IHO order the exclusion of said testimony.

### **REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS**

On June 30, 2008, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members of the BSEA participated. Each had received and reviewed the record from the due process hearing below, including the Petition for Review and the School's Response to the Petition for Review. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows.

Based on its review, the BSEA now determines the following Combined Findings of Fact and Conclusions of Law.

## COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; 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 BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. Article 7 hearings are conducted pursuant to the Indiana Administrative Orders and Procedures Act (I.C. 4-21.5-3) and 511 IAC 7-30-3.
3. The IHO's decision must contain separately stated findings of fact, conclusions of law,<sup>10</sup> and, if applicable, orders. The conclusions of law must be based upon the findings of fact and the orders must be derived from the conclusions of law.
4. A petition for review of a due process hearing must be specific as to the reasons for the exceptions to the IHO's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken. 511 IAC 7-30-4(d).
5. No objections were raised to any of the IHO's findings of fact. The findings of fact are supported by substantial evidence and should be upheld in their entirety.
6. The Student did not object to any specific conclusion of law. The Student's objections are general and not addressed to any specific conclusion. It is not the role of the BSEA to make the Student's argument for him, nor to guess as to which conclusions he objects.
7. The School did not deny the parents the ability to fully participate and make decisions regarding how to program for the Student's behaviors. The behaviors exhibited in the school setting did not require a functional behavioral assessment or a behavioral intervention plan. The adaptations and accommodations provided by the School were more a function of teaching strategies that are not a part of the IEP. Instructional strategies effectively dealt with the Student's behaviors. The parents were permitted to fully participate in the case conference committee meetings.

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<sup>10</sup>The Administrative Orders and Procedures Act uses the terminology "findings of ultimate fact."

8. The Student argues the parents were denied the right to make a decision regarding whether or not the Student needed extended school year (ESY) services. The Student has failed to identify any finding of fact or conclusion of law on this issue to which he takes exception. Although ESY services may not have been discussed to the extent the parents might have liked, each IEP indicates the CCC determined that ESY were not required to meet the Student's needs. The IHO's determinations in this regard are supported by the evidence.
9. The Student claims the parents' rights to make decisions throughout the school year were denied because the parents were not informed of the Student's progress at least as often as they parents of non-disabled children were informed of their progress. The evidence indicates the parents were provided frequent information as to the Student's progress through the agenda book, e-mail communication, progress notes, and telephone calls. However, failure to provide progress reports was not identified as an issue before the IHO. Any objections to this issue are waived as not having been raised in the due process hearing.
10. The Student's objection to the admission of the August 2007 IEP is not well-taken. Contrary to the Student's assertion, no objection to this exhibit was made in the course of the due process hearing. There were no objections made as to any of the exhibits. Further, Issue No. 24 was stated as: **Is the IEP, as developed during the August 13, 2007, Case Conference Committee meeting, appropriate for the Student including any subsequent recommendations for a Functional Behavioral Assessment and a Behavioral Intervention Plan?** The IEP developed during the August 13, 2007, would be a required piece of evidence for the IHO to be able to make a determination as to this issue.
11. The IHO issued subpoenas for the release of medical records at the request of the School. When the medical providers refused to comply without a signed release from the parents, the IHO, at the request of the School, ordered the parents to sign releases. Although objecting, the parents indicated they would comply. Only some of the medical records were received by the School prior to the start of the hearing. The Student now claims the IHO erred by "forc[ing] the parents to sign a full and unlimited release allowing the school unfettered access to all of the student's medical information[.]" The Student claims medical records are protected by I.C. 16-39-3-3(2), which requires a court order, after hearing, before the release of medical or mental health records. The Student misreads the statute, as it pertains only to mental health records. There was no showing that the records sought were mental health records. As such, I.C. 16-39-3-3(2) does not apply. However, even if some of the records sought were mental health records, such records can be released with the consent of the patient, or the patient's parent if the patient is a minor. Although the Student now objects that the order was too broad, and that the order did not limit disclosure to only relevant parts of the medical records, or limit who would have access to the records, there is no indication in the record that the Student ever sought a protective order to limit disclosure to only certain records. In

seeking a protective order, the Student could have asked the IHO to review the medical records *in camera* such that the IHO could limit disclosure to the School of only those records determined to be relevant. The Student did not seek such a protective order or take any other measure designed to limit disclosure to only those records deemed relevant.

12. The Student's claim that he was precluded from presenting the testimony of his doctors at the hearing is unsupported by the record. At no time during the five days of hearing did the Student offer the testimony of any of his doctors. This objection is unfounded.
13. The conclusions of law are supported by the findings of fact, are not contrary to law, and are within the IHO's jurisdiction and authority.
14. The Student has not raised any specific objection to any of the IHO's orders. The orders are supported by the IHO's findings of fact and conclusions of law.

#### ORDERS

In consideration of the foregoing, the Board of Special Education Appeals rules as follows:

1. The IHO's Findings of Fact, Conclusions of Law, and Orders are upheld in their entirety
2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: July 7, 2008

/s/ Rolf W. Daniel  
Rolf W. Daniel, Ph.D., Chair  
Board of Special Education Appeals

#### APPEAL RIGHT

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