BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of B.H. and the	)	
South Bend Community School Corporation	)	**Article 7 Hearing No. 977-97**
	)	
	)	

Procedural History

The Indiana Department of Education received on May 21, 1997, a request for a due process hearing from the parents of B.H. (hereafter, the "Student") to determine the educational placement of the Student for the 1997-1998 school year. The Student had been placed in an early childhood classroom for three-year-old children at a local private program. The South Bend Community School Corporation (hereafter, the "School") proposed for the 1997-1998 school year that the Student be placed at one of its schools. An Independent Hearing Officer (IHO) was appointed on May 23, 1997.[1]

Both the School and the Student were represented by counsel. The Student's counsel requested an extension of time, which was granted by the IHO on June 11, 1997. The IHO, by separate letters to counsel on June 11, 1997, established August 19 and 20, 1997, as the initial hearing dates, with the proceedings to be conducted at the administration offices of the School. A prehearing conference was set for July 24, 1997, beginning at 11:30 a.m. in the offices of the Student's counsel. A final prehearing conference was scheduled for the first day of the hearing on August 19, 1997. The IHO also identified the issue as the appropriate educational placement for the Student. The IHO fully advised counsel of their respective hearing rights.

On or about July 23, 1997, counsel for the School moved orally for a continuance of the prehearing scheduled for July 24, 1997. The IHO, by order dated July 23, 1997, granted the

[1]The letter of appointment indicates the parents' request for a hearing was received on May 23, 1997. The parents' request was actually received by the Indiana Department of Education on May 21, 1997, as indicated above, and not May 23, 1997, which is the date the Division of Special Education, Indiana Department of Education, received the parents' request. The first date dictates the timelines.

continuance.[2] The IHO set August 6, 1997, as the date for the prehearing, beginning at 2:00 p.m. The prehearing was again scheduled for the offices of the counsel for the Student. The IHO also set August 1, 1997, as the date upon which the parties were to exchange witness and exhibit lists, as well as any documentation expected to be introduced in the hearing.

The prehearing conference was conducted on August 6, 1997. The IHO, in a prehearing order dated August 7, 1997, delineated the issue more specifically as:

> "[T]he issue for the hearing is the appropriate educational placement for the child for the 1997-1998 school year, specifically, should the child be placed in [the] kindergarten and the severe disabilities classroom at the local elementary school or in the 4-year-old classroom in the early childhood program at the Early Childhood Developmental Center."

The IHO also ordered the hearing closed to the public and a separation of witnesses.

The first day of the hearing on August 19, 1997, concluded at 6:30 p.m., with the second day scheduled for August 20, 1997 (IHO's Written Entry of August 19, 1997). On August 20, 1997, the School completed the presentation of its evidence. The Student, by counsel, moved for Involuntary Dismissal under Indiana Trial Rule 41(B), which the IHO denied.[3] Prior to the presentation of the Student's evidence and testimony, the parties agreed to a continuance of the hearing so that the IHO could observe the Student in his current educational setting in the private school and to view the proposed educational setting in the public school (IHO Written Entry of August 20, 1997).

On September 3, 1997, the IHO, by order, set October 10, 1997, as the date for reconvening the hearing. The site for the hearing was changed to the private school setting so the IHO could observe the private school classroom. After doing so and receiving testimony, the hearing was adjourned and reconvened at the proposed public school site so the IHO could observe the public school classroom. The hearing was concluded on October 10, 1997. Counsel for both parties requested the opportunity to file closing briefs in the matter. The IHO agreed to permit this, setting October 24, 1997, as the date such briefs are to be received by the IHO. The parties further agreed that the IHO would have until November 10, 1997, to issue his written decision

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[2]The IHO indicates in his written decision at ¶4, p. 2, that a prehearing was conducted on July 24, 1997. There is no reference to the prehearing on August 6, 1997. As this is not a matter of any major concern, the Board of Special Education Appeals (BSEA) will rely upon the record as a whole.

[3]Trial Rule 41(B) is a procedural mechanism whereby an adjudicator can dismiss an action, upon motion by the opposing party, where a party with the burden of proof, upon conclusion of the presentation of the party's evidence, has failed to establish any right to relief. TR 41(B) is designed for use by judicial adjudicators and not specifically by administrative adjudicators.

(October 10, 1997, transcript, pp. 138-139).

The IHO's Written Decision

Findings of Fact

The IHO issued his written decision on November 10, 1997. Based upon the record before him, the IHO determined twenty (20) Findings of Fact.[4] Generally, the IHO found that the Student has Down Syndrome and was born with a severe heart defect, which required surgery when he was five and one-half months old. He is five years old but is enrolled in a developmental class for four year olds at a private school for early childhood development. The Student weighs only 29 pounds and is short for his age. The Student is currently in good health and is active, although he does experience problems with endurance. At three years of age, the Student was determined to be at the 15 to 16- month developmental level. His present cognitive level is in the 25 to 30-month range. The student has progressed developmentally five (5) to seven (7) months during the each of the first two (2) years he was enrolled in the private early childhood program. He does not currently know any letters of the alphabet nor does he understand the concept of a word. He does use sign language to communicate and is very social. The Student has a limited vocabulary of approximately twenty-five (25) words. He has limited motor skills, with neck instability.

The Student was referred in 1995 for an educational evaluation to determine eligibility for early childhood special education services. The evaluation was completed in February of 1995. The Student's physical limitations and developmental delays, perceptual and visual motor anomalies, and moderately delayed receptive and expressive language skills resulted in an assessment that the Student's level of intellectual functioning was within the Moderately Mentally Handicapped (MoMH) range. His adaptive behavior skills appeared to be within the Mildly to Moderately Mentally Handicapped range. The evaluation supported a determination that the Student was eligible for services as a child with a moderate mental handicap and a communication disorder. The initial case conference committee (CCC) met on March 2, 1995. The CCC determined the student eligible for services and developed and individualized education program (IEP) for the student. Pursuant to the IEP, the Student was to receive occupational therapy, physical therapy, and speech/language therapy. He was placed for the 1995-1996 school year in an early childhood development program for three year olds, with special education services for more than 50 percent of his instructional day. The Student made substantial gains in all areas during this school year.

On March 13, 1996, an Annual Case Review (ACR) was conducted. The CCC determined the Student still required special education services. His IEP was reviewed. His educational placement for the 1996-1997 school year was to be full-time in the early childhood developmental program with general education instruction for the entire instructional day, with modifications and

[4]Actually, as will be seen in the Petition for Review, the IHO made twenty-one (21) Findings of Fact. He numbered two different rhetorical paragraphs as "14."

with individualized instruction. The Student was placed in the same classroom for three year olds with the same teacher as in the prior school year. The Student made substantial gains in all areas.

An ACR was conducted on April 28, 1997. The CCC determined the Student continued to need special education services. The IEP was reviewed and revised, with concurrence of all CCC members. However, there was disagreement over the proposed educational placement. The School proposed placement in a public school kindergarten, but the parents, the Student's teacher, and the director of the private early childhood development center recommended the Student attend the private program for another year. The Student has remained in the private program's classroom for four year olds, as his current educational placement, during the pendency of these proceedings.

The parents' concerns regarding the School's proposed kindergarten placement generally centered around least restrictive environment, or LRE (the student would attend part of his day in a life skills program where he would be with other students with disabilities rather than peers without disabilities); safety (the Student's stature and weight are such that associating with much older and larger students may pose a risk); full-time teaching assistant (further erodes LRE); program option (moving from a classroom for three year olds to a kindergarten class is a drastic change); negative peer modeling (the Student would not have age-appropriate, non-disabled peers upon whom he could model his behavior); and vitality (length of proposed instructional day is too long). The teacher and director from the private program expressed the same concerns, adding that the kindergarten curriculum would have to be modified to such an extent that educational benefit to the Student would be compromised.

The School's rationale for the proposed placement was based generally on the fact the Student is five years old, an age that is appropriate for kindergarten; the public school site is closest to the Student's home; and the teacher is licensed in the Student's primary disability (MoMH). In addition, the Student would be with age-appropriate peers with disabilities during the morning and at lunch and recess. This would be followed by a one-hour self-contained kindergarten classroom involved with "life skills."

The IHO found that the Student was not at risk of injury at the public school, and there would be limited interaction with much older and larger students. In addition, the assignment of a full-time teaching assistant in the kindergarten classroom does not render inappropriate the School's proposed placement of the Student. Although the IHO recognized that the Student would realize educational benefit from either the private or the public program, the standard is whether or not the proposed public school placement would provide an *appropriate* program (emphasis added). The IHO added that the private placement "will probably maximize the Student's development but unfortunately, that is not what this Independent Hearing Officer can impose pursuant to legislative and judicial mandates." (Finding of Fact No. 20, p. 6, Written Decision.)

Conclusions of Law

Based upon the aforementioned twenty (20) Findings of Fact, the IHO reached fifteen (15) Conclusions of Law. Generally, the IHO explained the standard of "appropriateness" as determined by the U.S. Supreme Court in Board of Education of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). The standard is not dictated by any particular level of education, but is predicated upon (1) access to publicly funded programs which confer some educational benefit regardless of the nature or severity of the student's disability; (2) the adherence by the public school to the procedural safeguards under the Individuals with Disabilities Education Act (IDEA) and Indiana's implementing regulations, 511 IAC 7-3 *et seq.* ("Article 7") when developing a student's educational program; and (3) an educational program which is individually designed and reasonably calculated to enable the student to receive educational benefit. Although a State can establish educational standards which exceed the standard of "free appropriate public education" (FAPE), Indiana has not done so. The fact that the private program may maximize the educational benefit of the Student is not the standard to be applied where, as here, the School has complied with IDEA and Article 7 in developing the Student's educational program and is offering an educational benefit where the Student is likely to receive a FAPE. "The IEP, with placement at the public kindergarten, is reasonably calculated to enable the student to receive some (more than *de minimis)* educational benefits, as required by the IDEA and the Rowley case." (Conclusion of Law No. 15, p. 9, Written Opinion.)

Orders

Based upon the foregoing Findings of Fact and Conclusions of Law, the IHO issued four (4) orders, directing, *inter alia*, that the April 28, 1997, IEP and the proposed public school placement will provide a FAPE to the Student; the Student is to be placed in the public school program and mainstreamed with other students until 10:40 a.m., followed by lunch and recess and concluding with the "life skills" class for one hour (the parents may continue the private placement, but at their own cost); public school personnel and the parents are to meet weekly in person to review the Student's performance and to address any problems and concerns, including necessary modifications or adaptations; and the full-time teaching assistant provided for the Student is to "blend in so that it is not clearly apparent she is there solely for the Student."

The IHO properly advised the parties of their appeal rights, except that the statement of appeal rights indicates that should "the Order(s) herein...not [be] implemented, the parent(s) of the student may file a written Complaint with the Indiana Department of Education, Division of Special Education..." A parent may do so but is not required to file a Complaint under 511 IAC 7-15-4 in order to ensure the orders of an IHO or the BSEA are implemented. This is a function of the Indiana Department of Education.

Appeal

Petition for Review

The Student timely filed his Petition for Review under 511 IAC 7-15-6. The Student specifically objected to Findings of Fact 14-20 inclusive, except Finding of Fact 18 (including both rhetorical paragraphs No. 14), Conclusions of Law 13 and 15, and all four (4) Orders. For ease of reference, the disputed Findings of Fact, Conclusions of Law, and Orders are reproduced below.

14. The parents' concerns about the proposed placement at the public kindergarten included:
    a. The Student would spend part of his day in a life skills program solely with other disabled students, that not being the least restrictive environment for the student.
    b. Safety concerns at the public kindergarten (i.e., associating with much older and larger students).
    c. Placement of a full-time teaching assistant, therefore not the least restrictive environment for the Student.
    d. Moving from a three-year-old classroom to kindergarten [is] a drastic change or leap, even for a non-handicapped student.
    e. Opinions of the teacher and director of the early childhood development program that placement at the public kindergarten is inappropriate.
    f. Negative peer modeling of other handicapped students.
    g. Medical and physical—past medical problems caused "loss" of one year of development and being very small for his age.
    h. Length of instructional day was too long.

14. The public school corporation traditionally transitions five year olds into public kindergarten and not into a pre-school or early childhood development program.

15. The School's rationale for placement at the public kindergarten included the following:
    a. The student is now five years old and is age-appropriate for kindergarten.
    b. It is the closest placement to the Student's home.
    c. It is the appropriate setting as the teacher of record is certified to teach the moderately mentally handicapped, the Student's primary exceptionality.

16. The Director of Special Education,...public [school] teachers and other public school personnel all believed the IEP calling for placement at the public education kindergarten is appropriate and will provide a free, appropriate public education. The student would be with regular, non-handicapped students during the morning from the start of school until 10:40 a.m., then have lunch and recess, then spend one hour in a contained kindergarten class (life skills).

17. It was the opinion of the early childhood development teacher of the 3-4 year old class and the director of this program that placement in a kindergarten class does not maximize the Student's education, but were unaware of the setting or program at the public kindergarten. Also, they believed that the public [school] kindergarten was not appropriate by reason of placing the Student with only other handicapped students. They believe that the kindergarten placement may provide some educational benefit but expresses concerns about possible negative effects on the Student (i.e., frustration, negative peer modeling, the modifications that would be required would greatly change the traditional kindergarten curriculum, and compromise the safety of the Student).

19. The placement of a full-time teaching assistant in the kindergarten setting for the Student does not make the placement inappropriate.

20. Placement at the early childhood development program or at the public [school] kindergarten will provide some educational benefit. The placement at the early childhood development program will probably maximize the Student's development but unfortunately, that is not what this Independent Hearing Officer can impose pursuant to legislative and judicial mandates.

Conclusion of Law (COL) 13: Indiana Law does not raise the IDEA's standard, as set forth herein in Conclusions of Law 1, 2, 3, 4, 5, and 6. [These COLs restated the Rowley standard of appropriateness of individualized programming, which must be reasonably calculated to provide some educational benefit to an eligible student. The educational benefit must be more than a trifling—*de minimis*, as used by the IHO—and States may establish standards which exceed what may constitute a "free appropriate public education" or FAPE.]

COL 15: The IEP, with placement at the public kindergarten, is reasonably calculated to enable the Student to receive some (more than *de minimis*) educational benefits as required by the IDEA and the Rowley case.

Order 1: The April 28, 1997, IEP with placement at the public [school] kindergarten is a free appropriate public education for the Student.

Order 2: The Student shall forthwith be placed in the public [school] kindergarten pursuant to his IEP of April 28, 1997, with the Student to be mainstreamed with other students from his arrival at school until 10:40 a.m., then lunch and recess, and

finally participation in a "life skills" class for approximately one hour, unless the parents pay for the continued private placement at the early childhood development program.

Order 3: All parties shall take all necessary and appropriate steps to assure that the Student transitions into the kindergarten class. The Student's regular kindergarten teacher, life skills teacher and his mother (and father, if available) shall meet weekly in person to review the Student's performance and problems, and address any concerns or required modifications or adaptations.

Order 4: The full-time teaching assistant provided to assist the Student shall blend in so that it is not clearly apparent she is there solely for the Student.

The Student objects to the first Finding of Fact (FOF) 14 because it merely summarizes testimony and does not indicate any determination by the IHO. Notwithstanding, the Student alleges the IHO failed to include other concerns of the parents, such as: (1) the proposed public school placement would not provide any educational benefit to the Student; (2) the Student was not properly evaluated prior to the proposed significant change in his educational placement; (3) the change of placement was significant in that the proposed public school placement would be nearly 100 percent special education programming during the instructional day; and (4) the curriculum for kindergarten would have to be modified beyond recognition, the Student would not be able to master the curriculum, and the Student's presence in the general education kindergarten class, even with supplementary aids and services, would pose a significant distraction.

The Student objects to the second FOF 14 because the educational placement decision was based upon an unwritten policy, was not based upon individual consideration of the Student's needs, and was in contravention of 511 IAC 7-11-4(a), which permits a five-year-old child to be eligible for early childhood special education services if determined appropriate by the Student's CCC.

Blanket objections are raised by the Student as to FOFs 15, 16, and 17, asserting that these FOFs are merely summaries of testimony and not supported by substantial evidence. However, the Student does object to that portion of FOF 15 which indicates the public school teacher is licensed to teach MoMH students where her licensure is for "K-12 mentally handicapped." The Student also objects to that portion of FOF 17 which summarized the testimony of the director of the private early childhood program. The director stated that it was her opinion that the public school kindergarten environment would provide no academic benefit to the Student.

The Student objects to FOF 19 because it is a Conclusion of Law.[5] The Student also alleges that the assignment of a full-time teaching assistant does not determine the appropriateness of an

[5]The IHO noted at rhetorical ¶11, p. 2, of his Written Decision that "Any of the following Findings of Fact that may be interpreted or viewed as Conclusions of Law are hereby so designated and are hereby so concluded."

educational setting.

Finding of Fact 20 is not supported by substantial evidence, the Student objects, in that there does not exist a sufficient factual basis for the IHO to conclude the public school program was appropriate and that the Student would derive educational benefit.

The Student's objection to COL 13 is a general one, asserting that the IHO made an incorrect statement of the law. He also objects generally to COL 15 in that the IHO did not engage in a proper analysis of the evidence. The Student merely objects to all four (4) of the Orders as "contrary to law."

The School's Response

The School timely filed its Response on December 22, 1997. The School objected that the Student's Petition for Review does not fully comply with 511 IAC 7-15-6(e)(3) because some of the objections lack specificity. The School argues that the BSEA should not have to "comb" through the record in order to add substance to an objection without any. Notwithstanding, the School acknowledges that there are three arguments forwarded by the Student in his Petition for Review, but these are not germane of these issues to the fact-finding, conclusions, and orders of the IHO:

1. Would the kindergarten curriculum be modified beyond recognition for the Student?
2. Could the Student master any of the curricular objectives?
3. Would the Student's presence in the kindergarten class constitute a significant distraction?

The School asserts that not every "fact" is a Finding of Fact, and that the IHO correctly included all relevant Findings. Specifically, the IHO's Orders would have placed the Student with age-appropriate peers who are not disabled for the majority of his day and not, as the Student alleges, place him 100 percent of the instructional day with other students with disabilities. Additionally, the presence of a full-time teaching assistant does not, *per se*, render a placement in the general education setting inappropriate. The kindergarten teacher is also licensed to teach students with mental handicaps and has previously taught students similar to the Student. The private school placement, the School asserts, would have the Student with children younger than he is. The IHO made sufficient Findings, Conclusions, and Orders relative to the issue regarding the appropriateness of the educational placement proposed by the School. The IHO is not required to include in his decision all contrary opinions, but is required to determine which opinions and whose testimony is more credible. Under the standards for administrative review at 511 IAC 7-15-6(k), the BSEA cannot reverse the IHO without some showing that his decision is clearly erroneous when considering the record as a whole. The School also asserts the IHO correctly interpreted and applied the Rowley decision to Indiana law.

The BSEA, by Notice of Review dated January 5, 1998, notified the parties that the impartial review would be conducted on January 23, 1998, without oral argument and without the

presence of the parties. The parties were also advised that the review would be tape recorded and a transcript prepared. Counsel for the parties will be provided with a copy of the transcript as soon as it is prepared.

Review by the Board of Special Education Appeals

The BSEA convened on Friday, January 23, 1998, in the offices of the Indiana Department of Education, in Room 229 of the State Capitol. All members were present. Kevin C. McDowell, General Counsel for the Indiana Department of Education, was also present and serving as counsel to the BSEA for this review.

Both the Student and School refer to D.F. v. Western School Corp., 921 F.Supp. 559 (S.D. Ind. 1996), a dispute which was reviewed administratively by the BSEA as Article 7 Hearing No. 713-93. The D.F. case involved a reverse situation. The student was MoMH with significant medical involvement, including cerebral palsy, hydrocephalus, and a seizure disorder. The parents of D.F. were trying to have him educated in his local public school rather than being transported to a cooperative program in another school district. It was the school, not the parents, who asserted D.F. could not derive any educational benefit from the placement in his home school. The federal district court, in reviewing the BSEA's decision upholding the IHO's determination that D.F. would be inappropriately placed in a general education classroom, stated four factors to be used in evaluating the appropriateness of a placement:

1. What are the educational benefits to the student in the general education classroom, with supplementary aids and services, as compared to the educational benefits of a special education classroom?
2. What will be the non-academic or personal benefits to the student in interactions with peers who do not have disabilities?
3. What would be the effect of the presence of the student on the teacher and other students in the general education classroom?
4. What would be the relative costs for providing necessary supplementary aids and services to the student in the general education classroom?

D.F., 921 F.Supp. at 566-67.

The federal district court also noted that academic achievement is not the only factor to be considered, but exposure to peers without disabilities can also be beneficial. Id., at 569.

Both parties also make reference to the general education curriculum for kindergarten. For the purposes of this review, the kindergarten curriculum is found at 511 IAC 6.1-5-1. It is reproduced below.

511 IAC 6.1-5-1 Kindergarten Curriculum

Sec. 1. (a) The kindergarten curriculum shall include developmentally appropriate activities in the following areas:

(1) Language experiences, including oral, listening, and visual activities.

(2) Creative experiences, including music, dramatics, movement, arts, and crafts.
(3) Personal growth experiences, including motor skills development, health, safety, nutrition, and self-concept development.
(4) Social living experiences.
(5) Environmental and science experiences.
(6) Mathematical experiences.

(b) Schools shall maintain instructional programs that provide all students with opportunities to acquire proficiencies as established in subsection (a). Schools shall refer to the educational proficiency statements developed under IC 20-10.1-16-6. [This statute is part of the Indiana Statewide Testing for Educational Progress, or ISTEP+, program.]

BSEA'S DECISION

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In consideration of the record as a whole, the written decision of the IHO, the Petition for Review, and the Response thereto, the Indiana Board of Special Education Appeals now makes the following Combined Findings of Fact and Conclusions of Law.

1. There is no dispute regarding the IEP developed for the Student. The dispute involves the educational placement where the IEP would be implemented. This dispute does not involve issues regarding "change of placement."

2. Although the Student raises extensive modification of the curriculum in his Petition for Review, the Student presented no evidence at the hearing which could have been considered by the IHO much less the BSEA. This issue is waived. 511 IAC 7-15-6(h).

3. There is no credible evidence that the Student would not benefit from social interaction with his peers who are not disabled in the public school setting. The Student, it is undisputed, is considered social and has benefitted from past interactions with peers, with and without disabilities.

4. There is no evidence that the presence of a full-time teaching assistant in the public school kindergarten program would isolate the student from participation in the classroom setting to such an extent that he would derive no benefit or negligible benefit, either academic or socially, from the public school placement.

5. The Student is eligible for consideration in a kindergarten classroom by virtue of his age. I.C. 20-8.1-3-17(e)(2). Although a five-year-old child can be included in an early

childhood special education program under 511 IAC 7-11-4(a), the Student's CCC would have to determine such a placement appropriate. The CCC obviously has not done that. The CCC has agreed on the Student's IEP, and there is no showing that this agreed-upon IEP cannot be implemented within the public school program.

6. The teacher has an all-grade licensure K-12 for students with mental handicaps and is properly licensed to teach students with MoMH. See 515 IAC 1-1-52 and 515 IAC 1-1-53.

7. Indiana law adopts the standard of appropriateness for developing and implementing programs for students with disabilities who require special education services. Indiana has not adopted any standard above what is appropriate, such as what would be considered "best" or what would "maximize" an eligible student's program.

8. The IHO's Findings of Fact, Conclusions of Law, and Orders are based upon the evidence and credible testimony presented to him and included in the record. The IHO consistenly applied proper procedures in the conduct of the hearing and the rendering of the written decision.

9. The BSEA, by unanimous voice vote, upholds FOFs 14, 14 (the second one), 15, 16, 17, 19, and 20, as well as COL 13 and 15, and all four (4) of the IHO's Orders.

ORDERS

1. The decision of the IHO is upheld in all respects.

2. Any relief requested but not specifically addressed by the BSEA is hereby deemed denied.

Date: January 23, 1998

/s/ Cynthia Dewes, Chair
Indiana Board of Special Education Appeals

APPEAL RIGHT

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