BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of M.S.	)	
and the	)	**Article 7 Hearing No. 1007-98**
Eagle-Union Community School Corporation)		

STATEMENT OF JURISDICTION

The Student involved in this case was not and is not eligible for special education services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, as implemented in Indiana through the rules of the Indiana State Board of Education, 511 IAC 7-3 *et seq.* ("Article 7"). However, as in the predecessor to this case, the parties continue to invoke both the IDEA and Sec. 504 of the Rehabilitation Act of 1973. The Independent Hearing Officer (IHO) assigned to this case specifically stated he would exercise concurrent jurisdiction under 34 CFR §104.36 (Sec. 504). Accordingly, as we held in *M.S. and the Eagle-Union Community School Corporation*, **Article 7 Hearing No. 941-97**, 26 IDELR 106 (BSEA 1997), the Board of Special Education Appeals (BSEA) has jurisdiction.

Procedural History of the Hearing

The parent requested a due process hearing on January 5, 1998.[1] The one-sentence hearing request reads as follows: "I am requesting an independent hearing officer re: Individuals with Disabilities in Education Act evaluation conflict."[2] An IHO was appointed on January 6, 1998. A

[1]Although the parent's handwritten request for a hearing bears a date of December 4, 1997, the date-stamp for the Division of Special Education, Indiana Department of Education, indicates receipt on January 5, 1998. The subsequent appointment letter of January 6, 1998, states plainly the hearing request was received on January 5, 1998, and not December 4, 1997.

[2]IDEA now requires, under 20 U.S.C. §1415(b)(7), that a parent of a student with a disability, or the attorney representing the student, is required to provide the name of the student, the student's address, and the school the student attends; a description of the nature of the problem the student relative to the proposed or refused action of the school; and a proposed resolution of the problem, if known or available to the parent.

prehearing conference was conducted on January 16, 1998. The resulting prehearing order, *inter alia*, required the parent to clarify the issues by January 26, 1998, and established hearing dates for February 10 and 11, 1998. A second prehearing conference was conducted on January 28, 1998, with a supplemental prehearing order issued on February 5, 1998. In this latter order, the IHO identified the five (5) issues for hearing as:

1. Whether the local educational agency (LEA) used Article 7 provisions to threaten the student or his parents.
2. Whether the parents of the student are entitled to make an informed consent relating to the initial Article 7 evaluation.
3. Whether the needs of a student determine the composition of the Article 7 multidisciplinary evaluation team.
4. Whether there is an attempt on the part of the LEA to limit the due process rights of the student or his parents.
5. Whether the LEA prevented the student from participating in the school's interscholastic sports' program in violation of Sec. 504 or Article 7.

The five (5) issues, except for some minor editing, are identical to the five (5) issues presented by the parent through a facsimile transmission of January 30, 1998. The parent did not object to the statement of the issues. The LEA acknowledged the right of the parent to give "informed consent" (issue 2) as to the initial evaluation contemplated under Article 7.[3] The LEA also conceded the needs of the student would determine the composition of the multidisciplinary team (issue 3). The IHO also determined issue (4) to be moot because the parties were involved in a due process hearing. The remaining two issues involved a letter from the LEA in December of 1997, offering homebound instruction for the student (issue 1) and the student being cut from the high school basketball team (issue 5). The IHO also ordered the parties to reach agreement on the person or persons to conduct the initial educational evaluation, and further ordered the parents to execute releases for the LEA to obtain medical records of the student.

The IHO conducted a prehearing conference on February 10, 1998, prior to commencement of the hearing. The IHO's detailed written entries over various dates indicate the parties' various objections to proffered documents and requests for continuances. There was a telephone prehearing conference on March 27, 1998, regarding the LEA's intent to file a Motion to Dismiss because of the parent's failure to comply with the IHO's previous order with respect to selection of a qualified evaluator. The parent's attorney sought and received a continuance to respond to the Motion to Dismiss, but still failed to file timely his response. Notwithstanding, the IHO denied the Motion to Dismiss (order of April 21, 1998) but ordered the parent to show cause why the parent should not be found in contempt for failure to comply. Following hearing on the contempt motion, the IHO took this matter under advisement (written entry, May 19, 1998).

[3]See 20 U.S.C. §1414(a)(1)(C)(i).

The IHO's Written Decision: Findings of Fact and Conclusions of Law

Hearing was conducted over five (5) days: February 10, March 23, March 24, May 19, and May 20, 1998. Both parties were represented by counsel. The IHO established on May 20, 1998, a post-hearing schedule for the submission of written closing arguments and any responses thereto. On May 21, 1998, the LEA withdrew its request to evaluate the student under IDEA, rendering moot the parent's failure to comply with the IHO's orders. By a "confidential order" of June 8, 1998, the IHO identified the independent evaluators qualified to conduct an occupational evaluation of the student.

The IHO issued his written decision on June 8, 1998. The decision contains thirty-six (36) findings of fact, twenty-four (24) conclusions of law, seven (7) orders, and a "Comment to Both Parties," the latter an admonishment regarding the depth of "animosity, distrust and lack of cooperation between the two parties," followed by an encouragement of the parties to work together for the benefit of the student.

The IHO's written decision noted the student was seventeen (17) years old and completing his junior year at the LEA. The student has had an Alternative Learning Plan (ALP) since the 1994-1995 school year. The ALP has detailed various modifications and supports. On August 27, 1997, it was determined the student was disabled under Sec. 504. The ALP was revised to include twelve (12) intervention strategies. The parent agreed to the ALP. During the early part of the 1997-1998 school year, the student received three B's and one C with two incompletes, but by November, the student received one B with five (5) incompletes. At some time prior to December 12, 1997, the parent requested an occupational therapy (OT) evaluation. LEA personnel viewed the request as a request for an initial evaluation under Article 7 to determine whether the student qualified for special education and related services under IDEA. On December 12, 1997, the LEA's high school principal completed a referral for evaluation, citing the parent's request for an evaluation of the student's tremors, the student's excessive absenteeism, and the student lack of academic progress. The LEA's high school guidance counselor, on December 15, 1997, offered to reconvene the Sec. 504 conference to "explore the possibility of homebound instruction for [the student], since he cannot come to school on a regular basis." The guidance counselor also made the offer due to the student's declining grades and increasing incompletes. However, the Sec. 504 conference was never held. Despite numerous attempts from December 12, 1997, to January 7, 1998, by LEA officials to contact the parents, the parents never contacted LEA personnel to discuss the evaluation and be informed as to their procedural rights and recourse. The educational evaluation has never been conducted. The LEA did not pursue permission to evaluate the student through IDEA due process hearing procedures.[4]

Notwithstanding the student's declining grades and excessive absenteeism, the student tried out for the high school basketball team during the fall of the 1997-1998 school year. The varsity

[4]See 20 U.S.C. §1414(a)(1)(C)(ii).

basketball coach was supportive of the student, encouraging him to try out for the team and permitting the student to attend additional sessions due to missing a few try-out sessions. The coach was aware the student had a disabling condition, but was not sure what the condition was and did not observe any physical limitations on the student's ability to participate in basketball. Although the parent was to provide information to the coach regarding the student's disability, she did not do so. The coach had previously coached the student during the student's ninth grade year. The coach, in consultation with his assistants, selected twenty-four (24) students for the varsity and the junior varsity teams, utilizing both objective and subjective criteria as well as his knowledge and experience regarding the sport. The student was not selected. There was no evidence presented at the hearing regarding the student's basketball ability in relation to the twenty-four selected, nor was there any evidence presented that anyone from the LEA prevented the student from making the team. The student was provided an equal opportunity to make the team. The student did not suffer discrimination when he was cut from the roster along with five to seven other students.

The IHO reiterated the concessions of the school as to "informed consent" and the constitution of a multidisciplinary team being affected by a given student's suspected disabling conditions. The IHO also reiterated the student and his parents were not denied access to due process. As to whether the LEA threatened the student and his parents, this issue involved the December 15, 1997, offer of homebound by the high school guidance counselor. The IHO noted the parent provided no evidence that anyone perceived the letter to be a threat. The IHO concluded his fact-finding by detailing agreements between the parties as to assistive technology evaluations and OT evaluations, neither of which are implicated in this appeal.

From these Findings of Fact, the IHO concluded the student is a qualified individual with a disability for school-attendance purposes, 34 CFR §104.3(k)(2), due to his clinical depression and aforementioned tremors. The student and his parents were provided due process rights under both Sec. 504, 34 CFR §104.36, and IDEA, 511 IAC 7-15-5(j). The student was not prevented from participating in interscholastic sports solely because of his disability. He was provided the same opportunity to try out for the basketball team as all other students without disabilities and was assessed in a "fair and essentially uniform application of the same subjective and objective factors utilized in the consideration of other students in the selection of the high school basketball team." The IHO reiterated the December 15, 1997, letter was not a threat. The resulting orders related, to a great extent, to the assistive technology and OT evaluations, which are not at issue on appeal.

As noted above, the IHO concluded his written decision with an admonishment to the parties coupled with an encouragement to work more cooperatively in the future.

APPEAL

On June 17, 1998, the student, by his parent, requested information on how to secure an extension of time in order to prepare and file a Petition for Review under 511 IAC 7-15-6, should the parent decide to appeal. General Counsel for the Indiana Department of Education responded that same date, informing the parent of the specific procedures for requesting such an extension.

The parent, on June 22, 1998, did request such an extension of time. The BSEA granted the requested extension of time, permitting the parent until the close of business, July 24, 1998, to file a Petition for Review.

The record in the proceedings was copies and forwarded on July 15, 1998, to each member of the BSEA.

The Petition for Review

The parent timely filed a Petition for Review on July 24, 1998. Although vague, it is concerned mainly with the IHO's determinations and conclusions regarding the selection of the basketball team. The following are the specific Findings of Fact and Conclusions of Law to which exception is taken. The parent's assertions of error are indicated immediately following each cited Finding of Fact (FOF) and Conclusion of Law (COL). The parent's exceptions are restated where possible.

FOF 15: The varsity basketball coach encouraged the student to try out for the basketball team and, due to the student missing a few try-out sessions, allowed the student to attend additional sessions. The coach hoped the student would make the team.

(Parent asserts the record supports a finding the varsity basketball coach used subjective criteria to exclude the student even though he was better or equal in ability to students who made the team.)

FOF 16: The varsity basketball coach was aware of the student's 504 determination, but not the student's specific disability, but did not observe during the try-out sessions any handicapping conditions adversely affecting the student's try-out. The Student's mother was to provide the coach with information as to the student's handicaps but failed to do so. The coach had previously coached the student during his 9th grade year.

(Parent disputes whether it is her responsibility to provide information to the coach when the LEA had the information.)

FOF 17: The varsity basketball coach selected the twenty-four students for the varsity and junior varsity teams, whom he determined, based upon his and other assistant coaches' observations at the try-out sessions, were the best basketball players (i.e., not necessarily the fastest or best in one facet but the best all-around players), and

most likely to help the team to be successful. The coach believed the student did not have the skills at the level of the twenty-four students selected for the team, based upon his observations, using subjective and objective components, and his past knowledge and experience in coaching basketball.

(Parent asserts that athletes do not exist to help the team. Rather, interscholastic sports are to help develop students.)

FOF 18: There was no evidence presented by which the Hearing Officer could evaluate the student's performance at the try outs in comparison to the other boys who tried out for the basketball team and were either selected for the team or cut.

(Parent asserts this conflicts with FOF 22, which indicated "The coach gave an equal opportunity, if not more so, to the student to make the team and did not discriminate against the student.")

FOF 19: There was no evidence presented that anyone wanted to prevent the student from making the high school basketball team.

(Parent asserts this conflicts with the "comment to both parties," presumably the first paragraph of this comment. For ease of reference, the IHO's "comment" reads as follows: "This Hearing Officer has been a hearing officer for eighteen years and heard numerous cases, but never observed such animosity, distrust and lack of cooperation between two parties. It is a very sad situation when the needs of the student become secondary to the battles and skirmishes of the parents and school personnel. Such needless bickering must cease if this young man is to have a successful and enjoyable senior year in high school."

FOF 20: The junior varsity basketball coach agreed that the twenty-four players selected for the varsity and junior varsity teams were the best basketball players who tried out for the varsity and junior varsity teams.

(Parent asserts the record does not support this finding.)

FOF 21: The student herein was not selected as one of the best twenty-four players and was cut from the team along with approximately five to seven other students.

(Parent complains there is a lack of objective criteria upon which the coaches could make such a determination.)

FOF 22: The coach gave an equal opportunity, if not more so, to the student to make the team and did not discriminate against the student.

(The parent asserts the IHO exceeded his jurisdiction by determining there was no discrimination.)

COL 7: For the purposes of provisions of [Section] 504 prohibiting discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," an "otherwise qualified person" is one who is able to meet all of the program's requirements in spite of his handicaps. Southeastern Community College v. Davis, 99 S.Ct. 2361, 442 U.S. 397 (1979).

(The parent asserts that only measurable, objective criteria should be used in assessing basketball

ability, and that subjective criteria is inherently discriminatory.)

COL 8: Sec. 504, by its terms, does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not permissible grounds for assuming an inability to function in a particular context. Ibid., 442 U.S. at 405, 99 S.Ct. At 2366.

COL 9: In this case, the term "otherwise qualified" does not mean that the student must be selected for the basketball team despite his handicap; it prohibits the non-selection of the student when the student has the skills to make the team but is not selected.

(Parent objects to both Conclusions of Law. This is based on the parent's belief the student has requisite basketball skills.)

COL 10: The school coach could consider such other relevant subjective and objective factors as he deemed appropriate consonant with a fair and essentially uniform application of the same subjective and objective factors utilized in the consideration of other students in the selection of the high school basketball team.

COL 11: The student was given the same opportunity to try out for the high school basketball team as was provided to students without disabilities.

COL 12: The decision as to who was qualified for the team as a result of the basketball tryouts was a matter left to the discretion of the varsity basketball coach, with input from the junior varsity coaches.

(Parent disagrees with these three Conclusions of Law, asserting the record supports contrary conclusions.)

COL 13: Based upon the evidence presented, the student was graded in a non-discriminating manner, based on the coaches' subjective and objective criteria, as were all the other students trying out for the basketball team.

(Parent asserts this conflicts with FOF 18, which addresses the parent's failure to present any evidence of the student's basketball ability vis-a-vis the other students who were selected or who were cut from the team.)

COL 14: The Office for Civil Rights complaint concerning the Alpena Public School District [Education of the Handicapped Law Report, EHLR, 257:565 (OCR 1984)] is not applicable to the facts in this case. In Alpena, the student was not selected to the team because of his handicapping condition, even though he was evaluated by the coach to be a better basketball player than four other students who made the team. Here, the coach was aware of the student's [Sec.] 504 plan, encouraged the

student to try out, did not observe any handicapping problems during the try outs, previously had known the student, hoped he would make the team, but deemed he did not have the requisite basketball skills needed for the team. The school did not violate Section 504 or Article 7 when the student was cut from the high school basketball team.

(Parent asserts the IHO erred as a matter of law and fact. The coach was not knowledgeable about the student's disabilities. Any decision with respect to the student's participation in interscholastic sports should have been made by his Sec. 504 conference.)

COL 15: The letter of December 15, 1997 by the guidance counselor was not a threat but merely offered to reconvene a [Sec.] 504 conference and of possible services which the school believed may be appropriate due to the student's increased and excessive absences, falling grades, and increased incomplete class work.

(Parent asserts the IHO's conclusions violates the "least restrictive environment" requirement.)

COL 16: The student and his parents were provided their due process rights pursuant [to] the regulations for Section 504 and Article 7 in that this hearing was held, they had the right to and did present evidence, and they were given the opportunity and did cross-examine the school's witnesses and there was no limitation on their due process rights.

(Parent asserts the LEA attempted to delay due process, but does not state anything further in this regard.)

COL 20: There is no real current case or controversy about the 1997-1998 high school basketball team. The season has already concluded and that controversy is moot. However, this Hearing Officer hereinabove determined that no discrimination occurred during the 1997-1998 basketball team selection, since such a controversy may occur in the future (i.e., 1998-1999 basketball season).

(Parent asserts evidence supports an opposite conclusion, entitling the student to remediation for wrongful exclusion from the basketball team. The "remediation" would apparently consist of "compensatory basketball mentoring in adult directed remediation in the fall of 1998 prior to basketball season.")

It cannot be determined whether the parent objects to any specific order. The parent does include a number of proposed Findings of Fact, Conclusions of Law, and Orders that she believes the IHO should have rendered.

The LEA's Response to the Petition for Review

The LEA timely responded on July 29, 1998, reiterating the points it made in its written Closing Argument to the IHO. However, the LEA notes that the parent "consistently refused to address the issues" as delineated, and that the Petition for Review is in similar fashion. The LEA also argued that the parents presented no evidence to contradict the testimony of the coaches. Neither

parent testified, nor did the student. As to the specific issues, the LEA maintains the IHO was correct in finding the letter of December 15, 1997, did not constitute a threat; there is no disagreement that a parent has the right to give informed consent prior to an initial evaluation under IDEA; there is no dispute the suspected disabilities of a student dictate composition of a multidisciplinary team; there is no evidence the LEA attempted to limit the parents' access to due process; and the LEA did not violate any State or Federal law when the student was cut from the high school basketball team.

Review by the Board of Special Education Appeals

The BSEA notified the parties by an order dated August 5, 1998, that review would be conducted on August 18, 1998, but without oral argument and without the presence of the parties.

The parties were notified by letter of August 12, 1998, that a discrepancy appeared in the BSEA's above-referenced order. Under 511 IAC 7-15-6(j), the BSEA has thirty (30) calendar days from the filing of the Petition for Review to conduct its review. Because the thirtieth day falls on a weekend, the first business day will be August 24, 1998, a Monday. This is the date by which the review must be conducted and a written decision mailed.

The BSEA convened on August 18, 1998, in Bainbridge, Indiana. All three members were present. Each member had read the record in its entirety, as well as the Petition for Review and the Response thereto.

After consideration of the record as a whole, the BSEA, by unanimous vote, determined the following *Combined Findings of Fact and Conclusions of Law* and *Orders.*

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA has jurisdiction in this matter.

2. M.S. is seventeen years old (D.O.B. 12/8/80). He has clinical depression and experiences occasional tremors. He is considered to have a disability for the purposes of Sec. 504 of the Rehabilitation Act of 1973. The LEA has complied with the procedures for evaluating the student's educational needs under Sec. 504 and has provided him an appropriate education. M.S. is not presently eligible for special education and related services under IDEA and Article 7.

3. The parent requested on January 5, 1998, a due process hearing under IDEA and Article 7. The initial issue involved evaluation under IDEA.

4. Although the parent requested an occupational therapy (OT) evaluation, the student had not been previously identified as eligible for special education and related services. OT is

a related service. 511 IAC 7-13-5(b)(5). However, any related service is not provided in isolation but must be supplementary and complementary to a special education program. 511 IAC 7-13-5(a); 511 IAC 7-3-44. The LEA was, therefore, justified in initiating a referral for an educational evaluation under 511 IAC 7-10-3 because the student had not previously been determined eligible for special education services.

5. Because the parties raised issues of discrimination, it was wholly within the IHO's discretion to determine the student experienced no discrimination.

6. Although comments in the final written decisions of IHOs are unusual, the BSEA—following review of the record as a whole, and especially the transcript of the proceedings—finds the IHO was wholly justified in making his comments.

7. The parent fails to state any reason for disturbing the Findings of Fact, Conclusions of Law, or Orders of the IHO. The record supports the IHO's determinations.

ORDERS

1. The written decision of the IHO is upheld in its entirety.

2. Any matters raised by the parent and not specifically discussed above are hereby overruled or dismissed, as appropriate.

Date: August 19, 1998

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

Appeal Right

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