

Indiana Board of Special Education Appeals



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BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of W.J.C. , the Duneland)
School Corporation and the Porter County)
Education Interlocal)
)
Appeal from the Decision of)
Laureanne Nordstrom, J.D.,)
Independent Hearing Officer)

HEARING NO. 1446.05

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History

W.J.C., by his Parents (hereafter, collectively referred to as the "Student"), requested a due process hearing on July 14, 2004, against the Duneland School Corporation and the Porter County Education Interlocal (hereafter, the "School"). On that same date, Laureanne Nordstrom, J.D., was appointed pursuant to 511 IAC 7-30-3 as the Independent Hearing Officer (IHO). A pre-hearing conference was conducted via telephone on August 6, 2004. During the conference counsel for the School requested an extension of time in which to conduct the hearing. A Pre-hearing Order was issued on August 9, 2004, granting the School's request and extending the date for decision to October 1, 2004. The parties were advised of their rights, and the issues were identified as:

1. Whether the School failed to identify the Student as eligible for special education services. If yes, then what services and placement are appropriate?
2. Whether the School expelled the Student in December 2003 for behavior that is a manifestation of his disability.
3. Whether the Student is entitled to compensatory education.

Pursuant to the Pre-hearing Order, the School was to conduct a limited assessment, and another pre-hearing conference was scheduled for August 24, 2004.

The hearing took place on September 16, 17 and 20, 2004. At the conclusion of the hearing, the Independent Hearing Officer requested that the attorneys submit proposed findings of fact and conclusions of law. Counsel for the Student requested an extension of time in order to prepare the proposed findings and conclusions and to issue the decision. This request was granted on September 20, 2004, extending the date of decision to October 8, 2004. Due to problems the IHO had with printing out the transcript of the hearing, counsel for the Student requested an extension of time for the decision to be rendered. The request was granted, and the date for decision was extended to October 22, 2004.

The IHO's Written Decision

For ease of reference, the IHO’s Findings of Fact, Conclusions of Law, and Orders are reproduced below, with corrections as necessary for grammatical and stylistic reasons.

The IHO’s Findings of Fact

1. This matter is properly before the Independent Hearing Officer (IHO) pursuant to Indiana Code, IC 4-21.5, et seq., 511 IAC 7-30-3, and the IHO has the authority to hear and rule upon all matters presented herein.
2. All Findings of Fact that can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. W.J. C. (hereinafter “student”) is a fifteen year old student who attends the 9th grade at Chesterton High School. Chesterton High School is within the Duneland School Corporation and Porter County Education Interlocal (hereinafter referred to collectively as the “School”).
4. Student attended Westville School in Ohio for his kindergarten year through part of his fourth grade year. The School has no school records, including report cards or grades of any kind, for student’s kindergarten through the first part of his fourth grade school years.
5. During his fourth grade school year he moved from Ohio and attended Yost Elementary School in the Duneland School Corporation for the remainder of the fourth grade school year and for the fifth grade year as well. His fourth grade grades were: Language Arts (A), Science (B), Social Studies (B+), Math (C) A second set of grades were also reported his fourth grade year as: Reading (B), English (B), Math (B), Science (C), Social Studies (B).
6. Student’s grades for fifth grade were:

Reading	B	C	C
Language	A	B	B
Composition	C	C	C
Spelling	A	A	B
Math	B	B	C
Social Studies	C	C	C
Science	C	C	C
Health	C	B	C
7. Student’s fifth grade behavior and effort grade related to his work study skills was a (-), which indicated that he needed improvement in his behavior and effort.
8. Student attended sixth grade at the Westchester Intermediate School during the 2001-2002 school year. During the sixth grade, Student was suspended in January and again in February for physical aggression toward other students. He was suspended again in April for another act of aggression toward a student.

9. During his sixth grade year, student received F's in social studies, reading, music, language arts and science. He received a D in math, a C- in health, and B's in computers, art and P.E. Student failed the 6th grade ISTEP test.
10. Student attended seventh grade at Chesterton Middle School during the 2002-2003 school year. During his seventh grade year, student received twenty six disciplinary referrals. The referrals were not as frequent during the first grading period and became more frequent as the year progressed. Student received four disciplinary referrals from the beginning of school until November 19, 2003, followed by twenty-one referrals from November 19 to the end of the school year. The behaviors that resulted in referrals included numerous incidents in which student was a disruption in class. Student also exhibited acts of aggression and anger during school.
11. Student's grades for 7th grade were the following (Academic grade is on the left side of the slash; behavior grade is on the right side of the slash):

	1 st	2 nd	3 rd	4 th
Science	B-/D	D-/C	D/B	D-/B
Communications	F/C	D-/B	F/C	F/B
IPASS	P/C	P/C	P/C	P/C
Math	C/B	C/B	C+/B	D-/B
PE	C/B	B-/C		
Social Studies	C/D	D/C	D-/D	F/B
Art		B-/D		
FACS		C+/D	D/C	C+/B
Intechnology			C-/B	C-/B
Music			D/C	
Life Skills				F/F

12. He received disciplinary referrals from his life skills class teacher. He was eventually moved out of the life skills class because he distracted other students.
13. On December 19, 2002, the school issued the following notice:

“[Student] has been sent to the office out of IPASS class for disruption. According to the teacher, he continually demeans two other students in class. He feels the need to entertain others in class with his inappropriate behavior. He is disrupting the educational process of other students as well as being insulting to them. This behavior must get under control for [Student] to continue to attend class at CMS. I am requiring that you meet with [Student's] teachers after the winter break to discuss a behavior plan. Your input and support is crucial in order to see the needed change in behavior. Please call Ms. Hursey at CMS to set up a meeting. The entire team and the assistant principal will be in attendance.”

14. On January 7, 2003 of his seventh grade year, a parent teacher conference was held to discuss student's behavioral and academic difficulties. A general education intervention plan was put into place to address his behavior and work completion. In addition, Mr. Collins requested that the School conduct an evaluation to consider what possible learning problems Student may have that contributed to his behavioral issues. The School agreed to conduct a multidisciplinary evaluation of Student to determine if he was eligible for special education services.

15. Following the parent teacher conference in January of his seventh grade year, a “Plan For Achievement” was developed for Student that included, among other things, strategies to put in place in an attempt to improve Student’s performance on tests.
16. On February 10, 2003, an initial request for staffing was made. The reasons identified for the request were academic, behavioral and social/emotional concerns.
17. On March 18, 2003, Mr. Collins provided written consent for multidisciplinary services, specifically, a multidisciplinary evaluation. A staffing was held on March 18, 2003.
18. Student’s mother completed a Social and Developmental History form on March 23, 2003 as part of the evaluation process. She described student’s behavior as “great at home and troubled at school.”
19. Student was seen by Dr. Anderson on March 24, 2003 for a discussion of possible ADHD.
20. Some time during student’s second semester of 7th grade, Ms. Brownell referred student for placement in the “alternative school.” This was confirmed in a memo from the CMS Guidance Department regarding “students with multiple “F” grades.
21. Mr. Collins provided written consent on April 6, 2003, for the school to secure medical records from student’s physician, Dr. Anderson, who was in the process of evaluating student for possible ADHD.
22. At the beginning of May 2003, Student began taking medications to mitigate any attentional concerns associated with his ADHD diagnosis.
23. A Case Conference was scheduled for May 27, 2003. The school psychologist wrote a letter to Dr. Anderson, the physician treating student for ADHD, on May 20, 2003, to request the medical records. The Case Conference Report makes no reference to receipt or review of any of student’s medical records. The School was not aware of what specific medication student was taking or the dosage of the medication.
24. On May 5, 2003, student’s science, communications, and math teachers completed Teacher Rating Forms (TRF) which assess behavioral problems, including behavior consistent with ADHD. School performance was not rated and an Academic Performance Score was not calculated.
25. On May 9, 2003, the school psychologist administered the Weschler Intelligence Scale for Children –III (WISC-III) which measures intellectual ability using two scales, each with several subtests. The verbal scale measures language expression, comprehension, listening, and the ability to apply these skills to solve problems. The Performance Scale measures nonverbal problem solving, perceptual organization, speed, and visual-motor proficiency. Student obtained a standard score of 92 on the Verbal Scale, and a standard score of 96 on the Performance Scale. His full-scale IQ score was 93. Student’s potential to learn is in the average range.

26. The verbal comprehension, perceptual organization and freedom from distraction indexes were measured as 91, 96 and 87, respectively, however, no processing speed index was measured.
27. The School uses an 18 point discrepancy formula to determine whether a “significant” discrepancy exists between ability or “learning expectancy” and achievement. The number “18” is a number predetermined by the School as the measure of a “significant discrepancy” between achievement and ability for all students evaluated for a learning disability by the School. Using the “18 point” discrepancy formula, Student’s Learning Expectancy Formula was “ $95 - 18 = 77$.”
28. Another teacher report entitled ‘Teacher Report: Secondary Level’ was completed by student’s social studies teacher, his science teacher, and his communication teacher. Student’s current grades in his social studies and communications classes were “F’s” and his grade in science was “68%.” The science teacher did not complete the entire form. The social studies and communications teachers describe student as performing “below average” and “Poorly!” when compared to the other students. On the teacher report form, student’s science teacher reported that student’s performance was “far below grade level.”
29. The School’s Educational Diagnostician evaluated student on May 12, 2003, to determine whether a learning disability existed. She administered the Woodcock Johnson III Tests of Achievement (WJ-III), which scores students in reading, math and written language. The tests she administered to Student are the same tests she routinely administers to all students she evaluates for a learning disability. She administers additional tests or subtests to explore specific areas of weakness more thoroughly if a student achieved a standard score on a subtest that is at least “18 points” below his ability level.
30. On the WJ-III Student obtained standard scores of 101 in math reasoning and 115 in math calculation. He received a score of 98 in Letter-Word Identification, 98 in Passage Comprehension, 87 in Reading Fluency, 97 in Spelling, and 98 Writing Sample. Reading Fluency is a timed subtest which requires that Student read simple one sentence true false statements and circle “Y” for yes and “N” for no to as many statements as possible within a three minute time limit. In the specified time period, Student completed 45 problems and got all of them correct. The educational diagnostician did not administer any other tests to identify Student’s individual areas of weakness in Reading Fluency. None of Student’s test scores on the WJ-III came within one Standard Deviation (15 points) of his Learning Expectancy.
31. Based on the “18 point discrepancy formula” consistently used by the School to define the “significant discrepancy” between ability and achievement to determine whether a student has a learning disability, the educational diagnostician and school psychologist determined that Student did not qualify for services as a student with a learning disability.
32. On the Competence Scale Scores, Syndrome Scale Scores, Internalizing/Externalizing Total Problems for Boys 12-18, teacher Kim Kociara rated Student in the normal range. Student’s Self-Descript/Identity Problem Scores were also in the normal range. Teacher Chuck Craycraft rated student in the clinical range for academic performance, but rated Student in the normal range in all other categories of Adaptive Functioning, Syndrome, and Internalizing/Externalizing.

33. Ms. Mario, a School psychologist, observed Student in his communications class as part of the evaluation process. Ms. Mario concluded that Student was “not as attentive as most of his classmates appeared to be.”
34. As part of the evaluation conducted in May of 2003, the School also considered whether Student was eligible for special education as a student with ADHD.
35. Teachers reported that Student exhibited attentional difficulties in their classes, trouble staying on task, problems completing work and producing quality work. He frequently received disciplinary referrals for class disruption or distracting other students. He was disciplined for acts of anger and aggression toward other students.
36. On May 27, 2003, a case conference committee convened to review the results of the evaluation. The case conference committee determined that Student “would not appear” eligible for special education services since he has just begun a low dosage of stimulant medication until it is decided that the medication will not sufficiently address his attention needs.
37. During the summer of 2003, Student became a patient of Dr. Ludwig, a pediatrician with expertise in the area of ADHD. Dr. Ludwig agreed with Student’s previous diagnosis of ADHD, and began treating Student for this medical condition. Dr. Ludwig placed Student on Adderall, a sustained release stimulant medication to treat the symptoms of ADHD.
38. Student attended summer school for several weeks during the summer of 2003. He continued to demonstrate an enjoyment of math and liked his teacher, who was also his football coach. Student did not exhibit significant behavioral problems in his summer school math class.
39. During the summer of 2003, Mr. Collins took Student to the hospital for drug testing which was positive for marijuana. Mr. Collins immediately took Student to see Dr. Lelek, a drug counselor.
40. Dr. Lelek first met with Student on July 9, 2003 to evaluate him for possible problems with drug addiction because of his recent drug use. He met with Student again on July 24, 2004, at which time he administered a random drug screening test, which proved negative for any drugs. Once drug abuse was ruled out, Dr. Lelek’s concerns were related to ADHD and possible Oppositional Defiant Disorder. Dr. Lelek recommended that Mr. Collins have the School reevaluate Student to see if he was eligible for special education services. Dr. Lelek diagnosed Student with “amotivational syndrome.” He ruled out amotivational syndrome as a result of drug use or abuse, but had concerns that Student suffered from the syndrome as a result of his ADHD, possible ODD, an undiagnosed learning disability or a combination of any of the three.
41. Student began his eighth grade year in the fall of 2003. Teachers reported his behavior as improved over the previous semester.
42. On October 15, 2003, Ms. Brownell sent a notice to Mr. Collins informing him that Student had been tardy to school on four occasions and that subsequent tardies would result in Saturday School.

43. Student's grades after the first quarter of eighth grade were as follows (academic grade is on the left side of the slash and behavior grade is on the right side of the slash):

Science	C+/B
Communication	A-/B
Health	B/B
Math	A-/D
PE	BB
Social Studies	D/A
Art	B+/C

44. The D in Student's Math behavior grade was caused by his frequent tardiness to class.

43. On October 31, 2003, Ms. Brownell sent a letter to Mr. Collins advising him that Student was assigned to Saturday School on November 15, 2003 as a result of his truancy from school.¹

44. In early November, Mr. Collins attended a parent teacher conference. At the conference, the social studies teacher discussed with Mr. Collins his concerns about whether Student's medication was wearing off toward the latter part of the day, as Student demonstrated difficulty sustaining his attention in his class. Student was not an overt behavioral problem in social studies, but he had problems focusing in class.

45. On November 7, 2003, Mr. Collins took Student for an appointment with Dr. Ludwig. Dr. Ludwig increased Student's dosage of medication from Adderall XR 30 mg. one tablet daily to Adderall XR 20 mg. two tablets, one time daily. This change in medication was to occur once the current prescription was depleted.

46. On November 12, 2003, Ms. Brownell sent another notice to Mr. Collins, advising him that Student was assigned to Saturday School on November 22, 2003 for excessive tardies.

47. On the afternoon of November 19, 2003, immediately after the dismissal bell, Student physically assaulted another student. Student confronted the other student about sexually explicit notes he had allegedly written regarding Student's girlfriend. Student had been obtaining notes of this type for some period of time before the November 19 incident.

48. Student was suspended from school and on November 20, 2003, Ms. Brownell filed a written request with the Superintendent for Student's expulsion for the remainder of the school year. On November 24, 2003, a notice of expulsion was sent to Mr. Collins from Mr. Mark McKibben, the expulsion examiner.

49. An expulsion hearing took place on December 8, 2003. Mr. Collins appeared at the hearing and presented a letter stating his belief that Student was eligible for special education and that a causal relationship existed between his behavior and his disability. Ms. Brownell was in attendance at the hearing. Mr. Collins communicated at the hearing that he believed Student

¹The IHO's original decision has two Findings of Fact #43 and two Findings of Fact #44. The IHO's numbering is left unchanged herein for ease of reference in addressing the objections raised in the Petition for Review.

did not receive due process due to his disability. Student was expelled from Chesterton Middle School until the end of the school year.

50. Ms. Brownell did request that Ms. Vukusich, the Director of the Interlocal, review the records. Ms. Vukusich reviewed the tests administered and other records and made a determination that Student was not eligible for special education. She did not confer with any of the case conference committee members when making her determination, nor did she solicit any information from Student's physician regarding his opinion as to the effectiveness of the medication Student was currently taking for his ADHD.
51. On January 19, 2004, a "Waiver of Due Process Rights" agreement was sent to Mr. Collins, which, if agreed to by Mr. Collins, would allow Student to return to school. Mr. Collins did not agree to the waiver, which included a provision that Mr. Collins waive his statutory and constitutional rights to due process.
52. On February 9, 2003,² the expulsion examiner sent Mr. Collins a note that the purpose of the Waiver of Due Process Rights agreement was to allow the student to continue his education at CMS even though he was still considered expelled, and that the waiver agreement had nothing to do with waiving due process rights concerning a possible handicap.
53. Mr. Collins chose to keep Student out of school until such time as the School would provide the appropriate special education supports and services to Student.
54. In March of 2003,³ Student was evaluated for a possible learning disability by Dr. John Hosterman, Ph.D., a learning disabilities specialist. Dr. Hosterman has a private practice and also consults with a number of private schools. He has worked as an adjunct professor at Northwestern University, where he has taught graduate level courses in assessment.
55. Dr. Hosterman administered the WISC-IV multifactorial test of intelligence, as well as a number of tests of achievement. Student achieved a full scale IQ score of 99 on the WISC IV. Student earned lower scores on the WISC-IV than he received on the WISC-III administered to him in the Spring. Dr. Hosterman also administered a number of achievement tests, including Form A of the WJ-III. He administered both timed and untimed tests to Student. Student obtained lower scores on the WJ-III compared to his performance on this test in the Spring. He completed less problems in the Reading Fluency test when tested by Dr. Hosterman than when tested at school in the Spring. Dr. Hosterman then measured each academic area against the full scale IQ score.
56. Dr. Hosterman administered tests to Student both with and without medication for his ADHD, and Student's scores on the tests that were administered when he was not taking his medication were significantly lower than those scores when he was taking medication.

²Although no objections have been raised concerning this finding, the year should probably be 2004.

³Although no objections have been raised concerning this finding, the year should probably be 2004.

57. Dr. Hosterman diagnosed Student with a learning disability based on a “severe discrepancy between his measured intellectual potential and his academic performance.”
58. As part of his evaluation, Dr. Hosterman referred Student for evaluation by Dr. Nancy Luna to rule out the possibility of an emotional disorder as being the primary cause of his underachievement. Dr. Luna determined that Student did not have an emotional disorder that was the cause of his underachievement.
59. In August 2004, the School had Student evaluated by Dr. Mark Noll, a clinical psychologist. Dr. Noll’s evaluation determined that Student presents a pattern of behavior that may fit the diagnosis of ADHD. He found no evidence of any underlying conduct disorder.

The IHO’s Conclusions of Law

1. WHETHER THE SCHOOL FAILED TO IDENTIFY THE STUDENT AS ELIGIBLE FOR SPECIAL EDUCATION SERVICES. IF YES, THEN WHAT SERVICES AND PLACEMENT ARE APPROPRIATE.

Student has been diagnosed with ADHD. This diagnosis may or may not lead to an eligibility under Article 7/IDEA.

Schools are mandated to conduct an evaluation that is sufficiently comprehensive to identify all of a student’s special education and related service needs. 34 C.F.R. § 300.532(h); 511 I.A.C. 7-25-3(e)(7). Furthermore, the School must use assessment tools and strategies that provide relevant information that directly assists in determining the educational needs of the student. 34 C.F.R. 300.532(j); 511 I.A.C. 7-25-3(e)(6). The School is mandated to draw upon a variety of sources including aptitude and achievement tests, parent input, and teacher recommendations and to ensure that information from all of these sources is documented and carefully considered. 34 C.F.R. §300.535(a). To qualify as a student with a learning disability, a severe discrepancy must exist between the student’s academic achievement and normal potential. 511 IAC 7-26-8(b). This is determined by reviewing results from a multifactor test of learning capability, an assessment of educational needs, an observation, social and developmental history, along with consideration to any educationally relevant medical information. *Id.*

In conducting its evaluation, and interpreting the data, the School gave adequate consideration of information from the variety of sources that were available to them to appropriately evaluate the Student. At the time of the evaluation in May of 2003, the School knew Student’s 4th and 5th grade academic and behavioral performance, knew that Student failed the 6th grade ISTEP, and knew of Student’s academic and behavioral problems in 6th grade as well. The School was also aware of Student’s academic performance and behavioral problems in 7th grade, his physician’s diagnosis of ADHD, and his use of ADHD medication.

The School administered a comprehensive individualized evaluation of Student to assess what, if any, special educational needs he may have. The committee received input from some of student’s 7th grade teachers regarding his behavior, administered the WISC-III and WJ-II, observed student in a classroom setting, and received input about Student’s social and developmental history from the Student’s mother. The School also knew of Student’s 4th, 5th, and 6th and 7th grade academic performance and behavior. The School knew that Student had been diagnosed with ADHD by Student’s physician and had been prescribed medication for this condition, but the School had not been provided with the physician’s notes or information about

the medication at the time of the case conference. The School was unaware that Mr. Collins began to suspect Student was using illegal drugs during the summer of 2003, that Student visited Dr. Lelek, a drug counselor, during the summer, and that Dr. Lelek diagnosed student with amotivational syndrome.

The Student's learning capability was measured by the WISC-III in May 2003 to be in the average range. During this same assessment period, Student's academic achievement was also measured in the areas required by 511 IAC 7-26-8 (c). During the administration of this testing, no severe discrepancies occurred between Student's learning capability and academic achievement.

The evaluation was sufficiently comprehensive to support the School's May 27, 2003 determination that Student did not appear eligible for special education services.

Dr. Hosterman, the learning disabilities specialist, conducted an independent evaluation of Student in March 2004 at Mr. Collins' request. Because Dr. Hosterman is not a licensed school, clinical or child psychologist, or a psychiatrist, his independent evaluation does not need to be considered in this decision. 511 IAC 7-25-5 (e). Nevertheless, his evaluation will be addressed.

Dr. Hosterman based his conclusion that a discrepancy existed between academic performance and potential based on Student's performance on the WJ-III. However, when this test was administered by the School, Student demonstrated that he was capable of performing within the range of his learning expectancy. While Student's performance on Dr. Hosterman's administration did not reveal the same strengths as found during the School's administration of the WJ-III, the lower scores cannot necessarily be attributed to the presence of a learning disability since the School's scores demonstrate that Student can perform within his learning expectancy.

2. WHETHER THE SCHOOL EXPELLED THE STUDENT IN DECEMBER, 2003 FOR BEHAVIOR THAT WAS A MANIFESTATION OF HIS DISABILITY.

A student who has not been determined eligible for special education and related services and who has engaged in behavior that violated any rule or code of conduct of the LEA may assert protections under IDEA and Article 7 if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated that disciplinary action occurred. 34 CFR § 300.527 (a); 511 IAC 7-29-8 (a).

The evidence does not support a violation of Article 7 occurred when the school expelled Student in December 2003. The School had conducted an evaluation of Student in May of 2003 and determined that Student was not eligible for special education services. This determination was reviewed and reaffirmed by Ms. Vukusich shortly after the suspension on November 19, 2004. Other information the School had related to the Student at the time of the suspension and subsequent expulsion included the following: 1) Student attended summer school for several weeks during the summer of 2003. He demonstrated an enjoyment of math, liked his teacher, and did not exhibit significant behavioral problems in summer school. 2) In the Fall of 2003, teachers reported improved behavior and grades over the Spring 2003 semester. Student's behavioral problems during the Fall of 2003 revolved around tardiness and truancy, not physical aggression towards others. 3) At the November 2003 parent-teacher conference, the social studies teacher discussed with Mr. Collins his concerns about whether Student's medication was wearing off toward the latter part of the day as Student demonstrated difficulty sustaining his

attention in his class. The teacher told Mr. Collins that Student was not an overt behavioral problem. The teacher assessed Student's behavior as a "D."

Student's physician increased student's dosage of Adderall in early November, but Student continued to take the lower dosage of Adderall in November, with the intention of beginning the new dosage when he ran out of the lower dosage. Student's suspension and ultimate expulsion from School following the November 19, 2003 fight was not based on behavior that was a manifestation of a disability.

3. WHETHER THE STUDENT IS ENTITLED TO COMPENSATORY EDUCATION.

Due to the conclusions expressed in the discussion of issues 1 and 2, the answer to this issue is No.

The IHO's Order

It is hereby ordered that the School did not fail to identify Student as eligible for special education services, that the Student was not expelled in December of 2003 for behavior that was a manifestation of a disability, and that Student is not entitled to compensatory education.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The Student's Petition for Review

The Student, by counsel, filed his Petition for Review on November 24, 2004. The Student objected to the IHO's conclusions of law and orders pertaining to each of the three issues raised in the hearing, and findings of fact, as noted below.

- A. The Student takes exception to the order and conclusion of law that the school did not fail to identify the Student as eligible for special education as being unsupported by substantial evidence and contrary to Article 7 and the Individuals with Disabilities Act (IDEA). While factually accurate, the Student objects to Findings of Fact Nos. 27, 29 and 31 to the extent they may be considered conclusions of law. According to these findings, the School used an 18 point discrepancy formula to determine whether a learning disability existed. The BSEA has held that the 18 point discrepancy model results in an application of a sole criterion for determining eligibility which contravenes state and federal law.
 1. The Student objects to that part of Conclusion of Law No. 1 which states that the School gave adequate consideration of information from a variety of services, as the law requires the school to give careful consideration. The Student objects to Findings of Fact Nos. 33, 34, 18 and 23. The Student argues the findings misstate substantial evidence, omit critical evidence, and fail to show the School carefully considered information from a variety of sources. Further, the School failed to request medical information in a timely manner. Therefore, the case conference committee did not even have this relevant information to consider in determining the Student's eligibility for special education services.

2. The Student objects to the IHO's conclusion that the School administered a comprehensive individualized evaluation to assess what, if any, special educational needs the Student may have. The Student objects to Findings of Fact Nos. 29, 55, and 43. The Student argues the School failed to administer any additional tests and to fully evaluate the Student because it required, contrary to established practice and law, that the Student receive a standard score on a subtest of at least 18 points below his ability level. The application of this standard precludes an individualized evaluation. The Student objects to the IHO's comparing the scores administered by the School and by Dr. Hosterman as Dr. Hosterman administered a greater number of subtests, and the School did not administer enough subtests to obtain a global or composite score in reading or writing. Finding of Fact No. 43,⁴ while factually correct, omits critical information. The evidence and testimony demonstrated the Student's grades and behavior historically declined as the school year progressed. The Student requests the BSEA consider the Student's grades for the first grading period of the 2004-2005 school year, attached as Exhibit A, that were not available at the time of the hearing.
 3. The Student takes exception to the IHO's conclusion that the independent evaluation of Dr. Hosterman does not need to be considered because he is not a licensed school, clinical or child psychologist, or a psychiatrist. 511 IAC 7-25-5(e)(2) provides that if a parent obtains an independent evaluation at the parent's expense, the results of the evaluation may be presented by the parent as evidence at a due process hearing. The IHO did, however, consider Dr. Hosterman's evaluation. The IHO compared Dr. Hosterman's test results with the results obtained by the School. The IHO erred in concluding that the School and Dr. Hosterman administered the same battery of tests. Further, the Student notes that portions of the School's test were administered by an educational diagnostician who is a teacher, not a licensed school psychologist, whose work as a diagnostician was not supervised by the School psychologist. The IHO's conclusions of law pertaining to the results of Dr. Hosterman's evaluation are unsubstantiated by the evidence and testimony.
 4. The Student objects to the IHO's conclusion that the School's evaluation was sufficiently comprehensive to support the May 27, 2003, determination that the Student did not appear eligible for special education services.
- B. The Student takes exception to the order and conclusion of law that the Student was not expelled in December of 2003 for behavior that was a manifestation of his disability as being unsupported by substantial evidence and is contrary to both Article 7 and IDEA. The School determined the Student was not eligible as a student with an other health impairment without considering available medication background, without medical information, and without seriously considering the Student's history of disciplinary referrals which included several acts of aggression toward other students. The School did not seriously consider the effect of the Student's ADHD on his behavior or the resulting problems associated with his medication regimen.

⁴The Student's objection refers to the IHO's first Finding of Fact No. 43.

- C. The Student takes exception to the IHO's order that the Student is not entitled to compensatory services as being unsupported by the evidence.

The School's Response to the Petition for Review

On December 3, 2004, the School, by counsel, requested an extension of time in order to prepare and file its Response to the Student's Petition for Review. The BSEA granted the request on December 3, 2004, providing the School until January 4, 2005, to file its Response.

The School timely filed its Response on January 4, 2005. The School argued the IHO's decision is supported by substantial evidence and should be upheld. The School responded to the objections raised by the Student.

- A. The School argues that its use of the 18 point discrepancy model is based upon a local guide, and there is no evidence the School rigidly applied the 18 point discrepancy. The School further argues they are required to use a discrepancy model to determine LD eligibility. The School further notes there is no evidence to support the conclusion the case conference committee primarily based their decision on the School psychologist's and diagnostician's interpretation of test scores. The School notes that a variety of sources and information were utilized when making the Student's eligibility determination.
1. The School notes that the Student's exception to the IHO's conclusion that the School gave "adequate" consideration to information from a variety of sources, rather than "careful" consideration focuses upon semantics. The testimony and record demonstrate that "careful" consideration was given. Findings of Fact Nos. 33, 34, 18, and 23 are supported by the evidence
 2. The School did administer a comprehensive individualized evaluation to determine what, if any, special education needs the Student may have. The School notes that subtests of the Woodcock Johnson III (WJ-III) are administered to assist in determining whether a discrepancy will be revealed. Depending upon the results of those tests, additional test may be given. The Student misrepresents the testimony of the School's diagnostician. The IHO's Findings of Fact Nos. 29, 55, and 43 are supported by the evidence. The School also objects to the Student's attempt to introduce new evidence not presented to the IHO.
 3. The weight given to the independent evaluation of Dr. Hosterman is not the same weight as would be given to an evaluation performed by a licensed school, clinical, child psychologist, or a psychiatrist. The definition of psychological services includes the administration of psychological and educational evaluations by a licensed school, clinical, or child psychologist, or a psychiatrist. The School argues the only evaluations conducted with appropriately licensed individuals were the evaluations performed by the School's psychologist, the School's Education Diagnostician, Dr. Luna, and the evaluation by Dr. Mark Noll, none of which revealed a qualifying disability.
 4. The School's evaluation was sufficiently comprehensive to support the May 27, 2003, determination that the Student did not appear eligible for special education services.

- B. The Student was not expelled in December of 2003 for behavior that was a manifestation of a disability. The Student had been evaluated and determined not to be eligible for special education services.
- C. The Student is not entitled to compensatory education.

Review by the BSEA

The complete record was photocopied and transmitted to the members of the BSEA on December 28, 2004. On January 13, 2005, the BSEA notified the parties that the matter would be reviewed on January 24, 2005, without oral argument and without the presence of the parties. On that date, all three members of the BSEA met in the offices of the Indiana Department of Education to review this matter. Based on this review, the following Combined Findings of Fact and Conclusions of Law with Orders are determined.

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.
2. It should be noted from the outset that an IHO is not required to recite all conceivable facts that may be gleaned from documentary and testimonial evidence. The IHO is required to make his findings based exclusively upon the evidence of record in the proceeding. Such findings must be based upon evidence that is considered substantial and reliable. I.C. § 4-21.5-3-27(d). In this matter, the IHO's Findings of Fact are factual recitations of evidence from the record.
3. The School is required to ensure that information obtained from a variety of sources is documented and carefully considered. 511 IAC 7-25-3(j); 34 CFR §300.535(a). The IHO concluded the School gave adequate consideration of information from a variety of sources that were available to them to appropriately evaluate the Student. "Adequate" means "sufficient for a specific requirement."⁵ The testimony and evidence support the IHO's conclusion the School complied with the requirements of federal and state law in considering information from a variety of sources. The IHO's conclusion is upheld.

⁵*Webster's Ninth New Collegiate Dictionary*, 1984.

4. Although the School often employed appropriate assessment instruments with respect to the Student, its continual reliance upon an 18-point discrepancy is a substantive procedural defect. Although the School indicates the use of an 18-point discrepancy in its local policy, the testimony indicates this was derived from perceived state requirements and from the “LD Guidelines.” The “LD Guidelines” never possessed any scientific bases, was unreliable, was invalid, and directly interfered with the function of the Case Conference Committee. The employment of this long-discredited standard resulted in an application of a sole criterion for determining eligibility, which contravenes both State and Federal law. 511 IAC 7-26-8; 511 IAC 7-25- 3(i). The Office of Special Education Programs notified the Indiana Department of Education over twelve (12) years ago that the “LD Guidelines” were contrary to the requirements of IDEA. The Department of Education notified all affected parties then— and continues to do so—that the LD Guidelines and the attendant 18-point discrepancy are invalid and are not to be used. The School in this matter is charged with knowing this.
5. Although the School inappropriately employed an “18-point discrepancy” model in determining the Student ineligible for special education services, there was a considerable amount of information from a variety of sources that supported the case conference committee’s determination.
6. If the parent obtains an independent evaluation at the parent’s expense, the results of the evaluation:
 - a. shall be considered in any decisions made with respect to the provision of a free appropriate public education to the student if the independent educational evaluation complies with the agency criteria for an evaluation; and
 - b. may be presented by the parent as evidence at a due process hearing.511 IAC 25-5-5(e).

The independent evaluation obtained at the parent’s expense was properly admitted into evidence and considered by the IHO. There was no evidence presented as to the School’s criteria for an evaluation. The independent evaluation, therefore, must be considered in any decision made with respect to the provision of a free appropriate public education to the Student. Although the IHO erred in concluding otherwise, such error was harmless as she did address the independent evaluation.

7. The IHO’s conclusion that because Dr. Hosterman is not a licensed school, clinical or child psychologist, or a psychiatrist, his independent evaluation does not need to be considered in this decision is not supported by the evidence or the law and should be struck.
8. The School’s evaluation consisted of information from a variety of sources and was sufficiently comprehensive to support the case conference committee’s determination the Student did not appear eligible for special education services.
9. The IHO’s Conclusion of Law No. 2 and Conclusion of Law No. 3 are supported by the evidence and the law.

10. The Student, with his Petition for Review, has submitted additional evidence consisting of grades for the first grading period of the 2004-2005 school year. The School had objected to the submission of additional evidence. The proposed new evidence will not be considered on appeal as it is not relevant to determinations made prior to the hearing and could not have been considered by the case conference committee or the IHO.

ORDERS

1. The following language is struck from the IHO's first Conclusion of Law at the top of page 17: "Because Dr. Hosterman is not a licensed school, clinical or child psychologist, or a psychiatrist, his independent evaluation does not need to be considered in this decision. 511 IAC 7-25-5(e). Nevertheless, his evaluation will be addressed."
2. The IHO's written decision, except as amended *supra*, is sustained.
3. The School is directed to revise its local guidelines for analyzing psychometric data in the diagnosis of learning disabilities to discontinue its reliance upon the unreliable and invalid 18-point discrepancy.

Date: January 24, 2005

/s/ Raymond W. Quist, Chair
Raymond W. Quist, Chair
Indiana Board of Special Education Appeals