

Indiana Board of Special Education Appeals



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

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of K.M. and the Northern)
Community School Tipton County and) **Article 7 Hearing No. 1238.01**
Kokomo Area Special Education)
Cooperative)

The Parent's request for hearing was received by the Division of Special Education, Indiana Department of Education, on August 3, 2001, and an Independent Hearing Officer (IHO) was appointed. The Student and the Student's Parent were represented by their attorney. The local public school and special education cooperative were represented by legal counsel. A prehearing telephone conference was held on August 17, 2001, with a final prehearing conference held on September 5, 2001, prior to the commencement of the hearing. The issues identified for the hearing were:

1. Was the 1998 evaluation by the School appropriate?
2. Should the student have been identified as eligible for special education in 1998? And
3. If so, does the School owe the Parent reimbursement for private evaluations and tutoring at a local learning center?

The hearing was open to the public at the request of the Parent. The Parent's Exhibits 1 through 15 and the School's Exhibits I A-E, II A-F, III A-F, IV A-E, and V A-M were admitted. The School's Exhibits I F, II G, H, I, and J were withdrawn. The School's Exhibit V C was admitted over objection. The IHO made nineteen (19) findings of fact, eight (8) conclusions of law, and three (3) orders.

The IHO's Findings of Fact

The Student is fourteen years old and an eighth grade Student at the local middle school. The Student has attended a local school since the third grade. During third grade the Student received B's and C's in her academic classes and a B, C's and 3 D's during the fourth grade year. In October, 1998, the Student's mother requested an evaluation because of academic problems. Specific concerns were reading comprehension, not completing assignments or tasks accurately or on time, poor organization, not following instructions, test performance, homework, and attention. Prior to the evaluation, the Student had been medically diagnosed with attention deficit hyperactivity disorder (ADHD) and was prescribed Ritalin.

The evaluation was conducted on October 15, 1998. Results of the Wechsler Intelligence Scale for Children, Third Edition, (WISC-III) showed a verbal scale IQ of 82, a performance scale of 80, and a

full scale IQ of 79. On the Wechsler Individual Achievement Test the Student scored in the low average range in basic reading, reading comprehension, reading composite, mathematics reasoning, numerical operations, and spelling. The Student performed in the borderline range in mathematics composite and written expression.

The Student's mother submitted a social and developmental history report, including the Student's prior ADHD diagnosis. The mother did not complete a behavioral assessment nor an ADHD rating scale. The school psychologist did not note in the Student's medical history the ADHD problem since she did not have the medical diagnosis, but did note that the Student did have ADHD characteristics. The Student's general education 5th grade teacher and a special education teacher each submitted a multidisciplinary team member evaluation of the Student.

In October, 1998, the multidisciplinary team found, based upon the evaluation and the teachers' observations and history with the Student, that there were no severe discrepancies in the Student's intelligence and achievement levels. The school psychologist did not believe that ADHD was the main issue, rather, the Student's low-below average to borderline intelligence caused difficulties in school. Also, the Student showed logical thought, so the psychologist did not see the Student as ADHD. The school psychologist found the Student's indicated intellectual potential was consistent with her achievement scores.

The case conference committee, composed of the Student's assistant principal, school psychologist, 5th grade general education teacher, and the Student's mother, met by telephone on November 13, 1998, and upon review of the evaluation and other available information, determined that the Student was not eligible for special education services under Article 7.

In February, 2000, the Student was diagnosed as bi-polar and ADHD by a medical physician. In June, 2000, the Student was evaluated by a private psychologist. The Student was administered the WISC III and scored as follows: Verbal IQ 79; Performance IA 91; and Full Scale IQ 83. The psychologist attributed the difference of the verbal and performance IQ's to difficulties in the auditory-vocal channel, short term memory and distractability resulting from ADHD. The psychologist opined that the Student's primary difficulty is in reading, with deficits in six (6) areas in the WISC III, and that the Student has learning disabilities. The Student was also administered the Wide Range Achievement Test (WRAT) and scored as follows:

Reading	Percentile Score = 3 rd	Grade Score = 3 rd
Spelling	Percentile Score = 13 th	Grade Score = 4 th
Arithmetic	Percentile Score = 5 th	Grade Score = 4 th

In July, 2000, the Student's reading level was assessed by a local learning center. The Student's total reading level was at a grade equivalent of 2.7. The Student's mother enrolled the Student in this learning center for reading assistance.

In August, 2000, the Student was evaluated by a second school psychologist. The Student was administered the Stanford-Binet Intelligence Test, Fourth Edition, and scored as follows:

	<u>Standard Score</u>	<u>Classification</u>
Verbal Reasoning	78	Borderline

Abstract/Visual Reasoning	89	Upper limits of low average
Quantitative Reasoning	90	Average
Short-Term Memory	75	Borderline
Test Composite	81	Low Average

A Section 504 conference was held on August 16, 2000. The Student was deemed eligible for a 504 plan and services due to having a bi-polar disorder and ADHD, which were substantially affecting the Student's life function of learning. The Student was also referred for special education services. On September 1, 2000, a case conference committee determined that the Student was eligible for special education services based upon the Student's written expression scores in comparison to the Student's potential. The Student continues to receive such services.

The Student's grades in the 5th grade were average to slightly below average. In the 6th grade the Student failed most of her academic classes. The Student's mother is requesting reimbursement of \$392.50 for the private evaluation in 2000 and the costs of the private reading program in the amount of \$403.00.

The IHO's Conclusions of Law

Based on the foregoing, the IHO concluded the evaluation performed on October 15, 1998, complied with the requirements of Article 7. Based upon the evaluation and other available information, the case conference committee properly found the Student was not eligible for special education services under the criteria for learning disability. Specifically, the Student did not have a severe discrepancy between the Student's academic achievement and normal or near normal potential under Article 7, or any other possible areas of disability under Article 7. Based upon the appropriate denial of eligibility for special education services in 1998, the School does not owe the mother reimbursement for the costs of the private evaluation nor for the tutoring through the private learning center.

The IHO's Order

The IHO ordered that the October 15, 1998, evaluation of the Student was appropriate; the Student was not eligible for special education services in 1998 under Article 7 and IDEA; and the Student's mother is not entitled to reimbursement for the costs of the 2000 independent evaluation nor for the costs of the private learning center.

Procedural History of the Appeal

On October 19, 2001, the Parent filed her petition for review. On October 24, 2001, the School, by counsel, requested an extension of time in which to file its reply. The Board of Special Education Appeals (BSEA) granted this request on October 25, 2001, such that the School's reply was due to be filed on or before November 5, 2001, and the BSEA's decision was thereby due to be rendered by December 5, 2001. The School's Reply was timely filed.

Parent's Petition for Review

The Parent, in her Petition for Review, takes exception to findings of fact numbers 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, and 17. The Parent generally argues the actual facts were not taken into consideration and the decision is not based on compliance with Article 7. The Parent further complains that during the lunch break, the IHO ate with the superintendent, special education director, school's attorney, and a school board member in an enclosed room that was not open to the Parent or the Parent's attorney.

School's Reply to Petition for Review

In its Reply, the School first acknowledges the superintendent provided box lunches for the IHO, the court reporter, himself, the special education director, and the School's attorney. The meal was eaten in the hearing room, which was open to the public. The Parent and her attorney went out to lunch, although they could have brought their lunch back and eaten in the hearing room. No discussion of the hearing issues took place during the lunch break.

The School argues that the findings are an accurate reflection of the testimony. The Parent has failed to identify any evidence in the record which would support a change in any of the IHO's findings. The BSEA should uphold the IHO's decision in its entirety.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on November 29, 2001, to conduct its review of the above-referenced matter without oral argument. All three members were present and had reviewed the record, the petition for review, and reply. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-30-4.
2. The BSEA is charged with reviewing the entire record of the due process hearing to ensure the procedures of the hearing were consistent with 511 IAC 7-30-3.
3. The BSEA shall not disturb the findings of fact, conclusions of law, or orders of the IHO unless the BSEA finds the IHO's decision to be:
 - a. arbitrary or capricious.
 - b. an abuse of discretion.
 - c. contrary to law, contrary to a constitutional right, power, privilege, or immunity.
 - d. in excess of the jurisdiction of the IHO.
 - e. reached in violation of an established procedure.
 - f. unsupported by substantial evidence.

511 IAC 7-30-4(j).

4. The Student is fourteen years old and in the eighth grade at the local middle school.
5. During the 1998-1999 school year, the Student was evaluated because of academic problems. The evaluation was conducted on October 15, 1998.
6. The multidisciplinary team found that there were no severe discrepancies in the Student's intelligence and achievement levels.
7. The case conference committee met on November 13, 1998 and determined the Student was not eligible for special education and related services under Article 7.
8. There is no evidence the School failed to follow proper procedures in evaluating the Student.
9. In February, 2000, the Student was diagnosed as bi-polar and ADHD by a psychologist.
10. In June, the Student was evaluated by a private psychologist. The psychologist attributed differences in the Student's Verbal IQ score of 79 and Full Scale IQ of 83 to difficulties resulting from ADHD. The psychologist was further of the opinion the Student's primary difficulties were in reading, and that the Student has learning disabilities.
11. In July, 2000, the Student was assessed by a local learning center. The Student's total reading level was at a grade equivalent of 2.7.
12. In August, 2000, the Student was evaluated by a second school psychologist.
13. A Section 504 Conference was held on August 16, 2000. The Student was determined eligible for a 504 Plan and services due to being bi-polar and ADHD, which were substantially affecting the Student's life function of learning.
14. The case conference committee met on September 1, 2000, and determined the Student was eligible for special education services based upon the Student's written expression scores in comparison to the Student's potential. The Student continues to receive services.
15. Due process hearings are subject to the provisions of both Article 7 (511 IAC 7-30-3) and the Administrative Orders and Procedures Act (I.C. 4-21.5-3). 511 IAC 7-30-3(p).
16. Independent Hearing Officers (IHOs) are prohibited from engaging in *ex parte* communications. An *ex parte* communication is a communication regarding any issue in the proceeding while the proceeding is pending, with certain individuals, including any party or any individual who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate in the communication. I.C. 4-21.5-3-11.
17. During the lunch break, the School's superintendent provided box lunches for himself, the special

education director, the School's attorney, the IHO and the court reporter. Such lunches were not provided for the Parent or the Parent's attorney, who went out for lunch. The box lunches were eaten in the hearing room.

18. There is no evidence, nor has any allegation been made, that any issues involved in these proceedings were discussed during the lunch break.

Discussion

The Parent, in her Petition for Review, has raised a concern over being excluded from the lunch arrangements made by the School, which included the IHO. The School, in its Reply, has acknowledged that the School's superintendent made such arrangements, but assures the BSEA that no discussion of the hearing took place during lunch. The Parent has not alleged that any improper discussion took place during the lunch break. Although there is no indication that any *ex parte* communications occurred, the BSEA encourages IHOs to consider the appearance of impropriety in all aspects of the conduct of due process hearings.

ORDERS

1. Finding of Fact No. 12 is modified to read as follows:

In February, 2000, the Student was diagnosed as bi-polar and ADHD by a psychologist.

2. The IHO's decision is accepted as written, with the corrected Finding of Fact No. 12.

All other Motions not specifically addressed herein are hereby deemed denied.

Date: November 29, 2001

/s/ Cynthia Dewes
Cynthia Dewes, Chair
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 decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-30-4(n).