

# Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798  
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## BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

*In the Matter of B.L.,* )  
*and the* )  
*Warsaw Community School Corporation* ) Article 7 Hearing No. 1390.04  
*and the North Central Indiana Special* )  
*Education Cooperative* )  
)  
)  
Appeal from the Decision of )  
Cynthia Stanley, Esq. )  
Independent Hearing Officer )

### Procedural History and Background

The Student's<sup>1</sup> request for a due process hearing was received by the Indiana Department of Education, Division of Exceptional Learners, on October 24, 2003. On October 27, 2003, Cynthia Stanley, Esq., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO).

A pre-hearing conference was held on November 5, 2003. The November 5, 2003 pre-hearing order indicated that the parties jointly requested an extension of time in which the decision must be issued to December 22, 2003. The request was granted by the IHO. The parties were advised of their due process rights. The issue for hearing was identified as whether the Student was eligible for services under Article 7.

By letter dated November 8, 2003, the Student requested the School provide certain information regarding credentials of specific school personnel involved in evaluating or teaching the student, as well as information regarding validity and reliability of tests and procedures used in the school's evaluation. The record indicates that responsive materials were provided to the Student before hearing.

The hearing was scheduled for December 1 and 2, 2003. On November 20, 2003, the Student requested an extension of time. On November 21, 2003, the IHO issued a notice of pre-hearing conference that included an order granting the Student's request for an extension of time. A second pre-hearing conference was held on November 26, 2003, with a pre-hearing order issued the same date. Hearing dates were established for January 8 and 9, 2004. A written order granting an extension of time in which the decision must be rendered was issued on December 3, 2004. The decision was due to be rendered by January 30, 2004. The hearing was held on January 8 and 9, 2004.

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<sup>1</sup>Student refers to both the Student and Parent as parties herein.

The IHO issued her written decision on January 28, 2004. The IHO determined fifty-one (51) findings of fact.

1. This matter was properly assigned to the IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, which give the IHO the authority to hear and rule upon all matters presented.
2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. The student at the time of hearing was 9 years 5 months of age. She was receiving occupational therapy and behavioral therapy privately; the parent planned to begin individual therapy for the student as well.
4. The student has migraines and asthma and is under a pediatrician's care for both conditions. The pediatrician evaluated the student for Attention Deficit Hyperactivity Disorder (ADHD) in July 2000. The pediatrician wrote that the student had more indicators of Oppositional Defiant Disorder and recommended a psychiatric evaluation at Riley Hospital.
5. The student received speech therapy services for a communication disorder from 1997 to 2000. During the Case Conference Committee (CCC) meeting of October 25, 2000, it was agreed that the student no longer needed services for a communication disorder. Also during that meeting, the parents notified the CCC of their concern regarding possible Sensory Motor Integration (SMI).
6. The student was placed by her family at Behavioral Healthcare of Northern Indiana on January 31, 2001, after she made threats to kill herself. Her kindergarten teacher prepared assignments for the student while she was an in-patient. The student remained at Behavioral Healthcare until February 7, 2001. Upon discharge, she was placed on Luvox for depression and "unstable mood swings."
7. In the weeks following her return to the classroom on February 8, 2001, the kindergarten teacher noted the student exhibiting new behavioral problems, including problems getting along with other students, crying for no apparent reason, and paranoia about other students' looking at her. She called herself "dumb" and said she wanted to go live in a foster home or with her grandmother. In a music class, she refused to cooperate with the teacher's directions. She was exhibiting some self-harm behaviors, such as scratching her face with her nails, and threatening to kill herself when she got home. Beyond telling the parent that the student had had a rough day, the parent was not told the specifics of the self-harm and the threats. An observation by the elementary counselor noted the student was not focusing well and her gross motor coordination seemed underdeveloped.
8. In March 2001, an evaluation was performed by Riley Child and Adolescent Psychiatry Clinic, addressing the possibility of bipolar disorder and ADHD, among other concerns. The outcome of that evaluation in regard to ADHD was that symptoms were not judged to be sufficiently numerous or severe to formally justify the diagnosis. The record does not contain the actual report; the outcome regarding bipolar disorder seems to have been negative as well.

On advice from Riley Hospital, the student was taken off the Luvox; the parent testified that the Riley Hospital staff told her that Luvox was actually for Obsessive Compulsive Disorder, not for depression patients.

9. The student was seen for therapy privately by a psychologist at the SELAH Center, Inc. from June to December 2002.
10. In a letter dated December 13, 2002, the student's pediatrician recommended that the student be tested for learning difficulties and sensory integration.
11. During this time, the student missed a good deal of school. Testimony by the mother at hearing indicated that the absences were frequently related to doctor appointments.
12. In an evaluation by an occupational therapist (OTR) at Parkview Hospital on March 6, 2003, the student was found to have Sensory Integrative Dysfunction (SID). This report was eventually provided to respondents. Occupational therapy both private and through the school was recommended by the OTR, plus the Wilbarger Protocol for sensory defensiveness and establishment of a sensory diet plan for home and school settings.
13. A Teacher Assistance Team (TAT) meeting on April 17, 2003 discussed the SID diagnosis and developed a plan for gathering information on SID and for observing the student for classroom effects of SID.
14. By letter dated April 17, 2003 the parent requested an evaluation for speech, math, reading, English and phonics. The parent requested that the school accept the evaluation done at Parkview Hospital and provide the recommended services.
15. Services for OT are a related service and cannot be provided by respondents absent a finding of eligibility under Article 7. 511 IAC 7-28-1.
16. By letter dated April 25, 2003, the classroom teacher wrote to the Parkview Hospital OTR and requested information on activities that might assist the student in the classroom. A list of classroom accommodations for the student was developed by the TAT and dated May 5, 2003, to address SID.
17. By letter dated May 15, 2003, the parent requested an evaluation of the student to determine whether the SID affected her academic and social performance at school.
18. In second grade (2002-03), the student's teacher at first thought the student might have a disability, but as she watched the student longer, the teacher became convinced the student was capable of the work and was avoiding the difficult work. The teacher believed the student was capable of better work than she did. The student was a slow, "very neat worker" and needed extra time to complete assignments. Also, the student had activities she would do to avoid work that was harder for her. It took more effort by the teacher to get the student to do the work the student was not as good at. The student's location in the classroom was at the back, close to the door, the pencil sharpener and the bathroom, where she could not turn and distract the other students, and could see everything going on around her. This worked better.

19. A TAT meeting was held to discuss the possibility of a Learning Disability (LD). In the discussion, the classroom teacher noted the student did not want to use the technology provided for SID. At a Parent Teacher Conference (PTC), the mother worried about how student was doing. The student's grades during 2002-03 included As, Bs, Cs, Ds and Satisfactories, with mostly Cs and Ds. Math was her weakest subject.
20. The student is a very active child, moving around. In her second grade classroom, the rule was that students had to ask to move, if it was during a lesson. Otherwise, students could get up and move around. This student was significantly more active than most other children, but she was allowed to do that. The student brought aids for her SID to the classroom, but she did not like to use them.
21. The second grade teacher has taught many ADHD students in 27 years as a second grade teacher. She believed the student had the ability to focus; the teacher came to believe the student was not focusing by choice. She did not believe the student has ADHD or that her performing below her ability was the result of a disability under Article 7. The teacher testified that the student needs to continue to have choices and structure in her school environment; needs self-esteem and a teacher to work with her. Setting limits works beautifully with the student. The student needs to know the teacher will follow through on rules.
22. An evaluation of the student by a psychologist was performed at the parent's request at the Bowen Center on June 4, June 26, and July 9, 2003. As part of the evaluation process, the psychologist had access to behavior assessments filled out by the parent and grandmother, but none from school personnel, despite the parent's efforts to provide such. The evaluating psychologist wrote: "The client was previously assessed at Riley Hospital for ADHD and was then found to have too few symptoms to fully justify that diagnosis. Presently, however, sufficient data appears to be present to now justify the diagnosis." The psychologist did not assign a DSM-IV category.
23. The student has taken Focalin for ADHD on prescription from her pediatrician, beginning in late August 2003.
24. In third grade (2003-04) fall semester the student has been on track academically. The student is a very good reader, and generally an average student. She very much likes to talk to the teacher. The teacher encourages her to return to work. The teacher doesn't think the student has to struggle to understand the content of the work she is asked to do. The teacher testified she doesn't know why student doesn't want to sit and work except it's not fun. The student does not choose to use her SID cushion very often in the classroom.
25. The student began turning classroom work in late or not at all in the second nine week grading period. The student would stick unfinished work in her desk and say she forgot it at home. The effect of not finishing work is a zero grade; however, the student can finish it later and get credit. A school-wide system says undone work leads to an "occurrence". The teacher testified that she was too lenient with the student and did not give the student an occurrence for each assignment not completed. She gave the student the benefit of the doubt and it snowballed.

26. At one point in the second nine weeks of classes, the parent was facing at least 43 pages of uncompleted classroom assignments to help the student finish at home. The parent had not been kept aware of the problem as it developed.
27. The student testified that she did not keep up with the classroom work because “[i]t was boring.”
28. During one week in October 2003, the student was angry and uncooperative. Since that time, the student has been cooperative. The student has not had a behavior occurrence card sent home this school year, which indicates her behavior has been good overall. Students have the option of working in the hall. This student has done so a couple of times. The student is not highly distractible; she can concentrate in the classroom. The student sometimes asks the third grade teacher to tell her the directions again, but the teacher does not know whether it is because of a difficulty in listening comprehension or to get extra attention. By the time of the PTC in December 2003, most of the overdue work had been turned in, and most of the student’s work for December itself had been done, although not all. The teacher uses missing recess as a motivator with her other students. The parent has asked that the student not be kept in from recess to work.
29. In the October CCC, the third grade teacher opined that the student does not exhibit a LD to the level to infringe on school work. Hyperactivity doesn’t interfere with the student’s school work; avoiding doing her work affects the work. The student’s avoidance behaviors include talking to the teacher, going for drinks, sharpening her pencils; talking quietly to others; looking at books, or drawing.
30. The student’s attendance record for fall 2003 shows a significant number of absences for doctor’s appointments or illness.
31. The student’s scores on classroom assignments vary widely. Her grades through the first semester reflect uneven performance, but an ability to perform.
32. By letter dated September 8, 2003, the student’s optometrist recommended the student be provided OT services for coordination skills and possibly vision therapy to improve visual depth perception.
33. An evaluation was done by respondents during September and October 2003 in response to the parent’s requests. The school psychologist administered a battery of tests to determine whether the SID diagnosed by Parkview Hospital was significantly hindering the student’s acquisition and development of academic and social interaction skills.  
  
Tests administered included Differential Ability Scales-School Age Form, Diagnostic Achievement Battery-Third Addition, and the Developmental Test of Visual-Motor Integration. Adaptive skills were measured with the Behavior Evaluation Scale - 2, completed by the mother and grandmother, and the Basic Assessment System for Children (“BASC”), filled out by the mother.
34. In the testing, the student would start out with strong focus, then her attention would wane. It was hard for the student to sustain attention. For this reason, the psychologist believed the

results were a minimal estimate of the student's ability. The psychologist did not believe the lack of sustained attention was an effect of ADHD or a listening disability.

35. The school psychologist evinced concern that the mother's ratings were unduly negative. Both the mother's and grandmother's responses yielded scale elevations within the clinically significant range. Family members rated the student more hyperactive, depressed, and anxious than the teachers did.

The student's second and third grade teachers collaborated on completion of the teacher rating scales of the BASC. There were areas rated significant (Externalizing Problems and Internalizing Problems) or at-risk (Depression, Attention Problems, Atypicality, Withdrawal, Adaptability, and Study Skills). Learning problems were rated at average by the classroom teachers. On adaptive behavior scales, the teachers did not see anywhere near the same profile as described by the parent. The teacher ratings were much more positive than those generated by the family.

36. The student herself was presented with the Children's Depression Inventory, a self-rated depressive symptom inventory suitable for school-aged children. The student's own profile yielded no clinically significant scores and only one slightly above average score, although the psychologist noted the student changed her first response of "I think about killing myself but I would not do it." to "I do not think about killing myself." The areas of Negative Mood and Anhedonia were rated within the average range for girls of her age. Ineffectiveness, Negative Self-Esteem, and the overall score fall within the slightly below average range, suggesting lack of problems in the areas.
37. In the evaluation summary, the psychologist notes: "The second and third grade teachers do indicate some social/emotional/behavioral concerns, most notably somatic complaints, aggression, and conduct problems. However, [the student] has made improvements in many of these areas, and they are not indicated as significant detriments to learning in the school environment. Family members ratings indicate a much more dysfunctional profile when looking at adaptive behavior skills as well as social/emotional/behavioral adjustment. In this evaluation, [the student] demonstrates overall cognitive functioning within the average range with a strength in the spatial area. There does appear to be a significant discrepancy between expected and measured achievement in the area of listening; however, inconsistent attention may have negatively influenced the score in that area."
38. Respondents' responsibilities under Article 7 depend upon the student's functioning within the school context.
39. The test results showed a discrepancy between the expected achievement score of 96 and a standard score of 1 on Story Comprehension, a part of Listening. This score yielded a percentile ranking of below 1 percent.
40. In the hearing, the school psychologist testified to the following reasons she discounted the apparent discrepancy:
- a) the evidence of a severe discrepancy was not consistent;
  - b) "...I really felt that that score is an underestimate of her true listening ability....Because of that low story comprehension score, it is so uncharacteristic of how she performed in other aspects of the testing. At no point did I have to repeat myself. At no point did she

misunderstand what I was saying. I didn't have to clarify anything for her. So I really felt that she was listening and understanding what I was saying throughout the evaluation. And I felt that that story comprehension score was affected by ...the attention...";

- c) the psychologist checked the student's cumulative file and found notations that the student would talk too much or she was too loud; the file had no indication that listening in and of itself was a problem of significance;
- d) the psychologist saw the student's score within the average range of IQ as a further factor in ruling out a true listening comprehension disability;
- e) the Bowen Center testing results reinforced the psychologist's opinion that the student did not have a listening comprehension disability.

41. In September and October 2003, also as part of respondents' evaluation, the teacher of Learning Disabilities and Mild Mental Disabilities conducted observations and testing, including the Woodcock Reading Mastery tests. The student's scores were in the average range and consistent with MAP testing done in spring 2003. On the KeyMath Inventory, the student's total score was slightly below average, consistent with MAP tests in spring 2003. On the Test of Written Language, the student's overall score was below average.
42. Also as part of respondents' evaluation, an occupational therapy evaluation was completed during October 2003, including observation, testing and inventories filled out by the student's classroom teacher. The school's OTR summarized: "Based on the information gathered during the testing and observation it appears that [the student] is functioning at or above her age level in the area of visual perception. She does not require intervention from the teacher or additional cues to maintain her attention or alertness level appropriate to her age level. Although she seems to take additional time to complete tasks, she is able to move on to the next command without additional cues....Based on observation and the results of the Sensory Integration Inventory, [the student] demonstrates no overt indication of sensory processing difficulties related to tactile, vestibular or proprioceptive sensory systems. The teacher reported she is pleasant and cooperative in the classroom and generally is eager to please and produce her best work. She also demonstrated these skills during testing. [The student] herself stated, 'I can do everything at school, sometimes the spelling words are hard but really nothing at school is hard for me.' Based on the testing results, [the student] does not qualify for occupational therapy services. She did not demonstrate any areas of concern at this time."
43. The CCC met on October 23, 2003, following completion of respondents' evaluation. The CCC determined, with the mother dissenting, that the student was not handicapped as defined by Article 7 and was ineligible for services under ADHD/OHI or LD. The discrepancy between expected achievement scores and the standard score of one with corresponding statistical score of below 1 percentile on a subtest of Listening was not found to be a severe discrepancy on a consistent basis.
44. The parent then requested a due process hearing.
45. Parent argues for eligibility under OHI for ADHD or SID and under LD.
46. Under Article 7, Other Health Impairment means an impairment that adversely affects a student's educational performance and is manifested by limited strength, vitality or alertness

due to chronic or acute health problems. It also may be manifested by heightened alertness to environmental stimuli that results in limited alertness with respect to educational performance. 511 IAC 7-26-12

47. The record does not support a finding that the student's ADHD or SID have adversely affected her educational performance.
48. The student does not meet the criteria for eligibility for services under OHI.
49. Under Article 7, a learning disability is characterized by severe specific deficits in perceptual, integrative, or expressive processes involved in understanding or in using language, spoken or written, that adversely affects the student's educational performance; ...may be manifested in disorders of: (A) listening;.... 511 IAC 7-26-8
50. The record does not support a finding of a severe specific deficit in perceptual, integrative or expressive processes involved in understanding or in using language, spoken or written, that adversely affects the student's educational performance.
51. The student does not meet the criteria for eligibility for services under LD.

Based upon these findings of fact, this Hearing Officer made five conclusions.

1. This matter was properly assigned to the IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, which give the IHO authority to hear and rule upon all matters presented.
2. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law.
3. The issue before the IHO is whether the student is eligible for services. The possibility of eligibility was raised under two specific Article 7 eligibility categories:
  1. Other Health Impaired
  2. Learning Disability
4. The student is not eligible for services as a student with Other Health Impairment.
5. The student is not eligible for services as a student with a Learning Disability.

Based on the foregoing, the IHO issued the following Order:

The determination of the Case Conference Committee that the student is not now eligible for services under Article 7 as a student with Other Health Impairment or Learning Disabilities is affirmed.

The IHO properly notified the parties of their respective administrative appeal rights.

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

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

The Student filed a Petition for Review of the IHO's decision on February 17, 2004. The Student disagrees with most of the IHO's findings of fact, arguing that the facts are not supported by the evidence, or that contrary evidence in the record supports a finding contrary to that found by the IHO. In some instances, the Student appears to present arguments based upon evidence not appearing in the record. The Student objects to the IHO's Findings of Fact Nos. 3, 4, 6, 8, 10, 11, 13, 16, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 35, 37, 38, 39, 40, 46, 47, 48, 49, 50, and 51. The Student also disagrees with the IHO's conclusions concerning eligibility categories under Article 7. The Student argues the IHO erred in determining in Conclusions of Law Nos. 4 and 5 that the Student was not eligible for services as a student with Other Health Impairment (OHI) or a Learning Disability. The Student further disagrees with the IHO's order and argues the Student should be eligible as a student with Other Health Impairment and a Learning Disability.

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

On February 19, 2004, the School requested an extension of time in which to file its response to the Student's Petition for Review. By Order dated February 19, 2004, the Board of Special Education Appeals (BSEA) granted the School's request such that the School's Response would be due by February 27, 2004, and the final written decision of the BSEA would be rendered by March 29, 2004.

The School's Response was timely filed on February 27, 2004. The School generally argues the IHO's findings of fact are supported by the evidence. In some instances, contradictory testimony may appear in the record, but it is the IHO's right and responsibility to judge the credibility of the witnesses. Further, the School argues the Student makes some objections based upon matters not in the record. The School argues IHO's conclusions of law are based upon the findings of fact and the criteria for eligibility found in Article 7 and should be upheld. Finally, the findings and conclusions support the IHO's order finding the Student is not eligible for services under Article 7.

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

On March 12, 2004, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows.

### **COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by

the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. The sole issue presented in this matter was whether the Student was eligible for services under Article 7.
3. Although contradictory testimony may appear in the record, an IHO does not have to credit all the testimony the IHO receives into a record. An IHO must make a determination what evidence is credible and relevant to the issues as framed. There was no showing the IHO abused her discretion in this matter in weighing the evidence and judging the credibility of witnesses.
4. The IHO has broad discretion as to how she will weigh the evidence.
5. The IHO's Findings of Fact Nos. 3, 4, 6, 8, 10, 11, 13, 16, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 35, 37, 38, 39, 40, 46, 47, 48, 49, 50, and 51 are all supported by substantial evidence in the record.
6. The IHO's Conclusions of Law are based upon the Findings of Fact and the eligibility criteria as set forth in Article 7.
7. The IHO's Order is appropriately based upon the Findings of Fact and Conclusions of Law.

### **ORDERS**

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

1. The IHO's decision is sustained, including the IHO's Order.
2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: March 12, 2004

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Richard Therrien, Chair  
Board of Special Education Appeals

## **APPEAL RIGHT**

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