

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 E.U.,)	
<i>Valparaiso Community Schools, and the</i>)	
<i>Porter County Education Interlocal</i>)	Article 7 Hearing No. 125-2007
)	Article 7 Hearing No. 1605.07
Appeal from the Decision of)	
James A. Jacobs, Ph.D.)	Status: Open
Independent Hearing Officer)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History and Background

The request for this due process hearing was filed by the Student¹ on September 12, 2006. On September 13, 2006, James A. Jacobs, Ph.D., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO). The School filed a Motion for Specificity on September 15, 2006. On that same date, the School submitted a letter to the IHO to spread on the record a previous professor-student relationship between the IHO and counsel for the School that occurred seventeen years prior to the hearing. On September 15, 2006, the IHO also issued a response to the School's disclosure. The Student filed a response to the School's Motion for Specificity on September 19, 2006. On September 20, 2006, the Student notified the IHO that the Student was satisfied that the IHO will be able to render an impartial decision and the Student had no objections to the IHO serving in this matter.

On September 20, 2006, the IHO issued an order on the School's Motion for Specificity, indicating the clarity of the issues filed by the Student would be addressed at the prehearing conference. Written Notice of Prehearing Conference was issued on September 20, 2006. On September 22, 2006, the IHO received a letter from David L. Hollenback, Esq., requesting the IHO recuse himself. That same day, the School filed its Response to the Student's Due Process Request.

A prehearing conference was held on September 25, 2006. The single matter discussed was the content of Mr. Hollenback's letter, in which he expressed concern that a prior student-professor relationship occurring seventeen (17) years prior between counsel for the School and the IHO may negatively impact the IHO's handling of this matter. On that same date, the School filed a

¹The term "Student" as used throughout denotes the student or her parents as appropriate.

Motion to Evaluate and a request for the IHO to recuse himself.

On September 28, 2006, the IHO determined there was no reasonable basis for alleging the IHO would have a personal bias or prejudice. The IHO did not recuse himself. On that same date, the IHO issued an Order in response to the School's Request for Specificity.

On October 3, 2006, the IHO ordered both parties to submit available dates for a prehearing conference. On October 4, 2006, the IHO received an audiotape from counsel for the School. The IHO notified the parties that the taping of the September 25, 2006, prehearing conference was contrary to his directives and possibly in violation of law. He directed that audiotaping of any prehearing conference or other matter is expressly prohibited without prior written permission.

The Student responded to the IHO's order concerning specificity on October 4, 2006. On that same date, the IHO determined the Student met all specificity requirements. On October 5, 2006, the IHO issued a Notice of Prehearing Conference for October 17, 2006. At the prehearing conference, both parties requested a sixty-day extension of time. A Prehearing Order and Notice of Hearing were issued on October 18, 2006. The prehearing conference that began on October 17, 2006, was re-convened on October 18, 2006, due to telephone difficulties. The Student had requested that the two-year statute of limitations be waived. The IHO determined the Student would be permitted to address whether the School withheld information from the Student that it was required to provide. Seven issues were identified for hearing:

1. Did the school fail to conduct an evaluation of the student for special education and related services as required by either Article 7 or the IDEA?
2. Did the School fail to appropriately and timely identify the Student as being eligible for special education and related services as required by either Article 7 or the IDEA?
3. Did the school fail to educate the student in the Least-Restrictive Environment (LRE)?
4. Did the School fail to devise IEPs to address the Student's academic, behavioral, social, physical or emotional needs?
5. Did the School fail to provide the Student with an IEP or IEP's that contained appropriate accommodations and modifications as would be required by the Student's academic, behavioral, social, physical or emotional needs?
6. Did the School fail to prevent discipline of the Student due to manifestations of her disabilities; specifically, truancy actions(s) against the Student for missing school due to a panic disorder, agoraphobia, or an anxiety disorder?
7. Did the School fail to maintain disciplinary records of the Student for the 2005-2006 school-year?

Hearing dates of December 14, 15, 19 and 20, 2006 were established. The parties were advised of their hearing rights. The IHO granted the Parties' request for an extension of time in an order dated October 18, 2006. On October 23, 2006, the IHO issued a corrected order with the deadline for the IHO's written decision identified as January 25, 2007.

On November 30, 2006, the School filed its Motion for Discovery and Interrogatories. The same date, the Student filed a Motion for Continuance of Discovery Deadline and a request for an extension of time. On December 2, 2006, the Student filed a response to the Motion for Discovery. The Student also filed a Motion to Compel the Production of Documents, and requested that an additional issue be added. The School replied on December 4, 2006. On December 6, 2006, the IHO issued a Notice of Attempts to Schedule a Prehearing Conference and directed the School's attorney to immediately notify the IHO as to her availability for a prehearing conference.

On December 7, 2006, the IHO issued an order granting the Student's request for a continuance. The hearing and decision dates were continued until a prehearing conference could be arranged and new dates established. A Notice of Prehearing Conference was issued on December 8, 2006. The prehearing conference was held on December 11, 2006, with the Prehearing Order issued on December 15, 2006. New hearing dates of February 8, 9, 12, 22, and 23, 2007, were established. The School's November 30, 2006, Motion for Discovery and to Propound Interrogatories was granted. The Student requested a sixty (60) day extension of time to which the School did not object. By orders dated December 14, 2006, the IHO granted the Student's request for an extension of time, such that the new decision date was established as March 26, 2007. The IHO denied the Student's request to add an additional issue. The IHO issued an order directing the Student to answer the interrogatories by January 4, 2007. The Order on Prehearing Conference and Notice of Hearing was issued on December 15, 2006.

The hearing was conducted on February 8, 9, and 12, 2007. The Student was represented by counsel and her Parents. The School was represented by counsel. The hearing was open to the public at the request of the Parent.

The IHO's Written Decision

The hearing was convened on February 8, 2007, and began with a pre-hearing conference wherein exhibits and witness lists, and issues for hearing were discussed. Subsequent hearing dates were held as outlined above. On February 21, 2007, after the hearing had concluded, the Student objected to documents submitted by the School after the conclusion of the hearing. The IHO responded the following day indicating he had not received any documents, and, that as a matter of course, he would not consider any documents submitted after the hearing. The School's tendered documents were received later in the day on February 22, 2007.

The IHO issued his final written decision on, March 22, 2007. He determined sixty-four (64) Findings of Fact, four (4) Conclusions of Law,² and one (1) Order. The decision, in relevant part, is reproduced below.³

FINDINGS OF FACT

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, which gives 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. It was determined that all due process procedures were in compliance with requirements of 511 IAC 7-30-3 and IC 4-21.5 *et seq.*
4. The Student is eighteen⁴ years, four months old (DOB 11-11-88).
5. The Student has not been identified as being a student with a disability under the IDEA (20 U.S.C. 1400 *et seq.*) or Article 7 (511 IAC Rules 17-31).
6. Until October 2006 the Student had not been referred by the School, the Student, or Parents for assessment and subsequent determination regarding qualifying the Student as a student with a disability under either the IDEA or Article 7 at any time during her public school experience.
7. The School had no obligation to inform the Parents of their due process rights under either Article 7 or the IDEA unless and until a written referral was made to the proper authority.
8. The Student began her secondary school experience by enrolling in Valparaiso High School, Valparaiso, Indiana as a freshman in fall semester of 2003. The Student completed the freshman and sophomore years of high school at Valparaiso High School.
9. Valparaiso Community Schools is the Student's school corporation of legal settlement for the Student.
10. Upon entering high school at Valparaiso High School, the Student began demonstrating a pattern of significant anxiety based symptoms which led to a variety of physical and emotional symptoms.

²Conclusion of Law No. 4 is in seven parts, one part for each issue raised in the hearing.

³The restatement of the IHO's Findings of Fact, Conclusions of Law, and Orders have been edited for format purposes and the correction of minor typographical errors.

⁴The Student's age has been corrected to match the date of birth.

11. Valparaiso High School has a student population of slightly above two thousand students.
12. During the Student's freshman and sophomore years at Valparaiso High School she was absent from school an excessive number of days. No accurate number of days missed could be determined from the School's records. However, the IHO determined that the Student missed up to fifty (50) school days, or part thereof, during her two school years while enrolled at Valparaiso High School. The School notified the Student's parents, by letter, in January of 2005 (no specific date attached to letter) that the Student was a serious attendance problem, citing that the Student had missed 81 class periods at the time the letter was composed and sent.
13. The School was made aware that the Student was experiencing anxiety related issues as early as January 14, 2004, as documented by Schools "Conference" notes.
14. School records document that the Student and her mother spoke with both the school nurse and guidance counselor in January of 2004 for the purpose of making the School aware of the anxiety issues being experienced by the Student. The Student's mother also spoke with the guidance counselor on "several" subsequent occasions regarding her concern about her daughter's anxiety related difficulties.
15. The Student first complained of nausea and dizziness to the school nurse on October 13, 2003. From February 2003 through August 26, 2005, the Student visited the nurse's office on twenty nine (29) occasions.
16. The Parents sought assistance from the school counselor in May of 2004 regarding anxiety symptoms experienced by the Student whereupon the school counselor determined the Student to be eligible for services under Section 504 of the Rehabilitation Act of 1973.
17. A written Section 504 plan was developed on May 27, 2004.
18. The School determined eligibility for Section 504 based on a request for assistance for the Student's anxiety related difficulties by the Parents and a letter from Brian McGuckin, D.C., DABCI, dated May 26, 2004.
19. The Section 504 Conference Committee Report indicated that the "committee" found the Student to be eligible for Section 504 in that the Student 1) has a physical or mental impairment that substantially limits one or more major life activity, and 2) has a record of impairment.
20. The Parent signed the Section 504/ADA Accommodation Plan on May 27, 2004, acknowledging by her signature that "I hereby acknowledge having been notified of my procedural rights under Section 504/ADA And (sic) having agreed to the contents of this plan."

21. A psycho-educational assessment was not conducted to determine if the Student had any emotional or anxiety based problems during her enrollment at Valparaiso High School by either the School or the Parents.
22. During the summer of 2005, the Student experienced increasing anxiety regarding a dread of returning to school for the approaching fall semester.
23. On August 23, 2005, the Parent placed a telephone call to the School asking for information regarding sources of counseling that may be available to "...help [the Student] be able to relax". The Parent was referred to seek assistance from a private agency at parental expense by the guidance counselor receiving the telephone call. When asked about the availability of financial assistance for such counseling, the guidance counselor told the parents to check with their insurance company. The Student's parents subsequently sought such assistance for the Student from Choices! Counseling Services at parental expense. Private counseling services began on September 21, 2005. The Student was discharged on March 27, 2006, in that "the planned treatment was completed."
24. The School's Section 504 "team" of one (the guidance counselor) again found the Student to be eligible for Section 504 on August 24, 2005.
25. Up to the time of the Student unilaterally leaving Valparaiso High School, the School had provided a Section 504 plan which included all requests for accommodations or modifications provided to the School by the Parents.
26. The Student obtained meaningful educational benefit from the general education program provided her at Valparaiso High School, up to and including the time of unilateral enrollment in South Central High School.
27. The Student, without benefit of special education or related services as defined by Article 7, has continued to receive meaningful educational benefit from the general education services and programs provided her at South Central High School in which she has been continuously enrolled since transferring from Valparaiso High School.
28. The Student passed both portions of the ISTEP in the sixth grade. However, she failed to pass the math section of the ISTEP in grades eight and ten.
29. The Student, by her parents, was unilaterally removed from Valparaiso High School in September of 2005, her junior (3rd) year of high school, and subsequently enrolled her, by choice, in South Central High School. South Central High School is located in an adjoining school corporation's area of legal settlement, and therefore is not a part of the Valparaiso School Corporation.
30. The Parents did not request additional meetings of the Section 504 Conference Committee or a Section 504 hearing in order to seek additional services for the Student at any time during the Student's enrollment at Valparaiso High School.

31. Neither the School nor the Parents referred the Student for special education under Article 7 during the Student's enrollment at Valparaiso High School.
32. The Parents did not provide the School with prior notice regarding their intent to enroll the Student in South Central High School.
33. South Central High School currently has a student population of approximately 463 students. This population has not varied significantly during the past three academic years.
34. During her elementary school years the Student earned grades in the A-B range. During her seventh grade year, the Student earned grades ranging from A to C. In the eighth grade year the Student's grades were reported to range from B to D. In her ninth grade year the Student's grades were reported to range from B to D. During her first semester of her high school experience she earned grades ranging from A to D, with a cumulative grade point average of 2.318. During the second semester of her freshman year she earned five B grades and one C, with a grade point average of 2.736. During the first semester of her sophomore year she earned four D grades, one C grade and two B grades; the B grades being earned in Art and Communication. The C grade was earned in Theatre. Her grade point average for the semester was 1.929. During her last semester at Valparaiso High School the Student earned grades of B (3) and C (3). A grade point average of 2.40 was earned. The improvement in grade point average during this final semester is attributable to numerous things; a lighter course load, a less intensive academic focus and the results of private counseling services, from Choices! Counseling Services
35. Since enrolling in South Central High School, the Student has earned grades ranging from A to D. Her current overall grade average is C+. She currently ranks 65 in a senior class of 81 students.
36. Subsequent to enrolling at South Central High School, the Student's grades for grade eleven ranged from A to F, the F grade being earned in Algebra courses. The grade of B was the median grade for grade eleven. The Student failed to pass the math section of the ISTEP on September 19, 2005. The Student passed the math section of the ISTEP on March 15, 2006. The Student has missed school during the current school year as follows: Fall 2006, two days total; Spring 2007, two one half days total.
37. Testimony of some witnesses and documents and exhibits provided by the Student suggest that the primary need of the Student in order to reduce her school-based anxiety was a smaller class size. Only a single document referred to the need to be enrolled in a smaller school and this document was not received by the School until well after the Student had unilaterally terminated her enrollment in Valparaiso High School.
38. The class sizes at South Central High School compare favorably to those as Valparaiso High School and vice versa. Class sizes, overall, are almost identical in the two schools. The primary difference between the two schools is the number of students enrolled and the size of

the physical plant. This was true at the time of unilateral transfer of the Student from Valparaiso High School to South Central High School and remains so at the time this decision is being written.

39. Subsequent to the Student's move to South Central High School, the School offered the Student the option of enrolling in the Alternative High School which is a part of the Valparaiso Community School system. This was offered only after the Student had enrolled at South Central High School. This placement was to have been a modification of the Section 504 Plan.
40. The Alternative High School is physically attached to Valparaiso High School. The Alternative High School operates as a segregated facility to the extent that students in the Alternative High School have little, if any, opportunity to interact with students attending Valparaiso High School. The Alternative School, as perceived by the community, and many of the School's faculty and administrative staff, is designed to serve students with drug or alcohol problems, those who are juvenile offenders, and those who are pregnant. The Alternative High School starts later in the school day and has different breaks from the regular High School in order to limit interaction between students attending the regular High School.
41. The Parents, during the time period leading up to the filing for this due process hearing, were not provided with information regarding Article 7 in general, or, more specifically, their due process rights under Article 7. However, Schools have no obligation to inform Parents of their due process rights under Article 7 until a written referral has been made.
42. Each of the Student's teachers from Valparaiso High School who testified stated that they had not observed any behavior of the Student while she was participating in any of their classes during the 2003-2004 or 2004-2005 school years as suggesting a need for referral for special education or other psychological or medical services.
43. Valparaiso High School's school psychologist conducted a psychological assessment during the months of October and November 2006. Date of completion is shown as November 27, 2006. The Student has no record of prior assessment conducted by the School. No other psycho-educational report is available from any other source prior to the assessment conducted by the School's psychologist during the months of October and November 2006. The School's assessment included the administration of the Wechsler Adult Intelligence Scale, 3rd edition (WAIS-III). The psychologists' report revealed the Student earned a verbal I.Q. of 94 (34th percentile), performance I.Q. of 91 (27th percentile) and a full scale I.Q. of 93 (32nd percentile). Scale scores within the verbal scales ranged from a low of 7 (comprehension) to a high of 12 (digit span). Scale scores within the performance scales ranged from a low of 6 (block design) to a high of 12 (matrix reasoning). While the VIQ, PIQ, and FSIQ are all within a very narrow range, the scatter of subtest scale scores are not. Such variation is atypical and suggests some learning channel difficulties, emotional difficulties, or other difficulties with the assessment itself.

44. The Student's Social and Developmental History, as contained in the school psychologist's report, indicates that the Student had been exposed to a significant degree of stress over a two-year period of time; that being, watching her older sister die of leukemia. Further analysis of the Social and Developmental History reports that the Student experienced multiple signs of anxiety which negatively affected her ability to interact with her peers at approximately the same time the Student left Valparaiso High School.
45. The Wechsler Individual Achievement Test-II (WIAT-II) was administered on October 25 and 26, 2006. The Student's scores were all within the average range. Standard scores ranged from 101 to 115, and percentile scores ranged from 55 to 84. These scores indicate slightly higher academic performance than would be expected based on the Student's assessed level of intellectual functioning.
46. Four teacher reports from South Central High School were completed as part of the psychological assessment conducted in October and November 2006. All teacher reports are dated as having been completed on November 11, 2006. One of the teachers completing the forms indicated that during the period of evaluation, being fall semester of 2006, the Student did not experience any difficulties in her class. One teacher reported severe problems regarding the Student's ability to contribute to classes, and a mild problem regarding test performance. This teacher stated that the Student "...keeps to herself. I do not see any interaction with peers in this class...She seems very withdrawn in class. She doesn't seem to have any friends in this class. I'm not sure about overall. She never appears happy. She just seems 'to be there'." The third teacher reported that the student had experienced mild problems in the areas of reading comprehension, listening comprehension, test performance, and contributing to class. Additionally, this same teacher reported that the Student is "...a very nice person but quite shy."
47. The Achenbach System of Empirically Based Assessment (ASEBA) was administered as part of the psycho-educational assessment conducted in November 2006. Scores were within the normal range with the exception of Withdrawn/Depressed which was rated in the border line range of scores by one teacher. Parents reported clinically significant difficulties in the areas of internalizing and "total problems" due to significant concerns regarding anxiety, depression, somatic complaints and thought problems. The Student's self ratings were reported as being within the normal range, with the exception of the areas of anxiety and depression which were rated as borderline.
48. Contained in the Clinical Psychology Associates Intake Sheet, dated November 18, 2006, the Student's father stated that there was a family history of anxiety.
49. During early November 2006, the Student, by her Parents, was referred to Kathlene Pueschel, Ph.D., Clinical Neuropsychologist, for consultation, and evaluation regarding possible anxiety based symptoms.
50. Dr. Pueschel met with the Student and her parents on November 18, 2006, and December 2, 2006, for the purpose of reviewing case records, conducting selected assessments and

providing recommendations regarding the selection of an appropriate school setting for the Student.

51. Dr. Pueschel administered the MMPI-A and Adult Sentence Completion Form to the Student during the two visits previously identified. Thus, Dr. Pueschel's report was based on reports from others, the Student's self-reports, and the results of the MMPI-A.
52. Under cross examination, when asked if the MMPI-A revealed any emotional problem the Student exhibited at the time of examination, Dr. Pueschel testified that "Other than being very naïve, having some elevation on depression and being very defensive in terms of wanting to present a good image so not acknowledging fully some of the problems she may be having, no."
53. Later, under cross examination, Dr. Pueschel testified that "The young lady still has an anxiety disorder."
54. When asked by Counsel for the Student under re-direct examination, Dr. Pueschel testified that the Student 1) exhibits a tendency to develop physical symptoms or fears associated with personal or school problems, 2) displays a general pervasive mood of unhappiness or depression, 3) does not consistently display an inability to learn that cannot be explained by intellectual, sensory, or health factors, 4) displays an inability to build or maintain satisfactory interpersonal relationships, and 5) displays inappropriate behaviors or feelings under normal circumstances.
55. Subsequent to testing and review of available records, Dr. Pueschel determined that "...it appears readily apparent that upon entering high school [the Student] was developing a pattern of significant anxiety based symptoms."
56. Dr. Pueschel's report states that the Student's "...transfer to a school setting involving smaller classes apparently met the need for flight by providing accommodations that were not being met within the very anxiety provoking setting [of Valparaiso High School]." However, Dr. Pueschel was unaware that the class sizes at the two schools in question were virtually identical.
57. Dr. Pueschel also stated that the Student currently has "no current problems" in either acquired academic skills or cognitive/intellectual skills."
58. Dr. Pueschel provided the following summary regarding the Student. "...data suggest [The Student] to be cognitively alert, astute young lady who demonstrates average cognitive abilities and acquired academic skills consistent with projected level." Dr. Pueschel attributed the Student's current and adaptive adjustment as being "... in response to accommodations offered by her current school placement."
59. Dr. Pueschel testified that she concurred with a prior diagnosis (September 21, 2005) by a Ms. Beckner, MSW, LCSW, ACSW, Therapist at Choices! Counseling Services, of

agoraphobia. Dr. Pueschel defined agoraphobia as "...an anxiety-based disorder in which a person becomes intensely afraid and either gets into a fear or a flight pattern, and then they try to avoid the situation that is the trigger for the anxiety."

60. When asked by counsel for the Student if there was any way to know what causes an anxiety disorder in an individual, Dr. Pueschel testified that "I don't know of any. I mean, in my knowledge, no."
61. The Student was in attendance throughout much of the second day of hearing. The Student was attentive to questions by counsel for both parties and the responses of witnesses. The Student maintained consistent and extended eye contact with the speaker. The Student remained seated without fidgeting, or other noticeable repetitive body movements for up to one and one half hours without a break. Prior to the beginning of the second day of hearing the Student extended a cordial greeting to the IHO, including a moderately firm hand shake, while concurrently maintaining appropriate eye contact.
62. At the time, and at no time subsequent to the Parents' filing for due process did the School offer the Student assessment to determine the possibility of being eligible for special education or related services, nor did the School offer the Student the opportunity to attend a High School within their corporation wherein enrollment would have been significantly less than that at Valparaiso High School until after the Parents had unilaterally enrolled her in South High School.
63. The chemistry teacher at Valparaiso had the Student in classes during her sophomore year of school. He stated that the Student was absent "about 20 times" and he did not ask why. He did not know who the guidance counselor or school nurse was. He stated that he had had training in recognizing anxiety disorders within the past ten years. Upon further questioning, he stated that the training actually occurred in the 1980s.
64. The Student missed seventeen days of health classes during her ninth grade school year. The health class was conducted during the first class period of the day.

CONCLUSIONS OF LAW

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 et seq. and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.
2. All Conclusion of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact which can be deemed Conclusion of Law are hereby deemed Conclusions of Law.
3. As a preliminary matter, Petitioners' requested the IHO rule regarding the possible tolling of the statute of limitations as contained in the IDEA at 20 U.S.C. § 1415 (f)(3)(C-D)(I-ii). The IHO finds that Petitioners have not provided evidence that this two-year statute of limitations should be tolled in that there is no evidence that the School withheld information from the Parent that was required under this part to be provided to the parent.

First, the Student has never been referred for special education or related services under either the IDEA or Article 7. As such, the School had no obligation to provide the Parents any information regarding Article 7. Secondly, by her signature, the Parent was informed of parental rights under Section 504 of the Rehabilitation Act of 1973 at the time eligibility for Section 504 was determined. As such, the issues in this matter will be considered as those occurring between the date of the hearing request, September 12, 2006, and September 12, 2004.

4. The issues presented in this hearing are presented below and ruled upon accordingly.
During the 2004-4005 and 2005-2006 school years:

Issue #1: Did the school fail to conduct an evaluation of the student for special education and related services as required by either Article 7 or the IDEA?

Answer: No

Schools are required to establish, maintain, and implement written procedures that ensure the location, identification, and evaluation of all students who have legal settlement within the jurisdiction of the public agency, are between the years of birth but less than twenty-two (22) years of age, and are in need of special education and related services regardless of the severity of their disabilities. (511 IAC 7-25-2 (a)) Petitioners did not allege that the School failed in its responsibilities regarding child find, per se. However, Petitioners did allege that the School failed to initiate a referral to special education under Article 7. Secondly, no referral for special education eligibility under Article 7 or the IDEA was ever initiated by the Parents, School, or anyone else. Evaluation for special education under Article 7 or the IDEA is rarely conducted without a written referral for special education. Prior written authorization for such evaluation must be provided, in writing, by the parents of a child, or the child if of the age of majority, suspected of having a disability before such evaluation can be conducted. The Parent contacted the School on several occasions during the Student's freshman and sophomore years regarding issues relating to anxiety. In response, the School offered the Student an intervention based on the requirements of Section 504 of the Rehabilitation Act of 1973 on May 27, 2004. By her signature, the Parent accepted this intervention and further acknowledged she had been informed of her rights under Section 504. The adequacy of neither the Section 504 Plan nor the procedures used to determine the Student's eligibility under Section 504 of the Rehabilitation Act of 1973 is at issue in this matter.

Issue #2: Did the school fail to appropriately and timely identify the Student as being eligible for special education and related services as required by either Article 7 or the IDEA?

Answer: No

The School could not have identified the Student as being eligible for special education and related services as required by either Article 7 or the IDEA without the Student first being referred as possibly being eligible for services and an appropriate assessment being conducted. Petitioners have failed to show that the School had received a request for such services from the Parents or anyone else. Petitioners failed to identify anyone who provided adequate reason to

the School to initiate a referral for special education services during the two years the Student attended Valparaiso High School. Information that was subsequently provided to the School that may have stimulated a referral to special education was presented well after the Student's unilateral transfer to a high school outside the Valparaiso Community School Corporation.

Issue 3: Did the school fail to educate the student in the Least-Restrictive Environment (LRE)?

Answer: No

In that the Student had not been referred for special education services nor had a psycho-educational assessment been conducted prior to the Student transferring to an out-of-district school, the Student was not eligible under Article 7 or the IDEA for special education or related services. As such, the School had no obligation to provide the Student with a free, appropriate public education in the least restrictive environment at the time the Student transferred to South Central High School. Subsequent data that have been generated from a variety of sources, including the psycho-educational assessment completed by the School's psychologist in November of 2006, does not support a conclusion that the Student is currently eligible for services as a student with a disability under either Article 7 or the IDEA.

Issue 4: Did the school fail to devise IEPs to address the Student's academic, behavioral, social, physical or emotional needs?

Answer: No

In that the Student was not determined to be eligible for services as a student with a disability under either Article 7 or the IDEA during the time period in question, Issue 4 becomes moot. Unless a student is eligible for special education or related services under one or both of the previously cited statutes, a school is under no obligation to provide an education for such a student according to an individualized education plan. However, the Student obtained meaningful benefit from the general education services and programs provided at Valparaiso High School up to the time of the Student's unilateral transfer to South Central High School. Further, the Student has obtained meaningful benefit from the general education services and programs provided at South Central High School.

Issue 5: Did the school fail to provide the Student with an IEP or IEP's that contained appropriate accommodations and modifications as would be required by the Student's academic, behavioral, social, physical or emotional needs?

Answer: No, as would pertain to either Article 7 or the IDEA.

The School had no obligation to provide accommodations or modifications under either Article 7 or the IDEA for reasons previously cited. This issue would be more appropriately addressed under a Section 504 hearing.

Issue 6: Did the school fail to prevent discipline of the Student due to manifestations of her disabilities; specifically, truancy actions(s) against the Student for missing school due to a panic disorder, agoraphobia, or an anxiety disorder?

Answer: No

Petitioners failed to provide any evidence that the Student was disciplined for any reason beyond having received a form letter from the School expressing concern for excessive absences. The letter being referenced is a form letter sent to parents of students who have excessive absences and serves as a warning of possible disciplinary actions which may occur rather than being a disciplinary action in and of itself. Further, Petitioners failed to establish a nexus between the Student's absences and a disability as defined under Article 7 or the IDEA.

Issue 7: Did the school fail to maintain disciplinary records of the Student for 2005-2006 school year?

Answer: No

The only "disciplinary record" that Petitioners allege the School failed to maintain was the original copy of the letter to the Parents regarding school attendance referred to above. The IHO has previously ruled that this communication did not constitute a disciplinary action, but rather a warning that a disciplinary action may occur unless attendance improved. In that such incidental disciplinary notices to parents do not constitute a disciplinary action the School is under no obligation to maintain them.

ORDERS

1. In that the Student is determined to have been ineligible for special education and related services at the time of her unilateral transfer from Valparaiso High School to South Central High School, and continues to be ineligible for such services, it is deemed that further Orders in this matter would be unnecessary and inappropriate.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The Student requested an extension of time in which to file a petition for review on April 20, 2007. On April 24, 2007, the Board of Special Education Appeals (BSEA) granted the request for an extension of time, extending until May 15, 2007, the time for the Student to file a petition for review, and extending the timelines for review and issuance of a written decision until June 14, 2007. The Student timely filed a Petition for Review on May 15, 2007. On May 21, 2007, the School requested an extension of time in which to file a response. On May 23, 2007, the BSEA granted the School's request such that the School's response was to be filed by June 11, 2007. The timelines for review and issuance of a written decision were also extended to and including July 11, 2007. The School timely filed its response on June 11, 2007.

The complete record from the hearing was photocopied and provided to the BSEA members on June 7, 2007. The BSEA,⁵ on June 15, 2007, notified the parties that it would review this matter with oral argument. Review was set for June 26, 2007, at 11:00 a.m. in Indianapolis. On June 21, 2007, Catherine Michael entered her appearance for the Student.

⁵Dennis D. Graft, Esq., was appointed by the State Superintendent of Public Instruction to serve in the stead of BSEA member Raymond W. Quist, Ph.D., who could not participate in this matter due to illness.

Student's Petition for Review

The Student argues the IHO's conclusions for each of the seven issues, and the order, were arbitrary and capricious, an abuse of discretion, contrary to law, and unsupported by substantial evidence. The Student argues that the School was required to conduct an evaluation pursuant to the regulations implementing Section 504 of the Rehabilitation Act, 34 C.F.R. §104.35. The Student claims the School failed to appropriately and timely identify the Student as being eligible for special education and related services under Article 7 or the Individuals with Disabilities Education Act (IDEA). The Student's slipping grades, anxiety, absences from school, and frequent trips to the nurse and guidance counselor should have led the School to refer the Student for an evaluation. The Student argues the School did not follow its own policies to explore special education for the Student. The School failed to educate the Student in the least restrictive environment, which would have been in an environment with a smaller student population. The School failed to devise individualized educational programs (IEPs) to address the Student's academic, behavioral, social, physical, or emotional needs. The School failed to provide the Student with IEPs that contained appropriate accommodations and modifications required by the Student's needs. The Student also argues the School failed to prevent discipline of the Student for manifestations of her disability, and failed to maintain the records of that disciplinary action. The Student argues that child find is an affirmative duty imposed on the School. The Parent's failure to request evaluation and identification does not relieve the School of its obligations. The Student further argues the BSEA should reverse a decision in favor of a school to make it in favor of a parent, claiming the BSEA has not ruled in favor of a parent since 1999.

School's Response to the Petition for Review

In its response, the School indicates the Student is a graduate of South Central High School. The Student previously sought transfer tuition from the Indiana State Board of Education (SBOE), seeking transfer for medical reasons. The SBOE denied the request for transfer in July, 2006. The School responds to the Student by arguing the IHO properly determined the School did not fail to conduct an evaluation as required by Article 7. The Petition alleges violations of Section 504, but the IHO did not address 504 issues. A separate hearing was held to address those concerns. The School argues it was not obligated to evaluate the Student as she did not exhibit characteristics which necessitated a referral for a special education evaluation. During the Student's two years at the School, two accommodations were identified: (1) to take examinations in the guidance counselor's office; and (2) the need to frequently use the restroom. The School made the accommodations requested by the Parents. The IHO correctly determined the School did not fail to identify the Student as eligible for special education. The IHO properly determined the School did not fail to educate the Student in the LRE. The LRE requirement doesn't apply to a student not eligible for special education. Because the Student was not eligible for special education, the School was not required to develop IEPs for the Student to address the Student's needs. The IHO correctly determined the School did not discipline the Student due to manifestations of her disability. No discipline was ever imposed on the Student. The School did not fail to maintain disciplinary records as it never disciplined the Student.

Additional Proceedings

The entire record from the hearing was photocopied and provided to each member of the BSEA. Oral argument was established for June 26, 2007, at a time and place convenient to the parties. 511 IAC 7-30-4(k). The Parent elected to have the oral argument open to the public. The Parent also elected to receive the written decision of the BSEA in electronic format. The parties received official Notice of Oral Argument on June 15, 2007.

On June 26, 2007, the parties appeared before the BSEA and provided oral argument and rebuttal, in accordance with the procedures detailed in 511 IAC 7-30-4 and in the Notice of Oral Argument. At the conclusion of the rebuttal, the BSEA inquired of counsel for the Student whether the Student objected to any of the findings of fact, as none had been identified in the petition for review. Counsel responded that the Student objected to Findings of Fact Nos. 19, 26, 41, 44, and 61, and all of the conclusions of law. The School was provided an opportunity to respond to the Student's additional objections. The BSEA further inquired of counsel for the Student as to whether she adopted the arguments raised in rhetorical paragraphs 46 through 51. Counsel acknowledged the petition was drafted by another attorney and that counsel was asking for a review on the merits of this case, rather than as argued in paragraphs 46 through 51.

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Following oral argument, the BSEA deliberated without the presence of the parties to review the issues raised in the Petition for Review, the Response thereto, and the arguments presented with reference to the record as a whole.

Based on its review, the BSEA now determines the following Combined Findings of Fact and Conclusions of Law.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

2. 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).
3. The Student had been found eligible for accommodations pursuant to Section 504. Although Section 504 procedures were not issues in this hearing, the fact that the Student received services under Section 504, and the accommodations provided to her, were part of the evidence and testimony. Unlike Article 7, Section 504 does not identify specific individuals, by title, that are required participants of a case conference committee.

Section 504's requirement is "that the placement decision is made by a group of persons . . ." 34 C.F.R. §104.35(c). The IHO did not err in using "committee" to refer to the individuals making the eligibility determination under Section 504. Finding of Fact No. 19 is supported by the evidence.

4. The testimony and evidence support the IHO's determination in Finding of Fact No. 26 that the Student obtained meaningful educational benefit while attending Valparaiso High School.
5. The Student was unilaterally removed from Valparaiso High School on August 31, 2005. Finding of Fact No. 29 is amended to reflect the correct date.
6. The Student did not begin private counseling services until after her last semester at Valparaiso High School. The last sentence of Finding of Fact No. 34 is amended to read: The improvement in grade point average during this final semester is attributable to numerous things, including a lighter course load and a less intensive academic focus.
7. A copy of the notice of procedural safeguards is required to be given at times as specified in Article 7, beginning when a student is first referred for an evaluation. 511 IAC 7-22-1(d). There is no obligation on the part of a school generally to inform parents of their due process rights before a student has ever been referred for an evaluation. The IHO's Finding of Fact No. 41 is supported by the evidence and consistent with the law.
8. The Student's older sister died when the Student was four. The Student objects to Finding of Fact No. 44, arguing that it finds the sister's death to have been within the past two years. The IHO's finding does not indicate that this stress occurred within the past two years. Rather, the IHO's finding is that the Student had been exposed to a significant degree of stress over a two-year period of time. There is nothing in the finding indicating the IHO found this two-year period of time to have been the past two years rather than two years surrounding the death of the sister. The finding is supported by the evidence.
9. Finding of Fact No. 61 is a statement of the IHO's observations of the Student during the course of the hearing. The finding is not relevant to the issues, and has no bearing on the conclusions of law.
10. The School is required to establish, maintain, and implement written procedures that ensure the location, identification, and evaluation of all students having legal settlement within the school corporation; who are from birth through age 21; and who are in need of special education and related services. 511 IAC 7-25-2. The Student does not challenge whether the School has such procedures, but argues that the School did not follow its procedures to identify and evaluate the Student.
11. The IHO found that none of the Student's teachers who testified from Valparaiso High School observed any behavior of the Student during her freshman and sophomore years suggesting a need for a referral for special education or other psychological or medical services. The evidence in the record supports this finding.

12. The IHO did not conclude, as argued by the Student, that the School had no obligation to evaluate solely because the Parent made no referral for an evaluation. The IHO recognized the School's obligation for child find. However, the findings of fact, supported by the record, show the school had no reason to suspect the Student might have a disability requiring special education and related services. None of the Student's teachers noted any difficulties in class that would cause them to make a referral. Without a reason to suspect a disability, there is no obligation to make a referral for an educational evaluation. The IHO's conclusion of law concerning Issue No. 1 is not contrary to law.
13. Because the School had no reason to suspect a disability, and the Parents did not make a referral for an evaluation, no evaluation was conducted until after this hearing was requested. The Student was evaluated in October and November, 2006. Such evaluation indicates the Student was not eligible for special education and related services. The IHO's conclusion concerning Issue No. 2 that the School did not fail to appropriately and timely identify the Student as being eligible under Article 7 or IDEA is supported by the evidence and the findings of fact, and is not contrary to law.
14. The Student is not eligible for special education. The requirements of Article 7 and the IDEA, requiring a school to provide a free appropriate public education in the least restrictive environment, are not applicable.
15. The Student is not eligible for special education. The School was not required to devise IEPs to address the Student's academic, behavioral, social, physical or emotional needs or to provide an IEP that contained appropriate accommodations and modifications. The School did provide requested accommodations to the Student pursuant to a Section 504 Plan.
16. There is no evidence the School imposed any discipline on the Student. The IHO correctly determined the School did not fail to prevent discipline of the Student due to manifestations of her disability, and did not fail to maintain disciplinary records.
17. The IHO correctly determined that no further orders are necessary or appropriate.
18. One of the concerns or arguments found in the Petition for Review was that the BSEA find in favor of the Parents based upon the perceived history of not reversing a decision in favor of the parents since 1999. This argument can be viewed at best as poor due to the logic that it is requesting that the BSEA not decide this appeal based upon the merits of the case, but upon the perception of the attorney that the BSEA has decided too many cases unfavorably to her clients in the past. If not accepted as merely being a poorly crafted and frivolous argument, counsel's argument can only be seen as accusing the BSEA of being biased and inappropriate in the manner the BSEA performs its duties. On this point it should be noted that the counsel representing the Student at the oral argument – not the same counsel who filed the Petition for Review – before the BSEA

acknowledged that the Petition for Review that was crafted by another attorney was inappropriate and would border on contempt if tendered before most judicial bodies. Therefore, it is the opinion of the BSEA that the counsel who prepared the Petition for Review be admonished that arguments of this nature are not appropriate.

ORDERS

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

1. The Findings of Fact entered by the IHO are supported by the testimony and evidence in the record. Other than the minor corrections in Findings of Fact Nos. 26 and 29, the IHO's Findings of Fact are upheld as written.
2. The IHO's Conclusions of Law and Order are upheld as written.
3. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: July 2, 2007

/s/Rolf W. Daniel
Rolf W. Daniel, Ph.D., 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).