

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of M.D.)	
And)	
Western Boone County Community School)	Article 7 Hearing No. E1267.02
Corporation and Boone-Clinton-Northwest)	
Hendricks Joint Services)	
Appeal from a Decision by)	
Thomas J. Huberty, Ph.D.,)	
Independent Hearing Officer)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

Procedural History

It should be noted from the outset that any references to the “Student” or the “Student’s representative” include the parent or parents of the student. It should also be noted that Western Boone County Community School Corporation and Boone-Clinton-Northwest Hendricks Joint Services will be referred to as the “School.”

On January 22, 2002, the Student filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed on January 23, 2002. The Student had been expelled due to bringing prescription drugs to school, and the hearing was deemed to be expedited. The original date for rendering a decision was February 5, 2002. Counsel for the Student requested an extension of time for the hearing beyond the original ten (10) day timeline. In a letter of January 30, 2001, Respondents agreed to extend the hearing if Petitioner consented to continuing the Student’s homebound instruction of five (5) hours a week and speech therapy services of twenty (20) minutes a week. The Petitioner agreed to these conditions and an Order from the IHO was issued on February 4, 2002 which changed the status of the hearing from expedited to non-expedited. The hearing dates of March 6 and 8, 2002 were established, and an extension of time to

render the decision was granted to and including April 1, 2002. A Prehearing conference was held on February 1, 2002. The parties defined the issues for determination as follows:

1. Was the IEP in place until January 9, 2002 appropriate?
2. Are the five (5) hours of homebound instruction appropriate to meet the Student's needs?
3. Were the behaviors that led to the expulsion a manifestation of the Student's disability?

The due process hearing was held on March 6 and March 8, 2002. Exhibits presented by the Student were admitted without objection from the School. The Student objected to the School's Exhibit R6 on pages 180-181 as hearsay, because they were written statements by two students who had knowledge of the incident in question, but were not being called to testify. The IHO admitted the documents with significant limitations on the weight he would place upon them, if any.

The Written Decision of the IHO

The IHO's written decision was issued on March 28, 2002. The following background information is reproduced verbatim from the IHO's written decision.

The Student is a fifteen (15) years old and is enrolled in the ninth grade in a corporation junior/senior high school. The Student is described as having many strengths, including being cooperative, pleasant, working hard to do well in school, skilled in athletics, very social, and consistently demonstrates good behavior at school. The Student was identified as being eligible for services as a student with a learning disability (primary) and communication disorder (secondary) in her previous school. There is no dispute between the parties on this eligibility. She is described in the exhibits and testimony as having difficulties with organization, staying on task, using her time wisely, and talking too much.

Upon arriving at the current school, a case conference was convened and her eligibility was maintained as learning disability and communication disorder. The IEP for 2001-02 includes goals and objectives for her learning disability in reading and mathematics. Needs listed include academic skills, organization, and responsibility. Annual goals are to improve language arts skills by receiving passing grades, pass all classes, and demonstrate age appropriate articulation skills. There is no evidence that ADHD was discussed at that IEP meeting and the Student's mother signed and approved the IEP. Testimony of school personnel indicated that the Student did not demonstrate significant behavior problems that necessitated referral or a behavior plan in her IEP.

The School conducted an educational evaluation in August and September, 2000. She was

found to have average intellectual ability and average achievement in math and reading. Deficiencies in spelling and the mechanics of written language were found. Recommendations were made to continue her eligibility as a student with a learning disability, receive instruction in organizational techniques and scheduling of academic tasks, receive training in study skills and note-taking, and an incentive program for courses the Student found to be boring and tedious. The school psychologist who evaluated the Student testified that he obtained information from a written developmental history that the Student's mother had concerns about impulsive behavior. The psychologist conducted brief interviews with the Student's teachers about behavior problems and they reported no significant concerns. There was no formal evaluation of the Student's behavior patterns, as he did not deem it necessary, based on the teachers' reports. Observations by the school psychologist in his report did not indicate concerns about her behavior.

The Student was being served in a resource room for language arts and math, and the teacher testified that the Student was making progress, was working hard, and did not demonstrate behavior problems, except for some distractibility and off-task. The special education teacher did not see impulsive behavior or problems with judgment. She checked with other teachers every three weeks, and there were no reports of distractibility or impulsiveness.

The Student had been given a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) in 1995-96, and attempts to treat her with medication were not successful. The Student's mother took her to a pediatric neurologist, who saw her on February 8, 2002. His evaluation was based upon reports from the mother and the Student and physical examination. He made a diagnosis of ADHD, but did not begin medical treatment, such as medication. He did not contact any school personnel, despite recommendations of guidelines from the American Academy of Pediatrics to obtain information from the school. The neurologist concluded that the Student has distractibility, attention problems, impulsivity, and poor judgment and concluded that "there is no doubt in my mind that her ADHD was the main contributor of her poor judgment and the present situation at school." He testified at length about the nature of ADHD and that impulsivity in girls may not always be demonstrated overtly, but shown more in talking out and less obvious behaviors. He could not rule out the possibility that the behavior was not related to her disability, but believed that it was likely if not certain in this case.

Issue #1: Was the IEP in place until January 9, 2002 appropriate?

The IHO found that the IEP in effect at the time of the manifestation determination conference had been based upon the Student's learning disability, with goals primarily focused on academic matters and organizational skills. The IHO found that there is no evidence that the Student was exhibiting significant behavior problems such as impulsivity or judgment problems that warranted the development of

behavioral goals and objectives or a behavioral plan. The IHO also found that, even though the Student's mother maintained that the Student has ADHD and is impulsive, there is not compelling evidence that, even if present, the condition is significantly impairing her educational performance. The IHO concluded that the IEP in effect as of January 9, 2002, was appropriate (511 IAC 7-26-3, 511 IAC 7-26-8, 511 IAC 7-27-6, 511 IAC 7-27-7, 34 CFR §300.7(10)(i), 34 CFR §300.7(11), 34 CFR §300.340, 34 CFR §300.346, 34 CFR §300.347).

Issue #2: Are the five hours of homebound instruction appropriate to meet the Student's needs?

The IHO found that the five hours of homebound instruction are appropriate to meet the Student's needs (511 IAC 7-27-10).

Issue #3: Were the behaviors that led to the expulsion a manifestation of the Student's disability?

The IHO found that: the evidence and testimony indicate that the School considered the Student's documented learning disability and behavior at school in conducting the manifestation determination; an appropriate plan to conduct a functional behavior assessment was made (511 IAC 7-29-5, 34 CFR §300.520(b)(1), though not completed due to the mother's wish to consult counsel; the manifestation determination was done appropriately and was in compliance with 511 IAC 7-29-6 and 34 CFR §300.523(c).

The IHO found that: there is no compelling evidence that the Student has significant behavior problems that warrant development of a behavior plan in her IEP; although the Student has been given a diagnosis of ADHD, a medical diagnosis is neither sufficient nor necessary to establish eligibility for services or modifications to an IEP; and the Student does not show impulsive or other behavior that is significantly interfering with her educational performance or that would contribute to her decision to bring medications to school. The IHO concluded that the behaviors were not manifestations of the Student's disability and the School may apply its disciplinary procedures as they would for a student without a disability (511 IAC 7-29-6, 34 CFR §300.524).

Appeal To The Board Of Special Education Appeals

Petition for Review

Student filed on April 30, 2002, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review includes the following information reproduced verbatim.

. . .7. Petitioners partially dispute Finding of Fact No. 13. The Hearing Officer finds: “The Student had been given a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) in 1995-96, and attempts to treat her with medication were not successful. There were no exhibits regarding this diagnosis, but were reported by the Student’s mother.”

The following exhibits were submitted as evidence at the hearing, which address the diagnosis or signs and symptoms of ADHD:

- A. Exhibit P1: Letter from Dr. Peter Castellanos, dated February 8, 2002.

- B. Exhibit P2: Neurologic Consultation Evaluation Note from Dr. Peter Castellanos, dated February 8, 2002.

- C. Exhibit P3: Letter from Dr. Jason Cooper, dated January 15, 2002.

- D. Exhibit P6: Letter from Dr. Steven Fisher to Dr. Richard Beesley, dated September 3, 1996. This letter was part of the School’s record received by Petitioners.

- E. Exhibit P39, page 17: A hand written note incorporated as part of the IEP Case Conference Summary dated 3/28/00. which refers to “Dr. Castalonos” [sic], “Ped. Nuerologist” [sic], “ADHD”.

- F. Exhibit P40: The Psycho-Educational Evaluation by Damon Krug, Ph.D., School Psychologist for School, and Elizabeth Wagner, MS, Educational Consultant for School, dated 8/31/00 and 9/11/00, which addresses Ms. Goodrich’s concerns of Mandi’s poor concentration, short attention span, high impulsivity, high distractibility, and organizational skills.

- G. Exhibit P44: Physician’s Referral for Physical Therapy, dated 4/4/00, which had the diagnosis of ADHD and was part of the School’s record.

- H. Exhibit P45: Referral for Occupational Therapy Evaluation, dated 4/4/00, which had the diagnosis of ADHD and was part of the School’s record.

- I. Exhibit P55-1: Individualized Education Program, dated 10/6/94 from Mandi’s prior school, which refers to Mandi’s difficulty performing in regular classroom, impulsivity, short attention

span, and exhibitions of inappropriate behavior in class and on the playground, which was part of the School's record.

J. Exhibit 55-2: A report from Mandi's teacher at her prior school dated 9/29/94, which addressed Mandi's impulsivity, restlessness, short attention span, and difficulty following directions, and which was part of the School's record.

K. Exhibit 76: Psychoeducational Evaluation from Mandi's prior school, dated August 22, 1997, which was part of the School's record.

8. Petitioners dispute Conclusions of Law 3. Issue #1: Was the IEP in place until January 9, 2002 appropriate? The Hearing Officer states "[a]lthough the mother maintained that the Student has ADHD and is impulsive, there is not compelling evidence that, even if present, the condition is significantly impairing her educational performance." First there is no question that Mandi has a diagnosis of ADHD. ADHD is a clinical diagnosis and to make that diagnosis, one must be a medical doctor. She was given the diagnosis of ADHD by her prior doctor and has again been diagnosed as ADHD by her current Pediatric Neurologist. This is not just an idea that Mandi's mother proposed. The School had as part of the School record all of the exhibits listed in Paragraph 7 (above) except Exhibit P1, P2, and P3 prior to the behavioral incident leading to Mandi's expulsion. Further, the Manifestation Determination Form (Exhibit P19) states that "Mandi's mother and school staff report that Mandi is impulsive." In Finding of Fact 7, The Hearing Officer states that she [Mandi] is described in exhibits and testimony as having difficulties with organization, staying on task, using her time wisely, and talking too much. In Finding of Fact 33, the Hearing Officer stated that the neurologist "testified at length about the nature of ADHD and that impulsivity in girls may not always be demonstrated overtly, but shown more in talking out and less obvious behaviors". . . .It seems clear that the School was aware of Mandi's diagnosis of ADHD prior to the behavior leading to her expulsion. It is also clear from the evidence and testimony that although the school personnel did not recognize the specific behaviors as ADHD; Mandi exhibited a pattern of typical symptoms of ADHD while at school, as those symptoms were defined for females by the pediatric neurologist. . . .Mandi's prior school records notified the school of Mandi's specific diagnosis of ADHD and the sometimes serious pattern of behavioral problems Mandi had demonstrated. Mandi also demonstrate a pattern of behavior at her current school, which, while not recognized as ADHD, definitely follows the pattern described by her neurologist. The goal of passing her classes and the corresponding objectives only generally addressed this pattern. The objectives listed would be the same for any general education student.

9. Petitioners dispute Conclusions of Law 5. Issue #3: Were the behaviors that led to the expulsion a manifestation of the Student's disability? As stated in Paragraph 9 (above), there is no question that Mandi has a diagnosis of ADHD. Further, the evidence and testimony support that there was a pattern of behaviors typical of ADHD demonstrated by Mandi at school prior

to the behavior leading to her expulsion. While those prior behaviors did not rise to the level of seriousness to require formal disciplinary actions, that fact would not rule out that the series of impulsive behaviors leading to Mandi's expulsion was a manifestation of her ADHD. Findings of Facts 13, 14, 15, 16, 17, and 18 describe the sequence of events leading to Mandi's expulsion. The neurologist testified that "there was no doubt in my mind that her ADHD was the main contributor of her poor judgement and the present situation at school."

The Student requests the BSEA reverse the decision of the IHO and determine that there was a causal relationship between the Student's disability and the behaviors leading to her expulsion.

The School on May 6, 2002, timely requested an extension of time within which to respond to the Petition for Review. This request was based on the need to prepare for a pre-hearing conference in another Due Process matter. The BSEA granted the request that same date, issuing an Order extending the deadline for responding to May 24, 2002, and the deadline for conducting a review and issuing a written decision to June 7, 2002. On May 3, 2002, the Indiana Department of Education, Legal Section, provided copies of the record to each member of the BSEA.

The Response to the Petition for Review

The School filed on May 24, 2002, a Response to the Petition for Review. The School indicated that the IHO's decision is correct in all respects and should be affirmed.

A. The Record Supports the IHO's Finding of Fact #13.

With regards to Finding of Fact #13 and the diagnosis of ADHD, the School claims that the Student is upset with the following sentence which states, "There were no exhibits regarding this diagnosis, but were reported by the Student's mother." The School claims: that the Student lists a number of exhibits that refer to the Student's ADHD, however, Exhibits P-1, P-2, and P-3, all are dated after the manifestation determination case conference was held on January 9, 2002; the other exhibits refer to the Student having been diagnosed with ADHD, but none of these exhibits demonstrate what testing was done or how the doctor reached this diagnosis; there were no exhibits regarding treatment for ADHD from September 3, 1996 until January 15, 2002; the Student's expert witness testified that the Student's mom had mentioned a previous diagnosis of ADHD, but did not have the report or anything like that to show it; while there were exhibits that referred to a prior diagnosis of ADHD, there were no exhibits reflecting the testing or other evaluations that were done to reach the initial diagnosis of ADHD.

The School asserts that the IHO's Finding of Fact #13 should be upheld.

B. The IHO Correctly Determined that the IEP in Place until January 9, 2002 Was Appropriate.

The School claims that IHO's Conclusion of Law #3 is supported by the IHO's Findings of Fact Nos. 5, 8, 9, 11, 12, and 34, and that the Student failed to dispute any of those Findings of Fact. The School claims that the IHO found that the Student is not exhibiting impulsive behavior that is significantly interfering with her educational performance, and this is supported by the testimony of the School personnel. The School requests the BSEA uphold the IHO's Conclusion of Law #3.

C. The IHO Correctly Determined that the Behaviors that Led to the Expulsion Were Not a Manifestation of the Student's Disability.

The School requests the BSEA affirm the IHO's Conclusion of Law #5. The School claims that the Student is relying primarily upon the testimony of Dr. Castellanos, her pediatric neurologist who based his conclusion that the Student's behavior was a manifestation of her disability solely on information provided by the Student and her mother. The School claims that: Dr. Castellanos was not present at the January 9, 2002 manifestation determination case conference, and did not meet the Student until February 8, 2002; Dr. Castellanos met with the Student for one hour and fifteen minutes, never spoke to school personnel, and at the time he wrote his February 8, 2002 letter had not completed any educational testing; the Student had only one prior incident of discipline during the 2001-2002 school year (a detention for spitting gummy bears in the cafeteria), which was not indicative of a pattern of behavior resulting from ADHD; the Student's decision to provide prescription medication to another student in exchange for money was not a manifestation of her disability; and that no evidence was presented of a pattern of behavior typical of ADHD demonstrated by the Student at school prior to the behavior that led to her expulsion.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated May 14, 2002. Review was set for June 4, 2002, in Indianapolis, in the offices of the Indiana Department of Education.

All three members of the BSEA appeared on that date. After review of the record as a whole and in consideration of the Petition for Review, and the Response thereto, the BSEA makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-30-4(j).
2. The BSEA accepts Finding of Fact #13 as written by the hearing officer.
3. The BSEA accepts Conclusion of Law #3 as written by the hearing officer.
4. The BSEA accepts Conclusion of Law #5 as written by the hearing officer.

ORDERS

In consideration of the forgoing, the Board of Special Education Appeals now issues the following Orders:

1. The BSEA upholds the decision of the hearing officer.
2. Any other motions not addressed specifically in this opinion are hereby deemed to be overruled or denied.

Date: June 4, 2002 _____

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

APPEAL STATEMENT

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