

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

**In the Matter of R. L. and the** )  
**Richmond Community School Corporation** )  
 ) **Article 7 Hearing No. 1415.04**  
**Appeal from the Decision of** )  
**Joseph R. McKinney, J.D., Ed.D.,** )  
**Independent Hearing Officer** )

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

**Procedural History**

R. L., by her Parents (hereafter, collectively referred to as the “Student”), requested a due process hearing on March 3, 2004, against the Richmond Community School Corporation (hereafter, the “School”). On that same date, Joseph R. McKinney, J.D., Ed.D., was appointed pursuant to 511 IAC 7-30-3 as the Independent Hearing Officer (IHO). The IHO notified the parties on March 9, 2004, that a pre-hearing conference would be conducted via telephone on March 12, 2004. An agenda was established for the pre-hearing conference.

The pre-hearing conference was held on that date. The IHO issued a Pre-Hearing Order on March 16, 2004, establishing the issues for the hearing, exchange dates for documents and witness lists, and hearing dates, as well as other matters pertinent to the conduct of the hearing. On March 18, 2004, counsel entered her appearance on behalf of the Student and requested a continuance. The IHO granted the continuance on March 30, 2004.

On April 1, 2004, the IHO sent the parties’ representatives a Notice of Second Pre-Hearing Conference, setting April 6, 2004, for this purpose. An agenda for the pre-hearing conference was included. The IHO issued a Pre-Hearing Order on April 19, 2004. The parties agreed to hearing dates for May 11, 12, 13, 2004, and a location for same. Exchange dates were determined. The Student requested the hearing be open to the public and that witnesses be separated. The Pre-Hearing Order also indicated the School agreed to provide the Student with a complete copy of the Student’s educational record. The parties agreed to the following issues:

1. Did the School fail to appropriately identify the Student as eligible for special education services under 511 IAC 7-17 *et seq.* (“Article 7”) dating to the second grade?
2. Did the School fail to provide an appropriate level of speech services to the Student?

3. Did the School fail to evaluate the Student in a timely manner after a parental request for an evaluation?
4. Did the School fail to develop and implement an appropriate Individualized Education Program (IEP) that addresses the unique special educational needs of the Student?
5. Is the Student entitled to compensatory educational services?

The Student, by counsel, advised the IHO on April 14, 2004, that the School had not provided a complete copy of the Student's educational records. The IHO issued a subpoena to the School directing the School to comply with the request.

On April 29, 2004, the Student amended her hearing request. This did not alter the issues as delineated in the Pre-Hearing Order of April 19, 2004. The hearing was conducted over three days—May 11, 12, and 13, 2004. At the conclusion of the hearing, the parties agreed to an extension of the due date for the written decision to and including June 4, 2004. The IHO issued his written decision on that date. The IHO determined eighty-seven (87) Findings of Fact, reached six (6) Conclusions of Law, and issued three (3) Orders.

### **The IHO's Written Decision**

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

#### ***The IHO's Finding 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 gave the IHO the authority to hear and rule upon all matters.
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 is thirteen years of age (date of birth: April 24, 1991).
4. The Student is an African-American female in the 6<sup>th</sup> grade at Charles Elementary School in the Richmond Community School Corporation (RCSC).
5. The Student attended kindergarten at Crestdale Elementary (RCSC). The school found through test screening that she scored considerably below age level in receptive language and moderately below age level in expressive language and visual memory.
6. The Student had semester grades of "S-" in reading, handwriting, and spelling (language arts) in 1<sup>st</sup> grade. Teachers noted her problems with distractibility, attention, and reading. She participated in an "at risk" program.
7. The Student attended summer school between 1<sup>st</sup> and 2<sup>nd</sup> grades and had problems with spelling, reading and understanding what she read.

8. The Student attended 2<sup>nd</sup> grade at Crestview Elementary School (1998-99 school year). The Student continued to have academic problems.
9. On October 21, 1998, the Student's mother requested that she be evaluated for a possible learning disability. The mother was concerned about the Student's difficulties in reading, writing, and spelling.
10. The 2<sup>nd</sup> grade teacher reported the Student having difficulties in the areas of word recognition, reading comprehension, and phonetic decoding. The teacher noted that the Student was working below grade level and struggled with anything involving reading and writing.
11. The mother reported to the Multidisciplinary Team in October of 1998 that Head Start in Arkansas had recommended speech therapy for the student when she was in that preschool program.
12. The school did not conduct a speech evaluation.
13. On December 3, 1998, Linda Johnson, an RCSC school psychologist conducted a psycho-educational evaluation of the student.
14. Ms. Johnson reported in her evaluation that the Student's 2<sup>nd</sup> grade teacher had modified the Student's spelling list (shortened it) and other assignments, had increased verbal reinforcement, and had moved her to the front of the classroom. Ms. Johnson noted that despite these attempts at remediation, the Student was continuing to struggle academically.
15. Ms. Johnson administered the Wechsler Intelligence Scale for Children- 3<sup>rd</sup> Edition (WISC-III), including the 6 verbal subtests and 5 performance subtests. The Student's verbal IQ was measured at 91, her performance IQ was 89, and full-scale IQ was 89.
16. The Student's scores on the Wechsler Individual Achievement Test (WIAT) for basic reading was 87, grade equivalent of K.9; reading comprehension 80, 9<sup>th</sup> percentile and 1.2 grade equivalent; and her reading composite standard score was 81, 10<sup>th</sup> percentile and 1.3 grade equivalent. Her spelling standard score was 83, 13<sup>th</sup> percentile and grade equivalent of 1.3. These scores indicated that the Student was approximately one (1) year below grade level in reading and spelling.
17. Ms. Johnson testified that school practice is to use an 18-point difference (in rare instances will accept 17 points) based on a regressed standard score from the WISC-III and achievement testing scores at or below that point to determine eligibility for special education and related services under the Article 7 category of Learning Disability. Ms. Johnson testified that this approach represented a state guideline but not state law.
18. A Case Conference Committee (CCC) meeting was held on January 25, 1999. The 2<sup>nd</sup> grade teacher noted the Student had difficulties in language arts. Ms. Johnson reported to the CCC that the Student did not meet the "18-point discrepancy." Primarily based on Ms. Johnson's interpretation of the test scores, the CCC found the Student not eligible as a student with a learning disability.

19. The psycho-educational evaluation report prepared by Ms. Johnson set forth that the Student's expected achievement was 93 and that a significant discrepancy existed at 75 (18-point discrepancy approach). The Student's WIAT reading composite score was 81.
20. Ms. Johnson wrote in her evaluation report dated December 3, 1998, that the Student's reading, written expression, and spelling scores were at the early to mid-first grade level and that she would require classroom support in these areas. Ms. Johnson also reported the Student would need additional help to be successful in a grade-level curriculum. She suggested that the classroom teacher consider several possible accommodations, which she listed in her report.
21. The Student definitely struggled academically the rest of the 2<sup>nd</sup> grade year. At the end of 2<sup>nd</sup> grade, she was reading and spelling at the low 1<sup>st</sup> grade level.
22. The Student attended the same public school in the third grade and her grades were low. The Student failed both the language arts and math portions of Indiana Statewide Testing for Educational Progress (ISTEP+) in 3<sup>rd</sup> grade.
23. The parents looked for assistance after the Student failed ISTEP+ at the Richmond Community Christian School (RCC). Testing by RCC showed the Student not scoring as well as students attending kindergarten at the school. The principal of RCC suggested to the parents that they seek tutoring for the Student at the Whitney Center.
24. On October 7, 1999, Mrs. Gibbs, Director of the Whitney Center (who holds a master's degree in education) conducted an evaluation of the Student.
25. The Student scored in the low to low-average ranges in the areas of vocabulary and comprehension. On the Peabody Picture Vocabulary test, a task of receptive vocabulary, the Student scored at the 7<sup>th</sup> percentile. The Student's scores on the tests of oral and reading comprehension were also in the low range. She scored at the 16<sup>th</sup> percentile and 9<sup>th</sup> percentile on the oral and silent reading comprehension tests.
26. Mrs. Gibbs of the well respected Whitney Center concluded that the results of the auditory processing, reading, and spelling tests indicated a severe auditory processing dysfunction which affects the Student's visual memory as well.
27. Mrs. Gibbs recommended several programs to work on remediating the Student's auditory processing and phonic deficits, her weaknesses in concept imagery, and decoding problems. Mrs. Gibbs recommended programs by Charles and Patricia Lindamood and Nanci Bell.
28. The parents enrolled the Student at the Whitney Center where she received her language arts, spelling, social studies and science during the second semester of third grade at Crestdale Elementary School.
29. Dr. Patterson, the Student's pediatrician, diagnosed her with Attention Deficit Hyperactivity Disorder (ADHD) in 1999 and prescribed adderal. Mrs. Gibbs of the

Whitney Center had recommended the Student to see the physician because of her inattentiveness.

30. The Student attended the RCC for the last quarter of third grade. She was placed in 2<sup>nd</sup> grade by Mrs. Soots and provided one-to-one tutoring in reading and language arts twice a week. She continued to attend the Whitney Center. The Student made substantial gains while attending tutoring sessions at the Whitney Center (Oct. 1999-March 2000), (June, July 2001).
31. The Student attended 3<sup>rd</sup> grade at the RCC School for the 2000-01 school year.
32. The Student's 2000-01 progress report indicated she struggled in many areas but never gave up. She continued to struggle with reading and language-oriented tasks. She had problems with attention. She received needed improvement (NI) grades for most of the entire year in vocabulary development, word attack, expression, spelling, capitalization/punctuation, and sentence structure.
33. The parents took the Student to the Children's Medical Center in Dayton, Ohio, on January 11, 2001, for a central auditory processing evaluation. The results of the testing showed the Student had moderate delays in central auditory processing skills. Specific weaknesses were identified for auditory closure, auditory figure ground, auditory memory, and dichotic listening skills.
34. The evaluation report contained 23 specific recommendations for home and classroom use. Copies of the report were provided to the RCC School and RCSC personnel.
35. The evaluation report indicated the Student had been diagnosed with ADHD by Dr. Patterson and was taking 10 mg of adderal per day, except for summer and weekends.
36. The RCSC evaluated the Student in May 2001 for suspected communication disorders. The evaluation included a Test of Auditory Perceptual Skills (TAPS), which indicated the Student had significant deficits in auditory perceptual skills. Testing by the School indicated the Student had significant problems with auditory interpretation of directions and auditory processing.
37. The speech-language therapist reported the Student's auditory perceptual difficulty was affecting academic performance. She determined that non-fluencies were hindering responses in the classroom. The School focused on perceived difficulties in fluency instead of addressing her known significant difficulties with auditory processing.
38. A CCC meeting was held on May 18, 2001, and the Student was found eligible for special education under the category of communication disorder. The IEP called for speech-language therapy for 40 minutes per week.
39. The speech-language pathologist reported the Student was administered a test called the Stuttering Severity Instrument (SII) or Stuttering Profile, and the Student had moderate noninfluencies [sic]. A copy of this test could not be located.

40. An IEP was written for the Student at the May 18, 2001, CCC meeting. Most of the IEP had been prepared (typewritten) prior to the CCC meeting. The principal testified that it is standard practice in RCSC to type IEPs before CCC meetings. He also noted that school personnel are prepared to make changes and additions to the IEP.
41. The IEP dated May 18, 2001, contained one annual goal: "Increase awareness and production of fluent speech until 80% fluency in connected speech." The present level of performance was described: "[The Student] exhibits mild non fluencies in conversational speech."
42. Six objectives for mastery were identified by the IEP and three (3) procedures of evaluation were listed: teacher observation, oral performance, and criterion-referenced test.
43. The speech-language pathologist testified that no criterion-referenced tests were conducted to measure progress toward the six (6) objectives in the IEP.
44. The present level of performance contained in the IEP did not include how the student's disability affected her involvement and progress in the general curriculum. The speech-language pathologist could not specify in measurable terms what "mild non fluencies" meant in the context of generating measurable annual goals or objectives.
45. No goals or objectives were written in the IEP to address the Student's deficits in auditory processing or auditory perceptual skills. The CCC summary/IEP documented that auditory difficulties were specifically affecting her academic performance.
46. The Student attended 4<sup>th</sup> grade (2001-02) at Charles Elementary School in the RCSC. The parents could not afford to continue to send the Student to the private RCC School nor could they afford to continue with tutoring for the child. The Student had made significant progress from tutoring at the Whitney Center.
47. The Student's grades were poor in 4<sup>th</sup> grade. Her teacher indicated she had trouble staying on task and completing assignments. She was below grade level in reading and math.
48. An annual CCC meeting was held on March 19, 2002. The CCC report stated that the student "demonstrates auditory perceptual difficulties which negatively impact academic performance." It also reported that she had been evaluated for academic difficulties in 1998, 1999, and 2001 by the RCSC, the Whitney Center, and the Children's Medical Center respectively.
49. A new IEP was written for the Student on March 25, 2002. Mrs. Linville, another school speech-language pathologist, became the Student's teacher of record. She testified that the annual goal set forth in the IEP was not measurable.
50. The Student attended the 5<sup>th</sup> grade at Charles Elementary School for the 2002-03 school year.
51. The parents informed the Student's 5<sup>th</sup> grade teacher that she was diagnosed with ADHD. They had also informed the 4<sup>th</sup> grade teacher.

52. The Student was reading at a 3<sup>rd</sup> grade level in 5<sup>th</sup> grade despite being retained in 3<sup>rd</sup> grade.
53. The mother expressed concern to the 5<sup>th</sup> grade teacher about the Student not reading grade-level material in the accelerated (students select books and this is monitored by the teacher) reading program.
54. Dr. Patterson recommended the Student be evaluated for speech and language difficulties by the Children's Medical Center. The results of the October 28, 2002, evaluation showed significant difficulty on all receptive language subtests. Auditory memory deficits were apparent as well as temporal sequencing problems.
55. The October 2002 evaluation also showed severe sentence formulation difficulties, mild-to-moderate word retrieval difficulties and a moderate fluency problem.
56. The Student continued to struggle academically during 5<sup>th</sup> grade.
57. In April 2003 the parents requested again the Student be evaluated for a suspected learning disability. The mother provided consent for evaluation on April 8, 2003.
58. The 5<sup>th</sup> grade teacher was given the request for an evaluation. He suffered a heart attack around April 11, 2003, and missed the remainder of the school year. The timeline of 60 instructional days to complete an evaluation and conduct a CCC meeting was September 19, 2003.
59. The RCSC admitted at the due process hearing that it failed to meet the September 19<sup>th</sup> deadline.
60. A CCC meeting was convened on January 20, 2004, but the full evaluation of the student had not been completed at that time (ADHD testing, etc.). The CCC meeting was not convened until March 2, 2004, approximately 11 months after parental consent was given by the parents for the evaluations.
61. The Student attended 6<sup>th</sup> grade at Charles Elementary School. She received 40 minutes per week of speech-language therapy. She had the same teacher in 6<sup>th</sup> grade as she had in the 5<sup>th</sup> grade. Her teacher reported she had difficulties putting thought into written form, had a poor auditory memory, and was inattentive
62. In November 2003 when the Student was 12 years 7 months of age, Mrs. Johnson, the school psychologist, administered a psycho-educational evaluation. She noted the Student had academic difficulties dating to 1<sup>st</sup> grade when she was in an "at risk" program.
63. The Student scores on the WISC-3 suggested the Student was functioning within the low-average range of intellectual ability. Her verbal IQ was measured at 80, performance IQ was 83, and her full-scale IQ was 87. Ms. Johnson indicated the 18-point discrepancy was 69 for determining whether the student had a learning disability.
64. The Student's academic progress was measured using the WIAT-2. She earned a standard score of 82 on the reading composite and 78 on the writing composite.

65. Ms. Johnson reported there was no significant difference between the Student's verbal scores and her performance scores.
66. Ms. Johnson reported the Student read quickly and impulsively. The Student often omitted words as she read and rarely took the time to carefully decode unknown words. Ms. Johnson reported the Student had a great deal of difficulty writing a short paragraph and her writing skills were at the early- to mid-3<sup>rd</sup> grade level.
67. Ms. Johnson concluded the Student's reading skills were at the late 2<sup>nd</sup> to mid-4<sup>th</sup> grade level. Overall, Ms. Johnson reasoned that the student had a low IQ, which caused her to learn slowly, and that her academic problems were consistent with her low-average IQ instead of a learning disability or ADHD.
68. A resource teacher administered one test of auditory perceptual skills. This test was not valid because it was not normed for children of the Student's age.
69. A CCC meeting was held on January 20, 2004. The Student was determined not eligible for any services other than speech-language therapy. Again, the CCC adhered strictly to the "18-point discrepancy model" in deciding the Student was not eligible as a child with a learning disability.
70. The parents brought an advocate from IN\*SOURCE with them, Ms. Vermillion, to the CCC meeting. She asked why the student was not eligible for services under OHI because the Student's diagnosed ADHD was adversely affecting her academic progress.
71. Ms. Vermillion requested a physician's form for Dr. Patterson to complete and the CCC agreed to reconvene the meeting after the Student saw her physician.
72. Dr. Patterson completed the school's medical referral form on February 3, 2004. The diagnosis of the student was ADHD-mixed type. The doctor wrote under "Educational Implications" that symptoms may interfere with learning and should be approached with behavioral and medical interventions.
73. Ms. Johnson also conducted testing to determine whether the Student's ADHD was interfering with her academic work. The scores on the Conner's Behavior Rating Scale, with two (2) of her 6<sup>th</sup> grade teachers as informants, were nearly two (2) standard deviations above the norm, and over three (3) standard deviations above the norm respectively for cognitive problems/ inattention on the ADHD index.
74. The DSM scores for ADHD were also elevated similar to the Connor's score for ADHD.
75. Ms. Johnson's November 2003 testing indicated the Student's IQ and achievement scores had declined since 1998. Her performance IQ dropped from 89 to 83 and full-scale IQ from 89 to 80.
76. The parents took the Student for an evaluation to John Hosterman, who holds a Ph.D. from Northwestern University in learning disabilities, and is a professional Learning Disabilities

Specialist. Dr. Hosterman administered the Stanford-Binet-4<sup>th</sup> ed. to the Student, which measured her verbal IQ at 74 and her nonverbal IQ at 94.

77. Dr. Hosterman reviewed the Student's extensive past testing including the CELF that was administered at the Children's Medical Center and her scores on the Stanford-Binet. He determined that her language disabilities, some of which had been previously diagnosed, substantially impacted her scores on the verbal portion of the IQ, contaminating the results of the tests, and invalidating the tests for the purpose of obtaining a composite IQ score.
78. Dr. Hosterman determined that because of the heavy emphasis that the Wechsler scales place on oral language, the Student's scores substantially underestimated her intelligence and resulted in misleading conclusions (i.e., not eligible under Article 7).
79. Dr. Hosterman noted that the Student's declining test scores (see number 75 above) were probably due to her lack of development in language and reading over the years, which affected her verbal ability relative to her peers.
80. Dr. Hosterman derived a full IQ score for the Student by using a non- language-based test of intelligence, the TONI-3. The TONI-3 does not measure language defects. The Student's IQ as measured by the TONI-3 was 104 (average intelligence range).
81. Dr. Hosterman diagnosed the Student's learning disabilities as very substantial. Specifically, he diagnosed the Student with : Mixed Receptive-Expressive Language Disorder; Reading Disorder; Disorder of Written Expression; and ADHD (previously diagnosed).
82. Dr. Hosterman concluded the Student meets criteria for severe learning disabilities. Dr. Hosterman said the Student's disability is Developmental Aphasia.
83. Dr. Hosterman testified the Student's learning disability is characterized by severe deficits in auditory perceptual and expressive processes involved in understanding and using both spoken and written language. These deficits are manifested in her disorders of reading, writing, listening, and speaking.
84. The Special Education Director testified that RCSC has currently identified 27% of its student population in need of special education services under Article 7. In one category RCSC has overidentified African-American children as in need of special education. Ms. Dickman, the director, testified the RCSC is taking steps to remedy the over-identification of students receiving special education.
85. Ms. Dickman testified that for the 2<sup>nd</sup> straight year she has completed an action plan for the Division of Exceptional Learners of the Indiana Department of Education (IDOE) documenting how RCSC will reduce the percentage of students who are identified with a disability under Article 7.
86. School psychologists have been made aware of the over-identification problem.
87. The Student has never passed the ISTEP examination.

### ***The IHO's Conclusions of Law***

1. The School failed to appropriately evaluate and identify the Student as eligible for special education services under Article 7.
2. The School failed to provide an appropriate level of speech services to the Student.
3. The School failed to evaluate the Student in a timely manner after parental request for an evaluation. This was a serious procedural error that harmed the Student and denied her a free and appropriate education.
4. The School failed to develop and implement an appropriate IEP that addresses the unique special education needs of the Student.
5. The Student is entitled to compensatory education.
6. The Student has been denied a free and appropriate public education both procedurally and substantively under Article 7.

### ***The IHO's Orders***

1. The Student has a severe learning disability. The School shall identify the Student as a student with a learning disability under Article 7. The School will immediately develop and implement an appropriate IEP for the 2004-05 school year based on the Student's learning disability, specifically on her language and reading needs, as well as accommodations or modifications necessary to meet her diagnosed ADHD.
2. The purpose of compensating education is to replace lost educational opportunities. Appropriate relief is designed to ensure the Student is appropriately receiving education within the meaning of Article 7 and IDEA.

As compensatory education, the School is ordered to pay for two 6-week summer sessions at the Whitney Center consisting of four (4) sessions per day beginning as soon as possible. This follows the recommendations of Ms. Gibbs, Director of the Whitney Center, and Dr. Hosterman.

3. As compensatory education, the School shall provide the Student with appropriate daily speech therapy services for 40 minutes per day during the two 6-week summer sessions that the Student is enrolled in the Whitney Center program. These sessions can take place either at the Whitney Center or at RCSC facility. The School's speech and language pathologist shall consult with staff at Whitney Center on a weekly basis during the summer.

The Student's IEP for the 2004-05 school year shall provide the Student with 30 minutes of speech therapy three times per week.

## APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The School, by counsel, requested on June 30, 2004, an extension of time to prepare and file a Petition for Review. The Board of Special Education Appeals (BSEA), by its Chair and pursuant to 511 IAC 7-30-4(i), granted the request, establishing July 27, 2004, as the date for submission of the School's Petition for Review.<sup>1</sup>

### *The School's Petition for Review*

The School, by counsel, filed its Petition for Review on July 27, 2004. It categorized its exceptions to the IHO's decision, as noted below.

1. The IHO placed inappropriate weight on misleading information of the Student's developmental history to support a legally adequate conclusion under Article 7. Particularly, the School objects to Finding of Fact Nos. 5, 6, 7, 9, 10; Conclusion of Law No. 1; and Order No. 1. The objections generally are the IHO selectively used information regarding the Student's difficulties in kindergarten, ignoring information that militates against the presence of a learning disability; the Student's problems were more pronounced at the second grade level than at the first grade level; although the Student did attend summer school between the first and second grades, but there is no information she had difficulties with spelling, reading, and comprehension during that time; the Student did experience these difficulties during the second grade, resulting in a referral to the Teacher Assistance Team (TAT) early in the school year, but there is no evidence that inattention was an underlying cause for academic concerns; the referral was initiated by the TAT as a part of the School's general education intervention process and not by the parent as the IHO indicated; the parent expressed concerns about reading, writing, and reversals, but not about spelling; the Student experienced academic difficulties in mathematics and reading during the second grade but her overall performance indicated she progressed at a rate more aptly described as "slow learner" than as "learning disabled"; the Student's academic difficulties in reading, writing, and spelling were not isolated but represented "academic difficulties in all areas"; the IHO did not include other critical information in developing the Student's evaluation background, notably the lack of behavioral or emotional concerns at the time of the psycho-educational assessment during the second grade, including the lack of any inattention arising from a diagnosis of ADHD.
2. The School's 1998 and 2003 Evaluations adhered to the requirements of Article 7 to consider each evaluation component and to include a multi-factored test of intelligence. Although the School does not direct the BSEA to any Findings of Fact, Conclusions of Law, or Orders with which it takes exception, it does acknowledge that a determination of eligibility under "learning disabilities" is to be made by a Case Conference Committee (CCC) "upon finding that a severe discrepancy exists between the student's academic

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<sup>1</sup> The School also filed a document styled as "Respondent's Response to Motion for Interim Independent Hearing Officer Orders." However, no such Motion was in the official record of the hearing below. On July 19, 2004, General Counsel for the Indiana Department of Education, on behalf of the BSEA, advised the representatives of the parties that the Motion referenced by the School had not been filed with the BSEA. The Student eventually filed the Motion with the BSEA but not until September 2, 2004.

achievement and normal or near normal potential” based upon a number of factors all delineated at 511 IAC 7-26-8(b) and including “[a]n individual standardized multifactored test of learning capacity.”<sup>2</sup> The School asserts due weight was not accorded to its evaluation results.

3. The Independent Educational Evaluation (IEE) failed to adhere to Article 7 in the interpretation of evaluative data. This exception challenges Findings of Fact Nos. 76, 77, 78, and 80 regarding Dr. Hosterman and his evaluation. The IEE relies upon a “unidimensional intelligence test” (the TONI) rather than a multi-factored one. Dr. Hosterman’s procedures violated “established procedures for assessment of children” in the administration of the TONI. Further, there was no evidence Dr. Hosterman was qualified to administer the test or review and comment on the results from other evaluations. The TONI was not administered in accordance with standard practice.
4. The School properly based its conclusions on standardized measurements. The School takes exception to Finding of Facts 16, 21, 23, 25, 66, and 67 because the IHO gave greater weight to “percentile scores or grade equivalency earned on standardized testing.” Percentile scores and grade equivalency, the School argues, “have no relevancy” to a determination of eligibility under the category of “learning disabilities.” In like manner, the School also argues that “any discrepancy found based on grade-level performance also violates established procedures.”
5. The School appropriately determined no discrepancy exists between the Student’s academic skills and learning capability. The School apparently takes exception to Finding of Fact No. 75, although this appears in a footnote (as did several previous exceptions the BSEA has noted). The School also takes exception to Findings of Fact Nos. 17, 18, 69, and 79, arguing the Student’s test scores did not decline over the years. The IHO also failed to follow “established procedure” to analyze whether a severe discrepancy existed based on standardized scores.<sup>3</sup> The School argues that the 18-point discrepancy to determine the Student ineligible, per the “LD Guidelines,” followed established procedures. The School wrote: “[I]n the absence of evidence of an established practice to the contrary, the LD guidelines continued to be an effective *guide* for analyzing psychometric data in the diagnosis of learning disabilities” (emphasis original). The School also wrote that there is no evidence that it strictly adhered to the “18-point discrepancy model’ because “in rare instances [the School] will accept 17 points.”<sup>4</sup>

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<sup>2</sup> The BSEA notes that 511 IAC 7-26-8 was not in effect at the time of the 1998 evaluation but was during the 2003 evaluation. However, the predecessor to this regulation was not substantively different. The same requirements applied.

<sup>3</sup> The BSEA notes that a “severe discrepancy,” which is nowhere defined in State or Federal law, is not determined based on standardized scores alone. The School’s assertion in this part of its exceptions actually contradicts other parts of its arguments. Its arguments are also flawed as the only “established procedures” are those in State and Federal law, and there are serious questions as to whether the School has complied with these requirements.

<sup>4</sup> As will be noted, this argument is unavailing. The so-called “LD Guidelines” were never statistically valid or reliable, lacked any scientific scrutiny, and eventually resulted in their being recalled after the Office of Special Education Programs advised the Indiana Department of Education that they could not be used for any

6. Substantial evidence does not support that the Student had a learning disability resulting from auditory and phonic deficits. The School takes exception to Findings of Fact Nos. 26, 33, 36, 37, and 83.
7. Substantial evidence does not support that the Student's disability is developmental aphasia, thus qualifying her as a student with a learning disability. The School takes exception to Finding of Fact No. 82.
8. The School appropriately considered what, if any, impact the Student's ADHD had on her educational performance. The School takes exception to Finding of Fact Nos. 72, 73, and 74, as well as Order No. 1. The School argues that a "mere diagnosis of ADHD is not tantamount to eligibility for special education services."
9. The School appropriately identified and appropriately developed IEPs specific to the Student's special education needs, as required by Article 7. The School takes exception to Findings of Fact No. 40, 43, 44, and 60 as well as Conclusion of Law No. 4 and Finding of Fact No. 60. The School also challenged the implications of Conclusion of Law No. 3 (failure to timely complete the evaluation process) although it does not challenge the Conclusion of Law itself. The School argues that either procedural anomalies did not exist or that if they did, they were not substantive enough to warrant a conclusion it failed to provide the Student with a FAPE.
10. The School's IEPs were designed to confer educational benefit to the Student. The School takes exception to Findings of Fact Nos. 36, 37, 41, 45, and Conclusion of Law No. 2.
11. The School takes exception to the awarding of compensatory educational services to the Student. The School takes exception to Findings of Fact Nos. 27 and 30; Conclusion of Law No. 5; and Order Nos. 2 and 3.

### ***The Student's Response to the Petition for Review***

On August 5, 2004, the Student, by counsel, requested an extension of time in order to prepare and file her Response to the School's Petition for Review. The BSEA granted the request on August 6, 2004, providing the Student until August 16, 2004, to file her Response.

The Student timely filed her Response on August 16, 2004. The Student argued the IHO's written decision is supported by the record as well as by the established procedure under both State and Federal law. The Student argues that the School, in its Petition for Review, relied upon and quoted extensively from various published sources regarding evaluations and appropriate interpretations of the data drawn therefrom. The Student notes that these documents were never entered into evidence at the hearing nor did any witness indicate that the witness relied upon such treatises when making the decisions the witness may have made. For this reason, the Student moves to strike such references as inappropriate "new evidence" that could have been provided at the hearing but was not. The Student further argues that the School is attempting to

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purpose. This was over twelve (12) years ago and was communicated then—and often—to the field. The "LD Guidelines" do not exist.

use these treatises, not for legal argument, but as substantive evidence of what established procedures are or should be.

Notwithstanding the School's use of treatises not introduced into evidence, the Student argues in the alternative that such treatises would support the IHO's determinations. The main points of the Student's Response relate to the following: The IHO placed appropriate weight on the Student's developmental history to support legally sufficient conclusions under Article 7. In her Response, the Student addresses each of the challenged Findings of Fact and notes in the record where the support for such factual determinations were derived.

The Student also challenges the School's reliance upon the "18-point discrepancy" from the so-called "LD Guidelines." The school psychologist, although disavowing the use of the descriptor "rigid," nevertheless testified that she applied this 18-point discrepancy through 2003 and that she deviated from this only in a case of "extremely extenuating circumstances" such as where the discrepancy was "one point off."<sup>5</sup> The Student also challenges generally the School's method for determining whether a discrepancy exists between a Student's academic achievement and normal or near normal potential.

The Student also asserts that Dr. Hosterman's findings and recommendations were in concert with State and Federal law. He indicated his professional background. In addition, he testified as to his administration of the TONI-3 in concert with multi-factored tests of intelligence, and that his evaluation technique was consistent with the language of both Article 7 and IDEA.

Although the School objected to the IHO's use of grade equivalencies and percentile scores, it was the School that consistently used them, both in its evaluations and in its ultimate determinations.

There is substantial and relevant evidence to support a determination that the Student has a language-based learning disability and that she experiences developmental aphasia. In addition, the School failed to appropriately consider what, if any, impact the Student's ADHD had on her educational performance. Although the Student does not maintain that ADHD automatically qualifies one for special education and related services under Article 7 and the IDEA, such a diagnosis does not automatically exclude one for such consideration. There was sufficient evidence to warrant the School's evaluation of the potential adverse impact of her ADHD on her educational performance.

The School failed to appropriately identify the Student's disability and failed to develop appropriate IEPs to address the Student's educational needs. Some of the procedural lapses by the School were sufficiently substantive to constitute a denial of FAPE. The Student is entitled to compensatory educational services.

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<sup>5</sup> It is apparent the School and the Student are operating from a premise or belief that such LD Guidelines exist. As noted previously and applied *infra*, there are no such guidelines and the School is charged with knowing this.

### ***Student's Motion for Supplemental Order***

On September 2, 2004, the Student, by counsel, filed with the BSEA a Motion for Supplemental Order. It appears the Student filed this Motion with the IHO after the School had requested an extension of time from the BSEA. The School filed a Response to this Motion with the BSEA, but the BSEA had not seen the Motion and advised the parties that the Motion had not been filed with it. Inexplicably, the Student waited until September 2, 2004—nearly six weeks after being advised the Motion had not been filed, after requesting an extension of time, and after filing her Response—to file the Motion with the BSEA.

Although 34 CFR § 300.514(c) and 511 IAC 7-30-3(v) do provide that where an IHO's decision concurs with the parents' contention that a change of placement is appropriate, the IHO's decision shall be treated as the placement agreed upon by the parent and the public agency. However, this is applied only where it is necessary "to protect children with disabilities from being subjected to a new program that parents believe to be inappropriate." **Federal Register**, Vol. 64, No. 48 (Friday, March 12, 1999), ***Analysis and Comments*** to 34 CFR Part 300 at p. 12615. This is not the case in this matter. Further, change of placement was not a specific issue in this hearing. Accordingly, the Motion will be denied.

### ***Review by the BSEA***

The complete record was photocopied and transmitted to the members of the BSEA on August 13, 2004. On August 17, 2004, the BSEA notified the parties that the matter would be reviewed on September 7, 2004, without oral argument and without the presence of the parties. On that date, all three members of the BSEA met in the offices of the Indiana Department of Education to review this matter. Based on this review, the following Combined Findings of Fact and Conclusions of Law with Orders are determined.

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

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. It should be noted from the outset that an IHO is not required to recite all conceivable facts that may be gleaned from documentary and testimonial evidence. The IHO is required to

make his findings based exclusively upon the evidence of record in the proceeding. Such findings must be based upon evidence that is considered substantial and reliable. I.C. § 4-21.5-3-27(d). In this matter, the IHO's Findings of Fact, for the most part, are factual recitations of evidence from the record. With the exception of Finding of Fact No. 26, the IHO's Findings of Fact are based on the record and are considered substantial and reliable.

3. Finding of Fact No. 26 refers to the Whitney Center as “well respected.” There is no evidence to support this characterization. This descriptor is unnecessary to the Finding of Fact, which is otherwise sustained.
4. Although the School often employed appropriate assessment instruments with respect to the Student, its continual reliance upon an 18-point discrepancy from the so-called “LD Guidelines” is a substantive procedural defect that denied the Student a FAPE. The “LD Guidelines” never possessed any scientific bases, was unreliable, was invalid, and directly interfered with the function of the Case Conference Committee. The employment of this long-discredited standard resulted in an application of a sole criterion for determining eligibility, which contravenes both State and Federal law. 511 IAC 7-26-8; 511 IAC 7-25-3(i). The Office of Special Education Programs notified the Indiana Department of Education over twelve (12) years ago that the “LD Guidelines” were contrary to the requirements of IDEA. The Department of Education notified all affected parties then—and continues to do so—that the LD Guidelines and the attendant 18-point discrepancy are invalid and are not to be used. The School in this matter is charged with knowing this.
5. While legitimate criticisms could have been made of Dr. Hosterman's evaluation techniques and conclusions, the time for doing so was at the hearing and not on administrative appeal. The School's attempt, through lengthy citations to treatises in its Petition for Review, to challenge his methods—without the opportunity for him to explain or otherwise justify his methods—crosses the border from legal argument to the submission of new evidence. There is no evidence in the record that School personnel relied upon and implemented any of the information supplied directly from these treatises. This is not “newly discovered evidence” in the sense that such information was unavailable prior to or during the hearing. This information was available. It simply was not employed. To permit consideration of such information at this stage of the proceedings would be to deny the other party essential hearing rights: to examine, to cross-examine, and to rebut.
6. As to the IHO's Conclusion of Law No. 1 (“The School failed to appropriately evaluate and identify the Student as eligible for special education services under Article 7”), the BSEA, by 2-1, sustains this Conclusion.<sup>6</sup>
7. The BSEA sustains the IHO's Conclusions of Law Nos. 2-6 inclusive, as these Conclusions are supported by the record and the resulting Findings of Fact.

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<sup>6</sup> BSEA member Richard Therrien believes the School may have appropriately evaluated the Student and correctly identified her learning needs. Although he dissents to the BSEA's sustaining of this Conclusion, he joins in the finding of the denial of FAPE because of the School's erroneous employment of the “LD Guidelines” and the 18-point discrepancy.

8. The BSEA notes that the first sentence of the IHO's Order No. 1 ("The Student has a severe learning disability") is actually a Conclusion of Law, especially as the IHO never actually made such a legal Conclusion in a direct fashion.
9. The BSEA sustains the IHO's Orders Nos. 1 and 2.
10. The BSEA amends the IHO's Order No. 3 to read as follows (amended language in bold face type):

As compensatory education, the School shall provide the Student with appropriate daily **language and** speech therapy services for 40 minutes per day during the two 6- week summer sessions that the Student is enrolled in the Whitney Center program. These sessions can take place either at the Whitney Center or at RCSC facility. The School's speech and language pathologist shall consult with staff at Whitney Center on a weekly basis during the summer.

The Student's IEP for the 2004-05 school year shall provide the Student with 30 minutes of **language and** speech therapy three times per week.

The amended language is to reflect the information in the record that the Student's primary difficulties are in language. The amended language is intended to assist the parties so that a disagreement will not arise that "speech services" were the only services to be considered.

### **ORDERS**

1. The Motion for Supplemental Order is denied.
2. The IHO's written decision, except as amended *supra*, is sustained.
3. Any allegation of error in the Petition for Review or Motion raised by either party not specifically addressed above is deemed denied

DATE: September 7, 2004

/s/ Cynthia Dewes  
Cynthia Dewes, 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).