BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of J.H.L.,II,	)	
the Lafayette School Corporation, and	)	
the Greater Lafayette Area Special	)	
Services Cooperative	)	**Article 7 Hearing No. 1071.98**
	)	
Appeal from the Written Decision	)	
of Cynthia Stanley, J.D.,	)	
Independent Hearing Officer	)	

This is an administrative appeal under 511 IAC 7-15-6 by the parents of J.H.L., II, (hereafter, the "Student") from the March 29, 1999, written decision of Cynthia Stanley, J.D., an Independent Hearing Officer (IHO) appointed pursuant to 511 IAC 7-15-5.

Procedural History of the Hearing

On November 18, 1998, the parents of the Student requested a due process hearing under 511 IAC 7-15-5 to challenge the placement proposed by the Lafayette School Corporation and the Greater Lafayette Area Special Services Cooperative (hereafter, collectively referred to as the "School").[1] Cynthia Stanley, J.D., was assigned the following day as the IHO.

The IHO contacted the parties' representatives to establish a prehearing conference. By notice dated November 25, 1998, the IHO set December 1, 1998, as the date for a telephonic prehearing conference to discuss procedural aspects for the conduct of the hearing. The parties were also advised of their hearing rights.

[1]Although the IHO in her written decision indicated the hearing was requested on November 4, 1998, this was the date the parents placed on their letter. The hearing was not officially requested until November 18, 1998, when the letter was received by the Indiana Department of Education.

Following the prehearing conference on December 1, 1998, the IHO issued a prehearing order, as required by I.C. 4-21.5-3-19(c) of the Administrative Orders and Procedures Act (AOPA). The issues for hearing were determined to be: (1) whether the proposed placement at a full-day day treatment program located at the Wabash Valley Hospital (hereafter, the "Hospital") was appropriate; and (2) whether the School is entitled to medical information from the Student's medical providers. The IHO established hearing dates for January 25 and 26, 1999, and again advised the parties of their respective hearing rights.

The parties, on or about December 3, 1998, filed a Joint Motion for Extension of Deadline. The IHO, in an Order dated December 7, 1998, granted the Joint Motion, extending the deadline to complete the hearing and render a written decision to March 5, 1999.

The School, on January 12, 1999, filed with the IHO a Motion for Order to Authorize Release of Records from an Indianapolis hospital where the student had received treatment. The IHO granted the Motion on January 14, 1999, and issued an Order to this effect.

A prehearing conference was conducted on January 21, 1999, after the Student and the parents requested a continuance. March 4 and 5, 1999, were set as the new hearing dates. The IHO issued a prehearing order, wherein she again advised the parties of their hearing rights.

On or about February 18, 1999, the parties filed with the IHO a Joint Motion for Continuance of Hearing and Extension of Deadline. The IHO granted the Joint Motion on February 23, 1999, and issued an Order, extending the deadline to issue a written decision to April 2, 1999, but retaining March 4 and 5, 1999, as the hearing dates.

The hearing was conducted on March 4, 1999. Both parties were represented by counsel. The parties presented evidence and testimony regarding the following two issues:

1. The appropriateness of the proposed placement at the day treatment program; and

2. The extent to which the School should have access to the Student's medical records and providers.

The IHO was asked to take official notice of 511 IAC 7-11-7(a)(4)[2] and 511 IAC 7-12-2(c).[3] Under I.C. 4-21.5-3-26(f) of AOPA, the IHO did take official notice of these regulations of the Indiana State Board of Education. The IHO's written decision was issued on March 29, 1999. She determined fourteen (14) Findings of Fact, reached three (3) Conclusions of Law, and issued one (1) Order. The IHO properly notified the parties of their right to appeal her decision.

IHO's Findings of Fact

The IHO found the Student is nine years old (d.o.b. 7/27/89). He takes a number of medications for various conditions, including current and past diagnoses of seizures/epilepsy, Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder (ADHD), Attention Deficit Disorder (ADD), asthma, Pervasive Developmental Delay, Tourette's Syndrome, disruptive behavior disorder, sleep apnea, bladder problems, and a possible mild mental handicap. Within the School context, his primary educational disability is an emotional handicap. See 511 IAC 7-11-5.

At the time of the hearing, the Student was receiving educational services through homebound instruction. The Student had been placed on homebound at the request of his psychiatrist following an incident at the School on April 10,1998, where he ingested a Clonidine patch while in time-out. This resulted in the hospitalization of the Student.

The case conference committee (CCC) met on May 20, 1998. The parents advised that the Student's psychiatrist would be requesting homebound placement.[4] The psychiatrist requested homebound instruction for the Student in a letter dated June 1, 1998. The CCC placed the student on homebound instruction despite concerns among some CCC members that the Student should continue in his School-based program.

The psychiatrist's written request for homebound was not intended to make such a placement permanent. The letter stated, in relevant part: "Would expect to start a half-day program on return to

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[2]511 IAC 7-11-7(a)(4) excludes from consideration of a learning disability those "learning problems due primarily to: (A) visual impairment; (B) hearing impairment; (C) orthopedic impairment; (D) mental handicap; (E) emotional handicap; or (F) environmental, cultural, or economic disadvantages."

[3]511 IAC 7-12-2(c) is the general statement of a continuum of placement alternatives to be considered by a case conference committee when determining the "least restrictive environment" (LRE) wherein an eligible student's Individualized Education Program (IEP) will be implemented.

[4]In Indiana, homebound instruction for a student with special health problems, temporary illness, or injury that precludes typical school attendance is preceded by a written statement from a physician that substantiates the medical need for the homebound instruction. See 511 IAC 7-12-4(b).

school." At the 60-day review, the CCC recommended the day treatment program provided in conjunction with the Hospital.[5] This proposed placement led to the aforementioned hearing request.

The current homebound teacher, who at the time of the hearing had provided instructional services at the Student's home for about a month (an hour a day, four days a week), reported that he did not believe the Student was progressing behaviorally or academically. The Student responds better to the current teacher, a male, than to the previous homebound teacher. The Student is less frequently physically and verbally aggressive with the current teacher, and is less disruptive of the tasks attempted. The current teacher is a full-time teacher in the recommended day treatment program, and he would be the Student's teacher for about one-half of his instructional day should he be placed there.

The previous teacher was female. She provided instruction to the Student from August of 1998 to the end of January of 1999 (five days a week, one hour a day).[6] The teaching schedule was frequently interrupted by the Student's illnesses and disrupted by the Student's aggression and unwillingness to attend to assigned tasks. Although the parent was helpful in controlling the Student's outbursts, the teacher felt it necessary to be accompanied by a paraprofessional beginning on November 24, 1998. The teacher and the paraprofessional both reported they observed little behavioral or academic progress.

On January 29, 1999, the former teacher arrived at the home but left when the parent expressed a concern the teacher had made a negative report to the local Child Protective Services (CPS) regarding the home-schooling of another the children in the home. The teacher denied making such a report. Notwithstanding, the teacher did not feel she should continue to provide homebound services.

According to the Student's past and current teachers, the Student is capable of working for brief periods of time on certain tasks without one-to-one adult supervision. The teachers believe, as does the school psychologist, that the proposed placement at the day treatment program would be appropriate in meeting the Student's needs. The local assistant director of special education testified she believed the day treatment program would be a less restrictive placement than his current homebound placement. The Student, she said, would still be able to succeed, "with consistent follow-up by the parents in the evenings and weekends in the home."

The parents expressed concerns for the Student's safety, as well as the safety of others, should he return to a School setting.

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[5]In Indiana, the IEP of a student placed in a homebound placement is to be reviewed every sixty (60) instructional days. See 511 IAC 7-12-3(b).

[6]The Student has also received occupational therapy services throughout his homebound placement. These services are not at issue.

The Student's psychiatrist testified that a day treatment program offering a combination of education and intensive behavioral modification would be beneficial to the Student. The psychiatrist also believes the Student needs one-to-one adult supervision. There should be no time-outs in locked rooms. The psychiatrist also recommended in a December 1, 1998, letter that the Student receive physical therapy services, in conjunction with his occupational therapy services, to address coordination problems.[7] However, the School's physical therapist evaluated the Student in January of 1999 and, based on this evaluation, concluded the Student did not require such services to support his educational program.

The day treatment program proposed by the CCC is designed for students with serious emotional handicaps. Most students in the program have behavioral problems and deficient social skills similar to the Student in this matter. The Student's current homebound teacher would be the Student's teacher for about one-half of each instructional day. There would be at least one other adult constantly present in the classroom. There would also be additional one-to-one assistance from adult personnel should the teacher request such assistance. The Student's teacher for the other half of the day would be a female teacher. At all times there would be at least two (2) adults in the classroom, with additional adults available as needed.

There would be a progressive "time-out" strategy employed to address disruptive behavior, with the first level a "head down" time-out or standing within the classroom but away from other students. The second level would be an "open milieu" outside the classroom but under the supervision of Hospital staff. Should behavioral problems continue, the next level would be a "time-out room" that is outside the classroom but with adult supervision. The door would be closed should the student continue to shout or attempt to run. The fourth level would be a "seclusion room," which is a bedroom without furniture where the student is observed from the outside. Should aggressive behavior continue, "padded restraints" would be used, with supervision. The use of physical restraints is described as being used "on very rare occasions."

The day treatment program also employs "an intensive program of behavior modification." The number of students in the classroom would remain very small. The current elementary school class has six (6) students. "Educational counseling" would also be available to the Student.

The School also testified through its nurse consultant that, due to the Student's many medical needs and medications, access to the Student's medical providers and medical records are necessary to program for the Student's day-to-day needs as well as to address any crisis situations. It is also important for School staff to be aware of some of the possible behavioral effects of the medications the Student is taking.

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[7]Physical therapy is provided only upon the referral or order of certain health service or health care providers, including a physician. See 511 IAC 7-13-5(n).

IHO's Conclusions of Law and Order

Based on the foregoing, the IHO concluded the day treatment program is an appropriate placement for the Student. The IHO also concluded the day treatment program staff must have access to the Student's medical providers and medical records. However, the IHO concluded the Student does not require physical therapy services to support his educational program.

The IHO ordered the Student placed in the day treatment program full-time through the 1999-2000 school year, or until or unless the CCC, based upon the results of the Student's triennial evaluation, should determine otherwise. The School staff are to have access to the Student's medical records and medical providers. Transportation and related services, including occupational therapy and counseling, are to be provided as recommended in the November 2, 1998, IEP.

Appeal to the Indiana Board of Special Education Appeals

Student's Petition for Review

On April 27, 1999, the Student timely appealed the written decision of the IHO. The Student's Petition for Review asserts the Order of the IHO is not supported by substantial evidence and was contrary to law. Although the IHO identified the Student's many medical needs, the description of the day treatment program (Finding of Fact No. 12) is inconsistent with the testimony of the Student's psychiatrist (Finding of Fact No. 9). While the Student's psychiatrist testified the Student needed one-to-one adult supervision, and the Student's current teacher testified the Student cannot work independently, the proposed placement would not provide one-to-one supervision for the Student. In addition, most of the students in the class are inpatients at the Hospital and have severe psychological problems. These students would not only require a great deal of attention themselves but wold also be distractions to the Student. The proposed placement also utilizes a locked time-out room, which the Student's psychiatrist does not recommend.

The Student objects to the extent to which the IHO ordered access by the School to his medical providers. The School has permission to obtain the Student's hospital and medical records "pertaining to testing outcomes, diagnoses, medications, and possible behavioral effects." This, the Student argues, is sufficient access. There should be no need to speak directly with the Student's health care providers.[8] The Student argues that any direct contact with his medical providers should only be conducted with the consent of the Student's parents and with participation of their legal counsel.

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[8]The Student's Petition for Review indicates that "such direct contact is completely inappropriate" due to an apparent pending tort claim for injuries against the School arising from the April 10, 1998, ingestion of the Clonidine patch by the Student.

The Student requests the Indiana Board of Special Education Appeals (BSEA) to order the homebound placement to continue, and to restrict direct access to the Student's health care providers until the Student's pending tort claim is resolved. This would not prevent the School from obtaining copies of the Student's existing medical and hospital records.

The School's Response to the Petition for Review

The School, on April 28, 1999, timely requested an extension of time to prepare and file a Response to the Petition for Review. The BSEA granted the Motion for Extension of Time and issued an Order that same date, granting the School an extension of time to and including May 14, 1999.

The School timely filed its Response on May 14, 1999.[9] In its Response, the School asserts there is no inconsistency between the IHO's description of the day treatment program and the testimony of the Student's needs as provided by his psychiatrist. The Student's psychiatrist testified favorably for a day treatment program. The differences of opinion involve whether the Student requires one-to-one supervision. The Student's psychiatrist believes he does; the Student's current and former teachers do not believe he requires one-to-one supervision. The current teacher testified the Student is capable of working in a small group or independently, albeit for short periods of time.

The School also objects to the Student's characterization of the psychological status and behavioral needs of the other students in the proposed classroom. There was no such testimony to this effect.

The various levels employed for time-out always include adult supervision. The Student's psychiatrist, the School represents, testified that locked time-out should not be used without adult supervision. He did not categorically rule out the use of locked time-out. The program offered, the School believes, is not inconsistent with the testimony of the Student's psychiatrist.

The School also asserts the IHO's decision with respect to access to medical providers is correct, especially in light of the many medications the Student is taking, the observed possible side effects (from lethargy to hyperactivity), and the uncertainty of the treating psychiatrist as to a present medical solution. The School argues that open communication among the School, the parents, and the medical providers is necessary in order for the Student to progress medically, behaviorally, and educationally. The School agrees the parents should not be excluded from these communications, but it argues that the

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[9]The School filed separately—and beyond the time permitted to file a Response—certain documents described in the Response "as an update to the record." These documents apparently are intended to supplement Respondent's Exhibit 9 from the hearing. However, some of these new documents bear dates that precede the March 4, 1999, hearing date. Accordingly, the BSEA will decline to consider these documents in the review of this matter.

existence of a pending claim against the School for injuries is an insufficient reason to restrict direct access when a collaborative effort would help all service providers.

Review by the Board of Special Education Appeals

On May 11, 1999, the BSEA notified the parties it would review the record in this matter, including the Petition for Review and the Response thereto, without oral argument and without the presence of the parties. The BSEA set the matter for review on Thursday, May 27, 1999, in Indianapolis, beginning at 9:15 a.m.

The BSEA did convene on that date, with all three members present. All members had previously received copies of the record and had reviewed same prior to convening for this review. In consideration of the record as a whole, the Petition for Review, and the Response thereto, the BSEA determines the following.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is the entity of the State authorized under 511 IAC 7-15-6 to review the written decisions of Independent Hearing Officers. The BSEA has jurisdiction to decide this matter.

2. The Student is nine years old (d.o.b. 7/27/89). He has a primary educational disability of emotional handicapped, as defined at 511 IAC 7-11-5.

3. The Student has a number of medical diagnoses for which he is prescribed numerous legend drugs. Some of these diagnoses include seizures/epilepsy, Oppositional-Defiant Disorder, Attention Deficit Hyperactivity Disorder, asthma, Pervasive Developmental Delay, Tourette's Syndrome, disruptive behavior disorder, sleep apnea, bladder problems, and a possible mild mental handicap.

4. The Student's psychiatrist testified that a day treatment program offering a combination of education and intensive behavioral modification would be beneficial to the Student. The psychiatrist believes the Student needs constant one-to-one adult supervision, and no time-outs in a locked room or without constant adult supervision. The psychiatrist, in a letter of December 1, 1998, recommended the Student receive physical therapy services, along with the current occupational therapy services, to address coordination problems.

5. The day treatment program proposed by the November 2, 1998, case conference committee has the following elements:
   a. The day treatment program is designed for students with serious emotional handicaps. Most of the students have behavioral problems and are lacking in social skills, similar to

the Student in this matter.

b. The Student's current homebound teacher would be the Student's teacher for about one-half of the instructional day. Additional adult personnel would be present constantly in the classroom to provide one-to-one assistance with the Student should the teacher so request.

c. A different teacher would be the Student's instructor the other one-half of the instructional day. There would be at least two (2) adults available in the classroom at all times, with additional adults available should this be necessary.

d. The day treatment program utilizes a level-system for "time outs." However, only the last level would be a locked time-out. There is adult supervision at all times. The levels are: (1) head-down time-out or standing in the classroom but away from the other students: (2) time-out in the "open milieu" outside the classroom but under the supervision of Hospital staff; (3) time-out room, outside the classroom, with adult supervision but with the door closed, should disruptive behavior continue, such as shouting or running; (4) seclusion room, which is a bedroom without furniture, where supervision is maintained from the outside; and (5) padded restraints with supervision, to be used only in rare circumstances where the aggressive behavior persists.

e. The day treatment program utilizes an intensive program of behavior modification;

f. The number of students in the elementary class would remain very small. There are currently six (6) students in the elementary classroom.

g. Educational counseling would be provided to the Student.

6. The Student's many medical and educational needs are so intertwined that one is barely distinguishable from the other. It would be impossible for the School to address appropriately the Student's medical needs during the school day if the School does not have information regarding testing outcomes, diagnoses, medications, and possible behavioral effects of medication being used, both in a singular sense and in combination. The School and the staff at the day treatment program must have access to both the Student's medical providers and records.[10]

7. The full-time day treatment program at the Hospital is the least restrictive environment for the

[10]The BSEA is mindful of the pending tort claim action resulting from the ingestion of the Clonidine patch by the Student. However, the pendency of such a claim is unrelated to the issues in this hearing. Where, as here, the medical needs of the Student are so intertwined with the Student's educational needs, it is as much a necessity for the School to have access to the Student's medical providers as it is for the medical providers to have access to the School staff, especially where so many medications are being employed in combination and the medical providers are adjusting medications in order to find the most effective combination.

Student to receive an appropriate education. However, the Student does not require physical therapy services as a related or supportive service in order to receive an appropriate education.

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals now issues the following orders:

1. The Independent Hearing Officer's written decision is sustained in its entirety.

2. The Student is to be placed full-time in the day treatment program at the Hospital for the remainder of the 1998-1999 school year and for the 1999-2000 school year, unless or until the parties may agree to a different educational placement.

3. The School and the day treatment program staff shall have access to the medical providers for the Student as well as the Student's medical records.

4. Transportation and related services, including occupational therapy and counseling, shall be provided to the Student, as recommended at the November 2, 1998, case conference committee.

Date: May 27, 1999

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

Appeal Statement

Any party aggrieved by the decision of the Indiana Board of Special Education Appeals may seek judicial review in a civil court with jurisdiction within thirty (30) calendar days of receipt of this decision, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p)