

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

In the Matter of S.M. and the Brown)
County School Corp.) **Article 7 Hearing No. 1077-98**

The parent's request for hearing was received by the Division of Special Education, Indiana Department of Education, on December 30, 1998. The Independent Hearing Officer (IHO) was appointed on that same date. On January 8, 1999, the IHO sent a letter to the parties which included preliminary instructions. A notice for a prehearing conference was issued on February 25, 1999 scheduling the conference for March 3, 1999. The IHO granted the parent's request for an extension of time on February 25, 1999, extending the date for the decision in this matter until March 15, 1999. On March 2, 1999, the prehearing conference was rescheduled for March 11, 1999. On April 26, 1999, the IHO issued an order on extension of time and a notice of hearing. The hearing was scheduled for May 19 and 20, 1999, with the decision due by May 31, 1999.

A prehearing conference report was issued on April 27, 1999. The issues for hearing were identified as :

1. Disagreement with the recommendations arising out of the causal relationship review.
2. Failure to develop and implement a behavior intervention program for the student.

On July 26, 1999, the division of special education's due process coordinator sent a letter to the IHO advising that the decision was to have been rendered by May 31, 1999. The IHO's decision was finally rendered on August 10, 1999.

The IHO's Written Decision

The IHO's written decision contained ten (10) Findings of Fact.

1. The Student, a 17-year-old male, was a freshman in high school during the 1998-1999 school year.
2. For educational purposes the Student was classified as learning disabled. The Student, prior to the 1998-1999 school year, had been educationally classified as mildly mentally handicapped; however, a re-evaluation by the public agency resulted in reclassification.
3. On December 4, 1998, the Student was given a discipline referral for possession of marijuana in violation of school policy relating to possession of drugs on school property. The facts are undisputed that the Student received from another student, at her request, a substance believed to be marijuana which he placed in his wallet. The Student was summoned to the principal's

office whereupon he disclosed the contents of his wallet. It is believed the other student was attempting to avoid detection by asking the Student to hold the contraband. The Student testified he intended to reveal the marijuana to his parents, as he had previously been instructed, when he arrived home.

4. The public agency referred its expulsion recommendation to the director of special education and the teacher of record.
5. A manifestation determination meeting was held in a timely fashion on December 8, 1998, by the case conference committee. The parent received notice and attended the meeting.
6. The Student remained in his current placement during the pendency of the manifestation determination.
7. A functional behavior assessment was performed by the public agency which revealed no significant behavior deficits. He is considered a “risk taker,” but is not reckless and knows the difference between right and wrong.
8. The case conference committee reviewed the appropriateness of the Student’s placement in relation to the alleged behavior, the Student’s ability to understand the impact and consequences of his behavior, and whether his disability interfered with his ability to control behavior.
9. All required criteria were examined and duly considered in determining the alleged behavior was not a manifestation of his disability.
10. There is no evidence to support the contention the public agency was remiss in not developing an individualized behavior intervention plan for the Student. His interpersonal relations with students and teachers were positive. His attendance was within attendance policies. And his overall behavior was within acceptable limits.

Based upon the Findings of Fact, the IHO made the following Conclusions of Law:

1. The parties and subject matter of this proceeding are properly before an independent hearing officer. 511 IAC 7-15-5.
2. Further reference - I.C. 4-21.5-3, *et seq.*; 511 IAC 7-11-7; 511 IAC 7-10-3(o); 511 IAC 7-15-2(a)(b); 511 IAC 7-15-2(e); 511 IAC 7-15-2(h)(i); and 20 U.S.C.A. § 14-15(4)(c). [sic].
3. The Findings of Fact hereinabove set forth are deemed Conclusions of Law and are, therefore, incorporated as such.

Due to the nature of the findings and conclusions, no orders were issued.

Procedural History of the Appeal

On September 21, 1999, the parent, by counsel, requested an extension of time in which to file an appeal. The Board of Special Education Appeals (BSEA) granted this request on September 22, 1999, such that the petition for review was due to be filed on or before October 25, 1999. The

parent's Petition for Appeal was timely filed on October 25, 1999. The school has not filed a response.

Parent's Petition for Review

Petition raises several objections to the IHO's written decision. Petitioner objects to Finding of Fact No. 2 in that it leaves the inference the Student had been classified as learning disabled at the beginning of the 1998-1999 school year. The classification change was not made until October 5, 1998. Petitioner disputes a portion of Finding of Fact No. 3 in that it is not clear who believed the substance to be marijuana. Petitioner claims this is important as to a determination of whether the school policy was violated. Petitioner objects to Findings of Fact Nos. 7, 8, 9, and 10 as being erroneous. Petitioner argues that the major problem in this case is the Student's disability and his ability to process information quickly. Members of the case conference committee were not sure of the criteria to be used to determine whether the Student's behavior was a manifestation of his disability. Petitioner claims the school refused to address the Student's behavior despite the concerns of the mother and other evidence in the record, including the individualized education program (IEP), re-evaluation summary and disciplinary actions and records showing behavior problems. Petitioner also objects to Conclusion of Law No. 3 to the extent they have been set out in the objections to the findings of fact. Finally, Petitioner objects that no order was issued.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on November 12, 1999, to conduct its review of the above-referenced matter without oral argument. Two members were present and had reviewed the record, the petition for review, response and other pleadings and complaints. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. The Student was seventeen years old and a freshman in high school during the 1998-1999 school year.
3. The Student had previously been classified as mildly mentally handicapped. A re-evaluation by the public agency resulted in the case conference committee's changing the Student's classification to learning disabled on October 5, 1998.
4. The most recent testing of the Student indicates an overall level of intellectual functioning that falls within the low average range. The Verbal IQ score fell within the borderline handicapped range, while

the Performance IQ score fell within the average range. A Verbal-Performance discrepancy of this direction and magnitude has been associated with individuals who exhibit learning and behavioral difficulties.

5. The Student has exhibited some behaviors which show a lack of appropriate judgment for his age. While the Student may generally know right from wrong, he cannot always appropriately process the information and will seek the assistance of his parents for an appropriate response to situations he perceives as difficult.

6. The Student has been taking medication for depression.

All votes by the BSEA regarding the above were voice votes and were unanimous.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. Finding of Fact # 2 is modified as follows:

For educational purposes the Student was classified as learning disabled on October 5, 1998. The Student, prior to the 1998-1999 school year, had been educationally classified as mildly mentally handicapped; however, a re-evaluation by the public agency resulted in reclassification.

2. Finding of Fact # 7 is modified as follows:

A functional behavior assessment was performed by the public agency which revealed significant behavior deficits due to limited intellectual capacity. He is considered a "risk taker," but is not reckless and knows the difference between right and wrong.

3. Finding of Fact # 9 is amended as follows:

Although all required criteria were examined, not all factors were duly considered in determining the alleged behavior was not a manifestation of his disability.

4. Finding of Fact # 10 is amended as follows:

There is evidence to support the contention the public agency was remiss in not addressing behavioral problems and teaching judgment skills of the Student in his IEP.

5. Conclusions of Law # 2 and # 3 are struck and replaced as follows:

Conclusion of Law # 2: The Student's behavior was causally related to his disabilities.

Conclusion of Law # 3: The school failed to address behavior concerns in the Student's IEP.

6. Findings of Fact # 3 and # 8 are upheld as written.

7. The BSEA adds the following two orders to the IHO's written decision:

Order # 1: The school may not expel the Student for the behavior exhibited on December 4, 1998.

Order # 2: The School shall reconvene the case conference committee to include a plan for addressing the Student's behaviors and judgment skills within his IEP.

All other Motions not specifically addressed herein are hereby deemed denied.

Date: _____

/s/ Raymond W. Quist, Ph.D.

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

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).