

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

In the Matter of C.M. and the)
Northwestern School Corporation and) **Article 7 Hearing No. 1123.99(CM)**
Kokomo Area Special Education Cooperative)

The hearing and appeal issues were determined to be:

1. Is the least restrictive environment for educational placement of the student in the day program at the Indiana School for the Blind (ISB) or in the regular school classroom as it relates to the following goals and objectives identified by the case conference committee: (1) the need to provide Braille instruction by a trained professional at an acceptable frequency per week in order that the student develop a learning modality; (2) the need to improve the Student’s proficiency in Braille commensurate with the student’s progression through the instructional goals and objectives in reading, writing, mathematics, and science; and (3) the need to provide orientation and mobility instruction by a trained professional.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

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 Northwestern School Corporation and Kokomo Area Special Education Cooperative will be referred to collectively as the “School.”

September 27, 1999 The Student and the School filed a request for a due process hearing with the Indiana Department of Education (IDOE).

September 30, 1999 Lon C. Woods, Esq., was appointed Independent Hearing Officer (IHO)

under 511 IAC 7-15-5.

October 27, 1999 A prehearing conference was held at the offices of the Kokomo-Center Township School Corporation.

The Student requested a thirty (30) day extension of time during the prehearing conference which was granted up to and including December 8, 1999. The parties stipulated in writing to consolidation of the hearing for the Student and two siblings.

November 22, 1999 was established as the date for the submission and exchange of witness and exhibit lists. A hearing was scheduled for November 29 and 30, 1999.

November 29, 1999 A final prehearing conference was held prior to the start of the hearing.

November 29 -30, '99 The due process hearing was conducted.

December 31, 1999 The IHO issued his written decision.

The due process hearing was conducted over two days -- November 29 and 30, 1999. The IHO's decision found that the student is a seven-year-old male (dob 10-6-92) who resides with his parents and had moved from Germany and entered the local elementary school in the 1999-2000 school year. The student has been visually impaired since birth and has been diagnosed with macular dysplasia, congenital nystagmus, and hyperopia. Two of his five siblings have been similarly diagnosed.

A comprehensive evaluation of the student was timely commenced by the School. The student was found to be visually impaired, unable to use standard large print material, and unable to successfully utilize vision as a primary channel for learning. His intellectual capacity for verbal reasoning was found to be in the average to superior range. His skills in quantitative reasoning and short term memory were rated in the average to high average categories. The Student is performing in reading and mathematics at the first-grade levels, and is functioning academically below his ability level. No formal Braille instruction had been made available to the student, but good tactile abilities with raised line formats

suggested his readiness for pre-Braille and Braille I instruction.

The student was placed in the first grade at the outset of the school year. He has had minimal success with closed circuit television and computers since large print material is of little use. The student's initial case conference committee meeting was held on September 10, 1999. The parties agreed the student was academically at the first grade level and that his annual goals should include developing readiness for Braille reading and writing, and orientation and mobility skills. Letter recognition in an enlarged presentation was also recommended. The School recommended placement in the ISB day program as the least restrictive environment. The parents disagreed with this recommendation, but agreed to reconvene following a visit to ISB.

The case conference committee reconvened on September 20, 1999. The parties agreed on the proposed instructional goals and objectives but disagreed on placement at the ISB. At the parent's request, additional intellectual and achievement testing along with an orientation and mobility evaluation were arranged through the ISB. The ISB findings with regard to intellectual and academic skills were consistent with those of the School.

The case conference committee reconvened a third time on November 15, 1999, with representatives of the ISB present. The results of the evaluations and assessments performed at the ISB were presented and discussed. The parties remained in disagreement as to the least restrictive environment for educational placement.

During the first nine-week grading period, the student received "progressing" marks in most of his readiness activities. During this time, the student was not exposed to any pre-Braille instruction. Most learning occurred through his listening skills and the use of a black magic marker pen. The testimony of the student's teachers, teaching assistants, and evaluators showed that the student's socialization skills were satisfactory and demonstrated good interpersonal relationships with students and adults. The

social and developmental history report prepared by the parent on August 9, 1999, revealed normal, age appropriate behavior, some shyness, and desirable social relationships with friends, siblings, and parents. There was nothing in the record to suggest the student had significant social and emotional deficiencies. The Student is capable of ambulating in a familiar environment such as his educational setting, and he is not at risk in such surroundings; however, stairs and curbs should be considered hazards. Orientation and mobility training was needed at his readiness level to meet safety concerns when outside the school building, and during transportation between school and home.

The IHO made four Conclusions of Law. These read as follows:

Conclusions of Law

1. A parent or public agency, including the state education agency, may request a due process hearing to resolve issues regarding student eligibility for services, the appropriateness of educational evaluation, the appropriateness of a proposed or current program or placement, or any other issue involving a free appropriate education for a handicapped student. 511 IAC 7-15-5(a)(3). In the present case, both parties requested the due process hearing to determine the least restrictive environment for educational placement of the student. This proceeding, including the parties and subject matter, is, therefore, properly before an independent hearing officer.
2. A student is visually impaired and eligible for special education services when the vision loss with best correction adversely affects educational performance. Eligibility for special education services exists for the student whose reduced visual acuity requires modifications or specialized materials such as large print or for the student whose vision cannot be utilized as a primary channel for learning due to blindness. 511 IAC 7-11-13(a)(b)(c). This student cannot use large print and other visually enhanced material for learning. Academic success has been achieved auditorily and by utilization of ~~her~~ [his] contractual Braille skills. For him, vision cannot be considered as a primary mode of learning. Introduction of pre-Braille and Braille I instruction should commence at the earliest possible date. Braille and Nemeth skills are as essential an educational tool to this student as a computer, the science laboratory, or a musical instrument is to a non-handicapped student.

3. The least restrictive environment for placement of a handicapped child is defined to be one within an educational setting comprised of nondisabled students if the student's education can be satisfactorily achieved using supplementary aids and services. 511 IAC 7-12-2(a)(1), (2) and (3). The public agency is required to develop a student's IEP prior to determination of placement in the least restrictive environment. 511 IAC 7-12-2(b)(1). Further, a continuum of placement alternatives including the provision of supplementary aids and services in the general education classroom must become a consideration in order to implement the IEP. 511 IAC 7-12-2(b) and (c).

Authority is provided at 511 IAC 7-11-13(g) for the case conference committee, after determining eligibility and developing the student's IEP, to determine placement at the ISB is the appropriate least restrictive environment. However, the case conference committee is also required to consider student-specific factors in determining an appropriate (least restrictive) educational placement. 511 IAC 7-11-13(f).

This student has been visually impaired since birth, and there exists no potential use of residual vision as a primary mode of learning. Further, the student is above average intellectually and has earned excellent grades in the regular classroom, but will require Braille and Nemeth training in order to continue to experience academic success. There is no evidence of social and emotional deficiencies. And lastly, the student is capable of functioning in the regular classroom setting with the provision of Braille and Nemeth instruction and orientation and mobility training.

There is no reference, specific or implied, in 511 IAC 7-12-2 et seq or 511 IAC 7-11-13(f) and (g) which authorizes the public agency to determine the least restrictive environment for placement contingent upon the availability of qualified personnel and appropriate supplementary aids and services. The least restrictive environment for this student is placement in the regular classroom at the appropriate grade level.

4. The public agency is required to provide a disabled student with other related services to maximize the benefits of special education. 511 IAC 7-13-5(a)(b)(14). Instruction in the use of Braille and

Nemeth code and orientation and mobility training are not precluded by the broad scope of this provision. This student is entitled to these services provided at the appropriate readiness level with professionally acceptable frequency to enable the student to achieve instructional and adaptive behavior goals and objectives.

The IHO's Order read as follows:

1. The student's IEP developed and proposed on November 15, 1999, shall be implemented forthwith, except, however, placement of the student shall be in the regular classroom of the public agency at the appropriate grade level.
2. The public agency shall provide the student not less than five (5) hours of instruction per week in Braille and Nemeth code at the appropriate readiness level by a duly qualified professional.
3. The public agency shall provide the student not less than two (2) hours per week training in orientation and mobility at the appropriate readiness level by a duly qualified professional.
4. The related services prescribed in #2 and #3 above shall be commenced forthwith.

PROCEDURAL HISTORY OF THE APPEAL

The IHO's written decision was issued on December 31, 1999. On January 24, 2000, the School requested an extension of time in order to prepare a Petition for Review. The Indiana Board of Special Education Appeals (BSEA), by order dated January 25, 2000, granted the School an extension of time to file its Response to the Petition for Review until close of business on February 18, 2000. The School's Petition for Review was received on February 18, 2000.

The BSEA notified the parties by order dated February 28, 2000, that it would conduct its review on March 13, 2000, beginning at 10:00 a.m., but without oral argument and without the presence of the parties. 511 IAC 7-15-6(k). The BSEA also notified the parties that the review would be tape

recorded and a transcript prepared. A copy of the transcript is to be sent to the representatives of the parties when available.

School's Petition for Review

The School's Petition for Review was timely filed on February 18, 2000. The School appealed for the following reasons:

IHO's Findings of Fact

The School objects to Findings of Fact #1, #2, #4, #6, #11, #13, and #15 on the ground that they are not supported by substantial evidence.

The School objects to Finding of Fact #1 on the grounds that the finding is not supported by substantial evidence. The School claims that the IHO states that the Student resides with his parents and five elementary school-aged siblings when the evidence showed that the Student has three elementary school-aged siblings and two preschool-aged siblings.

The School objects to Finding of Fact #2 on the grounds that the finding is not supported by substantial evidence. The School claims that the IHO refers to the Student as "her" when he is a male. The School argues that the finding should read "two of his five siblings have been similarly diagnosed."

The School objects to Finding of Fact #4 on the grounds that the finding that the Student is performing at grade level is not supported by substantial evidence. The School claims that the IHO suggests that the Student's evaluation shows he is performing at first grade level when he is below grade level in reading. The School also claims that the testimony of the Student's teacher showed that he is about one year behind his classmates.

The School objects to Finding of Fact #6 on the grounds that the finding that the case conference

committee concluded that the Student is academically at the first grade level is not supported by substantial evidence. The School claims that the case conference committee's report states that the Student is functioning below his ability level.

The School objects to Finding of Fact #11 on the grounds that to the extent the IHO's finding suggests that the Student is performing satisfactorily in reading, it is not supported by substantial evidence. The School claims that in paragraph 11 of the finding of fact, the IHO reports that the student received "progressing" marks in most of his readiness activities during the first nine week grading period when according to his teacher he did not receive a grade for reading for the first nine weeks because he was not reading at the time.

The School objects to Finding of Fact #13 on the grounds that the Student is a male and not a female and the testimony showed that the Student had experienced some difficulty interacting with other students and had demonstrated extreme frustration on several occasions at school.

The School objects to Finding of Fact #15 on the grounds that to the extent that the IHO's finding is the basis for his order that the Student needs two hours per week of orientation and mobility instruction, such a finding is not supported by substantial evidence. The School claims that the evidence supports a finding that the Student needs no more than one-half to one hour per week of orientation and mobility training.

IHO's Conclusions of Law

The School objects to Conclusions of Law #2, #3 and #4.

The School objects to the IHO's finding in Conclusion of Law #2 on the grounds that Conclusion of Law #2 contains a number of factual findings that are not supported by substantial evidence. The School objects in particular to the paragraph that states that the student cannot use large print and other

visually enhanced materials for learning. The School argues that the Student has used visually enhanced materials under the CCTV for math and other subjects and on the computer screen.

The School also objects to the paragraph which states that the Student has achieved success by utilization of “her” contractual Braille skills when the Student, a boy, does not have any contractual Braille skills. The School argues that the Student knows only a few letters in Grade 1 Braille, and contracted, or Grade 2 Braille is learned after Grade 1 Braille so there is no substantial evidence to support this conclusion of law.

The School also objects to the IHO’s Conclusion of Law #2 that states that the introduction of pre-Braille and Braille 1 instruction should commence at the earliest possible date because it fails to consider the recommendations of experts, who evaluated the Student, and determined that he needs to use his residual vision before transitioning to Braille. The School argues that the experts recommended that the Student should commence Braille readiness activities such as exploring objects tactually, before being instructed in beginning Braille. The School argues that there is no evidence to support the IHO’s conclusion of law that the Student must begin learning Grade 1 Braille immediately. The School claims that the IHO’s Conclusion of Law 2 is unsupported by substantial evidence, is arbitrary and capricious, and should be overruled.

The School objects to the IHO’s Conclusion of Law #3 on the ground that the IHO makes a number of statements of law, but fails to correctly apply the law to the facts presented at the hearing. The School refers to 511 IAC 7-14-1(a), 511 IAC 7-11-13(f) and 511 IAC 7-11-13(g). 511 IAC 7-11-13(g) provides that “[s]tudents who have been identified as visually impaired shall be educated in programs provided by the public school unless the case conference committee, after determining eligibility and developing an individualized education program, determines that placement at the Indiana School for the Blind is the appropriate, least restrictive placement.” The School claims that the case conference committee concluded that due to the intensity of the services the Student requires, and the fact that the

Student is behind his other classmates in reading, the appropriate placement is in the day program at the Indiana School for the Blind (ISB). The School claims that the case conference committee considered the factors listed in 511 IAC 7-11-13(f) when it determined that the day program at the ISB was the appropriate placement. The School also claims that the following factors were considered by the case conference committee: the Student's potential use of some residual vision; the Student's functioning below the rest of his class academically; the Student's need for both large print and Braille; and his expression of frustration and emotion while in his classes. The School claims that the case conference committee concluded that the intense level of services the Student requires in pre-Braille readiness, Grade 1 Braille, and visual efficiency cannot be provided in the local school. The School argues that Conclusion of Law #3 is also based on factual findings that are not supported by substantial evidence as outlined below: 1) The case conference committee and evaluator found that the Student should learn to use his residual vision through visual efficiency training which was contrary to the IHO's finding that there exists no potential use of residual vision as a primary mode of learning. 2) The IHO found that the Student had earned excellent grades in the regular classroom when his teacher testified that he did not receive a grade in reading because he is not able to read. 3) The IHO found that there is no evidence of social and emotional deficiencies and yet the testimony showed that the Student experienced frustration in class along with some acting out behaviors, such as kicking a classmate in the leg, which demonstrated that is current placement was not appropriate.

The School also argues that contrary to the IHO's conclusion of law, the availability of qualified personnel may be considered in determining what is the least restrictive environment for a student. The School argues that: 1) in determining what is the appropriate placement for a student with a visual impairment, the case conference is required to consider the student's "large print or Braille needs." 511 IAC 7-11-13(f)(5); 2) in selecting the least restrictive environment, the case conference committee must consider "any potentially harmful effect of a suggested placement on the student or on the quality of services needed." 511 IAC 7-12-2(b)(3); 3) the case conference committee considered the fact that the teacher of the visually impaired (V.I. teacher), currently has a full schedule and would not be

able to provide the services that the Student requires; 4) there is a critical shortage of V.I. teachers, and the evidence showed that there are no V.I. teachers presently available for employment; 5) that the V.I. teacher does not have experience in pre-Braille readiness activities and knowing when a student should be introduced to Braille to effectively determine those points at which the Student should be introduced to Braille; and 6) that the V.I. teacher cannot provide the visual efficiency training the Student needs.

The School argues that the case conference committee must ensure that placement is based on the IEP developed prior to the placement determination, and that the placement determination meets the individual needs of the student. 511 IAC 7-12-2(b)(1) and (2). However, the IHO ordered the same type and amount of services for all three siblings, i.e. five hours of Braille instruction per week and two hours of orientation and mobility instruction per week, without considering their individual needs. The School claims that this does not comply with the following: 1) 511 IAC 7-12-1(k) regarding the development of an individualized education program; 2) 511 IAC 7-12-2(b)(1), which requires that placement be based on the student's individualized education program; and (3) 511 IAC 7-12(b)(2) which requires that the placement decision meet the individual needs of each student.

The school objects that the IHO's order which assigns the same number of hours of Braille instruction, and orientation and mobility instruction to each student regardless of his or her individual needs demonstrates that his order is arbitrary and capricious. The School objects to the IHO's Conclusion of Law #3 on the grounds that it is contrary to law, is arbitrary and capricious, is unsupported by substantial evidence and should be overruled.

The School objects to Conclusion of Law #4 on the grounds that it misstates the law and is arbitrary and capricious as the IHO's finding that the Student's IEP can be implemented satisfactorily in the regular classroom with the provision of Braille instruction and orientation and mobility training is not supported by substantial evidence. The School claims that the IHO erroneously states that "[t]he public agency is required to provide a disabled student with other related services to maximize the benefits of

special education.” The School argues that this misstates the law, as 511 IAC 7-13-5(a) does not use the word “maximize.” The School argues that this section does require the school to provide related services, if a student needs those services to benefit from special education, but there is no maximizing provision. The School agrees that instruction in Braille and orientation and mobility training may be appropriate as related services if a student’s IEP can be effectively implemented in the regular classroom, but disagrees that the provision of Braille and orientation and mobility training as related services in the regular classroom will be sufficient to provide him a free appropriate public education.

The relief sought includes:

1. A request that the BSEA reverse the IHO’s conclusion that the appropriate placement for the Student is in the regular education classroom and vacate the IHO’s order requiring the School to provide five hours per week of Braille instruction and two hours per week of orientation and mobility training.
2. A request that the BSEA order the Student be placed in the day program at the Indiana School for the Blind.

Student’s Response to the Petition for Review

The Student filed its Response to the Petition for Review. In summary, the Student argues:

1. Petitioners agree that the Student has only three elementary school-aged siblings and two pre-school-aged siblings.
2. Petitioners agree that the Student is a male.
3. Petitioners agree that the Student arrived in the class behind the level of the other students, and that the Student is visually impaired and requires instruction in Braille. Petitioners argue that Respondents have failed to provide instruction in Braille because the sole teacher of the visually impaired is overworked; has no time left in her schedule; has not taught Braille in ten years; does not know contracted Braille, does not know Nemeth math; and it would, therefore, require the School to spend additional funds to provide those services.

4. Petitioners agree that the teacher's testimony states that the Student remains below grade level in reading. Petitioners claim that this is a result of the School's failure to provide services.
5. Petitioners state that notations on the Student's report card reflecting "modified," "special education" or other such labels are inappropriate under the law. Petitioners also state that the Student did receive "progressing" marks in subjects other than reading, but claim that it would be unfair to grade the Student in subjects (i.e. reading) when the School has not provided the student instruction in those subjects.
6. Petitioners state that the evidence shows that the Student's socialization skills, peer relationships, adult relationships, mental and emotional state are excellent. Petitioners also state that the two examples of "acting out behavior" and frustration are to be expected given the lack of instruction in areas of need. Petitioners claim that the evidence supports the IHO's finding that the Student is a healthy, happy, normal child who is frustrated because he is visually impaired and not receiving the educational services the case conference committee agree he needs.
7. Petitioners claim that the School's assertions as to the testimony of the orientation and mobility teacher is a misrepresentation. Petitioners claim that he testified that, "I would see them once a week. And we would start out, we would work to a goal in two hours each time that I saw them. Initially, especially with the young one, I think probably an hour is going to be enough, 'cause, you know, they're just - - we got the attention span tolerance there that's not going to warrant much more than an hour." Petitioners note that he also states, "It would be better to see them a couple of times a week." Petitioners argue that this testimony shows that the orientation and mobility instructor should spend one hour of direct services and an additional amount of time after the sessions with the teacher and aide explaining how to work with the children between sessions. Petitioners state that the IHO's Finding of Fact #15 is clearly supported by substantial evidence.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The BSEA convened on Monday, March 13, 2000, to review the Petition for Review and the Response thereto in consideration of the record as a whole. All members were present and had reviewed the record. The review was tape recorded. A transcript will be made from the tape and provided to the parties by the IDOE.

In consideration of the record, the Petition for Review, and the Response thereto, the BSEA now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. The BSEA changes Finding of Fact #1 to read “The student is a seven-year-old male (dob 10-6-92) who resides with his parents and three elementary school-aged and two pre-school aged siblings.”
3. The BSEA changes the word “her” to “his” in Finding of Fact #2.
4. The BSEA changes Finding of Fact #4 in part, by deleting “reading and” in line 4 on page 5.
5. The BSEA accepts Finding of Fact #6 as written.
6. The BSEA accepts Finding of Fact #11 as written.
7. The BSEA accepts Finding of Fact #13 as written with the exception of the word “she” be changed to “he.”
8. The BSEA accepts Finding of Fact #15 as written.
9. The BSEA accepts Conclusion of Law #2 as written with the exception of the word “her” be changed to “his” in the sentence beginning “Academic success has been achieved . . .”
10. The BSEA accepts Conclusion of Law #3 as written.
11. The BSEA accepts Conclusion of Law #4 with the exception that the word “maximize” be changed to “permit.”

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. Order #1 is accepted as written.
2. Orders #2 and #3 are accepted as written.
3. Any other matters not specifically addressed by the BSEA in this written decision are hereby deemed denied or dismissed.

Date: March 17, 2000 _____ /s/Cynthia Dewes _____

Cynthia Dewes, 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).