BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of H.S., and the	)	
West Lafayette Community School	)	
Corporation and the Greater Lafayette Area	)	**Article 7 Hearing No. 1401.04**
Special Services	)	
	)	
Appeal from a Decision of	)	
Thomas J. Huberty, Ph. D.,	)	
Independent Hearing Officer	)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History and Background

The Student's[1] request for a due process hearing was received by the Indiana Department of Education, Division of Exceptional Learners, on January 5, 2004. On January 5, 2004, Thomas J. Huberty, Ph.D., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO).

A pre-hearing conference was scheduled for January 16, 2004. On January 7, 2004, counsel for the School[2] filed a motion to dismiss the hearing, claiming 1) the student has never been evaluated for special education; 2) the student has never been identified as eligible for services under 511 IAC 7-17 et seq. ("Article 7") or Section 504 of the Rehabilitation Act of 1973; 3) the School has never been provided with an outside evaluation of the Student regarding potential eligibility; and 4) the School offered a special education evaluation and was awaiting parental permission to evaluate. In reply, the advocate for the Student, in a four-page response, asserted that the School failed to properly evaluate, identify, and provide an appropriate education to the student, and failed to notify the parent of his procedural safeguards. By a letter dated January 9, 2004, the IHO decided to withhold ruling on the School's motion until January 19, 2004. The Student requested a Subpoena Duces Tecum from the School to release certain documents. However, on January 13, 2004, the School made all records available, negating the need for a subpoena.

On January 16, 2004, the IHO conducted a telephonic pre-hearing conference. At the conference, it was determined that the School would conduct an educational evaluation. This would be followed by a case conference committee meeting to determine whether the Student was eligible for special education services. The evaluation was to be completed by February 6, 2004, and the case conference process to discuss the evaluation

[1] Student refers to both the Student and the Parent.
[2] West Lafayette School Corporation and Greater Lafayette Area Special Services will be referred to collectively as the "School."

was to be completed no later than February 20, 2004. Subsequent to the pre-hearing conference, the IHO, in an order dated January 19, 2004, denied the School's motion to dismiss. Additionally, the IHO granted the School's request for an extension of time in order to conduct the educational evaluation. The IHO also extended the due date for the issuance of a written decision to March 22, 2004.

At the case conference on February 20, 2004, the Student was found eligible to receive services under the category of Other Health Impairment (OHI). See 511 IAC 7-26-12. That same day another pre-hearing conference was convened during which the hearing arrangements were finalized. Furthermore, the IHO requested that the Student submit a list of issues for the hearing, which was sent to the IHO and the School's counsel on February 23, 2004.

In the final pre-hearing conference on February 23, 2004, both parties jointly requested an extension of time. A pre-hearing order was issued on February 24, 2004, which established arrangements for the hearing, including hearing dates of April 6, 7, and 8, 2004. The hearing was determined to be non-expedited, and an extension of time was granted, extending the decision date to May 3, 2004. The order identified two issues for hearing:

1. Was the Student's behavior that led to the School's disciplinary action a manifestation of her disability?
2. Is the Student entitled to compensatory education services?

The Student, in a letter dated March 1, 2004, objected to the non-expedited status, the granting of the extension of time, and the specific framing of the issues. On March 11, 2004, the IHO issued another pre-hearing order, rephrasing the issues as follows:

1. Was the incident that resulted in the disciplinary action taken by the School influenced by the Student's disability?
2. Is the Student entitled to compensatory educational services?

The IHO also noted that the extension of time had been requested by both parties. The IHO attempted to contact the Student's representative to discuss other concerns she had raised, but the Student's representative was unavailable and would be so until March 29, 2004.

The hearing was closed to the public and conducted on April 6, 2004, and April 8, 2004. Witnesses were ordered separated with instructions not to discuss their testimony with others.

The IHO's Written Decision

The IHO issued his written decision on April 27, 2004. The IHO determined thirty-nine (39) Findings of Fact.[3]

The IHO's Findings of Fact

1. This matter was properly assigned to this IHO pursuant to the Administrative Orders and Procedures Act (AOPA), IC 4-21.5 *et seq.*, and 511 IAC 7-30-3, which give the IHO the authority to hear and rule upon all matters presented.

2. All Findings of Fact that can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact.

3. It was determined that all due process procedures were in compliance with requirements of 511 IAC 7-30-3 and IC 4-21.5 *et seq.*

4. The Student is a girl aged fifteen (15) years old who is in the ninth grade in the high school of the school corporation.

5. On December 17, 2003, the Student became ill and went home, leaving her purse in the art room. That evening, a custodian found the purse and turned it in to the office of the assistant principal.

6. The purse was opened by the assistant principal to identify its owner. In the purse was an unlabelled bottle containing 94 pills of a prescription drug identified by the school nurse as Adderall, a controlled substance for the treatment of Attention Deficit Hyperactivity Disorder (ADHD). Most of the pills were whole, and a few had been cut into two pieces.

7. When the Student returned to school on December 18, 2003, a conference was held with the Student, her father, and school administrators. The Student testified that she believed the purpose of the meeting was to return her purse. The Student admitted that the drugs were hers and had been prescribed for her, although she was no longer taking them. That medicine had been discontinued in 2001 and she began taking Concerta, another medication to treat ADHD, which she did not have to take at school.

8. School policy requires that all prescribed drugs to be taken at school be made known to the school, which arranges for dispensing. The father and Student were informed that she would be suspended immediately, pending expulsion for violating school policy on use or possession of drugs. The suspension was effective December 19, 2003.

[3] The IHO's decision is reproduced in the entirety. It is edited only as to format. The substance of the IHO's decision remains intact.

9. The Student testified that she did not know the drugs were in her purse. She stated that, at the end of each school year, remaining medications are given to students to take home. It was her belief that she put the medicine in her purse in May of 2001, after she had taken them home. She testified that she believed the pills were put in the purse and remained there until they were found at school. She stated that the pills were in a zippered pocket in the purse, which she did not use often. She also stated that she did not know how the pills came to be in the purse.

10. The Student testified that she used the purse only occasionally to carry her make-up in an outside pocket and she did not use the zippered pocket. She stated that she had been using the purse for about a month when the pills were found. The Student testified that she was not given an opportunity to explain why she had the pills at school.

11. The father took the Student to complete a urinalysis drug test, which determined that there was no evidence of drugs in her system at the time. He was hopeful that if she were found to be not taking drugs, she would be permitted to return to school.

12. The father testified that he did not know how the drugs came to be in the Student's purse. With regard to whether he believed the behavior was a manifestation of her disability, he did not express a definite opinion, but suggested that her problems with inattention may have been the contributing factor. He is not a licensed mental health or education professional.

13. The Student testified that she had been given information about the School's drug policy at the beginning of the school year, but did not read it. She stated that "...I know that we weren't suppose[d] to have like Tylenol or any of that. We weren't suppose[d] to have anything on school grounds."

14. The school nurse testified that she verified that the pills were Adderall and were used to treat ADHD. At the time of the incident, she was not dispensing any medications to the Student and was unaware that she had ADHD. She testified that the Student admitted that the pills and purse were hers and quoted her as saying, "I'm not doing anything wrong with these this time, not like when I was selling them in junior high school." She could not recall if the Student stated that she did not know that the pills were in the purse. The nurse opined that the Student knew the pills were in the purse, knew about the policy about carrying medications at school, and understood that having them could be viewed as inappropriate. She testified that she assumed the Student knew the pills were in her purse.

15. During the manifestation determination phase of the February 20, 2004, case conference, the school nurse concluded that having the pills was not a

manifestation of the Student's ADHD because she knew she should not have them, was adamant about not doing anything wrong, and referred back to when she did have medications at school in the seventh and eighth grades.

16. The school principal testified that she attended the December 18, 2003 meeting with the Student, her father, and the assistant principal. She testified that the Student started talking right away that she was not using or selling drugs, but did not recall if the Student talked about whether she knew the pills were in the purse. The principal did believe that the Student was given ample opportunity to explain, but did not recall if she was asked why the pills were in the purse. The Student did not say that she did not know the pills were in the purse and did not deny they were hers.

17. The assistant principal testified that he found the purse in his office on the morning of December 18, 2003. He testified that he recognized it immediately by a word and a logo on it because, on December 2, 2003, he had searched it. Based on information from other students, he had reports that the Student and others may have had drugs in their possession on school grounds. He asked permission to search her purse, backpack and locker. She agreed and the principal gave a detailed description of how the search of the purse was done. Its contents were emptied onto the floor and he searched inside it. No drugs were found and he did not recall breaking the inside pocket zipper.

18. During the discovery of the pills, the assistant principal testified that he opened the outside flap of the purse to find identification and that the pills were in the unlabelled bottle clearly visible on the top of the contents. He testified that he was certain that the purse was the same one he searched on December 2, 2003. He testified that no one prevented the Student from trying to explain the situation and that no discussion of ADHD was presented by her or her father.

19. During rebuttal testimony, the Student testified that the assistant principal did not search the purse on December 2, 2003, because it was in her locker due to school policy that purses cannot be taken into classrooms.

20. The evidence and testimony indicate that the Student did not attempt to explain why she had the pills in her purse or that school personnel specifically asked her to explain their presence.

21. In third grade, the Student's teacher suggested that she might have ADHD and recommended that she be evaluated. Her father took her for an evaluation, which resulted in a diagnosis of ADHD and prescription of medication to address it.

22. The records indicate that in the third grade when she was referred by the teacher, she was getting primarily "excellent" grades with a few "good" grades. In first and second grade, she was doing well. In grades four and five, she received "A's" and "B's" with only one "C+" in that two-year period.

23. In grade six, a significant decline in grades was noted, ranging from "B+" to "F." The decline in grades coincided with a traumatic personal event involving her mother. The decline continued through grades seven and eight. In seventh grade, teachers' comments included low test and quiz performance, failure to complete assignments, and not being prepared for class. In grade 8, she continued to demonstrate low, but passing grades, with teacher comments of "a pleasure to have in class" and "improved class participation."

24. The Student testified that she did find it difficult at times to make the transition to junior high school where there were more classes and going from class to class.

25. During the current ninth grade year, her performance during the first semester was lower than the prior year, with a "D+,""D-," "D," and three "F's." Teacher comments included lack of effort, frequent absences and tardies, incomplete assignments, inattention, and work not handed in on time. She was suspended on December 19, 2003 and placed on homebound instruction.

26. The Student and her father testified that they had told various teachers and a counselor at the School that she had ADHD. There is no evidence that any written documentation to that effect was provided to the School or that there was a written request for assistance or referral. The Student and her father testified that they received an information packet at the beginning of the school year, which included information on how to access special education services. They had not read the student handbook provided to them.

27. The homebound teacher testified that the Student was making progress toward graduation and was passing all subject areas at mid-term with three "C's" and two "B's." Her grades at the time of the hearing were in the "B" and "C" range, and algebra in the "D" range.

28. Standardized group test scores in grades 1, 3, 4, 6, and 7 were average to above average, indicating that she was progressing in the curriculum.

29. The Student's records indicate a few disciplinary records for tardies and other relatively minor infractions. She was not considered to exhibit significant behavior problems in the classroom which were different from her peers, other than inattention, organization, and other problems noted in the record.

30. At the time of the suspension, the Student had not been evaluated by the School or been determined to be eligible for special education services. When the request for a hearing was submitted, the School offered to complete an educational evaluation. The parent consented to the evaluation, which was completed on January 26, 2004.

31. Evaluation results indicated that the Student had average ability and average to above average achievement, with reading comprehension and reading fluency skills to be significantly higher than her reading decoding skills. Adaptive skills as reported by the father were below average. Self-reports of social-emotional functioning indicated concerns in depression, sense of adequacy, and anxiety. Behavior ratings from parents and teachers indicated significant in externalizing areas (e.g., hyperactivity, aggression, conduct problems) and internalizing areas (e.g., anxiety, depression, withdrawal). The psychologist concluded that the Student had significant attention problems, as well as some possible emotional problems associated with sadness, mood, and unhappiness. He reported that the Student had engaged in some self-injurious behavior at times.

32. The case conference summary indicates that the school psychologist expressed that the Student intellectually understood the consequences of her actions and that nothing in the evaluation information was related to her disability. The summary also states that the School personnel were of the opinion that the Student could have controlled herself.

33. In the case conference on February 20, 2004, school personnel concluded that the behavior of bringing the pills to school was not a manifestation of her disability.

34. The School's code of student conduct prohibits "...knowingly possessing, providing, transmitting to another person, or recently consuming or ingesting a controlled substance, unauthorized drug or its paraphernalia.…"

35. In the "Notice of Student Suspension-Pending Expulsion" document dated December 19, 2003, it was stated that an oral statement of the charges was made, the Student admitted responsibility, and she was given an opportunity to explain her conduct.

36. Development of an IEP was attempted at the February 20, 2004 case conference, which included goals and objectives for ADHD behaviors of inattention, hyperactivity, organization/assignment completion, and administration of medication. Testimony indicated that the IEP was to be implemented in the fall of 2004-05 when she would return to school.

37. The Student's father and advocate did not agree with the proposed IEP and manifestation determination conclusion and did not sign it.

38. Publications in the Petitioner's exhibits (which are not evidence specifically about the Student) describe the three major characteristics of ADHD as being inattention, impulsivity, and hyperactivity, which are consistent with information provided about the Student by school personnel and the educational evaluation. There is no dispute between the parties that the Student has ADHD or is eligible for special education services.

39. There is no evidence that the behavior of bringing the pills to school was the result of being inattentive, impulsive, or hyperactive or other characteristics of the Student's ADHD. The Student provided no explanation as to why she had the pills during the meeting on December 18, 2003.

The IHO's Conclusions of Law

Based upon these Findings of Fact, the IHO reached four (4) Conclusions of Law.

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.

2. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact that can be deemed Conclusions of Law are hereby deemed Conclusions of Law.

3. **Issue #1: Was the incident that resulted in the disciplinary action taken by the School influenced by the Student's disability?**

   At the time of the suspension, the Student had not been identified as a student with a disability, but could assert "Protections for children not yet eligible for special education and related services" because there were reasonable indications of difficulties to suggest the Student might need such services (511 IAC 7-29-8(b)(2); 34 CFR § 300.527).

   To determine if a student's behavior is related to a disability, a public agency must consider evaluation and test results, including information provided by the parents; observe the student; and consider the student's IEP program and placement (511 IAC 7-29-6(d)(1); 34 CFR § 300.523(c)(1)(i)). The evaluation was conducted and an IEP and placement were discussed, but not approved by the Student. An observation in the school setting could not be conducted because the Student had been suspended, which the School was permitted to do. The school psychologist reported his observations of the Student during the evaluation.

   The Student testified that she knew that she was not to have drugs at school and was aware of the possible consequences. Therefore, the IHO concludes that her disability of ADHD did not impair her ability to understand the school policy and the impact and consequences of bringing the pills to school (511 IAC 7-29-6(d)(2)(C); 34 CFR § 300.523(c)(2)(ii) and (iii)).

   There is no evidence that bringing the drugs to school was the result of inattention, hyperactivity, or impulsivity, or other characteristics associated with her ADHD. Therefore, the IHO concludes that the behavior was not a manifestation of her disability.

1. **Issue #2: Is the Student entitled to compensatory educational services?**

The School had sufficient knowledge of the Student's behavior, performance, and history of ADHD to suspect that she might have a disability, and should have initiated a referral process and determined whether an educational evaluation was necessary. Because the Student has been found to have a disability and eligible for special education services, which were not provided, she may be eligible for compensatory services.

Compensatory education is a remedy limited to those services that should have been provided to an eligible student, but were not offered. In this matter, there was no IEP in effect and special education services had not been determined. The proposed IEP was not accepted by the parent and was not at issue in this hearing. However, it is the only document that defines the nature of services, which are reasonable to provide. Based on the evidence and testimony, the proposed IEP is designed for the Student to gain educational benefit. The special education teacher recommended that the Student attend her resource room one hour per day for basic skills instruction and to maintain day-to-day contact with her. The proposed IEP describes instructional strategies, but not specific direct or related services to be given, other than consultation. Attending the resource room would provide the teacher the opportunity to consult with the Student about her progress. Although the Student expressed discomfort with going to the resource room, it is an appropriate service. It is not clear from the testimony and evidence if these services would have been required in grades six, seven, and eight, given other factors that were occurring. Further, it is not clear if ADHD was the primary or sole contributor to her performance in the classroom during those years. The first semester of the current academic year was more problematic and was the primary basis for the development of the proposed IEP.

To be eligible for compensatory educational services, there must be substantial evidence that the Student's ADHD was the cause for her academic difficulties and that she needs compensatory services to "make up" for the services she did not receive. The Student asks for three types of compensatory services: (1) the equivalent of two years of academic time for the last two years, calculated as 2 years x 180 days x 6 hours per day for a total of 2160 hours; (2) 45 days x 6 hours per day (270 hours) for the time she has been suspended from school; and (3) prospective relief for the remaining years of the Student's time in the public school.

If the first claim has merit, it would suggest that the Student's ADHD was the primary cause for her academic difficulties but was not addressed appropriately in her educational program for the past two years. The claim is broad and does not specify what services should be provided to help the Student make progress. The Student demonstrated an inconsistent pattern of performance across seventh through ninth grades. Her grades varied during this period, including doing

relatively well in one subject, but doing poorly later. Her grades ranged from "A" to "F." The evidence and testimony suggest that low grades or variations in grades were not attributable solely to the Student's ADHD. There were external personal and family factors that contributed to her ability to perform in and out of the classroom, as well as the effects of adjustment from elementary to secondary school. Individual assessment by the school psychologist indicated that the Student is average to above average in achievement. However, the IHO concludes that it is likely that some direct services such as those in the proposed IEP would have been appropriate for at least the eighth grade and first semester of the ninth grade and some compensatory services for three semesters are appropriate.

If the second claim has merit, it would need to be demonstrated that the School acted improperly in suspending the Student. The Student violated school policy when she brought the drugs to school. A school may suspend a student with a disability for bringing drugs to school and place him/her in an interim alternative educational setting (511 IAC 7-29-3(a)(1) 34 CFR § 300.520(a)(2)(ii)). If a suspended student has a disability, the School must provide educational services to enable the student to progress in the general curriculum (511 IAC 7-29-3(b); 34 CFR § 300.526(a)). There is no requirement that the alternative setting be substantially similar to the typical school setting. At the time of the suspension, the Student had not been identified as being eligible for special education services. Nevertheless, the School provided homebound instruction in which the Student was making progress toward earning credits and would pass the courses being taught. The School was within its rights to suspend the Student (511 IAC 7-29-3(a); 34 CFR § 300.520(a)(2)(ii)), and continued to provide the services necessary for a student with a disability to progress in the curriculum. Therefore, compensatory educational services for the period of suspension are not justified and are denied.

Regarding the third claim, there is no provision in Article 7 or IDEA for providing prospective relief. Compensatory services are to be awarded when services that should have been provided were not offered. Further, there must be a current dispute for a hearing officer to provide a remedy for proposed or current level of services or placement (511 IAC 7-17-27), which cannot be projected onto future IEPs. Therefore, prospective compensatory services are denied.

The IHO's Orders

Based on the Findings of Fact and the Conclusions of Law, the IHO issued the following three (3) Orders:

1. The School is to provide 270 hours of compensatory resource room instruction as described by the special education teacher. This amount is based upon three semesters (eighth grade and the first semester of ninth grade) of 18 weeks each times five days per week times one hour per day (3 x 18 x 5 x 1 = 270). This

instruction can be provided during a period of up to three semesters and is in addition to other services that will be determined in the final IEP. If the Student does not wish to use the services described, then the School is under no obligation to make other arrangements. If the parties agree, other arrangements to provide the services may be made, but they may not be substantially different in the educational benefit intended by the proposed IEP and this Order.

2. The School is to maintain a record of the hours of compensatory services completed and provide a copy to the parent at least twice per semester.

3. This Order is to be included in the Student's final IEP.

The IHO properly notified the parties of their respective administrative appeal rights.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Procedural History of the Appeal

On May 20, 2004, the Student requested an extension of time in which to file her Petition for Review. The Board of Special Education Appeals (BSEA) granted this request by an order dated May 24, 2004, granting the Student an extension of time to file the Petition for Review to June 21, 2004. The BSEA's written decision would be due by July 21, 2004. However, on May 25, 2004, the Student inexplicably filed an outline of the Student's Petition for Review with a note in the transmittal letter indicating that a supporting brief would be submitted in the near future. Since the BSEA had granted the Student's request for extension of time, the Indiana Department of Education's General Counsel informed the Student, by a letter dated May 25, 2004, that the outlined Petition for Review received on May 25, 2004 was insufficient and would not be considered filed until the supporting brief was received.[4]

The Indiana Department of Education received the Student's completed Petition for Review on June 21, 2004. On June 25, 2004, the School requested an extension of time of one (1) week to file its Response. The BSEA granted this request by an order dated June 25, 2004, granting the School an extension of time to July 8, 2004, with the BSEA's written decision due by August 9, 2004. On July 2, 2004, the BSEA established July 13, 2004, as the date for review and issued a Notice to this effect. The Review would be conducted without oral arguments and without the presence of the parties. On July 6, 2004, the School requested an additional extension of time of one (1) week to file its Response. This request was made based on the illness of the School's counsel. By order of July 6, 2004, the BSEA granted the School's request. The School's Response to the Petition for Review would be filed by July 15, 2004, and the BSEA's decision due by August 16, 2004. The BSEA, on July 6, 2004, issued an amended Notice of Review

[4] The Student did not refer to her Petition for Review filed on May 25, 2004, as an "outline." This description was applied by the General Counsel, who reminded the Student that 511 IAC 7-30-4(d) requires a Petition for Review to be specific as to the reasons for the exceptions taken. The May 25, 2004, Petition does not provide specific reasons.

without Oral Argument, re-setting the Review date for July 26, 2004. The complete record from the hearing was photocopied and provided to BSEA members on June 29, 2004. On July 15, 2004, the School timely filed its Response to the Petition for Review.

Student's Petition for Review

As noted *supra*, the Student filed her Petition for Review on June 21, 2004.[5] In the "outline" submitted on May 25, 2004, which was inadequate to serve as a Petition for Review under 511 IAC 7-30-4(d)(3) because of the lack of specific exceptions to the IHO's written decision, the Student listed the following Findings of Fact: Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 15, 17, 18, 19, 20, 21, 23, 25, 26, 29, 31, 32, 33, 34, 35, 36, 38, and 39. The Student also listed general objections to Conclusions of Law Nos. 3 and 4, as well as Orders Nos. 1 and 2.

When the Petition for Review was filed on June 21, 2004, the Student categorized her exceptions into five (5) areas.

1. The IHO erred in denying the parent's motion for voluntary dismissal of Issue No. 1.

The Student represents that neither Article 7 nor the AOPA addresses a Petitioner's Motion for Voluntary Dismissal. As a consequence, the IHO should have sought guidance in this regard by referring to the Rules of Trial Procedure, specifically Trial Rule (TR) 41(A).[6] The Student maintains the IHO's proffered reasons and legal rationale for denying the Student's attempt to voluntarily dismiss Issue No. 1 were inadequate and amounted to an abuse of discretion.

2. The IHO erred in finding that the School met its burden in proving that the Student's disability did not influence the behavior that resulted in the suspension.

The Student argues that the School failed to show, by more than a preponderance of the evidence, that she ***knew*** there was a pill bottle with controlled substance in her purse (emphasis by the Student). The Student testified that she did not know the pills were in her purse and that she did not know what a "controlled substance" was. In the absence of any definitive statement regarding the Student's knowledge of the presence of the pills, there is no objective evidence to support a conclusion that she "knowingly" possessed the pills at school. Additionally, there was no evidence that the Student had used illegal drugs, nor is there evidence that she was engaged in selling a controlled substance. The Student also argues the School failed to prove the existence of the pill bottle or its contents. The Student argues in the alternative that the drugs could not be "illegal"

[5] The BSEA notes the Student uses various dates for when the hearing was requested and when her Petition for Review was filed. The BSEA has determined the actual dates based upon the record. The inconsistent dates in the Student's Petition for Review are erroneous.

[6] TR 41(A) provides in relevant part that a plaintiff may voluntarily dismiss the plaintiff's action without an order of the court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. Such a dismissal would be "without prejudice," which means the action could be refiled.

because she had a valid prescription for the drugs at the time the drugs were purchased. The Student also opines that, due to the fact she left the purse at school from December 17, 2003, to December 18, 2003, someone else could have put the drugs in her purse.

3. The IHO erred in failing to provide the Student with an expedited hearing.

Because the Parent disagreed with the manifestation determination reached during the Case Conference Committee meeting of February 20, 2004, there should have been an "expedited hearing." The IHO, however, granted extensions of time that resulted in the issuance of an untimely hearing decision. According to the Student, the written decision should have been issued by February 16, 2004.[7] The failure to provide the Student with an expedited hearing deprived the Student of a resolution of the nature of her educational placement.

4. The IHO erred in allowing testimony of the psychologist and in basing his decision upon the psychologist's testimony.

The Student argues that the IHO had a potential bias or prejudice—or his impartiality might reasonably be questioned—because he permitted the testimony of the psychologist in this matter and this psychologist was at one time a student of the IHO. The IHO informed the parties of this relationship but not till the second day of the hearing. The IHO should have notified the parties of this at the commencement of the proceedings. His failure to do so prevented the Student from seeking the IHO's disqualification in this matter. As a result, the BSEA should, the Student argues, disregard any testimony from the psychologist and any ruling by the IHO based upon the testimony of the psychologist.

5. The IHO erred in failing to determine the Student's Stay-Put placement during the pendency of the hearing, the subsequent appeal, and any potential court action.

The IHO failed to address the Student's "stay-put placement."[8] The Student argues that where the IHO agrees with the parent that a change of placement is appropriate, that placement is to be treated as an agreement between the School and the parent, citing 34 CFR § 300.514(c).

Although the Student's "outline" indicates dissatisfaction with Conclusion of Law No. 4 and Orders Nos. 1 and 2, which address compensatory educational services, the Student does not state with any degree of specificity any exceptions other than the IHO erred by

[7] The BSEA is relating the arguments contained in the Student's Petition for Review. The Petition contains a number of factual errors and misrepresentations from the record. It is noted that the manifestation determination did not occur until February 20, 2004. It would be impossible to issue a decision four days prior to the actual determination. The Student also fails to acknowledge that she joined in the determination of the hearing dates, nor does the Student acknowledge that she never requested an expedited hearing. These matters will be addressed *infra*.

[8] "Stay-put" is the common phrase employed to describe the current educational placement for a student while administrative and judicial procedures are being employed. See 511 IAC 7-30-3(j), which provides in relevant part, "If the last agreed-upon placement cannot be determined, the independent hearing officer shall determine the student's educational placement." See also 34 CFR § 300.514.

determining that he could not order "prospective compensatory educational services." Because no specific exceptions have been made, this issue will be addressed *infra* as a question of law.

School's Response to the Petition for Review

The School timely filed on July 15, 2004, its Response to the Student's Petition for Review. The School argued that the Student should not have been permitted to withdraw the issue regarding the manifestation determination because the School had already prepared to address the issue and there was nothing to prevent the Student from initiating a separate hearing on the issue. Additionally, the Student is incorrect in stating the IHO did not have any specific authority in Article 7 or the AOPA. 511 IAC 7-30-3(m) grants the IHO broad authority to rule on any matter with respect to the conduct of a due process hearing, subject to administrative and judicial review.

The School argues that it is not within the province of the IHO to determine whether the Student violated School rules; rather, the IHO's "sole task was to decide whether or not the School had presented evidence to justify its manifestation determination." The "ultimate determination" as to whether the Student violated school rules will be made by a school-based expulsion examiner. In this case, the IHO heard testimony from a number of witnesses, including the relation of statements made by the Student herself. There was sufficiently reliable information to indicate the Student brought a large number of legend drugs to school, the prescription for same having expired two years earlier. The IHO's responsibility is to judge the credibility of the witnesses. His decision is based upon substantial evidence in the record and should not be overturned.

The issues of an interim alternative educational placement and expedited hearing, as raised by the Student in her Petition for Review, were never raised as issues in the hearing. The core issues in this hearing were whether the Student's behavior was a manifestation of her disability and whether the School would be required to provide compensatory educational services. The parent had not requested an educational evaluation for the Student prior to the request for a hearing. It was the IHO who ordered the educational evaluation. The Student was not then considered to be eligible for services under Article 7 such that an expedited hearing would have been practical, especially in determining whether there was any relationship between her behavior and her as-yet undiagnosed disability.

The School also takes exception to the Student's statement the IHO failed to determine her "stay-put placement" during these proceedings. The IHO did, in fact, make a specific assignment of services for the pendency of the administrative proceedings, which would include court proceedings. The IHO modified the original homebound services provided by the School by increasing these services.

REVIEW BY THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The BSEA reviewed this matter on July 26, 2004, without oral argument. All three members of the BSEA participated. Each had received and reviewed the record from the due process hearing below, as well as the Petition for Review and the Response thereto. In consideration of same, the BSEA now determines the following Combined Findings of Fact and Conclusions of Law.

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 filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. Due process hearings under Article 7, as noted by the IHO in his written decision, are conducted pursuant to Article 7 and the AOPA. See 511 IAC 7-30-3(p).

3. A telephonic pre-hearing conference was conducted on February 23, 2004. I.C. 4-21.5-3-19. Pre-hearing orders, pursuant to I.C. 4-21.5-3-19(c), were issued on February 24, 2004. The IHO's "Order Establishing Hearing Status As Non-Expedited" (Order I) indicates both the Student and the School agreed the Student was eligible for services as a Student with an Other Health Impairment (OHI) due to her Attention Deficit Hyperactivity Disorder (ADHD). Order I also indicates a manifestation determination had been conducted as a part of the Case Conference Committee (CCC) meeting process, the CCC's consensus was that the Student's purported behavior of bringing drugs to school was not a manifestation of her disability, and the Parent has elected to challenge this determination. The determination was made in the CCC meeting of February 20, 2004. The IHO noted that such challenges are subject to the expedited hearing process. See 511 IAC 7-30-5(a)(1).

4. Order I further indicates that both parties agreed the hearing would not be considered an expedited hearing and further agreed the hearing would be conducted on April 6, 7, and 8, 2004, with the IHO's written decision due by May 3, 2004. The IHO also indicated the Student was receiving homebound services as the "interim alternative placement," as modified by the IHO.

5. The IHO also issued on February 24, 2004, an "Order Granting Extension of Time" (Order II). Order II indicates that both parties, via their representatives, jointly requested an extension of time to conduct the hearing. 511 IAC 7-30-3(i).

6. A party to an Article 7 hearing can be represented by a "duly authorized representative." I.C. 4-21.5-3-15(a). The Student elected to be represented by a lay advocate. The School elected to be represented by legal counsel. 511 IAC 7-30-3(l)(1). The IHO is authorized to determine whether "individuals are knowledgeable with respect to special education in order to assist in the proceeding[.]" 511 IAC 7-30-3(m)(2). The IHO made no findings adverse to the capacity of either party's representative. Both had the authority to represent their respective parties. The IHO reasonably relied upon their representational capacities.

7. The Student's representative on March 1, 2004, denied that she had agreed to a non-expedited hearing or to an extension of time. The Student's representative also objected to the IHO's framing of the issues.

8. On March 8, 2004, the IHO acknowledged receipt of the advocate's letter and attempted to arrange a pre-hearing conference. The IHO also attempted to contact the advocate by telephone on March 8, 2004, but was informed the advocate would not be available until March 29, 2004.

9. Because attempts to reach the advocate by telephone were unsuccessful, the IHO wrote a letter on March 11, 2004, to the parties' representatives, reiterating the content of his March 8, 2004, letter, and indicating his willingness to discuss changing both the dates for and the status of the hearing. However, the advocate's absence prevented such a discussion from occurring.

10. The IHO indicated the advocate is the one who stated the issues, adding that the "framing of the issues" was the IHO's "call."[9] The IHO indicated a willingness to alter the language, but he reminded the advocate the issue must be stated with sufficient preciseness so as to be quantifiable. The IHO restated the first issue to accommodate the advocate's concern. The IHO also noted the Student's homebound instruction was increased to five (5) hours a week. The IHO restated the first issue to read as follows: "Was the incident that resulted in the disciplinary action taken by the School influenced by the Student's disability?"

11. During the pre-hearing conference of April 6, 2004, the advocate continued her objection to the non-expedited status of the hearing. She also requestd the IHO to determine the Student's "stay put" placement. The School and an attorney representing the Student in a related but separate action had been negotiating educational services for the Student. The advocate raised these separate

[9] This occurred during the pre-hearing conference of February 23, 2004, during which the exact wording of the issues was discussed. On several occasions, the advocate told the IHO it was "your call" on the precise wording.

negotiations, and asked that the Student be placed at the alternative school. The School objected to the advocate's representations and to the advocate's statement that the alternative school placement had been offered. The School also objected to a "stay put" determination because this dispute arose from a suspension and possible expulsion of a student who was not then eligible for special education services. The School raised the issue of the possible application of 511 IAC 7-29 (Rule 29), which, in part, addresses interim alternative educational placements (IAEP) for students perceived to be a danger to themselves or others. The School did not establish the IAEP for the Student under 511 IAC 7-29-3 (possession of weapons or drugs), and neither party specifically requested the IHO to determine the IAEP under 511 IAC 7-29-4 (dangerous student). Rather, the School offered the original three (3) hours of homebound instruction because the Student had been referred for an educational evaluation under Article 7. The IHO deferred ruling on the Student's "stay put" placement until he had more information via the hearing.

12. On April 8, 2004, during the course of the hearing, the IHO broached the matter of the Student's current educational placement. He determined the Student's current five (5) hours of homebound instruction would be supplemented with three (3) hours daily at the alternative school. Transcript, April 8, 2004, pp. 54-55.) The IHO later qualified this to indicate this was an "interim placement." (T. at 57.) The IHO further indicated that should he rule in favor of the School, the interim placement would dissolve, leaving the Student with just the homebound services. (T. at pp. 57-58.)

13. The advocate attempted to withdraw the first issue, to which the School objected. (April 8, 2004, Transcript at pp. 55-56.) The IHO indicated the issue was intimately involved in the determination whether the Student would be or could be expelled. The advocate stated, "We don't care if she's expelled. Go ahead and expel her. Dad wants her back in school. If she's in [the] Alternative School and getting Homebound, let them expel her. We don't care about that." (T. at p. 56.)

14. Although the advocate sought to withdraw the first issue, the advocate would not waive any further challenges nor would she agree the complained-of behavior was not a manifestation of the Student's disability. (T. at p. 59.)

15. The advocate acknowledged the IHO disclosed earlier to the parties that one of the School's witnesses had been a student of the IHO at one point.[10] The IHO did not believe this posed a conflict and did not disqualify himself as the IHO. When the witness was prepared to testify in the afternoon of the last day of the hearing, the advocate posed an objection, apparently for the first time. Initially, the advocate objected to the witness providing any testimony. She then rephrased this as an objection to the IHO's continuing to serve in this capacity. The IHO

[10] The advocate, in the Petition for Review, attempted to characterize the witness as a current student of the IHO. The advocate knew the school psychologist was not a current student of the IHO.

declined to disqualify himself and advised the advocate of her administrative and judicial appellate right to challenge this decision. (T. at pp. 273-74.)

16. Although audio cassette tape-recordings of pre-hearing conferences are generally not considered a part of a record where a pre-hearing order has been issued, in this case, given the advocate's representations—and invitation to the BSEA to listen to the tape—the BSEA will consent to do so. The tape-recording from the February 23, 2004, pre-hearing conference has been marked as "BSEA Exhibit A" and entered into the record. The pre-hearing conference indicated that both parties, by their representatives, indicated the hearing could not be concluded in one day. There was only a part of one day in early March where some testimony might be taken. It was the advocate who indicated she would be unavailable for nearly the entire month of March (she would be unavailable for non-specific reasons for four weeks, or until March 29, 2004). The parties initially agreed the hearing would be conducted on March 30, 2004, and April 1 and 2, 2004. The written decision would be issued during the third week in April. The IHO then discovered he had made a mistake and would not be available on those hearing dates. The parties readily agreed that the week of April 5, 2004, would be acceptable. Accordingly, the hearing was set for April 6, 7, and 8, 2004. The IHO repeatedly asked the parties' representatives if they had any questions. He also indicated he would wait for one (1) day until he issued his pre-hearing order in order to accommodate the parties should any issues arise. At no time during the pre-hearing conference did the advocate request an expedited hearing or object to the dates established for the conduct of the hearing and the rendering of a written decision. In fact, the dates were established principally to accommodate the advocate.

17. The Student's appellate issue one was stated as "The IHO erred in denying the Parent's Motion for Voluntary Dismissal of Issue No. 1." The Student asserts she had a right to withdraw the issue, even though this was not raised until the afternoon of the last day of the hearing after substantial documentary and testimonial evidence had been introduced. The Student also argues that Trial Rule 41(A) permits the Student to do this, and that the IHO should have resorted to this Trial Rule because he was not otherwise authorized to rule on this Motion. The law is not on the Student's side in this regard. 511 IAC 7-30-3(m)(3) authorizes the IHO to frame and consolidate the issues, while 511 IAC 7-30-3(m)(4) provides in unequivocal language that an IHO may rule on *any* other matters with respect to the conduct of a due process hearing. (Emphasis added.) The IHO had the unequivocal authority to rule on the motion and did so appropriately. The Student's argument that Trial Rule 41(A) should apply is deeply flawed and her case law wholly unpersuasive. There is no question that the proceedings were at an advanced stage and that the School had already put into evidence significant documentary and testimonial evidence regarding this issue. Trial Rule 41(A) does not permit a party even at court to withdraw an issue mid-stream in the fashion suggested herein. There is no case law to support such a construction at court, much less applying it to an administrative proceeding.

18. The Student's appellate issue two is stated as follows: "The IHO erred in finding that the School met is burden in proving that the Student's disability did not influence the behavior that resulted in the suspension." The Student relies overmuch on the School's purported failure to prove that she ***knew*** (emphasis by Student) she had the pills in her purse while on school property in contravention of the School's policies. The School did not have to prove that she knew she possessed such drugs or that she "knowingly" possessed such drugs. The issue in the hearing had to do with the manifestation determination conducted in the CCC meeting of February 20, 2004, and whether the School met its burden under 511 IAC 7-29-6. 511 IAC 7-29-6(d) addresses the conduct of a CCC meeting where a manifestation determination is to be made. This process is admittedly awkward because the CCC must often accept on a theoretical basis that the untoward behavior charged against the Student actually occurred. The theoretical assumption occurs often before the legal ascertainment that the untoward behavior occurred at all. The legal determination that the untoward behavior occurred is within the province of the School-based expulsion examiner under I.C. 20-8.1-5.1-13 where, as here, expulsion is contemplated. A School is not required to prove in any legal sense that the Student knowingly violated its rules during the manifestation phase of a CCC meeting or in the resulting Article 7 due process hearing. The burden of proof is whether the School has demonstrated the Student's behavior was not a manifestation of the Student's disability or placement. 511 IAC 7-29-6(m). In this case, the School provided substantial and relevant evidence to sustain its position that the complained-of behavior was not a manifestation of the student's disability or placement.

19. The Student's third appellate issue is as follows: "The IHO erred in failing to provide the Student with an expedited hearing." This is a disingenuous issue based upon a series of misrepresentations, either through omission or commission. While it is true that an expedited hearing can be requested where, as here, the Parent disagrees with the determination that the complained-of behavior was a manifestation of the Student's disability or placement, 511 IAC 7-29-6(m), 511 IAC 7-30-5(a)(1), the record not only indicates the Parent never made such a request but further indicates the advocate waived such a process even if it should be construed that the Parent made such a request. The BSEA rejects outright the expedited hearing should have been concluded on February 16, 2004, as this would be an impossibility given that the manifestation determination was not made until February 20, 2004. Further, there is no evidence in the record that the Parent ever requested an expedited hearing. The Student misrepresents the law in stating that IHO was required to do so; it was the Parent who had to request the hearing. The tape-recording from the pre-hearing conference of February 23, 2004, indicates the hearing dates were established in part—if not in principal part—to accommodate the advocate, who would not be available for nearly the entire month of March. The record supports the IHO's attempts to contact the advocate after receipt of the advocate's letter of March 1, 2004, but these were to no avail. There are no indications in the record that the advocate ever responded to the IHO's attempts to contact her by telephone and letter. Under 511 IAC 7-

30-5(e), the parties "may agree to waive the requirements of the expedited process" and proceed under the typical procedures and time frames of 511 IAC 7-30-3. The tape-recording from the February 23, 2004, pre-hearing conference supports a conclusion that—even if the Parent had requested an expedited hearing—the advocate waived it by discussing and negotiating the hearing dates. At no point did the advocate express any objections or misgivings. This constitutes waiver.[11]

20. The Student's fourth appellate issue is stated as follows: "The IHO erred in allowing testimony of the psychologist and in basing his decision upon the psychologist's testimony." An IHO should disqualify himself from serving in this capacity where his impartiality might reasonably be questioned, or personal bias, prejudice or knowledge of a disputed evidentiary fact might affect his judgment. He could be disqualified where there is shown bias, prejudice or an interest in the outcome of the hearing; he has commented publicly on the dispute; was involved in a pre-adjudicative stage (such as an investigation or a consultation); for has a financial interest or business relationship implicated by the dispute. I.C. 4-21.5-3-9(c), (d); I.C. 4-21.5-3-10; I.C. 4-21.5-3-12; and I.C. 4-21.5-3-13. The Student provides no proof of any of these factors. The only assertion is that the school psychologist was, at one time, a student of the IHO. The IHO advised the parties of this relationship, although when he did so is not clear from the record. It is clear that he advised them before the school psychologist testified. The IHO is a professor at Indiana University. He teaches a number of school psychologists. The Student provides no proof that the IHO committed any of the breaches that would support disqualification. There is also no proof in the record that would raise reasonable doubts as to the IHO's impartiality, nor is there any showing as to why the school psychologist's testimony should be disregarded.

21. The Student's fifth and final appellate issue is: "The IHO erred in failing to determine the Student's stay-put placement during the pendency of the hearing, the subsequent appeal, and any potential court action." This is, of course, untrue. The IHO did make such a determination and did so on the record. The Student's "stay put" placement is five (5) hours of homebound instruction.

22. Although not specifically raised as an issue, the Student also questions the IHO's determination that he could not award "prospective compensatory education." The Student does not challenge the IHO's Order, other than indirectly, so the Order will not be disturbed. The Student's concept of "prospective compensatory education" is unrelated to any remedial action that would be necessary to restore the Student to the position she would have been except where, as here, there were

[11] In reality, neither the School nor the Student expressly requested an extension of time for the conduct of the hearing and issuance of the written decision. The Student referred to the extension of time as being instigated at the School's request. The record does not support this. The parties acquiesced in the extension of time through their negotiation of the dates for the hearing. It is logical that an extension of time would be necessary to accommodate what the parties had jointly agreed to do. Form will not be exalted over substance.

identifiable procedural lapses on the School's part. The Student's concept of "prospective compensatory education" sounds more in damages, and punitive damages at that. The IHO correctly stated the law: Compensatory educational services are remedial. He also indicated that imposing "prospective compensatory education" would interfere with future CCC meetings regarding the appropriate services for the Student. The IHO's recitation of the legal basis for compensatory education is in concert with the law of the 7th Circuit Court of Appeals and the guidance from the Office of Special Education Programs (OSEP) of the U.S. Department of Education. See Board of Education of Oak Park & River Forest High School District 200 v. Illinois State Board of Education, 79 F.3d 654 (7th Cir. 1996), *reh. den.* Also see Letter to Shook, 28 IDELR 619 (OSEP 1997) and Letter to Riffel, 34 IDELR 292 (OSEP 2000).

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals rules as follows:

1. The pre-hearing audio cassette tape from the Februry 23, 2004, pre-hearing conference is entered into the record a "BSEA Exhibit A."

2. Finding no error on the part of the IHO, the BSEA upholds the IHO's written decision in its entirety.

3. Any allegation of error in the Petitions for Review not specifically addressed above is deemed denied.

DATE: July 26, 2004

Raymond W. Quist, Ph.D., 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).