

Indiana Board of Special Education Appeals



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BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of J. P.,)
Vincennes Comm. Sch. Corp.,)
And Knox Co. Sp. Ed. Services) **ARTICLE 7 HEARING NO. 1610.07**
) **HR 130-2007**
)
)
Appeal from the Decision of)
James A. Jacobs, Ph.D.,)
Independent Hearing Officer)

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

J.P. (hereafter, the “Student”) is a 19-year-old (d/o/b January 14, 1988) senior attending high school in the Vincennes Community School Corporation (the school corporation and the special education cooperative will be referred to collectively as the “School”).¹ The Student is not eligible for special education and related services under 511 IAC 7-17 *et seq.* (“Article 7”). On October 4, 2006, the Student’s Parent² requested a due process hearing under 511 IAC 7-30-3, challenging the appropriateness of the School’s educational evaluation as well as the determination that the Student is not eligible for services, and seeking reimbursement for services the Parent obtained privately. On that same date, James A. Jacobs, Ph.D., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO).

A pre-hearing conference by telephone was established for October 13, 2006. The School was represented by counsel; the Parent, by an advocate. Following the pre-hearing conference, the IHO issued a pre-hearing Order, addressing a number of preliminary procedural matters and advising the parties of their respective rights. The parties agreed to a second pre-hearing conference to be held by telephone on October 20, 2006.

¹ “School” shall also include the School’s legal counsel, except where a more specific reference will be necessary.

² “Parent” shall refer both to the Parent, both Parents, or the Parent and the advocate collectively. Where a distinction is necessary, a more direct reference will be used.

The IHO, while reading documents supplied by the Student's advocate, noticed that a retired psychologist whom the IHO had had previous professional association had assessed the Student some years before. The retired psychologist had been a guest lecturer at the university where the IHO is currently employed. By letter of October 16, 2006, the IHO advised the parties of this prior association, indicating that should any party object to his continuing to serve as the IHO, he would recuse himself. Neither party objected.

The second pre-hearing conference was held on October 20, 2006. The IHO issued a pre-hearing Order the next day. Hearing dates were established. An exchange date for documents and exhibits was established. The Parent elected to have the hearing opened to the public. The Student would be present at the hearing. February 3, 2007, was determined to be the date by which the IHO's written decision would be issued. The parties agreed to the following five (5) issues:

1. Does the Student meet the eligibility requirements of Article 7 (511 IAC 7-26-8) for a child with a disability, specifically a learning disability?
2. Was the evaluation conducted by Sheryl Schaefer-Jones in 2006 an appropriate evaluation according to Article 7 requirements?
3. Has the Student been denied special education services as a student with a learning disability from the time the school knew or should have known the Student had a disability, specifically a learning disability?
4. Did the School withhold information from the Parents and Student that was required by statute, specifically 20 U.S. C. § 1415(f)(3)(D)(ii), that would permit a tolling of the two-year statute of limitations on IDEA claims as established by 20 U.S.C. § 1415(f)(3)(D)(ii)?
5. Should the Parents of the Student be reimbursed for expenses related to, but not limited to, private evaluations, private school tuition, speech/language interventions tutoring, and cognitive training?

As to Issue No. 4, the Parent was provided until the close of business, October 24, 2006, to present argument as to why the two-year statute of limitations should not be applied. This was included in the October 21, 2006, pre-hearing Order. The Parent, by advocate, timely responded. The School, by counsel, also timely responded on October 27, 2006. On October 31, 2006, after considering both parties' arguments, the IHO ruled that no issues prior to October 4, 2004, would be considered. The IHO determined the School had not engaged in misrepresentation or intentionally withheld any information. This effectively addressed Issue No. 4.

The IHO also issued an Order that date, establishing a neutral site for the conduct of the hearing. His Order reiterated the dates for hearing (November 13, 14, 15, and 20, 2006).

On October 27, 2006, the Parent requested the IHO to order the School to provide original protocols, "approximately 377 pages," to the Parent for the stated purpose of having a "hand

writing” expert examine said documents in an effort to establish the authenticity of the Student’s written responses. On October 19, 2006, the School petitioned the IHO to require the Parent to produce multiple documents. By agreement of the parties, a telephonic pre-hearing conference was held on November 3, 2006. During this pre-hearing conference, the parties agreed that should any discrepancy exist between copies of test protocols previously provided the Parent and copies of original documents to be included as documents in the School’s documents and exhibits to be submitted for this hearing, the IHO would allow the Parent to challenge the authenticity of such documents, at which time the IHO would address any question regarding the authenticity of the documents or exhibits. The IHO denied the Parent’s request to order the release of the original protocols to an independent third party.

The first three days of hearing took place on November 13, 14, and 15, 2006. The IHO issued an Order of November 19, 2006, incorporating, *inter alia*, the agreement of the parties to continue this matter to December 12 and 13, 2006, as additional hearing dates.

On November 25, 2006, the IHO issued an Order, granting the School’s request for an extension of time. The IHO’s written decision was to be released by February 14, 2007. By agreement of the parties, a telephonic pre-hearing conference was conducted on November 22, 2006. During this pre-hearing conference, both parties stipulated that multiple scoring errors were contained within the evaluation conducted in 2006 by Sheryl Schaefer-Jones.³ Accordingly, the Parent withdrew her request for a subpoena for original test protocols. Two contingent days were identified for hearing (January 4 and 5, 2007).

Prior to the first day of hearing on November 13, 2006, the IHO conducted a pre-hearing conference to discuss exhibits. The Parent requested that a document, not previously submitted to the School, be accepted into evidence. The School objected. The IHO examined the proposed document and determined that the document was not relevant to the issues in this matter. Its inclusion as either a document or an exhibit in this matter was denied. The Parent later moved the IHO to reconsider this ruling. On December 2, 2006, the IHO issued an Order confirming his previous ruling to exclude the document. The issues to be heard were reaffirmed by the IHO. No other objections to documents submitted by either party were made and all remaining submitted documents and exhibits were admitted. The hearing continued on November 14, 15, and December 12, and 13, 2006.

The IHO issued his written decision on January 16, 2007.⁴ In his decision, he determined thirty-nine (39) Findings of Fact, reached five (5) Conclusions of Law, and issued two (2) Orders. The IHO’s written decision, in relevant part, is reproduced below for ease of reference.⁵

FINDINGS OF FACT

4. The Student is nineteen years old (D.O.B. 1/14/88).

³ The IHO clarified this stipulation in a written document of December 2, 2006, directed to the parties.

⁴ The IHO, at the conclusion of his written decision, indicated the date of issuance as January 17, 2007. It is immaterial which date was employed. Either way, the decision was issued timely.

⁵ The IHO’s written decision has been edited to reflect the format of the Board of Special Education Appeals.

5. Student attended Knox County Schools during her first through early fourth grade school years.
6. During her second and third grade school years, the Student was determined by the School to be eligible for special education and related services as a student with a learning disability.
7. Student was removed from public schools by her parents at the end of the first quarter of the fourth grade and placed in a private educational setting, whereupon she remained until the beginning of her sixth grade school year.
8. Student was re-evaluated by the schools multi-disciplinary assessment team (MDAT) for eligibility as a student with a disability, specific learning disability, at the beginning of her sixth grade school year (2000).
9. The School's Case Conference Committee (CCC), based on a recommendation of the MDAT, determined that Student was no longer eligible for special education and related services.
10. Student's parents initiated home-schooling at the beginning of the sixth grade school year.
11. Student's parents then unilaterally enrolled her in the Lindamood-Bell Learning Process for four months at parental expense.
12. Student was subsequently unilaterally enrolled in a private educational program, at parental expense, for the remainder of her sixth grade school year. She remained enrolled in a private educational program until she had completed her ninth grade school year.
13. Student re-entered Knox County Schools at the beginning of her tenth grade school year.
14. The Student is currently enrolled in general education classes, several of which are advanced placement (honor) classes at Lincoln High School, located within the Knox County School Corporation, Vincennes Indiana, which is designated as her "home school."
15. Student's parents provided the Knox County Special Education Cooperative with a rather lengthy, psycho-educational report privately obtained at parental expense during the fall semester of 2005. This private assessment was conducted over a four-day period during September and October 2005 by Marcella Piper-Terry, M.S., who is not currently licensed in Indiana as a psychologist. Ms. Piper-Terry is able to legally conduct psychological assessments in that she has established a professional association with Jeffrey Gray, Ph.D., neuropsychologist, who "signs off" on her assessments.

16. Ms. Piper-Terry's evaluation resulted in the following findings:
 - a. Student is eligible for special education as a student with a learning disability.
 - b. Student is characterized by "Social anxiety and depression."
 - c. Student has an attention deficit hyperactivity disorder, primarily inattentive type.
 - d. Student's academic and social performance is impaired by an auditory processing disorder.
 - e. Student has visual processing deficits.
 - f. Student should be coded by the public school system as a student with multiple handicapping conditions.
 - g. Multiple recommendations for educational modifications and accommodations were identified.

17. A privately obtained, parentally funded Speech-Language Re-Evaluation was conducted by the Language and Learning Center, Ltd., of Carbondale, Illinois, on November 19, 2005. This report stated, in part, that "...It is clear that [Student] desperately needs appropriate, intensive speech-language therapy to treat the underlying receptive and expressive language disorder." Subsequent to this report, Student's parents purchased extensive, privately funded speech and language therapy from this same facility. These services were obtained by driving from their home in Vincennes, Indiana, to Carbondale, Illinois, on Saturdays during December 2005, and January through February 2006. This same facility also stated "...it is highly recommended that [Student] receive a minimum of 4 hours of therapy per day during her Spring break. It is also recommended that [Student] receive this same type of intensive therapy during the summer." This same report went on to recommend that "...[Student] is already 18 years of age and needs as much intensive work as can be accomplished before taking college entrance exams and selecting a college for post-secondary education. It could be that if she doesn't receive this type treatment in the next year, she will need to delay high school graduation until she has the necessary treatment." This report was issued by Darmaris S. Miltenberger, M.A. CCC-SLP, Speech Language Pathologist.

18. A parentally obtained and funded assessment of the Student's visual abilities was subsequently obtained from Steven F. Sampson, O.D., Doctor of Optometry. This evaluation revealed that corrected visual acuity (contact lenses) was within normal limits at both close and distant ranges. This report further revealed that while Student "...has some difficulty with comprehension" and "...multiple tasking/divided attention tasks," no significant impact on Student's learning was noted.

19. A CCC meeting was held by the School on March 8, 2006, to determine Student's eligibility for special education and related services as a student with a learning disability. Subsequent to considering all available data, including privately obtained psycho-educational reports provided by Student's parents, and input

from Student's current and past teachers, the CCC determined that Student was not eligible for special education and recommended continued regular class placement.

20. On March 17, 2006, the School requested parental permission to conduct a comprehensive psycho-educational evaluation of Student.
21. The School subsequently received permission from Student's parents to conduct a psycho-educational evaluation of Student on April 7, 2006.
22. A complete psychological evaluation was conducted by the school's MDT over a six-day period in May and June 2006, by the School's psychologist, Sheryl Schaeffer-Jones. This evaluation included the following procedures and psycho-educational instruments: Behavioral Assessment System for Children, Classroom Observations, Social and Developmental History, Kaufman Assessment Battery for Children-Second Edition, Kaufman Test of Educational Achievement-Second Edition, Behavioral Assessment System for Children-Second Edition, Learning Disabilities Diagnostic Inventory, Developmental Test of Visual Motor Integration, Leiter International Performance Scale-Revised Visualization and Reasoning Battery, Autism Diagnostic Observation Scale, Vineland adaptive Behavior Scale-Second Edition, Asperger Syndrome Diagnostic Scale, Learning Disabilities Diagnostic Inventory, and the Behavior Assessment System for Children, Second Edition (BASC-2). The cumulative results of this evaluation resulted in the school psychologist determining that Student "...has some strengths and weakness in her cognitive profile." None of the weaknesses were determined to be severe deficits that would require special education or related services in order for the student to make satisfactory progress in her academic experiences at the secondary school level.
23. On May 19 and June 2, 2006, a Communication Evaluation (Speech/Language) was conducted by the Jennifer Lay, M.A., Speech- Language Pathologist (SLP), who was then employed by the School as a speech-language pathologist. During this evaluation Student's speech/language skills were assessed using the following instruments:
 - a. Clinical Evaluation of Language Fundamentals-4 (CELF-4)
 - b. Test of Auditory Processing Skills (TAPS-3)The examiner stated that as a result of her assessments, Student "...required more time to process and complete expressive and receptive language tasks than stated for the CELF. This would impact academic performance on tests and on work completed in class." Results of the CELF-4 indicated that Student scored within or above the average range on all subtests with one exception. Student scored below average on the Sentence Memory subtest. In summary, the SLP stated that the Student would not qualify for speech services. However, several recommendations were made in order to "maximize" Student's learning potential for academics.

24. Student did not allege that the School failed to provide assessment in any behavioral, emotional, psychological, educational, processing, or other learning area as required by the IDEA or Article 7. Student did, however, allege that the assessment conducted by the School was inappropriate due to scoring errors and alleged “manipulation” of Student’s responses on test protocols.
25. A CCC meeting was held on September 19, 2006, for the purpose of considering the educational needs of Student and to determine eligibility for special education. A follow-up CCC meeting was scheduled for October 3, 2006.
26. A CCC meeting was held on October 3, 2006, for the purposed of considering the educational needs of Student and to determine eligibility for special education. At this meeting it was determined that the Student was not eligible for special education as a student with a learning disability or any other disability.
27. A Section 504 committee meeting was held on October 5, 2006, by the School. It was determined that Student was eligible for accommodations under Section 504 due to an auditory/visual processing disorder, as determined by the results of a psychological evaluation, and difficulties with written expression, spelling, grammar and sentence structure as reported by Student’s parents. All accommodations were to be made by Student’s general education teachers.
28. Student is currently on-track to graduate from Lincoln High School at the conclusion of the Spring 2007 academic semester.
29. Student currently has earned a grade point average (GPA) of 3.743 based on completion of six semesters of work at Lincoln High School.
30. Student has earned a ranking of fortieth (40th) of one hundred ninety five (195) students in her senior class, which currently places her in the top twenty percent of her class.
31. All reports of her academic achievement for the first semester of this current semester indicate that Student continues to achieve at an A or B level in all her courses, including her honor classes. Should Student’s academic progress continue as it has for the past seven semesters, she will receive an Academic Honors Diploma at graduation.
32. Student passed Indiana’s high stakes examination, ISTEP, during her sophomore year in high school on her first attempt.
33. Classroom observations as conducted by the School’s psychologist, and as further supported by testimony of each of Student’s teachers, support as fact, that during these observations Student did not display any behavioral “issues” in the school setting, participated successfully in the general education curriculum with her peers without adaptations or modifications, was cooperative with both her peers

and teacher, actively participated in classroom discussions, was well prepared for her classes, and completed homework and examinations, both in-class and take-home, without needing additional time to complete such tasks beyond that required by many of her peers.

34. Based on current intellectual assessment data, including the Wechsler Adult Intelligence Scales, Leiter-R, and KABS-II, Student has a full scale intelligence quotient slightly above average with minimal variability between cumulative verbal and performance scales.
35. As reflected in multiple assessments, Student has multiple learning strengths and some processing weakness. During the past two school years, assessments conducted by private practitioners whose services were retained by Student's parents concluded that the Student has learning disabilities in the following areas: reading, spelling, math, written expression, and receptive and expressive language among others.
36. Advocate for Student's parents expressed strong concern that Student needs to be eligible for accommodations on the Scholastic Aptitude and ACT tests.
37. When asked why she felt this matter eventually went to due process, Student testified that the primary intent was to recover expenditures resulting from previous assessments and services provided to Student by her parents at parental expense.
38. Student has stated that she does not want to be labeled "special education."
39. Student is a highly self-motivated, self-structuring, articulate, intelligent, polite, hard-working, dedicated and successful student whose success in life is limited only by the possible cumulative negative effects resulting from having been told repeatedly throughout her nineteen years that she has, or has had, any combination of some thirteen different "disabilities" as identified through testimony and examination of the multiple evaluative reports contained within the documents and exhibits provided by parties for this hearing.

CONCLUSIONS OF LAW

. . .The issues presented in this hearing are presented below and ruled upon accordingly:

- 3. Issue #1: Does the student meet the eligibility requirements of Article 7 (511 IAC 7-26-8(a)(1-3) or the IDEA (20 U.S.C. §1401(30)(A-C) as a child with a learning disability? Answer: No.**

The burden of proof for issues brought by Student rests with the same. In order for a student to be eligible for special education and related services as a student with a learning disability, the student must first be determined to meet the requirements of Article 7 (511 IAC 7-17-69) as a student with a disability. As defined by Article 7 (511 IAC 7-17-69), a Student with a disability is one who is "...is identified in accordance with this article as having a disability, as in 511 IAC 7-26; and who, by reason of the disability, requires special education and related services." Neither the Individuals with Disabilities Education Act (20 U.S.C. § 1400 *et seq.*) nor Article 7 explicitly define to what extent a Student's educational performance must be impaired in order to "require" special and related services. However, case law is resplendent with guidance on this very matter. Courts have determined that Students with disabilities are entitled to an educational experience which affords the student meaningful benefit, which is to be interpreted as more than *de minimus*, or minimal benefit. Additionally, under no circumstance does special education legislation, or any other legislation for that matter, provide an assurance or right for any student, with or without a disability, to receive maximum benefit from their educational experiences. Without doubt Student is currently receiving, and has received over the past two academic school years, far more than minimal benefit from her educational experiences which have been provided full-time in general education classrooms with her non-disabled peers without special education or related services as defined in Article 7. Special education and related services are clearly not necessary for Student to receive an appropriate education as evidenced by her current academic success; specifically, her current grade point average (3.74 on a 4.0 scale), earned while participating in accelerated courses (college preparatory), having passed Indiana's High Stakes Assessment (ISTEP) on her first attempt, and continuing to earn grades of A or B in her current accelerated coursework.

In order to be eligible for special education services, the student in question must first meet the requirements as specified above for an individual with a disability, which Student clearly does not. Secondly, Student to be eligible for special education and related services as specified in Article 7 must also be identified as having a learning disability. Article 7 and federal statutes clearly provide Student due process when eligibility is in question, as well as the right to challenge any and all assessments used to determine eligibility. Additionally, Student has the right to obtain, in this case at her own expense, independent assessment data which the CCC must consider in determining both eligibility for services and the specific category of disability under which the student will receive such services. In this case Student requested that the CCC determine, based on both the School's own assessment(s), and those provided to the CCC by Student, that she be eligible for special education and related services under the category of learning disability. Article 7 defines a learning disability as follows:

- (1) is characterized by severe specific deficits in perceptual, integrative, or expressive processes involved in understanding or in using language, spoken or written, that adversely affect the student's educational performance.
- (2) includes conditions referred to, or previously referred to as:
 - (A) perceptual handicaps;
 - (B) brain injury
 - (C) minimal brain dysfunction;
 - (D) dyslexia; and
 - (E) developmental aphasia;
- (3) may be manifested in disorders of:

- (A) listening;
 - (B) thinking;
 - (C) speaking;
 - (D) reading;
 - (E) writing;
 - (F) spelling,; or
 - (G) arithmetic; and
- (4) does not include learning problems due primarily to:
- (A) visual;
 - (B) hearing;
 - (C) motor difficulties
 - (D) mental or emotional disability; or
 - (E) environmental, cultural, or economic disadvantage.

While assessment data presented by both parties strongly suggest that Student has some identified learning weakness, such weaknesses are neither severe, nor have such weakness had any measurable adverse effect on Student's educational performance.

4. Issue #2: Was the evaluation conducted by Sheryl Schaefer-Jones in 2006 an appropriate evaluation according to Article 7 requirements? Answer: Yes.

When a student suspected of having a disability is referred to proper local educational authority for possible identification as a student with a disability, Article 7, being concurrent with the IDEA, specifies those procedures with which local educational agencies (LEA's) must comply in order to conduct an appropriate evaluation. An evaluation is defined as those "...procedures used in accordance with 511 IAC 7-25-3 through 511 IAC 7-25-7 to provide information about a student's disability or suspected disability for the case conference committee to determine whether a student has a disability and the nature and extend of the special education and related services that the student needs. An evaluation may include review of existing data, which may include results on tests or other procedures that are based on the general curriculum and may be used with all students in a grade, school, or class." (511 IAC 7-17-32) Specific requirements for conducting educational evaluations that are relevant to this matter are found at 511 IAC 7-25-3, 511 IAC 7-25-4 and 511 IAC 7-25-5. The assessment conducted by the School complied with each section of Article cited above.

511 IAC 7-26-8 *et seq.* specifies additional requirements and guidelines to local educational agencies when considering an individual student as possibly qualifying as a student with a disability under Article 7 as a student with a learning disability. The School's assessment complied with such requirements without exception.

Student alleges that the evaluation conducted by Sheryl Schaefer-Jones in 2006 was an inappropriate evaluation due to multiple scoring errors made by Sheryl Schaefer-Jones when administering specific tests or subtests. Testimony revealed that when such errors were corrected, the overall findings and recommendations were not affected. Thus, there was no substantive negative effect on Student's education resulting from these scoring errors.

Therefore, the independent hearing officer finds that the evaluation conducted by Sheryl Schaefer-Jones in 2006 was an appropriate evaluation according to those requirements specified in Article 7.

5. Issue #3: Has the Student been denied special education services since October 4, 2004, as a student with a learning disability? Answer: No.

Issue #3 is moot in that the independent hearing officer finds that the Student does not have a learning disability as defined by either Article 7 or the IDEA. As such it is determined that since October 4, 2004, the student has not been denied special education services.

ORDERS

1. Student is to continue to receive her public education in the general education setting as any other student without a disability.
2. The School has no obligation to provide reimbursement for any educational, psychological, private school tuition, speech/language interventions, tutoring, cognitive training, or other such direct or related services privately obtained by Student or Student's parents in her behalf since October 4, 2004.

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

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

On February 13, 2007, Parent, by advocate, sought an extension of time to prepare and file a Petition for Review. The Board of Special Education Appeals (BSEA) granted the request and issued an Order to this effect on February 16, 2007. The Parent had till the end of the business day, March 19, 2007, to file a Petition for Review.

The Parent, by advocate, timely filed a Petition for Review on March 19, 2007. Thereafter, on March 23, 2007, the School, by counsel, sought an extension of time to prepare and file a Response. The BSEA granted the request and issued an Order to that effect on March 23, 2007. The School had until the close of business, April 12, 2007, to file its Response. The BSEA established May 14, 2007, as the date by which its final written decision must be issued.

The School timely filed its Response on April 12, 2007. Previously, the record from the hearing below was copied by the Indiana Department of Education and a copy each was provided to the BSEA members. On April 16, 2007, the State Superintendent of Public Instruction appointed Dennis Graft, Esq., as an *ad hoc* member of the BSEA for Raymond W. Quist, Ph.D., who became ill. Mr. Graft was provided a complete copy of the record.

The BSEA determined to conduct its review without oral argument and without the presence of the parties. On April 19, 2007, the BSEA provided each party with a Notice of Review Without Oral Argument, indicating that this review would occur on April 23, 2007.⁶

The Parent's Petition for Review

The Parent posed numerous objections to both the IHO's conduct of pre-hearing procedures and the Procedural History in the final written decision. The Parent posed specific objections to the following Findings of Fact: Nos. 5, 6, 7, 8, 9, 10, 11, 15, 16, 18, 19, 20, 21, 22, 23, 24, 26, 27, 29, 30, 31, 32, 33, 34, 35, 37, 38, and 39. The Parent also objected to the following Conclusions of Law: Nos. 3,⁷ 4, and 5. The Parent objected to Order #1 but did not object to Order #2, which denied reimbursement for any outside evaluations and services the Parent obtained for the Student. In addition to the above, the Parent asserted the IHO erred by applying a two-year statute of limitations, denied the Parent the right to present evidence at the hearing, acted unprofessionally during the conduct of these proceedings, and abused his discretion. The Parent also attached an "Appendix A," which continued the Parent's objections to the purported scoring errors of the school psychologist.⁸

The School's Response

Initially, the School objected that the Parent's Petition for Review was not timely filed. Although the Petition for Review would have been nine (9) minutes late Indianapolis time, it was filed timely based on Evansville time. Technically, the Petition for Review was not timely; however, given the confusion over time zones in Indiana, coupled with the fact the Parent is not represented by counsel, the BSEA will not find that the pleading was untimely. This should not be read as a controlling procedure for any future filings by any party in any other dispute. This determination is only for this hearing.

The School argues that the Parent's Petition for Review often does not challenge the accuracy of the IHO's Findings of Fact but rather seeks to supplement such Findings. All other Findings of Fact, the School argued, are supported by substantial evidence in the record. The School additionally argued that Finding of Fact No. 39 is supported both by the record and by the responsibility of the IHO to assess the credibility of witnesses, both those who testified as to the Student's qualities and the Student herself, who was present and did testify. Because the BSEA is not in a position to reassess credibility determinations, the School asserted, the BSEA should defer to the IHO's judgment in this regard. The School also argued the IHO's Conclusions of Law are supported by the Findings of Fact, as is the resulting Order No. 1.

The School also argued the IHO correctly applied the two-year statute of limitations, issued appropriate pre-hearing determinations, and conducted the proceedings in a professional manner.

⁶ The review occurred in Chesterton, Indiana, following oral argument in an unrelated matter.

⁷ The IHO used the number "4" twice in his Conclusions of Law. The BSEA has corrected this to indicate that Conclusion of Law No. 3 refers to "Issue #1."

⁸ Most of the Parent's objections are merely disagreements. As will be noted *infra*, the BSEA has determined the IHO committed no procedural or substantive error. Specific objections of the Parent will be addressed where warranted.

In addition, the IHO properly directed the Parent's advocate in her questioning of the school psychologist. The IHO also properly declined to entertain documentation proffered untimely during the hearing.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

On April 23, 2007, the BSEA met to review the issues raised in the Petition for Review and the Response thereto, with reference to the record as a whole. Based on the review, 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, a Conclusion of Law, or Order determined, reached, or directed 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 Parent timely filed a Petition for Review. The School timely filed a Response to the Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. From the outset, it will be noted that eligibility determinations are based upon information from a variety of sources and not by test scores alone. 511 IAC 7-25-3(i), (j). The Parent relies overmuch on quibbling about relative scores on assessment instruments. While some scoring errors did occur, these were trivial. The great weight of the credible testimony in this case supports the legal Conclusion that the Student does not possess a disability that poses an adverse effect upon her educational performance. The Student is not eligible for special education and related services.
3. The BSEA is required to review the record in its entirety to determine whether the procedures employed by the IHO were consistent with the requirements of 511 IAC 7-17 *et seq.* ("Article 7"). The record in this matter is voluminous for such narrowly defined issues. A review of the record in its entirety does not reveal any unprofessional conduct by the IHO, nor is there any indication in the record that any of his rulings, either prior to the hearing or during the four (4) days of hearing, denied any party a due process right accorded to the party under either Article 7 or the Individuals with Disabilities Education Act.
4. The IHO has the discretion to determine the admissibility of evidence and control the conduct of the hearing. I.C. §§ 4-21.5-3-25, 4-21.5-3-26. The IHO in this case acted

within the scope of his authority. There is no evidence of abuse of discretion or authority in this matter.

5. The IHO correctly applied the two-year statute of limitations. There is no evidence the School either specifically misrepresented or mislead the Parent, or withheld information from the Parent. 20 U.S.C. § 1415(f)(3)(D).
6. The IHO's Findings of Fact are supported by substantial evidence in the record. As to Finding of Fact No. 5, the School concedes the Student attended Knox County Schools for kindergarten and the following year in an interim classroom. However, this does not make Finding of Fact No. 5 incorrect. Findings of Fact Nos. 6-11, 15, 16, 18, 19, and 20 are correct as stated, being supported by substantial evidence in the record. The School agrees with the Parent that Finding of Fact 21 should reflect that on April 7, 2006, the Student provided written consent for the School to conduct a psycho-educational evaluation of the Student. In Finding of Fact No. 22, some redundant references occur, but this does not affect the substance of the Finding of Fact. Finding of Fact Nos. 23 and 24 are correct as written. As for Finding of Fact No. 26, the Parent reasserts arguments made at the hearing level, arguments the IHO rejected. The Parent also asserts the Student's grade-point average (GPA) is inflated. However, there is no evidence of grade inflation in the record. Such an issue cannot be raised for the first time on administrative appeal. 511 IAC 7-30-4(g). Finding of Fact No. 27 is supported by substantial evidence in the record. Finding of Fact No. 29 is changed to reflect that the Student's GPA is based upon four semesters at the public high school and two semesters at a nonpublic high school. This alteration of the Finding of Fact is not a substantive one as the Student's GPA remains as stated by the IHO, as based upon substantial evidence in the record. Findings of Fact Nos. 30-32 are supported by substantial evidence in the record and will remain unchanged. In Finding of Fact No. 33, the IHO indicated the Student did not receive any additional assistance that any other student would receive. The Parent mischaracterizes the testimony of the teacher. The IHO's Finding of Fact No. 33 correctly states the thrust of the credible testimony provided. Findings of Fact Nos. 34, 35, 37, and 38 are supported by substantial evidence in the record and are sustained as written. Finding of Fact No. 39 is supported not only by credible testimony from witnesses but by the credibility assessments of the IHO. The Student was present for the hearing and testified as well. The Parent argues that this is "opinion" and demonstrates "the IHO's abuse of discretion." It does not. It is supported by the record and by the responsibility of an IHO to make credibility determinations. The Finding of Fact is sustained.
7. The BSEA affirms the Conclusions of Law determined by the IHO. These legal conclusions are based upon relevant Findings of Fact. As to Issue No. 2 (whether the evaluation of the school psychologist was appropriate), the records supports this legal conclusion. Even though there were some scoring errors, these were not significant and would not have changed the outcome. As noted *supra*, eligibility determinations are not based upon scores alone but are dependent upon information from a variety of

sources. In this case, the ultimate decision—that the Student is not eligible for services—is supported overwhelmingly by testimony from credible witnesses.

8. The IHO's Order No. 1, the only Order that is challenged, is supported by both the IHO's Findings of Fact and his Conclusions of Law.

ORDERS

In consideration of the foregoing, the following Orders are issued:

1. The IHO's decision, as amended above, is affirmed in its totality.
2. Any issues not otherwise addressed above is deemed denied or overruled, as appropriate.

DATE: May 4, 2007

/s/ Rolf W. Daniel, Ph.D., Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals shall have thirty (30) calendar days from receipt of this decision to seek judicial review in a civil court with jurisdiction, as provided by 511 IAC 7-30-4(n) and I.C. § 4-21.5-5-5.