BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of M.S. and the	)	
Eagle-Union Community School Corporation	)	**Article 7 Hearing No. 941-97**
	)	

Although the Student through his parent-representative has raised numerous issues both at the due process hearing level and on appeal, the core issue has been and remains:

1. Is the Student eligible for special education services under the Individuals with Disabilities Education (IDEA) Act, as implemented in Indiana through the rules and regulations of the Indiana State Board of Education, 511 IAC 7-3 *et seq.* ("Article 7")?

2. If not, does the Student have a substantial limitation of a major life activity such that he is disabled or is considered disabled, precluding discrimination based upon the existence of a disability? This is a claim in the alternative under Sec. 504 of the Rehabilitation Act of 1973 as implemented by 34 CFR Part 104.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

It should be noted from the outset that any references to the "Student" or the "Student's representative" include the parent or parents of the Student.

January 13, 1997	The parent requested a hearing for the Student, alleging he is disabled under both Sec. 504 and IDEA, and further alleging the Student was being excluded without due processfrom geometry class and from participation on the junior varsity basketball team.
January 15, 1997	Joseph R. McKinney, J.D., Ed.D., was appointed Independent Hearing Officer (IHO) under 511 IAC 7-15-5.

January 16, 1997 A prehearing conference was conducted by telephone. The following issues were established:

1. Whether the Eagle-Union Community School Corporation ("School") failed to adequately identify the Student as a child in need of special education services and then failed to evaluate his disabling condition.
2. Whether the School failed to adequately identify the student as a child with a disability under Sec. 504 of the Rehabilitation Act of 1973 and then failed to evaluate his disabling condition.
3. Whether the School violated Article 7 and/or Sec. 504 when it suspended or otherwise excluded the Student from his geometry class.
4. Whether the School prevented the Student from participating in interscholastic sports, thus violating Sec. 504 and/or Article 7.
5. Whether the School provided the parents procedural due process under Sec. 504 and/or Article 7.

The parties also agreed the IHO would have jurisdiction over Sec. 504 issues as well as Article 7 issues.[1] January 29, 1997 was established as the date for exchange of witness and exhibit lists. Initial hearing dates were set for February 4 and 6, 1997. The hearing site was set at the parent's office. The prehearing conference was transcribed into a 31-page document.

January 23, 1997 The IHO's written prehearing order was issued. The IHO also sent out a hearing notice establishing the date, time and place for the hearing, beginning on February 4, 1997. A complete recitation of the hearing rights accompanied the hearing notice.

January 28, 1997 The School filed a "Draft" Motion to Separate Issues and for a Continuance of the Hearing so as to separate the issues. The thrust of the "Draft" Motion was to request the IHO to address the issues in a somewhat chronological manner, beginning with the evaluation and placement issues and then, if necessary, to address whether accommodations were or are necessary for the geometry class and for extracurricular activities. In the transmittal letter with the Motion, the School also requested reconsideration of the site for the hearing, urging the hearing be moved to a school facility to accommodate an expected large number of witnesses, especially teachers. The IHO treated the transmittal

[1]It is unusual for an IHO appointed under Article 7/IDEA to consider claims in the alternative under Sec. 504. However, in this matter, the parties requested the IHO to do so. As a consequence, the Board of Special Education Appeals (BSEA) has jurisdiction to address the same issues. Compliance with IDEA procedural safeguards is deemed compliance with Sec. 504 requirements. See 34 CFR §104.36.

letter as a Motion and denied it.[2]

The due process hearing was conducted over four days--February 4, 6, 11, and 14, 1997. The parties agreed to extend the time for the issuance of the written decision to March 12, 1997. The written decision was issued on that date.

The IHO's decision generally noted the Student (d/o/b 12/8/80) is a sophomore attending the local high school. The Student had attended a private school, but following a serious hazing incident during the 7th grade, the Student became withdrawn and refused to return to the private school. He was enrolled in the public school, but engaged in unusual behavior during his 7th and 8th grade years, such as avoiding contact with other students, refusing to enter the cafeteria, and hiding in the school offices or the nurse's room. His academic performance declined following the hazing incident. School officials observed the Student's behavior and advised the parents of possible suicidal ideation. On November 21, 1994, the School referred the Student for a comprehensive evaluation to determine eligibility for special education services. The parent refused permission for the evaluation. The parent was advised of parental rights under Article 7, including procedural safeguards.

On February 27, 1995, the parent provided written permission for the evaluation; however, when school officials met with the parent on February 28, 1995, to obtain a developmental history and explain the evaluation procedures, the parent withdrew permission for the evaluation. Nevertheless, the School developed and implemented a General Education Intervention (GEI) plan (see 511 IAC 7-10-2) for the remainder of the 1994-1995 school year. The parent reiterated opposition to a special education evaluation at a meeting with school officials on March 21, 1995, although the parent participated in this meeting by reviewing and revising the GEI plan. The parent provided additional recommendations on April 24, 1995 [this reads "April 24, 1997" in the decision], but did not respond to an April 10, 1995, request by the School to permit the evaluation.

The parent on March 30, 1995, provided the School with a report from a pediatric neurologist, who concluded the Student's problems are not the result of a learning disability. The parent was concerned abut confidentiality, and requested the report not be maintained in the Student's educational record.

The student entered 9th grade at the high school in August of 1995. The middle school

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[2]Even though Article 7 requires that due process hearings be conducted "at a time and place reasonably convenient to all parties to the hearing," 511 IAC 7-15-5(n), the federal law requires that "[e]ach hearing...must be conducted at a time and place that is reasonably convenient to the parents and child involved." 34 CFR §300.512(d). Indiana's regulatory provision, then, is an ideal and not a strict mandate where, as here, the parent of the child and the school are in disagreement as to what is "reasonably convenient to the parents and the child." Under such circumstances, the federal law dictates.

apprised high school officials of the Student's involvement and their concerns. High school officials included the student in their "child find" procedures for Sec. 504. [See 34 CFR §104.32.] The guidance counselor contacted the parent in September of 1995, but the parent denied the Student was experiencing any difficulties and declined receipt of a copy of Sec. 504 rights. The Student's academic performance did improve during his freshman year, and he made the freshman basketball team. However, the Student's English teacher observed the Student's hands shaking uncontrollably at the chalkboard. The parent dismissed these concerns as "benign motor tremors."

The student was offered a study hall for his sophomore year as a means of providing remediation based upon his ISTEP scores. [See, generally, I.C. 20-10.1-17 for remediation grant responsibilities for students who do not perform acceptably on the Indiana Statewide Testing for Educational Progress, a statewide assessment known as "ISTEP."] The Student and parent objected to the study hall. In November of 1996, the Student was cut from the junior varsity basketball team. The basketball coach did not select the Student because he did not believe the Student possessed the requisite skill or ability to play basketball at that level. The basketball coach did not "believe or perceive the Student to have a disability." The parent "was very upset that the Student did not make the basketball team."

The Student was tardy several times to his geometry class. Following his fourth tardy, School officials met with the parent. The parent did not express an opinion that the Student may have a disability or that there may be a relationship between a disabling condition and the tardiness. The Student was tardy for the sixth time on December 6, 1996, and was suspended from the class. School officials and the parent met on December 6 and December 9, 1996, during which time the parent was advised of parental rights under Sec. 504.

Although the Student had been receiving individual and family counseling on a regular basis from a licensed clinical psychologist from June 1994 to June 1996, the psychologist's reports were not shared with School officials until this due process hearing. The Student had been seen for depression (single episode, severe) and a generalized anxiety disorder. However, the therapy was terminated as the Student's academic and social progress improved (IHO Findings of Fact Nos. 1-51).

Based upon the above-referenced Findings of Fact, the IHO concluded the School did not fail to adequately identify the Student as being disabled. Neither School officials nor the parents perceived a disabling condition which either adversely affected the student's educational performance [see 511 IAC 7-3-4] or constituted a substantial limitation on a major life activity [see 34 CFR §104.3(j)]. The School did develop a GEI plan and did seek permission from the parent in order to evaluate the Student to determine whether or not the Student did require special education services, but the parent consistently refused to permit such an evaluation. A parent-provided report from a pediatric neurologist indicated there was no learning disability present. The student demonstrated academic and social progress such that it cannot be said the School did not provide an appropriate education to the student. This conclusion is further supported by the

School's development of a GEI plan despite parental intransigence.

The IHO also concluded the School did not violate Article 7 or Sec. 504 when it applied its tardiness policy to the Student and suspended him from the geometry class. The Student was not then, and is not now, a Student with a disability which either adversely affects educational performance or substantially limits a major life activity. Likewise, the School did not discriminate against the Student when he was cut from the basketball team. The School did provide the parent with notice of the parent's rights under Sec. 504 and Article 7, and the School's procedures for establishing a system of procedural safeguards are consistent with the requirements of Sec. 504.

The IHO advised the parties of their right to appeal and further advised them of the exact procedures for doing so.

PROCEDURAL HISTORY OF THE APPEAL

Although the IHO's written decision was issued on March 12, 1997, the parent requested on March 18, 1997, an extension of time to prepare a Petition for Review.[3] The Indiana Board of Special Education Appeals (BSEA) on March 24, 1997, granted the request, permitting the parent to prepare and file a Petition for Review by the close of business on May 12, 1997. The BSEA also advised the parent of the specific procedures the BSEA employs for filing of all pleadings and correspondence directed to the BSEA. The BSEA also extended to June 30, 1997, the time within which it must conduct review and issue a written decision.

On May 5, 1997, the parent filed a "Motion to Submit Newly Available Evidence," which was restyled by the BSEA as a "Motion to Submit Newly Discovered Evidence." The Motion purports that there is available medical evidence that the Student does have a disability. The BSEA, by order dated May 7, 1997, took the matter under advisement so as to permit the School to respond to the Motion. The BSEA deferred ruling on the Motion until it conducts its review

[3]The parent expressed confusion between Article 7 and Sec. 504 issues and time lines. The parent also complained that she had been unable to obtain a copy of the transcript and, essentially, the entire record so that she could share them with an attorney. She also inquired whether disability organizations could file an *amicus* brief in the matter. By letter dated March 21, 1997, General Counsel for the Indiana Department of Education advised the parent: (1) a copy of the transcript would be sent to her; (2) the record will be made available for her inspection but will not be copied; (3) the parent needs to clarify how much additional time she requires to prepare a Petition for Review; (4) it is discretionary with the BSEA whether or not to permit a third-party to file an *amicus* brief; (5) IDEA procedures will dictate the time line for the conduct of the review; and (6) whether or not the BSEA permits oral argument is discretionary with the BSEA.

of the record.[4] The parties were notified by copy of a May 5, 1997, memorandum from the General Counsel for the Indiana Department of Education of the BSEA's standards for receiving and considering "newly discovered evidence." Notwithstanding the above, the parent filed on June 6, 1997, two additional Motions, one regarding allegedly "newly discovered medical evidence" and the other "newly discovered evidence of LEA communication with State Agency Official." The latter motion will be discussed later. The parent also filed a fourth Motion on June 12, 1997. This Motion is supposedly "newly discovered evidence" but it actually addresses the parent's desire to clarify statements attributed to the clinical psychologist who treated the student. The BSEA rulings on these Motions appear below.

The BSEA notified the parties by order dated May 27, 1997, that it would conduct its review on June 12, 1997, beginning at 1:00 p.m., but without oral argument and without the presence of the parties. 511 IAC 7-15-6(k). However, the BSEA notified the parties that the review would be tape recorded and a transcript prepared. A copy of the transcript will be sent to the representatives of the parties when available.

Student's Petition for Review

The Student's Petition for Review was timely filed on May 12, 1997. The Student took exception to certain Findings of Fact, all Conclusions of Law, and "certain orders," although the latter was never clarified further. The Student also claimed that procedural errors were committed by the IHO, which constituted a denial of due process. Although the Student refers to "504/IDEA" throughout his Petition for Review, the BSEA is mainly concerned with issues related to IDEA, 20 U.S.C. §1400 *et seq.*, 34 CFR Part 300, as implemented in Indiana through Article 7. In most critical situations, compliance with IDEA procedures is considered sufficient compliance with Sec. 504 requirements. *Cf.* §§104.33(b)(2), 104.36. The Student appears to make the following claims:

Denial of Due Process

1. The federal district court judge who denied the Student's request for injunctive relief prior to the initiation of this action is related to the IHO. The IHO should have disqualified himself.

2. The IHO engaged in improper *ex parte* communication with the parties, and failed to

[4]BSEA procedures are governed, to the extent not in conflict with federal law, by the Administrative Orders and Procedures Act, I.C. 4-21.5-3. See 511 IAC 7-15-6(d). I.C. 4-21.5-3-31(c) requires a party submitting newly discovered evidence to demonstrate that such evidence is "material" and could not have been discovered through due diligence of the party and produced at the hearing below. The BSEA interprets "material" to mean such evidence is relevant, not merely cumulative, not merely impeaching, not privileged or incompetent, credible, and reasonably likely to change the outcome of the hearing. See Article 7 Hearing No. 777-94.

document such contacts in the record.

3. The Student was prevented from obtaining legal representation.

4. The IHO failed to order the Student to remain in his current educational placement ("stay put").[5]

5. The IHO sustained objections by the School, preventing the Student's presentation of expert testimony on his behalf.

6. The IHO violated the Student's physician-patient privilege with respect to certain psychiatric records.[6]

7. The IHO failed to issue subpoenas at request of the Student's parent.

8. The IHO did not declare a recess when the Student's parent became upset.

9. The IHO did not timely file the record with the Indiana Department of Education, thus preventing the Student from adequately reviewing the record in order to prepare a Petition for Review.

10. The IHO failed to maintain proper decorum.

The Student also alleges several procedural errors against the School, especially the School's attorney, which the Student claims instructed School personnel not to have additional discussions with the Student's parent, but instead to refer all such inquiries to his attention. It is not clear how this violates IDEA , but it is clearly not an issue raised at the hearing below. Accordingly,

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[5]The BSEA notes that there are several Motions and resulting Orders from the IHO which are not included in his written decision but are included in the official record. One such order, dated February 14, 1997, orders the Student reinstated in his geometry class, effective January 16, 1997.

[6]Again, the IHO's written decision did not include any Motions or Orders with respect to confidentiality, but the official record contains two Orders. One Order is dated February 11, 1997, and orders that all medical information submitted in the hearing is to be treated as confidential and is to be maintained as confidential information "as required by law." The second Order, issued on February 14, 1997, orders the School "to seal and maintain sealed psychological evaluations and records that were disclosed in *in camera* proceedings in response to a judicially authorized subpoena." An IHO in Indiana has the authority to issue subpoenas, discovery orders, and protective orders in accordance with the rules of procedure governing discovery, depositions, and subpoenas in civil court actions. I.C. 4-21.5-3-22(a).

this issue will not be addressed on review. 511 IAC 7-15-6(h).

IHO's Findings of Fact

The Student takes exception to the following Findings of Fact (FOF) determined by the IHO. When necessary, the actual FOF is reproduced parenthetically following the objection.

1. The Student objects to a factual error in FOF No. 9, which should indicate the parents moved in 1994 and enrolled the Student in the School in the Spring of 1994.

2. FOF No. 20 is allegedly misleading in that the IHO did not emphasize that the Student's parent gave permission for an evaluation. ("School personnel continued to meet and discuss the Student's problems at school. The school stayed in contact with the mother. On February 27, 1995, the school psychologist received a letter from the mother authorizing a "special needs" evaluation.")

3. FOF No. 22 is allegedly misleading in that the Student's parent objected to the qualifications of the School's evaluator and continued a request for the School to provide a clinical psychologist. ("The mother refused to give consent to allow the school to evaluate the Student at the February 28, 1995 meeting. The mother expressed concerns about "labeling" and the effect it could have on enrolling the Student in another private school.")

4. FOF No. 23 is allegedly factually incorrect . However, the Student does not state what portion of FOF No. 23, which addresses the GEI plan, is incorrect.

5. FOF No. 29 allegedly ignores the treating physician's observation that social isolation is the Student's major disability which presents educational problems. ("Dr. Dunn, who specializes in pediatric neurology at Rile Hospital[,] concluded on March 30, 1995 that the Student's difficulty in school was not the result of a learning disability. The letter indicated that the Student's problems at school were a result of his difficulties interacting with others.")

6. FOFs Nos. 33, 37, 38, 39, 40, 41, 43, 44, 45, and 47 are allegedly only partially correct, reveal bias on the part of the IHO, and are not supported by a preponderance of evidence. However, the Student does not indicate which portions are incorrect nor how such findings reveal any bias. Whether or not such FOFs are supported by testimony and documentary evidence will be determined by the BSEA below.

7. FOF No. 51 is in error and unsupported by the record. ("The mother's testimony that she requested an impartial Section 504 due process hearing in December was not persuasive in light of the written correspondence in December and January between the mother and school.")

IHO's Conclusions of Law

As noted above, the Student objects to all eight of the Conclusions of Law determined by the IHO. The Student argues that the evidence and testimony should have resulted in conclusions of law which held that the Student was disabled under IDEA and Sec. 504; that school personnel, including teachers and the school nurse, suspected the Student might be disabled (social isolation, academic failure, neurological impairment, seizure disorders) and should have referred the Student for an evaluation; failure to evaluate the Student during the 1994-1995 school year violated IDEA when the School did not seek to overcome parental intransigence by requesting a due process hearing [see 511 IAC 7-10-3(s) and 34 CFR §300.504(b),(d) and Notes 2,3]; that the School violated IDEA when it failed to develop an individualized education program (IEP) and violated Sec. 504 when it failed to implement a Sec. 504 educational plan [see §104.35(c)]; and the School failed to provide the parent with adequate notice of procedural safeguards under IDEA and Sec. 504, and the School actively sought to prevent the parent from understanding these rights.

The above summarizes the Student's objections to the Conclusions of Law. There is apparently a general grievance with the IHO's receiving into evidence and considering a "504 Telephone Script" (Appendix B). Following these objections is a somewhat lengthy "Fact Summary," which includes other possible objections, but these were not raised. Hence, the Student did not wish for these to be reviewed.

As noted above, the Student's parent has filed four (4) separate Motions, two seeking to submit allegedly "newly discovered evidence," but the other two are different. One Motion actually seeks to impeach a School official for writing to the Assistant Director of the Division of Special Education, Indiana Department of Education (IDOE), following the initiation of the due process hearing. This Motion is disingenuous for several reasons: (1) The IDOE has never been a party to this proceeding. A review of the record indicates that both parties--especially the parent--wrote letters to the IDOE. This internal correspondence of IDOE was combined with the official record when the IHO filed same with the IDOE. There is no indication that the IHO ever saw these letters or considered them during the hearing or while writing the decision. (2) The parent reviewed on May 9, 1997, the official record in the offices of the IDOE's General Counsel and obtained copies of these letters *before* filing the Petition for Review. There is no explanation given why this wasn't included with the Petition for Review. As a consequence, the BSEA will not consider this Motion as it isn't timely nor is it relevant. Likewise, the BSEA will not consider the Motion filed on June 12, 1997, well after the Petition for Review and the School's Response were filed. This Motion seeks to "clarify" the record. This is not "newly discovered evidence" but is a lack of due diligence. The BSEA will not consider the Motion filed on June 12, 1997.

School's Response to the Petition for Review

The School timely filed its Response to the Petition for Review and to the Motion to Submit Newly Discovered Evidence (at that time, there was only one such Motion). In summary, the School argues:

1. The "newly discovered evidence"--a letter from a physician--does not meet the standard for newly discovered evidence because such a statement could have been produced before or during the four days of testimony. The physician was listed as a witness by the Student but was never called to testify. The attempt to submit such testimony after the fact deprives the School of its right to cross examine the physician.

2. The Petition for Review is "rambling and disjointed," making it difficult for the School to respond.

3. The Student's parent possesses a law degree but does not practice law. She consulted with several attorneys regarding possible representation. One attorney initiated representation but then later withdrew. The IHO never advised against representation or otherwise prevented the Student from being represented. On the contrary, the IHO "showed incredible restraint and patience" with the Student's parent-representative.

4. There was a considerable amount of testimony and documentary evidence, some of it contradictory. The IHO must decide which evidence is credible. The hearing was full and fair to all parties.

5. The record supports the IHO's written decision in all respects.

While the Student requested oral argument, the School asked that this matter be reviewed without oral argument. This is a matter within the discretion of the BSEA. The BSEA decided this matter should be reviewed without oral argument and without the presence of the parties. 511 IAC 7-15-6(k). Review was set for Thursday, June 12, 1997, in the Board Room, Room 225, State House, Indianapolis, beginning at 1:00 p.m.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on June 12, 1997, to conduct its review of the above-referenced matter. All members were present and had reviewed the record, the Petition for Review, the Response thereto, and the Motions filed by the Student's parent. The

Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.

2. The four (4) Motions filed by the Student in an attempt to submit newly discovered evidence are denied. The proffered information does not meet the test of "newly discovered evidence" under I.C. 4-21.5-3-31(c) because the information could have been discovered through due diligence of the Student's representative. In addition, the information was neither material nor relevant; was cumulative at best; and would not have changed the outcome of the hearing even if timely provided.

3. The BSEA agrees with the Student that the IHO made a factual error in Finding of Fact No. 9, but further finds that such error was inconsequential. The Finding of Fact is revised to read as follows:

> 9. In the Spring, 1994, the parents moved to Zionsville and enrolled the Student in the school district. The mother informed the school of the hazing incident and the school made a report of institutional abuse to the Boone County Welfare Office.

4. The BSEA finds no merit to the parent's allegations that the IHO erred in Findings of Fact Nos. 20, 22, 23, 29, 33, 37, 38, 39, 40, 41, 43, 44, 45, and 47. The record amply supports the IHO's findings that School personnel continued to meet and discuss the Student's school problems; that School personnel received on February 27, 1995, a letter from the parent authorizing a "special needs" evaluation but that the parent refused at a meeting on February 28, 1995, to give the consent based upon concerns about "labeling" and the effect this might have on the Student's possible enrollment in another private school; that the School developed a GEI plan for the Student to assure his successful participation in general education classes, and that the School revised the GEI plan during Winter/Spring of 1995; that teachers met at least five times with the school psychologist or guidance counselor to discuss the Student's past problems and progress; that the IHO correctly summarized the statement of the pediatric neurologist; that the high school guidance counselor called the parent of the Student in late September of 1995 to offer an evaluation or services to the Student, but was advised by the parent that the Student was no longer experiencing any problems; that the parent during this conversation was offered a copy of her rights under Sec. 504, but she declined same; that the Student was cut from the junior varsity basketball team because of a lack of skill and not because of a disability; that the School withdrew the Student from the geometry class pursuant to its tardy policy; that the parent and the School met on December 6, 1996, in what was described as a "pre-504" meeting to discuss the geometry class and the unsubstantiated claim by the parent that the Student was disabled; that at this meeting the parent was provided in writing her procedural safeguards and parental rights under Sec. 504; that a report from a clinical psychologist presented by the parent at the hearing

but not previously shared with the School indicated that the Student had been seen for individual and family counseling on a regular basis from June of 1994 to June of 1995 for depression and a generalized anxiety disorder, and was making progress in his therapy and medication such that the therapy was discontinued; that the clinical psychologist noted academic improvement such that there was, in his opinion, "no need for special education programming"; that the Student was not referred for an educational evaluation by either the parent or the School during his freshman and sophomore years until he was withdrawn from geometry due to excessive tardiness; and that the parent did not request a Sec. 504 hearing; that it was reasonable for the School to assume the parent was challenging the disciplinary action taken.

5. The IHO's eight (8) Conclusions of Law are based upon testimony presented and documentary evidence submitted, which the IHO had reduced to fifty-one (51) Findings of Fact. The BSEA upholds the IHO's Conclusions of Law, which found that the School did not fail to adequately identify the Student as disabled under either IDEA or Sec. 504, nor did the School fail to initiate evaluation procedures; the School did not deny a free appropriate public education to the Student; that the School did develop an individualized plan under the General Education Intervention procedures of 511 IAC 7-10-2 and monitored his progress; the withdrawal from the geometry class due to violation of the excessive tardy policy did not violate either IDEA or Sec. 504 because the Student is not disabled under either law for educational reasons; the School did provide the parents with procedural due process under IDEA and Sec. 504; and the School has established a system of procedural safeguards in compliance with Sec. 504.

6. The Student was not denied due process by the fact that the federal district court judge who considered the Student's request for injunctive relief happened to be related to the IHO who was eventually appointed to consider the matter. An IHO is an administrative law judge and would not be reviewing any decision of a federal district court judge. The appearance of impropriety would be a concern should the federal district court judge receive this dispute under judicial review provided by 20 U.S.C. §1415(e) and 511 IAC 7-15-6(p). It is not a concern of this IHO.[7]

7. An IHO may find it necessary to have *ex parte* discussions regarding procedural matters only, although all such discussions are discouraged because they are fraught with peril. However, the Student does not state--and it is not the BSEA's duty to guess--what *ex parte* conversations took place which were not documented in eventual orders, or how such conversations, if they occurred, were prejudicial to the Student. There has been no denial of due process.

8. The Student was not prevented from obtaining legal representation. The record contains

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[7]In fact, this has occurred previously. In *D.F. v. Western School Corporation*, 921 F. Supp. 559 (S.D. Ind. 1996), the parents sought judicial review of an adverse decision by the BSEA in Article 7 Hearing No. 713-93. The IHO was Dr. Joseph McKinney. The federal judge who first received the assignment was Judge Larry McKinney. Judge McKinney recused himself because of the familial relationship, and the matter was determined by another federal district court judge.

numerous instances where the parent indicated she had sought or was seeking legal representation. The Student's representative offers no proof whatsoever that the IHO prevented her in any way from securing representation of her own choosing.

9. The IHO did not fail to order the Student to remain in his current educational placement. In fact, he issued such an order, placing him back in the geometry class whereas at the time of the hearing request, his "current educational placement" would not have included the geometry class.

10. The Student's parent alleges that the IHO's sustaining of objections by the School prevented the testimony of an expert witness. However, the parent does not provide sufficient detail in order for the BSEA to know what objections were made by whom, when, and towards whose testimony. A review of the record as a whole does not indicate that the IHO acted in any arbitrary or capricious manner in considering such Motions. The Student was not denied due process.

11. The IHO did not--and could not--violate any physician-patient privilege the Student may have. The parent requested the hearing and placed the Student's medical condition at issue. The IHO issued two separate orders in response to the parent's concerns regarding confidentiality. It is inconceivable how the IHO could have breached any privileged relationship the Student may have had, and the Petition for Review provides no elaboration. The Student has not been denied due process.

12. The Student's parent does not state how or when the IHO refused to issue a subpoena at the parent's request, nor does the parent state to whom the subpoena was intended. A Petition for Review has to be specific. 511 IAC 7-15-6(e)(3). This is not specific enough and precludes meaningful review by the BSEA. The Student has not been denied due process.

13. The conduct of the hearing is within the purview of the IHO. Whether or not the IHO grants recesses or continuances is within the IHO's discretion, subject to review if there is an abuse of that discretion. In this case, the IHO declined to recess the hearing--which had already consumed several days of testimony--and otherwise continue the proceeding because the parent became upset. The BSEA finds that the IHO had sufficient reason to decline the request, and did not abuse his discretion when he denied it. The Student has not been denied due process.

14. The IHO did not fail to timely file the record with the Indiana Department of Education, Division of Special Education. As the Procedural History indicates, the parent sought documents shortly after receiving the IHO's written decision. The written decision is sent by certified mail. 511 IAC 7-15-5(t). In any case, the parent sought and was granted a generous extension of time to May 12, 1997, to prepare and file a Petition for Review. The parent has not alleged, much less shown, how the Student was denied due process based upon when the record is filed with the Indiana Department of Education. There is no denial of due process.

15. There is absolutely no evidence in record to support an allegation that the IHO failed to

maintain proper decorum. The Student has not been denied due process.

16. The BSEA will not review the allegation that the School's attorney improperly restricted communications between the parent and School personnel. This issue was never raised at the hearing below and will not be reviewed now. 511 IAC 7-15-6(h).

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

Orders of the Indiana Board of Special Education Appeals

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

1. The decision of the IHO is upheld in all respects except as to the editorial error in Finding of Fact No. 9, which is hereby corrected (see BSEA's FOF No. 3, *supra*).

2. All four (4) Motions submitted by the Student's parent are denied.

3. The Student was not denied due process.

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

Date: June 13, 1997

/s/ Richard L. Therrien
Richard L. Therrien, Chair
Board of Special Education Appeals

Appeal Right

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