



No. 90-24

The University of the State of New York
The State Education Department
State Review Officer

**Application of a CHILD WITH A HANDICAPPING
CONDITION, by his parent, for review of a determination of
a hearing officer relating to the educational program provided
by the Board of Education of the Pine Bush Central School
District**

Appearances:

Anderson, Banks, Curran and Donohue, Esqs., attorneys for respondent,
James P. Drohan, Esq., of counsel

DECISION

Petitioner appeals from the determination of an impartial hearing officer finding that the special educational program recommended by respondent's committee on special education (CSE) for petitioner's son for the latter half of the 1989-90 school year and the 1990-91 school year was appropriate to meet the pupil's needs, and denying petitioner's request that the pupil be provided with cognitive remediation therapy. Petitioner asks that I annul the hearing officer's decision, direct respondent to provide cognitive remediation therapy to her son, engage the services of an appropriately qualified psychologist to act as a consultant to respondent's staff in the provision of such therapy, and direct respondent to reimburse petitioner for the costs which she has incurred in providing such therapy to the pupil, obtaining topographical brain mapping and having the pupil's private therapist testify at the hearing. The appeal must be dismissed.

Petitioner's son, who is now ten years old, was initially classified as learning disabled by the CSE on March 22, 1989. Petitioner does not dispute the appropriateness of the pupil's classification.

The record reveals that the pupil was examined by a neurologist on January 27 1989. The neurologist reported that the pupil showed signs of attention deficit disorder, dysfunction in his fine and gross motor, decoding and reading skills, as well as having soft signs of neurological impairment. The neurologist recommended that the pupil be placed in a small class and receive additional services, and suggested that the use of the drug Ritalin to increase the pupil's attention span be deferred until there are greater demands upon his attention span.

Psychological evaluations by the school district psychologist in 1988 and 1989 revealed that the pupil functioned within the average range of intelligence. The evaluator reported that the pupil had some difficulty following instructions, and that his distractibility affected his test performance. Projective testing revealed that the pupil had some anxiety with regard to his academic performance and self-concept.

A speech and language evaluation conducted on March 1, 1989 revealed a need to provide speech/language therapy to improve the pupil's auditory processing skills with respect to receptive language and to improve his ability to organize words and phrases into sentences with respect to his expressive language.

The CSE also considered the results of an independent psychological evaluation performed in January, 1989, in which the pupil was found to have a serious impairment in sustaining concentration to perform mental operations, as well as deficits in organizational skills and short-term memory. The evaluator recommended that the pupil be placed in a small class, with access to a study carrel and head phones to minimize distractions, and that modifications be made in his academic testing, such as extending time limits and a quiet environment. The psychologist also suggested that the pupil's parents consider the use of cognitive remediation therapy. The record reveals that the pupil received cognitive remediation therapy, at his parent's expense, from January - March, 1989 and June - December, 1989.

On March 22, 1989, the CSE recommended that the pupil, who was then enrolled in a private school located in another school district, receive speech and language therapy, occupational therapy on a consultative basis and resource room services. These services were to be provided in a public school in the other district, in accordance with the provisions of Section 3602-c of the Education Law (Application to reopen the appeal of a Child with a Handicapping Condition, Appeal No. 90-20). The recommended services were not immediately provided, although it is not clear from the record why there was a delay in providing services.

The CSE met with petitioner on August 21, 1989 to discuss the pupil's IEP and the services to be provided during the 1989-90 school year, when the pupil would be in the third grade at a private school. The recommended services were provided during the Fall of 1989, but petitioner and the staff of the private school were concerned about the

fragmentation of the pupil's program as a result of having the pupil being transported to and from a public school for such services in the middle of the school day. Petitioner examined a number of respondent's special education classes, and agreed to transfer her son from the private school to a district class.

On November 30, 1989, the CSE met with petitioner to develop a new individualized educational program (IEP) for the pupil. That IEP provided that the pupil would receive instruction in reading and mathematics in a self-contained class of no more than 12 pupils, and would audit regular education classes in science and social studies. The pupil would be mainstreamed in regular classes for the subjects of art, music, and physical education. The related services of speech and language therapy and occupational therapy would be provided, and additional sessions were to be scheduled to makeup for the initial delay in providing such services when the pupil was enrolled in the private school. The CSE recommended that pupil receive three 30 minute sessions of speech and language therapy, and one 45 minute session of occupational therapy each week. Although the subject of cognitive remediation therapy was discussed at the November 30, 1989 meeting, the CSE did not recommend that the service be provided to the pupil. The pupil's IEP also provided that testing should be administered in a special location, with testing time limits to be waived or extended, and that test questions should be read to the pupil, except when the purpose of a test was to determine the level of the pupil's reading comprehension.

On January 16, 1990, the CSE met with petitioner to discuss her concerns, including whether a twelve month educational program should be provided, the appropriateness of cognitive remediation therapy, as well as petitioner's request for an updated evaluation by the psychologist who had provided cognitive remediation therapy to the pupil, and for topographical brain mapping. The CSE declined to provide any of these items, but did amend the pupil's IEP to specify that a study carrel and a headset should be made available to the pupil, and to provide for an additional 30 minutes of physical education each week. A Phase II IEP meeting was conducted on January 25 1990, at which time petitioner approved that document, which sets forth learning objectives for each marking period.

On February 26, 1990, petitioner requested that an impartial hearing be held with respect to the CSE's denial of her request for cognitive remediation therapy. Hearings were held on 10 days between April and September, 1990. At the commencement of the hearing, petitioner stated that she did not challenge the pupil's classification or the pupil's educational program, except for the CSE's failure to include cognitive remediation therapy. During the lengthy hearing, the CSE met on May 30, 1990 to conduct its annual review of the pupil and to prepare a Phase I IEP for the 1990-91 school year. That IEP provides that the pupil will remain in a special education class for reading and mathematics, but will be mainstreamed for credit in fourth grade science and social studies, as well as music, art and physical education. The provisions of the previous IEP

with regard to related services, special equipment and testing modifications were also included in the IEP for the 1990-91 school year. Petitioner requested an additional hearing to challenge the omission of cognitive remediation therapy from the 1990-91 IEP. In view of the identity of issues and the extensive testimony and evidence already adduced, the hearing officer consolidated the hearings in order to render a decision as to the appropriateness of the pupil's program for the 1989-90 and 1990-91 school years.

In his undated decision, the hearing officer noted that a significant portion of the hearing transcript is devoted to petitioner's efforts to obtain services from the CSE for her son, commencing in 1987, despite the repeated admonitions of the hearing officer that the pupil's current needs were the only relevant issue. Relying upon the definition of cognitive remediation therapy included in the testimony of the pupil's private therapist and comparing the services provided as part of that therapy with the services already provided to the pupil by respondent's staff, the hearing officer concluded that the therapist had not provided a different form of remediation than that provided by respondent. The hearing officer found that respondent had met its burden of proving that it was offering an appropriate program to petitioner's son, and denied petitioner's request that cognitive remediation therapy be included in the pupil's program. The hearing officer did direct respondent to reimburse petitioner for a \$25 fee that petitioner had been charged by the private therapist to discuss the pupil with respondent's speech and language therapist.

The central issue in the appeal is whether, for this pupil, cognitive remediation therapy is a necessary component of the free appropriate public education which respondent must provide in accordance with the provisions of 20 USC 1412 [1]. A free appropriate public education may consist of special education and related services provided in conformity with a pupil's IEP (20 USC 1401 [18]). Under both Federal and State law, a related service is defined as a service designed to assist a child with a handicapping condition to benefit from instruction, but does not include medical services other than those necessary to diagnose and evaluate a pupil (20 USC 1401 [17]; 8 NYCRR 200.1 [gg] and [w]). Although neither Federal nor State regulation specifically refers to cognitive remediation therapy (34 CFR 300.13; 8 NYCRR 200.1 [gg]), I note that the latter regulation defines related services to include other appropriate support services. In determining whether a board of education has provided an appropriate program, it is necessary to ascertain whether such program is reasonably calculated to enable the pupil to receive educational benefits (Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176; Karl v. Board of Education Geneseo Central School District and Ambach, 736 F. 2d. 873), and whether the program offers appropriate opportunities to meet the annual goals of the pupil's IEP (Application of a Child with a Handicapping Condition, 29 Ed. Dept. Rep. 83; Application of a Child with a Handicapping Condition, 29 *id.* 339).

The record reveals that the term cognitive remediation may refer to various kinds of therapies. The pupil's private therapist testified that she was providing two kinds of

therapy to the pupil. Electroencephalograms and biofeedback were applied to increase the self-generated stimulation of the pupil's Rolandic Cortex, for the purpose of decreasing the pupil's distractibility. At the hearing and in this appeal, petitioner stated that she did not seek to have respondent pay for this form of therapy. In any event, I find that the record establishes that respondent is offering an effective educational program to deal with the pupil's distractibility with the individualized instruction in reading it provides and the use of a study carrel and headphones. I note that the pupil's special education teacher and his speech and language therapist testified that the pupil's ability to remain on task has improved. I also note that the pupil's special education teacher further testified that the pupil has successfully participated in a regular education class in science and social studies to the extent, that he is now mainstreamed in those subjects.

The pupil's therapist testified that she also used a multi-sensory technique involving writing in sand, skywriting and other manipulative exercises to improve the pupil's ability to encode and retain information. The therapist testified that her technique differed from those employed in special education, as follows:

"Special education is really teaching content coursework, academics, like math and spelling and reading and social studies to a child and they're using adaptive techniques to facilitate the child's learning contents. Cognitive remediation does not instruct in any particular academic coursework. It works on the skills that underlie the ability to learn. You would be working on things like vigilance, selective attention, concentration, short-term memory, echoic storage, iconic storage, higher executive processes."

It is not necessary for me to determine the efficacy or desirability of the technique employed by the pupil's therapist, or to choose between content based instruction and non-content based instruction. Upon the record before me, I find that the pupil's IEPs accurately identify the pupil's needs and that the program selected by the CSE adequately addresses those needs.

The pupil's need for structure and organization is being met in the special education class, where there are clearly established expectations as to performance and behavior. As noted above, the pupil's distractibility and short attention span have improved since his entrance into respondent's program, to the extent that he will be mainstreamed in some academic subjects.

The pupil clearly has a deficit in one or more modes of processing information. During the 1989-90 school year, his deficit in reading was addressed by one to one instruction, using a multi-sensory approach. Following a meeting with petitioner on May 8, 1990, the CSE agreed to supplement the pupil's reading program with a whole language approach, a computer assisted program and tactile activities. The pupil's needs in expressive and receptive language are adequately addressed by respondent's speech and

language therapist who employs a variety of techniques, a number of which are similar to those used by the pupil's cognitive remediation therapist.

The pupil's need to improve his gross and fine motor skills have been addressed by the school's occupational therapist. Petitioner's suggestion that respondent has not addressed the pupil's need to improve his visual memory is apparently based upon the testimony of the pupil's special education teacher that pupils in her class are not required to copy information appearing on a blackboard into their notebooks. However, there are many ways to improve a pupil's visual memory, and I credit the teacher's testimony that she uses other techniques to address this need.

I have carefully considered petitioner's claim that her son has not made the educational progress reported by respondent. However, I find that the pupil has made appropriate progress in the relatively short period of time in which he has been in respondent's program. The record includes the results of various diagnostic and achievement tests administered before and since the pupil entered the program in January, 1990. Those test results suggest that there has been a slight regression by the pupil in reading and mathematics between May and September, 1990. However, it does not follow that respondent's program is inappropriate.

In view of the brief period of time he has been in the program as well as the differences in the composition and purposes of such tests, I am not persuaded that the test results afford an adequate basis for determining the pupil's rate of academic progress. I find that the pupil's achievement of goals set forth in his Phase II IEP in reading, spelling, written language and mathematics, as well as the testimony of his teacher, is far more persuasive evidence that the pupil has been provided with appropriate opportunities to meet the annual goals of his IEP. I also note that the pupil passed the third grade New York State Pupil Evaluation Program mathematics test in May, 1990, and that he will be graded in regular education social studies and science at the fourth grade level in the 1990-91 school year, after having audited these subjects at the third grade level in the 1989-90 school year.

Petitioner also asserts that respondent's program is deficient because the school psychologist does not coordinate the services being provided by the special education teacher, the speech and language therapist and the occupational therapist. Petitioner misapprehends the role of a school psychologist in the public schools, who is certainly available as a resource person to other school staff, but is not a supervisor of instructional and supportive staff. A pupil's program is developed by the CSE and is implemented by appropriate school staff in accordance with the pupil's IEP. Petitioner's request that the pupil's therapist or another appropriately trained psychologist be employed to coordinate the instruction of her son appears to be premised upon her belief that he requires the instructional technique used by a cognitive therapist, and that an appropriately trained therapist should be hired by respondent to assist the pupil's teachers in using this

technique. In view of my finding that, respondent has offered an appropriate program without cognitive remediation therapy, there is clearly no basis for requiring respondent to employ anyone as a consultant to advise the staff about the technique used in such therapy.

Petitioner requests that she be reimbursed for her expenditures in providing her son with cognitive remediation therapy. It is well established that a board of education may be required to pay for services obtained by the parents of a pupil, if the services offered by the school district were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359; Application of a Child with a Handicapping Condition, 27 Ed. Dept. Rep. 378; Application of a Child with a Handicapping Condition, Appeal No. 90-8). In this instance, I have determined that respondent has offered an appropriate program. Therefore, petitioner is not entitled to reimbursement.

Petitioner also requests that she be reimbursed for the cost of the topographical brain mappings which she obtained for use in the hearing. A parent of a child with a handicapping condition has the right to obtain an independent evaluation at public expense, provided that a board of education may initiate an impartial hearing to show that its evaluation is appropriate. If it is determined that the board's evaluation is appropriate, the parent has a right to an independent evaluation, but not at public expense (34 CFI 300.503 [b]; 8 NYCRR 200.5 [a][1][vi][a]). The record does not reveal whether petitioner has requested payment from respondent for the cost of the topographical brain mappings or whether respondent has refused to pay for such testing. Petitioner's request is therefore premature. I must also note that petitioner, the board's attorney and the hearing officer refer, in the transcript of this hearing, to another hearing which was held to determine the need for additional testing of this pupil. However, it is not clear from the record whether the testing which petitioner sought in the other hearing was the testing for which she now seeks reimbursement.

With regard to petitioner's request that respondent pay for her expenditures in having the pupil's psychologist testify as to the cognitive remediation therapy which he has provided to the pupil, I find that there is no basis in law for me as State Review Officer to direct respondent to pay for such expenditures. Although the expenses of an expert witness may be a cost for which reimbursement is possible under the Handicapped Children Protection Act, 20 USC 1415 (e), (Schroeder v. San Mateo County Office of Education, EHLR 441:245), such expenses may be awarded only by a court to a prevailing party (Application of a Child with a Handicapping Condition, 30 Ed. Dept. Rep. 378; Application of a Child with a Handicapping Condition, 28 id. 44).

Finally, I must note that the extensive proceedings which preceded this appeal which is one of a number of appeals which petitioner has brought, impel me to urge that

parties to work constructively for the benefit of the pupil. I do not minimize petitioner's efforts to obtain appropriate services for the pupil. However, it is also clear that parents and school districts have a mutual obligation to work together to develop and implement appropriate programs for pupils (School Committee of the Town of Burlington, supra; Tucker v. Bay Shore Union Free School District, 873 F. 2d 563).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 4, 1991**



HENRY A. FERNANDEZ