



No. 91-1

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

**Application of a CHILD WITH A HANDICAPPING  
CONDITION, by her 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 respondent's committee on special education (CSE) had recommended an appropriate educational program, including the related service of counseling, to be provided to petitioner's daughter during the 1990-91 school year, and denying petitioner's request that respondent be ordered to pay for the cost of counseling given to the pupil at the Orange County Mental Health Center. The appeal must be dismissed.

Petitioner's thirteen year old daughter is presently classified as learning disabled, because she has difficulty in writing which impairs her academic performance. There is no dispute as to the pupil's classification as learning disabled.

On July 5, 1990, respondent's CSE recommended that the pupil be placed in a regular eighth grade class, with resource room services for 3 hours per week and testing modifications, and that the pupil have access to a word processor and/or typewriter. The CSE also recommended that the pupil receive counseling in a small group setting once per week and individual counseling twice per month. Petitioner does not challenge what the CSE has recommended, but she asserts that the pupil should continue with individual

counseling at the Orange County Mental Health Center, at respondent's expense, on a once per week basis.

Before reaching the merits of the disagreement between petitioner and respondent, I must first consider petitioner's claim that the hearing officer was not impartial. Both Federal and State regulations require that an individual conducting an impartial hearing have no personal or professional interest which would conflict with his or her objectivity in the hearing (34 CFR 300.507 [a][2]; 8 NYCRR 200.1 [p][2]).

Petitioner timely raised the issue of the hearing officer's impartiality at the hearing (Application of a Child with a Handicapping Condition, 28 Ed. Dept. Rep. 240). The record reveals that the hearing officer, who is the attorney for another school district, served as a hearing officer in the Pine Bush Central School District on one prior occasion. The CSE chairperson testified that he had selected the hearing officer from a list of individuals who have completed a training program approved by the State Education Department, and that respondent had approved the chairperson's selection.

Petitioner asks that I conclude, as a general rule, that an attorney who has a school district as a client may not serve as an impartial hearing officer in any other school district. Petitioner suggests that I reach this result by finding it might be contrary to the interest of the attorney's school district client to render a decision ordering another school district to provide a particular service to a pupil. Petitioner asserts that a school attorney serving as a hearing officer would be inhibited from directing respondent to pay for private counseling, because such a decision would be a precedent which could be used in the attorney's school district.

I must first note that the use of non-school district employees to provide related services has been recognized for a number of years (Matter of Bd. of Ed. Frontier CSE, 23 Ed. Dept. Rep. 85). As I stated in Application of a Child with a Handicapping Condition, Appeal 90-4, a board of education may, in its discretion, select qualified school district employees or may engage the services of qualified non-employees to provide related services, such as counseling. Whether the use of a particular provider of related services is appropriate is a matter to be determined upon the facts of each case. Therefore, a finding by a hearing officer in this case that petitioner's daughter should be counseled by someone other than a school district employee would be of no significance to any other school district. I decline to find that, as a matter of law, attorneys are precluded from serving as impartial hearing officers in districts where they are not employed or retained, in the absence of any factual showing of actual or potential bias.

At the hearing, petitioner questioned the hearing officer about litigation in which the hearing officer's law firm and the law firm representing respondent at the hearing had appeared, and about respondent's payment for the services of the hearing officer on a prior occasion by a check payable to the hearing officer's law firm. Petitioner was advised

by the hearing officer that his firm and respondent's law firm had represented separate clients in the litigation to which petitioner referred. There is no evidence in the record that the hearing officer's law firm, or any member thereof, has rendered legal services for respondent, other than the hearing officer's prior service as a hearing officer. Therefore, I find no basis in law or fact to conclude that the payment of the hearing officer's fee to his law firm affords a basis for concluding that the hearing officer lacked the requisite impartiality.

I have also considered petitioner's claim that the hearing officer attempted to force her to retain an attorney to represent her at the hearing, as evidence of a lack of impartiality by the hearing officer. The record reveals that at the first day of the hearing, the hearing officer asked petitioner whether she had or required counsel. Petitioner replied by stating that she would prefer counsel, but that none was available at that time. Petitioner then asserted that a list furnished by respondent of possible sources of free or low cost legal and other relevant services in the area was of little practical use in obtaining such services. The hearing officer asked petitioner if she would like an adjournment of the hearing, but petitioner declined the hearing officer's offer. Petitioner then revealed in testimony that her assertion about the list furnished by respondent was based upon her experience approximately five months before, in connection with another hearing. The hearing officer granted a brief adjournment of the hearing, with a direction to petitioner to document her attempts to obtain counsel for this hearing and a direction to respondent's attorney to have respondent verify the availability of free or low cost legal services from the organizations on the list which respondent had given to petitioner. Upon the record before me, I am unable to conclude that the hearing officer acted improperly in seeking to ascertain whether petitioner could obtain counsel.

Federal and State regulations require each school district to inform the parents of children with handicapping conditions of the availability in the area of free or low cost legal and other relevant services, upon request of a parent or at the initiation of a hearing (34 CFR 300.506 [c]; 8 NYCRR 200.5 [a][2][iv]). In this instance, the list of possible providers of such services which respondent gave to petitioner included six organizations, one of which was the Office of Counsel of the State Education Department which could clearly not provide legal representation to private individuals. Of the five other organizations, the record reveals that one organization provides lay advocates and one organization provides attorneys for impartial hearings. Respondent correctly points out that neither Federal nor State regulation requires that a board of education assure that an attorney is available to any parent who requests legal assistance. Nevertheless, I agree with the hearing officer's observation that a board of education must make a good faith effort to verify the availability of services through the organizations which the board lists in its notices to parents. Since at least two of the organizations listed by respondent do in fact provide some appropriate services, I am not persuaded that respondent acted in bad faith. Nevertheless, I caution respondent to carefully review and update its list of possible providers of free or low cost legal and other relevant services.

A history of the pupil's education is set forth in Appeal of a Child Suspected of Having a Handicapping Condition, 29 Ed. Dept. Rep. 112. That decision noted that the pupil was initially identified as learning disabled in November, 1984, and was recommended by the CSE to receive resource room and counseling services. However, the pupil was removed from respondent's schools during the course of a hearing to review the CSE's recommendation. Respondent did not perform an annual review or provide special educational services to the pupil, who was placed in a private school by her parents. As noted by the Commissioner in his decision, the pupil's parents did not challenge the failure of the CSE to evaluate or provide services.

Petitioner referred the pupil to the CSE in December, 1987, but on February 1, 1988, the CSE determined that the pupil did not have an educationally handicapping condition. Petitioner did not seek a review of the CSE's determination. In January, 1989, petitioner asked respondent to pay for the cost of certain independent evaluations of the pupil which petitioner had obtained. Respondent's refusal to pay for the independent evaluations was the subject of petitioner's appeal to the Commissioner.

The Commissioner ordered respondent to pay for the cost of certain evaluations, rejected petitioner's request that respondent pay for other evaluations and services, and ordered respondent to immediately evaluate the pupil and convene a meeting of the CSE to consider the results of the evaluation. The record reveals that, subsequent to the receipt of the Commissioner's decision, an impartial hearing was held to determine whether the required evaluation would be done by respondent's staff or an outside organization. The parties then agreed to have the evaluation performed by the New York Hospital - Cornell Medical Center, which was completed in January, 1990.

Following the receipt of the aforesaid evaluation and the results of a classroom observation of the pupil in her private school, the CSE recommended that the pupil be placed in a regular seventh grade class, with resource room services and small group counseling once each week. The pupil was enrolled in respondent's Circleville Middle School at the end of March, 1990.

On June 6, 1990, the CSE met with petitioner to plan for the 1990-91 school year. Respondent's school psychologist, who had provided counseling to the pupil upon her return to respondent's schools, reported to the CSE that the pupil had successfully adjusted to her new school. The psychologist did not recommend any additional counseling. Petitioner requested that the school district pay for the once per week individual counseling which the pupil had been receiving at the Orange County Mental Health Center since April, 1989. The CSE did not accede to petitioner's request. An individual education program (IEP) was prepared, which did not provide for any counseling for the pupil.

The CSE met on July 5, 1990, one day before the hearing in this matter commenced. The CSE revised the pupil's IEP to provide that the pupil would receive group counseling once per week and would be individually counseled twice per month, and that the pupil's counselor would coordinate his efforts with those of the pupil's private therapist.

The central issue in this appeal is whether respondent has offered an appropriate program which is reasonably calculated to enable the pupil to receive educational benefits (Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176). As there is no dispute as to the rest of the pupil's educational program, the relevant questions are why is counseling to be provided and will the counseling to be provided by respondent adequately address the pupil's educational needs.

The January, 1990 independent evaluation of the pupil reported that the pupil's intellectual potential is in the superior range, but that she has difficulty writing. The evaluation also reported that the pupil has significant emotional problems which infringe upon her ability to learn in school. However, the evaluation does not reveal what testing was employed to support the conclusion as to the pupil's emotional difficulties, nor does it identify the nature of the pupil's emotional difficulties. The independent evaluation does not specifically recommend that the pupil receive counseling. The record also includes the results of a neuropsychological evaluation of the pupil performed by a private psychologist in January, 1989, in which the pupil is described as "a basically well-adjusted child who harbors a considerable amount of resentment for her mother". The private psychologist suggested that petitioner and the pupil receive joint-psychotherapy to establish a meaningful relationship, in a report which also stated that there was no basis for referring the pupil to the CSE.

The pupil's Phase II IEP for the remainder of the 1989-90 school year identifies her counseling goals as improving her ability to work appropriately in individual, small and large group instructional situations, increasing her awareness of her personal thoughts and feelings, and improving her basic social skills and sensitivities. Respondent's psychologist wrote an end of the year summary in which he stated that the pupil's behavior in a group was almost always appropriate and that the pupil could verbalize her feelings, but that the pupil needed to work on her ability to relate to peers.

At the hearing, the school psychologist testified that at the June 6, 1990 CSE meeting, the pupil's resource room teacher had expressed her concern about the pupil's social isolation, but that the CSE had not initially recommended counseling for the 1990-91 school year because the CSE and petitioner could not agree on whether it should be provided in school or by an outside counselor. The psychologist further testified that while the CSE agreed to provide counseling at the CSE meeting of July 5, 1990, there was no evidence that the pupil's emotional needs required the employment of an outside counselor.

The record reveals that the pupil has been counseled by a social worker at the Orange County Mental Health Center. However, the social worker did not testify at the hearing. A letter written by the social worker is in the record, but does not reveal the nature of any educationally related problem which her counseling addresses. Petitioner testified that the social worker had helped her daughter deal with the trauma which she allegedly suffered in 1984 because an elementary school teacher in respondent's district had allegedly treated the pupil unfairly. Petitioner asserts that the pupil has attained a trusting relationship with the social worker, and that the pupil should continue to receive counseling from the social worker to overcome to effects of her trauma.

Upon the record before me, I find that the counseling to be provided by respondent pursuant to the pupil's IEP for the 1990-91 school year will adequately address the pupil's emotional needs, which involve her ability to establish and maintain satisfactory peer relationships. The record establishes that the pupil successfully completed the 1989-90 school year with satisfactory grades. On the pupil's report card, her teachers describe her as courteous, well behaved, and having a positive attitude. The school psychologist, who will provide counseling during the 1990-91 school year, testified that he has a good rapport with the pupil. The counseling to be provided will address the concerns raised by the pupil's resource room teacher and school psychologist, which are the only educationally related emotional needs of the pupil in this record.

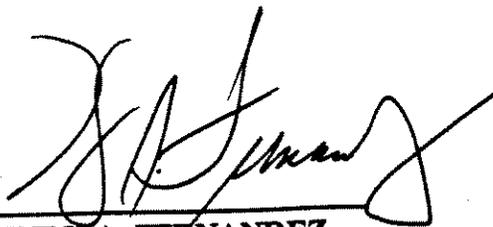
Petitioner also seeks to raise a number of issues relating to the failure of respondent to perform annual reviews and a triennial evaluation and to provide services to the pupil during the period when she was enrolled in nonpublic school. Petitioner asserts that the Commissioner of Education failed to address these issues in his prior decision. I do not agree with petitioner's assertion, and note that the Commissioner found that those issues had not been raised on a timely basis by petitioner, who failed to request a hearing at the time of respondent's omissions. Therefore, petitioner may not raise the same issues in this appeal. In any event the alleged errors by respondent do not establish what the pupil's present educational needs are, and are therefore irrelevant as to the services to be provided to the pupil (Leonard v. McKenzie, 869 F. 2d 1558).

Petitioner asserts that respondent did not comply on a timely basis with the Commissioner's decision of October 23, 1989, which required the CSE to conduct an evaluation and convene a meeting of the CSE within 30 school days after the date of the Commissioner's decision. Implementation of the Commissioner's decision appears to have been delayed by the subsequent dispute between the parties as to whether an independent evaluation would be performed. The evaluation was deferred because of another impartial hearing and subsequent agreement to obtain an independent evaluation from the New York Hospital - Cornell Medical Center. That evaluation was not obtained until January, 1990.

I have considered petitioner's remaining contentions, and find them to be without merit.

**THE APPEAL IS DISMISSED.**

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



**HENRY A. FERNANDEZ**