



No. 91-3

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 South Colonie Central School
District**

Appearances:

Mid-Hudson Legal Services, Inc., attorney for petitioner, Rosalee Charpentier, Esq., of counsel

Tabner and Laudato, Esqs., attorneys for respondent, C. Theodore Carlson, Esq., of counsel

DECISION

Petitioner appeals from respondent's alleged failure to implement the decision of an impartial hearing officer with regard to a revision of her son's individualized education program (IEP) and the initiation of a community based work experience as part of the pupil's vocational education program. The appeal must be sustained in part.

Although this appeal was originally filed with the Commissioner of Education for determination pursuant to the provisions of Section 310 of the Education Law, on January 22, 1991 it was referred to the State Review Officer, because it necessarily involves a review of the decision of a hearing officer to ascertain what was in fact decided, and whether petitioner is entitled to the relief she seeks even if the hearing officer did not rule in petitioner's favor with regard to such relief. The last document in the record before the State Review Officer was filed by respondent on February 22, 1991.

Petitioners sixteen year old son has Down Syndrome. The record reveals that in 1988 the pupil achieved a full scale I.Q. score of 44. His reading and mathematical skills are at approximately the second grade level. The pupil's classification as mentally retarded is not in dispute.

Petitioner became a resident of the South Colonie Central School District in August, 1989. On September 19, 1989, petitioner met with respondent's committee on special education (CSE) to develop the pupil's Phase I IEP. The CSE recommended that the pupil be enrolled in a self-contained special education class of the Board of Cooperative Educational Services of Albany, Schoharie and Schenectady Counties (BOCES) located in the high school of the Bethlehem Central School District. The pupil was to be mainstreamed for physical education and lunch. The CSE also recommended that the pupil receive speech/language therapy three times each week and counseling by a social worker once each week.

Petitioner initially agreed to the proposed placement, and the pupil began to attend school in Bethlehem, where the pupil was also enrolled in a regular education wood shop class. On November 14, 1989, a vocational evaluation of the pupil was conducted at the BOCES. As a result of that evaluation, the pupil was enrolled in a kitchen services class at a BOCES vocational center (Vo-Tech) located in the Town of Colonie. The pupil attended class at Bethlehem in the morning, was transported by bus to the Vo-Tech center in the middle of the day, and returned to class in Bethlehem for the remainder of the school day.

On January 3, 1990, petitioner requested a hearing to review the pupil's educational program. A hearing was held over five days in January and February, 1990, to consider petitioner's request that the pupil receive instruction in respondent's own high school and that he be provided with a series of community based work experiences. In a decision dated May 7, 1990, the hearing officer found that the BOCES class in Bethlehem was not the least restrictive educational environment for the pupil, and directed respondent to place the pupil in a self-contained special education class in the South Colonie High School. The hearing officer found that the CSE should have performed an assessment of the pupil's adaptive behavior to determine the levels of the pupil's self-help skills and of his independence, and directed the CSE to perform such an assessment. The hearing officer further found that the pupil required a functional educational approach to learning and that the BOCES Vo-Tech program was suitable to meet his vocational needs. He directed that the pupil should continue with the Vo-Tech kitchen service program, with a community based work experience, for the 1990-91 school year.

Respondent conducted an adaptive behavioral assessment on May 24, 1990. Petitioner, dissatisfied with respondent's evaluation, obtained a private evaluation, which was completed in July, 1990.

The CSE met with petitioner on June 19, 1990 to review its assessment and plan for the pupil's 1990-91 school year. Petitioner and the CSE disagreed on the intent of the hearing officer's decision with regard to the nature of the pupil's vocational education for the 1990-91 school year, and sought a clarification from the hearing officer. In a letter dated July 31, 1990, the hearing officer noted that he had directed that the pupil continue in the Vo-Tech kitchen service program with a community based experience to enhance his job readiness skills. However, the hearing officer declined to provide further direction, and stated that he was leaving the specifics of the pupil's program and community based work experience to be developed by the CSE.

Petitioner was advised by the CSE on August 30, 1990, that it had determined that the pupil was not ready to enter into a community based work experience and that it would not employ a job coach to assist the pupil in such an endeavor. The CSE prepared an IEP which provided for an accelerated simulated workshop program, in lieu of the kitchen services vocational program which had been approved by the hearing officer. Respondent's attorney alleges in an affidavit that the pupil's vocational program was altered at petitioner's request. I note that petitioner signed a new IEP with the notation that she approved of it only with respect to the pupil's English and mathematics classes (See Exhibit 3 to affidavit of C. Theodore Carlson). The record before me also includes correspondence from petitioner to respondent's superintendent, in which petitioner states that she does not want her son to be enrolled in either the kitchen services program or the alternative program recommended by the CSE. The correspondence also reveals that the pupil was employed part-time at a local supermarket at the time of day when he was supposed to be in school attending the BOCES Vo-Tech program.

In this appeal, petitioner seeks an order compelling respondent to provide the pupil with community based work experiences with the assistance of a job coach, and to assess the pupil's present part-time employment for the purpose of incorporating such employment into the pupil's instructional program. Petitioner also asks that I direct respondent to reimburse petitioner for her expenditures in organizing his work experience at the supermarket and in transporting the pupil to and from the supermarket.

Respondent asserts that the appeal is untimely because it was not commenced within 30 days after any of the actions of which petitioner complains. Respondent's reliance upon 8 NYCRR 275.16, which prescribes the 30 day period to which respondent

refers, is misplaced. That regulation relates to appeals to the Commissioner of Education pursuant to Section 310 of the Education Law. As noted above, this appeal is being decided by the State Review Officer in accordance with the provisions of Part 279 of the Regulations of the Commissioner of Education. 8 NYCRR 279.2(b) provides that a petition to review the decision of the hearing officer must be served upon a board of education within 40 days after receipt of such decision. However, the decision of the hearing officer was not final in this case. The hearing officer directed the CSE to take additional action to ascertain the pupil's needs and establish an appropriate program for the 1990-91 school year. It was appropriate for petitioner to wait for the CSE to act in response to the hearing officer's decision; nor should she be faulted or penalized for attempting to informally resolve her concerns and complaint through settlement discussions with respondent and its superintendent in September, 1990. Informal resolution of disputes between parents and school districts is a desirable outcome. Respondent has not established that it was prejudiced by petitioner's subsequent delay in filing her appeal, and I will not dismiss the appeal as untimely (Application of a Child with a Handicapping Condition, 30 Ed. Dept. Rep. 64; Application of a Child with a Handicapping Condition, 28 id. 519; Application of a Child Suspected of Having a Handicapping Condition, 26 id. 474). To dismiss this appeal as untimely would be inequitable.

Respondent also asserts that the appeal is premature, in that petitioner must first request a hearing and obtain a hearing officer's decision with respect to her complaints about the pupil's program for 1990-91. Respondent is correct in asserting that parental disputes with a CSE are to be resolved initially by a hearing officer before State-level review as provided by Section 4404 of the Education Law. However, the central issue in this appeal is whether the pupil's instructional program for the 1990-91 school year should include community based work experiences, which was an issue before the hearing officer and which was decided and addressed affirmatively by him in his decision. There is no basis in law or logic for requiring petitioner to participate in another hearing on this issue. Therefore, I will consider petitioner's request for relief.

Petitioner asserts that the pupil is ready for meaningful work experiences, in view of his performance in work experiences prior to enrolling in respondent's schools. She further asserts that the hearing officer also concluded that the pupil was ready for such experiences, in finding that the BOCES Vo-Tech program was appropriate for the pupil. Respondent asserts that the pupil is not ready for a work experience, based upon advice given to the CSE by the principal of the BOCES program at the August 30, 1990 CSE meeting.

The record reveals that the student has already had prevocational work assignments. During 1987 and 1988 while attending school in the Lansing Central School District, the pupil participated in a private program known as the Learning Web. Student

participants in the program were placed in community apprenticeships for approximately two to ten hours each week to obtain hands-on experience in different trades or vocations. The Learning Web's program coordinator testified at the hearing that these unpaid apprenticeships were of fairly short duration, in order to afford the participants the opportunity to experience a variety of jobs. Petitioner's son was initially placed with a local animal shelter, where he fed dogs and cats and cleaned their cages. The pupil's next apprenticeship was with a cooperative food market, where he restocked shelves for approximately five months. The pupil then worked preparing salads and setting tables for approximately three weeks in a restaurant, and thereafter accompanied a parking meter attendant on her rounds for a five month period. The pupil's next assignment was to assist a security attendant at a local shopping mall for approximately four months. In September, 1988, the pupil began another apprenticeship at a grocery store. The Learning Web program coordinator testified that the pupil had been successful in each of his apprenticeships.

The BOCES vocational evaluator, in his report dated October 11, 1989, found that the pupil should be able to complete the kitchen services program without difficulty. However, the evaluator recommended that the pupil receive a year or two of vocational training, before beginning a work experience, in order to acquire more skills for a better job. Although respondent has referred to the comments of the BOCES principal about the pupil's readiness for a work experience, I note that there is no sworn testimony or written statement by the principal in the record.

Although the hearing officer in his letter of July 31, 1990 stated that he would leave the details of the pupil's vocational program for the 1990-91 school year to the CSE, he clearly found in his decision that the BOCES Vo-Tech program, with community based work experiences, would be appropriate for the pupil during such school year. The hearing officer noted that the pupil learns best when he is afforded the opportunity to learn meaningful, functional skills in actual relevant experiences. Having reviewed the entire record, I concur with the hearing officer's finding that work experiences should be a component of the pupil's vocational education.

The Vo-Tech kitchen services program would be appropriate for the pupil, in view of his interests and abilities. Although petitioner and respondent may mutually agree upon an alternative program for the pupil, I am unable to find that there has been a mutual agreement to an alternative to the kitchen services program previously approved by the hearing officer. Therefore, I find that the CSE must reconvene with petitioner, to amend the pupil's IEP for the 1990-91 school year to provide for a suitable program of vocational education, including an opportunity for a community based work experience.

In revising the pupil's IEP, the CSE must include information from the adaptive behavior assessment which it performed pursuant to the hearing officer's decision. I must note that the summary of respondent's evaluation included in the record does not provide

sufficient information, but it is based upon appropriate measures of the pupil's adaptive behavior. It is essential that the pupil's IEP include information as to the pupil's level of independence and self-help skills, in order to plan for the pupil's work experiences, as well as his entire educational program.

Although petitioner obtained a private assessment of the pupil's behavior, that assessment does not pertain to the pupil's adaptive behavior, i.e. the effectiveness with which the pupil copes with the natural and social demands of his environment (8 NYCRR 200.1[a]). Respondent should consider the private assessment in revising the pupil's IEP (8 NYCRR 200.5[a][1][v]), but it is not obliged to incorporate the recommendations of that evaluation in the pupil's IEP.

The amount of community based vocational instruction should be set forth in the pupil's IEP, and should be increased annually as the pupil progresses through a program of vocational education. Whenever possible, community base work experiences should be scheduled for a minimum of at least one semester and should provide a variety of tasks. The specific goals and objectives of the community based instruction, as they relate to a particular Vo-Tech instructional program, should be set forth on the pupil's Phase I IEP.

There must be careful coordination between the Vo-Tech program and the community based work experiences undertaken by the pupil, so that the pupil will learn and apply specific skills. The pupil will require supervision in his community based work experiences in order to provide the necessary coordination between his school based and community based instruction. The CSE, in consultation with the BOCES, should determine whether the needed coordination will be the responsibility of a job coach or other employee of the district or the BOCES.

With regard to petitioner's request that I order respondent to assess the pupil's present part-time employment and develop an individualized plan for such employment as part of the pupil's educational program, I must note that there is no basis in the record for me to determine whether such employment relates to any vocational instructional program offered by respondent or BOCES or is otherwise appropriate for the pupil. Respondent is, of course, free to consider whether such employment could be related to any appropriate program of vocational instruction. Petitioner's request for an order directing respondent to reimburse petitioner for her expenditures in arranging for the pupil's part-time employment and transportation to and from such employment must also be denied, in the absence of any evidence that such employment is related to an instructional program.

Finally, I must urge the parties to work cooperatively for the benefit of the pupil. I cannot condone petitioner's unilateral decision to withhold her son from attendance at school for a portion of the school day in order for him to be employed. The pupil's

absence from school deprives him of the opportunity to acquire necessary vocational skills and to participate in a program where work experience will reinforce instruction.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED THAT within 30 calendar days after the date of this decision, respondent's CSE must prepare a revised IEP for the pupil to provide a vocational education program with a community based work experience, in accordance with the provisions of this decision.

**Dated: Albany, New York
February 24, 1991**


HENRY A. FERNANDEZ