



No. 91-12

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 parents, for review of a determination of
a hearing officer relating to the educational program provided
by the Board of Education of the City School District of the
City of Lockport**

Appearances:

Legal Assistance Program, State University of New York at Buffalo, attorney
for petitioners, Melinda R. Saran, Esq., of counsel

Sargent, Repka and Pino, Esqs., attorneys for respondent, Nicholas J. Sargent, Esq.,
of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer, to the extent that such decision did not compel respondent to provide the related services of occupational therapy, physical therapy and speech therapy to their child during the months of July and August, 1991, as a remedy for respondent's failure to provide such services to the pupil during the 1989-90 school year, and to the extent that such decision implied that certain special educational and/or related services may only be provided at neutral sites to pupils who attend sectarian schools. The appeal must be sustained in part.

Petitioners' seven year old child has Down Syndrome. The pupil's classification as a mentally retarded pupil is not in dispute.

During the 1988-89 school year, the pupil was enrolled in a special education class of the Board of Cooperative Educational Services for Orleans and Niagara Counties (BOCES). At the BOCES, the pupil was in a class of not more than twelve pupils taught by a teacher with the assistance of an aide, for instruction on a twelve month basis. He

also received the related services of occupational therapy, physical therapy and speech therapy.

On April 21, 1989, the pupil's mother met respondent's committee on special education (CSE) to prepare a Phase I individualized educational program (IEP) for the pupil to be used during the period from July 1, 1989 through June 20, 1990. The pupil's mother testified at the hearing that the CSE meeting was conducted by an employee of the BOCES, and that the other participants were the pupil's teacher at BOCES and a school psychologist. The CSE chairperson was present for at least part of the meeting. The pupil's mother was advised by the BOCES administrator that the CSE would recommend that the pupil remain in the special class setting at BOCES on a twelve month basis for the 1989-90 school year and that the pupil continue to receive daily speech therapy, as well as occupational therapy and speech therapy on a twice per week basis. The pupil's mother asked whether the pupil could be placed in a regular kindergarten, but was told by one or more members of the CSE that such a placement was not feasible for the 1989-90 school year. The CSE chairperson had previously accompanied petitioners on an observation of a prototype program for mainstreaming pupils with handicapping conditions in the public schools of Buffalo.

At the April 21, 1989 meeting, the pupil's mother suggested that the pupil might attend St. Mary's Catholic School in Lockport (St. Mary's) during the 1989-90 school year. However, the pupil had not yet been accepted for enrollment in St. Mary's. The pupil's mother was asked by the BOCES administrator whether the pupil would attend the BOCES program during July and August, 1989, as provided for in the proposed Phase I IEP. The pupil's mother stated that he would be enrolled in a summer school program conducted by respondent. The BOCES administrator advised the pupil's mother that the pupil would not receive occupational therapy or physical therapy, unless he attended the BOCES program.

After the pupil had been accepted into St. Mary's, his mother had a telephone conversation with the CSE chairperson, in which she asked that physical therapy and occupational therapy be provided to the pupil while he attended St. Mary's. On July 26, 1989, the pupil's mother wrote a letter to the CSE chairperson, advising the latter that the pupil would be placed in St. Mary's, but the mother did not request that any services be provided to the pupil. On September 25, 1989, the CSE chairperson wrote a letter to the pupil's mother in which the chairperson acknowledged that the pupil had attended respondent's program, rather than BOCES, during July and August and would attend St. Mary's for the duration of the 1989-90 school year. During July and August, 1989, the pupil did receive speech therapy while he was enrolled in respondent's summer program.

From September, 1989 through June, 1990, the pupil was educated in a regular kindergarten at St. Mary's. Respondent provided speech therapy, but no other related services. A speech therapist employed by respondent testified at the hearing that the CSE

chairperson told her to provide speech therapy to petitioners' child at St. Mary's, on a daily basis during the 1989-90 school year. The speech therapist did not receive a copy of any Phase I IEP for the pupil, but nevertheless attempted to schedule a Phase II IEP planning conference with petitioners. Neither petitioner attended the scheduled conference, and the therapist made no further effort to hold a conference (cf. 8 NYCRR 200.4 [e][4]).

On June 11, 1990, petitioner's legal representative requested that respondent convene an impartial hearing to review respondent's failure to provide services to the pupil pursuant to his Phase I IEP for the 1989-90 school year. A hearing was held on September 18, 1990, at which the parties agreed not to discuss the pupil's needs as of that time. The appropriateness of the pupil's program for the 1990-91 school year was the subject of a separate hearing, and is now the subject of a separate appeal (Application of a Child with a Handicapping Condition, Appeal No. 91-13).

In a decision dated January 28, 1991, the hearing officer found that respondent's CSE had failed to inform petitioners of their right to obtain a hearing to review the CSE's recommendation that the pupil continue to be enrolled in the BOCES program, in violation of the provisions of 8 NYCRR 200.5(a)(4)(ii). The hearing officer further found that the CSE, upon learning of petitioners' intention to place the pupil in St. Mary's, should have reconvened to prepare a new IEP for appropriate services to be provided to the pupil at a religiously neutral site from September, 1989 through June, 1990. The hearing officer rejected respondent's contention that petitioners had waived their right to contest respondent's failure to provide related services to the pupil by not requesting a hearing until June, 1990, because respondent had not informed petitioners of their right to challenge the failure to provide services.

With respect to petitioners' request for an order directing respondent to provide occupational therapy and physical therapy during July and August, 1991 as a remedy for respondent's previous failure to provide such services, the hearing officer found that the extent to which the pupil's educational progress had been impeded by the absence of such services could not be determined on the record before her. The hearing officer directed respondent to have conducted an independent evaluation to reveal the extent to which the pupil's educational progress had been impeded by respondent's failure to provide occupational therapy and physical therapy, and to consider the results of that evaluation in amending the pupil's IEP to provide those services in July and August, 1991. The hearing officer also found that the CSE lacked the required parent member when it met on April 21, 1989, in violation of Education Law Section 4402 (1)(b)(1).

Petitioners assert that the hearing officer erred in limiting respondents' responsibility during the period from September, 1989 through June, 1990 to providing occupational therapy and physical therapy at a religiously neutral site. They further assert that such a limitation ignores the pupil's individual needs, in violation of the Individuals

with Disabilities Education Act (20 USC 1401 et seq.). Respondent asserts that the hearing officer's decision is consistent with Federal and State law, and that the location at which it provides services is a matter within its discretion.

I find that there is no reason to determine where the related services in question could have been provided during the period from September, 1989 through June, 1990. There is no dispute that the services were not offered by respondent to the pupil. Therefore, the location at which the services could have been provided is a moot question. The relevant issue is whether such services must be made available to a pupil whose parents unilaterally place the pupil in a private school. I find as did the hearing officer, that pursuant to Federal regulations and State law, a board of education is obligated to provide related services to pupils with handicapping conditions who have been placed by their parents in private schools (34 CFR 300.403 and 300.452; Education Law Section 3602-c). When a CSE learns that a pupil has been placed in a private school by the pupil's parents, the CSE should prepare an IEP to provide appropriate related services (Application of the Bd. of Ed. Middle Country CSD, 27 Ed. Dept. Rep. 114).

In view of the fact that respondent should have made available to the pupil the related services of occupational therapy and physical therapy, which were included in the pupil's proposed Phase I IEP for the 1989-90 school year, the central issue is what is the appropriate remedy for respondent's failure to offer such services. While petitioners and the hearing officer have referred to an appropriate remedy as compensatory education, I note that such term is usually applied to the provision of educational services to a pupil beyond the age of 21, when the pupil would not otherwise be entitled because of age under Federal or State law to receive such services (Burr v. Ambach, 863 F. 2d 1071, vacated sub. nom. Sobol v. Burr, 1095 Ct. 3209, reaffirmed 888 F. 2d 258; Lester H. v. Gilhool, ___ F. 2d ___, 16 EHRLR 1354; Jefferson Co. Bd. of Ed. v. Breen, 864 F. 2d 795; Application of a Child with a Handicapping Condition, 29 Ed. Dept. Rep. 223). In view of the pupil's age, his continuing eligibility to receive educational services, and the impossibility of predicting whether the pupil will be able to attain his educational goals by age 21, petitioners' claim for compensatory education, as such, would have to be denied (Application of a Child with a Handicapping Condition, supra). However, petitioners are in essence requesting that the pupil be provided with additional occupational therapy and physical therapy now, as a remedy for respondent's failure to provide those services during the 1989-90 school year.

While agreeing with petitioners that an order directing respondent to provide additional occupational therapy and physical therapy could be an appropriate remedy, the hearing officer directed respondent to obtain an independent evaluation of the pupil for the purpose of measuring the impact upon the pupil's educational progress of respondent's failure to provide those services during July and August, 1989. Petitioners assert that the hearing officer erred in limiting the remedy to the effects of respondent's failure to provide services in July and August, 1989, rather than including the remainder

of the 1989-90 school year. I concur that there is no basis for distinguishing between the loss of these services during those months and the loss of those services during the period September, 1989 through June, 1990.

Petitioners assert that the hearing officer exceeded her authority in requiring any assessment of the impact of respondent's failure to provide occupational therapy and physical therapy, as a precondition for the pupil's receipt of additional services. They assert that respondent should be directed to provide these services plus speech therapy, during July and August, 1991 and thereafter if necessary. They offer no explanation as to how the extent or duration of these services would be ascertained. With regard to petitioners' request for additional speech therapy, I note that respondent did provide such therapy during the Summer of 1989 and the regular 1989-90 school year.

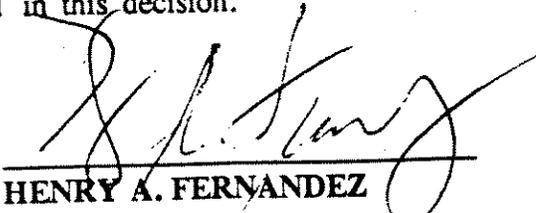
I cannot agree with petitioners' assertion that the pupil should be provided with additional occupational therapy and physical therapy without any assessment of his present need for such services. I agree with the hearing officer that the record does not contain current information about the pupil's needs and abilities. I also agree that the pupil should be evaluated, but not for the reason cited by the hearing officer. The hearing officer has directed that the results of an independent evaluation of the pupil's present needs and abilities be used to determine the extent to which respondent's failure to provide services in the 1989-90 school year has impeded upon the pupil's educational progress. However, I find that the use of such results for that purpose would be a highly speculative endeavor, which would not necessarily address the pupil's present needs. There are many reasons why a pupil may achieve, or fail to achieve a particular task or skill. I will, instead, direct respondent to use the results of an independent evaluation to develop an appropriate program to address the pupil's current needs, if any, for physical therapy and occupational therapy.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the hearing officer be, and the same hereby is, annulled to the extent that such decision directed respondent to use the results of an independent evaluation to ascertain the extent to which the pupil's educational progress had been impeded by respondent's failure to provide occupational therapy and physical therapy during the months of July and August, 1989; and

IT IS FURTHER ORDERED that respondent shall use the results of the independent evaluation for the purpose outlined in this decision.

Dated: Albany, New York
April 18, 1991


HENRY A. FERNANDEZ