



No. 91-43

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

**APPLICATION of a CHILD WITH A HANDICAPPING
CONDITION, by the parents, for review of a determination of
a hearing officer relating to the educational program offered
by the Board of Education of the Three Village Central School District**

Appearances:

Black and Black, Esqs., attorneys for petitioners, Edwin F. Black, Esq.,
of counsel

Pelletreau and Pelletreau, Esqs., attorneys for respondent, Vanessa M. Sheehan, Esq.
of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which upheld the denial by respondent's committee on special education (CSE) of petitioners' request that respondent provide their child with continuous nursing services while she is in school and while she is transported between home and school. The appeal must be dismissed.

On September 4, 1990, petitioners' child was struck by a car while the child was crossing a street near school. The child was hospitalized for a cervical spinal injury at Stony Brook University Hospital. While at that hospital, the child became dependent upon a ventilator for breathing. On September 19, 1990, she received a tracheostomy to facilitate her ventilator care. On October 16, 1990, the child was transferred to Children's Specialized Hospital in Mountainside, New Jersey for rehabilitation. On January 31, 1991, the child had a posterior spinal fusion at the United Hospital of Newark, New Jersey. The child returned to the Children's Specialized Hospital, where she remained until she was discharged on May 21, 1991. Upon discharge, the child was diagnosed as having quadriplegia, recurrent urinary tract infection, neurogenic bowel and bladder, as well as scoliosis. The child uses an electric wheelchair, which she controls by a sip and puff switch which she activates with her mouth.

She is dependent upon a ventilator, and requires assistance for catheterization and tracheostomy care.

The record reveals that while the child was at the Children's Specialized Hospital she received instruction at the seventh grade level, and made excellent progress in her studies. By mutual agreement of the parties, the child was provided home instruction upon her release from the hospital for the remainder of the 1990-91 school year and the Summer of 1991. The child, who is 13 years old, is currently in the eighth grade at respondent's Murphy Junior High School. As a temporary measure, the child's mother has accompanied her to school, in order to monitor the child's ventilator.

On December 11, 1990, the child's mother referred the child to the CSE. Representatives of the CSE attended a monthly staff meeting at the Children's Specialized Hospital, in January 1991, to learn about the child. The CSE agreed to have the child evaluated by appropriate staff at the hospital. A psychological evaluation and an educational evaluation of the child were performed in February, 1991. Psychological testing revealed that the child has a verbal IQ of 137. The psychologist found that the child should be educated in a mainstream setting, and that she should receive individual or group therapy to adequately address her feelings about her disability. The educational evaluation revealed that the child performed at or above grade level in all areas. It also revealed that the child had quickly learned a form of code, by which letters are put into a computer by blowing and sipping on a straw, for the purpose of using the computer to write. An in-patient classroom report revealed that the child was performing well above her grade level, and displayed maximum attention and cooperation. Thereafter, physical therapy, occupational therapy and speech hearing recommendations were prepared by the staff of the Children's Specialized Hospital, who recommended that adaptive equipment be purchased so that the child could participate in a public school program. The speech report revealed that the child could speak with or without the assistance of a special valve, but that her speech was better when the valve was used.

On June 4, 1991, respondent's chief school physician prepared a report for the CSE describing the child's needs and safety considerations while she attended school, in which the physician stated that the most critical threat to the child's safety would be a ventilator failure, either because of a power interruption, obstruction of airways or the inadvertent disconnection of the ventilator tubing. The physician also stated that it would be mandatory that a person trained and certified in the use of ventilator equipment, including the use of a bag-valve-mask be physically present at all times.

The CSE met with petitioners on June 14, 1991, to determine the classification of the child's handicapping condition and the appropriate program and services to be provided to her during the 1991-92 school year. The CSE recommended that the child be classified as orthopedically impaired, and that she be mainstreamed for all eighth grade subjects, with appropriate alternative testing techniques, at respondent's Murphy Junior High School. The CSE also recommended that the child receive physical therapy five times each week, and

occupational therapy consultation once a week. The CSE further recommended that specialized equipment be provided, including a computer and printer for in-school use, a voice activated computer system for completing school assignments at home, tape recorders for use at home and in school, a mechanical page turner for use at home, a desk attachment for the child's wheelchair, and books on tape. Special transportation would also be provided. The CSE also recommended that an aide be provided to assist the child with written activities, mobility and personal tasks. On July 16, 1991, respondent approved the CSE's recommendations.

On July 17, 1991, the CSE met with petitioners to discuss their request that respondent also provide their child with the services of a nurse during school hours. The nurse would monitor the child's ventilator and manually respire the child if her ventilator failed, would suction the child's tracheostomy periodically, would catheterize the child periodically, and be able to administer immediate care if necessary. The CSE recommended to deny petitioners' request. On July 31, 1991, respondent approved the CSE's recommendation.

On July 17, 1991, petitioners requested an impartial hearing, which was held on September 11, 1991. In a decision dated October 7, 1991, the hearing officer found that the child requires the continuous and exclusive services of a registered nurse between home and school and while the child is in school. Acknowledging that some tasks, such as catheterization, do not require the services of a registered nurse, the hearing officer found that a registered nurse would be required for the care of the child's ventilator and the recognition of possibly life-threatening conditions, and that such service would have to be provided on a continuous basis. The hearing officer further found that the nature and extent of the required nursing services were beyond what respondent would be required to provide as related services or medical services under Federal or State law. The hearing officer rejected a claim by petitioners that the CSE had exceeded its authority by recommending to respondent only that which respondent is legally obligated to provide, rather than what the child needs.

In this appeal, petitioners assert that their child has been denied a free appropriate public education solely because of the severity of her disability, in contravention of Federal law. Acknowledging that courts have considered the nature and extent of the health services which children require, in order to determine whether such services come within the statutory definition of a free appropriate education, petitioners assert that to make judgments based upon such an analysis is merely an expression of a personal attitude about the severity of the handicapping condition. They assert that children who require the assistance of a ventilator should not be excluded from instruction in a mainstream setting, merely because they also require the services of nurses to monitor their ventilators.

Respondent asserts that the child requires skilled, continuous nursing services in excess of those which are routinely provided by school nurses, and that such services are not related services which it is obligated to provide. Instead, respondent asserts that the services

which this child requires are more like medical services, which with certain exceptions, a board of education is not required to furnish under either Federal or State law.

There is no dispute about the child's handicapping condition, any aspect of her educational program, or that this child should be educated in regular education classes. There is also no dispute that, as a quadriplegic, the child is unable to care for herself and requires the assistance of a nurse to monitor her ventilator, provide emergency care if necessary, periodically suction the tracheostomy tube by which she breathes, catheterize her to remove urine from her bladder, and assist her to move her body to prevent the breakdown of her skin. A nurse would have to be assigned to monitor the child's condition continuously. Absent such assistance, the child could not attend school, and would have to receive instruction at home. The child requires such assistance regardless of whether she attends school.

At the hearing, the child's physician testified, as did the physician member of the CSE. Both physicians agreed that the child requires continuous nursing care, in that a trained nurse must be present at all times to provide life support through manual respiration or CPR (cardio pulmonary resuscitation), if the child's ventilator malfunctioned. The individual must be familiar with the operation of a ventilator, and be able to do minor adjustments, such as straightening out kinks in the plastic tubing linking the child to the ventilator. Periodically, the ventilator must be disconnected, and the tubing must be cleared of mucous secretions by flushing with a solution. During this procedure, known as suctioning, it is necessary to assist the child's respiration by using a bellows-like bag to force air into the child's lungs. This procedure is known as bagging. The child's physician testified that the child would normally have to be suctioned about once a day while in school, but more frequently if she had a cold or was wheezing. The child's physician further testified that suctioning can generally be done at scheduled times, rather than on an emergency basis. Respondent's physician testified that the child should be suctioned approximately every two hours. Both physicians testified that a registered nurse should be employed, although other necessary tasks, such as catheterization could be performed by a trained aide. The child's physician testified that any registered nurse should be confident about performing suctioning and bagging, with a minimum of training. Respondent's physician, who is also an assistant clinical professor at the State University of New York at Stony Brook, testified that a minimum of 40 hours of training would be necessary for any of the respondent's school nurses to acquire the necessary proficiency with these procedures. Respondent's director of health and physical education, who supervises respondent's school nurses, testified that the nurses presently on staff do not have the requisite training to provide the services needed by the child.

The central issue in this appeal is whether respondent is required by either Federal or State law to provide petitioners' daughter with the services of a registered nurse at all times when the child is in school or being transported to or from school. Respondent is obligated to provide each child with a disability who resides within the school district with a free appropriate public education. Federal statute defines a free appropriate public

education as special education and related services provided at public expense and under public supervision, and which meet the standards of the State educational agency, and are provided in conformity with a child's individual education program (20 USC 1401 [a][18]). The term related services is defined in Federal law to mean:

"...transportation and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation and social work services, and medical and counseling services, including rehabilitation counseling, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." (20 USC 1401 [a][17])

In Irving Independent School District v. Tatro, 468 U.S. 883, the Supreme Court held a child with a neurogenic bladder who required periodic catheterization was entitled to receive such service from the school district. The Court found that such service was a supportive service "required to assist a child to benefit from special education," i.e. it was a related service which the child's school district was required to provide. In doing so, the Court noted that Federal regulation defines related services to include "school health services", which are in turn defined as "services provided by a qualified school nurse or other qualified person" (34 CFR 300.13 [a] and [b][10]). With regard to the very limited purposes for which boards of education are required to provide medical services under the Federal statute, the Court reasoned that Congress had not intended to impose an obligation to provide an unduly expensive service or one beyond the range of school district competence. Noting that school nursing services have long been a part of the educational system, the Court found that Congress could reasonably have intended to impose an obligation upon school districts to provide such services.

The fact that the nursing services which this child requires would be supportive of her educational program is not dispositive (Clovis Unified School District v. California Office of Administrative Hearings, 903 F. 2d 635); nor is the fact that the services could be provided by a nurse, rather than a physician (Clovis Unified School District, supra; Tice v. Botetourt County School Board, 908 F. 2d 1200). Instead, it is necessary to consider the nature and the extent of the services, (Detsel by Detsel v. Board of Education Auburn Enlarged School District, 637 F. Supp. 1022, aff'd 820 F. 2d 587, cert. den, 484 U.S. 981). In Detsel, the Court reviewed a decision of the Commissioner of Education, who had concluded that the Auburn Board of Education was not required to provide skilled nursing care for a child with a disability who was also dependent upon a ventilator and who required continuous supervision by a nurse trained to provide respiratory care (Application of the Bd. of Ed. of the City Sch. Dist. of Auburn, 24 Ed. Dept. Rep. 306). The United States District Court for the Northern District of New York also found that the Board of Education was not required

such services as part of a free appropriate public education, noting the need for constant monitoring of the child and the fact that the medical attention which the child required was beyond the competence of a school nurse. On appeal, the U.S. Court of Appeals for the Second Circuit held that the District Court had given proper effect to the statutory scheme in balancing the interests of the parties. The parallel State law and regulations, Education Law section 4401 (2)(k) and 8 NYCRR 200.1 (ff), do not expand upon the Federal definition of related services. The nature and extent of the skilled nursing services which the child in this appeal requires are essentially the same as those in the Detsel decision.

This child will require extensive health care services on a continuous basis for perhaps the rest of her life. Although the Federal statute was intended to ensure that a comprehensive array of services are available to disabled children during their years in school, Congress also intended that "States ...utilize all sources of support for comprehensive services for handicapped children" (Senate Report 168, 1975 U.S. Code Congressional and Administrative News 1456, see also 34 CFR 300.301[b]). The crux of this dispute is not whether the child should attend school with an appropriately trained nurse, but which public entity must pay for the medical expense. Until recently, the Federal regulations governing the Medicaid program were construed by the United States Department of Health and Human Services to preclude payment for nursing services when the recipient's activities were outside of the home, such as when a recipient attends school. However that construction was soundly rejected in Detsel v. Sullivan, 895 F. 2d 58, where the court found it to be unreasonable to withhold Medicaid payment for nursing services provided to a disabled child while she attended school. Current Medicaid policy was clearly articulated in a stipulation settling litigation between the families of certain disabled children and State and Federal officials (Pullen v. Cuomo, U.S. DC. N.D. N.Y., August 7, 1991 (18 IDELR 132)). Medicaid recipients who would otherwise be eligible for private duty nursing services are eligible for Medicaid coverage of services performed while the recipients are out of the home. The transcript of the hearing reveals that petitioners were pursuing a Medicaid appeal, which is the appropriate source of funds for the services which this child needs. In view of all of the foregoing, I find that the hearing officer correctly determined that respondent was not legally obligated to provide the continuous service of a specially trained registered nurse.

Petitioners assert that the CSE failed to perform its duty to recommend an appropriate program and services for the child based upon her individual needs as required by 8 NYCRR 200.4 (c)(2)(i). At the hearing, the school physician member of the CSE and the CSE chairperson each testified that his or her decision to recommend to respondent that petitioners' request be denied was based upon their respective understanding of what respondent was required to provide by applicable law. Petitioners argue that the CSE should not consider what legal constraints a request for services may present, and that the board of education may hold a public hearing to consider what its policy should be in relation to any request by the CSE. I find that petitioners' reliance upon the provisions of 20 USC 1412 (7)(B) for the latter proposition is misplaced. Those provisions relate to the adoption of general State policies, and do not apply to the consideration of a CSE recommendation by a board of education. A CSE must exercise its functions within the

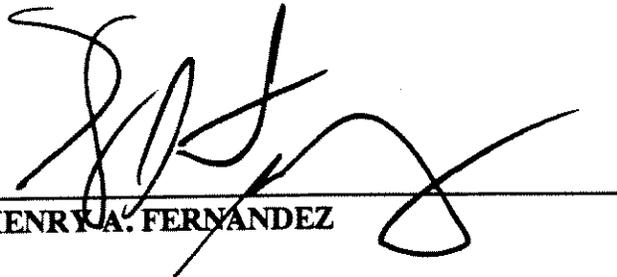
framework of applicable statutes and regulations, and its recommendations must be consistent with such statutes and regulations. Moreover, a CSE makes a recommendation, which the board of education accepts or rejects. Although the CSE could have described the child's physical needs in more detail in the child's individualized education program, given all the evidence in the record, I am not persuaded that the board of education was unaware of the nature of the child's physical needs.

Petitioners also assert that the denial of the requested services to their child constitutes a denial of equal protection of the law, because respondent provides an extensive program of intramural and interscholastic sports programs which require the employment of physicians, an athletic trainer and other personnel, although the expenditures for interscholastic sports are non-contingent budget items.

Whether or not an appeal to the State Review Officer is the appropriate proceeding to raise constitutional claims, the Equal Protection clause of the 14th Amendment to the U.S. Constitution directs that all persons similarly circumstanced be treated alike (Plyler v. Doe, 457 U.S. 202). I find that petitioners have not demonstrated that their child has been treated differently by respondent than any other child.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
December /6, 1991


HENRY A. FERNANDEZ