



No. 92-17

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

Application of a CHILD SUSPECTED OF HAVING A HANDICAPPING CONDITION, by his parent, for review of a determination of a hearing officer relating to the evaluation of the child by the Board of Education of the City School District of the City of New York

Appearances:

Hon. O. Peter Sherwood, Corporation Counsel, attorney for respondent,
Jyll D. Townes, Esq., of counsel

DECISION

Petitioner appeals from the determination of an impartial hearing officer that a sufficient basis exists for respondent's committee on special education (CSE) to evaluate petitioner's child, without petitioner's consent, in order to ascertain whether the child has a handicapping condition. The appeal must be sustained.

Petitioner's child, who is five years old, entered kindergarten at respondent's P.S. 193 in September, 1991. Within the child's first month of school, the child's teacher contacted petitioner to discuss the child's aggressive behavior. After meeting with the teacher and the principal of P.S. 193 on October 10, 1991, petitioner agreed to refer the child to the CSE for an evaluation. Petitioner subsequently changed his mind about having the child evaluated. On November 4, 1991, the CSE closed the child's case, because of petitioner's withdrawal of consent to an evaluation. On November 12, 1991, the child's teacher referred the child to the CSE, because the teacher was concerned about the child's behavior. The teacher reported that the child had a low level of concentration, lacked socialization skills, didn't follow directions, and hurt other children. The teacher further reported that attempts to remediate the child's behavior by rewarding the child for appropriate behavior and by conferences with the parent had been unsuccessful. Petitioner declined to consent to an evaluation, and the CSE closed the child's case on November 20, 1991.

On December 9, 1991, the child was reassigned by the principal of P.S. 193 to another kindergarten class. On the same day, the principal requested that a hearing be held to determine whether the child should be evaluated in the absence of petitioner's consent to an evaluation. The principal stated that the child needed more individual attention than could be provided in a regular kindergarten class, and that the child's aggressive behavior was detrimental to the child and to other children. Respondent agreed to the principal's request, and arranged for a hearing in accordance with the provisions of 8 NYCRR 200.5 (b)(2).

A hearing was held on January 8, 1992. By decision dated January 24, 1992, the hearing officer concluded that respondent had met its burden of establishing that a basis existed for evaluating the child, notwithstanding petitioner's refusal to consent to an evaluation. The hearing officer premised his conclusion upon findings that the child's behavior was dangerous to others and that the child was not learning in his regular education kindergarten program, despite respondent's attempts to provide remedial assistance.

At the outset, respondent asserts that the appeal should be dismissed as untimely. State regulation requires that an appeal from a hearing officer's decision be commenced by the service of a notice of intention to seek review upon the board of education within 30 days after receipt of the hearing officer's decision to be reviewed, and by service of the notice with petition and the petition within 40 days after receipt of such decision (8 NYCRR 279.2 [b]). The record reveals that the notice of intention to seek review was served on March 6, 1992, and the notice with petition and petition were served on March 16, 1992. However, the record does not reveal, nor has respondent established by competent evidence, the date when petitioner was mailed or received the hearing officer's decision. The respondent merely asserts that the hearing officer's decision was dated January 24, 1992. However, the date of the decision does not establish when petitioner was sent or received the decision. In the absence of proof in the record as to when petitioner received the hearing officer's decision, I find that the appeal is timely. It is noteworthy that respondent requested and received an extension of time in which to submit its answer to the petition, yet has failed to adequately demonstrate the date that the hearing officer's decision was mailed to, given to, or received by the petitioner.

Petitioner asserts that the hearing officer erred in finding that respondent had met its burden of proof. He further asserts that an evaluation would be premature, because the child was making adjustments to changes in his home life during the Fall of 1991. Petitioner states that he had just remarried, and moved into a new house with his wife, child and a step-child, when this child entered kindergarten. Petitioner asserts that the evidence adduced at the hearing merely demonstrated that his child was having a difficult time adjusting to kindergarten, and did not afford a basis for evaluating the child for a suspected handicapping condition.

Respondent asserts that the testimony of the child's teacher, as well as an anecdotal record of the child's behavior which the teacher prepared, and the testimony of the principal

of P.S. 193 regarding the remedial efforts undertaken with the child, demonstrate that there is a valid basis to suspect that the child may have a handicapping condition.

In meeting its burden of proof, respondent need not demonstrate that the child has a handicapping condition, but must establish that there is an adequate basis to suspect the existence of a handicapping condition which impairs the child's educational performance (Application of a Child with a Handicapping Condition, 30 Ed. Dept. Rep. 137; Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 91-29). It is also incumbent upon respondent to demonstrate what, if any, academic and/or behavioral remedial assistance it has provided to the child (Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 91-33).

There is a dearth of information about the child's educational performance in the record. While the principal of P.S. 193 testified to her conclusion that the child had regressed behaviorally since the opening of school and that the child had not exhibited progress behaviorally, her testimony did not reveal an underlying basis for concluding that the child's educational performance had been hindered by his behavioral problems. The child's kindergarten teacher for the first three months of the school year testified that the child has a short attention span and was difficult to direct. The teacher described the child as being bright, but not learning because of his constant aggressiveness toward other children in the class. The teacher's opinion that the child was not learning was not supported by any assessment instrument, (i.e. tests), or with evidence that showed his success or failure with portions of the kindergarten curriculum to which he had been exposed. Indeed, the teacher admitted that with her direct attention the child adequately completed the assignments given.

The teacher testified that she had received several complaints about the child's behavior from the parents of other children and from other teachers at P.S. 193. An anecdotal record of the child's behavior from September through November, 1991, which the teacher prepared, lists numerous instances of the child's failure to follow the directions of his teacher, as well as disturbances or altercations with other children. Clearly, the record establishes that the child has been disruptive and has exhibited inappropriate social skills during the brief period in which he has been in school. Nonetheless, the record does not establish that the child's behavior is likely to be the result of a handicapping condition. In view of the short length of time that the child has been in respondent's school, and the absence of information about the child's preschool educational activities, if any, the sole established fact that the child does not behave in an appropriate manner for school does not support the evidentiary standard that the respondent must meet to establish that a basis exists that the child may have a handicapping condition and may be evaluated without the consent of the parent.

The hearing officer's decision must also be annulled because before a child may be referred to a CSE, a board of education must attempt to remediate the child's performance, using supplementary aids or support services (Section 4401-a[2][b] of the Education Law), and the record reveals that the respondent failed to demonstrate that it had provided

appropriate remedial services to the child before referring the child to the CSE. The child received counseling in a total of ten one-half hour sessions from a school social worker between October and December, 1991. The counseling was provided as an educationally related support service (Section 3602[32] of the Education Law). State regulation provides that such services are to be furnished to children who are not presently identified as having a handicapping condition or who are the subject of pending referrals to the CSE and who evidence educational, behavioral, personality or social difficulties which are situational and/or amenable to short-term intervention (8 NYCRR 100.2[v]). The assistant chairperson of the CSE testified at the hearing that she had not expected that such counseling would be effective, a position supported by the P.S. 193 principal. In essence, both the assistant chairperson and the principal opined that the child would not benefit from a "pull-out" service, i.e. the child's removal from class for counseling, because the child required a smaller, more structured learning environment. Nonetheless, the child was provided services that were not expected to be beneficial, and neither witness explained why respondent failed to provide more appropriate direct intervention, such as having the counselor work with the child in his kindergarten class. The record shows no effort by respondent to provide the child's teacher with assistance in teaching the child appropriate classroom behavior other than the counseling service which was expected to be futile. The child's teacher's brief allusion to a behavior modification program for the child provides no meaningful information on the nature or duration of the teacher's program, which would allow me to conclude that the respondent has met its statutory responsibility to remediate the child's performance. Form over substance is insufficient.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the decision of the hearing officer by and the same hereby is, annulled.

Dated: Albany, New York
May 11, 1992



HENRY A. FERNANDEZ