



No. 93-48

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

**Application of a CHILD WITH A DISABILITY, by his parents,
for review of a determination of a hearing officer relating to the
provision of educational services by the Board of Education of
Waterford-Halfmoon Union Free School District**

Appearances:

Buchyn, O'Hara, Werner and Gallo, Esqs., attorneys for respondent,
Kathryn McCary, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied petitioners' request for an order directing respondent to pay for their child's tuition during the 1993-94 school year in a private school selected by petitioners. Although petitioners' request for such an order must be denied, their appeal is sustained to the extent that I will direct respondent to make certain changes in the child's individualized education program (IEP).

Petitioners' child, who is eight years old, has been classified as learning disabled, because of his difficulty with reading and written expression despite having cognitive skills in the average to above average range. Petitioners do not challenge the designation of the child as learning disabled.

The child successfully completed kindergarten in respondent's elementary school during the 1990-91 school year. In a test of his reading readiness skills completed during that school year, the child's performance was in the average range. The record reveals that the child performed satisfactorily while in the first grade, although his teacher suggested that the child continue to study reading during the Summer to maintain his skills.

At the beginning of second grade in September, 1992, the child was referred to a remedial reading teacher for an evaluation of his reading skills, because of his low score on a standardized test of reading comprehension which he had taken in the Spring of 1992. Respondent's remedial reading teacher, who assessed the child's reading skills on September 16, 1992, reported that the child's oral and silent reading skills were below a 1.4 grade level equivalent, while his listening skills were at a 2.8 grade level equivalent. The remedial reading teacher further reported that the child was unable to decode unfamiliar words, because of his weak word analysis skills. The teacher described the child as nervous and unable to self-correct his errors, and recommended that low frustration level materials be used to assist the child in developing reading comprehension skills. After meeting with the remedial reading teacher and the child's second grade teacher, the child's mother agreed to have the child receive remedial reading, which was provided for four 30 minute periods per week outside the child's classroom. The child also began to receive private tutoring in reading in September, 1992.

In a meeting with the child's second grade teacher held in November, 1992, petitioners discussed the child's difficulty in concentrating on his work and completing assignments, as well as his continued difficulty with reading and written expression. His teacher reported that the child had gained confidence, and was showing increased interest in reading and writing. Nevertheless, the teacher recommended the child be referred to respondent's committee on special education (CSE) for an evaluation, if his performance did not improve. Neither the teacher nor petitioners initiated a referral to the CSE at that time.

On January 8, 1993, petitioners requested that the child be referred to the CSE for an evaluation. The child's second grade teacher concurred with petitioners' request. As part of the child's psychological evaluation, respondent's school psychologist observed the child in his classroom on two occasions. The school psychologist reported that the child was attentive in class, but rarely volunteered for oral reading and required the teacher's assistance in decoding words. In an assessment of his cognitive ability, the child achieved a verbal IQ score of 119, a performance IQ score of 93, and a full scale IQ score of 107, with considerable scatter on various subtests. The child exhibited a significant weakness performing tasks which required association between symbols, which involves short-term memory, and relative weaknesses in attention to detail and visual organization. The child's visual motor skills were found to be in the average range. In tests of the child's academic achievement, he was reported to have mathematical skills at a 2.5 grade level equivalent, reading skills at a 1.5 grade level equivalent, and spelling skills at a 1.7 grade level equivalent. With regard to the child's reading skills, the school psychologist reported that the child could recognize some basic words by sight, but that he used only initial consonant sounds when decoding words. The school psychologist recommended that the child be classified as learning disabled, and that he receive appropriate resource room services. In a social history completed in January, 1993, petitioners reported that the child felt frustrated by his difficulty in reading.

On February 24, 1993, the CSE recommended that the child be classified as learning disabled, but that he remain enrolled in a regular education second grade class and continue to receive remedial reading to address his deficits in reading and continue with a modified, phonetically based second grade spelling program. For special education services, the CSE recommended that the child receive five periods per week of resource room services to assist him in spelling and written expression, and that he receive individual counseling from a school social worker twice per month to improve his self-esteem and confidence. The CSE also recommended that the child be further evaluated to ascertain whether he required occupational therapy. Petitioners accepted the CSE's recommendations, which were approved by respondent on March 4, 1993. By the end of the third marking period of the 1992-93 school year, the child's teacher reported that the child's reading and writing skills had begun to improve as he applied word analysis strategies. The child was reported still to have difficulty working independently.

The child's occupational evaluation, which was performed in May, 1993, revealed that the child's visual perceptual skills were above average, except for his visual memory and visual figure-ground skill, i.e., the ability to distinguish between foreground and background. The evaluator opined that the child could have a slightly hypersensitive vestibular system which would affect his ability to balance himself and contribute to the letter reversals in the child's reading and writing. The evaluator recommended that the child receive occupational therapy twice per week, and provided a list of suggested techniques for the child's teacher to use with the child.

The child's remedial reading teacher reported that between September, 1992 and May, 1993, the child's word recognition and reading comprehension skills had improved by almost one year to a grade level equivalent of 2.2, while his listening skills had improved by slightly more than one year to a grade level equivalent of 4.0. The teacher further reported that the child's ability to make self-corrections had improved, but his ability to blend sounds to form words remained weak. In May, 1993, the child also began to receive assistance in reading from the reading clinic of Russell Sage College, at petitioners' expense.

At petitioner's request, the child's annual review, which had been scheduled to take place in May, 1993, was postponed until June 15, 1993. On May 11, 1993, the child's resource room teacher and the CSE chairperson at petitioners' request, visited the Hartland School, a private school which has been approved by the State Education Department to provide instruction to children with certain disabilities and in which petitioners had expressed an interest for their child's instruction.

On May 12, 1993, the child's resource room teacher assessed the child's written language proficiency, using portions of a standardized achievement test including broad writing, dictation and writing samples. The resource room teacher found that the child's proficiency on each subtest was equivalent to that of a child entering the second grade.

On May 24, 1993, the child received an independent educational evaluation. A report of the evaluation revealed that the child's phonics skills and reading comprehension were found to be below the second grade level, as were his writing and spelling skills. The child's expressive and receptive language skills were reported to be above the second grade level. His auditory discrimination memory, synthesis and processing skills, as well as his visual-auditory association and visual memory skills, were also reported to be below the second grade level. The evaluator opined that the child's learning disability involved problems in recognizing words and making word substitution errors. The evaluator recommended that the child be provided with a remedial program which presented a systematic approach to phonics to increase the child's awareness of phonics.

On June 11, 1993, the CSE chairperson, who is also respondent's school psychologist, observed the child in his class. She reported that the child had volunteered to read orally a portion of a novel which the class was reading as a group, and that he had read most of the portion correctly and with little assistance. The chairperson opined that the readability level of the novel read by the child was approximately that of the sixth grade. However, the record reveals that the child had previously silently read the portion of the novel which he orally read when observed by the chairperson.

At the child's annual review conducted by the CSE on June 15, 1993, the resource room teacher reported that the child was doing well in his modified second grade spelling program, and that his written expression, including vocabulary and the mechanics of writing, had significantly improved during the four months in which he had received resource room services. For the 1993-94 school year, the resource room teacher recommended that the child continue to receive resource room services for writing, but that such services be provided in his regular classroom as part of his language arts program for the third grade. The child's remedial reading teacher discussed the child's progress in reading, and recommended that he continue to receive small group remedial reading instruction four times per week during the 1993-94 school year. The school social worker, who had counseled the child, reported that the child exhibited good self-confidence and recommended that the child continue to receive counseling to improve his self-esteem. The occupational therapist who had evaluated the child recommended that he receive occupational therapy to address the child's deficits in sensory motor processing, which contributed to his learning disability. The CSE discussed the child's distractibility, to which the occupational therapist and the independent evaluator had alluded in their respective reports. The CSE also discussed reducing the amount of time the child would be absent from class to receive special education, by providing resource room services in the child's regular classroom. Petitioners requested that the CSE consider recommending that the child be placed in the Hartland School. However, they were orally advised that the CSE would recommend that the child be enrolled in a regular education third grade class with appropriate special education services, for the 1993-94 school year.

Petitioners met with the CSE chairperson and some of the child's teachers on June 21, 1993, for a further discussion of the child's program for the 1993-94 school year, but they

were unable to reach an agreement. By letter dated July 1, 1993, petitioners were informed that the CSE had recommended that the child be enrolled in a regular education third grade class, with daily resource room services, occupational therapy twice per week, and counseling twice per month. The CSE also recommended that the child continue to receive remedial reading four times per week and that tests be administered to the child in a location with minimal distractions and that directions and test questions be read to the child. The CSE denied petitioners' request that respondent pay for the child's enrollment in the Hartland School, on the ground that the private school was not the least restrictive environment for the child. In a letter to them dated July 19, 1993, petitioners were informed that respondent had approved the CSE's recommendation.

On July 27, 1993, petitioners requested that an impartial hearing be conducted to review the CSE's recommendation. The hearing began on August 25, 1993, and was concluded on September 8, 1993. In a decision dated October 28, 1993, the hearing officer held that respondent had demonstrated that the child's IEP for the 1993-94 school year had been prepared with petitioners' participation and that the IEP addressed the child's individual needs. The hearing officer further held that the recommended placement of the child in a regular education class with supplementary services was consistent with the Federal and State regulatory requirement that the child be educated in the least restrictive environment.

Before reaching the issues raised by the parties in this appeal, I must first rule upon petitioners' request that I consider two evaluation reports which were not in the record before the hearing officer. The first report is an evaluation of the child's central auditory processing ability, which was completed at the Sunnyview Hospital on August 3, 1993 at petitioners' initiative. Respondent objected to the introduction of the report into evidence in the hearing, upon the ground that petitioners failed to lay a proper foundation for the document by not having the person who prepared the report testify in the hearing. Prior to a ruling by the hearing officer on respondents' objection, petitioner's attorney withdrew the document. Although the document was not certified by the head of the hospital (cf. Rule 4518 [c] of the Civil Practice Law and Rules), I find that for purposes of an administrative proceeding such as this proceeding the evaluation report should have been admitted, and I will allow the report to be part of the record of this appeal. The second report is a speech/language evaluation, which was conducted at the Sunnyview Hospital on October 20, 1993, more than a month after the hearing had concluded. Documentary evidence not presented at a hearing may be considered in an appeal from a hearing officer's decision, if such evidence was unavailable at the time of the hearing or the record would be incomplete without the evidence (Application of a Child with a Disability, Appeal No. 93-22). The second report was not available at the time of the hearing. Although the record also includes the results of an earlier speech/language evaluation obtained by respondent, I will nevertheless allow the second report to be part of the record in this appeal.

Petitioners assert that their procedural rights were violated during the hearing because of respondent's actions or the rulings by the hearing officer. They assert that

respondent refused to comply with a subpoena issued by the attorney who represented petitioners in the hearing, which requested that respondent's remedial reading teacher provide documentary evidence, such as the child's test results on one standardized test administered in 1992. In the hearing in this matter, the teacher testified that she did not have custody of the document, but that the document was part of the child's permanent records on file in respondent's elementary school. There is no evidence in the present record that petitioners or their attorney attempted to obtain the document from the custodian of the child's records, or asked for the production of the document after hearing the teacher's testimony.

Petitioners further assert that respondent improperly attempted to have their lay advocate, whom petitioners wished to have testify as their expert witness, sequestered, i.e., be kept out of the hearing room until called to testify. Petitioners acknowledge that the hearing officer denied respondent's request to have the witness sequestered. Nevertheless, they assert that their attorney was obliged to limit the scope of their expert witness' testimony because of respondent's objections to such testimony. Petitioners were entitled to be represented by counsel and advised by individuals with special knowledge or training with respect to children with disabilities (34 CFR 300.508 [a][1]; 8 NYCRR 200.5 [c][5]). However, there is a clear distinction between an attorney or adviser and an expert witness. With limited exceptions, an attorney cannot ethically become a witness in a proceeding in which the attorney appears as an advocate (Disciplinary Rule 5-101 B). Although a lay advocate may not be subject to the same restrictions placed upon an attorney, I need not determine whether the advocate could or should have been sequestered as a witness because petitioners are not aggrieved by the hearing officer's ruling upon respondent's motion to sequester.

During the course of the direct examination of the advocate by petitioners' attorney, respondent's attorney objected to the advocate's testimony about matters relating to her advocacy on behalf of petitioners, and asked that the advocate's testimony be limited to her opinions as an educator with regard to the appropriateness of the program offered by respondent and the private school program sought by petitioners. The hearing officer agreed with respondent's attorney. The testimony to which respondent's attorney objected involved discussions between petitioners and the advocate in preparation for the hearing. The hearing officer did not limit the advocate's testimony with regard to the child's educational needs, the adequacy of the child's IEP or the appropriateness of the public and private school programs at issue. I find that the hearing officer did not abuse her discretion by sustaining respondent's objections to certain portions of the advocate's testimony.

Petitioners further assert that the hearing officer's decision was untimely. Federal and State regulations require that a hearing officer render a decision within 45 days after a board of education has received a request for a hearing, provided that specific extensions of time may be granted at the request of either party (34 CFR 300.512 [a] and [c]; 8 NYCRR 200.5 [c][11]). The hearing in this matter was requested on July 27, 1993. The record reveals that on the last day of the hearing on September 8, 1993, the attorneys for both parties agreed

to an extension of the 45 day time limit until 7 business days after the hearing officer's receipt of the hearing transcript. Petitioners do not assert that the hearing officer failed to render her decision within the specific extension to which their attorney had agreed. I find that their assertion of untimeliness is without merit.

Federal and State regulations require that a CSE prepare a child's IEP with the participation of the child's parents (34 CFR 300.415 [a]; 8 NYCRR 200.4 [c][3]). The official interpretation of the Federal regulations provides, in material part, that:

"The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be." (34 CFR 300, Appendix C, 1.a Purpose of the IEP).

Petitioners assert that the CSE failed to treat them as equal participants in the preparation of the child's IEP for the 1993-94 school year, because the members of the CSE did not answer their questions about the nature of the child's disability, did not consider the results of the child's independent evaluation, and did not consider other program options for the child. Upon review of the record, including the testimony of the CSE chairperson, other members of the CSE, and the child's mother, and the minutes of the CSE meeting held on June 15, 1993, I find that petitioners were afforded the opportunity to participate in the development of the child's IEP. While a CSE must afford parents a meaningful opportunity to interact with the CSE, it is not obligated to accede to the parents' wishes with respect to each provision of an IEP (Application of a Child with a Handicapping Condition, Appeal No. 91-13; Application of a Child with a Handicapping Condition, Appeal No. 92-47). The CSE meeting minutes reveal that the results of the child's independent educational evaluation were considered by the CSE (8 NYCRR 200.5 [a][1][v]), and that the possible placement of the child in the Hartland School was discussed. Although petitioners asked the CSE to explain the cause of their child's learning disability, they were advised by a member of the CSE that there could be many reasons for a learning disability. However, the etiology of a learning disability is of less significance than the manifestation of such disability, i.e., how the disability affects the child's ability to learn. The fact that the CSE did not answer petitioners' question to their satisfaction does not afford a basis for concluding that petitioners were denied the opportunity to participate in developing the child's IEP.

The central issue in this appeal is the appropriateness of the program recommended by the CSE for the 1993-94 school year. Respondent bears the burden of establishing the appropriateness of the program recommended by the CSE (Matter of Handicapped Child, 22 Ed. Dept. Rep. 487; Application of a Child with a Handicapping Condition, Appeal No. 92-7; Application of a Child with a Disability, Appeal No. 93-9). To meet its burden, respondent must demonstrate that the recommended program is reasonably calculated to allow the child to receive educational benefits (Bd. of Ed. Hendrick Hudson CSD v. Rowley,

458 U.S. 176), and that the recommended program is the least restrictive environment for the child (34 CFR 300.550 [b]; 8 NYCRR 200.6 [a][1]).

An appropriate program begins with an IEP which accurately reflects the results of the evaluations to identify the child's needs, provides for the use of appropriate special education services to address the child's special education needs, and establishes annual goals and short-term objectives which are related to the child's educational deficits (Application of a Child with a Disability, Appeal No. 93-9; Application of a Child with a Disability, Appeal No. 93-12). The child's IEP for the 1993-94 school year includes data obtained from the CSE's evaluations of the child, as well as data from the independent educational evaluation which petitioners obtained. Although the IEP does not list all of the data reported by the independent evaluator, there is no requirement that all such data be included on the child's IEP. Notwithstanding the different pedagogical perspectives which are reflected in the various evaluation reports, there is a high degree of consistency in such reports in describing the deficits in the child's reading and writing skills.

Federal and State regulations require that an IEP describe a child's present levels of performance in the areas in which the child requires special education and related services, including supportive services (34 CFR 300.346 [a][1]; 8 NYCRR 200.4 [c][2][i]). I find that this child's IEP accurately describes the child's present levels of performance in various reading and writing skills which are the child's primary areas of special educational need. I further find that the child's IEP sets forth annual goals and short-term objectives which are directly related to those areas of special educational need. Although the IEP provides information about the child's motor proficiency and visual perceptual skills obtained by the BOCES occupational therapist and further provide that the child's sensory motor processing needs will be addressed through occupational therapy, the IEP is deficient because it does not include annual goals or short-term objectives for such therapy. In the hearing in this proceeding, the CSE chairperson testified that the CSE had not yet received suggested annual goals and short-term objectives for occupational therapy from the BOCES when the CSE prepared the child's IEP, although the child's occupational therapy needs were discussed with the BOCES occupational therapist at the child's annual review. However, it is the CSE's responsibility to obtain whatever information it requires before it conducts an annual review, and I will direct the CSE to revise the child's IEP to include appropriate goals and objectives for occupational therapy.

The annual goals in an IEP should be statements which describe what a child can reasonably be expected to accomplish within a 12-month period in the child's special education program (34 CFR 300, Appendix C, Question 38). The child's IEP includes annual goals, such as: "The student will increase reading comprehension skills"; "The student will improve study skills"; and "The student will increase writing skills." I find that such goals are too imprecise to provide direction to the child's teachers concerning the CSE's expectations (Application of a Child with a Disability, Appeal No. 93-24). Notwithstanding a lack of precision in some of the IEP's annual goals, I find that the CSE has provided the requisite specificity in the child's short-term objectives to set the general direction to be

taken by those who will implement the IEP and to afford a basis for developing a detailed instructional plan for the child (34 CFR 300, Appendix C, Question 41). Consequently, I will not invalidate the IEP solely because of its imprecise annual goals (Application of a Child with a Disability, Appeal No. 93-40). I will, however, require the CSE to revise the child's annual goals to precisely identify the CSE's expectations for the child's progress during the 1993-94 school year.

Federal regulation requires that a child's IEP shall include appropriate objective criteria and evaluation procedures, as well as schedules for determining, on at least an annual basis, whether the child's short-term instructional objectives are being achieved (34 CFR 300.346 [a][5]). Although such procedures and schedules need not be presented as a separate portion of an IEP, they must be presented in a recognizable form and be clearly linked to the child's short-term objectives (34 CFR 300, Appendix C, Question 54). In this instance, the child's short-term objectives set forth adequate objective criteria. However, they inadequately describe the procedures and schedules which will be used to determine if such objectives are being achieved. I will require the CSE to describe such procedures and schedules.

Although the child's IEP needs to be revised in a number of ways, it does not follow that respondent has failed to offer an appropriate program. The record reveals that the CSE has selected a variety of services to address the child's academic needs while maintaining the child to the maximum extent possible with non-disabled peers. Although remedial reading is not per se a special educational service, the CSE has elected to establish IEP goals and objectives for the child's small group instruction in remedial reading. Although petitioners assert that the child failed to make adequate progress while receiving remedial reading during the 1992-93 school year, the record demonstrates that the child made progress in reading at an appropriate rate, as reflected in his scores on the Spache Diagnostic Reading Test. In view of the child's progress to date while in remedial reading, the CSE could not lawfully have recommended that the child's reading needs be addressed in a more restrictive special education environment (34 CFR 300.500 [b]; 8 NYCRR 200.6 [a][1]).

The child's other major educational deficit is in his written expression. The record reveals that the child has difficulty organizing his ideas, as well as expressing his ideas in grammatically correct form. The CSE has recommended that a special education teacher and the child's regular education teacher team teach language arts, using large and small group, as well as individual, instruction to address the child's deficits in written expression. In the hearing in this proceeding, the special education teacher who would provide such service testified that the child would receive most of his special education while remaining in his regular classroom. The teacher would work with the child to collect relevant information, expand his ideas by providing detail and assist the child in expressing his ideas in the appropriate sequence. The special education teacher would also review drafts of the child's work, to encourage the child to self-correct his grammatical, and spelling errors. In the hearing in this proceeding, the special education teacher who had provided comparable

special education services to the child from March through June, 1993, testified that the child had begun to show improvement in his written expression as a result of his "prewriting" and review activities with the teacher. Although the child has also experienced significant difficulty with spelling, the record reveals that the child made appropriate progress in the modified spelling program which was instituted just prior to the child's classification as a child with a disability. I find that respondent has offered to provide the child with an appropriate special education program to address his deficits in writing.

State regulation requires that children with disabilities who are placed together for special education must be grouped by similarity of needs (8 NYCRR 200.6 [a][3]). In this instance, petitioners' child would receive most of his special education while in his regular education class, although the special education teacher testified that, on occasion, the child might receive some instruction in the resource room. The record reveals that two other children who are classified as children with disabilities would also be in the child's regular education third grade class, and would also receive resource room service from the special education teacher who would instruct petitioners' child. Although respondent was not required to demonstrate any similarity of needs with respect to the child's non-disabled third grade peers, it was required to show the similarity of needs with regard to the two children who would receive resource room services with petitioners' child (8 NYCRR 200.6 [f][4]). I find that respondent demonstrated that petitioners' child and the other two children would be appropriately grouped, through the unrebutted testimony of the CSE chairperson.

Petitioners assert that the CSE failed to consider the child's unique needs. However, I find that petitioners' assertion is not supported by the record. The CSE considered the reports of respondent's staff who had worked with the child during the 1992-93 school year, as well as its evaluation data and the data in the independent educational evaluation. Although petitioners assert that the CSE failed to consider the child's distractibility, the minutes of the CSE meeting of June 15, 1993 reveal that the subject was discussed at such meeting. The child's remedial reading teacher advised the CSE that the child had initially exhibited avoidance behavior, but that such behavior had decreased as his ability to read improved. In the hearing, the child's second grade teacher testified that the child had exhibited some distractibility, which was almost always when he was required to copy work from the blackboard, but that in other situations, the child was one of her most attentive students. Petitioners' reliance upon the testimony of the occupational therapist who evaluated the child is misplaced, because the therapist testified that she had not observed the child to exhibit distractibility during the evaluation.

Notwithstanding the revisions which must be made in the child's IEP for the 1993-94 school year, I find that respondent has met its burden of proving the appropriateness of the program recommended by its CSE. In appropriate circumstances, a board of education may be compelled to pay for the cost of a child's instruction in a private school selected by the child's parents (School Committee of the Town of Burlington v. Dept. of Education Massachusetts, 471 U.S. 359; Application of a Child with a Disability, Appeal No. 93-1). A board of education must pay for a child's tuition, if the services offered by the board of

education were inadequate or inappropriate, the services selected by the parents are appropriate, and equitable considerations support the parents' claim. In view of my finding that respondent has met its burden of proof with regard to the appropriateness of the services which it has offered to provide for the 1993-94 school year, there is no basis in the present record upon which respondent could be compelled to pay for the child's tuition at the Hartland School.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the hearing officer's finding that the child's IEP for the 1993-94 school year was complete is annulled;

IT IS FURTHER ORDERED that within 15 days after the date of this decision the CSE shall meet with petitioners to revise the child's IEP in accordance with the tenor of this decision.

**Dated: Albany, New York
January 7, 1994**



CLAUDIO R. PRIETO