



No. 95-11

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

**Application of a CHILD SUSPECTED OF HAVING A
DISABILITY, by her parents, for review of a determination of
a hearing officer relating to the provision of educational
services by the Board of Education of the East Islip Union Free
School District**

Appearances:

Long Island Advocacy Center, attorney for petitioners, Michael E. Deffet, Esq.,
of counsel

Ingerman, Smith, Greenberg, Gross, Richmond, Heidelberger, Reich and Scricca, Esqs.,
attorneys for respondent, Christopher Venator, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which upheld the recommendation by respondent's committee on special education (CSE) that petitioners' daughter not be classified as a child with a disability under Article 89 of the Education Law, but that she should be referred to respondent's committee for services to be provided under Section 504 of the Rehabilitation Act of 1993 (29 USC 749). They also appeal from the hearing officer's denial of their request for an order requiring respondent to reimburse them for the costs which they incurred in unilaterally placing the child in the Suffolk Developmental Learning Program EAC, in Deer Park, New York, in March, 1994. The appeal must be dismissed.

Petitioners' daughter, who is 18 years old, was born in Thailand. Little is known about the child's early life, except that she was placed in an orphanage in Bangkok, Thailand at an early age. The child was non-verbal in Thai or English when she was adopted at the age of four by petitioners. She reportedly had some problems in the lower elementary grades because of language difficulties. The child's kindergarten teacher recommended that the child be retained in kindergarten, but she was advanced to first grade at petitioners' request. She continued to have difficulty, and she repeated the first grade. In January, 1983, she was classified as speech impaired and received speech/language therapy until 1987, when she was declassified in the fourth grade. While in the fourth grade during the 1987-88 school year, the child received remedial reading. The child achieved grade equivalent scores of 4.8 in reading and 5.4 in math on a standardized achievement test administered in October, 1989, when she was in the sixth grade. The child was described by her sixth grade teacher as having a below average attention span and below average listening and writing skills.

At petitioners' request, the child was placed in "Regents", i.e., college preparatory, level courses for the seventh and part of the eighth grades, despite recommendations by respondent's guidance personnel that she be assigned to lower level "Regents competency exam" courses. However, she was enrolled in a remedial reading course. The child's grades were inconsistent during the seventh grade. Although she passed all of her academic courses during the first three marking periods, she failed English, mathematics, and life science in the final marking period. Her teachers for those courses described her class work as incomplete, and her mathematics and life science teachers reported that the child showed little signs of effort. The child attended summer school, and was advanced to the eighth grade for the 1991-92 school year. During that school year, the child was reassigned to lower level courses in science and social studies. The child continued to have academic difficulty, and failed her English, social studies, Spanish, and science courses. The child attended summer school, but failed English and science again. Nevertheless, she was advanced to the ninth grade for the 1992-93 school year.

The child was enrolled in Regents Competency Test level courses, except for English, in the ninth grade. Although she took respondent's regular ninth grade English course, she was also enrolled in a basic skills course to provide additional assistance in English. Except for an "incomplete" in English, she received grades of C or above in each of her courses for the first marking period of the 1992-93 school year. The child's academic performance and class attendance deteriorated in December, 1992, following an alleged sexual assault upon her in respondent's high school. In addition to cutting classes, failing to complete homework and being uncooperative in school, the child reportedly exhibited oppositional behavior at home. On January 10, 1993, following a dispute with petitioners about staying out late, the child ingested a quantity of aspirin, for which she was hospitalized for approximately two days. The child returned to respondent's high school, upon her discharge from the hospital. Her behavior at home reportedly worsened, and she continued to do poorly in school.

On February 3, 1993, the child was admitted to the South Oaks Hospital, in Amityville, N.Y., which is a private psychiatric treatment facility. At the time of her admission, the child was described as extremely depressed and angry, but as having an appropriate affect. She admitted to having suicidal ideations when angry, and her treating psychiatrist reported that the child's insight and judgement were impaired. The psychiatrist's provisional diagnosis of the child's condition was that she had an undifferentiated conduct disorder, and depression which was not otherwise specified. The child's treatment plan at South Oaks included individual, group, and milieu therapy. She was also enrolled in an educational program provided at South Oaks by the local BOCES. In the child's discharge summary, dated February 28, 1993, the psychiatrist reported that the child's initial depression and anxiety had improved, and that she appeared to have gained better control over her acting out and oppositional behavior and poor impulse control. The child's discharge diagnosis was that she had an undifferentiated conduct disorder. On March 1, 1993, the child entered a day treatment program of the South Oaks facility, where she received services until March 19, 1993. She was described as having periodic difficulties with rules and accepting the consequences for having violated rules. However, her ability to verbalize her anger improved. Her relationship with the members of her family reportedly improved, but she continued to have conflicts with her mother. Although she was to receive individual and family therapy after leaving the day treatment program, the record does not disclose whether such therapy was provided.

On March 19, 1993, the child returned to respondent's high school. She continued to cut classes, and was suspended from school on March 31, 1993 for refusing to obey the direction by a school aide to go to her assigned class. Shortly thereafter, the child ran away from home for approximately 24 hours. At the hearing in this proceeding, the child's father testified that the child did not "follow the rules" at home. On April 5, 1993, the child was readmitted to the South Oaks Hospital, where she was diagnosed as having an undersocialized, non-aggressive conduct disorder. She was reported to have intact thought processes, but her affect was anxious and her mood was dysphoric. The child's insight and judgement were described as quite impaired. At South Oaks, the child again received individual, group, and milieu therapy, and received instruction from the BOCES. At the time of her discharge from South Oaks on April 30, 1993, the child was diagnosed as having an undifferentiated conduct disorder. She was discharged from South Oaks to Wellspring, a residential treatment facility in Bethlehem, Connecticut.

At the time of her admission to Wellspring, the child expressed interest in improving her behavior and attitude, and remorse about the way in which she treated her parents. She denied that she had been sexually abused. She acknowledged to a Wellspring social worker that she did not like to work in school ("I work when I feel like it" - Exhibit 12, page 3). She expressed interest in attending college and becoming a dance choreographer. The child was assessed on May 5, 1993 by a Wellspring psychiatrist, who reported that the child was "in the throes of adolescent anger, rebellion, and emotional upheaval," and that further family assessment was needed. The psychiatrist diagnosed the child as having a conduct disorder, with a moderate level of psycho-stressors. He recommended a treatment plan consisting of

individual and family therapy. A psychotherapist at Wellspring hypothesized that the child's reaction to trauma she experienced prior to her adoption could have an impact upon her depression and underlying anger.

A treatment plan was developed for the child to deal with her oppositional behavior, difficulty maintaining relationships with others, and depression. The therapists who worked with the child indicated in their treatment notes that the child's depression was attributable to reactions to interactions with her family and their reactions to her behavior. By December, 1993, the child's primary therapist and her psychiatrist noted that the child was no longer exhibited symptoms of depression, and appeared to have made progress in accepting her adoptive status. Although the child's oppositional behavior had diminished and her relationship with members of her family had improved, the potential for conflict with her mother remained. The child's family participated with her in therapy at Wellspring.

In a letter to the chairperson of respondent's CSE, dated November 8, 1993, petitioners requested that the CSE develop an individualized education program (IEP) for the child and recommend that respondent place the child in a private school in Westbury, New York. Petitioners provided information for the child's social history, and arrangements were made for the child to be evaluated at Wellspring by respondent's staff. On November 29, 1993, respondent's school psychologist evaluated the child. She reported that the child's expressive language was sparse, but that her responses to questions were coherent and appropriate to the topic. The child's affect was described as normal. The school psychologist reported that the child did not display any evidence of anxiety, but had limited problem solving skills. The child reportedly worked in a concrete way, and exhibited little ability to shift to a new strategy when needed. The child achieved a verbal IQ score of 75, a performance IQ score of 81, and a full scale IQ score of 76, which is in the low-average to borderline range of ability. The psychologist reported that the child's skills ranged from mentally deficient in expressive vocabulary to the upper end of the low-average range in practical reasoning. The school psychologist opined that although the child might have difficulty comprehending the underlying reasons for social expectations, she was nevertheless able to understand and comply with such expectations. She described the child as stable, and having developed insights into her family problems and strategies for coping at home. While noting that the child's poor verbal communications skills could lead to pent-up emotions and impulsive behavior, the school psychologist opined that there was no evidence of a depressive condition which would adversely affect the child's ability to learn. She recommended that the child be enrolled in regular education Regents Competency Test level courses, and be given guidance to assist her in completing vocational plans.

On December 14, 1994, one of respondent's resource room teachers briefly observed the child in what was represented to him to be a school setting at Wellspring. The resource room teacher reported that the child appeared to be comfortable in that setting and to engage in positive interactions with peers and adults. He also reported that in the educational evaluation which he performed the child achieved grade equivalent scores of 7.7 in broad reading skills, 7.3 in broad mathematical skills, 6.4 in broad written skills, and 4.3

in general knowledge. The child's standard scores in those areas were 90, 89, 86, and 74, respectively. At the time of her evaluation, the child was in the tenth grade. However, the teacher opined that the child did not require a special education placement, notwithstanding her performance in the low-average range on the educational evaluation assessment test.

The CSE met with petitioners and the Wellspring director of education on January 5, 1994. Petitioners reiterated their request for placement of the child in a private school because of the latter's therapeutic day program with small classes and counseling. They also presented the CSE with a letter signed by the Director of Social Services and the child's psychotherapist at Wellspring, in which both individuals asserted that the child had made tremendous academic and emotional progress while at Wellspring. They recommended that the child be classified as a child with a disability and placed for the remainder of the 1993-94 school year in the private school favored by petitioners, in anticipation of the child's return to respondent's high school in September, 1994. The CSE requested additional information about the child's educational program at Wellspring, as well as information regarding the child's hospitalizations at South Oaks, and an updated psychiatric report.

On January 28, 1994, petitioners attended a CSE meeting with their advocate. The CSE considered a written report by the child's psychiatrist at Wellspring, dated January 27, 1994, in which the psychiatrist indicated that the child's current diagnosis was that she had an oppositional defiant disorder - in remission, and post-traumatic stress disorder - delayed and related to childhood deprivation/adoption. He reported that the child had made major improvements in treatment, without psychoactive medication, and that there was no evidence of depressed mood or of thought disorder. He opined that the child was extremely vulnerable, and that her self-esteem, while healthy, could only be maintained through continued attention through her special needs.

The CSE also considered some educational reports from Wellspring, which revealed that the child had successfully completed her ninth grade subjects at Wellspring, and had participated in a remedial program during the Summer of 1993 which had enabled her to pass the Regent's Competency Test in mathematics and science. The child achieved satisfactory grades in each of her tenth grade subjects at Wellspring during the first two marking periods of the 1993-94 school year. Her teachers reported that the child's confidence in her ability to learn had increased because her specific learning needs had been met at Wellspring, and that the child was beginning to develop some effective study skills. They further reported that the child's writing skills had improved. They opined that the child had accepted her limitations and had experienced success as a student. The Wellspring educators recommended that the child receive instruction in a small group, and extra help in any area in which she may need to make up work. With the concurrence of petitioners' advocate, the CSE agreed to defer making a recommendation until additional information about the child's needs could be obtained.

The CSE reconvened on February 23, 1994, when it considered a letter dated February 21, 1994, in which the child's psychiatrist at Wellspring asserted that at the time

of her admission to Wellspring the child had been clinically diagnosed as having a major depression, as well as learning disabilities. He noted that the child and her family needed continued therapy, and indicated that the child's primary working clinical diagnosis at Wellspring had become post-traumatic stress disorder. He recommended that the child have an intimate, nurturing setting in which to learn, and opined that she would become unable to sustain learning if her emotional state regressed. The CSE voted to recommend that the child not be classified as a child with a disability under Article 89 of the Education Law, but that she should be referred to respondent's Section 504 committee because she might be eligible to receive services under Section 504. The CSE also recommended that the high school child study team should meet with the child's therapist and her parents in order to plan an appropriate program for her.

By letter dated March 1, 1994, petitioners' then attorney requested that an impartial hearing be held to review the recommendation of the CSE. Petitioners through that attorney challenged the impartiality of two hearing officers. That matter was never resolved because there was no appeal from one hearing officer's refusal to recuse himself, and petitioners' then attorney did not proceed with the hearing. On September 8, 1994, petitioners' present attorney requested that an impartial hearing be held.

In the interim, the high school child study team prepared several recommendations to be considered by the Section 504 committee, which met with petitioners on April 13, 1994. The Section 504 committee concluded that the child had a disability for purposes of Section 504, and proposed that she be provided with various services which the child study team had recommended. Those services included a modified school day, if appropriate; selection of courses based upon the child's academic ability; tutorial help and additional assistance in a non-disabled resource room; individual daily counseling; group counseling; crisis counseling, as needed; assistance in participating in extracurricular sports; and the assignment of an instructional aide to accompany the child in classes and between classes throughout the school day.

The hearing in this proceeding began on October 28, 1994, and ended on December 9, 1994. In his decision, dated January 20, 1995, the hearing officer found that the child could not be classified as a child with a disability for educational purposes under either the Federal or State definitions (34 CFR 300.7; 8 NYCRR 200.1[mm]). He also found that the child had been correctly determined to have a disability under Section 504, and that respondent was required to provide the child with an accommodation plan under such law. Finally, the hearing officer found that petitioners were not entitled to be reimbursed for their costs in educating the child in a private school.

Before reaching the substantive issues in this appeal, I must first address respondent's objection to the inclusion in the record of certain documents attached to the petition which were not part of the record considered by the hearing officer. Exhibit 2 is a series of invoices for the cost of tutoring and related services provided by the Suffolk Developmental Learning Program EAC for the period April 5, 1994 through June 15, 1994. Exhibit 3 is an

affidavit by the child's father detailing the charges which he has paid to the same entity for services provided in September and October, 1994. Exhibit 4 consists of a brief statement by an administrator of the private facility about the nature of the facility's educational program and the dates of the child's attendance, as well as standardized test scores and progress reports about the child up until June, 1994.

Documentary evidence not presented at a hearing may be considered in an appeal from the 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; Application of a Child with a Disability, Appeal No. 94-5). Each of the documents in the three exhibits could have been offered for evidence at the hearing. Although the information set forth in Exhibits 2, 3 and 4 should have been provided by petitioners at the hearing as part of their burden of proof in their claim for tuition reimbursement, I find that the record would be incomplete without such information (Application of a Child with a Disability, Appeal No. 95-8).

Petitioners assert that their child should have been classified by the CSE as either emotionally disturbed or speech impaired. The board of education bears the burden of establishing the appropriateness of the CSE's recommendation that a child not be classified as a child with a disability (Application of a Child Suspected of Having a Disability, Appeal No. 93-18; Application of a Child Suspected of Having a Disability, Appeal No. 94-36; Application of a Child Suspected of Having a Disability, Appeal No. 94-41; Application of a Child Suspected of Having a Disability, Appeal No. 94-42).

Petitioners challenge the CSE's recommendation that the child not be classified on the grounds that the CSE allegedly failed to appropriately evaluate the child, and that it incorrectly applied Federal and State criteria for determining if a child has an educational disability. They assert that the observation of the child at Wellspring on December 14, 1994 by respondent's resource room teacher did not comply with the requirement that the child be evaluated in a "classroom setting." State regulation requires that an evaluation of a child suspected of having any educational disability include an observation of the child in the current educational setting (8 NYCRR 200.4 [b][4][viii]). Among the additional procedures which Federal regulations require only if a child is suspected of having a learning disability is that the child's academic performance be observed in the regular classroom setting (34 CFR 300.542 [a]). In this instance, the child was not suspected of having a specific learning disability, but of being emotionally disturbed. Petitioners' child was observed in the facility in which she received instructional services. In his written report of the observation, respondent's resource room teacher indicated that he had observed the child as she departed from class, and described her interaction with her classmates. At the hearing, he testified that he had observed her conversing with other children in an area like a lounge, and that such setting was presented to him by the facility's staff as a school setting. The teacher had the opportunity to observe how the child related to others and expressed herself. Upon the record before me, I find that the observation met the regulatory standard.

Petitioners further assert that their child's evaluation was inadequate because the extent of her language deficits was not assessed in order to ascertain whether her relatively low IQ score merely reflected those deficits, or accurately depicted the child's cognitive skills. They rely upon the testimony of one of their witnesses at the hearing, a private psychologist, who opined that it would have been preferable for respondent's school psychologist to have reported the child's scores on each of the IQ subtests. The private psychologist, who interviewed the child, but did not formally evaluate her, further opined that the child had expressive and receptive language deficits, and that the child should have a full evaluation of her learning strengths and weaknesses. The record reveals that the school psychologist administered three examinations: the Wechsler Intelligence Scale for Children-III, the Thematic Apperception Test, and the Sentence Completion Test. The first test assessed the child's cognitive skills, while the second and third were projective tests. Although the school psychologist did not report the WISC-III subtest results, she did describe the child's relative strengths and weaknesses with reference to her expressive vocabulary, word usage and knowledge, fund of general information, conceptual reasoning and practical reasoning. She also reported that the child's test scores were generally consistent. The child's performance on the educational evaluation by respondent's resource room teacher was reported in "cluster", i.e., composite, scores for the skills of reading, mathematics, writing, and broad knowledge. With regard to petitioners' assertion that the child's IQ test results may not have accurately measured her cognitive skills, I must note that there was relatively little difference between the child's verbal IQ score of 75 and her performance IQ score of 81. In addition, the standard scores which the child attained in her educational evaluation correlate closely with her performance IQ score. Her academic performance is also consistent with the IQ test results, which suggests that the child's weaknesses in vocabulary and language usage, as described by the school psychologist, have not significantly inhibited the development of the child's academic skills. As noted by respondent's school psychologist, the child can compensate for her poor verbal skills by developing her relatively stronger memory skills and visual motor abilities. There is no dispute that the child has language deficits. However, it does not follow that those deficits have distorted the results of the child's IQ test, or that an additional evaluation of her language skills and deficits is required in order to determine whether she may be appropriately classified as a child with a disability for educational purposes. Upon the record before me, I find that the CSE adequately evaluated the child.

The central issue in this appeal is whether the child should have been classified as emotionally disturbed by the CSE. An emotionally disturbed child is defined by State regulation as:

"A student with an inability to learn which cannot be explained by intellectual, sensory or health factors and who exhibits one or more of the following characteristics over a long period of time and to a marked degree:

- (i) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

- (ii) inappropriate types of behavior or feelings under normal circumstances;
- (iii) a generally pervasive mood of unhappiness or depression; or
- (iv) a tendency to develop physical symptoms or fears associated with personal or school problems.

The term does not include socially maladjusted students unless it is determined that they are emotionally disturbed." (8 NYCRR 200.1 [mm][4])

The Federal definition of a child with a "severe emotional disturbance" in 34 CFR 300.7 (a)(9) does not differ materially from the State definition, which will be used in this decision. Although the State definition refers to a student "with an inability to learn," it is well settled that the definition requires only that a child's emotional disturbance have a significant effect upon his or her educational performance (Application of a Child with a Handicapping Condition, Appeal No. 90-9; Application of a Child with a Handicapping Condition, Appeal No. 90-22; Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 91-23; Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-26).

Petitioners assert that there is extensive evidence in the record to support a finding that the child is emotionally disturbed, and that her emotional disturbance has adversely affected her educational performance. They assert that the child threatened to stab herself in February, 1991, before the January, 1993 incident when she ingested multiple aspirin tablets. They also rely upon the fact that she was hospitalized twice in 1993 at South Oaks for what they describe as "acute care", and thereafter was at Wellspring for eleven months of "semi-acute care." They also rely upon the opinions expressed by a psychiatrist and a psychologist at South Oaks, the child's psychiatrist at Wellspring, and the private psychologist who interviewed, but did not evaluate, the child.

The record includes extensive documentation of the child's emotional difficulties and the medical treatment which she received for them at both South Oaks and Wellspring. At the hearing, the parties vigorously disputed the accuracy of various diagnoses which the child received, and whether depression was a major component of her emotional difficulties (see 8 NYCRR 200.1 [mm][4][iii]). I find that the record does not establish that the child suffered from a generally pervasive mood of unhappiness or depression. The South Oak psychologist conceded that the child's depression was periodic, and the Wellspring psychiatrist described the child's depression as reactive, and not long lasting. There is no evidence that the child has an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. She clearly has had difficulty in her relationships with petitioners and her siblings, for which she and her family have received therapy. There is also no evidence that the child exhibited inappropriate types of behavior or feelings under normal circumstances in school. Although failing to complete homework and cutting classes are inappropriate conduct, they are not per se signs of an emotional disturbance. The

alleged threat to stab herself in 1991 and the 1993 incident with aspirin are serious matters. The record reveals virtually nothing about the first incident. The second incident resulted after a confrontation with petitioners about staying out late, and does not appear to have been related to school. It does exemplify the conduct disorder for which she was medically diagnosed. However helpful a medical diagnosis may be in providing information about a child's behavior, it is not determinative of an educational classification, where there is little or no evidence of any nexus between the child's medical condition and his or her educational performance (Application of a Child with a Handicapping Condition, 27 Ed. Dept. Rep. 116; Application of a Child with a Disability, Appeal No. 93-2; Application of a Child with a Disability, Appeal No. 95-4).

Federal regulation defines children with disabilities as:

"...those children evaluated in accordance with §§ 300.530 - 300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impairments need special education and related services." (34 CFR 300.7 [a][1])

The Federal regulation, and its State counterpart (8 NYCRR 200.1 [mm]), require that not only must a child have a specific physical or mental condition, but that the child's educational performance is adversely impacted by such condition to the extent that he or she requires special education and/or related services (Application of a Child Suspected of Having a Disability, Appeal No. 94-36). In this instance, the record reveals that the child was academically achieving at a rate commensurate with her ability prior to December, 1992. Thereafter, her academic performance declined because of the child's failure to complete homework and attend class on a regular basis. After she was hospitalized following the January, 1993 aspirin incident, the child reportedly made satisfactory progress with regular education instruction provided by BOCES. Thereafter, she received instruction at Wellspring, where she was reportedly instructed in small classes. Although the educators at Wellspring reported that the child learned "best" with multisensory techniques and intermittent reinforcement, it is not apparent from the record that the child requires these, or any other special education techniques in order to benefit from instruction. When asked at the hearing what special services the child might require, the private psychologist declined to specify any services in the absence of additional evaluations. However, I have found that no additional evaluation is required, and I further find that there is no evidence that the child requires special education and/or related services to benefit from instruction. Therefore, I must also find that the CSE correctly determined that the child would not be appropriately classified as emotionally disturbed. It is equally clear that petitioners' assertion that the child should have been classified by the CSE as speech impaired is also

unsupportable, because that classification would also require evidence that her language deficits significantly impair her educational performance and that she requires special education and/or related services to benefit from instruction.

Although petitioners have challenged the appropriateness of the accommodations recommended for the child by respondent's 504 committee, this appeal is a review of the CSE's recommendation. Consequently, I do not reach the issue of the appropriateness of the 504 accommodation plan.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
April 12, 1995


ROBERT G. BENTLEY