



No. 95-20

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
the Baldwin Union Free School District**

Appearances:

Ingerman, Smith, Greenberg, Gross, Richmond, Heidelberger, Reich and Scricca, Esqs.,
attorneys for respondent, Lawrence W. Reich, 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, for the 1994-95 school year, petitioners' child be placed in a day program of a private school in Flushing, New York, and which rejected petitioners' request for an order directing respondent to pay for the child's placement in a private school residential program in Connecticut. The appeal must be dismissed.

Petitioners' son, who is fourteen years old, was unilaterally enrolled by petitioners in the ninth grade of the Forman School in Litchfield, Connecticut, for the 1994-95 school year. At the hearing in this proceeding, an administrator of the Forman School testified that the school was a college preparatory boarding school for children with learning disabilities. The record reveals that the Forman School is not approved by either New York or Connecticut as a school for children with disabilities. However, that fact is not dispositive of petitioners' claim for tuition reimbursement (Florence County School District Four et al. v. Carter by Carter, ___ U.S. ___, 114 S. Ct. 361 [1993]).

The boy began kindergarten in a private school, in September, 1985. The private school reported that the child's performance on a standardized test was indicative of an IQ

of 120. In January, 1986, petitioner enrolled the child in respondent's kindergarten program. In February, 1987, while he was in the first grade in respondent's Milburn School, the child was referred by his teacher to a school psychologist, because the child reportedly had difficulty listening and following directions in class. His teacher reported that the child was unable to work independently, and appeared to "get lost, staring into space." The school psychologist reported that the child achieved a verbal IQ score of 116, a performance IQ score of 95, and a full scale IQ score of 106. He noted that the child was capable of achieving success in structured, one-to-one situations, and recommended that the child be encouraged to become more independent. The school psychologist also recommended that the child's family seek counseling for the child. The child received some remedial services from respondent.

The child received relatively low scores on standardized achievement tests which were administered to him in the Spring of 1987. However, respondent's staff questioned the validity of the test scores, in view of the child's distractibility and slow work habits. Although some consideration was given to retaining the child in the first grade, he was advanced to the second grade for the 1987-88 school year, upon the recommendation of respondent's staff. He reportedly received some remedial reading and speech/language services from respondent, as well as remedial assistance from a private learning center, at petitioners' expense, while in the second grade. The school psychologist reportedly agreed to work with the child's teacher to increase the child's independence.

The child was removed from respondent's schools, by his parents, at the end of the second grade in the Spring of 1988. He was enrolled in the private Waldorf School in Garden City, New York for the third through the fifth grades. There is virtually no information in the record about the child's education in the private school. At the hearing in this proceeding, petitioner testified that she was notified by the private school at the end of the fifth grade in 1991, that her son would not be invited back for the sixth grade, because the private school staff believed that the school could not meet the child's needs.

In September, 1991, the child entered the sixth grade in respondent's Milburn School. The child reportedly received passing grades while in the sixth grade, but had some difficulty completing all of his assignments and remaining on task. The child entered the Baldwin Junior High School in September, 1992. He was placed in an "Applied Track" instructional program for the seventh grade, and he received remedial assistance in reading. In October, 1992, a building-level committee of respondent's staff met to review the child's performance, because his teachers were concerned about the child's unwillingness to complete his assigned work, or to take responsibility for his actions. The building-level committee met with petitioners, and recommended that a "planner" (a written list of the child's assignments) be reviewed on a regular basis by petitioners to ensure that the child completed his assignments.

In the Spring of 1993, the child was privately evaluated by a psychologist at Adelphi University. The psychologist opined that avoidance was a common thread among the child's symptoms, which he described as a retreat by the child from situations which he feared

would challenge him beyond his capabilities. Noting that the child was at risk of failure, the psychologist recommended that the child be educated in a setting which provided a high ratio of teachers to students.

The child's mother discussed the private psychologist's recommendation with one of respondent's school psychologists, and agreed to have the child evaluated by the CSE. In a social history of the child, the child's mother reported that the child achieved his developmental milestones at an appropriate age. The child's physician reported to the CSE that the child had missed school on several occasions because of vague complaints of stomachaches and headaches. Although the physician did not indicate that there was any health related condition which impacted upon the child's performance in school, he recommended that the child receive one-to-one supervision while in school.

The CSE obtained reports about the child from his teachers. They described the child as having little interest in school, and being unconcerned about the consequences of his failure to complete his assignments. He was further described as easily distracted, and frequently unable to remain on task. The child's reading teacher reported that the child was disorganized, and that he had difficulty accepting instruction or corrective criticism. She described the child's oral reading as rapid, but inaccurate because of many substitutions. The child failed seventh grade English, mathematics, science, Spanish, health, technology, music, and physical education, and received D's in social studies, art, and home economics. The teachers' comments on his report card indicated that the child's low performance resulted from his failure to do his work, rather than a lack of skill.

On June 10, 1993, respondent's school psychologist reported that the child had achieved a verbal IQ score of 110, a performance IQ score of 86, and a full scale IQ score of 98. The school psychologist noted that the child's IQ scores were similar to those obtained in previous tests, including the child's private evaluation at Adelphi University. Upon analysis of the IQ test which she had administered to the child, the school psychologist reported that the child's freedom from distractibility was in the superior range. The child's verbal comprehension was found to be in the upper level of the average range, while his perceptual organization skills were described as being within the lower portion of the average range. The school psychologist also reported that the child's processing speed was in the borderline range, and noted that the child performed less well on tests which were timed. She also noted that the child's performance on timed tasks could be considered a measure of his motivation. The child's performance on a test of his perceptual motor skills was satisfactory. Although the projective tests administered by the school psychologist revealed no evidence of any severe psychopathology or thought disorder, the school psychologist reported that the child did evidence signs of depression.

The child was also evaluated by respondent's learning disability specialist, who reported that the child achieved a standard score of 107, or a grade equivalent of 8.6, in reading, and a standard score of 95 or a grade equivalent of 6.5, in mathematics. She further reported that the child achieved a standard score of 89, or a grade equivalent of 5.2,

in writing. Comparing the results of the child's achievement with his cognitive ability, the learning disability specialist concluded that the child's performance had exceeded expectation in all areas, except writing. The learning disability specialist recommended that the child not receive resource room services, but offered several recommendations to enhance the child's learning style in the classroom. The child's language skills were also evaluated, and found to be adequate for the child to succeed in regular education classes.

The child attended summer school after the 1992-93 school year had ended. He reportedly failed all of his summer school courses. In August, 1993, the child was evaluated by a neurologist, at respondent's expense. The neurologist described the results of her examination as normal, and reported that the child displayed a slight tremor and very little in the way of "soft signs" of a neurological dysfunction. She recommended that medication be tried to improve the child's attention span and ability to organize his work.

Although the record does not reveal when it acted, the CSE recommended that for the 1993-94 school year, the child be classified as other health impaired, and that he receive one period per day of resource room service. The child's individualized education program (IEP) is not included in the record. A school psychologist, who was a member of the CSE testified at the hearing in this proceeding that the child received resource room services to develop his organizational skills and to support the instruction which he received in his regular education eighth grade classes, rather than to remediate his academic skills. With regard to the child's classification as other health impaired (see 8 NYCRR 200.1[mm][10]), the school psychologist testified that the boy had been classified because he evidenced signs of an attention deficit disorder (ADD). Although the child's IEP for the 1994-95 school year referred to the child as having an attention deficit hyperactivity disorder (ADHD), the only medical diagnosis in the record is for ADD. The school psychologist testified that the use of the ADHD designation had been meant to include ADD as well, and that for educational purposes, it would make no difference whether the child had ADD or ADHD. In any event, petitioner has not challenged the child's educational classification as other health impaired, and I therefore do not pass upon the appropriateness of the child's classification (Hill v. Bd. of Ed. Brunswick CSD et al., 674 F. Supp. 73 [N.D. N.Y., 1987]; Application of a Child with a Disability, Appeal No. 93-42).

On November 12, 1993, a psychologist who was affiliated with the North Shore University Hospital reported that the child had not exhibited any obvious attention problems during a brief screening, but did appear to have some anxiety difficulty and some compulsive tendencies which could make him more avoidant. The psychologist recommended that additional neuropsychological testing be performed, and that the child be evaluated by a psychiatrist.

The child continued to have academic difficulties in the eighth grade during the 1993-94 school year. At the end of the first marking period, the child received a C in seventh grade English, which he was repeating, a D in eighth grade English, and Fs in the remainder of his courses. By the end of the second marking period, his grades were all Fs, except for

a C+ in seventh grade English. In the third marking period, he failed each of his courses. His teachers commented on his report card that the child was unprepared for class. Petitioners obtained private tutoring for the child, in December, 1993. In the Spring of 1994, the respondent agreed to reimburse petitioners for the cost of the tutoring services which they had obtained.

In early March, 1994, the child was evaluated by the North Shore University Hospital psychologist who had screened the child in November, 1993. In cognitive testing, the child achieved a verbal IQ score of 111, a performance IQ score of 96, and a full scale IQ score of 104. The child's performance on the various IQ subtests was comparable to that which he had demonstrated in previous tests and the psychologist's findings generally paralleled those which respondent's school psychologist had reported. The North Shore psychologist reported that the child had not had any difficulty on two highly structured tests measuring the child's ability to maintain attention. Noting that the child had reportedly been diagnosed as having ADHD, the psychologist suggested that ADHD might be an accurate characterization, despite only mild evidence of such a disorder when the child periodically "tuned out." He reported that the child had some cognitive features often associated with attentional difficulties, including problems with organization and problem-solving strategies. The psychologist suggested that medication be tried for the child's attention problems, and noted that the child's approach to school tests could represent avoidant behavior. The record reveals that the medication Ritalin was used with the child, but was discontinued because it exacerbated his agitation and hyperactivity. The psychologist again recommended that the child be seen by a psychiatrist. The psychologist suggested that the child could be a candidate for placement in a self-contained special education class, where he could be closely supervised and kept on task by teachers. He further recommended that the child not be placed with children who had significant cognitive or behavioral problems. In addition to tutoring on content areas, the psychologist recommended that the child continue to receive resource room services, or their equivalent, to develop his organizational and study skills.

In March, 1994, the child was evaluated by a psychiatrist, who described the child as moderately anxious, and frustrated about school. The psychiatrist diagnosed the child as having severe ADD and an anxiety disorder. He opined that the child needed a placement in a small school for children with special needs, with teachers who were trained to deal with distractible children. He suggested that the child's instruction focus upon organization, problem solving, and time management, as well as remediation in basic subjects.

On May 9, 1994, respondent's CSE conducted its annual review. The CSE recommended that the child remain classified as other health impaired during the 1994-95 school year, but that his placement be changed to a self-contained special education class with a child to adult ratio of 12:1+1 in a location to be determined. The CSE also recommended that the child receive counseling once per week. At the hearing, representatives of the CSE testified that neither of respondent's two self-contained classes was appropriate for the child because his abilities and needs were not similar to those of the

children in those classes. The CSE decided to pursue possible placements in a Board of Cooperative Education Services of Nassau County (BOCES) Alternative Learning Program (ALP), the programs of neighboring school districts, and three private schools. Respondent's Director of Pupil Services testified that the CSE was unsuccessful in attempting to place the child in the special education programs of neighboring school districts because no space was available. The private schools were the Summit School, which did not have a place for the child, the Community School, which because of its location in New Jersey was ultimately rejected by the CSE, and the Lowell School, which accepted the child on May 27, 1994. The CSE subsequently discussed the program of an unapproved private school in New York City, but informed petitioners that it could not recommend that school, if a place could be found for the child in an approved school. The State Education Department approved the child's placement in the Lowell School, for purposes of State aid to respondent, on June 21, 1994.

On June 27, 1994, the CSE met with the child's mother and her attorney to discuss a specific placement for the child. The mother, who had visited the Lowell School, expressed concern about the comparability of the needs and the abilities of the children in that school. The CSE agreed to obtain a class profile of the children in the class selected for the child at the Lowell School, which was to be discussed when the CSE met again in July. The CSE also agreed to have the child screened at the BOCES. Although the mother had visited the BOCES previously, the child had not accompanied her to be screened. Neither the mother nor the child visited the BOCES after the June CSE meeting.

On July 27, 1994, the child's mother and her attorney met with the CSE to discuss the class profile from the Lowell School, which the CSE selected as the child's placement. In early September, 1994 petitioners enrolled the child in the Forman School.

Petitioners requested that an impartial hearing be held to review the CSE's recommendation that the child be placed in the Lowell School. The hearing began on December 6, 1994, and was concluded on December 21, 1994. In an interim decision, dated December 13, 1994, the hearing officer denied respondent's motion for a "bifurcated" hearing, at which evidence would be taken only with respect to the appropriateness of the CSE's recommendation, and no evidence would be taken with regard to the appropriateness of the Forman School, unless the hearing officer first determined that the CSE had failed to recommend an appropriate program. She also denied petitioners' motion that a private psychiatrist and representatives of the Forman School be permitted to testify by telephone, over respondent's objection that it would not be afforded a full opportunity for cross-examination. The hearing officer ruled that telephonic testimony could not be taken, unless the witness was unavailable. Neither party has appealed from the hearing officer's interim decision.

In her final decision, which was rendered on January 23, 1995, the hearing officer found that the CSE had prepared a comprehensive IEP which accurately identified the child's needs, set forth appropriate annual goals and selected appropriate special education services to help the child achieve his annual goals. She also found that the child would have

been placed with children having similar needs and abilities in the Lowell School, and that the Lowell School was the least restrictive environment for the child. The hearing officer further found that placement in the Forman School would not be the least restrictive environment, and denied petitioners' claim for tuition reimbursement.

Before reaching the merits of petitioners' appeal, there are two procedural issues to be addressed. Respondent contends that the appeal should be dismissed as untimely. State regulation requires that a parent who seeks review of an impartial hearing officer's decision must serve a notice of intention to seek review upon the board of education within 30 days after receipt of the decision to be reviewed, and must serve the petition for review within 40 days after receipt of the hearing officer's decision (8 NYCRR 279.2[b]). The hearing officer's decision was dated January 23, 1995, but respondent has not established when petitioners received the decision (cf. Hyde Park CSD v. Peter C., Sharon C. and the State Review Officer, 93 Civ. 0250, [S.D.N.Y., 1994]); Application of a Child with a Disability, Appeal No. 93-23). Petitioners' notice of intention to seek review was received by respondent on February 27, 1995, but the petition for review was not served until May 1, 1995.

In their petition, petitioners acknowledge that they did not meet the "deadline for sending in the petition," but ask that their failure to do so be excused because they are proceeding without the assistance of an attorney and found the work of preparing their petition to be difficult. They also assert that their notice of intention was timely. The Federal regulations which implement the Individuals with Disabilities Education Act (20 USC 1400 et. seq.) provide short deadlines for the completion of hearings and State-level reviews to ensure the prompt resolution of disagreements about the identification, classification, and placement of children with disabilities. The deadlines imposed by State regulation for seeking review of hearing officers' decisions are consistent with the Federal policy for prompt determination of these matters, even though Federal regulation does not prescribe a maximum period of time within which an appeal must be commenced. While I am not persuaded that the deadline should be waived upon a mere assertion that it was difficult to prepare a petition, I will excuse petitioners' delay in this instance. Respondent was put on notice that a petition for review would be filed, when it received petitioners' notice of intention to seek review. In essence, petitioners seek a financial award for tuition against respondent. One of the criteria for such awards is whether equitable factors favor an award of tuition to the parents. Petitioners' delay in bringing the appeal would be an important consideration in determining if equitable factors favor an award of tuition reimbursement to them. However, their delay should not preclude a determination of whether there is any legal basis for their claim. Finally, excusal of petitioners' delay would not be prejudicial to the respondent.

The second procedural issue involves the three documents which petitioners have annexed to their petition. Those documents were not in evidence before the hearing officer. 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 if

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). "Addendum B", which is a letter from an administrator of the Forman School about the child's progress, is dated April 17, 1995. As that date is well after the hearing ended, I will accept the letter as part of the record. "Addendum A" is a copy of a site report about the Lowell School prepared by the State Education Department in 1987. The report was offered at the hearing, but rejected by the hearing officer, on the ground that the report was irrelevant because the Lowell School was still approved by the State Education Department, notwithstanding the deficiencies noted in the report. "Addendum C" is a copy of a letter, dated October 20, 1994, by the psychiatrist who was not permitted to testify by telephone. That document was also offered, but rejected, on the ground that respondent would not have the opportunity to cross-examine the psychiatrist about the opinions he expressed in the letter.

The twin criteria for admission of evidence into the record are relevance and reliability (Application of a Child with Disability, Appeal No. 94-6). A hearing officer may limit the admission of evidence which is not relevant to present conditions, i.e., is outdated (Application of a Child Suspected of Having a Disability, Appeal No. 93-18). In its site report, the State Education Department required the Lowell School to submit corrective action plans for the deficiencies noted in the report. I find that the report is of no value in establishing the current condition of the Lowell School, and that the hearing officer did not abuse her discretion in rejecting the report as evidence. I will not accept it as part of the record in this appeal. Although the strict rules of evidence do not apply in an administrative hearing, the parties are nevertheless entitled to be fully apprised of the proof to be considered, and to cross-examine witnesses and offer evidence in rebuttal or explanation (Simpson v. Wolansky, 38 NY 2d 391 [1975]). However, a document may not be excluded in proceedings of this nature merely because the person preparing the document did not testify (Application of a Child with a Disability, Appeal No. 94-29), and the right to cross-examination does not affect the admissibility of hearsay evidence, such as the psychiatrist's letter (Zimmerman v. Bd. of Regents of the University of the State of New York, 31 AD 2d 560 [3rd Dept., 1968]). Accordingly, I find that the hearing officer erred in excluding the psychiatrist's letter, which will be included in the record of this appeal.

Turning to the merits of petitioners' appeal, it is well settled that the board of education bears the burden of demonstrating the appropriateness of the program recommended by its 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, the board of education must show 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 [1982]), 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 evaluation 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 instructional 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).

Petitioners' child has been extensively evaluated in most areas, and the results of the evaluation are consistent. The child has average intellectual ability, but exhibits minor deficits in visual perception and performance on timed tasks. His basic academic skills are at a level which is consistent with his ability. As indicated in his IEP, the child has minimal academic deficits to be addressed in a special education program. The child is anxious and disorganized, and has poor work habits and poor self-esteem. I find that the child's IEP adequately describes his special education needs, based upon his classification as other health impaired. Although the child's IEP annual goals are very general for purposes of planning a special education program, they reflect the fact that the child does not have significant academic needs to be addressed in his special education program.

The central question presented in this appeal is whether the services selected by the CSE are appropriate, i.e., whether the child's program and placement at the Lowell School would have been appropriate. At the CSE meeting of May 9, 1994, the child's mother signed the child's IEP, which provided that the child would receive primary special education instruction in a self-contained special education class of no more than 12 children, a teacher and an aide. Petitioners did not challenge the appropriateness of the recommended program (8 NYCRR 200.4[c][2]) at the hearing, nor do they in this appeal. Indeed, the program recommended by the CSE is consistent with the advice given to petitioners by the private psychologist and psychiatrist. The appropriateness of the recommended program was also established at the hearing through the testimony of respondent's Director of Pupil Services and respondent's school psychologist, each of whom testified that the recommended program would provide the child with the opportunity to achieve his IEP annual goals during the 1994-95 school year.

Petitioners challenge the appropriateness of the child's recommended placement, i.e., the private school in which the child's program would have been provided. They assert that the Lowell School would have been inappropriate for the child because he would not have been appropriately grouped with children having similar needs and abilities, and because he would have had to spend an unreasonable amount of time riding a bus to and from the Lowell School.

At the hearing in this proceeding, an administrator of the Lowell School, whose duties included interviewing all applicants for admission to the school, was questioned extensively about the nature of the disabilities which Lowell School students have, and about the program which the Lowell School could provide to address this child's educational disability and help him achieve his IEP goals. Her testimony, which was unrefuted, established that the Lowell School accepts children who are classified as learning disabled, emotionally disturbed and other health impaired. With regard to the specific class in which the child would have been placed if he had been enrolled in the Lowell School, the administrator

testified that the child's cognitive ability, academic skills, management needs, and social development were similar to those of the other children in the class. Although the range of mathematical skills among the children in the class is unusually broad, I find that the child would have been appropriately grouped with the other children in the class. The administrator also testified that the program at the Lowell School could address this child's low self-esteem and anxiety about school related issues. She described the behavior management plan used at the Lowell School to motivate students, which would also have been appropriate for this child. The administrator testified that the Lowell staff were trained to use appropriate teaching techniques with children who have ADD, and to teach them to use compensatory strategies to overcome deficits in their organizational, problem solving, and study skills.

With regard to the transportation of the child to the Lowell School, the record does not reveal the distance between the school and the child's home. The school is located in the Borough of Queens, in New York City. The child's mother testified that a representative of a local bus company had estimated to her that the trip between home and school would take from 75 to 90 minutes, each way. The Lowell School administrator testified that she had travelled from the school to respondent's district in approximately 25 minutes. The Education Law and the Regulations of the Commissioner of Education do not impose a maximum time limit upon the transportation of children with disabilities between home and school (Appeal of Parents and Guardians of a Handicapped Child, 19 Ed. Dept. Rep. 494). Given the absence of an absolute limit and the various estimates in the record of the time required to transport the child between his home and the Lowell School, I find no basis for concluding that the CSE's recommended placement was inappropriate by dint of the length of time required for transportation.

In order to be appropriate a placement must be in the least restrictive environment for the child. There is no dispute that the child required an out-of-district placement in a private school to meet his educational needs during the 1994-95 school year. Federal and State regulations require that children with disabilities be placed as close as possible to their homes (34 CFR 300.552[a][3]; 8 NYCRR 200.1[x][3]). Upon the facts before me in the record, I find that placement in the Lowell School would have been consistent with the least restrictive environment requirement. I further find that the child's placement in a residential school like the Forman School would not be consistent with Federal and State law, because there is no evidence in the record that the child required a residential placement in order to benefit from his educational program (Abramson v. Hershman, 701 F.2d 223[1st Cir.,1983]; Burke County Bd. of Ed. v. Denton, 895 F. 2d. 973[4th Cir.,1990]; Kerkam v. Superintendent D. C. Public Schools, 931 F. 2d 84[D.C. Cir.,1991]; Applications of Bd. of Ed. Hoosic Valley CSD and a Child with a Handicapping Condition, 30 Ed. Dept. Rep. 129).

A board of education may be required to pay for educational services obtained for a child by the child's parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parent's claim (School Committee of the Town of

Burlington v. Department of Education, Massachusetts, 471 U.S. 359 [1985]). With regard to the first criterion, i.e., whether the services offered by respondent were appropriate, I find that the respondent offered an appropriate program and placement. My finding is dispositive of petitioners' claim for tuition reimbursement, because respondent may not be required to pay for the child's tuition if it has offered an appropriate program and placement. Despite petitioners' understandable desire to have their child in what they perceive to be the best educational situation for him, respondent met its obligation under the law to offer an appropriate program and placement (Bd. of Ed. Hendrick Hudson CSD v. Rowley, supra).

THE APPEAL IS DISMISSED

Dated: Albany, New York
June 13, 1995


DANIEL W. SZETELA