



No. 95-76

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

**Application of the BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF NEW YORK for
review of a determination of a hearing officer relating to the
provision of educational services to a child with a disability**

Appearances:

Lawrence E. Becker, Esq., Special Assistant Corporation Counsel, attorney for petitioner,
Paul Ivers, Esq., of counsel
Davis, Polk and Wardwell, Esqs., attorneys for respondent, Marlane Melican, Esq., of
counsel

DECISION

Petitioner, the Board of Education of the City School District of the City of New York, appeals from the determination of a hearing officer who determined, as a matter of law, that petitioner may be required to provide regular education to preschool children with disabilities, in some instances. However, the hearing officer recused himself from this proceeding before conducting a hearing with respect to the need, if any, of respondent's preschool child with a disability to receive regular education instruction as part of the free appropriate public education to which he was entitled in the 1994-95 school year. Petitioner seeks an order annulling the hearing officer's decision, and referring this matter to the State Education Department to investigate respondent's complaint about petitioner's refusal to provide regular education instruction to the child. The appeal must be sustained in part.

Respondent's son, who is four years old, has a profound bilateral hearing loss. The boy has been identified as a preschool child with a disability by petitioner's committee on preschool special education (CPSE). His identification as a preschool child with a disability is not in dispute. The child was evaluated for the CPSE by the Lexington School for the Deaf, which recommended to the CPSE that the child attend a mainstream nursery school, and receive speech/language therapy and hearing education services. On or about June 3,

1994, the CPSE recommended that the child be provided with two hours per week of individual speech/language therapy, and the same amount of individual "hearing education services." It also recommended that the child have the use of a FM receiver to amplify sounds for his residual hearing. Petitioner asserts that hearing education is a related service (see 34 CFR 300.16; 8 NYCRR 200.1 [gg]). The recommended hearing education service was to be provided by a teacher of the deaf. However, the record does not reveal the nature of the services to be provided by the teacher of the deaf, or the nexus, if any, of those services to the child's regular education program. The CPSE, which recommended that speech/language therapy and hearing education services be provided on a twelve-month basis, did not recommend that the child be enrolled in a regular education nursery (preschool) program, nor did it recommend any special education for him.

For the 1994-95 school year, the child was enrolled in the private St. Luke's Nursery School, at his parents' expense. The services which the CPSE had recommended were provided to him, at petitioner's expense. Petitioner has included two independent provider agreements in the record. Those documents imply that the child received speech/language therapy at the service provider's office, and that he received hearing education services at St. Luke's Nursery School. On or about June 22, 1995, the child's parents requested that an impartial hearing be held for the purpose of obtaining a hearing officer's determination that petitioner should reimburse them for the cost of the child's tuition at the St. Luke's Nursery School.

After a hearing officer was appointed, petitioner reportedly asked the hearing officer to recuse himself because the hearing officer's stepdaughter was the subject of another pending hearing to determine whether petitioner should be required to reimburse the parent for the cost of the tuition at the private school in which the child had been placed by the parent (see Florence County School District Four et al. v. Carter by Carter, ___ U.S. ___, 114 S. Ct. 361 [1993]). Petitioner asserts in its petition that it cannot obtain a transcript of the hearing at which it made its request for recusal.

The record before me includes the transcript of a hearing which was held on July 11, 1995. At that hearing, the hearing officer asserted that he was unaware of any personal or professional reason why he could not act impartially in this proceeding. He then alluded to prior off-the-record discussions with petitioner's attorney and respondent regarding petitioner's claim that it had no legal duty to provide regular education preschool services. The hearing officer proposed that petitioner file a written motion to dismiss respondent's claim for tuition reimbursement, and that the child's parents then respond in writing to petitioner's motion. He indicated that he would then either grant or deny the motion. If the motion was denied, the hearing would then proceed on the merits. He explained to respondent, who was not represented by an attorney, that the on-the-merits phase of the hearing would be to determine whether respondent's son was "... entitled to those services in an individual sense." Respondent and petitioner's attorney accepted the hearing officer's proposal to bifurcate, i.e., divide the hearing into phases. The hearing officer closed the

hearing, without taking any testimony. The hearing transcript is no more than 12 pages in length.

In his decision, which was dated October 17, 1995, the hearing officer rejected petitioner's claim that it had been ordered by the State Education Department never to provide regular education services to preschool children. While noting that the Federal Office of Special Education Programs (OSEP) and the State Education Department had taken different positions on the question of providing regular education instruction to preschool children with disabilities, the hearing officer held that he was obligated to make his own determination of the issue, based upon his analysis of Federal statute and regulations. He further held that a board of education could be required to provide or pay for regular education for a preschool child with a disability, if access to non-disabled children is required as part of the child's individualized education program (IEP), or if the child's IEP provides that the child is to receive special education services in an educational setting and those services could be provided in a regular education setting.

The hearing officer referred to petitioner's request that he recuse himself from this proceeding because of the pending hearing involving his stepdaughter. He declined to recuse himself, on the grounds that he was not a party in that other hearing, and that the other hearing concerned tuition reimbursement at an unapproved private school for the 1993-94 school year, which he purported to distinguish from this proceeding. However, the hearing officer did recuse himself on the ground that he had become involved in petitioner's search for a new Chancellor after he had conducted the July 11, 1995 hearing in this matter.

Petitioner questions the authority of the State Review Officer to determine this appeal, which it has brought, on the ground that matters involving the published policy of the State Education Department are allegedly beyond the State Review Officer's jurisdiction. Petitioner relies upon the provisions of 8 NYCRR 279.1 (c)(2), which reads as follows:

"State review officers shall not have jurisdiction to review the actions of any officer or employee of the State Education Department."

Petitioner does not identify any specific action of an employee which is to be reviewed. It contends that it is relying upon the "policy" of the State Education Department, which has been communicated to it, regarding its authority to provide or pay for regular education for preschool children with disabilities, and that the State Review Officer cannot analyze the relative merits of the State Education Department's and OSEP's policies. I find that petitioner's argument is without merit. The State Review Officer is required to apply the law as he perceives it to the facts of the appeal which is before him. While the opinions of Federal and State educational agencies must be considered, they are not dispositive of the legal issues which the State Review Officer must determine upon his own analysis of statute, regulations, and decisional law. I further find that petitioner's additional argument that the State Education Department is a necessary party to this proceeding is without merit.

The decision in Riley v. Ambach, 668 F. 2d 635 (2d Cir., 1981) upon which petitioner relies is inapposite because the instant proceeding is clearly the administrative remedy which the Riley court indicated should be pursued before parents resort to the courts.

Petitioner challenges the hearing officer's decision on the ground that the hearing officer acted in excess of his jurisdiction by reaching a legal conclusion which was unrelated to the identification, evaluation or placement of a specific child with a disability. It also challenges the hearing officer's decision as being contrary to the law on the question of whether petitioner could ever become obligated to provide or pay for regular education instruction of a preschool child with a disability.

Federal and State law provide that a board of education must appoint a hearing officer to hear and determine the claim of a parent of a child with a disability regarding the identification, evaluation, placement, or provision of a free appropriate public education to the child (20 USC 1415 [b][2]; Section 4404 [1] of the Education Law). It is the hearing officer's responsibility to ensure that the parties have the opportunity to present evidence, and to render a timely decision which is based upon the record which is before the hearing officer (34 CFR 300.508; 8 NYCRR 200.5 [c][4], [9] and [11]). The parties in an impartial hearing may stipulate that certain facts are not in dispute, and thereby avoid the necessity of presenting documentary evidence or testimony to establish those facts. Nevertheless, a hearing officer may not dispense with the requirement that there be an adequate basis in the record for his or her decision (Application of the Board of Education of the City School District of the City of New York, Appeal No. 94-35).

In this instance, 19 exhibits were reportedly introduced into evidence, although the transcript does not indicate that any exhibit was introduced into evidence. No testimonial evidence was adduced. The hearing officer's decision does not purport to determine the right, if any, of respondent's child to receive regular education at petitioner's expense. That issue must now be determined by another hearing officer, who must first determine the child's needs, and carefully review the child's IEP. Then, and only then, may the new hearing officer determine the legal rights of the parties. Unfortunately that determination will be delayed by the bifurcation of this hearing.

A hearing officer's decision is final, i.e., binding upon the parties, unless appealed to the State Review Officer (34 CFR 300.509; 8 NYCRR 200.5 [c][11]). Since the hearing officer's decision in this instance is unsupported by the record which is before me, and does not determine the rights of the parties, I find that it must be annulled. I have not considered the merits of the parties' legal arguments with regard to the provision of regular education services to a preschool child. It is not the function of the State Review Officer to render an advisory opinion (Application of the Board of Education of the City School District of the City of New York, *supra*).

Petitioner's request that this matter be referred to the State Education Department's Office of Special Education Services for resolution by that office must be denied.

Respondent initiated this proceeding in accordance with the provisions of 20 USC 1415 and Section 4404 of the Education Law. He does not seek a general determination with respect to the rights of all parents. He seeks reimbursement for his expenditures for tuition. Respondent is entitled to have his claim determined in accordance with the prescribed Federal and State procedures for determining such claims. Petitioner must afford respondent the opportunity to have his claim resolved by promptly appointing another hearing officer, who shall expeditiously conduct another hearing. The hearing officer shall make his or her determination based upon the record of the hearing.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the hearing officer is annulled; and,

IT IS FURTHER ORDERED that within 10 days after the date of this decision, respondent shall appoint a different hearing officer to conduct a de novo hearing in this matter.

Dated: Albany, New York
December 19, 1995


ROBERT G. BENTLEY