



No. 96-84

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

**Application of a CHILD WITH A DISABILITY, by his parent,
for review of a determination of a hearing officer relating to the
provision of educational services by the Board of Education of
the Canastota Central School District**

Appearances:

Hogan and Sarzynski, LLP attorneys for respondent, Edward J. Sarzynski, Esq., of counsel

DECISION

Petitioner appeals from a hearing officer's refusal to recuse himself from the hearing in this proceeding upon petitioner's contention that respondent's rotational list of hearing officers had been improperly prepared by respondent's then Director of Pupil Personnel Services, and that another school administrator had contacted the individuals on the rotational list about their availability to be the hearing officer in this proceeding. The appeal must be sustained in part.

Petitioner's extensive involvement with respondent and its committee on special education (CSE) has been detailed in prior decisions of the State Review Officer (see e.g., Application of a Child with a Disability, Appeal No. 95-10), and will not be repeated in this decision. His son, who is 20 years old, sustained multiple trauma, including a severe head injury, in an automobile accident in March, 1991. Except for two relatively brief stays in rehabilitation facilities, the child has been hospitalized since his accident. In 1993, the child's physician reported that the child was unable to perform any meaningful movements or activities on command. The child's classification as a child with a traumatic brain injury is not in dispute in this proceeding.

In September, 1993, the CSE recommended that the child receive a neuropsychological evaluation, and that pending the completion of that evaluation, the child receive two hours per day of special education, plus 30 minutes each of speech/language therapy, physical therapy, and occupational therapy, five times per week. Respondent approved the CSE's recommendation. As a result of the numerous due process proceedings

which petitioner has instituted since then, respondent has been required to maintain the level of services which the CSE recommended in September, 1993, as the child's "pendency placement" (see 20 USC 1415 [e][3][A] and Section 4404 [4] of the Education Law).

In a letter dated August 7, 1996, petitioner requested that an impartial hearing be held to resolve "...the violations that have occurred during the CSE meeting." (Joint Exhibit 2). The record does not reveal when the CSE met, or what, if any, action the CSE took. In a memorandum dated August 12, 1996, Ms. Sally Romano, who was respondent's Director of Pupil Personnel Services, as well as the chairperson of the CSE, informed respondent's president of petitioner's request for hearing. Respondent's president, in accordance with respondent's hearing officer selection procedure, asked Ms. Joanne Mitchell, an elementary school principal, to ascertain who was the next available person on respondent's rotational list of hearing officers.

Respondent is required by the Education Law and the Regulations of the Commissioner of Education to maintain a rotational list of hearing officers.

"Individuals so appointed by a board of education [to serve as hearing officers] shall be selected from a list of available hearing officers who have successfully completed a hearing officer training program conducted by the department according to a rotation selection process prescribed in regulations of the commissioner ... " (Section 4404 [1] of the Education Law)

Section 200.2 (e)(1) of the Regulations of the Commissioner of Education provides that a board of education must establish a list of:

"the names and resumes of impartial hearing officers certified by the Commissioner of Education pursuant to section 221 (s)(2) [should be 200.1 (s)] of this Part, from which the district shall select the first available hearing officer. Such list shall be maintained on a rotational basis and shall be compiled from a list of all certified impartial hearing officers available to serve in the district. Those hearing officers who have conducted impartial hearings on behalf of the school on or after July 1, 1993, shall be placed on the bottom of the list in the order of the date of their appointment; ... "

When Section 4404 (1) of the Education Law was amended in July, 1993 to require boards of education to use a rotational selection process for their impartial hearing officers, it was also amended to provide that:

" The commissioner shall develop and implement a plan to ensure that no individual employed by a school district, school

or district committee on special education acts as an impartial hearing officer and that no individual employed by such schools or programs serves as an impartial hearing officer for two years following the termination of such employment. Such plan shall be fully implemented no later than July first, nineteen ninety-six."

At some time before receiving petitioner's hearing request, respondent reportedly received a directive from the State Education Department requiring respondent to include on its rotational list of impartial hearing officers each of the State certified hearing officers who had indicated to the Education Department that he or she would be willing to serve as a hearing officer within Madison County. Respondent's school district is located in Madison County. Although Ms. Romano, respondent's former Director of Pupil Personnel Services, testified at the hearing about the Education Department directive, I note that a copy of the directive was not included in the record of the hearing. However, petitioner has annexed his petition a copy of a July, 1996 memorandum to the field from the State Education Department's Executive Coordinator for Special Education Services. The memorandum indicates that "All certified impartial hearing officers available to serve in the district, as indicated on the attached lists, and all other eligible hearing officers who indicate directly to the district their willingness to serve must be on the district's rotational list." An attachment to the memorandum included the names of 22 hearing officers who had indicated their willingness to serve as hearing officers in Madison County.

In a memorandum dated August 13, 1996, Ms. Romano submitted to the Superintendent of Schools a list of 22 hearing officers, with the request that the Superintendent of Schools submit the list to respondent for approval as its rotational list of impartial hearing officers. Respondent approved a list of impartial hearing officer names, without change, at its meeting on August 15, 1996. The first three names on the list were Maryanne DiMeo-Brindisi, Ralph Penner, and Henry Dowski.

At the hearing in this proceeding, Ms. Mitchell, the person who had been asked by respondent's president to ascertain who was the next available hearing officer, testified that Ms. DiMeo-Brindisi was the last person on the new list to have been contacted about serving as a hearing officer. Therefore, the first person she contacted about serving as the hearing officer in this proceeding was Mr. Penner, who declined to serve. Ms. Mitchell then contacted Dr. Dowski, who agreed to be the hearing officer. By memorandum dated August 19, 1996, Ms. Mitchell informed respondent's president that Dr. Dowski was the next available individual on respondent's rotational list of hearing officers. In letters each dated August 19, 1996, respondent's clerk advised Dr. Dowski and petitioner that respondent's president had appointed Dr. Dowski to serve as the hearing officer in this proceeding, and that respondent would ratify his appointment at its next regularly scheduled meeting on August 27, 1996. After respondent met on that date, respondent's clerk advised Dr. Dowski and petitioner that respondent had ratified Dr. Dowski's appointment.

By agreement of the parties, the hearing was held on October 16, 1996. Ms. Romano was questioned by petitioner's lay advocate about the composition and order of respondent's rotational list of hearing officers. She testified that each of the 22 individuals whose names appeared on the State Education Department's list of hearing officers who were available to serve in Madison County had been included in the list which she prepared, and which respondent approved on August 15, 1996. However, the 22 names did not appear in the same order as they did on the State's list. Ms. Romano testified that she rearranged the order of the names on the list so that individuals who had prior experience as hearing officers appeared at the beginning of the list, because she believed it would be advantageous to have experienced hearing officers available.

She also testified that she had spoken with the Directors of Special Education in the neighboring Fayetteville-Manlius and Liverpool Central School Districts about the prior experience of the individuals on the State's list. Ms. Romano asserted that she had not discussed whether the hearing officers had ruled in favor of the school districts, and that her counterparts had not described their experiences with the hearing officers, and had not recommended specific individuals to be hearing officers. Although Dr. Dowski had not previously served as a hearing officer for respondent, his name was placed ahead of at least two other individuals who had served as hearing officers for respondent. With regard to the position of Dr. Dowski's name ahead of the other two individuals, Ms. Romano testified that "... there's no specific rationale or reason." (Transcript, page 35)

Petitioner's lay advocate asked Dr. Dowski to recuse himself because Ms. Romano had compiled respondent's rotational list of hearing officers. The advocate also asked him to recuse himself on the ground that Ms. Mitchell had contacted him about his availability to conduct the hearing. Although Ms. Mitchell is the principal of two elementary schools, and does not supervise anyone who is providing educational services to petitioner's son, the advocate nevertheless asserted that Ms. Mitchell's contact was inappropriate because she could at some future time become the supervisor of one of the boy's service providers. Dr. Dowski declined to do so, and this appeal ensued.

Petitioner asserts that respondent's rotational list of hearing officers was improperly compiled. He requests that respondent be ordered to prepare a new rotational list, and to appoint a new hearing officer for the hearing in this proceeding. He also asks that respondent be ordered to stop its practice of having school district employees contact hearing officers to ascertain their availability for service in particular hearings.

There are two distinct, yet related, activities which are at issue in this appeal. The first is the creation of respondent's rotational list of hearing officers, and the second is the selection of an individual from the list to be the hearing officer in this proceeding. Only respondent could formally establish a rotational list pursuant to Section 4404(1) of the Education Law, but it does not follow that school district staff may not assist respondent in compiling its list (Application of a Child with a Disability, Appeal No. 96-2; Application of a Child with a Disability, Appeal No. 96-38; Application of a Child with a Disability, Appeal

No. 96-69). However, school district employees who may be called as witnesses or who were otherwise involved in the matters to be reviewed by a hearing officer should not participate in the selection of the hearing officer for a specific hearing because their participation in the selection process could create the appearance of impropriety (Application of a Child with a Handicapping Condition, 30 Ed Dept. Rep. 195; Application of a Child with a Handicapping Condition, Appeal No. 92-25; Application of a Child with a Handicapping Condition, Appeal No. 92-46).

Although Ms. Romano was no longer employed by respondent when the hearing in this proceeding began, the hearing was requested to review some action by respondent's CSE, which she had chaired. Nevertheless, I must point out that she was not involved in the selection of Dr. Dowski to be the hearing officer in this proceeding, and there is no evidence that she had any contact with him prior to the hearing (cf. Application of a Child with a Handicapping Condition, 30 Ed. Dept. Rep. 195; Application of a Child with a Handicapping Condition, Appeal No. 92-25). It is also important to note that Ms. Romano did not add any person to, or exclude any person from, respondent's rotational list of hearing officers. Respondent's list consisted of the 22 individuals whose names were provided to it by the State Education Department. The State Education Department listed the hearing officer's names in alphabetical order. Ms. Romano altered the order in which the hearing officer's names appeared on respondent's list. Neither statute nor regulation mandates that the names of hearing officers appear in alphabetical order on a board of education's rotational list of hearing officers.

While I find that Ms. Romano's rationale for the order of the names on respondent's list, i.e. to ensure the availability of experienced hearing officers, is questionable (see Application of a Child with a Handicapping Condition, 29 Ed. Dept. Rep. 138), the record does not afford any factual support for petitioner's contention that Ms. Romano was attempting to "stack the deck" with hearing officers inclined to rule in the district's favor. As noted above, no one has been excluded from the rotational list. Whether a particular hearing officer is selected depends upon his or her position on a rotational list, and the hearing officer's availability to serve at a particular time. Therefore, it is by no means certain that any of the individuals near the top of respondent's rotational list will in fact be appointed by respondent to conduct a specific hearing. Under the circumstances presented, I am not persuaded by petitioner's claim that respondent's hearing officer list is tainted because of Ms. Romano's participation in the creation of the list.

Although I do not agree with petitioner's contention that the order of the hearing officers' names on respondent's list was arranged to provide respondent with partisan hearing officers, I nevertheless must conclude that the order of the hearing officers' names is invalid. 8 NYCRR 200.2 (e) (1) expressly provides that the names of the hearing officers who have conducted hearings in a school district on or after July 1, 1993 must be placed on the bottom of the district's rotational list in order of the date of their appointment to conduct hearings. To the extent that the names of individuals who had previously served as hearing officers for respondent were placed before those of individuals who had not served

as hearing officers for it on the rotational list which respondent approved on August 15, 1996, I find that respondent's rotational list did not comply with the regulatory requirement. Although I will direct respondent to revise its rotational list, I note that Dr. Dowski had not previously served as a hearing officer for respondent, and I find that there is no basis for annulling his appointment because of the defective composition of respondent's list.

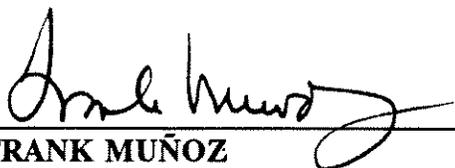
The second activity which is at issue is respondent's selection of Dr. Dowski from respondent's rotational list to serve as the hearing officer in this proceeding. Petitioner contends that Dr. Dowski's selection was tainted because Ms. Mitchell contacted Dr. Dowski to ascertain whether he would be available to conduct the hearing in this proceeding. Ms. Mitchell has been assigned the responsibility of contacting the hearing officers on respondent's list, to assist respondent's president in the task of ascertaining who is the next available hearing officer. Respondent's president initially appoints the hearing officer, subject to respondent's subsequent ratification. Respondent has not delegated its authority to appoint hearing officers to any school employee (cf. Application of a Child with a Handicapping Condition, Appeal No. 92-19, Application of a Child with a Disability, Appeal No. 96-35; Application of a Child with a Disability, Appeal No. 96-60). Ms. Mitchell is not the child's principal, nor does she supervise anyone who provides special education or related services to the child. Petitioner has not alleged that Ms. Mitchell was a member of the CSE involved with his son. Although she testified at the hearing about her actions in assisting respondent's president, I find that there was not even the appearance of impropriety in having her assist respondent's president in this matter (Application of a Child with a Disability, Appeal No. 95-44; Application of a Child with a Disability, Appeal No. 96-2).

I have considered petitioner's contentions, and I find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that respondent shall review and revise its rotational list of hearing officers in compliance with the requirements of 8 NYCRR 200.1 (e) (1).

Dated: Albany, New York
December 7, 1996


FRANK MUÑOZ