



No. 96-93

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

**Application of a CHILD WITH A DISABILITY, by her parent,
for review of a determination of a hearing officer relating to the
provision of educational services by the Board of Education of
the City School District of the City of New York**

Appearances:

Hon. Paul A. Crotty, Corporation Counsel, attorney for respondent, Steven Weiss, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which modified the recommendation by the Committee on Special Education (CSE) of Community School District No. 26 with regard to the classification of petitioner's daughter, and which upheld the CSE's recommendation that the child be placed in a modified instructional services - I (MIS-I) class in respondent's I.S. 55 in September, 1996. The appeal must be sustained.

At the outset, I note that petitioner initially attempted to commence her appeal by serving a copy of her petition upon the Board of Education in August, 1996. However, the papers which the State Education Department received were illegible, and petitioner was advised to resubmit her papers. Her petition was re-served upon the Board of Education on November 25, 1996, but her petition and the required notice of petition were not received by the Office of State Review until December 24, 1996.

Respondent did not serve its answer upon petitioner until January 21, 1997. It asks that its delay be excused because of the irregular and untimely manner in which this appeal was commenced. It alleges that upon its receipt of an unverified copy of the petition, an Assistant Corporation Counsel had contacted the Office of Counsel of the State Education Department about the alleged appeal, and that he was advised that no appeal had been filed. When it learned that the appeal had been filed on December 24, 1996, respondent

sought petitioner's permission for an extension of time to answer her petition, but she reportedly declined to give her consent. In view of the circumstances, including the fact that this appeal was not perfected in a timely manner, and the fact that acceptance of respondent's answer will not delay this decision, I will accept the answer.

Respondent argues that petitioner's appeal should be dismissed because she failed to verify the petition (cf. 8 NYCRR 279.1,275.5), despite having been previously advised by the Office of Counsel to do so. Petitioner signed the verification form which was annexed to her re-submitted papers, but her signature was not notarized. In view of the lengthy delay in resolving this dispute about the child's classification and placement, I find that the child's best interests require me to excuse petitioner's mistake.

Respondent also argues that it was not properly served with a copy of the petition. However, the petition which I am considering in this appeal is dated October 1, 1996, and is the same petition which respondent received on November 25, 1996, as indicated by its date stamp on the notice with petition. Accordingly, I find that respondent's argument is without merit.

The record which is before me is extremely limited with respect to the events which occurred prior to the hearing in this proceeding. Petitioner alleges that her daughter, who is now thirteen years old, was initially classified as learning disabled and speech impaired when she was five years old. Petitioner further alleges that the child's classification was changed to mentally retarded and emotionally disturbed by the CSE of Community School District No. 23, in which petitioner resides, when the child was twelve years old. Petitioner's daughter was reportedly enrolled in a special education program while attending school in Community School District No. 23. In her petition, petitioner has referred to prior proceedings in which impartial hearings were conducted. However, the record in this proceeding includes only two hearing officer decisions in a prior proceeding.

Petitioner apparently initiated a due process proceeding in the Fall of 1995 because the CSE of Community School District No. 23 had reportedly failed to recommend an educational placement for petitioner's child for the 1995-96 school year. The CSE was reportedly ordered to evaluate the child, and to offer her a placement in a private school. At a hearing which was held in November, 1995, an impartial hearing officer noted that the Board of Education had agreed that the child's then current classification as mentally retarded and speech impaired, and her placement in a MIS-I class were inappropriate for the child. The parties reportedly agreed that independent speech/language and educational evaluations would be performed, and that the child's adaptive behavior would be assessed. They also agreed that the CSE of Community School District No. 23 would review the results of the child's evaluations, and would then recommend a placement for her. Noting that there had been serious conflicts between representatives of Community School District No. 23 and petitioner, the hearing officer directed that petitioner's daughter be placed on an interim basis outside of Community School District No. 23, pending the results of the child's evaluations.

In an educational evaluation which was performed on November 30, 1995, the child, who was then in the seventh grade, achieved a grade equivalent score of 1.1 for letter-word identification skills. The evaluator reported that he was unable to establish a basal score for the child's reading comprehension skills, and he concluded that she was a non-reader. Although he was unable to obtain a basal score for the child's mathematical calculation skills, the educational evaluator noted that the child had some knowledge of basic addition and subtraction skills. On the applied mathematics problem subtest, the child achieved a grade equivalent score of the second month of kindergarten. The educational evaluator reported that the child was unable to consistently tell time to the hour and half-hour, and he reported that the child had extreme difficulty solving problems which did not have picture clues or concrete materials. The child achieved a grade equivalent score of 1.7 in writing. The evaluator and the child's teacher were unable to persuade the child to complete other tests which were designed to measure her academic achievement in science, social studies, and the humanities.

A speech/language therapist who evaluated the child on December 5, 1995, reported that the child had exhibited little or no effort in responding correctly to test questions. The child's speech intelligibility was described as fair. In a test of her receptive language skills, the child reportedly had difficulty understanding directions and the concepts of same-opposite-neither. Expressively, the child was reported to have difficulty combining two or more simple sentences into a single, grammatically intact, semantically accurate, complex sentence. The speech/language therapist opined that the child appeared to exhibit a moderately severe receptive and expressive language disorder, including weak auditory processing skills, limited receptive and expressive vocabulary, limited knowledge of semantics, and immature grammatical structures. He recommended that the child, who was then receiving speech/language therapy in P.S. 73, continue to receive such therapy to improve her auditory processing skills, and her receptive and expressive vocabulary skills.

On December 18, 1995, a school psychologist reportedly assessed the child's adaptive behavior, using the Vineland Adaptive Behavior Scales. The child's teacher reportedly provided the information which was used to determine the child's score on that assessment. I note that at the hearing in this proceeding, petitioner alleged that at some other hearing the child's teacher had indicated that she had not provided the information for the alleged assessment of her child's adaptive behavior skills. In any event, the school psychologist's report which is in the record of this proceeding, indicates that the child achieved standard scores of 52 in communications, and 63 in daily living skills, both of which were in the mildly deficient range. However, the child's standard score of 97 in socialization skills was well within the average range.

On January 22, 1996, the CSE of Community School District No. 23 recommended that petitioner's daughter be classified as mentally retarded, emotionally disturbed, and speech impaired. It also recommended that she be placed in a self-contained Special Instructional Environment - VI (SIE-VI) class, with a child to adult ratio of 12:1+2, and that she receive individual speech/language therapy three times per week. I note that petitioner

was not listed as a participant at the CSE meeting on the individualized education program (IEP) which was prepared at that meeting.

On February 13, 1996, the parties reappeared before the hearing officer who had conducted the hearing in November, 1995. Petitioner accepted respondent's offer of an interim placement of the child in a SIE-VI class in P.177, which is located in Community School District No. 26. The child was to be placed in that program pending the completion of her independent evaluation, at respondent's expense. Respondent agreed to provide the child with home instruction and private speech/language therapy, if the child's placement at P. 177 proved to be inappropriate. It further agreed to issue petitioner a "Nickerson" letter which would authorize petitioner to place the child in an approved private school, at respondent's expense, if her placement in P. 177 was inappropriate (see Jose P. et al. v. Ambach et al. [79 C 270, U.S. D.C., E.D. N.Y., 1982]). The minutes of a CSE meeting held on February 14, 1996 indicate that the CSE of Community School District No. 23 recommended that the child receive home instruction until transportation arrangements could be made for her to attend P. 177.

The child's independent educational evaluation was performed on February 29, 1996. Her evaluator reported that although the child's informal oral language skills were age-appropriate, she nevertheless demonstrated delays in expressive and receptive language skills. The child's reading skills were reported to be generally at the first grade level, while her mathematical calculation skills were reported to be at the mid-second grade level. Her writing skills were found to be at the mid-first grade level, and her science and social studies skills were reported to be at the high first grade level. The evaluator reported that the child had been responsive during the evaluation.

An independent psychologist who evaluated the child on March 5, 1996 reported that the child appeared to be a very angry adolescent who was in need of psychotherapy and a psychiatric evaluation. Although he attempted to administer parts of an IQ test to the child, the psychologist reported that "[e]motional factors rendered a calculation of an IQ score comparatively meaningless and unattainable". The girl reportedly exhibited oppositional behavior throughout the testing. Her visual motor integration skills were reported to be at the level of a four year old. Projective testing suggested that the child was prone to aggressive expressions, according to the male psychologist, who noted that the child had apparently established a good rapport with the female educational evaluator.

On March 13, 1996, the child was evaluated by a school psychologist employed by Community School District No. 26. Petitioner's daughter achieved a verbal IQ score of 60, a performance IQ score of 59, and a full scale IQ score of 56. Although all three IQ scores fell within the mentally deficient range, the school psychologist reported that the child did not present the profile of a clinically mentally retarded youngster because of the variability of her subtest scores. She also noted that the child's demeanor and manner of relating to others were indicative of a higher cognitive potential than was indicated by her IQ scores. On the IQ test, the child evidenced strength in her alertness to environmental detail, and

relative strength in graphomotor copying, and verbal abstract reasoning. The girl's numerical reasoning skills and her fund of general information were described as delayed. The school psychologist reported that the girl's greatest deficit was in spatial visualization, visual motor integration, and visual perception and imaging. On a separate test of her visual motor integration skills, the child achieved an age equivalent score of 6.6. Her projective test results were consistent with a higher cognitive potential than was indicated by the results of IQ testing. Although she was described as friendly and personable, the child reveals feelings of low self-esteem. The school psychologist opined that the girl might require considerable support emotionally, as well as academically.

On March 22, 1996, the CSE of Community School District No. 26 recommended that petitioner's daughter be classified as mentally retarded, emotionally disturbed, and speech impaired. It also recommended that she be placed in a MIS-I class, with a child-to-adult ratio of 15:1. The CSE further recommended that she receive individual speech/language therapy three times per week, and counseling in groups of three once per week. Petitioner participated by telephone in the CSE meeting. Respondent offered the child a placement in I.S. 55, which is located in Community School District No. 23.

At petitioner's request, an impartial hearing was held on June 5, 1996. Petitioner objected to the child's classification as mentally retarded. Although she did not object to the girl's placement in respondent's MIS-I program, petitioner insisted that she would not accept a placement in Community School District No. 23. The hearing officer heard the testimony of the Principal of P. 177, who reported that the child was inappropriately placed in the SIE-VI program in her school because she functioned at a higher level than her classmates. She also testified that the child had been well behaved in school. The school psychologist who had evaluated the child in March, 1996 testified about the results of the evaluation, and opined that the child was not mentally retarded. She testified that the child had a learning disability, and that her poor performance on parts of the IQ test could also be explained by the inconsistent education which she had received. The placement officer for Community School District No. 23 briefly described the proposed placement in I.S. 55, and she offered a profile of the proposed class for the child.

In his decision which was rendered on July 16, 1996, the hearing officer found that there was insufficient evidence to support the child's classification as mentally retarded, and he directed the CSE to delete that classification from the child's IEP. He noted that petitioner's opposition to her daughter's placement in her home school district appeared to be based upon petitioner's serious conflict with representatives of Community School District No. 23. The hearing officer found that respondent had met its burden of proof with respect to the proposed placement in I.S. 55, but he directed that her enrollment in that school be deferred until September, 1996. He noted that petitioner's disdain and distrust of Community School District No. 23, as evidence by several inappropriate comments made by petitioner during the hearing, were without merit, and had clouded her judgment. The hearing officer retained jurisdiction in the matter of the child's placement at I.S. 55 for the 1996-97 school year.

Petitioner does not challenge her child's classification as emotionally disturbed and speech impaired. I must note that notwithstanding the private psychologist's opinion that the child was at risk of psychic decompensation and that she appeared to have difficulty relating to males, there is little evidence in the record which is before me to establish that the child manifests the characteristics set forth in the regulatory definition of emotionally disturbed (8 NYCRR 200.1 [mm][4]). However, in the absence of a challenge to her classification, I may not review the appropriateness of the classification (Hiller v. Bd. of Ed. Brunswick CSD et al., 674 F. Supp. 73 [N.D. N.Y., 1987]).

Petitioner does not specifically challenge the appropriateness of respondent's MIS-I program. She asserts in her petition that Community School District No. 23 failed to provide her child with an adequate education in the past, and she reiterates her opposition to any placement of her child in that school district.

Respondent contends that the proposed placement in I.S. 55 would offer the child an appropriate education in the least restrictive environment. It asserts that the proposed placement would address the child's academic, language, and emotional needs. Respondent argues that petitioner's preference that the child be placed elsewhere should not be determinative of the appropriateness of the placement which it has offered.

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 evaluations to identify the child's needs, provides for the use of appropriate special education services to address the child's special education needs, and establishes annual goals and short-term 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).

Upon the record before me, I must find that respondent has not met its burden of proof. The testimony of its own school psychologist suggested that the child has a specific learning disability which may be based upon a neurological impairment. I note that there is no evidence of a medical or neurological examination in the record, notwithstanding the private psychologist's recommendation in March, 1996 that she be medically examined. Respondent's CSE must define the child's needs more carefully, and determine her learning style, before it can recommend an appropriate educational program. The child's IEP was prepared with the assumption that she was mentally retarded. The IEP annual goals and objectives, as well as the special education services recommended by the CSE, were premised upon the fact that the child was mentally retarded, and should be taught with

techniques which were appropriate for children with that disability. Merely deleting the classification of mentally retarded from her IEP would not necessarily result in an instructional program which was geared to meet this child's special education needs. The CSE must identify those needs, prepare IEP annual goals which are related to those needs, and recommend the appropriate special education services to address those needs.

Until an appropriate IEP has been prepared, it is premature to determine the appropriateness of a specific educational program and placement for this child. However, I will note for the benefit of the parties that parental preference for one school over another should be considered by a CSE, but is not determinative where, as here, the parent's preference is for a school outside of her local community school district (see 34 CFR 300.552 [a][3]). Petitioner is understandably concerned about the lack of educational progress which her daughter has made. Nevertheless, she and the CSE must work together to ensure that her child receives appropriate educational intervention to address her needs (Tucker v. Bay Shore UFSD, 873 F. 2d 563 [2d Cir., 1989]).

THE APPEAL IS SUSTAINED.

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

IT IS FURTHER ORDERED that within 30 days after the date of this decision respondent's CSE shall evaluate the child's special education needs, and shall recommend an appropriate educational program for her.

Dated: Albany, New York
January 23, 1997


ROBERT G. BENTLEY