



No. 97-1

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

**Application of the BOARD OF EDUCATION OF THE NORTH  
ROSE-WOLCOTT CENTRAL SCHOOL DISTRICT for  
review of a determination of a hearing officer relating to the  
provision of educational services to a child with a disability**

**Appearances:**

Hodgson, Russ, Andrews, Woods and Goodyear, LLP, attorneys for petitioner, Jerome D. Schad, Esq., of counsel

**DECISION**

Petitioner, the Board of Education of the North Rose-Wolcott Central School District, appeals from the decision of an impartial hearing officer which found that the individualized education program (IEP) which petitioner's committee on special education (CSE) had prepared for respondents' son for the 1996-97 school year was procedurally and substantively flawed. In place of the school-based program which the CSE had recommended for the child, the hearing officer directed petitioner to provide the child with applied behavioral analysis (ABA) instruction in his home, and the related services of speech/language therapy and occupational therapy in petitioner's schools. The appeal must be sustained in part.

Respondents' son, who is now seven years old, was reportedly born prematurely, and had breathing difficulties. Approximately one month after he was born, the child had a cerebral hemorrhage, for which he received an intracranial shunt. When he was approximately three years old, he had tubes placed in his ears to relieve his chronic otitis media. The boy was referred by his physician to the Roosevelt Children's Center in Newark, New York, for an assessment to determine whether he was autistic. Although he was three years old when he was referred, the child's receptive and expressive language skills were reported to be at less than a one-year old level. He was reportedly found to be moderately autistic by the Roosevelt Children's Center.

On June 7, 1996, he was medically diagnosed as having an autistic disorder by a pediatrician at the Strong Children's Medical Center. The pediatrician reported that the boy was mildly dysmorphic, and had markedly absent eye contact. He reportedly ignored a variety of loud sounds, and had a dearth of facial movement. She also noted that an older brother of the child had been diagnosed as having autism. On the Childhood Autistic Rating Scale, the child achieved a score of 42.5, which the pediatrician described as being in the severe range of autism. She reported that respondents' son manifested a qualitative impairment of social interaction, as indicated by the absence of eye contact and other non-verbal behavior. He also demonstrated some stereotypical vocalizations and hand flapping, as well as other perseverative behavior. The child's classification by the CSE as autistic (see 8 NYCRR 200.1 [mm][1]) is not disputed in this proceeding.

After his referral to the Roosevelt Children's Center at the age of three, the child was reviewed by petitioner's committee on preschool special education (CPSE), which recommended that he participate in the Center's preschool education program. The boy reportedly attended the Roosevelt Children Center's preschool program from December, 1993 until April, 1994. Petitioner transported the child to that program. The parties dispute the length of time required for such transportation, although they apparently agree that he was quiet and/or slept during the bus ride. Respondents unilaterally withdrew their son from the Roosevelt Children's Center preschool program in April, 1994.

The CPSE subsequently recommended, and respondents reportedly agreed, that the child receive speech/language therapy and occupational therapy in a "Head Start" program in the Red Creek Central School District, which was geographically closer to respondent's house than petitioner's schools. Respondents reportedly drove their son to the Head Start program in Red Creek. Both related services reportedly began in October, 1994. However, the boy's occupational therapy was interrupted by the therapist's maternity leave. Petitioner asserts that it had difficulty obtaining the services of a replacement occupational therapist. The boy's speech/language therapy was interrupted because respondents' car broke down. Respondents were also reportedly concerned about the use of a weighted vest with the boy to control his behavior while he was receiving speech/language therapy.

The CPSE's jurisdiction over the boy ended with the 1994-95 school year (see Section 4410 [1][I] of the Education Law). Although the child was eligible because of his age to attend kindergarten during the 1995-96 school year (see Section 3202 [1] of the Education Law), he was not required to attend school (see Section 3205 [1] of the Education Law). Respondents reportedly chose to keep him at home during that school year. The record does not reveal what, if any, services the child received during the 1995-96 school year. During the summer of 1996, the boy was reportedly instructed by a group of volunteers.

In June, 1996, the boy was screened by petitioner's staff for admission to kindergarten in the fall of 1996. Petitioner's CSE obtained the child's social history from information provided by the child's mother, who indicated that one of the boy's older brothers also had autism. On

June 18, 1996, the child was evaluated by a school psychologist who was an employee of the Board of Cooperative Educational Services for Ontario, Seneca, Yates, Cayuga, and Wayne Counties (Wayne-Finger Lakes BOCES, or BOCES). The school psychologist reported that standardized tests could not be administered in the usual manner to the child because he was not generally responsive to verbal directions, did not use expressive language to answer questions, and did not remain on task for sufficiently long periods of time. In his written report, as well as his testimony at the hearing in this proceeding, the BOCES school psychologist revealed that he had relied upon the child's mother to assist him in ascertaining the extent of the child's cognitive and linguistic skills. He noted that the child responded on a limited basis to sounds, and that the boy was able to follow simple familiar directions, such as pointing to body parts on a doll. The child was described by the psychologist as having very limited expressive speech, consisting of several words and approximations for words. The intelligibility of his speech was limited. With regard to the boy's cognitive skills, the school psychologist noted that the boy could imitate tasks, if he chose to do so. However, the child was very easily distracted, and his attention to task was limited. He displayed curiosity with regard to new objects, and was able to engage in simple problem solving activities. The boy liked to point to the words which were being read to him. Nevertheless, respondents' son evidenced marked delays in most areas of his cognitive development.

The child's mother reported to the BOCES psychologist that her son was not toilet-trained, and did not dress himself. He could eat food with his fingers, but did not use eating utensils. The boy's mother also indicated that the level of her son's daily living skills fluctuated in accordance with his mood and level of interest. When upset, the child would reportedly bite, or ram his head into other persons. However, he was described as able to adapt to change, and as generally cooperative. Based upon the information which the child's mother provided to him, the school psychologist reported that the child's score on the Childhood Autism Rating Scale indicated that the child's autism was in the moderate to severe range. He reported that the child had multiple special education needs which could be met in a structured functional special education program. He recommended that the child receive intensive assistance in developing his communication and language skills, and that he receive assistance in developing his daily living skills, his social skills, and his play skills. The school psychologist also recommended that the child's hearing be evaluated.

On August 26, 1996, respondents met with the CSE to review the results of the child's evaluations. The minutes of the CSE meeting reveal that the CSE considered respondents' request that petitioner provide their son with a 40 hour per week instructional program using the ABA technique. A consultant teacher would provide at least two hours of service per week, while teacher aides would provide the remainder of the instructional services, exclusive of the services, if any, of related service providers. The CSE rejected respondents' request on the grounds that the child reportedly did not require that level of service, and that he should be attending school. The CSE also reportedly considered the options of placing the child in a residential school, and of providing him with two hours per day of tutoring at home, both of which were determined to be too restrictive. The CSE also considered full and half-day placements in petitioner's special

education classes, as well as a BOCES placement for the boy. Respondents reportedly opposed each of those options. Ultimately, the CSE recommended that the boy be placed in a BOCES class for children with pervasive developmental disabilities. The BOCES class had a child to adult ratio of 6:1+1, i.e. six children, with a teacher and an aide. The recommended class is located in an elementary school of the Phelps-Clifton Springs Central School District in Phelps, New York. The CSE also recommended that the child receive speech/language therapy five times per week, and that he be evaluated by an occupational therapist.

The CSE meeting which was held on August 26, 1996 reportedly lasted from 2:00 p.m. to 5:30 p.m. The CSE chairperson testified at the hearing in this proceeding that the CSE had discussed the child's special education needs, but had not completed its preparation of the child's IEP annual goals and short-term instructional objectives, when it voted to recommend that the child be enrolled in the BOCES class. The child's annual goals and short-term objectives were completed at a subsequent CSE meeting which was held on September 3, 1996. The CSE chairperson testified that the second meeting took approximately three hours. The requisite parent member of the CSE (see Section 4402 [1][b][1] of the Education Law) was unable to attend the second CSE meeting. The boy's parents signed a brief statement purporting to waive their right to have a parent member of the CSE participate in the final development of the child's IEP.

At the end of the CSE meeting which was held on August 26, 1996, respondents requested that an impartial hearing be held to review the CSE's recommendation. They agreed to participate in the next CSE meeting on September 3, 1996, and they subsequently asked to have the 45-day time limit for the hearing officer's decision waived, while they pursued an attempt to mediate their disagreement with petitioner. The hearing was held on November 6, 1996. The parties agreed that there was no dispute about the scheduling of the CSE meeting, and the notices which the CSE provided to respondents, except in regard to the description of parental due process rights. Respondents contended that the description which the CSE gave to them erroneously indicated that they might be able to obtain free or low-cost legal assistance from the Legal Aid Society of Wayne County, which reportedly did not provide assistance to parents in this kind of proceeding. The parties also agreed that there was no dispute about the child's classification as autistic, or about the IEP description of his special education needs. They further agreed that there was no dispute about the IEP annual goals and short-term instructional objectives. Respondents challenged the appropriateness of the recommended BOCES class on the grounds that their son's needs were too severe to be appropriately addressed by that class, and that the proposed class was too far away from the child's home.

The hearing officer rendered his decision in this proceeding on December 2, 1996. He found that the Board of Education was required to show that it had complied with the applicable procedural requirements in preparing the child's IEP, and that the IEP was substantively appropriate to meet the child's special education needs. The hearing officer found that there were six procedural violations in the preparation of the boy's IEP. The first alleged violation concerned the reference to the Legal Aid Society of Wayne County as one of three possible sources of free or low-cost legal assistance, in petitioner's description of parental due process rights. While

petitioner was not a guarantor that any entity would provide such assistance, it was required to make a good faith effort to verify that the assistance is available through the agencies listed in its notice to parents (Application of a Child with a Handicapping Condition, Appeal No. 91-16).

The second alleged violation was that the CSE which met on August 26, 1996, did not include any special education teacher who was then providing special education to the child. However, there was no evidence that the child was then receiving any instruction. Under those circumstances, any teacher who is qualified to provide education in the type of program in which the child may be placed may serve as the teacher member of the CSE (34 CFR 300.346 Note 1). The record reveals that Ms. Carol Quill, a certified special education teacher served as the teacher member of the CSE.

The third alleged violation concerned the CSE's request that respondents leave the room during the meeting, to allow the CSE to deliberate and/or vote upon its recommendation. The fourth alleged violation by the CSE was that it reportedly tape recorded all of its meeting, except the portion of the meeting in which respondents' request for a home-based program was discussed. The hearing officer noted that there was no requirement that any portion of a CSE meeting be tape recorded. The fifth alleged violation concerned the fact that the CSE determined the child's placement before it had completed his IEP annual goals and short-term objectives. The sixth and last alleged violation concerned the fact that respondents were reportedly not provided with an explanation of the other options which the CSE had considered, in the notice of recommendation which the CSE sent to them (cf. 8 NYCRR 200.5 [a][4][i][c]).

Notwithstanding the fact that respondents had not challenged the IEP's description of their son's special education needs, the hearing officer nevertheless found that the boy's special education needs were inadequately described in his IEP. He also found that the IEP annual goals were not in any discernible order, and he indicated his belief that a teacher who was unfamiliar with the child would not know where to focus his or her efforts, by reading the child's IEP. The hearing officer further found that the boy's IEP did not include sufficiently objective evaluation criteria (see 34 CFR 300.346 [a] [5]) to adequately assess the child's progress towards achieving his annual goals. He also found that the CSE should have determined whether the child required occupational therapy, and that it had failed to indicate the extent to which the child might participate in regular education (cf. 8 NYCRR 200.4 [c] [2] [iv]). He indicated that the age span of the children in the BOCES class appeared to exceed the three-year limit set by State regulation (see 8 NYCRR 200.6 [g] [5]). The hearing officer noted that the CSE chairperson had testified that the trip between the child's home and the BOCES class would require one hour and forty minutes each way, and he suggested, but did not find, that the length of travel time involved was excessive.

The hearing officer held that the Board of Education had failed to meet its burden of proof with regard to the appropriateness of the placement which its CSE had recommended. He directed that the child's IEP be revised. The hearing officer also found that an appropriate program for the child would consist of a combination of instruction at his home using the ABA technique for

35 hours per week, and the provision of speech/language therapy and occupational therapy to the child in one of petitioner's school buildings. He directed that petitioner provide the ABA instructional program for the remainder of the school year, and through the summer of 1997. He directed the CSE to review the child's progress near the end of the summer of 1997, and to consider recommending that an individual aide be assigned to the child to help him make the transition from a home-based program to a school-based program. The hearing officer also directed petitioner to provide an audiological examination of the child.

Petitioner argues that the hearing officer's decision reflects an impermissible bias against the school district, as indicated by the hearing officer's remark in his decision that the child had " ... not been treated as well as he has had the right to expect by the educational agencies charged with responsibilities for his education" (Decision, page 17). The hearing officer was apparently alluding to the special education services which he believed the child should have received during the school years preceding the 1996-97 school year. A hearing officer must avoid even the appearance of impropriety, and must render a decision based upon the record (Application of a Child with a Disability, Appeal No. 94-32). Although the hearing officer was understandably concerned about the fact that the child had received special education services only intermittently prior to his referral to the CSE in 1996, the issues which he was called upon to decide involved the child's educational program and placement for the 1996-97 school year. At the hearing, both parties alluded to events which had occurred to the child's referral to the CSE. However, the evidence which was in the record before the hearing officer would not afford a basis for assessing blame exclusively against petitioner for the manner in which services were provided to the child prior to the 1996-97 school year. I find that the hearing officer's remark, to the extent that it was perceived as indicating that petitioner was solely responsible for what had occurred during that time period, was both unfounded and unfortunate. Nevertheless, I am not persuaded that it affords a basis for annulling his decision.

Petitioner disputes some of the hearing officer's findings with regard to petitioner's alleged procedural violations. Specifically, it challenges his finding that the CSE violated respondents' rights by asking them to leave the room for a portion of the meeting. A CSE is required to afford a child's parents a meaningful opportunity to participate in the development of a child's IEP (Application of a Child with a Disability, Appeal No. 96-31). It may not satisfy that obligation by merely listening to the parents' concerns, and then unilaterally preparing the child's IEP (Application of a Child with a Disability, Appeal No. 93-42). However, a CSE may discuss the classification or placement of a child with a disability in the absence of the child's parents (Application of a Child with a Handicapping Condition, Appeal No. 90-18). In this instance, the record reveals that the CSE discussed the child's needs, his IEP goals and objectives, and possible placements with respondents for approximately two hours on August 26, 1996, before asking respondents to withdraw from the room at about 4:00 p.m. Neither respondent refuted the testimony of Ms. Quill, the teacher member of the CSE, and Ms. Curtis, the CSE chairperson, that respondents were extensively involved in the preparation of the child's IEP. The child's mother testified that she and her husband were called back into the room by the CSE on two occasions during the next one and one-half hours while the CSE considered its recommendation.

Respondents were again involved in the further preparation of the boy's IEP goals and objectives when the CSE met again on September 3, 1996. Upon the record which is before me, I find that there is no basis for concluding that respondents were denied a meaningful opportunity to participate in the development of their son's IEP (Application of a Child with a Handicapping Condition, Appeal No. 90-18), and I will sustain petitioner's appeal with regard to that issue.

The Board of Education also challenges the hearing officer's determination that the boy's IEP was improperly prepared because the CSE devoted a significant portion of its meeting on August 26, 1996 to a discussion of the child's placement, before it had prepared the child's IEP goals and objectives. The hearing officer indicated in his decision that Federal regulation requires that a child's IEP goals and objectives be completed prior to determining the child's placement, because the CSE's determination about placement requires it to decide what would be an appropriate educational program and/or special education services to afford the child a reasonable opportunity to achieve the child's IEP goals and objectives (Application of a Child with a Disability, Appeal No. 94-4). The Board of Education contends that respondents and the CSE were in substantial agreement about the child's special education needs and the appropriate annual goals and short-term instructional objectives for him, at the August 26, 1996 CSE meeting. It asserts that the only real disagreement between the parties involved the child's placement, and that it was therefore appropriate for the CSE to discuss his placement at the meeting.

I agree that it was proper to discuss various placement options with the child's parents at the August 26, 1996 CSE meeting. However, I must point out that the CSE not only discussed possible placements, but it also voted on the child's placement at that meeting, according to the CSE chairperson's testimony (Transcript, page 239). She acknowledged that work on the child's annual goals and objectives had not been completed, and that a second meeting of approximately three hours on September 3, 1996 was necessary to complete the IEP. I concur with the hearing officer's determination that the CSE should not have determined the child's placement before it completed his IEP annual goals and short-term instructional objectives.

There is another reason why I must find that the boy's IEP was improperly prepared. As noted above, there was no parent member of the CSE when it convened on September 3, 1996. Although respondents purported to waive their right to have a parent member of the CSE participate in the completion of the IEP (Exhibit 11), I note that Section 4402 (1)(b)(1) of the Education Law provides that parents have the option of determining whether the school physician member of the CSE needs to attend a CSE meeting, but it does not authorize the parents or the school district to dispense with the services of the other required CSE members (Application of a Child with a Handicapping Condition, Appeal No. 91-41). An IEP which was prepared by a CSE which did not conclude each of its required members is a nullity (Application of a Child with a Handicapping Condition, Appeal No. 92-31).

I further find that the boy's IEP was substantively inadequate because it failed to adequately describe his communication skills. Although the IEP indicated that the boy "...needs

intensive work in communication skills, has limited skills in language," it did not establish a beginning performance level, against which his achievement pursuant to the IEP could be measured. Annual goals D and E, which were related to his communication and listening skills, had fairly specific short-term objectives. Those objectives were presumably based upon an assessment of the boy's present level of communication skills. However, I note that the record does not indicate whether a speech/language evaluation was performed. In addition, I note that the IEP indicated that the results of the child's most recent audiological evaluation were to be obtained from his parents. It also indicated that an occupational therapy evaluation was to be performed. The results from those evaluations should have been obtained by the CSE, and should have been reflected in an IEP which more precisely identified the child's special education needs.

Having determined that the boy's IEP, and thus the CSE's recommendation which it reflects, was defective, I now turn to the question of whether the hearing officer exceeded his authority by directing the Board of Education to provide the child with a specific educational program through the summer of 1997. The hearing officer purported to apply the three criteria for awarding parents the remedy of tuition reimbursement which were articulated in School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359 (1985), although tuition reimbursement was not an issue in this proceeding. A hearing officer's primary task is to determine whether the educational program or placement which a CSE has recommended is appropriate (Matter of a Handicapped Child, 23 Ed. Dept. Rep. 452). If the recommended program or placement is found to be inappropriate, the hearing officer should remand the matter to the CSE. However, where the record supports the hearing officer's conclusion, he or she may order the Board of Education to provide the necessary elements of a child's educational program or placement (Application of a Child with a Handicapping Condition, Appeal No. 90-17; Application of a Child with a Handicapping Condition, Appeal No. 92-2).

The question to be determined is whether the record supports the hearing officer's directive that the child should be instructed with the ABA technique in his home, and receive speech/language therapy, and occupational therapy in one of respondent's schools. As noted above, there is no evidence that the child had been evaluated to ascertain his speech/language, or occupational therapy needs. While I agree that the child should receive those evaluations, I cannot concur with the hearing officer's directive that the child receive those related services, because the extent of the boy's need for those services has not been established.

In his decision, the hearing officer indicated that there appeared to be no reason "...to deny the potential validity of an intensive ABA program" for the child. He recognized that the child must be educated in the least restrictive environment (LRE), but found that a split program of instruction in the child's home and related services in school would be consistent with the LRE requirement.

Having reviewed the documentary and testimonial evidence in the record which is before me, I am not persuaded that there is any single teaching methodology which must be used to instruct respondents' son. I note that petitioner's expert witness, the BOCES psychologist who

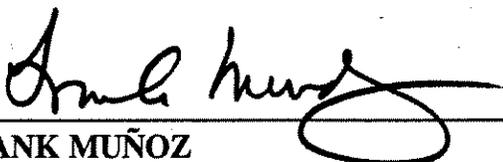
had evaluated the child, testified that the ABA technique was useful in teaching some baseline skills, but that it was less appropriate for teaching more complex skills, and for promoting social interaction. It is apparent that respondents' son needs to develop certain baseline skills, as well as to improve his social interaction with age-appropriate peers. Therefore, I find that an instructional program which consisted solely of 1:1 ABA instruction in the boy's home would not have met all of the boy's needs. Nevertheless, I recognize that at this point in the school year, it is essential that respondents' son begin to receive some meaningful instruction to develop his communication and pre-academic skills, in addition to his ability to interact with others. In this appeal, petitioner has not addressed the hearing officer's finding that the proposed BOCES class would not have been appropriate for the boy because of the age span of the children in that class. I am unable to ascertain from the record whether another class with an appropriate grouping of children according to their needs exists in the BOCES, or a neighboring school district. In view of the child's need for intensive instruction, and the absence of any clear alternative to providing him with 1:1 instruction during the remainder of the 1996-97 school year, I am constrained to uphold that portion of the hearing officer's decision which ordered petitioner to instruct the child in his home. However, I will modify his order to the extent of permitting petitioner to choose the appropriate teaching methodology for implementing the boy's IEP, which must be revised by the CSE as indicated in this decision.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the decision of the hearing officer is hereby annulled, to the extent that it determined that petitioner's CSE had violated respondents' rights by excluding them from a portion of the CSE meeting, and to the extent that it directed petitioner to instruct the child using only the ABA methodology, and directing petitioner to provide the child with speech/language therapy and occupational therapy before the extent of his need for those therapies was determined; and

**IT IS FURTHER ORDERED** that within 20 days after the date of this decision, petitioner's CSE shall obtain the results of speech/language, occupational therapy and audiological evaluations of the child, and shall prepare a revised IEP to reflect the results of those evaluations, and to provide him with appropriate related services at a location to be determined by petitioner.

Dated: Albany, New York  
March 18, 1997

  
FRANK MUÑOZ