



No. 97-25

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
Wappingers Central School District**

Appearances:

RosaLee Charpentier, Esq., attorney for petitioner

Michael K. Lambert, Esq., attorney for respondent

DECISION

Petitioner appeals from the decision of an impartial hearing officer which denied petitioner's request for an order requiring respondent to reimburse petitioner for the cost of his daughter's tuition at the two private schools which she attended from the 1989-90 school year through the 1996-97 school year. Notwithstanding the hearing officer's determination denying petitioner any tuition reimbursement, respondent board of education cross-appeals from the hearing officer's finding that petitioner's tuition claims for the years prior to the 1996-97 school year were not barred by the equitable doctrine of laches, as well as his finding that the private school which the child attended during some of those school years provided appropriate special education services to her. The appeal must be sustained in part. The cross-appeal must be dismissed.

Petitioner's daughter was initially referred to respondent's committee on special education (CSE) in the spring of 1988. She was repeating kindergarten in a local parochial school at the time of her referral. When evaluated by one of respondent's school psychologists in September, 1988, the child was found to have a verbal IQ score of 85, a performance IQ score of 88, and a full scale IQ score of 85, with severe deficiencies in her long-term memory for information, and verbal reasoning skills. Her visual perceptual skills were reported to be weak, and she had poor attention skills. The school psychologist reported that the child's reading and written language skills were in the severely deficient range. The psychologist reported that the child was highly anxious, and she opined that the child's emotional difficulties, as well as learning disabilities, were interfering with her ability to learn. A social history which was completed in October, 1988, when the child was enrolled in respondent's schools, revealed that her parents were in divorce proceedings which had reportedly increased the child's stress.

On November 17, 1988, the CSE recommended that petitioner's daughter be classified as learning disabled in the areas of reading and writing. The CSE also recommended that the child receive resource room services for two hours each day, and that she receive 8 thirty-minute sessions of individual counseling. In addition, the CSE recommended that one-hour of parental counseling be provided each month. On November 17, 1988, the child's mother was notified of the CSE recommendation, and was provided with information about challenging the CSE's recommendation by requesting an impartial hearing. In accordance with the practice at that time, the CSE's recommendation was known as Phase I of the child's individualized education program (IEP). At a meeting which both of the child's parents attended on January 19, 1989, Phase II of the child's IEP was completed. Neither parent challenged the child's IEP.

The child reportedly showed some signs of improvement in her academic performance during the 1988-89 school year. However, her resource room teacher reported in April, 1989 that the child continued to have great difficulty attending to task. In June, 1989, the resource room teacher indicated that despite trying very hard, the girl was unable to accomplish her goals. In April, 1989, the child's parents requested that their daughter's school records be sent to a private agency for an evaluation, and to a private school in Millbrook, New York, to which they had applied for the child's admission. A private psychological evaluation of the child was completed in June, 1989. The psychologist who performed that evaluation reported that the child's cognitive functioning ranged from the borderline to superior. She noted that the child was minimally able to remain focused when she worked on tasks which required skills in which she was deficient, but that she could maintain her attention while doing tasks which required skills which she had mastered. However, she had difficulty with tasks which required the correct order of presentation, either visually or auditorily. The psychologist indicated that the child's emotional difficulties were affecting her ability to learn. She recommended that the child receive psychotherapy twice per week, and that she be placed in a class for children with learning disabilities.

At a meeting which both of the child's parents attended on August 11, 1989, respondent's CSE recommended that the child be classified as learning disabled in the area of writing for the 1989-90 school year. It also recommended that the child be placed in one of respondent's self-contained classes for learning disabled children. By letter dated August 25, 1989, the CSE chairperson informed the child's parents of the CSE's recommendation, and informed them of their right to request a hearing to review the recommendation. Neither parent requested that a hearing be held.

On August 2, 1989, approximately one week before they met with the CSE, the child's parents applied for their child's admission to the Bishop Dunn Memorial School, in Newburgh, New York. The Bishop Dunn Memorial School has been approved by the State Education Department to provide special education to children with disabilities. Her parents unilaterally placed the child in the Bishop Dunn Memorial School for the 1989-90 school year. She remained in that school, at their expense, through the 1993-94 school year. During that time, respondent's CSE did not conduct an annual review of the child, and respondent did not offer an educational placement to her.

In April, 1994, the child was evaluated by a Bishop Dunn psychologist, who described her as

one of the most outgoing and friendly children which he had known. The child, who was then completing the sixth grade, achieved grade equivalent scores of 3.4 for basic reading, 3.3 for mathematical reasoning, 4.5 for numerical operations, 3.1 for spelling, 6.7 for listening comprehension, and 4.0 for oral expression, on the Weschler Individual Achievement Test. The psychologist reported that on the Peabody Individual Achievement Test Revised, the child exhibited some growth in spelling, reading decoding, and reading comprehension, but she remained approximately 3.5 years below grade level in those areas. On the Developmental Test of Visual-Motor Integration, the child exhibited a delay of almost five years in her visual motor integration skills, but her performance had improved since she was last tested.

Having completed the sixth grade at the Bishop Dunn Memorial School, the child aged out of that school's program in June, 1994. For the 1994-95 school year, she was placed by her parents in the Kildonan School, as a five-day per week residential student. At the hearing in this proceeding, the petitioner acknowledged that his daughter was placed as a residential student to accommodate family concerns, rather than as a matter of educational necessity. The Kildonan School, which is located in Arden, New York, has not been approved by the State Education Department to provide special education to children with disabilities. Respondent did not offer, nor did petitioner seek, a placement for the child in respondent's schools during the 1994-95, or the 1995-96 school years. The child continued to attend the Kildonan School, at her parents' expense, during the 1995-96 school year.

In early August, 1996, petitioner contacted respondent's CSE chairperson. He told the CSE chairperson that his financial resources were exhausted, and that he wanted respondent's financial assistance in keeping the child at the Kildonan School during the 1996-97 school year (Transcript, page 470). The CSE chairperson met with petitioner on August 8, 1996, at which time, petitioner provided some of the child's educational records to the chairperson. The CSE chairperson informed petitioner that the CSE needed to gather additional information about the child, and thereafter to meet to recommend an educational program for her.

On August 16, 1996, the child was evaluated by one of respondent's school psychologists, who reviewed the results of a prior, private psychological evaluation of the child, as well as some of her educational records from the Kildonan School. The school psychologist administered the Wechsler Individual Achievement Test to the child, who achieved standard scores of 72 for basic reading, 96 for reading comprehension, 91 for numerical operations, 93 for mathematics reasoning, 74 for spelling, and 77 for writing. In view of the child's most recent IQ testing in September, 1995, when she achieved a verbal IQ score of 98, a performance IQ score of 96, and a full scale IQ score of 97, the child's standard scores indicated that she continued to have a learning disability in her basic reading skills, spelling, and writing. The school psychologist testified at the hearing that he requested that the Kildonan School provide additional information about the child, which in fact was not subsequently received by the CSE. In any event, he recommended that petitioner's daughter be classified as learning disabled, and that she receive resource room services while enrolled in regular education ninth grade classes in one of respondent's high schools during the 1996-97 school year.

Petitioner was invited to attend a CSE meeting to be held on September 6, 1996. By letter

dated September 3, 1996, petitioner informed the CSE chairperson that he believed that respondent had failed to offer his daughter a free appropriate public education (see 20 USC 1401 [a][18]) since her entry into respondent's schools. He requested that an impartial hearing be held for the purpose of obtaining tuition reimbursement for the 1989-90 through the 1996-97 school years. On September 6, 1996, petitioner and his daughter attended a CSE meeting, at which the CSE recommended that the child be classified as learning disabled, and that she be enrolled in regular education ninth grade classes with resource room services for one period per day. It also recommended that she receive six individual sessions of counseling per year. The child's IEP for the 1996-97 school year provided that she would receive the services of a scribe "as needed," and that she would receive multi-sensory instruction in reading for one hour per day. Although the Kildonan School initially indicated to petitioner that it would not accept the child for the 1996-97 school year because her tuition for the 1995-96 school year had not been fully paid, it reportedly did allow her to return to school on or about September 20, 1996.

The hearing in this proceeding began on October 23, 1996, and it concluded on December 19, 1996. At the outset, respondent moved to dismiss as untimely all claims for relief for the school years prior to the 1996-97 school year. The hearing officer denied respondent's motion on the grounds that there was no statute of limitations for such claims, and that there were no facts in evidence at that time to support a finding that petitioner's claims were barred by the equitable doctrine of laches. However, he indicated that the timeliness of petitioner's tuition reimbursement claims would be considered in determining whether those claims were supported by equitable considerations (see School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359 [1985]).

On February 25, 1997, the hearing officer rendered his decision denying each of petitioner's claims for tuition reimbursement. He noted that under School Committee of the Town of Burlington v. Department of Education, Massachusetts, *supra*, 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 consideration supported the parents' claim. The fact that the facility selected by the parents to provide special education services to the child is not approved as a school for children with disabilities by the State Education Department (as is the case here with regard to the Kildonan School) is not dispositive of the parents' claim for tuition reimbursement (Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 [1993]). With regard to the 1989-90 school year, when the child entered the Bishop Dunn Memorial School, the hearing officer found that the board of education had offered the child an appropriate educational program in its own schools. Therefore, petitioner was not entitled to tuition reimbursement for that school year.

For the 1990-91 through 1995-96 school years, the hearing officer found that respondent which had not offered the child any educational program, had failed to meet its burden of proof that it had offered the child an appropriate educational program. He noted that the burden of proof shifted to petitioner to demonstrate the appropriateness of the program provided by the Bishop Dunn Memorial School for the 1990-91 through the 1993-94 school years, and the appropriateness of the Kildonan School's educational program for the 1994-95 and 1995-96 school years. The hearing officer found

that petitioner had met its burden of proof with respect to the educational program which his child had received during each of those school years. However, he further found that equitable considerations did not support petitioner's claim for tuition reimbursement for any of those school years. The hearing officer reached that determination after finding that petitioner had been aware since 1988 of his right to request an impartial hearing if he was dissatisfied with the action of the CSE.

With respect to the 1996-97 school year, the hearing officer found that respondent's CSE had failed to prepare an adequate IEP for the child. Specifically, he found that the IEP did not adequately describe the child's present levels of performance (cf. 8 NYCRR 200.4 [c][2][i]) and that the child's annual goals and short-term instructional objectives were insufficient, unspecific, and unrealistic. He further found that respondent had not demonstrated how the proposed program could be effectively implemented. The hearing officer determined that petitioner had met his burden of proving that the child would have received an appropriate educational program in the Kildonan School during the 1996-97 school year. Nevertheless, he rejected petitioner's request for an order requiring respondent to pay for the child's placement at the Kildonan School, because he found that equitable consideration did not support petitioner's request. He determined that petitioner had contacted the CSE solely for the purpose of obtaining financial assistance from respondent, rather than seeking to cooperatively develop an IEP for his daughter for the 1996-97 school year. He noted that petitioner had waited until early August, 1996 to contact the CSE, which deprived the CSE of an opportunity to observe the child in her then current educational placement, and severely limited the amount of time available to the CSE to develop an appropriate IEP for the child. The hearing officer also noted that CSE had been unable to obtain all of the child's educational records from the Kildonan School because petitioner had failed to pay the child's tuition for the 1995-96 school year.

In this appeal, as at the hearing, petitioner focuses primarily upon his daughter's educational program for the 1996-97 school year. Nevertheless, he requests that I order respondent to reimburse him for all of his out-of-pocket expenses relating to his child's private school placements from September, 1989 through June, 1996. I will first address petitioner's tuition claims for those school years, before reaching the issue of the child's educational program for the 1996-97 school year.

With regard to the 1989-90 school year, petitioner asserts that his daughter's IEP annual goals did not address her mathematics and writing needs. He also contends that the CSE erred by failing to observe the child in her then current educational setting (i.e., her regular education class) before it recommended that she be enrolled in a self-contained special education class. State regulation requires that a child be observed in his or her then current setting, when an initial evaluation is performed (8 NYCRR 200.4 [b][4][viii]). The child had been previously evaluated in the fall of 1988. Therefore, the requirement that an observation be conducted did not apply. The Federal regulations implementing Section 504 of the Rehabilitation Act of 1973 do require that a child be evaluated before there is any significant change in the child's placement (34 CFR 104.35). In this instance, the CSE which recommended that the child's program be changed from a regular education class to a special education class for the 1989-90 school year had the benefit of the private psychological evaluation which the girl's parents had obtained for her.

An appropriate educational program for a child with a disability begins with an IEP which accurately reflects the results of evaluations to identify the child's needs, establishes annual goals and short-term instructional objectives which are related to the child's educational deficits, and provides for the use of appropriate special education services to address the child's needs (Application of a Child with a Disability, Appeal No. 93-9). I must note that the record which is before me includes only a two-page "Phase I" IEP for the 1989-90 school year. The IEP sparsely describes the child's needs, and does not include any goal or objective. Although more detail may have been provided in a "Phase II" IEP, that document is not part of the record. Under the circumstances, I am constrained to override the hearing officer's finding that respondent had demonstrated that it had offered an appropriate educational program to the child for the 1989-90 school year.

Petitioner has the burden of proving that his daughter received appropriate special education services at the Bishop Dunn Memorial School during the 1989-90 school year. The only documentary evidence in the record to support his position is the IEP which the private school prepared for the child (Exhibit D). However, I am persuaded that the IEP, together with the testimony by Bishop Dunn's Director of Special Education, establishes that petitioner's daughter received appropriate services at the private school during the 1989-90 school year.

In order to obtain the relief of tuition reimbursement for the 1989-90 school year, petitioner must also show that equitable considerations support his claim. I note that the record reveals that petitioner had applied for his daughter's admission to the Bishop Dunn Memorial School before he met with respondent's CSE to discuss the child's educational program for the 1989-90 school year, but that fact is not dispositive of the matter. Of much greater significance is the question "was petitioner aware of his right to request an impartial hearing, and if so, when was he aware of that right". The record includes a copy of a letter dated August 25, 1989 from the CSE chairperson to petitioner and his wife informing them of the CSE's recommendation that their daughter be placed in respondent's self-contained class for the 1989-90 school year (Exhibit 41). In pertinent part, the CSE chairperson's letter indicated that:

"If you wish to challenge the recommendation being made by this Committee on Special Education to the Board of Education, you must request a hearing in writing to the Superintendent or the Board of Education. The decision of the Impartial Hearing Officer is reviewable by the Commissioner pursuant to the provisions of Educational Law, Section 4404, and Public Law 94-142."

At the hearing, petitioner could not recall receiving the chairperson's letter, and he denied receiving a similar letter addressed to his wife with regard to the CSE's prior recommendation on November 17, 1988 (Exhibit 27). In any event he did not deny that the August 25, 1989 letter had been received. I find that petitioner was apprised of his right to seek review of the CSE's recommendation. However, he did not request a hearing until seven years after the CSE made its recommendation. There is no requirement that a parent be specifically notified that he or she may be able to obtain the relief of tuition reimbursement (Application of a Child with a Disability, Appeal No. 96-5). The primary purpose of the due process procedures is to provide children and their parents with

a mechanism to ensure that the children receive a free appropriate public education. The parents must promptly notify the CSE of their dissatisfaction with the CSE's recommendation, or failure to make a recommendation, so that the CSE may have an opportunity to rectify its mistake, if any (Bernardsville Board of Education v. J.H., 42 F. 3d 149 [3rd Cir., 1994]; Matter of Northeast Central School District v. Sobol, 79 NY2d 598 [1992]; Application of a Child with a Disability, Appeal No. 95-83). Therefore, I find that petitioner's claim for tuition reimbursement for the 1989-90 school year is not supported by equitable considerations, and must be denied.

During the next six school years, respondent's CSE failed to make any recommendation for the child's educational program, despite its obligation to conduct an annual review and to make a recommendation (8 NYCRR 200.4 [e] [1]). Petitioner did not contact the CSE, nor did he request that respondent provide any service, except transportation to the Bishop Dunn Memorial School. The hearing officer found, and I concur, that respondent failed to meet its burden of proof with respect to the first Burlington criterion for an award of tuition reimbursement. He further found that petitioner had met his burden of proving that the services which his child had received at the Bishop Dunn Memorial School, and the Kildonan School, were appropriate. In its cross-appeal, respondent challenges this portion of the hearing officer's decision. It contends that the child made little academic progress in either school, and that neither school was the least restrictive environment in which the child could have been educated.

Having reviewed the child's academic records from both of the private schools, as well as two private psychological evaluations which were performed in 1992 and 1995, respectively (Exhibits G and 40), and having considered the testimony of Bishop Dunn's Director of Special Education and Kildonan's Academic Dean, I find that petitioner did meet his burden of proof with respect to the second of the three criteria for an award of tuition reimbursement. The child's progress in improving her reading and spelling scores has been slow, but there has been improvement. Her mathematics skills have shown greater improvement. The child's social and emotional needs also appear to have been addressed by her placement in the two private schools. I note that in September, 1995, the private psychologist reported that notwithstanding upheaval in the child's family caused by the separation of her parents, the child appeared to be emotionally stable and to have a healthy self-image. Nevertheless, she continued to be self-conscious about her learning disability.

The Bishop Dunn Memorial School provides both regular and special education. During her stay there, the child received some instruction in regular education classes. I find that her placement there was not more restrictive than the special class placement which the CSE had recommended for the 1989-90 school year. The Academic Dean of the Kildonan School testified that all of the school's students have learning disabilities, and that most of them are dyslexic, i.e., have difficulty reading. It should be noted that although the child boarded at the Kildonan School for five days each week during the period in question, petitioner seeks reimbursement only for the child's tuition, and his claim will be determined on that basis (Application of a Child with a Disability, Appeal No. 95-72).

The requirement that each child be educated in the least restrictive environment must be balanced against the requirement that the child receive an appropriate education (Briggs v. Board of

Education of the State of Connecticut, 882 F. 2d 688 [2d Cir., 1989]). During the 1994-95 and 1995-96 school years, petitioner's daughter continued to lag well behind her peers in her academic achievement. Her academic performance continued to be impaired by her poor visual perceptual and attentional skills, and she continued to be anxious about her academic deficiencies, as well as her parents' marital difficulties. The child received specialized reading and writing instruction in small classes. The Kildonan Academic Dean testified that as of the fall of 1996, the child's academic skills were generally at a mid-sixth grade level, and that her word attack skills were beginning to improve as a result of the drills which she had done as a student during the two prior school years. She further testified that the girl was capable of doing her work at the appropriate grade level, provided that she was instructed by teachers who had been trained in the Orton-Gillingham methodology because they could assist her in meeting the written language demands of her courses of instruction. The Academic Dean testified that the child's needs would not be met by merely providing her with daily specialized instruction in reading. She also testified that the girl had to be instructed in small classes because she was distractible. In view of this child's academic and emotional needs, her performance in a less restrictive setting during the 1988-89 school year, and the absence of any clear alternative for the years in question, I must reject respondent's argument that the Kildonan School was not the least restrictive environment for the child.

The hearing officer denied petitioner's claim for tuition reimbursement for the 1990-91 through the 1995-96 school years on the ground that petitioner chose not to involve the CSE in his daughter's education during those school years, at least in part because a portion of the child's tuition costs was borne by petitioner's employer. In any event, he specifically found that petitioner was aware of his right to request a hearing to review respondent's failure to offer the child a free appropriate public education, and that petitioner had chosen not to do so. In his petition, petitioner offers little reason for challenging the hearing officer's determination. My review of the entire record affords me no basis for reaching a different decision than that of the hearing officer. Therefore, I find that petitioner's claim for tuition reimbursement for the 1990-91 through the 1995-96 school years is not supported by equitable considerations, and was properly rejected by the hearing officer.

With regard to the 1996-97 school year, the hearing officer found that the IEP which the CSE had prepared for the child was inappropriate and insufficient. Notwithstanding that finding by the hearing officer, petitioner nevertheless challenges the appropriateness of the child's IEP for the 1996-97 school year. However, petitioner is not aggrieved by the hearing officer's finding. Furthermore, respondent has not specifically cross-appealed from that portion of the hearing officer's decision. I will not therefore review the hearing officer's finding (Application of a Child with a Disability, Appeal No. 95-40). Consequently, the hearing officer's determination that respondent failed to establish that it had offered an appropriate educational program to the child for the 1996-97 school year must stand. The hearing officer also found that petitioner had met his burden of proving that the educational services which the Kildonan School was providing to his daughter during the 1996-97 school year were appropriate. In its cross-appeal, respondent argues that the hearing officer erred as a matter of law in holding that a parent need not establish that the special education services which the parent obtained for his or her child were provided in the least restrictive environment. Although I do not agree with the hearing officer's holding (see Application of a Child with a Disability, Appeal No. 95-24; P.J. v. State

of Connecticut, 788 F. Supp. 673 [D. Conn., 1972]; Application of a Child with a Handicapping Condition, appeal No. 92-7, decision sustained sub nom. Lord v. Board of Education, Fairport Central School District et al., 92-CV-6286 [W.D.N.Y., 1994]), I am persuaded that the child's placement in the Kildonan School for the 1996-97 school year is consistent with the least restrictive environment requirement, for the same reasons which I have indicated with regard to the 1994-95 and 1995-96 school years.

Petitioner's claim for tuition reimbursement for the 1996-97 school year was denied by the hearing officer, who determined that petitioner had approached the CSE solely for the purpose of attaining financial assistance from respondent for maintaining his child's placement in the Kildonan School. He noted that petitioner had become aware in June, 1996 that his daughter would not be permitted to return to the Kildonan School in September because petitioner had failed to pay the child's full tuition for the 1995-96 school year. He further noted that petitioner had waited until August, 1996 to approach the CSE about a placement for his daughter in September, 1996, which precluded the CSE from observing the child in her classroom at Kildonan, and limited the ability of the CSE to prepare an appropriate IEP for the child. Remarkably, petitioner does not address the hearing officer's findings in his petition to review the hearing officer's decision. Nevertheless, petitioner asks me to order respondent to pay for the child's tuition at the Kildonan School for the 1996-97 school year.

In essence, the hearing officer found petitioner had failed to cooperate with the CSE in developing his child's IEP for the 1996-97 school year. The record reveals that petitioner made his daughter available for an evaluation by respondent's school psychologist when requested to do so by respondent. The CSE had originally been scheduled to meet with petitioner in August, but rescheduled its meeting for September because the school psychologist was unavailable. There is no evidence that petitioner delayed the work of the CSE in any way. Some of the child's records from the Kildonan School were reportedly unavailable to the CSE because of petitioner's failure to allow the child's tuition for the 1995-96 school year. However, it is not clear from the record how the CSE was hindered in preparing the girl's IEP. Although petitioner's request that an impartial hearing be held even before the CSE had met with him to prepare the child's IEP may be some evidence of his bad faith, it may simply reflect his concern that an appropriate placement be found promptly for his daughter. Upon review of the entire record, I cannot agree with the hearing officer's determination that equitable considerations do not support petitioner's claim for tuition reimbursement during the 1996-97 school year.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

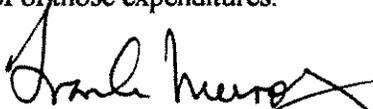
THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the decision of the hearing officer is hereby annulled, to the extent that it denied petitioner's claim for tuition reimbursement in the Kildonan School during the 1996-97 school year; and

IT IS FURTHER ORDERED that respondent shall reimburse petitioner for his out-of-

pocket expenditures for his daughter's tuition in the Kildonan School for the 1996-97 school year, upon petitioner's presentation to respondent of proof of those expenditures.

Dated: Albany, New York
September 16, 1997



FRANK MUÑOZ