



No. 97-48

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

Application of a CHILD WITH A DISABILITY, by his parents, 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 Oswego

Appearances:

Grossman, Kinney, Dwyer and Harrigan, P.C., attorney for petitioner, Colleen Walsh Heinrich, Esq., of counsel
Michael J. Stanley, Esq., attorney for respondent

DECISION

Petitioners appeal from the decision by an impartial hearing officer which upheld the recommendation by respondent's committee on preschool special education (CPSE) that their son be enrolled in a self-contained special education class for the 1996-97 school year, rather than a home-based program using the applied behavioral analysis methodology which petitioners preferred. The appeal must be sustained in part.

Respondent contends that this appeal should be dismissed as moot because petitioners have reportedly moved out of the school district and are no longer residing in New York State. In an affidavit which was notarized in Brunswick County, North Carolina on November 19, 1997, the child's father acknowledged that he had accepted employment outside of Oswego County, New York, but he asserted that petitioners have not purchased a new residence, and that they may decide to return to the City School District of the City of Oswego once a suitable educational program is established for their son. In any event, petitioners argue that the appeal should not be dismissed as moot because the issues which are raised are capable of repetition (see Application of a Child with a Disability, Appeal No. 94-13; Application of a Child with a Disability, Appeal No. 95-19). Moreover, a parent's removal of a child from school does not per se preclude the parent from challenging a hearing officer's decision (see Essen v. Board of Education of the Ithaca City School District et al., 24 IDELR 30, [U.S. D.C. N.D. N.Y., 1996];

Hiller v. Brunswick CSD, 687 F. Supp. 735 [N.D. N.Y., 1988]). In this instance, petitioners also seek reimbursement for the cost of certain services which they have provided to their son. Under the circumstances, I find that this appeal is not moot, even though the school year in question has ended.

Petitioner's son, who is five years old, was diagnosed as having Fragile X Syndrome in September, 1994. In February, 1995, the child was evaluated by a psychologist at the State University of New York Health Science Center in Syracuse. The psychologist reported that the child displayed certain physical and behavioral characteristics associated with Fragile X Syndrome. The behavioral characteristics included a short attention span, significant language delay, repetitive hand mannerisms, variable eye contact, and a general lack of relatedness (Exhibit D-35). The psychologist indicated that the child displayed characteristics which were consistent with a diagnosis of Pervasive Developmental Disorder (PDD). At the hearing in this proceeding, a pediatrician who had reviewed the psychologist's notes opined that the child was PDD or mildly autistic.

Suspecting that their son was developmentally delayed, petitioners had previously referred the boy to the Infant and Toddler Developmental Evaluation Service in Fulton, New York in August, 1994, when he was 17 months old. That agency's evaluator reported that the child's gross motor skills were at the 12-13 months level, and his fine motor skills were at the 8-9 months level. She further reported that the child exhibited high oral motor and sensory needs, and that his receptive language skills were at the 10 months level. The boy's expressive language skills were reported to be at the 11 months level. His social/emotional skills were found to be at the 14 months level, while his adaptive skills were at the 6-9 months level. Of particular concern was the fact that the child gagged on food which had not been pureed. Cognitively, the child was reported to be at the 8-9 months level. The evaluator recommended that the child receive educational services and occupational therapy pursuant to the Early Intervention Program (EIP) under the auspices of the State and County Health Departments (see Title II-A of the New York State Public Health Law).

In September, 1994, the child began to receive one hour per week of service from an EIP special education teacher, and one hour per week of occupational therapy provided by EIP. The child was evaluated by a speech/language pathologist at the Infant and Toddler Developmental Evaluation Service in October, 1994, when he was 20 months old. He was found to have receptive language skills at the 11-12 months level, and his expressive language skills were found to be at the 6-8 months level. The evaluator reported that the child could produce vowel sounds, consonants, and a few consonant-vowel combinations. He reportedly attempted to repeat a word which had been modeled for him, and he demonstrated good eye contact during conversational exchanges. The evaluator also reported that she had observed the child eating breakfast. He gagged on a piece of graham cracker, and his mother reported that the only textured food which the child tolerated was spaghetti. The evaluator recommended that the child receive speech/language services to enhance his receptive and expressive language skills (Exhibit P-G). The child subsequently began to receive one hour each of speech/language therapy and physical therapy which were provided by the EIP. All of the EIP services were provided in the child's home.

Petitioner's son was re-evaluated by Infant and Preschool Developmental Services in August, 1995, when he was 29 months old. His gross motor skills were found to be at the 21 months level, and his fine motor skills were reported to be at the 17 months level. The child's receptive language skills were reported to be at the 12-14 months level, while his expressive skills were described as being at the 10 months level. The evaluator reported that the child could say some words in imitation of a model, but his skills were inconsistent. The child's social/emotional development was found to be at the 18-21 months level. His adaptive skills were found to be at the 15 months level. The evaluator reported that the child's cognitive skills were at the 14-17 months level. The evaluation team recommended that the child continue to receive special education instruction, physical therapy, occupational therapy and speech/language therapy (Exhibit P-H).

With the assistance of EIP staff, petitioners explored possible placements for their son to be made in January, 1996, when he became eligible to be classified as a preschool child with a disability under the Education Law. In October, 1995, petitioner visited one private school and two special education programs operated by the Oswego Board of Cooperative Educational Services (BOCES), one of the latter of which respondent's CPSE ultimately recommended for the child at the Erie Street School in Oswego. At that time, the BOCES was the only approved provider of preschool educational programs in Oswego County. The child was formally referred to the CPSE on November 3, 1995 (Exhibit 6). On that date, the child's mother gave her consent to have her son evaluated by an approved evaluator for the CPSE pursuant to Section 4410 (4)(a) of the Education Law. On the consent form, the child's mother indicated that she wished to have her son evaluated by the BOCES evaluation team which included the special education teacher from one of the classes she had seen during her visit to the Erie Street School. That evaluation team reportedly convened only one day per month, and there were other children who were ahead of petitioners' son on the team's list of children to be evaluated. Consequently, the child was not evaluated by the BOCES team until February 9, 1996.

The BOCES school psychologist who evaluated the child reported that the child's verbal communication was nearly non-existent during the evaluation, although he often uttered a throaty sound. She further reported that the boy expressed his pleasure, displeasure, happiness and frustration through vocalizing and body language. On the Slosson Intelligence Test, the boy achieved a mental age of 17.5 months. He was 36 months old when tested. On the Developmental Activities Screening Inventory-II, which is a largely non-verbal assessment instrument (Transcript, page 47), the child's developmental age was reported to be at the nine months level. Petitioners provided the information which was used to ascertain the child's adaptive behavior on the Vineland Adaptive Behavior Scales. The child was determined to have age equivalent scores of one year for communication, 10 months for socialization, and 16 months for motor skills.

A BOCES speech/language pathologist used two tests to assess the boy's receptive and expressive language skills. She reported that the child's combined score was in the 12-14 months range for receptive language, and 10 months for expressive language. The speech/language pathologist explained that the child had passed all of the items in the 8-9 months age range and had demonstrated emerging receptive language skills through 20 months, while passing all items

in the 7-8 months range and demonstrating emerging expressive language skills through 14 months.

The two BOCES evaluators, plus the special education teacher from the Erie Street School who was the third member of the evaluation team, recommended that the CPSE identify the child as a preschool child with a disability. The team also recommended that the child be placed in a special education class of no more than 12 students with a teacher and 4 assistants on a 12-month basis. It also recommended that the child receive speech/language therapy five times per week, and suggested that the child's therapist determine whether such therapy would be provided to him individually or in a group. The evaluation team further recommended that the child receive both occupational therapy and physical therapy three times per week, but did not specify whether therapy should be 1:1 or in a group.

The CPSE did not receive the BOCES evaluation team's report until early March, 1996. The CPSE had previously received reports from the Infant and Preschool Developmental Services regarding the child's progress in the EIP. The child's mother requested that petitioners be given the opportunity to present information to the CPSE about their son and about a methodology of which they had recently become aware before the CPSE considered the BOCES evaluation team's recommendations. A meeting was held on March 22, 1996, at which petitioners discussed their son's strengths and needs. They asserted that their son could learn, but not in a traditional setting, and that he should be instructed at their home for 35 hours per week using the Applied Behavioral Analysis (ABA) methodology. A pediatrician who testified at the hearing described ABA as a form of "operant conditioning", which is used to shape a child's behavior (Transcript, page 903). Using this methodology, new skills are broken down into small manageable tasks, and the child is prompted to successfully complete those tasks and reinforced or rewarded for his or her success. The child's performance is charted or documented. As part of their presentation (Exhibit I), petitioners compared the cost of a center-based program, such as the special education class which the BOCES evaluation team had recommended, with the cost of the home-based program which they sought.

On April 3, 1996, petitioners met with a CPSE which consisted of one of respondent's school's psychologists, the BOCES special education teacher who was a member of the evaluation team, a representative of Oswego County, and two parent members. After agreeing to petitioners' request for certain amendments to the BOCES evaluation team's description of the child's receptive and expressive language skills, the CPSE discussed the team's placement recommendation. The CPSE did not recommend a placement for the child because it was agreed that the child would be independently evaluated at public expense (Exhibit 19).

On April 16, 1996, petitioners' son was evaluated by the Language Development Program (LDP) in North Tonawanda, New York. The LDP evaluation consisted of a speech/language assessment, an audiological assessment, a psychological evaluation, and a social history (Exhibit 5). On one of the two standardized tests which the BOCES evaluation team had also used to assess his receptive language skills, the child achieved a basal score at the 9-12 months level, with scatter in the 9-15 months range. He demonstrated the ability to maintain attention to pictures and gestures, respond to verbal requests, follow simple commands occasionally, and recognize family members' names. On a separate test, the child achieved a

language comprehension developmental age score of 15.75 months. The child's receptive language skills were also assessed informally by the LDP speech/language pathologist, who concluded that the child's receptive language abilities were in the 12-16 months range. Using the same standardized tests which the BOCES team had used to assess the child's expressive language skills, the LDP speech/language pathologist reported that the child had achieved a basal score of 9-12 months, and had exhibited scattered skills in the 12-15 months range. She indicated that the boy could vary his pitch when vocalizing, vocalize a desire for a change of activities, imitate duplicated syllables, vocalize a two-syllable combination, and vocalize in response to objects that move. On a separate test of his expressive language skills, the child received a language developmental score of 12 months. He was able to vocalize with vowel-consonant combinations and with two identifiable consonants, but did not appear to be able to imitate adult vocal play or use jargon speech as if communicating. The speech/language pathologist reported that the child's expressive language skills were at approximately the 12-months level and that his speech production skills and pragmatic speech/language abilities were commensurate with his expressive and receptive language skills. She recommended that the child be provided with an intensive home-based program of services for a minimum of 30 hours per week, in which speech/language therapy would be included. A LDP audiologist reported that the child's hearing appeared to be within normal limits, but that both of his middle ear tubes could be blocked with fluids.

A LDP school psychologist reported that the boy was able to remain seated at a table for approximately five minutes at a time, and that verbal cues and physical cues were used to assist him in remaining on task. She further reported that the child smiled appropriately in response to praise and reinforcement. However, the child's ability to imitate verbal sounds was limited, and he generally verbalized without apparent communicative effort. Although a formal score on the Bailey Scales of Infant Development-II was not obtained because of the child's limited speech/language development and his self-directed behavior during the evaluation, he did exhibit skills in the 12-19 months range, such as completing parts of puzzles and drawing purposefully. He was described as being interested in books and having the ability to attend to a short story. With information provided by petitioners for completion of the Child Development Inventory, his overall development was reported to be at the 13 months level. The LDP school psychologist also recommended that the child receive an intensive home-based program of services consisting of speech/language therapy, special education services, occupational therapy, physical therapy, and parent training. She indicated that those services should be provided at home until "developmentally appropriate markers" were observed.

The LDP evaluation team jointly recommended that the child receive two hours of special education itinerant teacher services five times per week, with the assistance of paraprofessionals for three hours per day, five days per week. The team also recommended that the child receive individual speech/language therapy for 30 minutes five times per week, as well as individual occupational therapy and individual physical therapy for 30 minutes three times per week. It further recommended that the child receive an audiological evaluation within six to twelve months. The LDP evaluation team also suggested annual goals and short-term instructional objectives for the child's individualized education program (IEP).

The CPSE reconvened on May 10, 1996. The special education teacher who had been a member of the BOCES evaluation team and who had attended the April 3, 1996 CPSE meeting did not attend the May CPSE meeting, nor did any other member of the BOCES evaluation team. Instead, the leader of another BOCES evaluation team attended the May CPSE meeting. Neither of the two parent members from the April CPSE meeting attended the May 10, 1996 CPSE meeting. However, another parent of a child with a disability served as the parent member of the CPSE at the May meeting. Respondent's director of special education and the acting director of special education for the BOCES also attended the meeting, as did the child's service coordinator from the EIP. A new representative of Oswego County also attended the meeting. The executive director of the LDP and the speech/language pathologist who had evaluated the child at the LDP participated in the CPSE meeting by telephone. The two representatives of the LDP were questioned about the recommendation that the child receive an intensive home-based educational program. The four voting members of the CPSE unanimously recommended that petitioners' child be identified as a preschool child with a disability, and that he be placed in a BOCES preschool class with a child to adult ratio of 12:1+4, for six hours per day five days per week. The CPSE further recommended that the child receive speech/language therapy individually three times per week and in a group of no more than two children twice per week. It also recommended that he receive individual physical therapy and occupational therapy three times per week. The CPSE also recommended that a half-time aide be assigned to serve the child. The recommended services were to be provided to the child on a 12-month basis.

By letter dated May 12, 1996, petitioners requested that an impartial hearing be held to review the recommendation of the CPSE. Respondent appointed an impartial hearing officer on May 21, 1996. The hearing in this proceeding began on July 23, 1996, and extended over an additional 16 days ending on January 22, 1997. The impartial hearing officer rendered his decision on June 11, 1997. He noted that petitioner had raised 15 objections, some of which were procedural, to the CPSE's recommendations. With regard to petitioners' contention that the CPSE had failed to comply with the 30-day time limit for making its recommendation to the board of education (see 8 NYCRR 200.16 [d]), the hearing officer found that the CPSE's delay was due in large part to petitioners' selection of a particular BOCES evaluation team after having been advised of that team's schedule, as well as their request that a CPSE meeting not be held until they could do their presentation about ABA on March 22, 1996, and their request for an independent evaluation. The hearing officer rejected petitioners' challenge to the composition of the CPSE, as well as their contention that the CPSE should have observed the child in his home as part of his evaluation. He did sustain two procedural objections by petitioners. First, he agreed that the CPSE should have performed a physical examination of the child (see 8 NYCRR 200.16 [c][2]; 8 NYCRR 200.4 [b]). The second objection which he sustained was that the CPSE had failed to specify petitioners' position, as well as its reason for recommending an educational program other than that which petitioners preferred, as it was required to do by 8 NYCRR 200.16 (d)(5). However, the hearing officer held that neither procedural defect had a significant impact on the substance of the educational program which was recommended for the boy, and did not afford a basis for annulling the CPSE's recommendations. Having reviewed the child's IEP, the hearing officer found that the IEP identified the child's needs and included appropriate annual goals and short-term instructional objectives for him. He found that the educational program which the CPSE had recommended for the boy in the Erie Street program was reasonably calculated to enable him to receive educational benefits and was consistent with

the requirement that the child be educated in the least restrictive environment. Accordingly, he denied petitioners' request that respondent be ordered to reimburse them for the cost of the private program which they had been providing for their child.

In April, 1996, petitioners employed a teacher to provide approximately 10 hours per week of ABA training to their son, who continued to receive instruction and related services pursuant to the EIP. The amount of his instruction from the EIP was increased in June, 1996. The child's teachers received some training in the ABA technique from a consultant engaged by petitioners. Although the child aged-out of the EIP at the end of August, 1996, he continued to receive services during the 1996-97 school year under the aegis of the Oswego County Health Department, which had become an approved provider of preschool education for children between the ages of three and five. The services were reportedly provided to the child pursuant to an order of the U.S. District Court for the Northern District of New York. I note that the court's order is not in the record before me.

Petitioners contend that the CPSE's recommendation for an educational program for their son must be annulled because of several procedural flaws in the child's evaluation and the method by which the CPSE arrived at its recommendation. The hearing officer found that the CPSE failed to obtain the results of a physical examination of the child as required by State regulation. The failure to conduct a physical examination of a child suspected of having a disability may afford a basis to annul a CSE's recommendation with regard to that child (Application of a Child with a Handicapping Condition, Appeal No. 92-12; Application of a Child Suspected of Having a Disability, Appeal No. 93-45). I must note that although the BOCES evaluation did not include a physical examination, the LDP evaluation which the CPSE had when it met on May 10, 1996 included a medical record form signed by a Dr. Varnum. The hearing officer found that the medical record form did not comport with the requirement of a physical examination. Since Dr. Varnum's report did not include an assessment of the child's vision and hearing, I agree with the hearing officer.

An evaluation of a child suspected of having a disability must also include an observation of the child in the child's "current educational setting" (8 NYCRR 200.16 [c][2]; 8 NYCRR 200.4 [b][4][8]). In this instance the child was not attending school when he was evaluated by the BOCES evaluation team, but he was receiving EIP educational services in his home. Petitioners contend that their son should have been observed in his home as part of the CPSE's evaluation. The hearing officer relied upon the provisions of 34 CFR 300.542 (b) which indicates that: "In the case of a child less than school age of a child out of school, a team member shall observe the child in an environment appropriate for a child of that age". The hearing officer found that the child had been observed in the Erie Street School during the course of his evaluation by the BOCES team. I disagree. Although the child was physically in the Erie Street School, he was not formally observed there. The failure to perform an adequate observation of a child may also afford a basis for annulling a CSE's recommendation (Application of a Child with a Handicapping Condition, Appeal No. 91-20; Application of a Child Suspected of Having a Disability, Appeal No. 93-32). I find that the same result should obtain in the case of a preschool child who has been evaluated by a CPSE.

Petitioners contend that their son was inappropriately evaluated by the CPSE because the BOCES evaluation team reportedly did not include anyone with expertise in autism or Fragile X Syndrome. I do not agree with their contention. The special education teacher member of the evaluation team, who is an approved preschool evaluator, testified that nearly twenty-five percent of the preschool children she has evaluated had developmental delays similar to those of petitioners' son. The speech/language pathologist member of the team testified that she had previously evaluated a child with Fragile X Syndrome, and that this child's condition had not affected the way in which he was evaluated.

Petitioners further contend that the CPSE was not duly constituted. They rely, in part, upon the fact that the Oswego County representative at the April 3, 1996 CPSE meeting was not an "appropriately certified or licensed professional" as required by Section 4410 (3)(a) of the Education Law. While that appears to be true with respect to that meeting, I must point out that the CPSE's recommendation that is being reviewed in this proceeding is the recommendation that was made on May 10, 1996. The Oswego County representative at that CPSE meeting was reportedly a certified special education teacher. Petitioners also contend that the parent member of the CPSE at the May meeting was biased because she was reportedly friendly with the CPSE chairperson, and her practicum for a graduate education course had been performed in the classroom of the BOCES teacher who had evaluated the child and who was the teacher of the class which the CPSE recommended for the child. Having reviewed the testimony of the parent member at the hearing, I find that there is no merit to petitioners' contention of bias. Petitioners also contend that the CPSE was invalidly constituted at its May 10, 1996 meeting because no member of the BOCES evaluation team attended the meeting. Section 4410 (3)(a) of the Education Law requires that a CPSE include a professional who participated in the child's evaluation, if the child has been evaluated for the first time. Although one of the LDP evaluators participated by telephone in the May 10, 1996 meeting, she was not a voting member of the CPSE. Therefore, I find that the CPSE was invalidly composed on May 10, 1996.

I have also considered petitioners' allegation that the CPSE improperly considered costs in making its recommendation. I find that their allegation is without merit. The Oswego County employee upon whose testimony petitioners rely was not a voting member of the CPSE at the May 10, 1996 meeting. As noted by the hearing officer, petitioners raised the issue of cost with the CPSE (see Exhibit I). I must also note that a school district is not precluded from considering cost when choosing between alternative, but comparable, placements (Application of a Child with a Handicapping Condition, Appeal No. 91-8).

Petitioners also argue that they were denied a meaningful opportunity to participate in the formation of their child's IEP. Although a child's parents must be afforded a meaningful opportunity to participate in the development of their child's IEP, a CPSE is not obligated to accede to the parents' wishes in drafting the child's IEP. My review of the record indicates that petitioners were afforded the opportunity to make their views known to the CPSE, and to participate in the preparation of their son's IEP. The CPSE chairperson testified that the May 10, 1996 CPSE meeting lasted for about three hours. The first one-half of the meeting was devoted to discussing the child's independent evaluation. The chairperson also testified that a draft IEP was circulated at the meeting. However, there is no indication in the record that the CPSE was inflexible about the draft IEP.

Petitioners raise two other procedural objections to the CPSE's recommendation. They assert that the CPSE's recommendation was untimely, and that the CPSE failed to provide a proper notice of its recommendation to them and to respondent. Section 4510 (5)(b)(ii) of the Education Law requires that:

"If the committee's recommendation differs from an expressed preference of a parent, the committee shall include in its statement the reasons why the committee recommended a program or service other than that preferred by the parent. The committee shall include in its recommendation any statement or statements provided by the parent, which the board [of education] shall consider" (see also 8 NYCRR 200.16 [d][5]).

Neither the May 23, 1996 form letter sent to petitioners (Exhibit 31), nor the child's IEP (Exhibit 3) which was presumably attached to the form letter, provided the information required by the statute and the regulation. I concur with the hearing officer's finding that this procedural violation had occurred.

When a preschool child who is suspected of having a disability has been referred to a CPSE, the CPSE must immediately notify the child's parents that a referral has been received, and must ask for the parents' consent to have the child evaluated (8 NYCRR 200.16 [b][iv]). State regulation does not specifically address the question of when the child's evaluation must begin. However, 8 NYCRR 200.16 (d)(1) provides that a CPSE shall provide a recommendation to the board of education within 30 days of the receipt of consent to evaluate. It should be noted that the term "days" means school work days, except during the months of July and August (8 NYCRR 200.1 [m]). Nevertheless, respondent does not contend that this child's first CPSE meeting on April 3, 1996 occurred within 30 days after the CPSE received consent to evaluate the child on November 3, 1995. The hearing officer attributed at least part of the delay to petitioners because they wanted the BOCES evaluation team on which a specific teacher served to evaluate the child. In addition, petitioners reportedly requested that the CPSE not meet in March, 1996 until they could complete their research about ABA and make a presentation to the CPSE.

Petitioners contend that they were not aware that their preference for a specific BOCES evaluation team meant that their son would not be promptly evaluated. At the hearing, the child's father testified that petitioners would have been willing to have the child evaluated by another team if they had known that it could have been done sooner (Transcript, page 2819). The BOCES teacher in question testified that the child's mother was aware that there was more than one evaluation team, and that her team evaluated children only one day per month (Transcript, page 245). Although I recognize that there may have been some delay in the child's evaluation because the BOCES was the only approved evaluator in Oswego County, I must point out that it was nonetheless respondent's responsibility to ensure that each child's evaluation was performed in a timely manner so that its CPSE could comply with the regulatory timeline for making its recommendation. I also recognize that the parties can agree to waive timelines, as for example when a child is to receive a second, independent evaluation. However, such waivers

should be documented, which was not done in this instance with respect to the delay in performing the evaluation and obtaining a copy of the results of the evaluation by the BOCES team. Notwithstanding the subsequent delays in making the recommendation at issue in this proceeding, which are at least in part attributable to the petitioners, I find that the CPSE's recommendation was untimely because respondent did not ensure that the child was promptly evaluated.

Not all procedural violations afford a basis for concluding that a board of education has denied a child a free appropriate public education (Hiller v. Board of Education Brunswick Central School District, 743 F. Supp. 958 [N.D. N.Y., 1990]; Application of a Board of Education City School District of the City of New York, Appeal No. 94-95). However, I find that the CPSE's failure to obtain a physical examination of the child and to observe him as part of its evaluation, in addition to the absence of one of its required members at the May 10, 1996 meeting, afford a sufficient basis to annul the CPSE's recommendation. In addition, I find that there are serious substantive concerns about the educational placement which the CPSE recommended for the child.

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).

In this instance, there does not seem to be any dispute as to the IEP's description of the child's needs, or to the annual goals and short-term objectives, which are similar to those that the LDP evaluation team recommended. Parties do disagree as to the nature of the special education services which the CPSE recommended that the boy receive. Those services should have been adequate to afford the child a reasonable opportunity of achieving his annual goals and his short-term objectives (Board of Education North Rose-Wolcott Central School District, Appeal No. 97-1).

Much of the hearing was devoted to the teaching methodology to be used with this child, and the location in which the child should be taught. The parties and their witnesses debated the efficacy of the ABA methodology. I note that one of petitioners' expert witnesses, Dr. Navalta, conceded that there was no reliable scientific basis for ABA because the results achieved by one early proponent of that methodology had not been replicated (Transcript, page 1194). However, he urged that the ABA methodology be used. Upon review of the entire record before me, I find that there is no single teaching methodology which must be used with this child. Consequently, I

would not annul the CPSE's recommendation on the ground that the CPSE did not recommend that ABA be used with this child (Lachman v. Illinois State Board of Education, 852 F. 2d 290 [7th Cir., 1988]).

The Executive Director of the LDP, the LDP's speech/language pathologist who had evaluated the child, and Dr. Navalta, who is the Director of the May Institute's Early Childhood Autism Program, opined at the hearing that the 12:1+4 special education class proposed by the CPSE was inappropriate for petitioner's son because he lacked the basic skills to benefit from instruction in that class. Specifically, they testified that the child did not have adequate attending skills, i.e., the ability to pay attention. One of this child's annual goals was to improve his "prerequisite learning behavior". The objectives for the school included stopping what he is doing and making eye contact with the speaker when his name is called, sitting down and remaining seated for two minutes when given a verbal prompt, sitting in a small group and attending to a group activity, and attempting to model behavior which he had observed, given a verbal prompt. I note that Dr. Navalta ultimately conceded that these prerequisite skills could be developed in a center-based program, which would include a special education class (Transcript, page 1223). The Executive Director of LDP, who is a licensed psychologist, observed the proposed BOCES class on July 2, 1996. In his report (Exhibit U), he indicated that the children in the classroom demonstrated a broad range of mild to severe disabilities. The Executive Director "targeted" one child whose behavior was similar to that of petitioners' son, and he reported that the boy engaged in unrelated activity for much of the time. He opined that the BOCES class provided most students with good opportunities for learning, but that it was not appropriate for petitioners' son. The Executive Director indicated that he had not seen evidence of individualized motivational systems being used with specific children, and he opined that petitioners' son lacked the prerequisite skills to benefit from the opportunity for social integration which the BOCES class would have provided. The LDP speech/language pathologist opined that the child would not have been successful in a center-based program. The speech/language pathologist explained that, to be successful in a program of that nature, the child needed to have the ability to maintain attention, follow simple directions, and control his self-directed behavior. She further opined that the addition of a fifty percent individual aide to this child's IEP would not have altered his ability to benefit from instruction in the proposed class. Respondent's witnesses, including the teacher of the proposed class, opined that the child's IEP goals and objectives could have been addressed in that class.

Upon review of the entire record, including a video tape of this child taken in April, July and September, 1996 (Exhibit X), I am not persuaded that the child could have benefited from instruction in the proposed class at the Erie Street School. On the tape, the child frequently had to be refocused, even in a 1:1 teaching situation, and engaged in self-directed behavior (hand flapping) on a frequent basis. Consequently, I find that respondent did not meet its burden of proof with respect to the appropriateness of the proposed educational placement.

In their petition, petitioners merely ask that the IEP which the CPSE prepared for their son be invalidated. However, petitioners argue in their memorandum of law that they are " ... entitled to reimbursement for all costs expended by them in connection with the training of the teachers for the home program which have not been paid by the County..." Although the transcript in this proceeding totals 2900 pages, and there are a total of 65 exhibits in the record, I

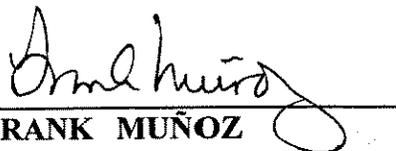
must note that petitioners have not identified the specific costs which they have incurred. As noted above, the EIP provided instructional and related services to the child until August 3, 1996. Thereafter, the Oswego County Health Department, which had become an approved provider pursuant to Section 4410 of the Education Law, apparently paid for the child's instructional and related services. The child's mother testified that Dr. Navalta provided two days of training, only one of which was specific to her son, in June, 1996. He returned on September 20, 1996 to consult with petitioners and their son's teachers. Dr. Anderson, the Executive Director of LDP, observed the child in his home and made suggestions to his teachers on July 2, 1996.

A board of education may be required to pay for educational services which a child's parents have obtained, provided that the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359 [1985]). The board of education bears the burden of demonstrating the appropriateness of the services recommended by its CPSE. I have found that respondent failed to do so. Petitioners bear the burden of demonstrating the appropriateness of the services which they obtained for their son. Although there is some indication in the record that the child was benefiting from his program of instruction at home in which the ABA technique was used, there is very little evidence about what Drs. Navalta and Anderson did for the child. The reasonableness of the cost of their services must be considered in determining whether equitable considerations support petitioners' claim for reimbursement (Florence County School District Four v. Carter by Carter, 510 U.S. 7 [1993]; Appeal No. 97-38). Petitioners' failure to provide information about the cost of the consultants' services precludes me from awarding them reimbursement.

THE APEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the hearing officer's decision is hereby annulled to the extent that it found that respondent's CPSE had offered an appropriate educational program to petitioners' son.

Dated: Albany, New York
August 13, 1998


FRANK MUÑOZ