

No. 97-61

**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 Ithaca**

**Appearances:**

Ronald R. Benjamin, Esq., attorney for petitioners

Bond, Schoeneck and King, LLP, attorneys for respondent, Donald E. Budman, Esq. of counsel

**DECISION**

Petitioners appeal from an impartial hearing officer's decision which found that the board of education had met its burden of proving that it had offered an appropriate educational program to petitioners' son for the 1996-97 school year. The hearing officer denied petitioners' request for an order requiring the board of education to reimburse them for the cost of their son's tuition in the unapproved private school in which they had unilaterally enrolled the boy. The appeal must be dismissed.

Petitioners' son, who is fifteen years old, has been classified as learning disabled since 1991. A private psychologist who evaluated the boy in 1991 reported that the child had achieved a verbal IQ score of 85, a performance IQ score of 101, and a full scale IQ score of 91. The child evidenced a two to three year delay in his visual motor integration skills. The boy, who was then in the third grade, achieved grade equivalent scores of 2.1 for word identification, 1.9 for word attack, 2.2 for word comprehension, and 1.5 for passage comprehension. However, his mathematics skills ranged from the beginning of the fourth grade to the latter half of the fifth grade. The psychologist opined that the child's learning problems stemmed from his significantly delayed auditory perceptual skills, and that the deficits in the boy's writing skills were attributable to deficits in his motor skills. A school psychologist who evaluated the boy in January, 1996, reported that he had achieved IQ scores of 98, 96, and 97, respectively, and that the boy's low score on the digit span subtest was indicative of attention and short-term auditory memory deficits. She also reported that the boy evidenced relative slowness when copying rote

symbols. At the hearing in this proceeding, the school psychologist testified that the boy also evidenced a processing deficit, in terms of the time he required to organize ideas and respond to questions. A private educational evaluator reported in August, 1996 that the boy's word recognition skills were at the third percentile, while his reading comprehension skills were at the eighteenth percentile. There is no dispute about the boy's classification as learning disabled.

Petitioners' son began his education in a parochial school in Ithaca. The boy reportedly repeated the first grade in the private school, and he continued to have academic difficulty while in the second grade. Petitioners reportedly provided a tutor for the boy, who continued to have academic difficulty. He was referred to a private psychologist while in the third grade. In June, 1991, respondent's committee on special education (CSE) classified the boy as learning disabled, and it recommended that he receive "Option 1", i.e., resource room, services for reading, writing, and spelling. The boy continued to attend the parochial school through the fifth grade, while receiving his recommended special education services in one of respondent's elementary schools.

The child entered respondent's DeWitt Middle School for the sixth grade in the 1993-94 school year. He received specialized reading instruction using the Orton-Gillingham technique in a 12:1+1 special education class, as well as resource room services to support his regular education instruction in other subjects. His special education reading teacher testified at the hearing that the Orton-Gillingham technique is based upon phonetic structure, and it is used to assist children who have serious reading decoding problems. The teacher testified that petitioners' son was slow at working through the sequential Orton-Gillingham program, but he had found some success with it. I note that the boy's scores on the Woodcock Johnson Reading Test which was administered to him in April, 1993 and March, 1994 revealed that he had made slight progress in reading (Exhibit P-3).

While in the seventh grade at the DeWitt Middle School during the 1994-95 school year, the boy continued to be instructed in English and reading in a self-contained special education class, and he continued to receive resource room services to support his regular education instruction. His reading teacher for the sixth grade also taught him reading with the Orton-Gillingham methodology during the seventh grade. She testified that petitioners' son made slow but consistent progress toward completing the specialized reading program. The results of the Woodcock Johnson Revised Reading Test administered to petitioners' son in March, 1994 and March, 1995 suggest that he made some progress in reading decoding and reading comprehension (Exhibit P-3). The boy failed seventh grade mathematics, and he received "D's" in social studies and science. He received D- for his special education English course. It should be noted that the boy's marks fluctuated in each of his subjects (Exhibit P-5). In the boy's triennial psychological evaluation which was performed in January, 1995, respondent's school psychologist reported that the child had received failing grades because of missing or incomplete assignments. She noted that one of the boy's teachers had informed her that the boy was easily overwhelmed by academic demands and had a tendency to become discouraged and "shut down". The psychologist further noted that the boy had begun taking Ritalin in October, 1994. While that drug is frequently prescribed for an attention deficit disorder (ADD), I must note that

there is no written evidence of that diagnosis in the record.

At the end of the seventh grade, the boy's progress was reviewed by the CSE. For the 1995-96 school year, the CSE recommended that the child continue to receive special education instruction for English and reading, but that he no longer receive resource room services. Instead, the CSE recommended that petitioners son be enrolled in a "transition" class for one period per day, and that he receive counseling once per week. Respondent's school psychologist explained at the hearing that the transition class did not provide "transition services", as that term is defined by regulation (8 NYCRR 200.1 [rr]). The transition class was intended to help students plan their activities and update their personal problems with school staff and student peers.

The boy's quarterly grades continued to significantly fluctuate in the eighth grade. For example, he earned grades of B, A, C, and F for science (Exhibit P-6) the boy earned final grades of D+ for special education English, D- for social studies, C for mathematics and science, B for special education reading, and D+ for special education writing. I note that the petitioners' son was suspended from school on May 3, 1996 by the principal for allegedly having used racial slurs on two occasions, and having displayed certain letters on his backpack which were deemed to be racially derogatory and inflammatory. Respondent's interim superintendent thereafter suspended the boy for the remainder of the school year.

On the Woodcock Johnson Revised Reading Test, the boy showed growth of about one year in his reading comprehension skills, between March, 1995 and March, 1996 (Exhibit P-3). In March, 1996 the academic achievement of petitioners' son was also assessed by the private psychologist who had evaluated the boy in 1991 and 1995. The psychologist compared the boy's scores on the Wechsler Individual Achievement Tests which were administered in January, 1995 and March, 1996. In basic reading, the boy's standard score improved from 66 to 72, while his reading comprehension standard score increased from 75 to 86. His mathematical reasoning standard score increased from 95 to 108, and his numerical operations standard score improved from 87 to 97. The boy's standard score for spelling increased from 65 to 70, and his writing standard score improved from 67 to 73.

On March 29, 1996, respondent's CSE prepared the boy's IEP for the 1996-97 school year. It considered written reports by the boy's special education English and reading teachers, and a written report by his transition class teacher. The boy's English teacher reported that petitioners' son would not read aloud passages of more than a few sentences, and he would not read silently. She also reported that he refused to write in class, and had insisted upon dictating his thoughts to the transition class teacher, upon whom the boy relied heavily to complete homework assignments. The boy's reading teacher described petitioners' son as very motivated, and she reported that his reading skills had improved. She recommended that he practice and review the Orton-Gillingham skills he had already learned in his next year of schooling. The transition class teacher reported that the boy's content knowledge in his mainstreamed courses had increased, despite the continuing deficiencies in his reading and writing skills. However, he

opined that the boy's poor behavior and academic choices had sabotaged his schooling. The transition teacher explained that the boy had not done his work in class even when he had the time, help and ability to do so. However, when the boy did his class work and homework, he could master the material. The teacher recommended that a plan be developed to assist the boy in keeping track of his homework, and that the boy receive counseling to help him understand the relationship between what he does and what happens behaviorally and academically.

The CSE recommended that petitioners' son continue to be classified as learning disabled in reading and writing, and that he be educated in regular education courses in the ninth grade, except for English, which he would receive in a 12:1+1 special education class. It further recommended that he receive one period of resource room services per day, and a second period of those services every other day. Pursuant to the CSE's recommendation, a note taker would take notes for petitioners' son in his social studies and science classes. The CSE also recommended that the boy be evaluated for counseling, and it indicated on the IEP that it would explore options for direct instruction in reading (Exhibit D-6). Testing modifications, such as separate location, extended time limits, having questions read to him, and his answers to test questions recorded for him, were included in the IEP. On June 17, 1996, the CSE amended the boy's IEP to provide that he would be enrolled in a special education English class for an additional period each day for the purpose of receiving instruction in reading (Exhibit D-10). At least initially, he was to be the sole student in the reading class (March 11, 1997 Transcript, page 105). On September 24, 1996, a high school level CSE met with the boy's mother. The minutes of that meeting (Exhibit P-4) indicate that the parent's concern about whether her son could graduate from high school in the normal four-year period were addressed when the CSE indicated that the boy's special education reading course would be credit bearing, and that the Orton-Gillingham methodology would be used in that course (March 11, 1977 Transcript, page 94). The CSE also recommended that the boy receive two hours of home tutoring at night for the first 30 days of school, to assist him in completing his homework assignments (Ibid., page 95).

During the summer of 1996, petitioners sent their son to a five-week residential camp at the Gow School in South Wales, New York. The Gow School is a private school which reportedly provides instruction to learning disabled students. However, it has not been approved for that purpose by the State Education Department. The boy reportedly did well in the summer camp. Petitioners chose to enroll the boy, at their expense, in the Gow School for the 1996-97 school year. By letter dated October 14, 1996, the boy's mother acknowledged receipt of her son's amended IEP after the September 24, 1996 CSE meeting, but she requested that an impartial hearing be held (Exhibit D-11).

The hearing in this proceeding began on January 9, 1997, and it concluded on March 11, 1977. Petitioners contended that respondent had failed to address their son's reading and writing deficits over an extended period of time, which had frustrated the boy and had led to his increasingly frequent misbehavior in school. They asked the hearing officer to find that respondent had not offered the boy an appropriate educational program for the 1996-97 school year, and to order respondent to pay for their son's placement in the Gow School for the 1996-97

school year. Respondent contended that it had offered to provide an appropriate educational program to the boy. While acknowledging that the boy had been disciplined for various infractions while in its middle school, respondent asserted that the boy's poor behavior was not a manifestation of his learning disability.

In the decision which he rendered on July 7, 1997, the hearing officer found that the boy had benefited educationally from the instructional program of the DeWitt Middle School, and that the boy's poor grades resulted from his failure to do his homework. He noted that many of the disciplinary incidents in which the boy had been involved had occurred outside of class, and he rejected petitioners' argument that their son's behavior problems were related to his learning disability. With regard to the educational program set forth in the boy's IEP for the 1996-97 school year in the ninth grade of respondent's high school, the hearing officer concluded that respondent had met its burden of proving that it had offered the boy an appropriate educational program. He noted that 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 considerations support the parents' claim (School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359 [1985]). 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) 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]). However, he denied petitioners' claim for public funding of their son's placement in the Gow School because the board of education had met its burden of proof on the first of the three Burlington criteria for tuition reimbursement.

Petitioners contend that the hearing officer erred in denying their request to allow the employees of the Gow School to testify by telephone at the hearing. The record reveals that at the beginning of the second day of the hearing, petitioners' attorney indicated that he intended to have one of the boy's teachers at the Gow School testify by telephone, when it was petitioners' turn to present their case. The hearing officer advised petitioners' attorney to work it out with respondent's attorney. He indicated that he doubted whether a witness could testify by telephone without the consent of all parties and the hearing officer (February 4, 1997 Transcript, pages 211-212). Respondent's attorney indicated that he would not consent to having the teacher testify by telephone, and the hearing officer stated that "... my inclination would not be to allow testimony by telephone over objection" (Ibid., page 212). The issue was not discussed on the third and final day of the hearing when petitioners presented their case. Although there is nothing inherently unreliable about the testimony of a witness who testifies by telephone. I am aware of the fact that each party at a hearing has the right to "confront" all witnesses (see 34 CFR 300.508 [a][2]; 8 NYCRR 200.5 [c][9]). Therefore, I am unable to conclude that the hearing officer violated petitioners' rights, notwithstanding my own belief that it would have been better to practice to have accommodated petitioners' request.

I note that at the hearing on February 4, 1997, petitioners' attorney asked the hearing

officer to recuse himself from the hearing, apparently in response to an evidentiary ruling by the hearing officer (February 4, 1997 Transcript, page 243). The recusal motion was made after the hearing officer directed petitioners' attorney to desist from cross-examining one of respondent's school psychologist about the relationship, if any, between the boy's disability and his behavioral difficulties. I find that petitioners' attorney was afforded an ample opportunity to question the witness. An impartial hearing officer may limit irrelevant and unduly repetitious evidence and testimony (Application of a Child with a Disability, Appeal No. 94-4; Application of a Child with a Disability, Appeal No. 96-51). In this instance, the witness was extensively questioned by petitioners' attorney about the basis for the CSE's determination that there was no nexus between the boy's disability and his behavior.

Petitioners contend that they had no alternative but to unilaterally place their son in the Gow School because they would otherwise risk having the boy fall so far behind that he could never become a responsible productive member of the community. They challenge various factual findings by the hearing officer, and they contend that he erred by relying upon the testimony of a school psychologist who had never tested their son, rather than accepting the private psychologist's testimony about the boy's lack of progress in respondent's middle school. They assert that the educational program which the CSE had recommended for their son contemplated an amount of classes which the boy could not complete during the school day. In addition, they assert that the CSE failed to make adequate provision for their son's instruction in reading, or to provide the "rigidity" which would insure that the boy remained on task and completed his assignments.

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).

This boy's IEP included both achievement test results and narrative reports by his eighth grade teachers describing his performance and his problems. His learning characteristics, social development and physical development were described. Although the only management need listed on the IEP referred to his need to take medication, I find that the narrative material adequately described those needs. The boy's IEP annual goals were related to improving his reading, writing, and study skills. The short-term objectives for his annual goals in reading and

writing explicitly referred to developing his phonics skills, which was directly related to the Orton-Gillingham training which he had received in respondent's middle school. The objectives for the annual goal to improve his study skills involved setting priorities for his school work, managing his time, keeping track of assignments, and properly organizing his work. I find that the boy's annual goals and objectives were directly related to his special education needs. However, I must note that the IEP did not include a description of the evaluative procedures and criteria to be used to ascertain whether the boy was achieving his goals and objectives during the 1996-97 school year (cf. 34 CFR 300.346 [a][3]; 8 NYCRR 200.4 [c][2][iii]). That omission does not, in my opinion, warrant a determination that the educational program which respondent offered was inappropriate. However, respondent must ensure in the future that this boy's IEP includes a description of the evaluative procedures and objective criteria to measure the boy's progress.

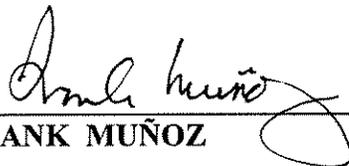
The remaining issue is whether the special education services which respondent offered were reasonably calculated to provide educational benefit to this boy during the 1996-97 school year. As noted above, this boy's primary special education needs involved deficits in his reading and writing skills, as well as his need for assistance in completing homework assignments. The program offered by respondent included one period per day of specialized reading instruction. Although no teacher had been formally designated to provide that instruction, I credit the testimony of Mr. James Scarpulla, who was trained in the Orton-Gillingham methodology, that his schedule could have been arranged for him to instruct petitioners' son. I further find that the one period per day of special education instruction in English offered by respondent would have been adequate to address the boy's writing needs. The record reveals that petitioners' son is capable of meeting regular education curriculum requirements with appropriate assistance, as evidenced by his seventh and eighth grade report cards. I find that supplementary instruction by a resource room teacher would have been an appropriate special education service to assist this boy in achieving his annual goal and short-term instruction objectives related to his study skills. Although the CSE had indicated on the boy's IEP that home tutoring was to be provided only for the first 30 days of school, the CSE chairperson testified that the CSE was prepared to review the IEP in 30 school days to insure that the boy was receiving an education (March 11, 1997 Transcript, page 108). While I have considered the private psychologist's opinion that this service would have been less satisfactory than a two-hour evening study hall in the Gow School, I am not persuaded by that opinion.

Respondent was required to offer an educational placement which was in the least restrictive environment. I have carefully considered the testimony by the private psychologist, who was petitioners' expert witness at the hearing. I note that he testified that he "... would be hard put to talk about placement beyond the public school program, based on just the fact of his [the boy's] learning disability" (January 9, 1997 Transcript, page 59). Nevertheless, the psychologist contended that the boy had developed such a level of anxiety and had doubts about his self-worth that he needed something beyond what could be provided in a public school. I must note that in the reports of his evaluation of the boy in January, 1995 (Exhibit D-9) and in March, 1996 [Exhibit P-2), the private psychologist did not refer to the child's anxiety or lack of

self-worth. In Exhibit D-9, the private psychologist suggested a residential placement for the child because the boy had allegedly not made academic progress in respondent's educational program. Although the boy reportedly received private counseling for approximately one year while in the middle school (March 11, 1997 Transcript, page 138), there is insufficient information in the record about the reasons for and the outcome of that counseling. Additionally, I must note that the boy's behavior at home as described by his mother at the hearing appears to have been quite different from his behavior in school. I have also considered petitioners' contention throughout this proceeding that their son's numerous infractions of respondent's discipline code while in the middle school were a reflection of his increased frustration with his academic performance. Having reviewed the various discipline reports (Exhibit D-17), as well as the testimony and written reports by the boy's seventh and eighth grade teachers, I am not persuaded by petitioners' contention, nor is it a basis for placing the boy in the restrictive placement sought by petitioner. Finally, I note that even in that placement, the boy continued to evidence some of the behavior which had impaired his academic performance in the middle school, i.e., being unprepared for class and not getting his homework done on time (Exhibit D-12).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
February 13, 1998**

  
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**FRANK MUÑOZ**