



No. 97-66

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

**Application of the BOARD OF EDUCATION OF THE CITY  
SCHOOL DISTRICT OF THE CITY OF BUFFALO for  
review of a determination of a hearing officer relating to the  
provision of educational services to a child with a disability**

**Appearances:**

Hon. Michael B. Risman, Acting Corporation Counsel, attorney for petitioner, Rosemary Gavigan Bis, Esq., and Carmen A. Gentile, Esq., of counsel  
Bouvier and O'Connor, attorneys for respondent, Bruce A. Goldstein, Esq., of counsel

**DECISION**

Petitioner, the Board of Education of the City School District of the City of Buffalo, appeals from an impartial hearing officer's directive that petitioner not assign the teacher who had served as a consultant teacher for respondent's son during the 1996-97 school year to be the boy's consultant teacher for the 1997-98 school year. It further appeals from the hearing officer's directive that petitioner's committee on special education (CSE) amend the boy's individualized education program (IEP) to specify how much of the consultant teacher's time should be spent performing indirect consultant teacher services. The appeal must be dismissed.

Respondent's son, who is thirteen years old, has been classified as multiply disabled. The boy is of average intelligence, but he has a learning disability with regard to his auditory short-term memory, visual short-term memory and processing speed. When evaluated in May, 1996 while repeating the fourth grade, respondent's son was found to have limited word attack and reading comprehension skills, as well as a limited sight vocabulary. He continued to have low reading skills when tested in January, 1997 (Exhibit 23). His writing skills were reported to be at the second grade level. In addition to his learning disability, the boy has deficits in his speech and language skills. His classification as multiply disabled is not disputed in this proceeding.

Respondent's son began to receive special education service in the summer of 1990, when he was a preschooler in the private Language Development Program (LDP). In September, 1990, the boy's parents placed him in a regular education Montessori kindergarten class in the Nardin Academy, where he reportedly received speech/language therapy. At or near the end of the 1990-1991 school year, the child's teachers referred him to petitioner's CSE because they were concerned about his slow learning rate. The CSE reportedly recommended that the boy be classified as learning disabled and be placed in a 12:1 self-contained special education class, and that he continue to receive speech/language therapy. The boy's parents disagreed with the CSE's recommendation. In March, 1992, an impartial hearing officer reportedly ruled that the boy should be classified as multiply disabled, and that the boy had been appropriately placed by his parents in the LDP. Respondent's son remained in the LDP for the following school year. For the 1993-94 school year, he was enrolled in a third grade, 15:1 inclusion class in petitioner's Dr. C. R. Drew Science Magnet School. He reportedly received in-school counseling during that school year. The boy continued to attend that school for the fourth grade during the 1994-95 school year.

In September, 1995, the boy returned to Nardin Academy, where he repeated the fourth grade. During the 1995-96 school year, he received remedial reading instruction at the Buffalo State Literacy Center. A school psychologist who evaluated the boy in May, 1996, noted that he had made academic progress during the year since his last testing (Exhibit 1). On the Woodcock Johnson Tests of Academic Achievement, the boy achieved grade equivalent scores of 3.8 for broad reading, 4.0 for broad mathematics, 3.1 for broad written language, and 5.4 for broad knowledge. The psychologist also observed the boy in his classroom, and reported that he was quiet, but had manifested inconsistent attention to task. She noted in her report which was prepared for the child's triennial evaluation that the child's parents had requested that he receive consultant teacher services and assistive technology, i.e., a computer, for him. The Nardin Academy requested that a full-time aide be assigned to the boy because of his deficits in organization, attention and memory. However, the school psychologist opined that the nature of the boy's disabilities did not warrant the assignment of an aide. The Nardin Academy also requested that the boy have an occupational therapy evaluation, which was performed by an evaluator who concluded that the boy did not require occupational therapy.

The boy was assessed to determine his need for assistive technology in May, 1996. The evaluators reported that the boy displayed weaknesses in spelling, punctuation, and handwriting, and that he had a poor memory for recently-learned strategies to improve his keyboarding skills. They recommended that respondent's son have access to a computer with appropriate software for academic subjects, such as spelling and mathematics, but they concluded that he could complete his homework assignments without assistive technology equipment.

The CSE developed the boy's IEP for the 1996-97 school year at a meeting which was held on May 30, 1996. It recommended that the boy receive 450 minutes per week of consultant teacher services to address the boy's deficits in mathematics and writing, but it did not specify whether those services were to be direct (see 8 NYCRR 200.1 [1] [1]), or indirect (see 8 NYCRR 200.1 [1] [2]). The CSE also recommended that respondent's son receive individual speech/language therapy for 30 minutes once per week, and group speech/language therapy for 30 minutes twice per week. The boy's IEP included the testing modifications of having

questions and directions read to him, taking tests in a separate location with extended time limits, and having his answers to test questions recorded "in any manner". The IEP also provided that he should have access to an electronic speller, calculator, tape recorder, taped textbooks, and a computer, and that he should receive preferential seating in the classroom to minimize his distractibility. The boy's IEP annual goals included improving his mathematical computation, writing, reading, and keyboarding skills, as well as separate goals relating to his speech/language skills.

In September, 1996, the boy returned to the Nardin Academy, where he was placed in a fifth grade class. Petitioner assigned a certified special education teacher to serve as a consultant teacher for respondent's son and one other student in the Nardin Academy. He also provided consultant teacher services to students in two other schools during the school day. Since this decision will be published, the consultant teacher will be referred to as "Mr. X." At the hearing in this proceeding, Mr. X testified that he provided direct consultant teacher services to the boy for most of the time he served the boy during the first semester of the 1996-97 school year. He further testified that he saw the boy each day during the second period of the school day, when the boy was assigned to be with the Nardin Academy's student services coordinator, as well as during the third period, when Mr. X provided instruction to the boy in his language arts class. In addition, Mr. X testified that later in the school year he provided individual and small group instruction to respondent's son in his reading class at the end of the school day, in lieu of working with the boy during second period. He also monitored the boy's progress in his mathematics, social studies and science classes.

On January 21, 1997, the CSE recommended that, effective March 4, 1997, the boy's consultant teacher services be increased to 650 minutes per week. Mr. X testified that he and the staff of the Nardin Academy had recommended that the amount of his services be increased so that he could have more contact time with the boy, who was apparently removed from a fourth period religion class to meet with Mr. X. Mr. X testified that he worked with the boy to finish his language arts assignments, or remediate his skills in mathematics, science, and social studies during this additional period of time. Although the boy's IEP had indicated that the consultant teacher services would address his deficits in mathematics and written language, Mr. X testified that he was in the boy's mathematics class on only eight occasions, because of a scheduling conflict with Mr. X's other consultant teacher assignment in the Nardin Academy.

In March, 1997, Mr. X underwent surgery. A substitute teacher was reportedly not assigned until after the boy's mother notified petitioner that her son was not receiving his consultant teacher services, approximately one week later. On or about March 12, 1997, a substitute teacher began working with the boy, and continued to do so until Mr. X briefly returned to work in April, 1997. On April 16, 1997, Mr. X went on sick leave for the remainder of the 1996-97 school year. A second substitute teacher briefly worked with the boy, but she was removed from this assignment on May 2, 1997 because of concerns about her performance. A third substitute teacher was assigned the task of providing consultant teacher services on May 5, 1997, and that teacher continued to teach the boy for the remainder of the school year. However, that teacher was apparently not certified to provide special education.

By letter dated April 29, 1997, the boy's mother indicated to petitioner's Assistant Superintendent of Schools that she had concerns about Mr. X's performance, and she requested that he be replaced by another teacher (Exhibit SD-3). In a letter to the CSE, which was dated June 2, 1997, respondent's attorney requested that an impartial hearing be held because of petitioner's alleged failure to provide a free appropriate public education to the boy, including the failure to implement his IEP.

The hearing began on July 3, 1997, and it ended on July 11, 1997. Mr. X's supervisor testified that in September, 1996, she became aware that the private school had concerns about the consultant teacher's role, and that she met with the student service coordinator of the Nardin Academy to discuss those concerns. The supervisor also arranged for in-service instruction to be provided by the local Special Education Training Resource Center to the Nardin staff. She further testified that the boy's mother had complained to her about Mr. X's services in January, 1997, but that she had heard nothing more from the mother until she received the mother's April 29, 1997 letter requesting that Mr. X be reassigned. The student services coordinator for the Nardin Academy testified that she did indeed have concerns about Mr. X's services, based upon the comments which she had received from the boy's teachers, as well as her own observation of Mr. X working with the boy (July 11, 1977 Transcript, pgs. 98-99). She asked to have him replaced, but Mr. X's supervisor declined to do so. The boy's mathematics and reading teachers at the Nardin Academy also testified at the hearing. They testified that their dealings with Mr. X had been less frequent and fruitful than had been indicated by Mr. X in his testimony.

In his decision which was rendered on August 17, 1997, the hearing officer noted that there was conflicting evidence about the amount and nature of the consultant teacher services which Mr. X provided to respondent's son during the 1996-97 school year. However, he observed that neither the parent nor the private school had logged or documented Mr. X's alleged failure to provide services. The hearing officer found that the boy's IEP had been generally followed, and that the boy had received significant educational benefit from Mr. X's services, in view of the fact that the boy had achieved passing grades in each of his fifth grade subjects. He did find that the board of education should have provided a qualified substitute for Mr. X during his illness related absences in the Spring of 1997, and he ordered petitioner to provide 1000 minutes of direct consultant teacher services to the boy, as compensation. The hearing officer ordered petitioner's CSE to conduct an annual review of the child prior to October 1, 1997, because its January 21, 1997 meeting had been denominated as an annual review, but it had not in fact been an annual review of the child. He also ordered the CSE to amend the boy's IEP on or before October 1, 1997, to specify how much of the consultant teacher's time would be spent providing indirect consultant teacher services to the boy. The hearing officer ordered petitioner not to assign Mr. X to be the child's consultant teacher for the 1997-98 school year because of the poor relationship between the Nardin Academy, the boy's parents, and Mr. X.

The board of education challenges two portions of the hearing officer's decision. It contends that the Regulations of the Commissioner of Education do not require a CSE to determine how much of a consultant teacher's services shall be indirect and how much shall be direct, but instead leave that determination to the consultant teacher. Petitioner argues that the hearing officer lacked authority to require a CSE to specify the amount of direct and/or indirect consultant teacher services to be provided to the student.

Federal regulation requires that each child's IEP include a "statement of the specific special education and related services to be provided to the child" (34 CFR 300.346 [a][3]). The United States Department of Education has opined that:

"...the amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP. Changes in the amount of services listed in the IEP cannot be made without holding another IEP meeting. However, as long as there is no change in the overall amount, some adjustments in scheduling of the services should be possible (based on the professional judgement of the service provider) without holding another IEP meeting." (34 CFR Part 300, Appendix C, Question 51).

The Regulations of the Commissioner of Education provide, in material part, that the CSE's recommendation, which must be in the form of an IEP, shall indicate the amount of time per day the student will receive special education and related services (8 NYCRR 200.4 [c] [2] [vi]). The regulations define consultant teacher services as follows:

"Consultant teacher services means direct and/or indirect services, as defined in this subdivision, provided to a student with a disability who attends regular education classes on a full-time basis and/or to such student's regular education teachers.

- (1) Direct consultant teacher services means specially designed, individualized, or group instruction provided by certified special education teacher pursuant to subdivision (II) of this section, to a student with a disability to aid such student to benefit from the student's regular education classes.
- (2) Indirect consultant teacher services means consultation provided by a certified special education teacher pursuant to subdivision (II) of this section to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes (8 NYCRR 200.1 [1])."

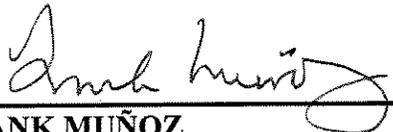
It is a CSE's duty to determine the specific special educational services which a child requires in order to receive a free appropriate public education. Although it may be appropriate in some cases for a child to receive both direct and indirect consultant teacher services, there is a significant difference between these services, in terms of the specially designed instruction to be given to the child by a certified special education teacher. After the CSE has prepared a child's annual goals and short-term instructional objectives, it must determine the amount of special education services, including the amount of primary special education instruction, which the child will need in order to have a reasonable opportunity to achieve his or her goals and objectives. I find that petitioner's argument that its CSE is not required to specify the amount of direct and indirect consultant teacher services to be provided to a child with a disability is

without merit (Application of the Board of Education of the Enlarged City School District of the City of Watervliet, Appeal No. 92-14; Application of a Child with a Disability, Appeal No. 97-5). Therefore, the hearing officer did not exceed his jurisdiction by requiring petitioner's CSE to specify the amount of indirect consultant teacher services to be provided to respondent's son.

Petitioner also challenges the hearing officer's directive that it assign someone other than Mr. X to be the boy's consultant teacher for the 1997-98 school year. Initially, I note that petitioner indicates in its petition that Mr. X asked for and received a transfer. Consequently, he had a new assignment for the 1997-98 school year (Paragraph 9 of the petition). The State Review Officer is not required to determine issues which are no longer in controversy, or make a determination which will have no impact on the parties (Application of a Child Suspected of Having a Disability, Appeal No. 91-45; Application of a Child Suspected of Having a Disability, Appeal No. 95-52; Application of a Child with a Disability, Appeal No. 97-23). In view of the fact that Mr. X was not assigned to provide consultant teacher services to respondent's son, petitioner's request that I determine whether the hearing officer exceeded his jurisdiction constitutes a request for an advisory opinion. I must decline to grant that request.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
July 17, 1998

  
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FRANK MUÑOZ