DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAI'I

In the Matter of by and through his Mother, Petitioners, vs. DEPARTMENT OF EDUCATION, STATE OF HAWAI'I, Respondent.	DOE-2002-023 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT

This matter having come on for hearing before the undersigned Hearings Officer on February 25, 2003; [redacted], Esq. appearing for Petitioners , by and through his Mother, ("Petitioners"); and Aaron H. Schulaner, Esq. appearing for Respondent Department of Education, State of Hawaii ("Respondent"); and after due consideration of the motion, memoranda and affidavits filed by the parties and their argument in light of the entire record in this matter, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law and Order.

I. FINDINGS OF FACT.

1. s born on September 7, 1990. In 1994, was diagnosed with .

2. attended public school until 1999.

3. In May 1999, parents enrolled , and requested that Respondent pay ition at

4. In September 1999, Respondent filed a hearing request over placement at . Respondent subsequently withdrew its request.

5. On October 25, 1999, Respondent convened an Individualized Education Plan ("IEP") meeting to discuss educational program. At that meeting, Respondent offered to pay for s tuition at . This agreement was written in the IEP.

6. has been attending since 1999. However, in March 2001, Respondent stopped paying for education at

7. An IEP meeting was convened on November 9, 2000 after which parents received a copy of the completed draft IEP proposed by Respondent.

8. In March 2001, Respondent was provided with a letter dated March 20, 2001 from Dr , one o eating physicians. In his letter, Dr. stated that, "[c]onsidering this young man's medical history, I feel that wherever he attends school, it is a medical necessity that when is on campus, there should be licensed medical personnel, such as an LPN or RN, on site to assist him should the need arise."

9. By letter dated August 28, 2001, Respondent received a letter from , a case manager for the Department of Health, Developmental Disabilities Division. In her letter stated: "Through the assessment of s needs and through the developmental of dividualized Service Plan (ISP) with the input of his circle of support, his need for waiver of service has been determined as skilled nursing. currently receives skilled nursing services, 2 days/week, 3 hours/day."

10. On November 10, 2001, an independent evaluation of was conducted by . In his report of the same date, opined that "[a]dequately trained personnel need to be present to recognize and be able to treat an anaphylactic condition. Additionally, they need to be able to recognize any side effects of treatments (such as a subcutaneous epinephrine, since there is a significant potential for hypertension to cause difficulties to his arteries and vascular system)."

11. IEP meetings were held on January 11, 2002, January 30, 2002, and March 5, 2002. However, s parents were not present at those meetings.

12. An IEP meeting was held on November 4, 2002. During that meeting, Respondent rejected s parents request for placement of at

13. teacher at , Mr. , was not invited to attend any of the IEP meetings between February 1999 and the present.

II. CONCLUSIONS OF LAW.

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett, 477 U.S. 3 (1986).* Summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *Celotex Corp., supra.* "If the party moving for summary judgment meets its initial burden of identifying . . . the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact . . ., the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." *T. K Elec. Serv. K Pacific Elec. Contractors Ass'n., 809 F.2d 626,630 (9th Cir. 1987).* Rather, the nonmoving party is required to set forth by affidavit specific facts showing that there is a genuine issue for trial. *T. W: Elec. Sew., 809 F.2d at 630 (9th Cir. 1987).* In that regard, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Ed. v. Boeing Co., 585 F.2d 946,952 (9th Cir.1978).* Moreover, the United States Supreme Court has stated that "[w]hen the moving party has carried its burden . . . , its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,586 (1966).*

When parents challenge the appropriateness of a program or placement offered to their disabled child under the Individuals with Disabilities Education Act

("IDEA"), there is a twofold inquiry. First, has the state complied with the procedural requirements set forth in the IDEA? And second, is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits?" *Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U. S. 176 (1982).* Respondent bears the burden of proving compliance with the IDEA at the administrative hearing. *Seattle School Dist. No. 1 v. B.S., 82 F.3d 1493 (9th Cir. 1996); Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994).*

A. Procedural Violations.

Petitioners complain that Respondent committed a number of procedural violations of the IDEA that resulted in a denial of a Free Appropriate Public Education ("FAPE") to Gaston. Under the IDEA, procedural flaws do not automatically require a finding of a denial of FAPE. However, procedural inadequacies that result in the loss of educational opportunity or seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. *W.G. v. Board of Trustees of Target Range School Dist., 960 F.2d 1479 (9th Cir. 1992); Amanda J ex rel. Annette J. v. Clark County School, 267 F.3d 877 (9th Cir. 2001); Roland M. v. Concord Sch. Comm, 910 F.2d 983 (1st Cir. 1990).*

1. Attendance of [illegible] Teacher.

Petitioners assert that Respondent did not ensure the attendance of [illegible], teacher at [illegible], at various IEP meetings. According to the evidence presented by Petitioners, [illegible] was not invited to and did not attend the November 9, 2000 or the February 1, 2001 meetings. Respondent, on the other hand, does not dispute that [illegible] was not in attendance at those meetings. Rather, Respondent argues that it was nevertheless in compliance with the IDEA because [illegible], a psychologist from [illegible] did attend those meetings.

The IDEA requires that the teacher "of" the child be included in the child's IEP team. 34 C.F.R. §300.344. In *Shapiro v. Paradise Valley Unified School District, ___ F.3d ___, (9th Cir. 2003),* the parents of a hearing-impaired child sued the school for its failure, *inter alia,* to have the actual teacher from the private school at the various IEP meetings. In reviewing the parents' claim that the "teacher" of the child, and

not some other employee, was required to attend the IEP meetings under the federal regulations, the court stated that:

> The [school district] argues that the IDEA, 20 U.S.C. § 1401(a)(20)[1], requires "a teacher" to participate in the development of an IEP and that by including "two qualified and credentialed teachers of the hearing impaired" at the June 8 IEP meeting, it was in compliance with the Act. According to §1401(a)(20), "*the* teacher," not "a teacher," must be included in the development of the IEP. The [school district's] interpretation of this statutory provision conveys too broad a meaning to the word "teacher," a meaning inconsistent with the statute.
>
> The implementing regulation for §1401(a)(20) helps clarify what is meant by "the teacher":
>
> > In deciding which teacher will participate in meetings on a child's IEP, the agency may wish to consider the following possibilities: (a) For a child with a disability who is receiving special education, the teacher could be the child's special education teacher. If the child's disability is a speech impairment, the teacher could be the speech-language pathologist; (b) For a child with a disability who is being considered for placement in special education, the teacher could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.
>
> * * * *

34 C.F.R. §300.344, Note 1.

Shapiro v. Paradise Valley Unified School District, __ F.3d __ (9th Cir. 2003).

The Court rejected the school's argument that the "teacher" could be any employee of the school:

> Because Dorie had been receiving special education services at CID at the time of the June 8 IEP, subdivision (a) applies here. Under subdivision (a), either Dorie's special education teacher or her speech-language pathologist should have been present at the IEP meeting. Dorie

[1] *Shapiro* involved an educational placement for the 1994-95 school year. Thus, the statutory and administrative provisions of the IDEA in effect at that time were applied.

> received special education at CID, not in the [school district], so, contrary to the [school district's] assertion, the only teachers who met the subdivision (a) criteria were her CID instructors.

Shapiro at page 1347.

Shapiro makes clear the requirement that *teacher at* must be included in the development of the IEP. Notwithstanding that, the undisputed evidence established that Respondent failed to have at the meetings. Moreover, Respondent has not presented any evidence to explain absence from those meetings or to otherwise raise a genuine factual issue in that regard.

2. Parental Participation.

The importance of parental participation in the IEP process is clear. 20 U.S.C. §1401(a)(20); 34 C.F.R. §300.344(a)(3). In *Amanda J. v. Clark County Sch. Dist., 267 F.3d 877 (9th Cir. 2001),* the court concluded that procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. And in *Board of Education v. Rowley, 458 U.S. 176, 205-06 (1982),* the court observed:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

Id. at 205-06 (1982)(internal citations omitted).

In *Shapiro, supra,* the school district argued that despite the IDEA's emphasis on parental participation in the IEP formulation process, the IDEA does not require parents to attend every IEP meeting:

> [The school district] relies on 34 C.F.R. §300.345(d) for this proposition. This regulation states that "[a] meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. According to the [school district], because Dorie's mother chose not to attend the June 8 IEP meeting but had a sufficient opportunity to do so, it was acceptable

to hold the meeting without her. The [school district] misinterprets §300.345.

Under the regulation, before it can hold an IEP meeting without a child's parents, the school district must document phone calls, correspondence, and visits to the parents demonstrating attempts to reach a mutually agreed upon place and time for the meeting. 34 C.F.R. §300.345(d)(1)-(3). Here, the Shapiros asked to reschedule the June 8 IEP meeting; they did not refuse to attend. The [school district's] reliance on §300.345 therefore misses the mark. The school district simply prioritized its representatives' schedules over that of Dorie's parents.

The [school district] also contends that [redacted] parents contributed adequately to the June 8 IEP because the [school district] mailed the IEP to them for their approval and they participated in prior IEP meetings. We disagree. The IDEA "imposes upon the school district the duty to conduct a meaningful meeting *with* the appropriate parties." *W.G., 960 F.2d at 1485 (emphasis added)*. We have made clear that those individuals, like Dorie's parents, "who have first-hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP *creation* process." *Amanda J., 267 F.3d at 891 (emphasis added)*. After-the-fact parental involvement is not enough. Nor does the [school district's] inclusion of the Shapiros in certain parts of the process excuse the district's failure to include the Shapiros in the June 8 IEP meeting; involvement in the "creation process" requires the [school district] to include the Shapiros unless they affirmatively refused to attend. By proceeding with the June 8 IEP meeting without Dorie's parents, the [school district] violated the IDEA.

Shapiro at pages 1348-1350.

Petitioners contend that Respondent proceeded with at least three IEP meetings without any parental input or participation. In support of this assertion, Petitioners presented the attendance sheets for the January 11, 2002, January 30, 2002, and March 5, 2002 IEP meetings. parents are not listed on any of those sheets. ___ s parents' absence from those meetings is not disputed by Respondent. Respondent instead contends that the parents were invited to every IEP meeting; that they were encouraged to participate; and that the parents elected not to

attend the March 5, 2002 meeting. Respondent apparently takes the position that "the DOE may go forward with an IEP meeting if it can be documented that the parents were given notice of the meeting." Such a conclusion, however, flies directly in the face of *Shapiro*.

With respect to the March 5, 2002 meeting, Petitioners presented evidence that on February 25, 2002, they wrote to Respondent and stated:

> I am responding to your fax of 20 February 2002. I am not yet able to commit to an IEP date for several reasons:
>
> * I have not yet received conference notes from the previous IEP meeting
>
> * I have not been able to confirm availability of
>
> * There has not been sufficient time for physicians to return the forms that were just released to me.
>
> Also, I am requesting that no IEP meeting be held for until I am able to prepare for it. Please offer additional dates several weeks later so that you have time to provide the needed information and we have time to receive the forms from physicians.

As such, Respondent was, at a minimum, obligated to document its attempts to reach a mutually agreed upon place and time for each of the three meetings. Notwithstanding that, the record presented is completely devoid of any evidence of (1) any meaningful effort by Respondent to reach a mutually agreeable date for the meetings or (2) an inability by Respondent to convince the parents that they should attend the meetings. In sum, no evidence was presented to even suggest that Respondent made any attempt to have parents attend the three meetings or that the parents otherwise refused to attend those meetings.[2]

Based on the foregoing, and viewing the evidence in light most favorable to Respondent, the Hearings Officer must nevertheless conclude that by proceeding with the November 9, 2000 and the February 1, 2001 meetings withou teacher in attendance, and the January 11, 2002, January 30, 2002, and March 5, 2002 meetings

[2] Respondent attached copies of correspondence purportedly sent to Petitioners. However, none of those documents were properly authenticated. Moreover, only one of those letters appeared to relate to the meetings in question (the January 11, 2002 meeting).

without the parents in attendance, Respondent violated 34 C.F.R. §§300.344 and 300.345. The Hearings Officer further concludes that these violations resulted in the loss of educational opportunity for In sum, Respondent's failure to include the persons most knowledgeable about s educational needs rendered the IEP defective resulting in lost educational opportunity for [3]

B. Substantive Violation - Nursing Services.

The standard for determining whether Respondent substantively offered FAPE involves the following three factors: whether the program was designed to address the student's unique needs; whether the program was reasonably calculated to provide with educational benefits; and whether the program conformed to the IEP. 20 U.S.C. §1400 et seq. FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, are provided in the least restrictive environment and meets the state's educational standards, and conforms to the child's IEP. 20 U.S.C. §1401(8); Hawaii Administrative Rules §8-56-2.

Petitioners complain that the IEP did not provide for nursing services to in the event of an emergency. According to Petitioners, such services constitute "related services" and as such, are required under the IDEA. 20 U.S.C. §1414(d)(1)(A)(iii); 34 C.F.R. §300.24(a); 34 C.F.R. §300.24(b)(12).

In support of this claim, Petitioners presented the opinions of Drs. and both of whom supported the need for nursing services for Moreover, although Respondent argued that "[i]t is a question of material fact as to

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[3] The importance of the ' participation in the IEP meetings was highlighted by Dr. Thomas E. Gallagher. In a November 10, 2001 evaluation report, Dr. Gallagher commented:

* * * *

> 2. The parents are very well educated and very involved/bonded to They have longitudinal experience with his skills, learning strategies, strengths, and motivators. Their expertise with Gaston is invaluable.
>
> 3. It is imperative that their concerns be validated and respected. To do otherwise will only alienate the system and introduce mistrust and animosity (something that certainly appears to have already happened).

whether Petitioner needed nursing services", it presented no evidence to refute the need for such services or otherwise raise a genuine issue of material fact for hearing.[4] Based on these considerations, the Hearings Officer concludes that there are no genuine issues of material fact on this issue and that the proposed IEP was not reasonably calculated to enable to receive educational benefits as a matter of law. The Hearings Officer further concludes that Respondent's procedural and substantive violations have resulted in a denial of FAPE to

III. ORDER.

Based upon the foregoing findings of fact and conclusions of law, the Hearings Officer orders as follows:

1. Petitioners' Motion for Summary Judgment is hereby granted; and

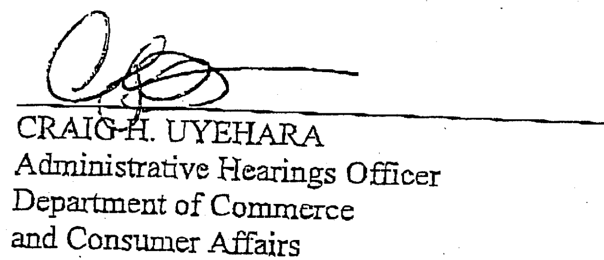
2. Unless otherwise ordered by the Hearings Officer, the hearing will be limited to addressing the following issues:

(a) whether continued placement at is appropriate under the circumstances;

(b) whether Petitioners are entitled to have all educational expenses and expenses for related services as a result of placement at from March 1, 2001 paid by Respondent; and

(c) whether Petitioners are entitled to reimbursement for related transportation costs.

DATED at Honolulu, Hawaii: MAR 21 2003.



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[4] Respondent does not contend that nursing services are not "related services" as defined under the IDEA and its implementing regulations. Rather, Respondent defends by asserting that, "[i]t is a question of material fact as to whether Petitioner needed nursing services."