



DEPT. OF COMMERCE AND CONSUMER AFFAIRS

2003 MAR 14 P 4: 05

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS HEARINGS OFFICE
STATE OF HAWAII

In the Matter of

_____ by and through her
Mother, _____
Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Respondent.

DOE-2003-001

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION**

I. CHRONOLOGY OF CASE

By letter dated December 27, 2002, _____, mother of _____ and hereinafter collectively referred to as "Petitioners"), informed the Department of Education ("Respondent") that _____ disagreed with the individualized education program ("IEP") that had been developed for _____.

On December 31, 2002, Respondent received _____ December 27, 2002 letter, and Respondent processed _____ letter as a request for a due process hearing under Hawaii Administrative Rules ("HAR") Title 8, Chapter 53. Petitioners' request for a due process hearing was duly transmitted to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs.

On January 22, 2003, the pre-hearing conference in the above-captioned matter was conducted by the undersigned Hearings Officer. Petitioners were represented by _____ Esq., and Respondent was represented by _____ Esq. At the pre-hearing

conference, Respondent requested that the hearing be rescheduled because of scheduling difficulties, and with the consent of the Petitioners the hearing was rescheduled from February 5, 2003, to February 18, 2003. Additionally, the parties also requested an opportunity to submit post-hearing briefs. Consequently, the parties requested that the forty-five day period specified by HAR §8-56-77(a), be extended from February 14, 2003, to March 11, 2003.

On January 23, 2003, Petitioners, by and through their attorney [REDACTED] filed Petitioners' More Definite Statement.

On February 18, 2003, the hearing in the above-captioned matter was conducted by the undersigned Hearings Officer. Petitioners were represented by their attorney [REDACTED] and Respondent was represented by its attorney [REDACTED] Esq. Petitioner [REDACTED] was present during the latter portion of the hearing.

On February 25, 2003, the parties filed their respective post-hearing briefs.

On March 11, 2003, the parties agreed to extend the forty-five day period specified by HAR §8-56-77(a), from March 11, 2003, to March 14, 2003.

II. ISSUES PRESENTED

The issues to be decided in the present matter, as identified in Petitioners' More Definite Statement dated January 22, 2003, are as follows:

1. Whether [REDACTED] placement in special education classes for math and language arts (academics) for 900 minutes per week constituted a violation of the least restrictive environment provision of the Individuals with Disabilities Education Act ("IDEA").
2. Whether [REDACTED] IEP team properly determined that [REDACTED] did not qualify for extended school year services at the December 2002 IEP meeting, and if not, whether [REDACTED] was denied educational opportunities.
3. Whether the benchmarks in [REDACTED] December 10, 2002 IEP were measurable and sufficient.
4. Whether the IEP team was required to identify a specific reading methodology in [REDACTED] December 10, 2002 IEP.

III. FINDINGS OF FACT

1. In January 2001, [redacted] was found to be eligible to receive special education services. [redacted] received special education services in regular education classes through the Fall semester of the 2001-2002 school year.

2. At the end of the Fall 2001 semester, [redacted] teachers felt that [redacted] was not progressing satisfactorily in regular education, and with the agreement of [redacted] [redacted] was placed in Special Education classes.

3. [redacted] subsequently reacted negatively to the special education classes, and the IEP Team with the agreement of [redacted] decided that a home-hospital placement for [redacted] would be appropriate.

4. [redacted] remained in the home-hospital placement for approximately two months, and during that time, no functional behavioral assessment was ever completed.

5. On March 11, 2002, because [redacted] was not satisfied with the home-hospital placement for [redacted] enrolled [redacted] at [redacted].

6. On March 20, 2002, [redacted] filed a request for a due process hearing because [redacted] believed that [redacted] placement at that time was overly restrictive.

7. On or about April 3, 2002, an IEP meeting was held, and according to the resulting April 3, 2002 IEP, [redacted] met the standard for extended school year ("ESY") because of the "Rate of retention recoupment in SBBH." Petitioners' Exhibit 3 at 17. Additionally, the April 3, 2002 IEP indicated that [redacted] would be receiving the following services:

21. SERVICES:	Projected Beginning Date	Projected Ending Date	Frequency (Min/Times/Period)	Location	ESY Yes/No
Special Education and Related Services:					
Special Education	04/04/2002	04/04/2003	150m/day	Sp. Ed.	No
Speech/Language Therapy	04/04/2002	04/04/2003	20m/week	Sp. Ed.	No
Occupational Therapy	04/04/2002	04/04/2003	30m/week	Reg. Ed./Sp. Ed.	No
SBBH-Individual Counseling	08/23/2002	04/04/2003	20m/2x/week	Sp. Ed.	Yes

The April 3, 2002 IEP also provided the following Supplementary Aids and Services, Program Modifications and Supports for School Personnel, on a daily basis in a general education classroom setting, from April 4, 2002 to April 4, 2003:

- Preferential seating in a non-distractable [sic] setting i.e. "personal office" study carol [sic]

auditory processing disorder with auditory integration problems and decoding issues, as well as attention-deficit disorder.

The patient also has needs specifically involving a language-based learning program, which I feel could potentially be offered through She needs increased speech therapeutic intervention as well as occupational therapeutic intervention. We need to add social skills intervention as well as mental health counseling. As stated above, finally, educational and psychological batteries should be performed to more clinically delineate the patient's cognitive strengths and weaknesses and tailor the education environment for such.

Respondent's Exhibit 2. I was of the opinion that [redacted] was now "completely into the best educational setting."¹

11. At the end of the Spring 2002 semester, [redacted] enrolled in the summer program at [redacted], while [redacted] continued to try to work with Respondent to complete [redacted]'s IEP.

12. In his report dated August 8, 2002, [redacted] informed [redacted] a of the results of [redacted] August 8, 2002 reevaluation of [redacted] [redacted] noted that: [redacted] has successfully completed first grade and summer school at [redacted]

The patient is not receiving any counseling or social skills intervention [at [redacted]]. It is brought to my attention, however, that her behavior at home at times is somewhat difficult, as she has trouble in understanding and processing auditory commands offered by her mother.

A recent psychoeducational re-evaluation is pending at the time of this dictation. [redacted] performed this neuropsychological testing.

[redacted] is an almost 7 year-old patient. She has a history of difficulties with impulse control and trouble with sustained attention. She has obsessive-compulsive tendencies and a clear central auditory processing disorder with auditory integration problems and

¹ May 22, 2002 report stated, "It is my opinion, however, that she [redacted] is not completely into the best education setting." [Emphasis added] However, in [redacted] August 8, 2002 report, he clarified that the statement should have been, "that she [redacted] is "now" completely into the best education setting." Respondent's Exhibit 3.

decoding issues. This is all over and above an underlying attention-deficit disorder.

I would like to review the upcoming IEP. I previously suggested that it was my opinion, however, that the patient was "not" completely into the best educational setting. That should have read she is "now completely into the best education setting" and that remains my opinion at today's re-evaluation.

I would, per your request, authorization and approval, like to see the patient upon my return visit in 3 months and will be in touch with the family in the interim to assure that the IEP continues to afford the services through [redacted], which have retrospectively, markedly and clearly benefited the patient. I also anxiously await a review of the recent neuropsychological testing and will be in touch with you with regard to such in the interim.

Respondent's Exhibit 3.

13. On August 23 2002, three days before the start of the Fall semester of the 2002-2003 school year for [redacted] Elementary School, but after the start of the Fall 2002 semester for [redacted] the IEP team met again at the request of [redacted] to redraft the Goals and Objective and make them more measurable.

14. According to the August 23, 2002 IEP, [redacted] met the standard for ESY because of the "Extent of regression and rate of recoupment caused by interruption in SBBH services." Petitioners' Exhibit 2 at 17. Additionally, the August 23 2002 IEP indicated that [redacted] would be receiving the following services:

21. SERVICES: Special Education and Related Services:	Projected Beginning Date	Projected Ending Date	Frequency (Min/Times/Period)	Location	ESY Yes/No
Speech/Language Therapy	04/04/2002	04/04/2003	20m/1x/wk	Special Ed.	No
Occupational Therapy	04/04/2002	04/04/2003	30m/1x/wk	Gen. Ed./SPED	No
SBBH-Individual Counseling	08/23/2002	04/04/2003	20m/2x/wk	Special Ed.	Yes
Special Education	08/23/2002	04/04/2003	180m/ day	Special Ed.	No

The August 23, 2002 IEP also provided the following Supplementary Aids and Services, Program Modifications and Supports for School Personnel, on a daily basis in a general education classroom setting, from April 4, 2002 to April 4, 2003:

- Opportunities for small group work
- Non-verbal cues to stay on task and follow directions
- Positive reinforcement schedule to promote & reward desirable behaviors

- Preferential seating in a non-distractale [sic] setting i.e. "personal office" study carol [sic]
- Prepare for transitions with a cue
- Checking for understanding and pro-active/pre-teaching techniques

Petitioners' Exhibit 2 at 17. Lastly, the August 23, 2002 IEP stated that [redacted] would participate in all academic, art, music, and PE activities with non-disabled peers, although [redacted] might miss centers, free choice, study hall etc., with non-disabled peers.

15. On August 29, 2002, [redacted] filed a Request for Impartial Hearing in Case No. 03-30, in which she raised a number of issues including whether [redacted] Present Levels of Performance ("PLEPs") had been appropriately updated and whether [redacted] Annual Goals and Objectives were sufficiently specific.

16. On October 22, 2002, the hearing officer in Case No. 03-30 found and concluded that Respondent failed to obtain current performance information on which to base the development of the IEP which rendered the IEP inadequate and thereby denied [redacted] a free and appropriate public education ("FAPE") as required by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400(d)(a)(A) and 1412(a)(1)(A). The hearings officer also determined that [redacted] was an appropriate private placement for [redacted]. The hearings officer did not reach a determination on the issues of: 1) whether the Respondent timely and appropriately evaluated [redacted] needs in the areas of mental health, language impairment, central auditory processing and function behavior; and 2) whether the Short-Term Objectives and/or Benchmarks in the August 23, 2002 IEP were inadequate. The hearings officer further noted:

However, it is noted that the IEP team "must develop either measurable, intermediate steps (short-term objectives) or major milestones (benchmarks) that will enable parents, students and educators to monitor progress during the year, and, if appropriate, to revise the IEP consistent with the student's education needs." Commentary to 34 CFR, Parts 300 and 303, Federal Register, Vo. 64, No. 48, March 12, 1999 at 12471, answer to question no. 1.

Respondent's Exhibit 15. The hearings officer ordered that: 1) Respondent reimburse [redacted] tuition at [redacted] for the first semester of the 2002-2003 school year; 2) the IEP Team convene at the first mutually convenient time to update [redacted] PLEPs, determine whether further evaluations are necessary; and develop an IEP

based upon current data that includes appropriate measurable goals, short-term objectives and/or benchmarks; and 3) if the IEP Team determined that [redacted] unique educational needs can be adequately addressed in a public school setting, an appropriate transition plan be included in the new IEP to ease [redacted] reentry into the public placement.

17. By letter dated November 7, 2002, [redacted] informed [redacted] of [redacted] preferred dates for the IEP meeting, and also requested Mr. Peck's presence at the IEP meeting.

18. In her letter dated November 8, 2002, [redacted] homeroom and writing teacher at [redacted] y, noted the following observations and opinions:

This letter is in behalf of [redacted]. I am [redacted] homeroom teacher and her writing teacher. Because of this fact, I see [redacted] four periods a day. Her reading and writing skills seem to be a major strength for [redacted]. She has improved in her daily writing tremendously this school year. She is now beginning to leave spaces between her words independently and she knows to focus on her neatness. In addition, she is now beginning to master the concept of editing mechanic language errors at the 1.0 grade level and has really began to enjoy writing, because the process has meaning to her. [redacted] ads independently at about a 1.0-1.5 grade level during the time when she comes to S.S.R (sustained, Silent, Reading), but more importantly she loves to read.

[redacted] biggest weakness is organization, this includes organization of thoughts. I have to stop class a good five minutes early to make sure [redacted] has the time to clean up and get ready for her next period. She is one that can only focus in on one person talking and processes slowly. [redacted] needs to have directions repeated to her and her teacher needs to check for understanding when giving her more than one step directions. In addition, she can easily get distracted from routine tasks if the schedule is altered, so routine is essential for [redacted]. In addition to processing difficulties, [redacted] social skills are lower than the average second grader and daily there is usually an issue concerning peer relations that impedes on the class routine. In closure, [redacted] equires a small, structured environment, which includes a modified behavior management program to aid her with organization and social/behavioral skills.

Respondent's Exhibit 15.

19. By letter dated November 12, 2002, [redacted] Student Services Coordinator for [redacted] Elementary School, reiterated the chronology of his efforts to find a mutually

agreeable date for the IEP Team meeting. letter concluded by informing Ms. that the IEP/Transition meeting would take place on December 10, 2002 at 2:15 p.m.

20. Prior to December 10, 2002, Respondent sent six members of IEP Team to observe. The IEP Team members talked to the staff at about educational needs. The IEP team considered evaluations from and an. The IEP team also considered reports from including the educational program developed by that school.

21. In the Respondent's Prior Written Notice of Department Action dated December 10, 2002, Respondent informed of the following:

1. **Description of the proposed or refused action:**
Special education services for language arts, math, behavior health, speech, and occupational therapy. Services to be provided in the special education classroom. No assessments will be made at this time. Transition services from on 1/8 from 8-9 am, 1/10 from 8-10 am, 1/13 from 8-11 am, 1/15 from 8-12 noon, and 1/16 from 7:45 am 2:00 pm.
2. **Explanation of why the action is proposed or refused:**
needs the small group instruction in language arts, math, behavior health, speech, and occupational therapy to help her meet her needs as determined by the IEP. IEP written, placement, and program determined by past assessments, evaluation, and reports. No need for further assessments at this time. is now attending and needs to be slowly transitioned to Elementary School.
3. **Description of other options considered:**
Fully mainstreamed into the general education setting.
New assessments.
4. **Reasons these options were rejected:**
needs the small group environment to work on her language arts, math, behavior health, speech and fine motor skills. Assessments are not needed at this time.
5. **Description of the evaluation procedures, tests, records, or reports used as a basis for the proposed/refused action:**
Based on annual Student Assessment Profile (ASAP), Stanford Diagnostic Reading Test (SDRT), classroom

assessments, classroom observations, teachers' reports, report 8/02, report 4/02, reports 5/02 & 8/02 and parent / teacher meetings.

6. Other relevant factors: [none listed]

Respondent's Exhibit 6.

22. The December 10, 2002 IEP indicated that would be receiving the following services:

21. SERVICES: Special Education and Related Services:	Projected Beginning Date	Projected Ending Date	Frequency (Min/Times/Period)	Location	ESY Yes/No
Special Education	01/21/2003	12/10/2003	900m/ wk	Special Ed.	No
Speech/Language Therapy	01/21/2003	12/10/2003	20m/2x/wk	Special Ed.	No
Occupational Therapy	01/21/2003	12/10/2003	30m/1x/wk	Special Ed.	No
SBBH-Individual Counseling	01/21/2003	12/10/2003	20m/2x/wk	Special Ed.	No

Petitioners' Exhibit 1 at 23. The December 10, 2002 IEP also provided the following Supplementary Aids and Services, Program Modifications and Supports for School Personnel, on a daily basis in a general education/special education classroom setting, from January 21, 2003 to December 10, 2003:

- Non-verbal cues to stay on task and follow directions
- Positive reinforcement schedule to promote & reward desirable behaviors
- Preferential seating (i.e. study carrel, near teacher, next to student role model)
- Minimal visual and auditory distractions; prepare for transitions with a cue
- Use of visual aides [sic], manipulatives, and demonstrations whenever possible
- Directions and/or info. given visually and orally -- repeat and rephrase as needed

Petitioners' Exhibit 1 at 22. As to other activities, the December 10, 2002 IEP stated, " will participate in the general education class for all activities, except for language arts and math." Petitioners' Exhibit 1 at 22. A summary of the benchmarks and short-term goals for language arts and mathematics, are attached hereto as Appendix A, and by this reference incorporated herein.

23. According to the December 10, 2002 IEP, did not meet the standard for ESY, and the December 10, 2002 Meeting Notes state in relevant part:

12/10/2002 IEP MEETING INFORMATION AND NOTES

... Team will reconvene after Spring Break to address regression, recoupment (which must be significant) and whether or not is eligible for ESY.*** **Reviewed services: Speech 40 minutes 1x per

week. O.T. 30 minutes (1x) per week. Counseling 20 minutes (2x) per week. 900 minutes per week for sped. Team understands that service may be increased or decreased (without the need for further assessments) based on the needs of _____ as determined by IEP team.*** Mom understands transition plan from _____ Team can meet to discuss transition as it takes place.*** Mom feels _____ needs an E.A. throughout the day. State has offered that a Sped teacher or E.A. will be available in throughout the day. After the transition period, team will reconvene to determine and update the IEP including supports throughout the day.***

Petitioners' Exhibit 1 at 23.

24. By Meeting Announcement dated December 20, 2002, Respondent informed that _____, Principal of _____ Elementary School, had scheduled a meeting with _____ on January 16, 2003, to review _____ IEP with Petitioners and if needed, to revise the IEP.

25. By letter dated December 27, 2002, _____ informed _____:

As I think you are aware, I am sending _____ back to _____ After I was unable to convince the IEP team of the appropriate placement there. After reviewing the current I.E.P. it is also clear that the team was unable to put _____ in an appropriate classroom with non-disabled peers.

The Transition Plan does not start until well into the 2nd quarter of school and a move right now would be disruptive and is unworkable with a young child with daily transition trauma in school.

I am also concerned that in the I.E.P. meeting the team agreed that the I.E.P. needed to be revised, but refused to make changes to the current I.E.P. until after the transition to _____ occurred.

Also, _____ reports were brushed aside and even questioned as to whether he signed them or not. I feel the team did not give them consideration for _____ placement.

The location of the I.E.P. meeting was changed to P7 and I was not notified until I was found sitting waiting in the Faculty Center for the I.E.P. meeting. This made me appear to be 20 minutes late for the meeting. My request for _____ to be tested for dyslexia has had no response and this is a concern of mine.

For these reasons, I am seeking reimbursement from the State Department of Education and sending _____ back to _____

Respondent's Exhibit 11.

26. By letter dated January 9, 2003, _____ i apologized to _____ for the "mix-up" in the location of the IEP Team meeting.

27. By letter dated January 13, 2003, _____ i informed _____ that the IEP meeting that had been scheduled for January 16, 2003 had been cancelled due to _____ continued enrollment at _____

28. The Annual Student Assessment Profile ("ASAP") prepared by _____ for _____ 2002-2003 school year provided in relevant part:

Methodology Provided for Academic/Behavioral Progress

Reading and Spelling

_____ needs to receive an average of 90 min per day of direct multisensory reading/spelling instruction and skill practice using sensory cognitive therapy methodology such as Lindamood Phoneme Sequencing™ Program for reading, spelling, and speech; Seeing Stars™ Symbol Imagery for sight words and spelling; and Visualizing and Verbalizing™ for language comprehension and thinking.

_____ needs to be taught in a small, highly structured specialized classroom setting with an average Teacher-Student ratio of approximately 1 : 7.

Writing

_____ needs to receive an average of 45 min per day of direct specialized writing instruction and skill practice in a small, highly structured specialized classroom setting with an average Teacher-Student ratio of approximately 1 : 7.

Mathematics

_____ needs to receive an average of 45 min per day of direct multisensory mathematics instruction and skill practice with direct instruction and manipulatives in a small, highly structured specialized classroom setting with an average Teacher-Student ratio of approximately 1 : 7.

Science

_____ needs to learn science concepts and content using inquiry-based, hands-on approach that focuses on the process and techniques of discovery while developing process skills and increasing appreciation for science with an average Teacher-Student ratio of approximately 1 : 7.

Social Studies

_____ needs to learn social studies concepts and content using a direct instruction approach with an average Teacher-Student ratio of approximately 1 : 7.

Accommodations Provided for Academic/Behavioral Progress

Classroom

- Class size: (Teacher:Student ratio: 1:7)
- Preferred seating
- Minimal visual distractions
- Minimal auditory distractions

Instruction

- Multi-sensory instruction
- Direct instruction
- Manipulatives
 - Area: Writing/Slant board p. grip
 - Area: Math
- Information presented sequentially
- Directions given visually and orally
- Repeating and rephrasing of information/directions
- Review of previously learned material
- Allow student to volunteer for oral reading and participation
- Shorter assignments
- Extended time to complete assignments
- Graded for content, not spelling except for spelling assignments

Behavior

- Seat student near good role model and teacher
- Proximity prompting
- Touch prompting

Organization and Planning

- Homework folders and assignment book: With parent signature
- Supervised writing of homework assignments
- Advanced notice for quizzes and tests
- Time frames for complex reports and projects
- Example of project/report when given assignment
- Provide study period for homework, organization, and planning
- Explain any changes in routine

Parental Contact

- Daily communication with parents via planner/point sheet
- Quarterly progress reports

Tests

- Tests completed in a quiet, small-group setting
- Test questioning, prompting, and cueing
- Matching test
- Multiple-choice test
- True/false tests

Draw test answers
Allow to re-take test without grade penalty
Extended time for test

Assistive Devices
Pencil grips

Respondent's Exhibit 17.

29. At the hearing, testified that the IEP Team did consider placing in regular education classes for all subjects but rejected this option. Respondent's Exhibit 6. also testified that was placed in special education for academics because of central auditory processing disorder ("CAPD") diagnosis and the fact that was coming from the more restrictive environment of a special education school with small classroom settings and no non-disabled peers.

30. requires a small classroom setting, at least for her academics. After the early morning circle time, has 8 students in her class during the morning and 6 students after lunch. Thus can provide a small classroom setting for

31. who is a certified special education teacher, testified how present levels of educational performance were developed and how the academic benchmarks were appropriate to the annual academic goals. also explained how they were measurable.

32. observed a being taught a and spoke to teacher at Ms. also reviewed all of the evaluations submitted to the IEP team. testified that she could effectively teach reading in her classroom a also testified that she could provide the small structured environment described in November 8, 2002 letter provided to the IEP team.

IV. CONCLUSIONS OF LAW

A. Overview

The IDEA guarantees all handicapped children FAPE. 20 U.S.C. § 1400(d)(1)(A) & 1412(a)(1)(A). In order to show that FAPE was offered, a two-part analysis must be

conducted. The DOE needs to show that (1) it has complied with IDEA's procedural requirements and (2) that the IEP developed for _____ is reasonably calculated to enable her to receive educational benefits. *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). If these two requirements are met, the DOE has offered FAPE to

Procedural deficiencies do not automatically require a finding of denial of FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1484 (9th Cir. 1992). However, procedural flaws which result in the denial of educational opportunities for the child or the serious infringement of the parents' right to participate in the IEP process will result in a denial of FAPE. *Target Range, supra* at 1484.

Also, the program offered need not be the absolute best educational program. Instead, the DOE needs only to provide a basic floor of opportunity through a program individually designed to provide educational benefits to _____ *Seattle Sch. Dist., No. 3 v. B. S.*, 82 F.3d 1493, 1498 (9th Cir. 1996); *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 587 (9th Cir. 1992).

B. The Least Restrictive Environment

Petitioners' first issue is whether _____ placement in special education classes for math and language arts for 900 minutes per week constituted a violation of the least restrictive environment provision of the IDEA.

In developing an IEP, placement in the least restrictive setting is required by law. 34 C.F.R. §300.550(b);² HAR §8-56-43. If at all possible, students with disabilities must be educated with non-disabled students. HAR §8-56-43(1).

In *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994), the court identified four factors that had to be considered in determining compliance with IDEA's mainstreaming requirements: 1) the educational benefits of

² 34 C.F.R. § 300.550 states:

General LRE requirements.

...
(b) Each public agency shall ensure ----

- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

placement in a regular education class, 2) the non-academic benefits of such placement, 3) the negative effect the student would have on the teacher and students in the regular education class, and 4) the costs of mainstreaming.

The Hearings Officer must also take into consideration the provisions of HAR §8-56-45(4) and (5) which state:

§ 8-56-45 Placements. In determining the educational placement of a student with a disability, including a preschool student with a disability, the department shall ensure that:

- (4) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs; and
- (5) A student with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

In reviewing the evidence presented by the parties, the Hearings Officer concludes that the preponderance of the evidence established that as of the date of the December 10, 2002 IEP, [redacted] required a small, structured environment, which includes a modified behavior management program to aid her with organization and social/behavioral skills. Furthermore, [redacted] required a teacher-to-student ratio of approximately 1 : 7.

Although [redacted] may have previously obtained educational benefit in a general education classroom setting, the Hearings Officer would note that both the Respondent and [redacted] had removed [redacted] from a general education classroom setting because it was felt that [redacted] was not making sufficient progress.

Even though the evidence established that [redacted] had an adverse reaction to being subsequently placed in a special education classroom setting, the preponderance of the credible evidence established that at [redacted] needed to be taught reading, writing, and mathematics in a small, highly structured specialized classroom setting with an average teacher-to-student ratio of approximately one teacher to seven students.

Consequently, the Hearings Officer must conclude that the preponderance of the evidence established that Respondent properly considered [redacted] needs, including the appropriate classroom environment, class size, and teacher-student ratio, and

individual educational needs in determining placement in special education classes for language arts and mathematics, and in general education classes for all other subjects, as reflected in the December 10, 2002 IEP.

As to the other factors set forth in *Sacramento City Unified School District v. Rachel H.*, *supra*, the Hearings Officer would note that parties did not specifically address the issues of: a) the non-academic benefits of such placement, b) the negative effect the student would have on the teacher and students in the regular education class, and c) the costs of mainstreaming.

Accordingly, the Hearings Officer concludes that Respondent did not violate the least restrictive environment provision of the IDEA.

C. Eligibility for Extended School Year

Petitioners' second issue is whether the IEP team properly determined that [redacted] did not qualify for extended school year services at the December 2002 IEP meeting, and if not, whether [redacted] was denied educational opportunities.

The provisions of HAR § 8-56-40 state in relevant part:

§ 8-56-40 Extended school year services.

(c) Extended school year services shall be provided only if the student's IEP team determines, on an individual basis, in accordance with sections 8-56-30 to 8-56-42, that the services are necessary for the provision of a free appropriate public education to the student.

(d) The IEP team shall consider factors that include the following in determining whether a student with a disability needs extended school year services:

- (1) The nature of the student's disabling condition;
- (2) The severity of the disabling condition;
- (3) The areas of learning crucial to attaining the goal of self-sufficiency and independence from caretakers;
- (4) The extent of regression caused by the interruption of educational programming; and
- (5) The rate of recoument following interruption of educational programming.

After reviewing the evidence, the Hearings Officer concludes that the preponderance of the evidence established that [redacted] should have been eligible to receive extended school year services, as of the date of the December 10, 2002 IEP.

First, the evaluations conducted by _____, reflect _____'s need for social skills intervention as well as mental health counseling. According to the documents from _____ as well as _____'s reports, _____ was not receiving mental health therapy at _____'s school. Consequently, Respondent was of the opinion that other than SBBH counseling during the regular school year, _____ did not require such services on an extended school year basis. However, the December 10, 2002 IEP did provide an opportunity to revisit the issue of _____'s need for extended school year services, after the Spring break.

On the other hand, the Hearings Officer finds significance in the fact that _____ was found to be eligible for extended school years services for SBBH individual counseling in _____'s April 3, 2002, and August 23, 2002 IEPs.

As to the December 10, 2002 IEP, the evidence presented at the hearing indicates that the Respondent either did not have sufficient information upon which to determine that _____ was not eligible for extended school year services, or that Respondent deferred that determination until after the Spring break when _____'s rate of regression and recoupment could be assessed.

Therefore, the Hearings Officer must conclude that _____ should have been found eligible to receive extended school year services in the December 10, 2002 IEP.³

D. Sufficiency of the Benchmarks

Petitioners' third issue is whether the benchmarks in _____'s December 10, 2002 IEP were measurable and sufficient.

As noted by the hearings officer's decision in Case No. 03-30:

... The revised statute and regulations also provide that, as an alternative, IEP teams may develop benchmarks, which can be thought of as describing the amount of progress the child is expected to make within specified segments of the year. Generally, benchmarks establish expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents of their child's progress toward achieving the annual goals. An IEP team may use either short-term objectives or

³ _____ may have also been eligible to receive other services in addition to SBBH counseling.

benchmarks or a combination of the two depending on the nature of the annual goals and the needs of the child. [Citing 34 C.F.R Part 300, App. B(1)]

After examining the December 10, 2002 IEP benchmarks for language arts and mathematics, the Hearings Officer concludes that Respondent proved by a preponderance of the evidence that the benchmarks are clearly measurable and show how progress towards the annual goal will be evaluated.

E. Reading Methodology

Petitioners' fourth issue is whether the IEP team was required to identify a specific reading methodology in the December 10, 2002 IEP. Petitioners have argued that in this situation, a reading methodology should have been discussed and/or identified by Respondent in the December 10, 2002 IEP.

The provisions of HAR §8-56-38(a)(3) state:

§ 8-56-38 Content of IEP. (a) The IEP for each student shall include:

- (3) A statement of the special education and related services and supplementary aids and services to be provided to the student, or on behalf of the student and a statement of the program modifications or supports for school personnel that will be provided for the student:
 - (A) To advance appropriately toward attaining the annual goals;
 - (B) To be involved and progress in the general curriculum in accordance with paragraph (1) and to participate in extracurricular and other nonacademic activities; and
 - (C) To be educated and participate with other students with a disability and students without a disability in the activities described in this section;

Accordingly, an IEP is required to include a statement of the special education and related service and supplementary aids and services to be provided to the student, and a statement of the program modifications or supports for school personnel that will be provided for the student.

Based on the evidence presented by the parties, the Hearings Officer concludes that the December 10, 2002 IEP does not contain the information required by HAR §8-56-38(a)(3).

Respondent was free to determine an appropriate reading methodology for [redacted], including a methodology other than the one requested by [redacted]. Furthermore, the IDEA does not require that specific educational methodologies be written into an IEP.

Based on the credible evidence presented, the Hearings Officer does not question the ability of [redacted] to effectively teach [redacted] reading in [redacted]s classroom at [redacted] Elementary School.

However, the requirements of HAR §8-56-38(a)(3) are fairly clear and straightforward. Without a generalized description of the type of special education and related service and supplementary aids and services to be provided to the student, and a statement of the program modifications or supports for school personnel that will be provided for the student, parents would be unable to adequately evaluate the offer of FAPE. Moreover, without the statement required by HAR §8-56-38(a)(3), the parents would not be able to evaluate the qualifications of the school personnel that will be responsible for providing such services.

F. Private Placement

Because the December 10, 2002 IEP did not offer FAPE to Petitioners, the Hearings Officer finds and concludes that Petitioners proved by a preponderance of the evidence that [redacted] is an appropriate private placement for [redacted].

V. DECISION

For the reasons stated above, the Hearings Officer finds and concludes that the December 10, 2002 IEP did not offer FAPE.

Based upon the foregoing, IT IS HEREBY ORDERED THAT:

1. Respondent convene [redacted] IEP team at the first mutually convenient date to revise [redacted] IEP to include an updated determination as to whether [redacted] currently requires ESY services, and if so, what ESY services will be [redacted].


provided; as well as a statement of the items required by HAR §8-56-38(a)(3);
and

2. Respondent reimburse Petitioners for the cost of current private
placement through the Spring semester of the 2002-2003 school year.

VI. RIGHT TO APPEAL

The parties have the right to appeal to a court of competent jurisdiction within thirty
(30) days of receipt of this Decision.

DATED: Honolulu, Hawai'i, March 14, 2003


 RODNEY A. MAILE
 Senior Hearings Officer
 Department of Commerce
 and Consumer Affairs