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DEPT. OF COMMERCE AND CONSUMER AFFAIRS

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

HEARING OFFICE

In the Matter of ) DOE-2003-02
)
) by and through his ) FINDINGS OF FACT,
Parents, MR. AND MRS. ) CONCLUSIONS OF LAW
) AND DECISION; APPENDICES "A"
) AND "B"
)
) Petitioners, )
) vs. )
)
DEPARTMENT OF EDUCATION, )
STATE OF HAWAII, )
)
) Respondent. )

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On January 10, 2003, the Department of Education, State of Hawaii ("Respondent") received a request for a due process hearing under Hawaii Administrative Rules ("HAR") Title 8, Chapter 56 from [redacted], by and through his parents Mr. and Mrs. [redacted] (collectively referred to as "Petitioners"). A prehearing conference was held on January 16, 2003, and attended by [redacted] Esq., attorney for Petitioners, and [redacted] attorney for Respondent. At the prehearing conference, the parties agreed to reschedule the hearing to February 13 and 14, 2003.

On February 13, 14 and 18, 2003, the hearing was conducted by the undersigned Hearings Officer. Mr. and Mrs. [redacted] were present and they were represented by Mr. Parsons. Respondent's representative [redacted] was present, and Respondent was represented by [redacted].

At the close of the hearing, the Hearings Officer gave the parties the opportunity to file written closing briefs, incorporating a closing argument, and those briefs were filed on March 6, 2003. The parties agreed to extend the date for the issuance of the final decision to March 27, 2003. On March 24, 2003, the parties agreed to extend the date for issuance of the final decision to March 31, 2003.

On March 27, 2003, Petitioners filed a Motion to Strike Respondent's Closing Brief ("Motion") on the basis that they were not served with Respondent's Closing Brief. On March 28, 2003, Respondent filed a memorandum in opposition to the Motion. Having considered the arguments presented, the Hearings Officer hereby denies Petitioners' Motion.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. [redacted] is 19 years old (DOB [redacted]) and currently attends [redacted] specializes in educating children with attention deficit hyperactivity disorder ("ADHD") and learning disabilities.

2. On September 14, 2000, Respondent received a request from Petitioners to have [redacted] evaluated for educational and related services. After a Student Support Team ("SST") meeting on September 25, 2000, the SST decided that there was insufficient information to warrant a referral for Chapter 53 or Chapter 56.

3. By a letter dated October 2, 2000, [redacted] certified that [redacted] had been diagnosed with ADHD, and has had symptoms since he was five years old.

4. On October 26, 2000, a second SST meeting was held, and based on Dr. [redacted] letter and other information, the SST decided to refer [redacted] for evaluation under Chapter 56. The attendees at this meeting did not include a special education teacher.

5. Respondent referred \_\_\_\_\_, Clinical Psychologist, who conducted a psychological evaluation on December 6, 2000. In his report dated December 6, 2000, \_\_\_\_\_ reported that:

\_\_\_\_\_ presents with irritability, depressed mood, anhedonia,<sup>1</sup> inattention, and peer difficulties which appear to be significantly impacting upon his academic functioning. It will be important for the team to assist \_\_\_\_\_ in developing increased motivation towards school, improved coping skills, and an elevated mood so that he can function more successfully in the academic environment. It will be important for the team to consider the impact that \_\_\_\_\_ current depressed mood is having on his ability to achieve academically when planning for his educational need.

\_\_\_\_\_ told \_\_\_\_\_ that "he would prefer to live on the mainland as Hawaii is too hot and people are rude to him." \_\_\_\_\_ also reported that \_\_\_\_\_ was lonely ever since his sisters left home and that he feels that he does not have anyone at home that he can relate to because he is the only child at home. \_\_\_\_\_ also stated that \_\_\_\_\_ had been receiving treatment for his ADHD since the eighth grade, and that medication was used initially, but stopped. Although \_\_\_\_\_ started \_\_\_\_\_ on medications again in 2000, \_\_\_\_\_ was not taking the medication.

6. On December 12, 2000, \_\_\_\_\_ was found eligible for special education services under the category of \_\_\_\_\_. This determination was based on parent and teacher input, \_\_\_\_\_ December 6, 2000 report, \_\_\_\_\_ letter dated October 2, 2000, cognitive and academic assessments conducted on November 30, 2000, classroom observation and student status reports.

7. The specific learning disability worksheet noted that \_\_\_\_\_ did not meet the eligibility criterion for specific learning disability. Composite scores were used in the evaluation. The worksheet and the Tables and Graphs Report of WIAT Testing which reported subtest, composite and total scores are attached hereto and incorporated herein by reference as Appendix "A".

8. In a report dated December 13, 2000, \_\_\_\_\_ strongly recommended that \_\_\_\_\_ be placed in a "well structured, residential, supportive educational facility

<sup>1</sup> "Anhedonia" means lack of pleasure, a common symptom associated with depression.

in which he would live until he completes his high school education and learns enough social and emotional skills to survive in the world after graduation." further stated:

At this point, the working relationship between [redacted] and the school system is irretrievably broken. He has no confidence that he will be educated, despite his best efforts and those of his family. He is failing to learn virtually anything at this time. He sees no hope of academic success given the current situation. I agree. After my most recent session with [redacted] on November 27, 2000, I became convinced his only hope of academic success and with it psychological and social success, will be placement in one of the two academic institutions mentioned above.

I have explored other options with [redacted] and his family. At this point, all other less intensive Hawaii options are either deemed inadequate or are not trusted by [redacted] or his family to meet academic needs. I do not like to recommend that an adolescent be sent away from Hawaii in order to meet his educational needs, but in this case I see no other alternative.

9. In response to Respondent's request for [redacted] opinion regarding the appropriateness of a private school or mainland placement, by a letter dated December 14, 2000, [redacted] stated:

[redacted] is a student who is presenting with depression and who has a history of ADHD. These are common difficulties that many students who attend public school experience. It has been my experience and is my opinion in this situation that students with such difficulties typically do not require private school or mainland school placement. I believe that it is necessary to first attempt to accommodate a student in the public education setting prior to even discussing private school placement. As for mainland school placement, I feel that this would be very inappropriate given situation and current difficulties.

...

If the public school system is unable to provide appropriate educational accommodations then and only then should settings outside of the public system be looked at. Given that depression appears to be the primary issue at this time in terms of what is impacting upon his educational functioning, it is unlikely that any school placement is going to help with this issue. Rather,

appropriate therapeutic servicing needs to be put into place to assist [redacted] with his current depressive issues.

I think the team should focus on how they can support [redacted] and begin to teach him functional and appropriate coping skills in addition to providing him with the academic support he needs to complete his assignments. I believe that ongoing discussions of private school placement or mainland placement will only shift the team's efforts and focus to issues (e.g. the school that attends) that do not appear to be primary in my opinion.

10. Individualized Education Program ("IEP") team meetings were held on December 12, 14 and 21, 2000 and January 9, 2001. [redacted] attended the December 12 and 14, 2000 meetings. On January 9, 2001, [redacted] ("Father") provisionally consented to the initial provision of special education and related services to [redacted] and Respondent issued a Parent Prior Notice for Free and Appropriate Public Education and Placement to Petitioners. The IEP provided for a combination of regular education, special education, school based counseling services and mental health services in order for [redacted] to progress academically, increase self esteem and develop social relationships with peers. Although the IEP team determined that the IEP could be implemented at [redacted] home school, the IEP team decided that they will not place [redacted] at his home school due to mental health needs. The IEP team was to investigate which high schools on Oahu have inclusion programs in place. A copy of the IEP that was provisionally accepted is attached hereto and incorporated herein by reference as Appendix "B").

11. The IEP team determined that mainland residential placement was not appropriate because they believed that [redacted] could be successful on a high school campus with the proposed educational and mental health supports contained in the IEP.

12. By a letter dated January 29, 2001, Petitioners informed Respondent that they decided to reject the proposed placement and that they intended to place [redacted] at a private school, academy or residential facility at public expense. Specifically, Petitioners rejected the suggested placement at [redacted] High School because they felt it did not meet [redacted] needs. Petitioners felt that the inclusion classes were too large to provide [redacted] with a distraction free environment, and did not provide an appropriate normal peer environment to receive an adequate academic program commensurate with

bility as determined by test score and classroom performance. Petitioners also felt that the classes were not sufficiently structured and that there was a shortage of certified special education teachers, which was confirmed by principal. Petitioners further stated:

We believe that I... or an meet his particular needs due to their well trained and ADHD-experienced staff, relatively distraction free academic environment for his ADHD, small group instruction, structured academic setting, remedial academic work through individualized education on reading, spelling, written and math. In addition, these schools provide personal attention, positive praises, and encouragement and a supportive living environment to foster independence and responsibility as well as individual therapy to focus on developing improved coping skills and to focus on improving his mood, emotional growth, improve social interaction and self-esteem.

13. By a letter dated February 9, 2001, Respondent informed Petitioners that it would not agree to pay for to attend or any other private school.

14. By a letter dated February 15, 2001, Petitioners informed Respondent that they took to or an interview, and that if he got selected, he would stay there for an appropriate education. Petitioners further stated that they would submit all receipts for their travel, and expected reimbursement for travel and placement pursuant to their January 29, 2001 letter. Petitioners also included a letter dated February 5, 2001 from which reported his findings in working with between January 18, 2001 and February 5, 2001.

15. report stated that the discrepancies between IQ, which placed him in the "low average" range and academic performance reflected learning disabilities. report stated in part:

These discrepancies between certain cognitive weaknesses and other strengths explain the serious difficulties is having despite his 'low average' full scale cognitive testing. The fact that both verbal and performance scales nearly coincide obscures the fact that there is significant discrepancy and serious weakness in

particular cognitive skills. These weaknesses represent learning disability, as reflected in his achievement tests.

self-esteem has been shredded; he does not feel safe out in the world. He feels that he needs to 'watch his back' when he ventures out in public. His perceived risk of being exposed to ridicule is so overwhelming that he cannot bear the idea of attending 'special education classes.'...He has not lost hope, however. He does have hope that he can have a positive experience in boarding school which might be able to offer him special services he needs in order to learn[.]

Because his self-esteem is in such disrepair after years and years of failure, he has developed an affinity, an identification with other dysfunctional youth. The day treatment program, operating from 8:00 am to 3 pm would be inadequate to protect him from the consequences of these years of neglect.

Placement in an appropriate boarding school which can allow positive identification with a successful peer group appears to be the only remedy for this situation. He would suffer harm without this support.

16. By a letter dated February 17, 2001, Petitioners informed Respondent that [redacted] had been accepted at [redacted] as of February 17, 2001, and therefore, Petitioners would be submitting all receipts for travel and placement, and expected reimbursement pursuant to their notification letter dated January 29, 2001.

17. By a letter dated February 22, 2001, Respondent notified Petitioners that the IEP developed on January 9, 2001 remained their offer of a free appropriate public education ("FAPE") for [redacted] should he return to Hawaii, and that [redacted] High School continued to agree to [redacted] placement there. Respondent also notified Petitioners that it would not agree to pay for any costs related to [redacted] voluntary placement by Petitioners at [redacted] his letter also stated:

Least Restrictive Environment determined by the IEP team is a combination of regular and special education classes on a regular campus. It was determined that this combination of regular education, special education, school based services as well as Mental Health services was appropriate to address his needs in

order for him to progress academically, increase self-esteem and develop social relationships with peers.

Other options considered were the delivery of Special Education services in the regular education classroom, Special Education pull-out for Language Arts and Math and mainland residential placement. These were not deemed appropriate as [redacted] may feel singled out while receiving additional support in the regular education setting and parents and therapist report that [redacted] has shared that he would be extremely embarrassed if he is in special education class.

In addition, we feel that [redacted] can be successful on a regular high school campus with the proposed educational and mental health supports in the IEP. [redacted] High School was offered as the placement site because of their inclusionary program. The IEP team felt that this setting would best address [redacted] s identified needs.

18. An IEP meeting had been set for February 27, 2001, but after Respondent was notified that [redacted] would be attending [redacted]; was cancelled. That meeting was to address the issues of appropriate class size and [redacted]; transition to High School. Petitioners still wanted to have the meeting, as they wanted to share information about [redacted] and go over [redacted] report and other items related to [redacted] IEP.

19. At Petitioner's request, an IEP meeting was held on August 9, 2002. In a letter of transmittal dated August 26, 2002, Respondent reiterated that it will not pay for costs related to [redacted]'s placement at [redacted]; any other private school.

20. At [redacted] semester GPA's have been: Spring 2001--3.71, Fall 2001--3.43, Spring 2002--3.39 and Fall 2002--3.83. An educational assessment report from [redacted] dated January 7, 2003 stated in part:

[redacted] has made significant gains across both academic and social/emotional domains while attending [redacted] Being in a structured environment with class sizes of eight or less for content classes and one to three students for remedial work delivered by instructors with special education backgrounds, speech and language therapists, social workers, medication management, and counselors on a twenty four hour a day basis is the optimal situation for [redacted] Despite the gains [redacted] has experienced, he



continues to be a vulnerable individual academically, socially, and emotionally. Continued educational programming is needed to maintain new skills and remediate existing deficits.

21. On December 27, 2002, [redacted] was reevaluated by [redacted] Ph.D., a clinical neuropsychologist, to document the status of his learning disabilities. Test results from December 2002 were compared with results in November 2000. Dr. [redacted] report dated January 21, 2003, stated in part:

Learning disabilities are typically diagnosed when there is a statistically significant discrepancy between 'ability' (represented by IQ scores) and 'achievement' (WIAT scores). It can be seen that on the first administration, that [redacted] met or was close to meeting the criteria for a learning disability in written expression, numerical reasoning, and reading, depending on the level of discrepancy specified. On the second administration, this month, there is a remarkable improvement in those identified areas and no evidence of a learning disability, though some related inefficiencies persist. It should be noted that [redacted] appears to have a remarkable strength in Oral Expression, as noted by the WIAT and demonstrated on testing by his ability to formulate, organize and express in detail a thorough response to the stimuli question.

Recommendations: It appears that the diagnosis reported on previous evaluations (Dysthymia, LD) have resolved, though continuing improvement in areas of relative weakness noted above needs to occur. Based on my review of the previous evaluations reporting [redacted] continuing downward spiral in public schools with no end in sight and his recent improvement in performance, it appears that the placement of [redacted] in the [redacted] School was an essential step in his academic success and mental well being. I would strongly recommend that this placement be continued until the completion of his high school requirements.

22. Reports by [redacted] M.A., CCC-SLP and [redacted] Psy.D., M.S./SLP in January 2003 which were prepared pursuant to records reviews requested by Petitioners indicate that they believe that [redacted] was the appropriate placement. They also believe that Respondent should have looked at the individual subtest areas of the WIAT instead of the composite scores, as it would have

shown that \_\_\_\_\_ did meet the criteria for a learning disability, and would have enabled Respondent to develop an IEP more suited to \_\_\_\_\_ needs.

23. In response to comments from \_\_\_\_\_ third grade teacher, \_\_\_\_\_ was seen by a \_\_\_\_\_ It was that doctor's opinion that \_\_\_\_\_ had \_\_\_\_\_ Mrs. \_\_\_\_\_ also talked to the school counselor, who discouraged her from having \_\_\_\_\_ tested, as he would be labeled learning disabled and teased by the other children. However, \_\_\_\_\_ s performance in school got worse and worse as he got older. In 1995, when \_\_\_\_\_ was in the sixth grade, informal testing was conducted by Respondent at Petitioners' request. Respondent reported that the results did not indicate a significant concern which would warrant a complete education evaluation.

24. \_\_\_\_\_ had to repeat tenth grade, and on September 29, 2000, he attempted to commit suicide.

25. Although \_\_\_\_\_ recommended small group instruction, \_\_\_\_\_ told him that he did not want to be placed in a smaller group, be given preferential seating or receive any kind of obvious or overt accommodation, which is why the IEP team developed an off campus placement at \_\_\_\_\_ High School's inclusion program. In the inclusion program, \_\_\_\_\_ would not be singled out as a special education student.

26. \_\_\_\_\_ talked to \_\_\_\_\_ about his recommendation for mainland residential placement. It is \_\_\_\_\_ understanding that \_\_\_\_\_ was recommending the mainland placement because he was concerned about the conflicts occurring at home. It is \_\_\_\_\_ opinion that residential placements are primarily focused around children in crisis.

27. It is \_\_\_\_\_ opinion that the IEP developed for \_\_\_\_\_ on January 9, 2001 was appropriate.

28. It is Respondent's position that once a student leaves the home school and Hawaii, Respondent is relieved of its obligation to continue to review and revise the student's IEP.

29. It is \_\_\_\_\_ opinion that \_\_\_\_\_ IEP, which was based on the diagnosis and low average intelligence, was deficient because it did not take into account \_\_\_\_\_ learning disabilities.

30. \_\_\_\_\_ believed that \_\_\_\_\_ needed around the clock support where there was a successful peer group who had similar difficulties and were mastering those difficulties. This would provide \_\_\_\_\_ with role models to begin to rebuild a different sense of identity.

31. \_\_\_\_\_ has been treating \_\_\_\_\_ since he went to \_\_\_\_\_ began seeing \_\_\_\_\_ in April 2001. Dr. \_\_\_\_\_ focus is more on \_\_\_\_\_'s emotional behavior, but does get feedback on \_\_\_\_\_'s academic progress on a weekly basis. It is \_\_\_\_\_ opinion that \_\_\_\_\_'s placement at \_\_\_\_\_ and other affiliated programs and summer placements were appropriate.

32. \_\_\_\_\_ is a program for students 12 to 20 years old with learning disabilities and \_\_\_\_\_ issues. Students there have the same kind of curriculum as a typical junior high or high school. The difference is in how the instruction is delivered, and how the information is received back from the student. Students are educated as to their strengths, and helped to develop compensatory strategies to help offset deficit areas. \_\_\_\_\_ also makes use of affiliated institutions to deal with specific issues.

33. \_\_\_\_\_ attended the \_\_\_\_\_ program in \_\_\_\_\_ during the summer of 2001. This program is not under the auspices of \_\_\_\_\_, but was recommended to Petitioners because although \_\_\_\_\_ was benefiting and growing from the academics at \_\_\_\_\_, \_\_\_\_\_ was acting out behaviorally and having difficulties in peer relationships, necessitating a stronger intervention. The cost of this program was not covered by the tuition paid to \_\_\_\_\_. According to \_\_\_\_\_, Ph.D., the Associate Director at \_\_\_\_\_ would not have been accepted back at \_\_\_\_\_ if he had not attended \_\_\_\_\_.

34. \_\_\_\_\_ is currently in the \_\_\_\_\_ program. This program is under the auspices of \_\_\_\_\_ and its cost is covered in the tuition paid to \_\_\_\_\_. \_\_\_\_\_ was placed there in order to deal with emotional and behavioral issues that he continues to struggle with. He began attending the \_\_\_\_\_ about four to five weeks into this (2002-2003) school year. According to \_\_\_\_\_ academic needs are being met there, but he may not be as challenged as he would be at \_\_\_\_\_. However, given the social, behavioral and emotional issues that \_\_\_\_\_ is contending with, it is \_\_\_\_\_ opinion that it's where \_\_\_\_\_ needs to be now.

35. It is [redacted]'s opinion that [redacted] is at a point where he has many of the tools to conquer the high school curriculum, but struggles with the content of the curriculum, and has a need for continued services if he hopes to transition into post high school vocational/technical school or junior college/college opportunities. Given some of the other overlays in and around behavior management and the social skills area, Dr.

[redacted] estimates that [redacted] needs continuing services for another 12 to 18 months.

36. For [redacted] ten month program, the tuition is \$41,000.00 per year.

37. Students at [redacted] are sent to [redacted] which is considered a respite care program. Students go there for respite as well as if they are having behavioral issues and is a resource when students need to be suspended. Placement at [redacted] [redacted] per day, and a typical stay is two days.

38. [redacted] is expected to stay at the [redacted] for the remainder of the 2002-2003 school year. [redacted] believes that [redacted] would benefit from a summer experience, either with the [redacted] or a work-related experience like he had last summer at [redacted], where [redacted] worked in the camp kitchen and in other capacities.

39. [redacted] is doing well at [redacted] and his goal is to go to college and get a degree in a field where he's helping people like the people who have helped him. He is currently in the second semester of his twelfth grade year, but he would like to continue to study past his twelfth grade year in order to prepare for college, as he feels that he still has some catching up to do. [redacted] feels that he is a much happier person and feels that he is doing great.

40. [redacted] wanted to leave Hawaii to go to a boarding school or to live with relatives on the mainland in order to go to a different school. [redacted] said that his parents supported his decision.

41. [redacted] would have felt embarrassed to be in a special education classroom in a public school. He did not want to go to [redacted] because of the school environment—academically, he felt it would be hard for him to concentrate. Also, it was still the public school system and he did not like the way it was being run. Also, the "special education" title really turned him off—he would have preferred the term

"learning disability". Being told that he would be put in a special education classroom was hard for him.

### III. CONCLUSIONS OF LAW

It is not disputed that [redacted] is a student with a disability and entitled to special education services pursuant to HAR Title 8, Chapter 56. Therefore, the issue to be determined is whether Respondent made a FAPE available to [redacted] for the second semester of the 2000-2001 school year and the 2001-2002 and 2002-2003 school years. If so, Petitioners are not entitled to reimbursement of the costs they incurred to enroll [redacted] for those school years.

Hawaii Administrative Rules Title 8 Chapter 56 requires that Respondent make available to students with a disability a FAPE that emphasizes special education and related services designed to meet their unique needs. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court set out a two-part test for determining whether Respondent offered Matthew a FAPE: (1) whether there has been compliance with the procedural requirements of the Individuals with Disabilities Education Act ("IDEA") and (2) whether Matthew's IEP is reasonably calculated to enable him to receive educational benefits. *Rowley*, at 206-207.

#### Procedural Violations

Under the IDEA, procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity or seriously infringe on 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 District*, 960 F.2d 1479 (9<sup>th</sup> Cir. 1992).

Petitioners alleged that Respondent violated the procedural requirements of the IDEA when a team that failed to include all required team members ordered an inadequate battery of tests that failed to produce the data necessary to fully evaluate [redacted] disabilities. HAR § 8-56-7(a) requires that a group that includes individuals required for the IEP team review existing data on the student and on the basis of that review, identify what additional data are needed to determine whether the student has a

disability and entitled to special education services. HAR § 8-56-34 provides that an IEP team shall include at least one special education teacher. At the October 26, 2000 SST meeting, there was no special education teacher in attendance. As a result, tests which may have more clearly revealed \_\_\_\_\_'s learning disabilities were not included, and resulted in the IEP Team's inability to identify and address all of \_\_\_\_\_'s needs.

In addition, upon receipt of \_\_\_\_\_'s February 5, 2001 letter from Petitioners, another IEP meeting should have been scheduled to review \_\_\_\_\_'s assertion that the Respondent's test results also showed that \_\_\_\_\_ had a learning disability. Although a meeting for February 27, 2001 had been scheduled, Respondent cancelled it upon learning that \_\_\_\_\_ would be attending \_\_\_\_\_. This action was contrary to HAR 8-56-33, which provides that the IEP team review and revise the IEP to address information provided by the parent on existing assessment data or to address other matters. Since Petitioners were requesting reimbursement for \_\_\_\_\_'s placement at \_\_\_\_\_, (and Respondent was denying that request) it behooved Respondent to ensure that \_\_\_\_\_ was being provided a FAPE by scheduling an IEP meeting to discuss what effect, if any \_\_\_\_\_'s opinions regarding \_\_\_\_\_'s learning disability would have on \_\_\_\_\_'s January 9, 2001 IEP.

The Hearings Officer concludes that the procedural violations found above resulted in the loss of educational opportunity and, therefore, denied \_\_\_\_\_ a FAPE.

#### Substantive Denial of FAPE

Petitioners contend that Respondent did not offer \_\_\_\_\_ a FAPE because the January 9, 2001 IEP was not reasonably calculated to enable him to receive educational benefit. Because of the procedural violations found above, the IEP team did not have the necessary information to properly address \_\_\_\_\_'s needs regarding his learning disabilities. Accordingly, the Hearings Officer concludes that the January 9, 2001 IEP did not offer \_\_\_\_\_ a FAPE for the second semester of his 2000-2001 school year. As the January 9, 2001 IEP has never been revised, the Hearings Officer also concludes that \_\_\_\_\_ has not been offered a FAPE for the 2001-2002 and 2002-2003 school years.

Compensatory Education

Petitioners requested at least one year of compensatory education after the 2002-2003 school year. Based on the evidence presented, the Hearings Officer concludes that [redacted] is entitled to one year of compensatory education--the 2003-2004 school year.

Tuition Reimbursement

Because the Hearings Officer has determined that a FAPE has not been offered to [redacted], it must be determined whether [redacted] is an appropriate school for [redacted] and whether there are any factors that would require a reduction or denial of the cost of reimbursement.

Hawaii Administrative Rules § 8-56-51 states in part:

**§ 8-56-51 Placement of students by parents if a free appropriate public education is at issue.**

(c) If the parent of a student with a disability, who previously received special education and related services under the authority of the department, enrolls the student in a private...secondary school without the consent of or referral by the department, a court or a hearing officer may require the department to reimburse the parent for the cost of that enrollment if the court or hearing officer finds that the department had not made a free appropriate public education available to the student in a timely manner prior to the enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the state standards that apply to education provided by the department.

(d) The cost of reimbursement described in subsection (c) may be reduced or denied:

(1) If:

(A) At the most recent IEP meeting that the parent attended prior to removal of the student from the public school, the parent did not inform the IEP team that the parent was rejecting the placement proposed by the department to provide a free appropriate public education to the student,

including a statement of the concerns and the intent to enroll the student in a private public school at public expense; or

(B) At least ten business day (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parent did not give written notice to the department of the information described in subparagraph (A);

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parent[.]

Based on the evidence presented, the Hearings Officer finds that \_\_\_\_\_ is an appropriate school for \_\_\_\_\_ and accordingly, the Hearings Officer concludes that Petitioners are entitled to be reimbursed for the cost of enrollment at \_\_\_\_\_ for the second semester of Matthew's 2000-2001 school year, and his 2001-2002 and 2002-2003 school years.

Next, it must be determined whether there is any reason that the cost of reimbursement should be reduced or denied. Respondent argued that Petitioners were unreasonable by refusing to consider any placement in Hawaii, and insisting on a mainland residential placement for \_\_\_\_\_

The evidence presented showed that \_\_\_\_\_ did not want to stay in Hawaii, and told his parents that he wanted to go to a boarding school or to live with relatives on the mainland. However, the evidence presented also showed that it was \_\_\_\_\_'s treating psychiatrists' opinions that a residential placement was the only way \_\_\_\_\_ would make academic, emotional and social progress, given \_\_\_\_\_'s condition, and that there were no appropriate facilities in Hawaii for \_\_\_\_\_. Based on the evidence presented, the Hearings Officer concludes that Petitioners' actions were not unreasonable.

IV. DECISION

IT IS HEREBY ORDERED THAT Respondent reimburse Petitioners for expenses incurred for \_\_\_\_\_ placement at \_\_\_\_\_ including related services and programs, from February 2001 through the 2002-2003 school year, including reasonable




costs of travel for \_\_\_\_\_ and his parents, and reasonable costs of lodging for \_\_\_\_\_ parents when they are a \_\_\_\_\_ for parent-teacher conferences or other school-related visits. It is also ordered that, as compensation for lost educational opportunity, \_\_\_\_\_ is entitled to attend \_\_\_\_\_ at public expense for one year, the 2003-2004 school year.

**RIGHT TO APPEAL**

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. The appeal must be made within thirty (30) days after receipt of this decision.

DATED: Honolulu, Hawaii, March 31, 2003

  
SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs