



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2003 JUN -5 A 11:30

HEARINGS OFFICE

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

In the Matter of	)	DOE-2003-011
	)	
y and through his	)	FINDINGS OF FACT, CONCLUSIONS
Mother, (	)	OF LAW AND DECISION;
	)	APPENDICES "A" TO "C"
	)	
Petitioners,	)	
	)	
vs.	)	
	)	
DEPARTMENT OF EDUCATION,	)	
STATE OF HAWAII,	)	
	)	
Respondent.	)	

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On January 28, 2003, the Department of Education ("Respondent") received a request for a due process hearing under Hawaii Administrative Rules ("HAR") Title 8, Chapter 56 ("Chapter 56") from \_\_\_\_\_ and through his mother \_\_\_\_\_ (collectively referred to as "Petitioners"). A prehearing conference was held on February 6, 2003, and attended by \_\_\_\_\_, Esq., attorney for Petitioners, and \_\_\_\_\_, Esq., attorney for Respondent. At the prehearing conference, the parties agreed to reschedule the hearing to March 13, 2003, and extend the date for the issuance of the final decision to April 4, 2003.

On February 12, 2003, Petitioners filed a Motion for Stay Put. On February 18, 2003, Respondent filed its Memorandum in Opposition to Petitioners' Motion. On February 20, 2003, oral arguments were heard on the Motion. Petitioners were represented by Mr. \_\_\_\_\_

and Respondent was represented by Mr. [REDACTED] On March 3, 2003, the Hearings Officer issued an Order Granting Petitioners' Motion for Stay Put.

The hearing was continued from March 13, 2003 to April 15, 2003 by agreement of the parties.

On April 15, 2003, the hearing was conducted by the undersigned Hearings Officer. ( [REDACTED] and [REDACTED] "parents") were present, and Petitioners were represented by Mr. [REDACTED] Respondent's representative Jean Hartmann was present and Respondent was represented by Mr. [REDACTED]

At the end of Respondent's presentation, Petitioners moved for a directed verdict. After hearing argument from the parties, Petitioners' motion was denied.

At the close of the hearing, the parties requested the opportunity to file written briefs, incorporating a closing argument. The parties agreed to file their briefs on or before April 25, 2003, and extend the decision deadline to May 9, 2003. Respondent filed its Closing Brief on April 24, 2003 and Petitioners filed their Closing Brief on April 25, 2003.

By a letter dated April 25, 2003, Petitioners objected to Respondent's "inaccurate legal assertions" and Respondent's attempt to introduce additional evidence via its closing brief. Petitioners requested that a transcript be provided, and that they be allowed to fill in citations to testimony noted in its Closing Brief. After a telephone conference with the parties, the Hearings Officer approved Petitioners' request that they be given the opportunity to review the transcript and file its Closing Brief with citations to the record within one week after receiving the written transcript and that the decision be issued two weeks after receipt of Petitioners' Closing Brief. Petitioners' Closing Brief with citations was filed on May 22, 2003. The decision deadline is June 5, 2003.

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 [REDACTED] years old [REDACTED] and is a [REDACTED] at [REDACTED] School ([REDACTED]). [REDACTED] has attended [REDACTED] since Summer 2002.

[redacted] Middle School [redacted] is [redacted]'s home school. [redacted] has been qualified as a student with a disability.

2. On January 6, 2003, [redacted], Individualized Education Program ("IEP") team held a meeting without Parents in order to conduct the annual review of [redacted]'s IEP, which needed to be completed by January 7, 2003. Because of the need to complete the annual review, the meeting was held even though Parents informed Respondent that they could not attend the meeting. Respondent believed the meeting was necessary because they thought that [redacted] would be attending [redacted] the next semester, which started the following week. Another IEP team meeting was scheduled for January 21, 2003.

3. The IEP completed on January 6, 2003 did not contain current information about [redacted] because Parents were not there to provide input as to [redacted]'s current status. A Prior Written Notice of Department Action ("Prior Written Notice") was issued, effective January 6, 2003.

4. [redacted]'s IEP was based on testing from [redacted] that was completed in Summer 2002, and the Student Profile from [redacted]. This was agreed to at an IEP team meeting in October 2002, where the IEP team decided that the testing from [redacted] was comprehensive and current enough. Parents did not want further unnecessary testing.

5. By a letter dated January 16, 2003, [redacted] declined Respondent's invitation to the January 21, 2003 IEP meeting. Enclosed with that letter was [redacted] Student Profile and first quarter report card.

6. Student Profile - Summer 2002 from [redacted] provided in part:

[redacted] is an inquisitive student. He is highly distractible and needs constant adult monitoring and assistance to clarify instructions and expectations for assignments as well as to maintain task commitment. He often has difficulty focusing during oral discussions and his contributions can be tangential or divert from the topic at hand. [redacted] enjoys working with computers and willingly assists his classmates in this area.

[redacted] optimal learning environments were seen as: (1) age-related peers, (2) small group instruction, (3) remedial, (4) self-contained class, and (5) highly structured setting. Mainstream, which was also an option, was not marked as one of his optimal learning environments.

7. According to [redacted] s progress report from [redacted] for the first quarter of the 2002-2003 school year, [redacted] had a B- for social science, mathematics, and language arts. His teacher commented:

[redacted] can be a capable student when he is able to focus on the task at hand; however, he frequently has difficulty attending to school tasks. [redacted] enjoys sharing his many experiences with the class—especially relating to science and social studies discussion.

8. On January 21, 2003, an IEP team meeting was held and the January 6, 2003 IEP was revised after input from Parents. The IEP stated that "[redacted] disabilities are such that he requires SpEd services for English, Math, Science and Social Studies." The IEP team felt that [redacted] should be in special education classes for those core subjects because he needed to pass those classes to be promoted to the eighth grade, but could be in regular education classes for all electives, advisory, lunch and recess.

9. The IEP team felt that [redacted] needed to be in special education classes for science and social studies because of his reading level, (2.9) even though Parents informed the IEP team that they believed he is doing better than his reading score shows, as [redacted] was a poor test taker, and that [redacted] ; teacher at [redacted] believed that [redacted] was reading at a mid-fourth grade level. The IEP team believed that the special education class would be a better setting for [redacted] to start off with, as the IEP team also believed that the transition from [redacted] to [redacted] , would be difficult for [redacted] and they felt that being safe and successful was important for [redacted] .

10. Although the IEP team believed that [redacted] should start social studies and science in the special education classroom, they were willing to change that if it appeared that [redacted] was ready for regular education social studies and science classes at the time he enrolled at [redacted] . The IEP Team's regular education teacher felt that it was better for [redacted] go from a special education classroom to a regular education classroom rather than vice versa because of self-esteem issues.

11. It was Respondent's intention to revisit the issue of least restrictive environment for social studies and science when [redacted] enrolled at [redacted] . If all indications were that [redacted] could manage in a regular education class for social studies and science it was Respondent's intention to place him there.

12. Respondent issued a Prior Written Notice which was effective January 21, 2003 and stated in part:

Least restrictive environment options considered were a combination of general education classes and special education classes. After the family makes an on-site visitation to an IEP meeting will be called to finalize the decision regarding social studies and science classes. is making a free and appropriate public education in the least restrictive environment available to therefore unilateral private school placement by the parents is at their own expense.

A true and correct copy of the Prior Written Notice is attached hereto and incorporated herein by reference as Appendix "A".

13. Respondent also developed a transition plan which would commence when Parents inform Respondent that will be attending The Transition Plan is attached hereto and incorporated herein by reference as Appendix "B".

14. At the January 21, 2003 IEP meeting, Parents informed the IEP team that they were going to have remain at for the remainder of the 2002-2003 school year, as the semester had already started. The IEP Team then discussed a summer transition so Parents assumed that Respondent would pay for second semester at. At the end of the meeting, principal informed Parents that Respondent would not pay for second semester at Parents responded by saying that they would pursue a due process hearing.

15. By a letter dated January 16, 2003 and received by Respondent on January 22, 2003, Parents informed Respondent that they were retaining at for the second semester and that they were seeking reimbursement from Respondent.

16. By a letter dated January 28, 2003, Respondent rejected Parents' request for reimbursement.

17. second quarter grades were as follows: Language Arts, Social Science, Health, Physical Education, B-; Mathematics, C+. , teacher commented:

appears to want to do well academically but he often engages in discussions unrelated to the topic at hand at inappropriate times. Recently he has shown an (sic) negative attitude when asked to assist with cooperative efforts in the

classroom. has worked hard to improve his homework responsibility.

18. On February 8, 2003, was assessed in reading at the Sylvan Learning Center. The grade equivalent results for the Oral Reading Test – GORT 3 and California Achievement Test were between 4.6 and 7.6. According to the Sylvan Learning Center, the grade equivalents reported are not expected to equal the classroom grade level. A copy of the Sylvan Learning Center’s Diagnostic Assessment, Academic Reading (2001) is attached hereto and incorporated herein by reference as Appendix “C”. These results were not given to s IEP team because there has been no IEP meeting since began attending the Sylvan Learning Center.

19. The Hearings Officer found that the IEP team members who testified in DOE-03-066 on December 11 and 13, 2002 all agreed that could be placed with general education students for social studies and science, with some support. Based on that testimony, the Hearings Officer concluded that the January 7, 2002 IEP did not offer a FAPE for the first semester of his seventh grade year.

III. CONCLUSIONS OF LAW

It is not disputed that 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 free appropriate public education (“FAPE”) available to

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 a FAPE: (1) whether there has been compliance with the procedural requirements of the Individuals with Disabilities Education Act (“IDEA”), and (2) whether IEP is reasonably calculated to enable him to receive education 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 allege that [redacted] was denied a FAPE when his IEP team proceeded with the January 6, 2003 meeting without Parents' participation. However, fifteen days later, on January 21, 2003, Parents had a full opportunity to participate in developing [redacted]'s IEP. As [redacted] continued to attend [redacted] with no interruption, and Parents had no intention of transferring [redacted] to [redacted] until summer 2003, there was no loss of educational opportunity for [redacted], or serious infringement of Parents' opportunity to participate in the IEP formulation process, and therefore no denial of a FAPE.

There is no contention that the January 21, 2003 IEP or the process that led up to that IEP was procedurally inadequate. The remainder of the discussion will be related to [redacted]'s January 21, 2003 IEP.

Substantive Denial of a FAPE

Hawaii Administrative Rules § 8-56-43 requires that Respondent ensure that students with a disability are, to the maximum extent appropriate, educated with students without a disability, and that special classes, separate schooling or removal of students with a disability from the regular educational environment should only occur if "the nature or severity of the disability is such that education, including special education, in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

Petitioners contend that Respondent did not provide a FAPE to [redacted] because his IEP provided for special education classes in social studies and science. Respondent contends that, based on the information they had at the time of the January 21, 2003 IEP team meeting and the fact that [redacted] would be a new student at [redacted], it was appropriate to initially place [redacted] in special education for science and social studies, with the option of moving him to regular education classes if it appeared appropriate.

At the previous hearing in December 2002, some members of [redacted] IEP team testified that he could be placed in regular education science and social studies classes, with some support. However, since then, some of [redacted]'s IEP team members have changed, and they decided that at least initially, [redacted] should be placed in special education for science

and social studies, despite Parents insistence that [redacted] was capable of being in regular education classes for those subjects, with some support.

It does not appear that [redacted] previous IEP team had the [redacted] assessments when they testified at the hearing, as it appears that [redacted] received the assessments in November 2002 and the last IEP meeting prior to the January 6, 2003 meeting was in October 2002. The assessments were completed in summer 2002 and [redacted] functional grade level for reading decoding was middle second grade, and his functional level for reading comprehension was middle third grade. In addition, his optimal learning environments were small group instruction, a self contained class and a highly structured setting. Mainstream was not included as one of his optimal learning environments. [redacted] first quarter report card commented that he could be a capable student when he focused on the task at hand, but that he frequently had difficulty in attending to school tasks. While the assessments were five to six months old at the time the IEP team was developing IEP, they were not outdated, and more recent test scores were not available because in accepting the [redacted] assessments, the IEP team took into consideration Parents' concern that more testing would put more stress on [redacted]. Although [redacted] may have been doing better in January 2003 than the assessments indicated, it was reasonable for the IEP team to rely on those assessments. The IEP team also took into consideration Parents' opinion that [redacted] was capable of being in regular education for science and social studies by agreeing to revise the IEP once [redacted] and Parents visited the school and observed [redacted] regular education social studies and science classes. Based on the evidence presented, the Hearings Officer concludes that the January 21, 2003 IEP and Prior Written Notice offered [redacted] a FAPE.<sup>1</sup>

As the Hearings Officer concluded that Respondent offered [redacted] a FAPE, the issue of tuition reimbursement need not be addressed.

<sup>1</sup> The February 8, 2003 test scores from Sylvan Learning Center are not relevant to a determination as to whether the January 21, 2003 IEP and Prior Written Notice offered [redacted] a FAPE as [redacted]'s IEP team had not had a chance to review this information. Pursuant to HAR § 8-56-33, Parents could have requested that an IEP meeting be scheduled in order to review this new information, and [redacted]'s IEP could have been revised, if appropriate.




IV. DECISION

IT IS HEREBY ORDERED that Petitioner's request for tuition reimbursement is denied and that their due process request is dismissed.

**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 days after receipt of this decision.

DATED: Honolulu, Hawaii, June 5, 2003

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