



DEPT. OF COMMERCE AND CONSUMER AFFAIRS

2003 JUL 28 P 1:16

HEARINGS OFFICE

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

In the Matter of

by and

through his mother,

Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Respondent.

DOE-2003-033

HEARINGS OFFICER'S
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

Legend:

Student -

Mother or SK -

CN -

AS -

JP -

DM -

IK -

LML -

I. BACKGROUND

On March 21, 2003, a Request for Impartial Due Process Hearing was filed by Student, by and through his mother, SK ("Petitioners"). The request was transmitted to the Office of Administrative Hearings and a Notice of Hearing and Pre-Hearing Conference was issued to the parties on March 24, 2003.

On May 9, 2003 Respondent the Department of Education ("Respondent"), filed a motion for summary judgment. On May 15, 2003, Petitioners filed a memorandum in opposition to Respondent's motion for summary judgment and a cross-motion for summary judgment. By order dated May 22, 2003, both motions were denied.

On May 28, 2003, the hearing in this matter was convened by the undersigned Hearings Officer with Petitioners represented by Stanley E. Levin, Esq. and with Respondent represented by Aaron H. Schulaner, Esq.

During the course of Respondent's case-in-chief¹, both parties moved the Hearings Officer to direct a verdict in their favor.² After considering the argument of counsel, the Hearings Officer denied Respondent's motion and granted Petitioners' motion on the issue of whether Student graduated from high school with a regular diploma. Thereafter, this matter was reconvened for further hearing on May 29, 2003 and was concluded on May 30, 2003.

At the conclusion of the hearing, the parties were directed to submit written closing briefs. On June 17, 2003, Respondent filed its closing brief and on June 23, 2003, Petitioners filed their closing brief. A Reply brief was filed by Respondent on July 3, 2003. The Hearings Officer, having reviewed and considered the evidence presented by the parties, together with the exhibits, records and files herein, hereby renders the following findings of fact, conclusions of law, and decision.

¹ The first three witnesses called by Respondent were from Redemption Academy. At the conclusion of their testimonies, Respondent's attorney confirmed that no other witnesses would be called to testify on the issue of whether Student graduated from high school with a regular diploma.

² Respondent based its motion on the argument that Student was not entitled to compensatory education because he had "aged out." Petitioners' motion sought a finding that Student did not graduate from High School with a regular diploma.

II. FINDINGS OF FACT

1. Student was deemed eligible for Special Education Services under the Individuals with Disabilities Education Act ("IDEA") prior to his third birthday.
2. Student's date of birth is November
3. Student was home-schooled for several years. Thereafter, Student was enrolled in and attended _____ y for the school years 1998-1999, 1999-2000, and 2000-2001.
4. In June 2001, Student received a Certificate of Achievement from
5. In approximately June 2001, Student underwent surgery which involved extensive hospitalization.
6. On August 30, 2001, an Individualized Education Plan ("IEP") was developed for Student. The IEP included a provision for transition services.
7. As a result of Student's medical condition, Respondent was unable to complete the transition services within the one-year period covered by the August 30, 2001 IEP.
8. In or about June 2002, the principal of _____ High School issued to Student a High School Diploma.
9. On August 26, 2002, the IEP team convened and determined that the IEP dated August 30, 2001 was "still active until completion."
10. By letter dated January 15, 2003, the principal of _____ High School informed SK that "your son is no longer eligible under the Individuals With Disabilities Education Act (IDEA). As such, the IEP team will not be reconvening in the future, and your son's file will be closed." Transition services to Student was set to terminate on March 31, 2003. Notwithstanding that, services to Student have continued to the present as a result of the filing of this action and a Stay Put Order issued by the Hearings Officer on May 11, 2003.
11. The 2002-2003 school year ended in June 2003.

III. CONCLUSIONS OF LAW

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

The focus of Petitioners' complaint is aimed at the Student's transition plan. Petitioners assert that Respondent failed to prepare, complete and implement an appropriate transition plan in a timely manner, and that the plan was, in any event, never reduced to writing. These assertions, if proven, would involve procedural violations of the IDEA. And, according to Petitioners, those alleged violations resulted in a denial of a Free Appropriate Public Education ("FAPE") to Student.

34 C.F.R. §347(b) provides:

(b) **Transition services.** The IEP must include-

(1) For each student with a disability beginning at age 14 (or younger, if determined appropriate by the IEP team), and updated annually, a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education program); and

(2) For each student beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

According to the evidence, Student's written transition plan in the IEP was never completed. AS, a vice principal at _____ High School, testified that she had directed CN, the school's transition teacher, to prepare a draft prior to the IEP meetings but that the team never got to the point of being able to finalize the plan "because of the time that was spent on the results of the testings that [SK] requested. A lot of it had to do with the physical therapy, the ankle brace, the information shared by the speech therapist, where the meeting time just went on beyond two, three hours." "Because in the IEP meetings that we started out with much of the information that was presented took up most, if not all, of the time, so a lot of the discussions that surfaced came up with SK's viewpoint about where Student was headed, his interest and we took all of that into consideration." AS also explained that Student underwent surgery and as a result, "we weren't sure of what he would be capable of doing without hurting himself, and CN would have been involved in

investigating the sites that he would be able to visit with the wheelchair” “As such, the IEP team agreed that the August 30, 2001 IEP would be continued.

The fact that Student’s transition plan was never finalized, however, does not end the inquiry. This is so because under the IDEA, procedural flaws do not automatically require a finding of a denial of FAPE. On the other hand, procedural inadequacies that result in the loss of educational opportunity or seriously infringe upon the parents’ opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. *W.G. v. Board of Trustees of Target Range School Dist.*, 960 F.2d 1479 (9th Cir. 1992); *Amanda J ex rel. Annette J v. Clark County School*, 267 F.3d 877 (9th Cir. 2001); *Roland M v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990). Thus, the Hearings Officer must determine whether Respondent’s failure to finalize a written transition plan in a timely manner resulted in the loss of educational opportunity to Student.

34 C.F.R. §300.29 defines “transition services” as follows:

(a) As used in this part, **transition services** means a coordinated set of activities for a student with a disability that-

(1) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual student’s needs, taking into account the student’s preferences and interests; and

(3) Includes-

- (i) Instruction;
- (ii) Related services;
- (iii) Community experiences;
- (iv) The development of employment and other post-school adult living objectives; and
- (v) If appropriate, acquisition of daily living skills and functional vocational evaluation.

* * * *

According to the evidence, CN provided transition services to Student by developing Student's post high school activities. CN looked into clerical work for Student along with opportunities with the FBI, an agency that Student had expressed an interest in. CN also offered to take Student to visit community college campuses³ and worked with the Division of Vocational Rehabilitation ("DVR") of the Department of Human Services and the Developmental Disabilities Branch ("DD") of the Department of Health in preparation for Student's anticipated departure from McKinley.⁴

Vice principal AS testified that representatives from both DVR and DD attended the IEP meetings in order to "listen in on current information as far as the student was concerned, plannings, interest areas, anything that might be serviced by agencies or providers connected to that student that might impact on their post-high-school plans." AS also pointed out that LML, McKinley's expert teacher in transition, conferred with CN about what he needed to do to follow up.

JP was assigned by Respondent to tutor Student and has tutored Student for the past nine years.⁵ In conjunction with his tutoring, JP has taken Student to the Honolulu Community College campus to begin the process of being evaluated for computer literacy. "[S]o this is what, basically, I think he needs right now because he's not really certain what he wants to do vocationally, but he will need some computer skills" According to JP, his goal was to have Student perform at grade level or meet the requirements to move toward graduation.

In addition to providing Student with academic instruction, JP also attempted to assist Student in researching possible employment opportunities:

He has vacillated basically over the past two years or three years. He has gone from wanting to work in the post office to possibly photography. He expressed an interest in law enforcement at one time. He's landed on two or three different things. We've done some Internet research to look at some related occupations. So he really hasn't landed on anything solid as of this point.

³ CN testified that although he offered to arrange for campus visits for Student, Petitioners did not take him up on this offer.

⁴ According to the evidence, Student was both DVR and DD certified.

⁵ The Hearings Officer found JP's testimony to be particularly credible given his nine-year relationship with Student.

According to JP:

Whenever he indicated an interest in a vocation, I would ask him what skills would be necessary and he would answer me to the best of his ability, and I would try to see what he knew, basically, about the occupation. Basically, what we would do is we'd do Internet searches, and that sort of thing. I would try and tell him, well, these are the qualifications. I know at one time the one thing I can remember we did is he wanted to be an FBI agent, I believe it was, so we did a search, and it showed the different qualifications, so I said, well, maybe we want to look at something related to this because these qualifications might be a bit much for you to attain. So he came up with some alternative types of vocations that were related to law enforcement, and - like I said, then he started hopping around a little bit. Basically, he wasn't quite sure what he wanted to do. We went to Borders one time, we used that facility often, and we were able to, of course, check books on that and do our research directly right there.

JP also worked with Student on developing certain life skills:

What I would like to do it in is, like, discuss this with them, like we're talking, have a dialog with him, and then if I give him a textbook with an exercise, then he can apply what we talked about, the terminology, the vocabulary, to what it is we talked about. Certain things like deductions, what kind of deductions they take out of your checks, state tax, federal tax, Social Security, how do you figure out what the total deductions are, gross pay versus net pay, that sort of things, hourly wage, salary, commission, depends on how you get paid, so

Respondent also arranged for DM, Ph. D, to provide services to Student. According to the evidence, DM provided Student with psychological services for over five years. For the past two years, his services have focused on "setting things up so that he started to have a transition to post high school." Toward that end, DM developed a transition plan for Student pursuant to a request from the IEP team.⁶ The plan was completed and sent to the team in or about October 2002 and, among other things, was coordinated with

⁶ DM testified that "I was requested to develop a transition plan by the school, and I then spent some time doing that and then sent it to them, but we've had no formal discussion on that after that point, but I have a monthly report submitted that I have was following the plan."

Student's skills trainer, IK. DM also prepared a set of goals and objectives for Student. DM explained that "I specified the goals and objectives, otherwise, what should be done in order to have Student adapt himself for the post high school situation, whether it's for work or further education" and described those goals and objectives:

Okay. We'll start out with career and life skills as a standard, 16A, and the issue is "Develop skills and attributes that are critical to a person's ability to successfully navigate the world, in and out of school, at work and in the home." And then I specified the skills and attributes, "Thinking and reasoning, personal quality skills for managing resources, skills to travel with available transportation and interpersonal skills."

* * * *

Okay. So we want him to be independent in his living, so that he isn't a burden to the state and things like this. That will be the annual goal, how independent is he? We will measure these goals by observations, frequency tallies, records, and arrangements for daily work, and/or schooling. And it starts out, [Student] -- for the benchmark, short-term objectives, [Student] will buy with correct amount of money over \$20 groceries five out of five times using shopping list, advertisements; clothing, five out of five times; restaurant meals, five out of five times; transportation, five out of five times; merchandise and other goods, so we want him to be able to go into any shops, we want him to be able to travel from place to place. That's what we're trying to achieve here. And it goes on and specifies further in detail. It indicates that "He should be able to take care of himself in terms of hygiene, taking care of the house, preparing food, cleaning the place, taking messages," daily living skills in the home. and, C, "[Student] will be able to take a bus by the end of the year without receiving instructions or assistance with accompaniment. If he cannot physically conduct the activity, then he can use the Handi-Van or some other form of transportation." You know he has a mobility problem?

* * * *

Okay. And D, is "He will work at a paying or volunteering part-time job or full-time job for at least three weeks, and we may use vocational rehabilitation or GD for that function." E is "Find his way to different stores and several

shopping centers by reading directions on signs, asking directions, calling on cell phones or using other approaches, five out of five times.”

* * * *

And, according to DM, progress was being made toward these goals and objectives. Of particular interest were Student’s monthly reports that had been prepared by both DM and the skills trainer, IK.⁷ In an April 2, 2003 session, DM and IK reported that, “[Student] is gaining confidence. His social skills are gradually improving.” And, in a report dated May 6, 2003, IK wrote: “The transition plan is being followed. [Student] is gaining a number of experiences which will desensitize his anxieties. He does not scan the environment as much now. [Student] plans on taking core college courses”.

Based on all of these considerations, the Hearings Officer finds that Respondent’s failure to complete a written transition plan did not result in the loss of education opportunity to Student. The evidence sufficiently established that Student was provided appropriate transition services in the form of instruction, community experiences, daily living skills, and related services. According to the evidence, Student has also received services focusing on vocational evaluation and the development of employment and other post-school opportunities.⁸ As such, the Hearings Officer concludes that Student was not denied FAPE by Respondent.

IV. DECISION

Based on the foregoing findings and conclusions, the Hearings Officer concludes that Respondent has proven by a preponderance of the evidence that it provided FAPE to Student and consequently, finds in favor of Respondent. Accordingly, it is ordered that Petitioners’ due process hearing request be and is hereby dismissed.

7 The Hearings Officer considers this significant in view of the fact that the skills trainer was extremely familiar with Student’s abilities.

8 These efforts, however, may have met with marginal success because, according to JP, Student “vacillated basically over the past two years or three years”.

RIGHT TO APPEAL

This is a final administrative decision and shall be binding on all parties hereto. Any party aggrieved by this decision is entitled to file a notice of appeal to a court of competent jurisdiction within thirty (30) days of the issuance of this decision.

DATED at Honolulu, Hawaii: JUL 22 2003



CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs