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

In the Matter of)	DOE-2003-047
)	
STUDENT by and through his Mother,)	FINDINGS OF FACT, CONCLUSIONS
MOTHER,)	OF LAW AND DECISION;
)	APPENDICES "A" to "D"
Petitioners,)	
vs.)	
)	
DEPARTMENT OF EDUCATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	
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FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On April 4, 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 Student, by and through his mother Mother (collectively referred to as "Petitioners"). A prehearing conference was held on April 25, 2003, and attended by [REDACTED] Esq., attorney for Petitioners, and [REDACTED] Esq. attorney for Respondent. At the prehearing conference, the parties agreed to reschedule the hearing to June 5 and 6, 2003, and extend the date for the issuance of the final decision to June 20, 2003. Subsequently, the parties agreed to begin the hearing on June 3, 2003, in order to accommodate a witness.

On June 3, 2003, the hearing was conducted by the undersigned Hearings Officer. Robert and Mother ("Parents") were present, and Petitioners were represented by Mr. [REDACTED]

Respondent's representative [REDACTED] was present and Respondent was represented by Ms. [REDACTED]. The hearing continued on June 5 and 6, 2003, August 25, 2003 and September 10, 2003.

At the close of the hearing, the parties requested the opportunity to file written briefs, incorporating a closing argument. Respondent's Closing Brief was filed on October 21, 2003 and Petitioners' Closing Brief was filed on October 27, 2003. Petitioners' request to extend the decision deadline to November 28, 2003 was granted. The parties' subsequent request to extend the decision deadline to December 8, 2003 was also granted.

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. Student ("Student") is 4 years old (DOB [REDACTED]) and has not attended a public school since November 7, 2002. [REDACTED] Elementary School ([REDACTED]) is Student's home school. Student was qualified as a student with a disability under the category of autism on July 1, 2002.

2. On July 19, 2002, Student's Individualized Education Program ("IEP") team agreed that Student would be placed in [REDACTED]'s inclusion preschool classroom which would enable him to be with regular education students throughout his school day. The IEP stated that Student would begin attending preschool on July 25, 2002. Student was to begin his transition into the classroom by being in the classroom during recess time (10:15 a.m. to 10:45 a.m.) with only Parent and teacher, then with teacher only, and then increase the time student is in the classroom, to include time when the other students are present. Pages from the July 19, 2002 IEP which include the Present Levels of Educational Performance, Section 21 (Services) and the Meeting Notes are attached hereto and incorporated herein by reference as Appendix "A". Parents were present at the IEP team meeting.

3. During the last weekend in July 2002, Mother ("Mother") received training in applied behavior analysis "ABA" on Oahu from a CARD outreach program. The CARD program uses only ABA methodology. Mother was very impressed with the CARD program and immediately attempted to implement it in her home. She saw immediate results.

4. On August 12, 2002 an IEP team meeting was held with Mother present at the meeting. The amount of time the skills trainer would be in the home was increased from 240 minutes per day to 480 minutes per day and the amount of time the Parent Counselor would spend in the home was increased from 1200 minutes per month to 1800 minutes per month. Pages from the August 12, 2002 IEP, which include the Present Levels of Performance, Section 21 (Services) and the Meeting Notes are attached hereto and incorporated herein by reference as Appendix "B".

5. On September 20, 2002, an IEP meeting was held to address concerns Parents raised in a written request to Respondent dated August 29, 2002. By a letter dated September 6, 2002, Mother indicated that she would not attend the meeting and that the meeting should proceed without her. The IEP team discussed Parents' request for additional skills trainer support in the school and home setting and additional hours for speech and occupational therapy. Concerns raised in Parents' letter and the decisions made by the IEP team are reflected in the Services section, the Meeting Notes, and the Prior Written Notices which are attached hereto and incorporated herein by reference as Appendix "C".

6. Student began attending [REDACTED] on July 25, 2002, staying for one-half hour in the beginning, and gradually increasing the number of hours he stayed in school. For at least the last two weeks he attended [REDACTED] Student was in school for about 4 ½ hours per day. Student's classroom had five students and three adults. Three of the students were regular education students, and two, including Student, were special education students.

7. At school, the learning strategies for Student included the ABA method, which includes discrete trial training; positive and negative reinforcement; functional analysis, and a structured teaching room. Although Student was in a classroom with other students, he did his discrete trial training with two adults when first learning a skill. After he learned the skill, only one adult was necessary.

8. Student started school without any "learning to learn" skills. In school, Respondent focused on teaching Student those skills and basic living skills using the learning strategies described above.

9. Respondent's overall program for Student incorporated ABA, functional communication training and a parent education component, as this was found to be most effective to help resolve specific symptoms in the presentation of autism.

10. Parents stopped sending Student to school after November 6, 2002. This coincided with the time Respondent felt that Student had sufficient "learning to learn" skills in order to start the picture exchange communication system ("PECS") and the visual schedule, as these methodologies are implemented most effectively after "learning to learn" skills are in place.

11. Petitioners' expert, [REDACTED], Ph.D., spent one day observing Student's home program in July 2003. Her opinions are based solely on her observations and what she was told by Petitioners, because she was not provided any other records, including Student's IEPs or evaluations, and did not speak with anyone associated with Respondent.

12. Dr. [REDACTED] believes that the ideal program for Student would be to be in a group based class that had individual discrete trial training in the classroom so that Student would also have some adaptive learning. Student would have direct one to one instruction, but have exposure to an appropriate peer group during recess or snack time.

13. Dr. [REDACTED] agreed that a program that consisted of one-to-one ABA methodology, as well as a variety of other methodologies, including working on "learning to learn" skills would be appropriate for Student.

14. According to Dr. [REDACTED] weekly one-half hour to one hour sessions with a speech therapist would be appropriate for Student, with aides from his home and school program attending so that the activities the speech therapist comes up with can be implemented on at least a daily basis with Student.

15. It was Dr [REDACTED] impression that Parents were not cooperating with Respondent and had a resistive attitude. It was also her opinion that a parent's participation and cooperation are essential to create and implement an effective program. Dr [REDACTED] tried to encourage Mother to be more cooperative with Respondent, as she believed that Petitioners would be needing special education services for many years to come.

16. Dr. [REDACTED] agrees with the methodology that CARD uses, but did not agree with the curriculum that had been structured for Student. However, it was Dr. [REDACTED] opinion that given the need for a home program for Student, it was a reasonable and appropriate decision for Parents to obtain CARD's packaged curriculum, and that Parents created an appropriate home program for Student. Dr. [REDACTED] stated that "...it's okay, but it's

not fabulous. I think it's the best alternative that the mother described to me as available for him at that time."

17. Parents did not allow the skills trainers (who were being paid by Respondent) to follow the recommendations from Student's school team at home. Even after Respondent agreed that the skills trainers can do the CARD program after doing some of Respondent's trials, the skills trainers were only allowed to do the CARD program. Respondent was concerned that the home program was not soundly based on developmental theory and that Petitioners were unwilling to blend CARD with the school program.

18. Respondent's efforts to design and implement Student's home program were delayed because Parents cancelled a parent-teacher conference and scheduled home visits, refused to allow the autism consultant into their home, and did not return Respondent's phone calls or provide requested information about Student. In spite of Petitioners' lack of cooperation, Respondent completed Student's proposed curriculum in early September, and asked Petitioners for input but received no response.

19. On October 24, 2002, Respondent attempted to share the curriculum for the home program with Mother, but Mother refused because she believed the autism consultant was not qualified to develop the program.

20. Although Student did not attend school after November 6, 2002, Respondent continued to provide Student with skills trainer services until December 31, 2002.

21. Student's first skills trainer began delivering services on August 29, 2002. Appendix "D" reflects a log of the skills trainer services and parent training services provided.

22. At Petitioners' request, on February 14, 2003, Student was evaluated by [REDACTED] Ph.D., and his expressive communication was found to be at the five to six month level, and his understanding was at the eighteen month level, and overall at the fifteen month level. He said "baby" one time, and was only able to babble a couple of syllables. At that time, Dr. [REDACTED] believed that PECS was not really in place.

23. Dr. [REDACTED] recommendation for Student was a minimum of 40 hours per week (spread over 6-7 days) of home-based direct one to one structured teaching using discrete trial training. Dr. [REDACTED] found that Student was benefiting from the CARD program and recommended that it continue through Summer 2003. If Student was then found to have a

fairly strong baseline of skills, she thought that he may be ready for a mixture of school and home based services. If Dr. [REDACTED] had a magic wand, she “would love for [Student] to be in a school-based program providing everything that one needs for a very autism specific program was there.”

III. CONCLUSIONS OF LAW

It is not disputed that Student 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 Student.

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 Student a FAPE: (1) whether there has been compliance with the procedural requirements of the Individuals with Disabilities Education Act (“IDEA”), and (2) whether Student’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 (9th Cir. 1992).

Petitioners alleged that Respondent predetermined Student’s placement at KES, failed to conduct a full and complete initial evaluation and failed to assure parent participation in IEP team and placement decisions, resulting in a major loss of educational opportunity for Student. The Hearings Officer finds that the evidence presented did not support those allegations, and accordingly, concludes that there was no loss of educational opportunity for Student, or serious infringement of Parents’ opportunity to participate in the formation of Student’s IEP, and therefore no denial of a FAPE.

Substantive Denial of a FAPE

In Petitioners' request for impartial hearing, they contend that Student did not have the necessary skills to benefit from a school placement and that Respondent failed to properly develop and implement a program that met Student's unique needs because the school-based program lacked structure, intensity, curriculum and trained personnel. Petitioners further alleged that Student's home-based program did not provide training for its personnel, an appropriate curriculum, or oversight and direction by Respondent. Petitioners also identified as a concern the fact that related services (speech, occupational and physical therapy) were not being provided. Petitioners' proposed resolution included:

Funding of a full-time home based-program using CARD, which includes but is not limited to 40 hours of direct one to one instruction, additional hours for administrative duties of the lead therapist, additional hours for quarterly training and on-going phone consultations, and reimbursement for all educational expenses related to the full-time home based program. DOE provide all related services at the home as stated in the IEP.

School-Based Program

The evidence presented showed that Student's school-based program included one-to-one and two-to-one instruction using ABA in order to develop "learning to learn" and basic living skills, which he did not have when he began school. Although Student was in a classroom with four other children, he was not receiving group instruction, but one-to-one and two-to-one instruction, with the opportunity to join the other children for recess, snack time, and circle time. Petitioners' experts described this as appropriate for Student. Petitioners contend that PECS should have been instituted as soon as Student started school. However, Dr. Siegel agreed that "learning to learn" skills were needed before PECS could be effectively implemented. Respondent believed Student was ready for PECS in late October or early November. However, it was never implemented because Parents stopped sending Student to school on November 6, 2002. Accordingly, the Hearings Officer concludes that Student's school-based program provided him a FAPE.

Home-Based Program

The evidence presented showed that Petitioners resisted and sometimes even obstructed Respondent's efforts to implement the home-based program. Nevertheless, the home-based program curriculum was completed in early September 2002, but delivery of the curriculum was delayed because Respondent attempted to meet with and obtain input from Petitioners. When the curriculum was finally presented to Petitioners on October 24, 2002, they refused to accept it because they believed that the autism consultant was not qualified to develop the program. Petitioners even refused to allow the skill trainers paid by Respondent to do the discrete trials developed by Respondent that would have provided continuity between Student's home-based and school-based instruction. Although Petitioners argued that Respondent did not provide an appropriate curriculum, trained personnel and oversight or direction, the evidence presented did not support those allegations. While the Hearings Officer is mindful that Parents' actions were motivated by their sincere belief that Respondent's home-based program was inappropriate for Student, their actions prevented Respondent from implementing Student's IEP. Accordingly, the Hearings Officer concludes that Respondent offered Student a FAPE.

The evidence presented also showed that there was some delay in implementing the home-based program, which was unrelated to Petitioners' resistance to Respondent's program. The Hearings Officer concludes that this delay, which occurred from July 25, 2002 to the end of August 2002, when the first skills trainer was hired, entitles Student to compensatory education. Based on the evidence presented, the Hearings Officer concludes that Respondent provided Student ample compensatory education by allowing skills trainer services to continue to the end of December 2002, even though Student's last day of school was November 6, 2002.

As the Hearings Officer concluded that Respondent offered Student a FAPE, the issue of tuition reimbursement and the provision of related services need not be addressed.

IV. DECISION

IT IS HEREBY ORDERED that Petitioners' request for 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 (30) days after receipt of this decision.

DATED: Honolulu, Hawaii, December 8, 2003

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