

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

In the Matter of)	DOE-2003-48
)	
STUDENT, by and through)	HEARINGS OFFICER'S
his Parents, MOTHER)	FINDINGS OF FACT,
and STUDENT,)	CONCLUSIONS OF LAW,
)	AND DECISION
Petitioners,)	
)	
vs.)	
)	
DEPARTMENT OF EDUCATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

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

Legend:

STUDENT - STUDENT
MOTHER - MOTHER
AH - Anastacia Heusinkveld
DU - Deborah Ullman
KK - Kelly Knudsen
LA - Dr. Laura Anderson
VE - Valerie Elmore

I. BACKGROUND

On April 4, 2003, STUDENT, by and through his parents ("Petitioners") filed a Request for Impartial Due Process Hearing. The request was transmitted to the Office of Administrative Hearings on April 16, 2003. On April 21, 2003, a Notice of Hearing and Pre-Hearing Conference was issued to the parties.

On June 3, 2003, the hearing in this matter was convened by the undersigned Hearings Officer with Petitioners represented by their attorney, Stanley E. Levin, Esq. and with Respondent Department of Education ("Respondent") represented by its attorney, Stella Kam, Esq. Thereafter, this matter was reconvened for further hearing on June 13, June 16, August 13, August 14, and was concluded on September 12, 2003.

At the conclusion of the hearing, the parties were directed to submit written closing briefs. On September 26, 2003, Respondent filed its Closing Brief and on October 7, 2003, Petitioners filed their Closing Brief. A Reply Brief was filed by Respondent on October 13, 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.

II. FINDINGS OF FACT

1. STUDENT was initially enrolled in Kilauea Preschool a few weeks prior to the end of the 2000-2001 school year. STUDENT continued to attend the school until he was removed from the program by Petitioners on November 6, 2002.

2. Kilauea Preschool is a pilot program administered by a regular education teacher and a special education pre-school teacher and is aimed at giving preschool special education students access to regular education students.

3. The Kilauea Preschool class is based on an applied behavior assessment and discreet trial training format which includes the picture exchange communication system.

4. Upon STUDENT's enrollment in Kilauea Preschool, there were approximately five regular education students and three other special education students participating in the program.

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.

In bringing this action, Petitioners complain, among other things, that the school program was inappropriate for STUDENT. According to Petitioners, STUDENT “did not benefit from the school program in any meaningful way”.

On the other hand, DU, the autism consultant, testified that the Kilauea Preschool focused on STUDENT’s areas of deficits including social skills, interactive play, and learning skills. DU also described STUDENT’s progress while attending Kilauea Preschool:

He had improved tremendously compared to all the students I worked with throughout district, and there were 26 at the time. He had made the most progress for the long length of time he retained the progress. He was able to come into the classroom, transition from his car to the classroom without incident. He was able to come into the classroom, put his backpack where—in the right area it was supposed to be. He was able to go to a schedule, a picture schedule, on the board and pick up the six items for where he was supposed to go. He would put his lunch items or snack items where they belonged. He also was able to transition within the classroom from independent tasks to group tasks to working on skill development. He was able to go out to the playground. Initially in the playground he was by himself and he wouldn’t interact with any of the children. He was sensitive to sand and those types of things. By the end of the time that I left, he was out on the playground and interacting with other students. I watched him one day climb up behind another student on the slide put his arms around the child and slide down laughing and giggling to the bottom. And he was not able to do any of that initially when we started.

AH, STUDENT’s special education teacher, testified that by the time STUDENT was removed from school in November 2002, he was able to complete visual schedules, use toys appropriately, sit in his chair, line up, look at others in the face, look at himself in the mirror, identify colors and shapes, dress himself, brush his teeth, use the toilet,

and wear shoes. STUDENT had also acquired better turn-taking skills, communications skills, fine motor skills, play skills, imaginative play skills, and self-help skills. In addition, his tantrumming had all but disappeared. Moreover, much of STUDENT's progress in school was corroborated by psychologist LA:

Once he got through the difficult transition period to school, he really responded remarkably well in the school environment, and the tantrums decreased dramatically.

And he was following schedules and checking off cards and moving around the room and interacting with other kids and eating independently and he didn't use the bottle at school and he was toilet trained at school.

So it worked. It worked, you know, very quickly once we had him at school enough to follow what we know works for kids with autism spectrum disorders. It really—It worked. So we didn't need—Behavior wasn't a problem for [STUDENT] at school.

The Hearings Officer credits the testimonies of AH, DU and LA, particularly because these professionals had been closely involved with STUDENT throughout most of the time he was enrolled in Kilauea Preschool.¹ Based on these considerations, the Hearings Officer concludes that Respondent proved by a preponderance of the evidence that it provided a Free Appropriate Public Education ("FAPE") to STUDENT with respect to his school program.

Petitioners also allege that the home program was never properly implemented by Respondent. More specifically, Petitioners complain that Respondent failed to prove that it provided the materials, curriculum and staff needed to implement the home program. A determination of those claims, however, must take into account the obvious disagreement between the parties as to the content of the home program as well as Petitioners' cooperation in the implementation of the program.

Respondent presented evidence that STUDENT had progressed in a number of areas while attending Kilauea Preschool. Undoubtedly, a major objective of the home

¹ Kelly Knudsen, the district school psychologist also testified that [STUDENT] "was eating on his own, he could sit in the chair. He was using utensils, he wasn't eating with his hands anymore. He wasn't tantrumming. . . ."

component of STUDENT's Individualized Education Program ("IEP") was to reinforce those skills. Notwithstanding that, there was evidence that Petitioners, on occasion, would not allow skills trainers in the home, refused services, asked for a reduction in skills trainers hours, refused to act upon the recommendations of the IEP team members in creating structure within the home, and required skills trainers to follow their directions in working with STUDENT. DU testified about Petitioners' reluctance to allow skill trainers into their home:

I originally requested five days a week and [MOTHER] had stated to the group . . . but stated it would be too infringing on their family, because they had family time. They had work. They were going through trying to get their business back on track, and they were too busy and they didn't want that interruption at the home. So we compensate—or we—she came back with two days a week and we ended up with three days a week.

Another challenge faced by Respondent was the numerous cancellations and rejections of services which were largely unexplained. In that regard, LA testified:

In September of 2001, there is a cancelled whole team meeting that was cancelled by the family.

February of 2002, they cancelled a home visit from me.

June 5th of 2002, we had an IEP arranged for last day of school to organize the whole summer service program, and then the family cancelled that meeting the day of it, and then tried to reschedule one again in the next couple days, but all the staff had already scattered for the summer, which was explained to them when they did cancel it that day that it was going to be hard to do.

In July of 2002, there were some consents needed signed that they said they were going to sign and didn't get to for a while.

I had a training visit planned with a skills trainer in the home that was cancelled by the family.

In August there was a meeting that was left early, an IEP meeting that was left early, and the parents stopped participating in it.

In September of 2002, I had a home visit planned with the autism consultant to go over specific training for the skills trainers to implement what needs to happen with these kids, and that was cancelled.

I also had a visit planned with the speech pathologist to go over the home communications plan. That was cancelled by the family.

Another three-month update treatment team meeting was also cancelled by the family in the month of September.

The month of October of 2002, a teacher conference that was supposed to go over part of the curriculum was cancelled.

The month of November, a home visit that I had planned to work with the home team again was cancelled.

In December of 2002, the parents requested that the IEP been postponed until they could get further evaluation done. So that was another meeting that was backed up.

And during that period of time, I never cancelled a single solitary planned meeting or organized plan.

There were repeated family cancellations of planned meetings to clarify the service and put services into place.

There was also a stretch of about six to seven weeks from about September 20th until – September 20th until about late October where the parents weren't returning phone calls and wouldn't accept the curriculum that we had prepared to offer.

They said that they saw that as a substitution for CARDS and that they weren't going to accept anything that was a substitution for CARDS, so they refused to let us even show them what the curriculum was.

Petitioners' dedication and devotion to STUDENT was readily apparent from the evidence. Nevertheless, the question before the Hearings Officer is whether Respondent provided FAPE to STUDENT. With regard to that issue and on the record presented here,

the Hearings Officer finds that the program Respondent attempted to institute in the home was designed to address STUDENT's unique needs and was reasonably calculated to provide STUDENT with educational benefits. *See, Board of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)(IDEA does not require that a student be provided with the best available special education instruction or services, or that those services maximize a student's potential-the basic floor of opportunity consists of access to specialized instruction and related services which are designed to provide educational benefit to the child)*. Accordingly, the Hearings Officer concludes that the evidence was sufficient to prove that Respondent provided STUDENT with FAPE with respect to the home program.

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.

V. RIGHT TO APPEAL

This is a final administrative decision and shall be binding on all parties hereto. Any person/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: November 6, 2003

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