



DEPT. OF COMMERCE AND CONSUMER AFFAIRS

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

HEARINGS OFFICE

In the Matter of)	DOE-2003-060
)	
DEPARTMENT OF EDUCATION,)	FINDINGS OF FACT, CONCLUSIONS
STATE OF HAWAII,)	OF LAW AND DECISION;
)	APPENDICES "A" and "B"
Petitioner,)	
vs.)	
)	
██████████ and ██████████ J, as the Parents)	
of ██████████,)	
)	
Respondents.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On May 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 ██████████ in, Department Representative, Department of Education, State of Hawaii ("Petitioner") with respect to ██████████ ("Student"). A prehearing conference was held on June 4, 2003, and attended by ██████████ Esq., attorney for Student and ██████████ and ██████████ ("Respondents") and ██████████ am, Esq. attorney for Petitioner. At the prehearing conference, the parties agreed to reschedule the hearing to July 8, 2003.

On July 2, 2003, Respondents filed a Motion for Stay Put. On August 5, 2003, Respondents' Motion was granted. By agreement of the parties, the hearing was rescheduled to September 22 and 29, 2003.

On September 22 and 29, 2003, the hearing was conducted by the undersigned Hearings Officer. Petitioner's representative Joseph Kernan was present, and Petitioner was represented by Mr. [REDACTED] and [REDACTED] ("Parents") were present on September 29, 2003, and Respondents were represented by Mr. [REDACTED].

At the close of the hearing, the parties agreed to file written briefs on or before October 13, 2003, and extend the decision deadline to October 28, 2003. Petitioner and Respondents filed their Closing Briefs on October 13, 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. Student is 11 years old (DOB [REDACTED]) and is a sixth grader at [REDACTED] bl. Student has attended [REDACTED] school, a special education school, for over three years. [REDACTED] school ("Home School") is Student's home school. Student has been qualified as a student with a disability under the category of autism.

2. On March 10, 2003, an Individualized Education Program ("IEP") team meeting was held to cover the period March 17, 2003 to March 10, 2004. The IEP team agreed that extended school year services would be provided, and Student would be in special education classes for language arts, math, social studies and science. All other activities and classes were to be with regular education students. When the subject of assistive technology devices was raised, no one, including Parents or Student's [REDACTED] School teacher, raised the issue of the timer, computer or spell checker Student was using at [REDACTED] School. A transition plan from [REDACTED] School to Home School was also presented to the IEP team. After the meeting, Parents told the IEP team that they wanted to take the IEP home and get input from other people who could help them make a decision. Parents indicated that they would call or write a letter to Petitioner with their decision. A copy of the IEP with the meeting notes and transition plan is attached hereto and incorporated herein by reference as Appendix "A".

3. On March 17, 2003, Petitioner issued a Prior Written Notice of Department Action, a copy of which is attached hereto and incorporated herein by reference as Appendix "B".

4. By a letter dated May 22, 2003, Parents rejected the summer program at Home School because they felt Student should be in a regular education class. Parents informed Petitioner that they were keeping Student at [REDACTED] and would seek reimbursement for the summer program expense.

5. By a letter dated August 12, 2003, Parents' attorney informed Petitioner's attorney that they were rejecting the March 10, 2003 IEP and had chosen to retain Student at [REDACTED] and seek reimbursement for tuition and related costs. The reasons for rejection were:

Student should be mainstreamed out of the special education classroom to a greater extent. Supports and accommodations were not designed to allow this. A smaller general education classroom was appropriate. Assistive technology was not identified to help Student. The qualifications and supports for the instructors were not defined. Nor was the modifications to be made to the content, methodology and delivery of instruction for Student's special education. The Present Levels of Performance was not accurate. Student's Goals and Objectives are not sufficiently measurable intra-year. Each of his unique needs have not been addressed.

6. Student spends eight hours a day, six days a week with his one-to-one adult assistant. Currently, Student's one-to-one adult assistant is a skills trainer. The qualifications for a skills trainer is less than what it was for a therapeutic aide, but not as low as an educational aide.

7. Student's IEP now requires a one-to-one adult assistant who is able to attend to Student's goals and objectives as stated.

8. Petitioner developed Student's present levels of educational performance by consulting with Student's teacher at [REDACTED] and his one-to-one adult assistant, as well as reviewing Student's student status report, progress reports from [REDACTED] and the one-to-one adult assistant's progress report.

9. Petitioner developed Student's educational goals and objectives with input from Student's teacher at [REDACTED] and his one-to-one adult assistant. Student's special

education teacher at the Home School also added goals and objectives that the Home School would be offering.

10. At the March 10, 2003 IEP meeting, both Student's teacher at [REDACTED] and his one-to-one adult assistant indicated that the present levels of performance and the goals and objectives were reasonable and pertinent to where Student was at that point.

11. At the March 10, 2003 IEP team meeting, there was no disagreement or further input or discussions about the breakdown between special education classes and general education classes and activities.

12. Petitioner developed the goals and objectives regarding Student's speech therapy with Student's speech therapist at [REDACTED]. The same amount of services was to be maintained. At the March 10, 2003 IEP team meeting, a few goals were added because he had mastered some of the older goals.

13. The transition plan to bring Student from [REDACTED] to the Home School was also discussed at the March 10, 2003 IEP team meeting. Student's special education teacher at the Home School drafted the transition plan.

14. The IEP team agreed to keep all of Student's services in place, and as he transitioned, the IEP team planned to decide on a case by case basis what level of services Student would continue to receive.

15. When asked by Petitioner, Student's [REDACTED] teacher said that Student did not need anything to assist him in the classroom other than the standard paper, pencil and books.

16. Student does not have an individualized positive behavior support plan.

17. The Home School is a small school with 333 students, of which 62 are special education students. Student's general education elective classes have about twelve students. The general education classes for the sixth grade is one semester of art and one semester of video, using the Olelo video studio that is on campus. There is also one semester of PE and one semester of health.

18. In February 2003, the Home School's special education teacher (who would be Student's teacher for the 2003-2004 school year) observed Student at [REDACTED]. He saw Student doing fractions, a journal assignment with his skills trainer, lunch and recess, then quiet reading with his skills trainer. Student was one of eleven students in the class,

ranging in ages from 5 to 12, Student being the oldest. Although there was a lot of commotion, Student was focused and was doing his work and not paying attention to the distractions.

19. There are four ten and eleven year old students in the special education class Student would be in at the Home School. There are no children with autism in that class. These students are in special education for math, language arts, social studies and science, and general education for electives.

20. The Home School's special education teacher wrote the transition plan. The transition plan was not implemented. Parents did not have any comments about the transition plan at the March 10, 2003 IEP team meeting.

21. Student's summer ESY at the Home School would have consisted of the same services that were in place for the school year. Student would have worked on the goals and objectives contained in his IEP, and could have included a regular education component.

22. For approximately six months, Student has been using a digital time clock that counts backwards when doing his assignments. The timer helps Student manage his time, as he tends to want to do everything perfectly and will keep on erasing and doing work over again without regard to the time. According to Student's teacher at [REDACTED]

Although neatness and accuracy are good learning traits, he shows tendencies of a perfectionist which can interfere with his performance rate in accomplishing his work. The timing device is helping to reduce excessive acts of meticulousness.

23. The Slingerlan reading methodology was not discussed at the March 10, 2003 IEP team meeting.

24. At [REDACTED] Student is in a carpeted classroom with white noise and an air conditioner--a reduced distraction environment. This was not discussed at the March 10, 2003 IEP team meeting.

25. Parents believe that Student has improved at [REDACTED] this year. They base their opinion on his report card and the fact that he has learned more vocabulary and he is more obedient.

26. According to Student's Quarterly Evaluation (November, January and April) from Variety School for the 2002-2003 school year, Student was outstanding in math, and progressing in all other areas.

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 Petitioner made a free appropriate public education ("FAPE") available to Student.

Hawaii Administrative Rules Title 8 Chapter 56 requires that Petitioner 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 Petitioner 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 education benefits. *Rowley*, at 206-207.

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). There is no contention that the March 10, 2003 IEP or the process that led up to that IEP was procedurally inadequate.

With respect to the second part of the *Rowley* test, Respondents claim that Student's IEP was deficient because: (1) it specified a "one-to-one adult assistant able to attend to the goals and objectives as stated" instead of a "skills trainer", (2) there are no speech goals, (3) there is no positive behavioral plan, (4) summer ESY was inappropriate, (5) the issue of assistive technology was never raised, (6) supplementary aids and services that are provided at Variety School are not included, (7) a language arts methodology was not discussed or selected, (8) the transition plan was insufficient, and (9) short term goals were not specified.

One-to-One Adult Assistant

Respondents contend that the IEP failed to list the qualifications for the one-to-one adult assistant or specify that Student required a "skills trainer". The IEP provides that the one-to-one adult assistant be "able to attend to the goals and objectives as stated", which

provides guidance as to what kind of person is appropriate for Student. Currently, Student's one-to-one adult assistant is a skills trainer. While Respondents are concerned that, without the term "skills trainer" in the IEP, Petitioner will retain someone who is not qualified to attend to Student's goals and objectives, the Hearings Officer finds that the March 10, 2003 IEP, as written, is sufficient. Any change to the level of services Student receives is subject to discussion at an IEP meeting, and so Respondents will have the opportunity to voice their concerns if Petitioner proposes to retain a one-to-one adult assistant who is unable to attend to the goals and objectives in Student's IEP.

Speech Goals

Respondents argued that there are no speech goals. However, under Language Arts - Oral Communication, there is a goal to improve oral language by one year, and five benchmarks/short term objectives which were developed by Petitioner with the assistance of Student's speech therapist at Variety School. Although this section is not labeled "speech therapy", the Hearings Officer finds that the IEP does contain speech goals. While Respondents argued that [REDACTED] provided additional speech services not a part of Petitioner's IEP, the additional speech services were not discussed at the March 10, 2003 IEP team meeting or identified at the hearing, and therefore, the evidence presented was insufficient to show that not including these additional services denied Student a FAPE.

Positive Behavioral Plan

Respondents argued that Student was not provided with a FAPE because a positive behavior plan was not included in the IEP. A behavior plan is not required to be included in a student's IEP. However, when a student's behavior impedes the student's learning or that of others, Hawaii Administrative Rules § 8-56-37 requires that the IEP team consider strategies to address that behavior. Although IEP goals under Career and Life Skills address Student's social/interactive/behavior strengths and needs that are described in the IEP's Present Levels of Educational Performance, no evidence was presented to show that Student's behavior impeded his learning or that of others. Accordingly, the Hearings Officer concludes that the omission of a behavior plan did not deny Student a FAPE.

Summer School

Respondents rejected the ESY summer program offered by Petitioner because they believed Student should only be in a regular education classroom. The evidence presented showed that summer ESY at the Home School would have consisted of working on Student's IEP so that Student did not regress during the summer months, and that the Home School's summer school offered both special education and regular education courses. Based on the evidence presented, the Hearings Officer concludes that the ESY summer program offered by Petitioner did not deny Student a FAPE.

Assistive Technology, Supplementary Aids and Services

Respondents argued that Petitioner did not offer Student a FAPE because Student's IEP did not include assistive technology, such as a timer, computer and spell checker that he uses at Variety School, and supplementary aids such as carpeting, air conditioning, white sound, a TEACCH classroom and a bare and distraction-free classroom. The evidence presented showed that when the subjects of assistive technology, supplementary aids and services and program modifications and supports for school personnel were raised, the devices, aids and program modifications at issue were not mentioned by Parents or Student's teacher at [REDACTED] even though they were present, and were the most knowledgeable people on Student's IEP team to provide input in this area. While Student may be receiving these items, services and modifications at Variety School, the fact that it is not included in his IEP does not automatically deny him a FAPE. Not every device or service that helps a student to improve, maintain or increase their functional capabilities will, for that reason alone, be required for a student to receive a FAPE. Based on the evidence presented, the Hearings Officer finds that the omission of the assistive technology items, supplementary aids and services or program modifications itemized by Respondents was not a denial of a FAPE.

Language Arts Methodology

Respondents contended that Student was denied a FAPE because a language arts methodology was not discussed at the March 10, 2003 IEP team meeting. While methodology is an appropriate topic for discussion at an IEP team meeting, that discussion or

its inclusion in an IEP is not mandatory. If Parents had raised a concern about the language arts methodology to be used, it would have been inappropriate for Petitioner to refuse to discuss it. However, the evidence presented showed that the issue of language arts methodology was not raised by anyone at the March 10, 2003 meeting. Accordingly, the Hearings Officer concludes that the failure to discuss methodology at the March 10, 2003 IEP team meeting or include it in Student's IEP did not deny Student a FAPE.

Transition Plan

The evidence presented showed that a draft transition plan was presented at the March 10, 2003 IEP team meeting, and that it was not implemented because Parents rejected summer ESY at the Home School, and ultimately rejected Petitioner's offer of a FAPE at the Home School for the 2003-2004 school year. Respondents' objections to the transition plan are that it was never finalized, it was not as detailed as the one developed (but also not implemented) for the 2003-2003 IEP, and that it was not developed with the input of Student's treating psychologist. Based on the evidence presented, the Hearings Officer concludes that despite Respondents' concerns, the transition plan did not deny Student a FAPE.

Short Term Goals

Respondents argued that short term goals were not specified, and therefore there is no way for Parents to determine whether Student is making appropriate progress towards his yearly goals. Based on the evidence presented, the Hearings Officer concludes that Student's IEP contains short term objectives that break the skill described in the annual goal into discrete components, which is allowed by Appendix A to the 1999 IDEA Regulations which was cited by Respondents.

Based on the evidence presented, the Hearings Officer concludes that the March 10, 2003 IEP and the March 17, 2003 Prior Written Notice offered Student a FAPE.

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

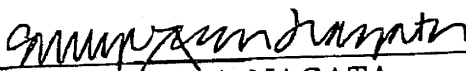
IV. DECISION

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

DATED: Honolulu, Hawaii, October 28, 2003



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