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

In the Matter of)	DOE-03-066
)	
and through his)	FINDINGS OF FACT,
Mother, ()	CONCLUSIONS OF LAW
)	AND DECISION; APPENDIX "A"
)	
Petitioners,)	
)	
vs.)	
)	
DEPARTMENT OF EDUCATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

i. INTRODUCTION

On October 14, 2002, 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 _____ n, by and through his mother (collectively referred to as "Petitioners"). A prehearing conference was held on November 4, 2002, and attended by Keith H.S. Peck, Esq., attorney for Petitioners, and Lono P.V. Beamer, Esq. attorney for Respondent. At the prehearing conference, the parties agreed to reschedule the hearing to December 11 and 13, 2002, and extend the date for the issuance of the final decision to December 31, 2002.

On December 11 and 13, 2002, the hearing was conducted by the undersigned Hearings Officer. _____ was present, and Petitioners were represented by Mr. Peck. Respondent's representative Joseph Kernan was present and Respondent was represented by Mr. Beamer. At the end of Respondent's presentation,

Respondent moved to dismiss Petitioners' request for due process hearing. After hearing arguments from both parties, the motion was denied. Petitioners then moved for a directed verdict. After hearing arguments from both 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 the briefs on or before December 27, 2002. On December 27, 2002, Respondent filed its Closing Statement. Petitioners filed their Closing Brief on December 30, 2002. The parties agreed to extend the date for the issuance of the final decision to January 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. _____) attended _____, at Respondent's expense during his fourth and fifth grade years. _____ Elementary School was _____ home school to the sixth grade, and _____ School is _____ home school for the seventh grade. _____ was diagnosed with Attention Deficit Hyperactivity Disorder and Specific Learning Disability.
2. _____ continued at _____ for his sixth grade year, and at an Individualized Education Program ("IEP") meeting on January 7, 2002, the IEP team ("Team") agreed that _____ should continue at _____ school for his sixth grade year, and continue to January 7, 2003 (the first semester of _____ seventh grade year). This was based on the information available to them indicating, that _____ required special education services all day. The Team agreed that _____ needed Extended School Year ("ESY") for summer only, and that the after school social skills program should continue for the 2001-2002 school year. The Team was to meet on January 28, 2002 to review the school level functional behavioral assessment and develop a behavior plan. An additional meeting was planned for March 11, 2002 to discuss "what is best for _____ next year". Mr. and Mrs. _____ ("Parents") attended this meeting.
3. The Present Levels of Educational Performance ("PLEP") focused on _____ behavior. A copy of the PLEP in _____ January 7, 2002 IEP, as well as the Annual

Measurable Goals, are attached hereto and incorporated herein by reference as Appendix "A". It is noted that "[p]arent agrees with that was stated in the PLEP".

4. On January 7, 2002 IEP has six standard areas where measurable annual goals and benchmark/short-term objectives are listed. Progress is reported quarterly unless noted.

5. The meeting notes for the March 11, 2002 IEP meeting indicate that the Team agreed that [redacted] would continue at [redacted] School for the duration of his current IEP (January 7, 2003), including summer session. The notes also state that Parents, who were present at the meeting, agreed to visit [redacted] School ([redacted]) with [redacted] on August 1, 2002. The [redacted] Student Services Coordinator ("SSC") was to contact Parents as to the exact dates, as [redacted] would be on summer break until the end of August. [redacted] SSC was present at this meeting, along with participants from [redacted] School and [redacted] school.

6. On April 9, 2002, the Team held an IEP meeting with participants from [redacted] Elementary School and Parents. The meeting notes indicate that [redacted] School stated that they were able to offer a free appropriate public education ("FAPE") to [redacted] for summer ESY, but that Parents indicated that they wanted ESY to be at [redacted] School. The meeting notes further state:

After discussion, there was no agreement. Parents do not accept provision of ESY at [redacted] because of the uncertainty of staffing to meet [redacted] needs at this time. Parents' acceptance of ESY at [redacted] is pending. Parents agree to inform [redacted] (via SSC) of their decision by Monday, April 15, 2002.

The meeting notes also state that [redacted] behavioral concerns were minimal recently, and that his behavior in the after school program improved since he was moved to an older group. The Team agreed that [redacted] was progressing satisfactorily per his IEP.

7. On April 9, 2002, [redacted], Principal at [redacted] Elementary School issued a Prior Written Notice of Department Action ("Prior Written Notice") which stated that ESY at [redacted] or at [redacted] School for summer 2002 was Respondent's offer of a FAPE. The Prior Written Notice also states that the summer program at [redacted] School was also considered, but rejected because [redacted] and [redacted] school were able to provide ESY for summer 2002.

8. By a letter dated April 14, 2002, Parents informed Respondent that they do not choose to go to mediation, and would be sending [redacted] School for summer school because they, along with [redacted] of [redacted] School, felt it was the appropriate placement for [redacted]. Parents did not request tuition reimbursement for summer school.

9. By a letter dated April 14, 2002, Respondent responded to Parents' April 14, 2002 letter by stating that "they have not agreed to pay for [redacted] to attend [redacted] or any other private school of your choice" because [redacted] and [redacted] Director of [redacted] School stated that they were able to provide a FAPE for [redacted] summer ESY.

10. By a letter dated May 7, 2002, Respondent offered a transition plan for [redacted] if Parents decided to accept Respondent's offer of a FAPE at [redacted] Middle for summer ESY. The transition plan provided for a site visit and informed Parents about an invitational meeting for incoming seventh grade special education students on May 23, 2002.

11. By a letter dated May 10, 2002, Parents responded to the May 7, 2002 letter and rejected summer placement at [redacted] Middle, as they felt it was inappropriate. Parents further stated: "You want [redacted] transition to occur in summer school. We do not understand how this summer transition works with the IEP dated 1/7/02 that is currently in place." In this letter, Parents stated that they were seeking reimbursement for the costs of sending [redacted] to [redacted] school for summer school.

12. By a letter dated August 9, 2002, Parents informed Respondent that they were rejecting the IEP dated January 7, 2002 because it was not an offer of a FAPE. The reasons given were: (1) did not provide for transition to higher functioning children, (2) did not have correct benchmarks and (3) did not provide for main educational concern of [redacted] dyslexia. Parents also stated that they, along with the [redacted] School staff, believed that [redacted] needed some exposure to a less restrictive environment for non-academic subjects. Lastly, Parents stated that it was their feeling, (and that of [redacted] School) that [redacted] School was best suited to meet [redacted]'s needs at that time, and therefore, Parents were giving Respondent ten days notice that it would be moving [redacted] to [redacted] School for the 2002-2003 school year. Parents did not request tuition reimbursement.

13. By a letter dated September 5, 2002, Respondent requested that an IEP meeting be scheduled to go over Parents rejection of the January 7, 2002 IEP. The letter also stated: "[i]f you have voluntarily decided to move [redacted] to [redacted] for the 2002-03 school

year, in your rejection of FAPE, that is fine. However, your decision will necessitate your full private/personal funding for your child's future education.

14. In a letter which Respondent received on September 17, 2002, [redacted] expressed his concerns about whether [redacted] could provide a FAPE to [redacted] that Parents never agreed to transitioning [redacted] to [redacted] School, and that Parents did not want to sign any document that mentioned transition to [redacted] School in January 2003, as they could not make a decision that far into the future.

15. At an IEP meeting on October 14, 2002, the Team agreed that [redacted] s IEP goals and objectives were to be re-addressed per information received from [redacted] School, and assessments from [redacted] to make a more appropriate educational program for [redacted].

16. According to [redacted] School letterhead, they serve "gifted, dyslexic, and gifted dyslexic children".

17. [redacted] Student Profile – Summer 2002 from [redacted] School provides 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.

18. According to [redacted] progress report from [redacted] School 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.

19. In a letter dated November 5, 2002 from _____, Head Teacher, _____ School, she stated that _____ required constant monitoring and adult assistance to maintain focus on the task at hand, and that adult guidance; even within a self-contained, small group setting is key to _____'s success in learning new concepts. _____ also stated that _____ needed a highly structured environment where expectations, consequences, and daily routines are consistently implemented and maintained, and that throughout the school day, small group and, at times, individualized instruction is required to optimize _____ progress.

20. As a practice, Respondent does not include methodology in the IEP because Respondent believes that the student's teacher should make the final decision based on the student's needs.

21. From September 2002 to December 2002, Respondent planned a gradual transition from _____ school to _____; with transportation being provided so that _____ could attend both schools on a part-time basis. Respondents planned to have _____ attend _____ full-time in January 2003 as a second semester seventh grader. _____ attendance at _____ through January 2003 was agreed to so that the Team could carefully plan _____ transition to seventh grade at _____ Middle. A Prior Written Notice was not issued.

22. As long as _____ attended _____ School, he would not be with regular education students, as _____ School is a special education school.

23. At the April 9, 2002 meeting, _____ Middle's principal told the Team he was unsure about staffing for summer session and had some concerns because _____ Middle was undergoing massive renovations. However, the principal was sure that there would be ESY at _____ Middle.

24. "Mainstreaming" means putting a special education student in a regular education class.

25. At the March 11, 2002 meeting, _____ testified that she told the Team that she wanted to explore _____ School for summer and that the Director of _____ School felt that _____ School was a good next step for _____. The Director of _____ School thought it was time for _____ to move on, but would provide a program for _____ if he stayed. Mrs. _____ was concerned that _____ School's plan to have autistic students

spend more time with the rest of the students would be detrimental to [redacted] because she felt that [redacted] behaves at the least common denominator.

26. In Mrs. [redacted] opinion, [redacted] did well at [redacted] School during the summer. [redacted] lack of disruptive behavior at [redacted] School made Parents decide to leave [redacted] at [redacted] School. Mrs. [redacted] believes that [redacted] School is a good fit for [redacted].

27. According to Mrs. [redacted], [redacted] of [redacted] Middle never contacted them about [redacted] campus visit. Mrs. [redacted] testified that they would have visited, if they had been contacted.

28. Mrs. [redacted] became concerned about methodology when they discovered how severely dyslexic [redacted] is.

29. The Team members who testified at the hearing all agreed that with the exception of math and English, [redacted] could be with general education students for lunch, physical education, music, social studies, science and health, with some support.

30. Petitioners' Request for Impartial Hearing, which Respondent received on October 14, 2002, was the first time Respondent was notified that Petitioners sought reimbursement for tuition at [redacted] School for the 2002-2003 school year.

III. CONCLUSIONS OF LAW

It is not disputed that [redacted] 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 FAPE available to [redacted] in a timely manner. If so, Petitioners are not entitled to be reimbursed for the costs they incurred to enroll [redacted] at [redacted] School for summer school and the 2002-2003 school year.¹

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 [redacted] a FAPE: (1) whether there has been compliance with the procedural requirements of the

¹ As a new IEP should be in place beginning January 7, 2003, it would be premature for the Hearings Officer to make a determination that is binding beyond the first semester of [redacted] 2002-2003 school year.

Individuals with Disabilities Education Act ("IDEA"), and (2) whether IEP is reasonably calculated to enable him to receive education benefit. *Rowley*, at 206-207.

As to the first part of the two-part test, there is no contention that the IEP or the IEP process was procedurally inadequate.

With respect to the second part of the test, Petitioners claim that IEP was deficient because it failed to cite any methodology regarding reading, that short term goals were not specified, and that educational services were not being provided in the least restrictive environment ("LRE").

Methodology

Hawaii Administrative Rules § 8-56-38, which lists the mandatory elements of an IEP, does not include educational methodology, and in fact, Respondents, as a matter of practice, do not include educational methodology in the IEP, leaving the selection of the methodology to the teacher's discretion. In *Dreher v. Amphitheatre Unified School District*, 797 F.Supp. 753 (D.C. Ariz. 1992), *affirmed*, 22 F.3d 228 (9th Cir. 1994) the Court held:

Parents, no matter how well-motivated do not have a right...to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.

While methodology is an appropriate topic for discussion at IEP meetings, its inclusion in an IEP is not mandatory. Accordingly, the Hearings Officer concludes that Respondent did not violate IDEA procedures by not specifying a reading methodology in IEP.

Benchmarks

Next, Petitioners assert that the IEP does not provide for short term goals. The evidence presented established that the IEP has six Measurable Annual Goals ("MAG"), and that each MAG has between four and six Benchmarks/Short-Term Objectives, which are evaluated and reported per quarter, using the codes Mastered, Progressing, Emerging and No Progress. The Hearings Officer finds that the MAGs correlate to the needs identified in IEP, and that the short term objectives/benchmarks measure the progress made towards the MAGs during the school year. Accordingly, the Hearings Officer concludes that IEP included short term goals.

Least Restrictive Environment

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 Respondents did not provide a FAPE to [redacted] because his IEP provided for full time special education classes to January 7, 2003.

A. Summer ESY

The evidence presented showed that up until the March 11, 2002, Parents agreed with what was stated in the PLEP, the assessment that [redacted] required special education services all day at [redacted] School, and that summer ESY would take place at [redacted] School. The evidence presented also showed that at the April 9, 2002 meeting, Parents requested that [redacted] receive summer ESY services at [redacted] School rather than [redacted] School, and that Parents rejected Respondent's offer of summer ESY at [redacted] Middle because of the uncertainty of staffing to meet [redacted] needs.

Based on the evidence presented, the Hearings Officer concludes that Respondent offered a FAPE to [redacted] for summer ESY at [redacted] School, as the IEP was reasonably calculated to enable him to receive educational benefit and was designed to meet [redacted] unique needs. According to reports from [redacted] School, [redacted] still required a structured, small group environment and individualized instruction, which he would have received at [redacted] School. With respect to the issue of LRE, the evidence presented was insufficient to show that, compared to [redacted] School, [redacted] School was the LRE for [redacted]. In addition, [redacted] Summer 2002 Profile from [redacted] School did not include "mainstreaming" as one of his optimal learning environments.

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

B. First Semester, 2002-2003 School Year

[redacted] January 7, 2002 IEP provided for full time attendance at [redacted] School until January 7, 2003, and stated that his disabilities are such that he requires special education

services all day. However, the evidence presented at the hearing showed that the Team intended to slowly transition [redacted] from [redacted] School to [redacted] Middle, using the time from August 2002 to January 2003 to allow [redacted] to get accustomed to [redacted] Middle, so that by January 2003, [redacted] could be a full time seventh grade student at [redacted] Middle. It is not disputed that the Team thought that [redacted] could be placed in general education classes (with support) for every class except math and English. However, the Team's transition plan to [redacted] Middle was not documented in a Prior Written Notice, (or even in written notes to IEP meetings held up to October 14, 2002) which is required when Respondent proposes to change the educational placement of a student with a disability, and which would have become Respondent's offer of a FAPE for [redacted] first semester of the 2002-2003 school year. As there was no Prior Written Notice issued for Respondent's plan to transition [redacted] from [redacted] School to [redacted] Middle, the Hearings Officer's analysis of whether a FAPE was offered to [redacted] for the first semester of the 2002-2003 school year must be based on the January 7, 2002 IEP alone.

Based on the evidence presented, the Hearings Officer concludes that the January 7, 2002 IEP did not offer [redacted] a FAPE for the first semester of his seventh grade year. Even Respondent admitted that [redacted] could be in classes with general education students for a majority of his courses, and revisions to [redacted] IEP, and an offer of a FAPE, should have been made in conformance with HAR Title 8, Chapter 56.

Tuition Reimbursement

Because the Hearings Officer has determined that a FAPE had not been offered to [redacted] in a timely manner prior to his enrollment at [redacted] School, it must be determined whether [redacted] School is an appropriate school for [redacted] and whether there are any factors that would require a reduction or denial of the cost of reimbursement.

Hawaii Administrative Rules § 8-56-51 states in part:

§ 8-56-51 Placement of students by parents if a free appropriate public education is at issue.

(c) If the parent of a student with a disability, who previously received special education and related services under the authority of the department, enrolls the student in a private...secondary school without the consent of or referral by the department, a court or a hearing officer may

require the department to reimburse the parent for the cost of that enrollment if the court or hearing officer finds that the department had not made a free appropriate public education available to the student in a timely manner prior to the enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the state standards that apply to education provided by the department.

(d) The cost of reimbursement described in subsection (c) may be reduced or denied:

(1) If:

(A) At the most recent IEP meeting that the parent attended prior to removal of the student from the public school, the parent did not inform the IEP team that the parent was rejecting the placement proposed by the department to provide a free appropriate public education to the student, including a statement of the concerns and the intent to enroll the student in a private public school at public expense; or

(B) At least ten business day (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parent did not give written notice to the department of the information described in subparagraph (A);

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parent[.]

Respondent argued that _____ School is not an appropriate school for _____ because it does not meet the requirement that _____ education be in the LRE. However, Respondent did not present evidence to show what kinds of students attend _____ School. The testimony at the hearing was inconclusive, and the only evidence submitted stated that _____ School serves "gifted, dyslexic and gifted dyslexic children". While Respondent argued that "there are no regular education students at _____", the evidence presented was insufficient to support this contention and accordingly, the Hearings Officer is unable to make a determination that _____ School is not appropriate because it is not the LRE for _____

Based on the evidence presented at the hearing that [redacted] is doing well at [redacted] School, the Hearings Officer finds that [redacted] School is an appropriate school for [redacted] and accordingly, the Hearings Officer concludes that Petitioners are entitled to be reimbursed for the cost of enrollment at [redacted] School for the first semester of [redacted] 2002-2003 school year.

Next, it must be determined whether there is any reason that the cost of reimbursement should be reduced or denied. The evidence presented showed that Petitioners did not give notice of their rejection of the January 7, 2002 IEP and their intention to place [redacted] School for the 2002-2003 school year at Respondent's expense at the last IEP meeting prior to removal. The evidence presented also showed that they did not give ten business days written notice of their intention to enroll [redacted] at [redacted] School at Respondent's expense. Based on Petitioners' failure to follow the procedures set forth in HAR Title 8, Chapter 56, the Hearings Officer finds that reimbursement to Petitioners should be reduced by 50%, and therefore, concludes that Respondents should be required to reimburse Petitioners for 50% of the costs they incurred to enroll [redacted] School for the 2002-2003 school year.


IV. DECISION

IT IS HEREBY ORDERED that Respondent reimburse Petitioners for 50% of the costs incurred to enroll [redacted] School for the first semester of the 2002-2003 school year.

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, JAN 13 2003



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