



DEPT. OF COMMERCE AND CONSUMER AFFAIRS

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

In the Matter of

[REDACTED] by and through [REDACTED]
[REDACTED]

Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Respondent.

DOE-03-72

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION

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I. INTRODUCTION

On October 24, 2002, the Department of Education ("Respondent") received a request for a due process hearing pursuant to Hawaii Administrative Rules ("HAR") Title 8, Chapter 56 ("Chapter 56") from [REDACTED] by and through his mother [REDACTED] (collectively referred to as "Petitioners"). A prehearing conference was held on November 12, 2002, and attended by [REDACTED] Esq., attorney for Petitioners, and [REDACTED], attorney for Respondent. At the prehearing conference, the parties agreed to reschedule the hearing to December 18, 2002, and extend the date for the issuance of the final decision to January 6, 2003.

On December 18, 2002, the hearing was conducted by the undersigned Hearings Officer at [REDACTED]. [REDACTED]'s parents were present, and Petitioners were represented by [REDACTED]. Respondent's representative [REDACTED] was present during portions of the hearing and was represented by [REDACTED]. At the close of the hearing, the Hearings Officer gave the parties the opportunity to file written briefs,

incorporating a closing argument. The parties agreed to file the briefs on or before December 30, 2002, and extend the date for the issuance of the final decision to January 13, 2003. On December 30, 2002, Respondent filed its Closing Brief. On January 7, 2003, the parties agreed to extend the date for the issuance of the final decision to January 21, 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. [redacted] currently attends [redacted] primary school in the morning and [redacted] School [redacted] from noon until about 2:45 p.m. (2:00 on Wednesdays). [redacted] is a high-functioning autistic student who has been diagnosed with resolving pervasive developmental disorder--not otherwise specified ("PDD-NOS"). [redacted] is home school. [redacted] has been qualified as a student with a disability.

2. On December 31, 2001, [redacted] who specializes in the consultation and treatment of autism spectrum and neurodevelopmental disorders. [redacted]'s recommendations were to "keep his present level of services" and to keep [redacted] in preschool for another year. [redacted] stated. "[h]e is very late born (September), which combined with his developmental immaturity makes it essential to give him extra time for his central nervous system to mature.

3. On May 17, 2002, [redacted] was evaluated by [redacted] a consultant in developmental pediatrics. The Vineland Adaptive Behavior Scales Survey conducted by [redacted] when [redacted] was 4 years and 8 months old indicated that [redacted] was at the age equivalent of: 3 years, 5 months for communication, 3 years, 7 months for daily living skills, 3 years, 1 month for socialization, 3 years, 11 months for motor skills, and 3 years, 6 months for adaptive behavior component. [redacted] s recommendations were:

1. [redacted] placement in a program for fall is critical for his ongoing progress. Placement is somewhat tricky for [redacted] because he needs exposure to typical peers as good language and social models along with age appropriate academic challenges but would likely be overwhelmed and totally over-stimulated in the busy, noisy environment of a regular kindergarten even if he had the assistance of

a full time educational aide. A self-contained special education setting is too restrictive for him.

I see two possible alternatives. First, _____ might do well in his _____ setting for ½ of the day then move into a DOE regular education classroom for the afternoon when the children are more likely to be working in smaller, quieter groups. He could receive his other support services during this time. _____ will need the assistance of a full time 1:1 educational aide for (sic) to ensure peer interactions, redirect attention to the teacher, provide ongoing interaction to expand creative play, thinking, and abstract reasoning skills. The first drawback to this option is that the _____ approach tends to be very child directed and I have concerns that _____ ; interpersonal skills may not be focused on. If left alone to explore his environment, _____ will be very happy and appropriate but his areas of weakness will not be addressed. The parents will need to be very clear that the staff has training in how to facilitate appropriate social interactions and expand _____ play/thinking/reasoning schemes...The second possible drawback is that the _____ (staff are probably not special education certified and may not understand the unique social and emotional needs of a child with PDD-NOS. Should behavior problems arise as _____ meets the demands in a new setting, they will need to have support.

2. A second, less optimal alternative may be to place _____ in a special education kindergarten setting with the majority of his time included in the regular education setting with a 1:1 full time educational assistant. He could spend time in the smaller setting when large group activities or highly noisy, busy activities were taking place but enjoy the academic challenges, circle time and small group activities with his typical peers. _____ does not have the social skill foundation nor does he have enough integrated social-emotional-physical skills to meet the demands of regular education full time.

4. The meeting notes for a May 28, 2002 Individualized Education Program ("IEP") meeting state: "Parents disagree with readiness for Kindergarten placement with Educational Aide. Parents are sending _____ with modified schedule to _____"

5. On May 28, 2002, Respondent issued a Prior Written Notice of Department Action ("Prior Written Notice") which stated that the proposed action would be to "send _____ and that the action was proposed because _____ would benefit socially by interacting with age-appropriate peers. It also stated that _____ schools with modified schedule." The

Prior Written Notice also stated that attending a private preschool or a self-contained special education classroom was rejected because _____ would benefit from being around age and developmentally appropriate peers.

6. _____ started their 2002-2003 school year on July 25, 2002. Kindergarteners take about ten days to get oriented and begin school full-time, and _____ was at _____ full time until September 6, 2002, when _____ started. At that time, _____ parents indicated to _____ principal that they had paid for _____ and his three year old sister to attend _____.

7. By a letter dated September 22, 2002, _____ restated her opinion regarding the appropriate placement for _____. This letter states in part:

In my opinion, continuing _____'s placement at the Pre-school Program is the suitable option for him. Given _____'s developmental level, the children at pre-school are a perfect match for him. They serve as excellent social skill and language models and provide _____ stimulation at his level. He can grow comfortably at this own pace and communicate comfortably. Within this placement _____ will need the services of a full time educational aide trained in autism spectrum disorders. The aide is necessary to facilitate appropriate social interaction, help _____ explore new academic ideas, and to expand his limited social, language, play, and motor repertoires.

My concerns about a special ^{education} kindergarten are several. First, I do not think _____ can handle ^{the} social demands of typically developing five and six year old children. He does not have the appropriate language or social skills to do so. Second, in my experience, kindergarten classrooms can be busy, noisy and socially demanding. _____ may regress if these types of demands are placed on him. Finally, _____ has a variety of oral motor/feeding issues that can be dealt with much easier in the _____ Program setting.

8. On September 13, 2002, J _____ observed _____ in his kindergarten classroom and at his speech class. _____ observation took place between 1:30 p.m. and the end of the school day. A _____ report states in part:

In this time frame, _____ was observed as being able to initiate as well as answer directed questions[.]

_____ kindergarten classroom is set up in a structured teaching style classroom, which is advantageous for _____. This is the general education teacher's teaching style and supports _____ learning style...Having areas designated for specific tasks and activities gives support for _____'s need for structure and routine.

n also has routine and structure built into her scheduling of activities. When she gives notice of changing from one activity to the next, she notifies the students what is coming up, what they need to finish before they can move to the new activity...The EA assigned for him also gives cues by showing, using visual props when directions are given.

Children with Autism have deficits in communication and socialization. Needs are being met within the regular classroom due to his regular education teacher, n having in place the supports that is required by I learning style[.]

9. h believes that it is important for to be in a classroom with peers his age because autistic children are visual learners and they will learn from seeing what their age appropriate peers are doing and will follow suit.

10. On September 25, 2002, , regular education teacher who is certified in regular education and special education, observed She was there from 9:00 a.m. and left at 11:00 a.m. She observed doing his activities alone, with very little peer interaction. However, at recess, she observed that he interacted well with his peers, and played with a variety of children spontaneously, joining games that were in progress and switching activities when he chose. Her written report states in part:

I am concerned about the lack of peer interaction in the classroom. It was explained to me that children choose what they are going to work on within an established sequence. The program appears to encourage the children to work independently or with one other peer at a mat or a table. My first concern is that if others are allowed to choose what they are working on peer interactions may not occur as frequently as they could.

11. The meeting notes for the October 22, 2002 meeting indicated that principal and M shared their observations of school. With regard to placement, the staff agreed that goals could be met by aff, regular education kindergarten with special education support. The IEP team agreed that at could eat in a quiet setting with one to two peers. Both of achers (ri) noted that doing quite well in both settings. The notes also indicated that "Parent requested Impartial Hearing".

12. On October 22, 2002, Respondent issued a Prior Written Notice which stated that the proposed placement would be "full day in regular kindergarten, public school of residence with 1:1 instructional support." This placement was proposed as a free

appropriate public education ("FAPE") to _____ because his IEP goals would be addressed in the least restrictive setting, and the placement provided "optimal interaction with age-appropriate language and socialization role models." Placement in a private preschool was refused because it did not provide certified special education staff, and because opportunities for _____ to socialize and build language skills were less available in the "free choice" _____ environment. The IEP team's decision was based on psychological reports, observations and test data in _____ file as well as observations of

13. _____ has no access to the academic part of _____ kindergarten program because he's only at _____ the afternoons. However, _____ is receiving services in speech, language and occupational therapy. Within the regular classroom, _____ has a skills trainer and participates with regular education children in all activities. There are 18 students in _____ class. _____ is also involved in a primary school adjustment program that is not a special education program, but is another opportunity to develop social and language skills.

14. According to _____, _____ did very well in her class for the one month period he attended _____ on a full time basis. _____ was able to follow all the classroom routines and got along well with the other children. _____ talks with the other children and is able to ask questions. _____ believes that _____'s socialization and communication skills are lower than his classmates, but that he is improving. _____ also believes that _____ needs socialization, and that he socializes well with the four and five year olds that are in his kindergarten class. Based on her observations and assessments, it is _____'s opinion that: (1) _____ is progressing on his IEP goals and objectives, (2) _____'s academic skills are at a kindergarten level, and (3) _____ is on track to be in the first grade.

15. _____ sees a speech pathologist five times a week for twenty minutes. It is the speech pathologist's opinion that _____'s language is around the level of a five year old.

16. _____ sees an occupational therapist for one hour per week. She works with him on fine motor and gross motor deficits, which in her opinion, are not considerable. She describes _____'s dyspraxia as "moderate". She tends to think that the least restrictive environment ("LRE") for _____ would be with his age-appropriate peers.

17. _____ has a skills trainer with him for the time he is at _____. The skills trainer helps _____ interact with the children. She also helps _____ with communication, such as encouraging him to use full sentences and correcting his pronunciation. The skills

trainer also discusses the plan for the day with [redacted], and she will sometimes work with [redacted] with a group of students so it is not so obvious that she is there helping. With [redacted] the focus has been on social interaction and communication, so that's where she focuses her attention.

18. [redacted]'s class at [redacted] there are thirty students between ages 3 and 6. There are 11 three year olds, 7 four year olds and 12 five year olds. There are three teachers in [redacted] class, and one is certified to teach special education.

19. The [redacted] method of education is individualized and child centered. Each child moves at his own pace, learning in his own learning style.

20. At [redacted] can choose to interact with a three year old, a four year old, or a five year old, or he can choose to not interact with anyone. However, if [redacted] chose to play alone, the teachers would question that because children his age usually love social interaction.

21. [redacted], [redacted] school administrator, believes that [redacted] socialization is age appropriate for their classroom. According to [redacted] [redacted] has been observed to work cooperatively with other students, but doesn't necessarily choose to work in a group, and seems to prefer to work alone.

22. [redacted] ("Parents") made the decision to send [redacted] to preschool for another year in May, based on the evaluations by [redacted], the fact that [redacted] is late-born, and because the IEP team described their kindergarten as very progressive, focusing on academics. Parents want [redacted] to be in a general education preschool, where he is on par with the rest of the students, and would not need a skills trainer or other adult with him all day.

23. The only reason Parents agreed to the modified schedule at [redacted] was so that [redacted] could continue to receive speech and occupational therapy.

24. Parents believe that preschool with non-disabled peers was not offered to [redacted] because it was not available, not because it was not appropriate.

25. Parents believe that [redacted] was not ready for kindergarten this year, and that putting him in kindergarten "set(s) him up for failure", since he will probably have to repeat kindergarten. Parents wanted [redacted] to repeat preschool rather than kindergarten.

26. Parents do not want _____ to feel "stupid", and believe that _____ should be around three and sub four year olds in order to socialize properly. Parents do not want _____ to have problems with self esteem.

27. Parents attribute the gains _____ has made to the comfort zone he's had in the preschool setting because at _____ can play with boys his age, but academically, he can be at the three or four year old level, where he is comfortable.

III. CONCLUSIONS OF LAW

It is not disputed that _____ 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 _____ for the 2002-2003 school year. If so, Parents are not entitled to reimbursement of the costs they incurred to enroll _____ for the 2002-2003 school year.

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 _____ a FAPE: (1) whether there has been compliance with the procedural requirements of the Individuals with Disabilities Education Act ("IDEA"), and (2) whether _____'s IEP is reasonably calculated to enable him to receive educational benefits. *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 contend that Respondent did not offer _____ a FAPE because the offer of special education and related services in a regular education kindergarten classroom was not appropriate for _____. In *Seattle School District No. 1 v. B.S.*, 82 F. 3d 1493 (9th Cir. 1996) the Court determined that an "appropriate" public education:

does not mean the absolutely best or 'potential-maximizing' education for the individual child...The states are obliged to provide a basic floor of opportunity through a program individually designed to provide educational benefit to the handicapped child.

Id., at 1500.

The October 22, 2002 Prior Written Notice provided for a full day of kindergarten at with 1:1 instructional support. The IEP team believed that this placement offered a FAPE to because I IEP goals, which focused on socialization and language skills, would be addressed in the least restrictive setting, with age appropriate language and socialization role models. The IEP team's decision was based on information they had available to them as of October 22, 2002, and included information contained in file and observations of

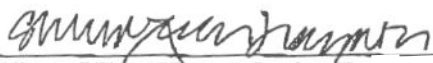
IV. DECISION

IT IS HEREBY ORDERED that Petitioners 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 days after receipt of this decision.

DATED: Honolulu, Hawaii, January 21, 2003



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