



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2003 MAR -3 A 10: 25

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

In the Matter of)	DOE-03-074
)	
by and through)	FINDINGS OF
his Parents,)	FACT, CONCLUSIONS
)	OF LAW AND DECISION
Petitioners,)	
)	
vs.)	
)	
DEPARTMENT OF EDUCATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. BACKGROUND

On October 29, 2002, a Request for Impartial Hearing was filed by _____, by and through his parents, _____ ("Petitioners"). On November 4, 2002, a Notice of Hearing and Pre-Hearing Conference was issued to the parties. The hearing was scheduled to commence on November 22, 2002. The parties subsequently agreed to the additional hearing dates of December 13, 2002, December 20, 2002 and February 6, 2003.

On November 15, 2002, Respondent filed a motion to limit the hearing to the two-year statute of limitations. The motion was denied at the commencement of the hearing on November 22, 2002.

On November 22, 2002, the hearing in this matter was convened by the undersigned Hearings Officer with Petitioners represented by _____; and with Respondent represented by _____. At the conclusion of

Respondent's case-in-chief, Petitioners moved for directed verdict. After hearing the argument of counsel, the motion was denied.

The hearing was reconvened for further hearing on December 13 and 20, 2002, and was concluded on February 6, 2003.

On November 29, 2002, Petitioners filed a motion to compel Respondent to permit Petitioners' educational expert to visit [redacted] he motion was granted by order issued December 6, 2002.

On December 9, 2002, Respondent filed a motion in limine to strike Dr. [redacted] as an expert witness on behalf of Petitioners. The Hearings Officer denied the motion at the commencement of the hearing on December 13, 2002.

On February 4, 2003, counsel for Respondent requested that the hearing be extended to February 10, 2003 in order to take the testimony of an additional witness¹. That request was denied on the same date.

On February 6, 2003, Petitioners filed a motion in limine to exclude improper rebuttal evidence. After hearing the argument of counsel, the motion was orally denied.

At the conclusion of the hearing, the Hearings Officer directed the parties to file written closing arguments by February 14, 2003. Both Petitioners' and Respondent's closing briefs were received on that date.

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. In or about December 1998 at the age of 11 years, Petitioner [redacted] was diagnosed with [redacted] As a result, [redacted] suffers from [redacted] s.

2. [redacted] was certified eligible under the Individuals with Disabilities Education Act ("IDEA"), in early 1999 under the category, [redacted] t." Respondent

¹ By letter dated February 3, 2003 but faxed and received on February 4, 2003, Respondent's counsel requested that Dr. Yates be allowed to testify on February 10, 2003. Petitioners filed objections on February 4, 2003 after which the request was denied.

certified) on the basis of a

3. An initial Individualized Education Program ("IEP") meeting for [redacted] was held in March 1999 and called for [redacted] to be educated in a special education classroom on a regular school campus.

4. The March IEP prescribed five hours per day of special education and five hours per week of speech therapy. There were no occupational ("OT") or physical therapy ("PT") hours listed.

5. The March IEP had two goals: "1) Given reading materials at various grade levels, as determined by ongoing informal assessment, [redacted] will answer comprehension questions (by pointing/gestures, orally or written) on (a) literal level (who, what, when, where); (b) inferential level (how, why, evaluative, etc.) at 75% accuracy or better. 2) Given math materials/instruction at various grade levels for (a) computation skills (addition, subtraction, multiplication, division, decimal, percents, fractions); (b) math application problems (time, money, measurement, word problems). [redacted] will respond by pointing/gesture, orally or written with 75% accuracy or better."

6. Under the March IEP, [redacted] was eligible for Extended School Year.

7. In early August 1999, [redacted] began the 1999-2000 school year. [redacted] had just returned from [redacted] here he had been seen by [redacted] of the [redacted]

I [redacted]

8. In her report, [redacted] found [redacted] to be strong in vocabulary but having "significant word-finding difficulties". [redacted] recommendations included a comprehensive outpatient rehabilitation program, intensive speech-language intervention services, occupational therapy remediation program, and mental health services for [redacted] and his parents.

9. According to [redacted] as [redacted] condition improved, he would likely exhibit increasing signs of depression and irritability as he becomes cognizant of his limitations.

10. In August 1999, Petitioners took [redacted] hospital for a periodic outpatient visit. The examining physician noted:

1. The IEP should be occurring on 8-19-99. I attended the previous IEP planning session. I will try to be at the one on 8-19-99. The most important thing is we should have DOE evaluate his present levels of performance and also help in planning a good program with reasonable objectives for his next upcoming years program. He certainly should continue to have PT/OT and speech-language therapy involved. An education aide might be very helpful in helping [REDACTED] focus on tasks that are presented to him in the school environment.

11. During the 1999-2000 school year, [REDACTED] improved in some academic and nonacademic areas. [REDACTED] began attending the [REDACTED] every day from 7:30 a.m. to 11:30 a.m. for intensive speech therapy. [REDACTED] also received OT and PT services throughout the year.

12. In the 2000-2001 school year, Respondent's speech therapist, [REDACTED] changed the program by adding a [REDACTED] known as [REDACTED] routine. The [REDACTED] referred to [REDACTED] and dealt with part of [REDACTED] auditory needs and had met with some success.

13. [REDACTED] parents took [REDACTED] to a [REDACTED] for an academic assessment and evaluation.

14. During the IEP meeting of January 10, 2001, the team considered a reduction in the frequency of services for [REDACTED]. The notes of the meeting stated:

A reduction in the frequency of services was agreed upon based on the agreement that services will be integrated between the special ed. teacher and the therapists

[REDACTED] will continue to receive all of his therapy services from the end of summer school through the beginning of school in the Fall 2001 as he did last summer. This is vital in that [REDACTED] cannot have a discontinuation of his various therapies for any length of time. An emergency IEP of July 20, 2000 was held to ensure that he would still continue his services from the end of July through the end of August of that year. This IEP recognizes that [REDACTED] will continue to receive his therapeutic services year-round.

15. The 2001-2002 school year began with a series of IEP meetings which ended in March 2002 with the principal informing Petitioners that the offer made in the 2001-2002 IEP was Respondent's offer of Free Appropriate Public Education ("FAPE").

16. Since October 2002, _____ has been participating in the _____ program and residing in the _____, both situated in _____.

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.

The IDEA requires that all students with disabilities be provided with a FAPE. 20 U.S.C. §1400(c) and §1421 et. seq. Chapter 56 of the Hawaii Administrative Rules ("HAR"), provides:

§8-56-3 Free Appropriate public education.

(a) The department shall ensure that each student with a disability who resides in the State . . . is provided a free appropriate public education in accordance with this chapter.

(b) The services provided to a student under this chapter shall address all of the student's identified special education and related services needs.

(c) The services and placement needed by each student with a disability to receive a free appropriate public education shall be based on the student's unique needs and not on the disability.

Generally, FAPE is provided where the program (1) addresses the child's unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with the IEP. *Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U. S. 176, 188-89.* FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, are provided in the least restrictive environment and meets the state's educational standards, and conforms to the child's IEP. 20 U.S.C. §1401(8); HAR §8-56-2. FAPE does not mean the best or potential maximizing education for the individual child . Rather, the state is obliged to

provide a basic floor of opportunity through a program individually designed to provide an educational benefit to the handicapped child. *Rowley*, 458 U.S. at 201.

When parents challenge the appropriateness of a program or placement offered to their disabled child under the IDEA, there is a twofold inquiry. First, has the state complied with the procedural requirements set forth in the IDEA? And second, is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. 176 (1982). Respondent bears the burden of proving compliance with the IDEA at the administrative hearing. *Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996); *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396 (9th Cir. 1994).

A. Procedural Violations.

Petitioners complain that Respondent committed a number of procedural violations of the IDEA that resulted in a denial of FAPE to Under the IDEA, procedural flaws do not automatically require a finding of a denial of FAPE. On the one hand, mere technical deviations will not invalidate an IEP. However, procedural inadequacies that result in the loss of educational opportunity or seriously infringe upon 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 Dist.*, 960 F.2d 1479 (9th Cir. 1992); *Amanda J ex rel. Annette J. v. Clark County School*, 267 F.3d 877 (9th Cir. 2001); *Roland M. v. Concord Sch. Comm*, 910 F.2d 983 (1st Cir. 1990). Consequently, Respondent must prove either that the alleged violations did not occur, or that they did not result in the loss of educational opportunity or deprive Petitioners of a meaningful opportunity to participate in the IEP process.

1. Full and Complete Evaluation.

Petitioners first complain that Respondent failed to conduct a full and complete initial evaluation of educational needs. 34 C.F.R. §300.320 requires in pertinent part that:

(a) Each public agency shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services under Part B of the Act --

* * * *

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(2) *To determine the educational needs of the child.*

(b) In implementing the requirements of paragraph (a) of this section, the public agency shall ensure that –

* * * *

(2) The results of the evaluation are used by the child's IEP team in meeting the requirements of Secs. 300.340-300.350.

(Emphasis added)

In *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1499 (9th Cir. 1996), the court found that both

[t]he district court and ALJ properly concluded that the School District failed to include on the assessment team anyone with knowledge in the disorders known to be the cause of A.S.'s problems. *This was contrary to the School District's duty to "ensure ... [that the] evaluation [of the student] is made by a multidisciplinary team ... including at least one teacher or other specialist with knowledge in the area of suspected disability."* *Smith*, 15 F.3d at 1523 (quoting 34 C.F.R. Sec. 300.532(e)).

(Emphasis added).

Moreover, the federal regulations make clear that:

(g) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

34 C.F.R. §300.532(g).

(h) In evaluating each child with a disability . . . , the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

34 C.F.R. §300.532(h).

According to the evidence presented, the only evaluation relied on by the evaluation team was an "Admission History and Physical" prepared two months earlier as part of [redacted] rehabilitation program at the [redacted]. That report addressed [redacted] needs and was clearly not intended as an evaluation of [redacted] educational needs.

2. IEP Teams.

According to Petitioners, [redacted] IEP teams were improperly composed. Pursuant to 34 C.F.R. §300.344, Respondent was required to ensure that [redacted] IEP teams included a representative of the agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the availability of resources of the public agency, and who can interpret the instructional implications of evaluation results. 34 C.F.R. §300.344 (a)(4)-(5). There was no evidence that Respondent had a [redacted] on the teams who could interpret evaluations such as that of [redacted] or who was aware of what resources were available in the State for the education of a child such as [redacted]. As a result, the full range of [redacted] needs or the resources that might be available to address those needs could not be fully addressed.

3. Current Evaluations.

Petitioners also allege that Respondent failed to properly consider the results of current evaluations. Generally, the child's IEP teams must address the results of current evaluations and revise the child's IEP accordingly. 34 C.F.R. §300.321(b); 34 C.F.R. §300.343(c)(2)(ii). Moreover, evaluation of a child with a disability requires that the agency ensure that the child is assessed in all areas of suspected disability. 20 U.S.C. §1414.

According to the evidence, an [redacted] evaluation prepared by [redacted] in March of 2001 recommended I [redacted] especially the [redacted] ms. [redacted] so recommended that [redacted] recommendations be implemented. [redacted] made similar recommendations in September of 1999 and so did I [redacted] Both [redacted] Respondent, however, did not bring an [redacted] onto the team to [redacted]

consider these reports or to weigh the recommendations by conducting evaluations of its own.

Respondent also failed to adequately consider the recommendations that [REDACTED] needed mental health services. These services were specifically identified in several of [REDACTED] evaluations. In a report dated May 7, 2002, Dr. [REDACTED] noted that "the patient clearly understands and experiences the psychological burden of not being able to perform cognitively and socially at his previous level. This provides additional problems for him". Notwithstanding that, there was little evidence to indicate that Respondent seriously considered that finding in terms of [REDACTED] mental health needs².

4. Revision of IEPs.

Pursuant to the IDEA, the school is under an affirmative duty to ensure that the IEP is revised as appropriate to address (1) any lack of expected progress toward the annual goals and in the general curriculum and (2) the child's anticipated needs. 20 U.S.C. §1414 (d)(4)(A)(ii)(I); 20 U.S.C. §1414 (d)(4)(A)(ii)(IV).

[REDACTED] testified that academic goals and objectives were not met and that the teacher documented the lack of progress. [REDACTED] was concerned that Respondent wanted to limit [REDACTED] to functional education rather than academic education. She testified that for two years at [REDACTED] School, [REDACTED] did not have an academic program (no reading, reading comprehension or math). Moreover, [REDACTED] testified that [REDACTED] had "plateaued in the beginning parts [REDACTED] that we were working on. We were not able to get any further because he was very concrete. He couldn't do the more abstract, which is a higher level, on the [REDACTED]"

According to the testimonies of [REDACTED] however, [REDACTED] was capable of making considerable academic progress and that he was in fact doing so in his current private placement. [REDACTED] testified that [REDACTED] prognosis was very good and that there can be improvement with intensive training. He testified that the [REDACTED] program employed by Respondent was wrong for [REDACTED] because his problem was

² Even when Petitioners raised the issue of [REDACTED] mental health therapy at the December 2001 IEP meeting and Respondent agreed to have [REDACTED] evaluated by a psychiatrist, it did not arrange for the evaluation until May 2002.

not with comprehension but with decoding. In addition, he testified that a reduction in services was wrong. In light of all of [redacted] needs and his failure to progress adequately with regard to his pivotal speech needs, Respondent was required to make substantial material changes to [redacted] IEPs. Instead, it appears from the evidence that Respondent attempted to reduce services to [redacted]

Based on the foregoing considerations, the Hearings Officer concludes that Respondent has failed to prove by a preponderance of the evidence that the alleged violations did not occur and, that they did not result in the loss of educational opportunity or deprive Petitioners of a meaningful opportunity to participate in the IEP process³. [redacted] has therefore been denied FAPE.

B. Substantive Denials of FAPE.

The standard for determining whether Respondent substantively offered FAPE involves the following three factors: whether the program was designed to address student's unique needs; whether the program was reasonably calculated to provide [redacted] with educational benefits; and whether the program conformed to the IEP. 20 U.S.C. §1400 et seq. It is of fundamental importance that the IEP addresses each of the child's unique needs. *Capistrano v. Warrenberg*, 59 F.3d 884 (9th Cir. 1995). It is also true that "educational benefit" is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization. *County of San Diego v. California Special Educ. Hearing Office*, 93 F3d. 1458(9th Cir. 1996).

Although Dr. [redacted], an expert in special education, operation, administration, and IEP formation, testified that a list prepared by Respondent entitled [redacted] was a thorough listing of his needs, she opined that the IEPs did not address [redacted]'s language needs sufficiently, that there was a lack of progress assessment, and that the IEPs did not deal properly with the therapy needs of understanding [redacted].

[redacted], according to [redacted], needed more extensive intensive language therapy than what was reflected in the IEPs, and that such therapy should be administered throughout [redacted]

³ Because Petitioners have established that [redacted] was denied FAPE, it is unnecessary to address Petitioners' additional theories of alleged procedural violations.

the day. In this regard, [redacted] strongly opposed the reduction of services by Respondent from five hours per week to two hours per week of speech services.

[redacted] agreed that [redacted] needs had not been met by Respondent. Dr. [redacted] an expert in acquired [redacted] in the context of special education and the director of the [redacted] er, the special program where [redacted] now resides in [redacted] testified that he could not see demonstrated progress in the IEPs. [redacted] also stated that the services did not seem to be integrated, and that there was no person on top of the plan with training in brain injury to oversee and monitor the program.

In addition, [redacted] explained that [redacted] has severe problems in decoding auditory information at the speech sound level as well as with temporal processing. [redacted] opined that [redacted] has a serious impairment extracting specific words from the ongoing flow of speech and an overload problem. These needs, according to [redacted], were not addressed in [redacted] IEPs, which failed to address feature detection, auditory phonemic awareness or auditory phonology. Nothing in the IEPs addressed lexical and word decoding or temporal decoding. [redacted] were completely inappropriate for [redacted]. [redacted] also agreed that [redacted] has serious psychotherapy needs that must also be addressed.

[redacted] noted that [redacted] had made no academic progress, and that he had significant difficulty understanding and keeping up with anything going on in the classroom. Dr. [redacted] had repeatedly brought to Respondent's attention need for psychotherapy. Yet, there was little evidence that the IEP teams addressed that need. Accordingly, the Hearings Officer concludes that the IEPs were not designed to address [redacted] unique needs and were not reasonably calculated to provide [redacted] with educational benefits. As such, [redacted] was substantively denied FAPE.

C. Compensatory Relief.

Petitioners request that they be awarded their expenses related to [redacted] education at the [redacted] r and the [redacted] program in [redacted]. In this regard, a court may award a disabled student the cost of his private placement if (1) the court determines the student's IEP is inappropriate and (2) the student shows that the private placement he seeks is reasonably calculated to enable the child to receive educational

benefits. *Florence County School District Four v. Carter*, 510 U. S. 7 (1993). Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case. *Burlington School Comm. v. Mass Dept. of Educ.*, 471 U.S. 359 (1985). A disabled student is not required to demonstrate that he cannot be educated in a public setting. Under the IDEA, the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether he will receive such an education. Here, the denial of FAPE may entitle Petitioners to reimbursement for certain expenses associated with the _____ and the _____ provided they show that those placements were appropriate.

_____ testified that the program in _____ put _____ at a place where he could function and move forward. She confirmed that _____ is very heavily researched and is the best known program for phonemic awareness. According to _____ needed a minimum of an hour and one half per day with intensity and under circumstances where it was spread throughout the day. _____ also opined that _____ needed a therapist to help him come to grips with what has happened to him as well as role models. According to the evidence, all of these services are available to _____ t the _____ am.

_____ testified that the _____ appropriate for _____ It allows him to generalize his learning into his larger academic program, strengthening his reading, memory, and social pragmatics. He opined that _____ ; progressing and needs to continue with the very intensive focused program that he is in.

_____ also observed _____ at the _____ and worked with him one on one. He testified that _____ has done a lot better since he's been at the _____ and also at the _____ Center.

_____, the clinic director of the _____ for _____ testified that _____ is receiving instruction four hours per day, five days per week, and that all of his instruction is one-on-one. All of this evidence on the appropriateness of Petitioners' private placement was largely un rebutted by Respondent. Consequently, the Hearings Officer concludes that Petitioners are entitled to reimbursement for the private placement.

The evidence established that _____ requires intense services and a _____ school, neither of which exists in Hawaii. _____ testified that she was not aware of anyone in Hawaii who was qualified to administer the _____ that _____ needed. _____ agreed, indicating that _____ appears to be an area that people in Hawaii need training in. Given _____ highly specific needs and his need for a _____ program, the Hearings Officer concludes that the _____ and the _____ are appropriate placements for _____

IV. DECISION

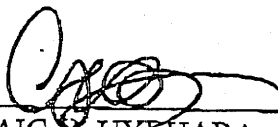
Based on the foregoing findings and conclusions, the Hearings Officer concludes that Respondent has failed to prove by a preponderance of the evidence that it provided FAPE to _____ and consequently finds in favor of Petitioners. Accordingly, it is hereby ordered as follows:

1. Respondent shall reimburse Petitioners for expenses incurred in placement in (a) the _____ consisting of travel costs of _____ and tuition costs of _____ and (b) the _____ consisting of tuition and evaluation costs of _____. Respondent shall also reimburse Petitioners for related travel, transportation and hotel expenses of _____
2. Respondent shall reimburse Petitioners for the cost of the evaluations conducted by _____) and _____
3. As compensation for lost educational opportunity, _____ is entitled to attend the _____ while residing at the _____ at public expense, for one year to wit, 2003-2004 school year.

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: _____ MAR - 3 2003



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