



DEPT. OF COMMERCE AND CONSUMER AFFAIRS

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

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

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. CHRONOLOGY OF CASE

By letter dated October 30, 2002, [redacted] sq., requested a due process hearing on behalf of his clients [redacted] and [redacted] and their son [redacted] (hereinafter collectively referred to as "Petitioners").

On October 31, 2002, the Department of Education ("Respondent") transmitted Petitioners' request for a due process hearing to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs.

On November 22, 2002, Respondent, by and through its attorney [redacted], filed its Motion to Dismiss Case with Prejudice Due to Petitioner [sic] Previous Settlement of the Underlying Matter.

On November 27, 2002, Petitioners, by and through their attorney [redacted], filed their Opposition to Department of Education's Motion to Dismiss Case with Prejudice Due to Petitioner [sic] Previous Settlement of the Underlying Matter.

On November 27, 2002, the hearing on Respondent's Motion to Dismiss Case with Prejudice Due to Petitioner [sic] Previous Settlement of the Underlying Matter was conducted by the undersigned Hearings Officer. Petitioners [redacted] and [redacted] were present and were represented by their attorney, [redacted]. Respondent was represented by its attorney [redacted]. After considering the matters raised by the parties, the Hearings Officer denied Respondent's Motion to Dismiss Case with Prejudice Due to Petitioner [sic] Previous Settlement of the Underlying Matter. After the hearing on Respondent's Motion was concluded, the hearing on the merits was convened.

The hearing continued on December 5, 6, and 18, 2002, and concluded on January 8, 2003. During the course of the hearing, Respondent raised the applicability of a two-year statute of limitations to Petitioners' claims for reimbursement of expenditures. However, Petitioners decided to bifurcate their claims for reimbursement and submitted only the claims for reimbursement arising since October 30, 2000 (two years prior to the filing of the requests for due process hearing in the instant case).

At the conclusion of the hearing, the Hearings Officer issued an oral ruling on the merits, and asked counsel for Petitioners to submit proposed findings of fact, conclusions of law.

On February 28, 2003, Petitioners, by and through their attorney [redacted], submitted Petitioners' Proposed Findings of Fact, Conclusions of Law, Judgment and Order.

On April 22, 2003, the Respondent, by and through its attorney Aaron H. Schulaner, requested an extension of the forty-five day period specified by Hawaii Revised Statutes ("HAR") §8-56-77(a), to April 28, 2003. Good cause appearing therefore, the Hearings Officer granted Respondent's request.

**II. ISSUES PRESENTED**

The issues to be decided in the present matter, as identified in Petitioners' request for a due process hearing dated October 30, 2002, are as follows:

1. The Individualized Education Plan ("IEP") is not tailored to meet the unique and individualized needs of [redacted] with an existing program and qualified personnel.

2. The IEP process has not used sufficient objective means to measure progress of specific learning needs related to disability.
3. The IEP process has not committed to or explained what individualized instruction or related services would be provided;
4. The IEP process has not identified the person who would conduct such instruction or their qualifications; and
5. The IEP process has not provided for specific means or measurements regarding implementation of services or program developments.

**III. FINDINGS OF FACT**

**A. Respondent's Motion to Dismiss Case with Prejudice Due to Petitioners' Previous Settlement of the Underlying Matter**

For the limited purpose of addressing Respondent's Motion to Dismiss Case with Prejudice Due to Petitioners' Previous Settlement of the Underlying Matter, the Hearings Officer hereby sets forth the following limited findings of fact.

1. On August 19, 2002, Petitioners filed a request for a due process hearing in Case No. 03-21. Petitioners were represented by their attorney \_\_\_\_\_, and Respondent was represented by its attorney \_\_\_\_\_. Case No. 03-21 involved the same issues as the present matter.

2. On September 20, 2002, \_\_\_\_\_, Esq., submitted a draft of Respondent's offer to settle the above-captioned matter to Petitioners' attorney \_\_\_\_\_.

3. On September 25, 2002, \_\_\_\_\_ submitted Petitioners' proposed revisions to the Respondent's offer to Mr. Schulaner.

4. On October 15, 2002, \_\_\_\_\_ and \_\_\_\_\_ agreed to the terms of the settlement.

5. By letter dated October 15, 2002, \_\_\_\_\_ informed \_\_\_\_\_

The [sic] letter confirms our discussion today in which you confirmed that the DOE would agree to reimburse the \_\_\_\_\_ for charges related to the IEP in the amount of \$ \_\_\_\_\_. Attorneys' fees and GET to date are: \_\_\_\_\_. (No charge was made for today's time). Please prepare the settlement agreement and forward it to my office for review and my clients' signature [sic].

Respondent's Exhibit 17 at 42 (only for purposes of the Motion).

6. On October 16, 2002, [redacted] transmitted the final revision of the Compromise and Settlement Agreement to [redacted] and in the transmittal letter, [redacted] informed [redacted].

Enclosed is the settlement agreement. I added in a section to address the reimbursement. I also increased your fees and costs to [redacted] however, I have added a line which says you will be paid after receipt of an original invoice in that amount. Our fiscal people prefer to have an original invoice to pay off of. Please have your client execute both originals along with yourself and return them to my office. After the settlement agreement is fully executed, I'll forward you one of the originals.

Finally, please inform the hearing officer that the case has been settled.

Respondent's Exhibit 17 at 44 (only for purposes of the Motion).

7. On October 16, 2002, [redacted] informed [redacted] Esq., the hearing officer that had been assigned to Case No. [redacted] that the matter had been settled and that there would be no need for a hearing in Case No. [redacted]. Consequently, on October 16, 2002, Hearing Officer Cote issued his Decision on Motion to Dismiss, and ordered that the hearing be dismissed without prejudice.

8. By letter dated October 24, 2002, [redacted] informed [redacted]:

I have made a mistake [in] the amount of reimbursements sought by the [redacted]. Through communication with the [redacted] I have verified that there are other items outstanding and I should have included those in the demand. They were omitted as a result of my error. I understand that you will have to review these items with your client before we can reach agreement. I will forward the additional items to you by the end of business tomorrow. I apologize for the error and delay and hope that it will not prevent us reaching agreement. Please call me if you have any questions.

Respondent's Exhibit 17 at 52 (only for purposes of the Motion).

9. By letter dated October 30, 2002, [redacted] informed [redacted] that [redacted] had not been able to confirm the final amounts claimed by the Petitioners, because of the unexpected death in [redacted] family. [redacted] further informed [redacted] that [redacted] hoped to be able to provide the information to [redacted] by the following week. Respondent's Exhibit 17 at 54 (only for purposes of the Motion).

10. By letter dated October 30, 2002, [redacted] informed [redacted] that:

This case has already been settled. The Department of Education, as of this time, has no plans to amend the settlement agreement.

Respondent's Exhibit 17 at 56 (only for purposes of the Motion).

11. By letter dated October 30, 2002, [REDACTED] requested a due process hearing on behalf of Petitioners which resulted in the present matter.

**B. Respondent's Offer of FAPE**

12. [REDACTED] was born on September [REDACTED] and by the time [REDACTED] was in pre-school, it became apparent that [REDACTED] was having behavioral difficulties.

13. Subsequently, [REDACTED] began receiving therapy from [REDACTED] Ph.D., a pediatric psychologist specializing in children with medical conditions including autism, cancer, diabetes, and Attention Deficit Hyperactivity Disorder ("ADHD").

14. In 1996, when [REDACTED] was approximately [REDACTED] years old, [REDACTED] was first hospitalized at [REDACTED] for behavioral problems. While hospitalized at [REDACTED] in 1996, [REDACTED] began receiving treatment from by [REDACTED], who specialized in child and adolescent psychiatry. As a result of the psychiatric evaluation conducted by [REDACTED] [REDACTED] was diagnosed as having ADHD and was placed on medication, and began receiving individual therapy.

15. In December 1997, [REDACTED] was diagnosed as having Oppositional Defiant Disorder ("ODD"), in addition to ADHD.

16. On or about February 18, 2000, [REDACTED] was admitted to [REDACTED] due to a manic state induced by his antidepressant medication, while [REDACTED] was attending school.

17. On April 26, 2000, an IEP meeting was held and the Present Levels of Performance reflected:

II. Behavioral Data

A. Classroom behavior

[REDACTED] overall behavior appears to fluctuate from cooperative eager and helpful to uncooperative, out of control, physically & verbally aggressive. His inconsistent behavior does adversely impact his classroom functioning.

[REDACTED] can be aggressive and competitive, but can also be led by "popular" students. He displays respect to adults, but will test his limits in the classroom. On the Academic and Personal Development rating scale, teachers indicated

areas in ; personal development as concerns, such as lack of self-confidence, not showing respect for others, unable to handle frustration, etc. Fidgetiness, restlessness, impulsivity and off-task behaviors were observed. He is able to accept consequences for his behavior, at times. completes assignments, but the quality of the work needs to be monitored. is highly distractible, impulsive and attention span is variable. Needs close adult supervision for immediate monitoring and modification, who can implement behavior management plan.

B. Supports and learning style

appears to benefit and needs multisensory and language experience approaches in teaching skills and concepts.

III. Social/Family Information

A. Social

interests include soccer, basketball, football, skateboarding, rollerblading and Pokemon.

Limited peer interactions, because of poor social skills.

Friendships are limited to obsession to peers that is usually not reciprocated. Very aggressive. Unable to play with peers of same age. Peer interaction affected by poor frustration tolerance. Takes risks and endangers himself. Grandeosity [sic] and paranoia affects peer relations.

...

C. Medical

was diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD) in June 1996 and added Oppositional Defiant Disorder (O.D.D.) in December, 1997. Medication and behavioral therapy were recommended at that time. Dr. [redacted] monitors medication and Dr. [redacted] provides psychotherapy. was admitted to [redacted] on 2/18/00 due to manic state induced by antidepressant, exhibited at school. is unable to function at Assets or in a highly structured educational setting. He is receiving Risperdal (.25) two times a day (am/pm). Daily Asthma medication exacerbates manic symptoms. Ear infections are infrequently recurring. He does have ear tubes.

Petitioners' Exhibit 3.

18. According to the April 26, 2000 IEP, \_\_\_\_\_ met the standard for extended school year ("ESY"). Additionally, the April 26, 2000 IEP indicated that \_\_\_\_\_ would be receiving the following services:

**Special Education and Related Services**

Services to be delivered	Initiation Date		Amount of Service		Projected Completion Date	
	Reg. Sch. Yr.	ESY	Reg. Sch. Yr.	ESY	Reg. Sch. Yr.	ESY
Special Education	04/26/00	See conf. notes	30 hrs./week	See conf. notes	04/26/01	See conf. notes
Mental health						
Individual therapy	04/26/00		Once a week	Throughout breaks	04/26/01	04/26/01
Medication monitoring	04/26/00		Twice a month or on an emergency basis		04/26/01	04/26/01
Family therapy	04/26/00		Every week		04/26/01	04/26/01
Transportation						

The April 26, 2000 IEP also stated that it was not appropriate for \_\_\_\_\_ to participate in the regular education program at that time. In regards to \_\_\_\_\_ placement, the April 26, 2000 IEP provided:

✓	PLACEMENT Instruction in:	REASON (for selecting or not selecting the alternative)
✓	Regular education class with special education monitoring and/or supplementary aids & services	Not appropriate, because of therapeutic needs and needs of highly structured setting
✓	Regular education class with provision of special education instructional and related services	Not appropriate, because of therapeutic needs and needs of highly structured setting
✓	Special Education class on regular education campus	Not appropriate, because of therapeutic needs and needs of highly structured setting
✓	Special Education School	Not appropriate, because of therapeutic needs and needs of highly structured setting
✓	Home or Hospital (partial)	Appropriate, because it meets his therapeutic needs and his highly structured
	Residential Facility	

Petitioners' Exhibit 3.

19. On April 26, 2000, \_\_\_\_\_ indicated her agreement with the April 26, 2000 IEP as it had been developed, by signing the April 26, 2000 IEP.

20. On about April 26, 2000, [redacted] of [redacted] Elementary submitted a Request for Special Education Transportation as a Related Service in the IEP Other Than To and From School to the Respondent's District Office so that Mr. and Mrs. [redacted] could receive mileage for taking [redacted] to [redacted] from April 27, 2000, to June 8, 2000.
21. As of April 26, 2000, [redacted] was placed at [redacted] pursuant to the April 26, 2000 IEP. During [redacted] placement at [redacted], Mr. and Mrs. [redacted] felt that [redacted] was receiving minimal educational opportunities and were waiting for another placement to be arranged.
22. Sometime prior to June 2000, Respondent proposed placing [redacted] at the [redacted] Treatment Program. At that time, [redacted] Elementary was [redacted] home school, and [redacted] Elementary was not able to provide for [redacted] educational and psychological needs.
23. Subsequently, Mrs. [redacted] and Dr. [redacted] visited the [redacted] Treatment Program and spoke to the primary therapist. At that time, [redacted] Treatment Program had a student to staff ratio of approximately 8 students to 5 staff members, and provided a structured environment that appeared to be appropriate for [redacted].
24. Sometime prior to June 12, 2000 an IEP meeting was held and the IEP placement for [redacted] was changed from [redacted] to the [redacted] Treatment Program.
25. On or about June 12, 2000, [redacted] began attending the [redacted] Treatment Program pursuant to an IEP.
26. Sometime after [redacted] began attending the [redacted] Treatment Program, the staff changed, and a new therapist began to work with [redacted] utilizing a different treatment technique reflective of a treatment philosophy that did not appear to be scientifically or medically based.
27. After the staff changed at [redacted] Treatment Program, [redacted] behavior became progressively worse. Mrs. [redacted] observed that [redacted] behavior at home was getting worse, and Mrs. [redacted] began meeting with the [redacted] Treatment Program staff every week. Mrs. [redacted] wanted information from the [redacted] Treatment Program regarding [redacted].



how the school was handling certain behavior so that Mr. and Mrs. [redacted] could be consistent in dealing with [redacted] similar behavior at home.

28. As a result of their growing concerns regarding the appropriateness of the Treatment Program, Dr. [redacted] arranged for a meeting with the school therapist and Mrs. [redacted] to help with [redacted] program. Dr. [redacted] request for projective testing was ridiculed by the school social worker at [redacted] Treatment Program.

29. In or around March 2001, while attending a [redacted] Treatment Program field trip, [redacted] had an emotional/psychological incident that the Treatment Program staff was unable to deal with. Consequently, [redacted] was sent home from the field trip by [redacted] treatment Program staff, and Mrs. [redacted] was instructed to call the Crisis Center. By the time [redacted] reached Mrs. [redacted] work place, his emotional condition had deteriorated to the point where [redacted] was required to be rehospitalized at [redacted] the following day.

30. While [redacted] was hospitalized at [redacted] Dr. Hoffman continued to provide continuity for [redacted]

31. Based upon her observations and evaluation of [redacted] condition, Dr. Hoffman was of the opinion that [redacted] Treatment Program was no longer an appropriate placement for [redacted]

32. By Meeting Announcement dated March 9, 2001, Respondent informed Mr. and Mrs. [redacted] of an IEP meeting that was scheduled to convene on March 14, 2001 to review, revise or develop an IEP for [redacted]

33. The Conference Information and Notes for the March 14, 2001 IEP meeting reflect the following agreements reached by the IEP team and approved by Mrs. [redacted]

IEP teams [sic] agrees to procure Dr. [redacted] services up to November 15, 2000 (including the 15<sup>th</sup> of November)

IEP teams [sic] agrees to procure Dr. [redacted] services for meetings scheduled December 6, 2000 and January 11, 2001

\*IEP team agrees student will change from a Day Treatment Program to another Day Program with more psychiatric services.

Petitioners' Exhibit 4. The Conference Information and Notes also reflect, "If more time is needed to meet for December 6, 2000 and January 11, 2001, IEP team will reconvene."

34. From approximately May 2001, to November 2001, [redacted] attended the [redacted] Treatment Program, pursuant to the March 14, 2001 IEP.

35. By letter dated April 2, 2001, [redacted], as attorney for Petitioners, informed [redacted] Principal of [redacted] Elementary School, and [redacted] Director of the Department of Health, Kalihi-Palama Family Guidance Center. of [redacted] status:

Because of his lack of progress at [redacted] Treatment Center, and a pattern of increasing outbursts, [redacted] educational status was reviewed at an IEP on March 14, 2001. It was agreed by the team that [redacted] needed a higher level of services with greater psychiatric involvement and [redacted] should be placed at the day treatment program. After the meeting, it was determined that [redacted] had no available space, and so [redacted] remained at [redacted]. However, the additional psychiatric care did not materialize, despite [redacted] deteriorating condition.

Last week [redacted] has made several threats to harm himself or others, and has been unable to attend school without violent outbursts. The school itself has been unable to provide any assistance in this regard, merely advising Mrs. [redacted] to call the Crisis Line. Late in the week, Dr. [redacted] determined that without psychiatric assistance [redacted] would not be able to [redacted] in any normalized education setting and referred him to [redacted], where he was admitted. Because [redacted] is entitled to immediate services in accordance with his IEP [redacted] these services can apparently only be provided now at [redacted] inpatient program, rather than the day treatment program, we expect the State to pay for [redacted] stay at [redacted] and to see that he receives the services set forth in his IEP.

Petitioners' Exhibit 5.

36. On June 27, 2001, an IEP meeting was convened and attended by a number of Department of Education ("DOE") representatives, along with Mrs. [redacted] and Dr. [redacted]. The Conference Minutes from the June 27, 2001 IEP meeting reflect in relevant part:

- IEP team agrees that it is the State's responsibility to pay for his [redacted] placement at [redacted]
- After the meeting, Care Coordinator and DOH [Department of Health] supervisor will assist in resolving issue. (decision: will be handled at future MHTP meeting)

Petitioners' Exhibit 8.

37. On July 25, 2001, an IEP meeting was convened and attended by Mr. and Mrs. [redacted], and Dr. [redacted]. The Conference Minutes from the July 25, 2001 IEP meeting reflect in relevant part:

- Parent received letter dated 7/11/01. parent is [sic] request an answer of why admission to [redacted] of April – May was paid for but other times had not been paid for by the State.
- KPFG is request [sic] in writing question regarding payment/billing questions.
- Parent is request [sic] in writing a response on policies, guidelines, and procedures in regard to specific billing questions within 2 weeks from today.
- Parent is requesting to initiate psychological evaluation process from DOH dated on 6/20/2001 and 6/27/2001 IEP meeting.
- Crisis Plan will be developed prior to discharge from [redacted] with school personnel of where he would attend.
- [redacted] will contact [redacted] elementary on release date for [redacted] with at least 4 weeks in advance.
- IEP team agrees to include Dr. [redacted] as input in FBA and next IEP meeting to discuss transition from [redacted]

Petitioners' Exhibit 8. However, the Crisis Plan referred to in the July 25, 2001 IEP meeting notes, was never developed.

38. On July 25, 2001, the IEP team apparently developed an IEP which indicated that [redacted] IEP could not be implemented at his home school because [redacted] required a therapeutic setting not found in his home school. Consequently, placement was determined to be "Partial Hospitalization Program," with the following special education and related services:

**Special Education and Related Services**

Services to be delivered	Location	Initiation Date		Completion Date		Amount of Service	
		Reg. Sch. Yr.	ESY	Reg. Sch. Yr.	ESY	Reg. Sch. Yr.	ESY
Special Education/Mental Health	[redacted]	7-25-2001	7-25-2001	7-25-2002	7-25-2002	30 hrs/wk	30 hrs/wk
Transportation	curb to curb	7-25-2001	7-25-2001	7-25-2002	7-25-2002	curb to curb	
Individual therapy	[redacted]	7-25-2001	7-25-2001	7-25-2002	7-25-2002	curb to curb	
Family therapy	[redacted]	[Unable to determine duration from document]				2 hrs/wk	2 hrs/wk
Medication monitoring	[redacted]	[Unable to determine duration from document]				1 hr/wk	1 hr/wk
Milieu therapy	[redacted]	7-25-2001	7-25-2001			1 hr/wk	1 hr/wk

Petitioner's Exhibit 11.

39. On October 23, 2001, an IEP meeting was convened and attended by Mrs. [redacted] and Dr. [redacted]. The Conference Minutes from the October 23, 2001 IEP meeting reflect in relevant part:

May 1 – May 4 was not covered by Dept. of Health and was billed to private insurance.

Care Coordinator will check on concern and will call parent.

Petitioners' Exhibit 8.

40. Because Mr. and Mrs. \_\_\_\_\_ were concerned that \_\_\_\_\_ had not been receiving sufficient education services while attending the \_\_\_\_\_ Day Treatment Program, in late October 2001, Mr. and Mrs. \_\_\_\_\_ made private arrangements to have \_\_\_\_\_ begin to receive tutoring from \_\_\_\_\_

41. On or about November 29, 2001, \_\_\_\_\_ was discharged from the \_\_\_\_\_ Day Treatment Program, and was placed on "home-hospital" status. As of November 29, 2001, Respondent did not have a completed IEP for \_\_\_\_\_, or a transition plan for \_\_\_\_\_ transition from "home-hospital" back to a school setting.

42. After \_\_\_\_\_ was discharged from \_\_\_\_\_ Dr. \_\_\_\_\_ continued to feel that \_\_\_\_\_ required a structured environment and recommended to Mr. and Mrs. \_\_\_\_\_ that \_\_\_\_\_ be placed at \_\_\_\_\_ School.

43. On or about January 4, 2002, Dr. \_\_\_\_\_ transferred \_\_\_\_\_'s care to Dr. \_\_\_\_\_ who continued to provide treatment and medication monitoring pursuant to IEP.

44. At the IEP meeting convened on February 20, 2002, the IEP team agreed that "Mileage reimbursement will be given to parent for any related service that is outside of the home." Petitioners' Exhibit 11. At the February 20, 2002, IEP meeting, Dr. \_\_\_\_\_ was asked by the IEP team to provide her recommendations as to placement, and Dr. \_\_\_\_\_ recommended that \_\_\_\_\_ be placed at \_\_\_\_\_ School, which was consistent with Dr. \_\_\_\_\_ previously expressed recommendations to the IEP team. The Meeting Notes for the February 20, 2002 meeting provided in relevant part:

- (1) The IEP team agrees that \_\_\_\_\_ will receive 10 hours a week of home instruction with a tutor, chosen by the parents, until transition plan is fully developed.
- (2) The IEP team agrees that a psychiatric evaluation would be done for medication evaluation and annual wholistic [sic] evaluation. Individual therapy will be for 2 hours a week. Family therapy will be for 1 hour a week. SSC is providing parents with names of psychiatrists for evaluation. Parents will make decision on the psychiatrist within 1 week by 2/28/92 and will

notify the S.S.C. of name of psychiatrist and dates available. Parent will call SSC within 1 week by 2/28/02 to give names of the therapist they prefer.

- (3) Counselor at the school will contact parent to meet and confer with the tutor.
- (4) IEP team agrees to meet on April 5, 2002 from 2:30 to 4:30 pm to develop the IEP. District will provide compensation for the tutor to attend IEP meeting. Mrs. [redacted] will inform the tutor concerning the date of the IEP meeting. FBA [functional behavior assessment] will be discussed at the IEP meeting also.
- (5) Mileage reimbursement will be given to parent for any related service that is outside of the house.

Petitioners' Exhibit 11.

45. On February 20, 2002, the IEP team also revised [redacted] July 25, 2001 IEP, to provide home instruction at home, along with the following special education and related services:

**Special Education and Related Services**

Services to be delivered	Location	Initiation Date		Completion Date		Amount of Service	
		Reg. Sch. Yr.	ESY	Reg. Sch. Yr.	ESY	Reg. Sch. Yr.	ESY
Mileage reimbursement	curb to curb	7-25-2001	7-25-2001	7-25-2002	7-25-2002	curb to curb	
Individual therapy	Home/Comm	7-25-2001	7-25-2001	7-25-2002	7-25-2002	2 hrs/wk	2 hrs/wk
Family therapy	Home/Comm	2-20-2002	7-25-2002	6-20-2002	7-25-2002	1 hr/wk	1 hr/wk
Medication monitoring	Community	2-20-2002	7-25-2002	6-20-2002	7-25-2002	1 hr/wk	1 hr/wk
Home Instruction	Home/Comm	2-20-2002	7-25-2002	6-20-2002		10 hrs/wk	

Petitioner's Exhibit 11. Mrs. [redacted] agreed to the February 20, 2002 revisions and initialed each entry.

46. In or around April 2002, because Mr. and Mrs. [redacted] were concerned that [redacted] was not receiving adequate educational services, Mrs. [redacted] began the application process for [redacted] to attend the summer program at [redacted] School.

47. As part of [redacted] application to attend the summer program at [redacted] Schools, Dr. [redacted] wrote a letter to [redacted] school in support of [redacted] admission to the summer program.

48. Dr. [redacted] also sent a letter to Respondent regarding [redacted] need for tutoring after his discharge from [redacted]

49. On April 5, 2002, an IEP meeting was convened and attended by Mr. and Mrs. along with [redacted] s, Parent Consultant. The Conference Minutes from the April 5, 2002 IEP meeting reflect in relevant part:

Parents are requesting the DOE pay the reimbursements, retroactively, and the copayments for the private psychiatric services that are being provided to [redacted]. This is due to the difficulty securing the appropriate collaboration between the psychiatrist who will provide medication monitoring and psychologist [who] will provide individual and family therapy. Principal will follow through with district personnel on the aforementioned. Mother will provide the copayment amounts to principal. Parents will continue their search to find appropriate DOE provider.

Copayment will be retroactive until appropriate DOE provider is secured.

The team agrees to increase tutoring hours from 10 hours to 15 hours per week.

Petitioners' Exhibit 8.

50. On April 11, 2002, [redacted] M.D., a child and adolescent psychiatrist, conducted a psychiatric diagnosis evaluation of [redacted] pursuant to a referral from the SSC at [redacted] School. In her Psychiatric Diagnostic Evaluation report, Dr. [redacted] stated in relevant part:

...  
**SOURCE AND RELIABILITY:** History was obtained from patient and both parents, who were reliable. Additional information was obtained from DOE notes, including psychiatric discharge summaries from [redacted]. Phone interview with current outpatient child psychiatrist [redacted] M.D. was on 4/26/02. Message was left with outpatient psychologist [redacted] Ph.D. but call was not returned.

**CHIEF COMPLAINT:** "to see how his diagnosis affects his behavior in the classroom."

**HISTORY OF PRESENT ILLNESS:** [redacted] has past diagnoses of Attention Deficit/Hyperactivity Disorder, Oppositional Defiant Disorder and Learning Disorder NOS. He has a long-standing history of behavioral problems that have affected his academics. He has been described as oppositional, aggressive, irritable, hyperactive, angry and defiant. He has had "out of control" behavior such as spitting and hitting his peers at school; and has displayed dangerous behaviors such as jumping from a moving car, held scissors at his chest, pointed a BB gun at his head and at his mother. At times he also has some obsessive-compulsive traits such as frequent checking.

His behaviors have resulted in acute and partial hospitalizations and placement in day treatment programs. He last left [redacted] Day Treatment Program in November 2001 and has been out of schools since then. Recently he has started receiving home tutoring 15 hours per week. His parents are awaiting placement in an appropriate school setting and want [redacted] in Regular Education.

Past treating psychiatrists/psychologists have varying opinions on whether he has Bipolar Disorder. . . Overall, Dr. Gibson also feels [redacted] is doing better, that he has temper tantrums and severe ODD but not Bipolar Disorder.

**PAST PSYCHIATRIC HISTORY:**

[redacted] was first hospitalized at [redacted] in 1996 for behavioral problems. He was in [redacted] Treatment Program for eight months. He was also in [redacted] acute hospitalization, then partial hospitalization from 6/00 - 3/01 and their day treatment program from 3/01 - 11/01. Psychologist Dr. [redacted] has been involved in [redacted] care since he was in Kindergarten and first diagnosed with AD/HD. She provides family therapy and behavioral management. Dr. [redacted] has been [redacted] outpatient psychiatrist since the beginning of this year, but has worked with him for 5 years. In the past, [redacted] has tried Ritalin, Adderall, Dexedrine, Metadate, Zoloft and Risperdal. WISC-III on 12/15/97 revealed a Verbal IQ of 99, Performance IQ of 102 and Full Scale IQ of 100, which is Average.

**EDUCATIONAL HISTORY:**

[redacted] was in a Montessori school in Kindergarten and [redacted] School in 1<sup>st</sup> grade. He was at [redacted] School for two years and noted to be most successful there. As previously note[d], [redacted] has been in day treatment programs and is currently being home-tutored. He states that he would like to return to [redacted] pl, and then [redacted] Schools.

**MENTAL STATUS EXAM:**

[redacted] was a handsome boy who was calm, polite, pleasant and cooperative. Speech and activity were within normal limits. Mood was "good" and affect was full range. He denied being anxious or having neurovegetative symptoms. Thought process was linear and coherent with no noted delusions, suicidal or homicidal ideation. He denied having auditory or visual hallucinations. Cognitively, he appeared grossly intact. He seems to have good insight. He thinks he'd do well in regular education classes "if I had an aide." . . .

**SUMMARY AND FORMULATION:**

[redacted] is a latency-age boy who presents with concerns of behavioral problems. He has some genetic loading for AD/HD and possible mood disorders. At this point, he meets the criteria for AD/HD and ODD but not quite bipolar disorder. He is at increased risk for developing bipolar disorder, as there is a family history and he has had an antidepressant-induced manic episode. In time, he might meet the criteria for bipolar disorder if more clear-cut manic and depressive episodes appear. His

behavioral problems have interfered with his academics and subsequently lowered some of his self-esteem. He appears to be resilient, however, and has shown improvement. His strengths include his athletic abilities and having a very supportive family. With appropriate treatment, has an overall good prognosis.

**DIAGNOSTIC IMPRESSION:**

- Axis I Attention-Deficit/Hyperactivity Disorder, Combined type (314.01)  
Oppositional Defiant Disorder (313.81)  
Rule-out Bipolar Disorder  
Rule-out Dysthymic Disorder
- Axis II No diagnosis
- Axis III Recurrent ear infections
- Axis IV Problems with academics
- Axis V GAF 60

**RECOMMENDATIONS:**

1. Being that the diagnosis of bipolar disorder in children is difficult, as there is much overlap with AD/HD, it would be beneficial for to be consistently followed by one treating child psychiatrist. Dr. [redacted] seems to be most familiar with and would be able to monitor ongoing patterns in his behavior. Continuing treatment with him would thus be helpful.
2. Ongoing family therapy with Dr. [redacted] who is familiar with the family, would also be helpful.
3. [redacted] has had some benefit from Metadate ER, but it does not last too long. A longer-acting form of stimulant medication such as Metadate CD or Concerta warrants a trial.
4. [redacted] seems motivated to be in Regular Education classes and should have a trial of placement in that setting, as it is the least restrictive environment. Naturally, he should not be set up for failure and should have some transition plan in place. Prior to starting back in school, a behavioral plan should be discussed and reviewed with [redacted]. This should include clear expectations, consequences and a reward system. He may need frequent reminders and preferential seating. Small class size would be helpful and possibly having a teacher's aide. He has done well in [redacted] School in the past and is interested in returning there. Placement in [redacted] School should also be considered.

Respondent's Exhibit 10.

51. On June 10, 2002, an IEP meeting was convened at [redacted] elementary School to develop an IEP for [redacted] Mrs [redacted] attended the June 10, 2002 IEP meeting, along with [redacted] (Consultant) and [redacted] (private tutor). Also



attending the June 10, 2002 IEP meeting were: [redacted] Principal of [redacted] Elementary School), [redacted] (Special Education teacher from [redacted] Elementary School) [redacted] (Counselor), [redacted] (Counselor from [redacted] Middle School), [redacted] (Regular Education teacher), [redacted] (Student Services Coordinator from [redacted] le School), and [redacted] (Student Services Coordinator from [redacted] Elementary School).

52. As part of the June 10, 2002 IEP meeting, the IEP team developed Present Levels of Educational Performance ("PLEP") which stated in relevant part:

**Assessment:** SDRT (Stanford Diagnostic Reading Test)  
 Purple Level - Form J  
 Comprehension - Gr. Equivalent 5.9  
 Scaled Score 666

**Strengths:**

Speech: [redacted] uses appropriate language skills to communicate effectively with others. He has good vocabulary that enables him to interact with a wide range of people.

Math: [redacted] is currently functioning at the end of the fourth grade level in math. He can add and subtract multi-digit numbers with or without regrouping. He can successfully divide a five-digit dividend with one-digit divisor. He can effectively tell time to the minute on a digital clock and count money to the fifty dollar denomination. [redacted] is efficient in identifying fractional values and adding or subtracting fractional values with common denominators.

Behavioral: In a one-to-one setting with cues and knowledge of consequences, [redacted] is able to redirect in five minutes and focus on the task. He responds well to a structured and consistent environment.

**Needs:**

Reading: Comprehension skills need more development to assist in independent reading and writing.

Writing: The overall skill of writing is difficult for [redacted]. The proper use of all punctuation marks need [sic] further development. Sentence and paragraph structure and pre-planning writing processes need to be clarified, taught and practiced. Often times, [redacted] will write just enough to fulfill the assignment requirements.

Math: [redacted] needs to develop automaticity in addition, subtraction and multiplication facts. He needs more exposure to multi-digit

multiplication and division computation. He requires more practice with fractions, reducing fractions, adding and subtracting fractions and comparing fractional values. Decimals need further clarification and development. Exposure to different units of measurement is recommended. He needs more practice with fundamental skills of measurement (time-analog clock to the minute and money) to improve automaticity, thus applying it to daily life. learns best when the teacher clarifies all content learned to real-life application. Proficiency is demonstrated in practical application of what skills were learned. needs more practice in deciphering and solving word problems based on cue words (eg. in all, larger than, etc.). He needs to learn to eliminate extraneous information to solve word problems.

In all subject areas: As a result of his disability, continues to need assistance to be more independent and responsible for specific reading of instructions for both class and homework assignments.

Behavioral: In the past, when required to work in groups, has experienced difficulties when paired with someone he dislikes. He continues to need assistance in developing his interpersonal skills and anger-management techniques. Therefore, it would be beneficial for to be paired with teachers skilled in these areas. needs to have a behavioral plan that addresses clear and consistent expectations, consequences and a reward system.

Learning environment: continues to need a highly structured setting that can provide him with routine, structure and consistency. He is successful when instructed with multisensory techniques. continues to need daily, positive reinforcement, even after he has made a poor choice and reassured that "tomorrow is a new start". It is crucial that has a trusting relationship with his teachers. Changes in his medication or classroom behavior should be regularly communicated between parents and the school.

Respondent's Exhibit 3.

53. The June 10, 2002 draft IEP contained the following Annual Goals:

16. STANDARD(S) Language Arts – Reading and Literature
1) Use strategies with the reading processes to construct meaning. 2) Apply knowledge of the conventions of language and texts to construct meaning.
17. MEASURABLE ANNUAL GOAL
will be able to increase his reading skills from the fifth grade level to the sixth grade level.
18. How will progress toward the annual goal be measured? Textbook chapter tests, daily work.
19. BENCHMARKS/SHORT-TERM OBJECTIVES
will achieve 80% accuracy on chapter tests.

16. STANDARD(S) Language Arts – Writing
1) Use writing processes and strategies appropriately and as needed to construct meaning and communicate effectively. 2) Apply knowledge and understanding of the conventions of language and research when writing.
17. MEASURABLE ANNUAL GOAL
will be able to increase his writing skills from the fifth grade level to the sixth grade level.
18. How will progress toward the annual goal be measured? Chapter tests, daily work.
19. BENCHMARKS/SHORT-TERM OBJECTIVES
will achieve 75% accuracy on chapter tests.

16. STANDARD(S) Mathematics – Number and Operations
Students use computational tools and strategies fluently and when appropriate, use estimation.
Mathematics - Measurement
Students understand attributes, units, and systems of units in measurement, and develop and use techniques, tools and formulas for measuring.
17. MEASURABLE ANNUAL GOAL
will be able to increase his math skills from end of fourth grade level to the end of fifth grade level.
18. How will progress toward the annual goal be measured? Chapter tests, daily work.
19. BENCHMARKS/SHORT-TERM OBJECTIVES
will achieve 80% accuracy on chapter tests.

16. STANDARD(S) History	Students employ chronology to understand change and/or continuity and cause and/or effect in history
17. MEASURABLE ANNUAL GOAL	will be able to increase his history skills from the fourth grade level to the fifth grade level.
18. How will progress toward the annual goal be measured?	Chapter tests, daily work.
19. BENCHMARKS/SHORT-TERM OBJECTIVES	will achieve 80% accuracy on chapter tests.

16. STANDARD(S) Science	Students demonstrate the skills necessary to engage in scientific inquiry
17. MEASURABLE ANNUAL GOAL	will be able to increase his science skills from the fourth grade level to the fifth grade level.
18. How will progress toward the annual goal be measured?	Chapter tests, daily work.
19. BENCHMARKS/SHORT-TERM OBJECTIVES	will achieve 80% accuracy on chapter tests.

16. STANDARD(S) Physical Education	Students demonstrate successful movement forms at a basic level and some movement forms at a mastery level.
17. MEASURABLE ANNUAL GOAL	will be able to increase his physical education skills from fifth grade level to sixth grade level.
18. How will progress toward the annual goal be measured?	
19. BENCHMARKS/SHORT-TERM OBJECTIVES	will achieve 80% accuracy on chapter tests.

16. STANDARD(S) Health	Students comprehend concepts related to health promotion and disease prevention.
17. MEASURABLE ANNUAL GOAL	will be able to increase his health skills from the fourth grade level to the fifth grade level.
18. How will progress toward the annual goal be measured?	Chapter tests, daily work.
19. BENCHMARKS/SHORT-TERM OBJECTIVES	will achieve 80% accuracy on chapter tests.

Respondent's Exhibit 3.

54. In the draft of the June 10, 2002 IEP, it was noted that \_\_\_\_\_ met the standard for ESY, but the extent to which ESY was necessary would be determined at a later date by the IEP team. Petitioners' Exhibit 18. Additionally, the June 10, 2002 IEP indicated that \_\_\_\_\_ would be receiving the following services:

21. SERVICES:					
Special Education and Related Services:	Projected Beginning Date	Projected Ending Date	Frequency (Min/Times/Period)	Location	ESY Yes/No
Individual therapy			1-2 hrs. / week		
Medication monitoring			2 hrs. /month		
Family therapy			1 hr. /week		
Transportation					
One-to-one adult support					
Special Education			6 hrs. /day		

Supplementary Aids and Services, Program Modifications and Supports for School Personnel:	Projected Beginning Date	Projected Ending Date	Frequency (Min/Times/Period)	Location
Behavioral Plan				
Highly structured setting				
Benefits from small class size				
A check for understanding will be determined by having student restate directions.				

23. Explain the extent, if any, that the student will not participate with students without disabilities in the general education class, extracurricular activities and other non-academic activities:  
 \_\_\_\_\_ will not participate in the general education class for math

Respondent's Exhibit 3.

55. At the June 10, 2002 IEP meeting, the IEP team agreed that \_\_\_\_\_ tutor would give \_\_\_\_\_ the end of the fourth grade level basal test (Reading and Language Arts) to assess \_\_\_\_\_'s progress and present level of achievement. The IEP team also agreed that tutoring would continue until July 11, 2002. The IEP team was scheduled to reconvene on June 20, 2002.

56. By Prior Written Notice of Department Action ("Prior Written Notice") dated June 10, 2002, Ms \_\_\_\_\_ informed Mr. and Mr. \_\_\_\_\_ of Respondent's proposed actions: 1) tutoring will continue until July 11, 2002; 2) tutor will give \_\_\_\_\_ the end of the fourth grade

level basal test for reading and language to assess his progress and present level of achievement; and 3) the IEP team will reconvene on June 20, 2002 at 2:30 p.m. at \_\_\_\_\_ school. The June 10, 2002 Prior Written Notice also indicated that the reason for the proposed action was, "The IEP team proposed the action plan to provide services and support to carry out the IEP plan and to enable to [sic] IEP team to meet and develop a new IEP plan with services and support for placement in the Least Restrictive Environment." Respondent's Exhibit 6.

57. The regular school year for \_\_\_\_\_ elementary School ended on June 10, 2002, and although the June 10, 2002 IEP indicated that \_\_\_\_\_ was eligible for ESY, no ESY services were identified in the IEP.

58. From June 20, 2002, to the end of July 2002, \_\_\_\_\_ attended the summer session at \_\_\_\_\_ school. Mr. and Mrs. \_\_\_\_\_ did not inform Respondent that \_\_\_\_\_ was attending the summer session at \_\_\_\_\_ school, and \_\_\_\_\_ continued to receive tutoring from Ms. \_\_\_\_\_ to July 11, 2002, pursuant to the terms of the February 20, 2002 IEP. Mrs. \_\_\_\_\_ felt that because Respondent had provided no ESY services, and because she felt that \_\_\_\_\_ was lagging behind in his educational development because he had not been in school for such an extended period of time, Mrs. \_\_\_\_\_ asked Ms. \_\_\_\_\_ continue tutoring \_\_\_\_\_ to try to help \_\_\_\_\_ catch up in his academics before the start of the next school year.

59. On July 16, 2002, an IEP meeting was convened at \_\_\_\_\_ elementary School to review \_\_\_\_\_ IEP. Mr. and Mrs. \_\_\_\_\_ attended the July 16, 2002 IEP meeting, along with \_\_\_\_\_ (Parent Consultant) and \_\_\_\_\_ (\_\_\_\_\_ s private tutor). Also attending the July 16, 2002 IEP meeting were:

- \_\_\_\_\_ (Principal of \_\_\_\_\_ elementary School),
- \_\_\_\_\_ (teacher, \_\_\_\_\_ elementary Sch)
- \_\_\_\_\_ (Special Education teacher, \_\_\_\_\_ elementary
- \_\_\_\_\_ (Student Services Coordinator, \_\_\_\_\_)

Mr. and Mrs. \_\_\_\_\_ had questions regarding such matters as the size of \_\_\_\_\_ Middle School; the class size for \_\_\_\_\_ classes; who would be working with \_\_\_\_\_ such as the therapeutic aide and school counselor. Mrs. \_\_\_\_\_ also had asked for the qualifications of the staff regarding their behavioral management training because Mr. and Mrs. \_\_\_\_\_ had concerns

regarding s safety and the ability of the staff at Middle School to properly manage . However, because there were no representatives from Middle School at the July 16, 2002 IEP meeting, the concerns of Mr. and Mrs. were deferred to the next IEP meeting.

60. The IEP Meeting Information and Notes for the July 16, 2002 IEP meeting reflect:

The IEP team reviewed the Present Levels of Education Performance that was done at the 6/10/02 IEP meeting and made appropriate changes. See Present Levels of Education Performance page with changes.<sup>1</sup>

The IEP team agrees that once placement has been determined, the IEP team will meet again to complete more specific benchmarks objectives. Goals and objectives for behavioral concerns will be addressed at another meeting by the IEP team.

Upon completion of submittal of private mileage reimbursement forms, payment will be made.

The IEP team agrees that the past issue of co-payment for private psychiatric services will need to be resolved.

The IEP team requires more time to determine further supplementary aids and services, modification and supports.

The IEP team will discuss transition plan, possibly tutoring to support the transition to new placement.

Respondent's Exhibit 4. Additionally, the IEP team discussed the issue of reimbursement to Mr. and Mrs. for transportation for tutoring from February 2002 to July 2002, and also that the issue of reimbursement for co-payments made by Mr. and Mrs. for private psychiatric services needed to be resolved. Ms. ended to submit the co-payment documents to IDO Special Education Specialist for disposition.

61. By Prior Written Notice dated July 16, 2002. Mr. and Mrs. of Respondent's proposed action:

1. **Description of the proposed or refused action:** The IEP team convened on July 16, 2002 to further address the IEP. The following is the proposed action: a) Individual therapy of 1-2 hours a week. b) Medication monitoring of 2 hours a

<sup>1</sup> The following handwritten notations were apparently added to the PLEP developed at the June 10, 2002 IEP meeting, "Directions/Instructions should be monitored and redirected. Teacher needs to have explain task to be done." Respondent's Exhibit 3.

month. c) Family therapy of 1 hour a week. d) One-to-one adult support of 6 hours a day. e) IEP meeting to be scheduled for one of the following days: July 31, 30, or 29, depending on \_\_\_\_\_ personnel can attend. Meeting to be held at \_\_\_\_\_ Middle School. Parents to be notified of meeting date and time.

2. **Explanation of why the action is proposed or refused:** The IEP team proposed the action to provide services and support to carry out the IEP and to enable the IEP team to determine appropriate placement in the Least Restrictive Environment.
3. **Description of other options considered:** Continue tutoring.
4. **Reasons these options were rejected:** The IEP was developed to reflect \_\_\_\_\_ current level of performance, academic and behavioral, goals and objectives, as well as, include the support and services needed for placement in the LRE: regular education.
5. **Description of the evaluation procedures, tests, records, or reports used as a bases for the proposed/refused action:** Former IEP, standardized test scores, classroom tests, tutor and parent input and all other information relevant to the proposed action.
6. **Other relevant factors:** N/A

Respondent's Exhibit 7.

62. Apparently, sometime between July 16, 2002, and July 30, 2002, the IEP team, without providing the required prior written notice to Mr. and Mrs. \_\_\_\_\_, and without obtaining the input or consent of Mr. and Mrs. \_\_\_\_\_, determined that \_\_\_\_\_ would be placed at \_\_\_\_\_ Middle School for purposes of the June 10, 2002 IEP.

63. By letter dated July 30, 2002 \_\_\_\_\_, informed \_\_\_\_\_ (identified in the letter as the Principal of \_\_\_\_\_ Middle School), and \_\_\_\_\_ (identified in the letter as the Principal of \_\_\_\_\_) that Petitioners were requesting a due process hearing pursuant to 20 U.S.C. § 1415. The August 16, 2002 letter stated in relevant part:

This letter is written to inform you that \_\_\_\_\_ pursuant to 20 U.S.C. § 1415(10)(C), are rejecting the unilateral placement proposed at \_\_\_\_\_ Middle School, because they do not believe it provides FAPE. Specifically, and without limitation, the \_\_\_\_\_ are concerned that the IEP is not tailored to meet the unique and individualized needs of \_\_\_\_\_ with an existing program and qualified personnel. Additionally, the IEP process:



- Has not used sufficient objective means to measure progress of specific learning needs related to disability;
- Not committed to or explained what individualized instruction or related services would be provided;
- Not identified the person who would conduct such instruction or their qualifications; and
- Not provided for specific means or measurements regarding implementation of services or program developments.

Mr. and Mrs. I have instructed me to inform you that within ten days, they will place [redacted] at [redacted] school at State expense. If the State refuses to pay for [redacted] school, the [redacted] will file for due process against the State.

Respondent's Exhibit 15.

64. On July 31, 2002, an IEP meeting was convened at [redacted] Middle School to review [redacted]'s IEP. Mr. and Mrs. [redacted] attended the July 31, 2002 IEP meeting.<sup>2</sup> After discussing the concerns raised by Mr. and Mrs. [redacted], the IEP team determined that [redacted] Middle School was the least restrictive environment and would be able to implement the IEP. Consequently, the IEP team determined that [redacted] Middle School was therefore the appropriate placement for [redacted]. Because Mr. and Mrs. [redacted] still felt that there were unresolved issues regarding the June 10, 2002 IEP, and because Mr. and Mrs. [redacted] did not feel that [redacted] would be able to handle regular education classes, they did not accept the Respondent's offer of a Free and Appropriate Public Education ("FAPE") at [redacted] Middle School. After Mr. and Mrs. [redacted] declined Respondent's offer of FAPE at [redacted] Middle School, further discussions regarding the unresolved details of the IEP were terminated.

65. By Prior Written Notice dated July 31, 2002, [redacted] informed Mr. and Mrs. [redacted] of Respondent's proposed action:

1. **Description of the proposed or refused action:** The least restrictive environment for [redacted] is in a special education placement on a regular education school campus. [redacted] requires special education services for Math on a regular

<sup>2</sup> The Conference Notes for the July 31, 2002 IEP meeting, if they exist, were not introduced into evidence at the hearing. Consequently, the Hearings Officer is not able to identify the individual members of the IEP team that participated in the July 31, 2002 IEP meeting.

education campus. He also requires related services of individual therapy, medication monitoring, family therapy and one-to-one adult support to meet his needs.

- 2. **Explanation of why the action is proposed or refused:** The most appropriate plan is for [redacted] to continue his home tutoring and gradually transition into the regular education school environment. The public middle school can offer special education and regular education services, as well as, provide for his emotional needs through the school based mental health services. This is the optimal time for him to be transitioned to the public school as he has made good academic gains with the assistance of home tutoring and this is a normal transition for students going into the sixth grade.
- 3. **Description of other options considered:** Placement at a private school at DOE's expense. Another option would be for the Parents to voluntarily place [redacted] at the private school at their own expense.
- 4. **Reasons these options were rejected:** DOE is able to provide services to meet [redacted] educational and behavioral needs in the least restrictive environment.
- 5. **Description of the evaluation procedures, tests, records, or reports used as a bases for the proposed/refused action:** Clinical assessments, private tutor reports and observations, parent observations, academic assessment results, previous assessments and IEP.
- 6. **Other relevant factors:** [redacted] has participated successfully in regular extra-curricular sporting activities in the past years. With adequate support and structure, [redacted] should be able to participate in school sponsored sporting events.

Respondent's Exhibit 16.

66. As of July 31, 2002, the IEP team had not finalized: 1) a transition plan to assist [redacted] in transitioning from home to [redacted] Middle School, 2) specific benchmarks for some of the annual goals, including the mathematics, history, and science goals that reflect that [redacted] was not a grade level to start with, and that [redacted] was not intended to reach grade level in those subjects, 3) any identified services for ESY, 4) a Functional Behavioral Assessment, or 5) a Behavioral Modification Plan. At the hearing, [redacted] testified that a Functional Behavioral Assessment could not be performed until [redacted] was placed at [redacted] Middle School. As to the transition plan, [redacted] understood that the transition plan was supposed to be discussed and drafted at the July 31,

2002 IEP meeting. Lastly, [redacted] acknowledged that some of the benchmarks still need to be developed as of the July 31, 2002 IEP meeting.

67. As of the July 31, 2002 IEP meeting, no staff members from either [redacted] School or [redacted] Middle School, other than [redacted] had met or seen [redacted]

68. As of the July 31, 2002 IEP meeting, no staff members from either [redacted] school or [redacted] Middle School had contacted [redacted] school to discuss the possibility of placing [redacted] at [redacted] School and part of the June 10, 2002 IEP.

69. By letter dated August 5, 2002, [redacted] and [redacted] informed Petitioners through [redacted] that [redacted] Middle School could provide a FAPE for [redacted]

70. By letter dated August 16, 2002, [redacted] Esq., informed [redacted] (identified in the letter as the Principal of [redacted] Middle School), that Petitioners were requesting a due process hearing pursuant to 20 U.S.C. § 1415. The August 16, 2002 letter stated in relevant part:

This letter is written to inform you that [redacted] are requesting a due process hearing pursuant to 20 U.S.C. §1415. As you were informed on [redacted] they are rejecting the unilateral placement proposed a [redacted] Middle School, because they do not believe it provides FAPE. Specifically, and without limitation, the [redacted] are concerned that the IEP is not tailored to meet the unique and individualized needs of [redacted], with an existing program and qualified personnel. Additionally, the IEP process:

- Has not used sufficient objective means to measure progress of specific learning needs related to [redacted] disability;
- Not committed to or explained what individualized instruction or related services would be provided;
- Not identified the person who would conduct such instruction or their qualifications; and
- Not provided for specific means or measurements regarding implementation of services or program developments.

Mr. and Mrs. [redacted] have instructed me to inform you that they will place [redacted] a [redacted] school and seek State reimbursement.

Respondent's Exhibit 2.

71. As of the date of [redacted] August 16, 2002 letter, [redacted] thought that [redacted] was still at home receiving the tutoring that had been authorized by the IEP team.

72. On about August 20, 2002, Mrs. [redacted] submitted her Request for Private Car Mileage Reimbursement for [redacted]'s tutoring and therapy sessions from February 25, 2000, to July 30, 2000.

73. In September 2002, [redacted] began attending the [redacted] school.

74. By letter dated October 30, 2002, [redacted] Esq., informed [redacted] Principal of [redacted] Middle School, that Petitioners were requesting a due process hearing pursuant to 20 U.S.C. § 1415. The October 30, 2002 letter stated in relevant part:

This letter is written to inform you that [redacted] are requesting a due process hearing pursuant to 20 U.S.C. §1415. As you were informed on [redacted] 2002, they are rejecting the unilateral placement proposed at [redacted] Middle School, because they do not believe it provides FAPE. Specifically, and without limitation, the [redacted] are concerned that the IEP is not tailored to meet the unique and individualized needs of [redacted], with an existing program and qualified personnel. Additionally, the IEP process:

- Has not used sufficient objective means to measure progress of specific learning needs related to disability
- Not committed to or explained what individualized instruction or related services would be provided;
- Not identified the person who would conduct such instruction or their qualifications; and
- Not provided for specific means or measurements regarding implementation of services or program developments.

Mr. and Mrs. [redacted] have instructed me to inform you that they will place [redacted] at [redacted] school and seek State reimbursement.

Respondent's Exhibit 1.

75. On November 18, 2002, Dr. [redacted] Law [redacted] and determined that [redacted] was doing well at [redacted] school, and that [redacted]'s self-image had improved.

76. At the hearing on December 5, 2002, Dr. [redacted] testified that her diagnosis of [redacted]'s condition is as follows:

- a. Attention Deficit/Hyperactivity Disorder
- b. Bi-polar Disorder

c. Obsessive Compulsive Disorder

d. Oppositional Defiant Disorder.

77. At the hearing on December 5, 2002, Dr. [redacted] testified that his current diagnosis of [redacted] condition is: a) Attention Deficit/Hyperactivity Disorder, and b) Oppositional Defiant Disorder. Dr. [redacted] also noted that [redacted] had obsessive compulsive traits. However, Dr. [redacted] did not feel that [redacted] had bi-polar disorder. Dr. [redacted] also testified very credibly that although he was not asked to participate in [redacted] IEP process, Dr. [redacted] supported [redacted] placement at [redacted] school because [redacted] had not been successful at any other school besides [redacted] school, and that [redacted] was doing very well at [redacted].

Dr. [redacted] was of the clear opinion that it would not be in [redacted] interest to change the school placement at this juncture.

78. In a letter dated May 1, 2000, [redacted] Head of [redacted] School, provided the following description to a DOE representative:

[redacted] school is a small independent school serving dyslexic and gifted children in grades Kindergarten through 12. [redacted] unique program integrates counseling and behavior management, provides differentiated integrated curriculum and small group learning environments. We cannot meet program and administrative regulations promulgated under the Individuals with Disabilities Education Act. Consequently, all tuition contracts at [redacted] school are drawn up between the school and the parents exclusively.

[redacted] School remains committed to educating children at risk for failure in school because of specific learning disabilities such as dyslexia. We seek active partnerships with schools and professionals who [redacted] this mission on behalf of these children. However, we feel that [redacted] mission is best served by remaining independent and adhering to our own policies and procedures regarding the education of our students.

Respondent's Exhibit 19.

79. In a letter to parents dated May 15, 2000, [redacted] provided the following information regarding the ability of [redacted] school to participate in the DOE IEP process:

As you are aware, [redacted] operates with D.O.E. schools during the IEP process on behalf of our students who are being followed by D.O.E. schools. When parents sign "Consent to Release Information Forms" we send testing documentation, Spring profile reports, report card objectives, narrative annotations, and descriptions of curriculum. We also encourage D.O.E. personnel to visit [redacted] classrooms when appropriate. These measures ensure that [redacted] documenting

progress for these students have the most recent information available from our files. Please do not ask \_\_\_\_\_ to adjust or alter our testing schedules to match the needs of other programs or to change the selection of tests we give. Requests such as these are disruptive to the program and costly in terms of disruptions to students' programs and teacher's instruction schedules.

Over the last several weeks \_\_\_\_\_ has been inundated with requests to consult with schools and with parents about the objectives included on I.E.P. written by other schools. Unfortunately we can not accommodate these requests. \_\_\_\_\_ teachers and administrators cannot make comments or judgments in regard to the programs offered in other schools or venues. We can not attend I.E.P. meetings or comment on objectives written by other professional[s] for use in other programs. We respect and understand that different programs operate and organize themselves differently.

At \_\_\_\_\_ we have found our mission is best served when we direct ourselves to the needs of our children as they are revealed through our diagnostic testing program and individual classroom performance. Our teachers need to be fully focused on their classrooms and the needs of their students. For that reason I ask your patience and support when requests are made from other schools for documentation and reports.

Please call if you have questions or concerns. I would be happy to discuss these issues more fully with you. \_\_\_\_\_ remains committed to cooperation and collaboration with other programs. However, our mission remains focused on your children, our students, here at \_\_\_\_\_

Respondent's Exhibit 20.

80. At the hearing, Mrs. \_\_\_\_\_ testified credibly that from January 2002 to July 2002, she had repeatedly suggested to the IEP team that they consider placing \_\_\_\_\_ at \_\_\_\_\_ Schools. However, the IEP team refused to discuss or consider placement of \_\_\_\_\_ at \_\_\_\_\_ School, even when suggested by Dr. \_\_\_\_\_ and Dr. \_\_\_\_\_. Mrs. \_\_\_\_\_ also testified credibly that because \_\_\_\_\_ was known to be a "runner", Mr. and Mrs. \_\_\_\_\_ had safety concerns regarding \_\_\_\_\_'s placement at \_\_\_\_\_ Middle School because of surrounding streets and vehicular traffic.

81. The Hearings Officer takes official notice that \_\_\_\_\_ Middle School began its 2002-2003 school year for students on August 1, 2002.

**IV. CONCLUSIONS OF LAW**

**A. Respondent's Motion to Dismiss Case with Prejudice Due to Petitioners' Previous Settlement of the Underlying Matter**

As an initial matter, the Hearings Officer finds and concludes that the preponderance of the evidence did not establish that the Petitioners had previously settled the issues presented in this case.

The evidence established that although \_\_\_\_\_ believed that he had calculated the amounts owed to Mr. and Mrs. \_\_\_\_\_ for purposes of the settlement of Case No. \_\_\_\_\_ after he had an opportunity to review the amounts with Mr. and Mrs. \_\_\_\_\_, Mr. \_\_\_\_\_ became aware of his error.

As such, although \_\_\_\_\_ may have been acting in good faith in delineating the terms of the proposed settlement based upon the information that \_\_\_\_\_ had at the time, until the clients, Mr. and Mrs. \_\_\_\_\_ had an opportunity to approve the terms of the final settlement documents, \_\_\_\_\_ would not be in a position to bind his clients.

The Hearings Officer would also note that there is no evidence that the Respondent tendered payment based upon the terms of the settlement agreement that Respondent is seeking to enforce.

**B. The June 10, 2002 IEP Was Not an Offer of FAPE**

**1. Overview**

The Individuals with Disabilities Act ("IDEA") guarantees all handicapped children FAPE. 20 U.S.C. § 1400(d)(1)(A) & 1412(a)(1)(A). In order to show that FAPE was offered, the DOE needs to show that (1) it has complied with IDEA's procedural requirements and (2) that the June 10, 2002 IEP developed for \_\_\_\_\_ is reasonably calculated to enable him to receive educational benefits. *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). If these two requirements are met, the DOE has offered FAPE to \_\_\_\_\_

Although procedural deficiencies do not automatically require a finding of denial of FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1484 (9th Cir. 1992), procedural flaws which result in the denial of educational opportunities for \_\_\_\_\_

the child or the serious infringement of the parents' right to participate in the IEP process will result in a denial of FAPE. *Target Range, supra* at 1484.

Also, the program offered need not be the absolute best educational program. Instead, the DOE needs only to provide a basic floor of opportunity through a program individually designed to provide educational benefits. *Seattle Sch. Dist., No. 5 v. B. S.*, 82 F.3d 1493, 1498 (9th Cir. 1996); *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 587 (9th Cir. 1992).

2. The June 10, 2002 IEP Was Not Complete

The provisions of HAR §8-56-38(a)(3) and (6) state in relevant part:

§ 8-56-38 Content of IEP. (a) The IEP for each student shall include:

- (3) A statement of the special education and related services and supplementary aids and services to be provided to the student, or on behalf of the student and a statement of the program modifications or supports for school personnel that will be provided for the student:
  - (A) To advance appropriately toward attaining the annual goals;
  - (B) To be involved and progress in the general curriculum in accordance with paragraph (1) and to participate in extracurricular and other nonacademic activities; and
  - (C) To be educated and participate with other students with a disability and students without a disability in the activities described in this section;
- (6) The projected date for the beginning of the services and modifications described in paragraph (3), and the anticipated frequency, location, and duration of those services and modifications; and

Accordingly, an IEP is required to include a statement of the special education and related service and supplementary aids and services to be provided to the student, and a statement of the program modifications or supports for school personnel that will be provided for the student.

Additionally, the provisions of HAR §8-56-31 state in relevant part:



**§8-56-31 When IEPs must be in effect.** (a) At the beginning of each school year, the department shall have an IEP in effect, for each student with a disability within its jurisdiction.

- (b) The department shall ensure that:
  - (1) An IEP is in effect before special education and related services are provided to a student;
  - (2) An IEP is implemented as soon as possible following the meetings described under section 8-56-32, including any case in which the payment source for providing or paying for special education and related services to the student is being determined;
  - (3) The student's IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation; and
  - (4) Each teacher and provider described in paragraph (3) is informed of:
    - (A) The teacher's or provider's specific responsibilities related to implementing the student's IEP; and
    - (B) The specific accommodations, modifications, and supports that shall be provided for the student in accordance with the IEP.

Based on the evidence presented by the parties, the Hearings Officer concludes that the June 10, 2002 IEP does not contain the information required by HAR §8-56-38(a)(3) and (6), nor HAR §8-56-31.

In the present case, the Hearings Officer concludes that the preponderance of the evidence established that the June 10, 2002 IEP, was not complete as of July 16, 2002, the date that Respondent indicates that FAPE was offered.

As of July 31, 2002, the IEP team had not finalized: 1) a transition plan to assist in transitioning from home to ██████████ Middle School; 2) specific benchmarks for some of the annual goals, including the mathematics, history, and science goals that reflect that ██████████ was not a grade level to start with, and that ██████████ was not intended to reach grade level in those subjects; 3) there were no behavior goals or components identified in the IEP or in any of the Conference Notes; 4) any identified services for ESY, 5) a Functional Behavioral Assessment, or 6) a Behavioral Modification Plan.

Additionally, the June 10, 2002 IEP notes in Section 21 regarding Supplementary Aids and Services, Program Modifications and Supports for School Personnel, indicated that [redacted] needed a highly structured setting, with multisensory instruction, and small class size. However, there was no evidence presented at the hearing that [redacted] Middle School was prepared to provide these aids, services, or program modifications, or supports for [redacted] in his general education classes as of July 16, 2002.

Furthermore, the June 10, 2002 IEP did not have any projected beginning dates or projected ending dates for the special education and related services, or the supplementary aids and services, program modification and supports for school personnel.

Given the severity of [redacted]'s previous psychological episodes which necessitated protracted periods of hospitalization, Petitioners' concerns regarding the incompleteness of the June 10, 2002 IEP are understandable. While it may be entirely possible for Washington Middle School to provide FAPE for [redacted] at some point in the future, before FAPE can be offered, an appropriate IEP must be developed by Respondent.

The Hearings Officer must conclude that these shortcomings in the IEP process and the IEP itself, are both procedural and substantive. See, *Evans v. Board of Educ.* 930 F. Supp. 83 (1996); *W.G. v. Board of Trustees of Target Range Sch. Dist.*, No. 7, 960 F. 2d. 1479 (9th Cir. 1992).

For the reasons stated above, the Hearings Officer must conclude that Petitioners proved by a preponderance of the evidence that the June 10, 2002 IEP was not an offer of FAPE.

In light of this determination, the Hearings Officer does not need to reach the specific issues raised by Petitioners.<sup>3</sup>

<sup>3</sup>In order to assist Respondent in developing future IEPs for [redacted], if the Hearings Officer had been required to make a determination regarding placement, the Hearings Officer would have found that the preponderance of the credible evidence presented at the hearing established that special education services in a general education setting for [redacted] was not an appropriate placement for purposes of the IEP. Instead, [redacted] required a small structured environment with appropriate instruction and behavioral supports. The Hearings Officer would also note that the issues raised by Petitioners regarding the substantive portions of the IEP should be carefully examined and considered by the IEP in developing [redacted]'s new IEP.

**C. Private Placement**

Based on the authorities cited by Petitioner, and because the Hearings Officer has concluded that the June 10, 2002 IEP did not provide FAPE, the Hearings Officer finds and concludes that Petitioners proved by a preponderance of the evidence that [redacted] School is an appropriate private placement for [redacted]. [redacted] has obtained educational benefit from attending [redacted] School, and Mr. and Mrs. [redacted] as well as Dr. [redacted] testified that [redacted] has made significant improvement in his emotional and psychological development.

**D. Reimbursements to Petitioners**

The Hearings Officer concludes that the preponderance of the evidence established that Mr. and Mrs. [redacted] are entitled to be reimbursement from Respondent for all of the items they requested from October 30, 2000 to the present.

**V. DECISION**

For the reasons stated above, the Hearings Officer finds and concludes that the June 10, 2002 IEP did not offer FAPE.

Based upon the foregoing, IT IS HEREBY ORDERED THAT:

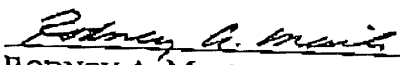
1. Respondent convene [redacted] IEP team at the first mutually convenient date to revise [redacted] IEP to include the items required by HAR §8-56-38(a), and to determine placement after considering the information provided by Mr. and Mrs. [redacted].
2. Respondent shall reimburse Petitioners for the cost of [redacted] current private placement at [redacted] school, until such time as the IEP process is completed and FAPE offered; and
3. Upon the receipt of an itemized statement from Petitioners, Respondent shall reimburse Petitioners for the following items related to hospitalization, treatment, and educational services from October 30, 2000 to the present:
  - all co-payments made for treatment and services provided by Dr. [redacted]
  - all co-payments made for treatment and services provided by Dr. [redacted]

- all co-payments made for treatment and services provided by
- reimbursement for transportation costs/mileage for tutoring and treatment/therapy
- reimbursement for payments to [redacted] for tutoring services.

**VI. RIGHT TO APPEAL**

The parties have the right to appeal to a court of competent jurisdiction within thirty (30) days of receipt of this Decision.

DATED: Honolulu, Hawai'i, April 28, 2003

  
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 RODNEY A. MAILE  
 Senior Hearings Officer  
 Department of Commerce  
 and Consumer Affairs