



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2004 JAN -5 P 4: 11

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

In the Matter of

DOE-2003-086

_____, by and through
_____, his Legal Guardian,

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION; APPENDICES
A and B

Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION**

I. CHRONOLOGY OF CASE

By letter dated July 14, 2003, Shelby Anne Floyd, Esq., requested a due process hearing on behalf of her clients _____, _____, and her grandson _____ (hereinafter collectively referred to as "Petitioners").

Petitioners' request for a due process hearing was duly transmitted by the Department of Education ("DOE"), State of Hawai'i ("Respondent") to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs.

On August 6, 2003, the pre-hearing conference in the above-captioned matter was conducted by the undersigned Hearings Officer. Petitioners were represented by their attorney Shelby Anne Floyd, and Respondent was represented by its attorney Steven K. Chang.

On September 29, 2003, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer in _____ Hawaii. _____ was present, and

was represented by her attorney Shelby Anne Floyd. _____, Student Services Coordinator ("SSC") for Konawaena Middle School, appeared on behalf of Respondent and was represented by Steven K. Chang, Esq.

The hearing was reconvened by the undersigned Hearings Officer in Kailua-Kona, Hawaii on September 30, 2003, October 1, 2, 28, and 29, 2003, and December 5, 2003, with the parties present and represented by their respective attorneys.

At the close of the hearing conducted on December 5, 2003, the parties agreed to present their oral closing arguments on December 16, 2003. The parties were also given leave to submit proposed findings of fact by December 17, 2003. Consequently, the Hearings Officer granted the parties' request to extend the forty-five day period specified by Hawaii Administrative Rules ("HAR") §8-56-77(a), from October 6, 2003, to two weeks after the receipt of the final hearing transcript.

The parties subsequently agreed to waive their closing arguments, and submit their proposed findings of fact by December 18, 2003.

On December 18, 2003, the parties filed their respective Proposed Findings of Fact.

On December 18, 2003, the final hearing transcript was received by the Office of Administrative Hearings.

On January 2, 2004, the parties agreed to extend the forty-five day period specified by HAR §8-56-77(a), from January 2, 2004, to January 5, 2004.

II. ISSUES PRESENTED

The issues to be decided in the present matter, as identified in Petitioners' Request for Impartial Hearing dated July 14, 2003, are as follows:

1. Whether _____ current placement has met and will meet _____ needs;
2. Whether _____ because of his emotional conditions, requires a community based highly structure therapeutic learning environment;
3. Whether some of the goals in _____ Individualized Education Program ("IEP") require changes in services that would increase the likelihood of achieving the goals;
4. Whether _____ progress towards achieving most of his IEP goals and objectives can be measured objectively, including whether there was a baseline from which progress could be measured; and

5. Whether Respondent provided sufficient intensive services in a therapeutic setting to address _____ deficits.

III. FINDINGS OF FACT

1. _____ was born in 1988, and experienced abuse and serious neglect as a young child growing up in Alabama. Petitioners' Proposed Findings of Fact No. 2, revised.

2. While enrolled in the public school system in Alabama, _____ was diagnosed as being mildly retarded. Petitioners' Proposed Findings of Fact No. 2, revised.

3. In 1999, _____ came to live with Ms. _____ his grandmother, in Kailua-Kona, Hawai'i.

4. Since 1999, Terry Fujioka, Ph.D., has been _____ treating psychologist. Petitioners' Proposed Findings of Fact No. 6, revised.

5. In January 2000, Jeffrey Cumes, Ph.D. and Heide Cumes, Ph.D, conducted an assessment of _____, shortly after _____ move to Kona from Alabama. Their diagnoses included:

- Posttraumatic Stress Disorder,
- Attention-Deficit/Hyperactivity Disorder,
- Sexual Abuse of Child,
- Enuresis,
- Encopresis,
- Learning Disorder NOS, and
- Academic Problems.

Drs. Jeffrey and Heide Cumes concluded that it was likely that _____ delayed educational functioning was likely most impacted by his emotional problems and previous deprivation of normal developmental experiences.

6. _____ initially attended Kahakai Elementary School for the fourth and fifth grades, and was determined to be eligible for special education services. Petitioners' Proposed Findings of Fact No. 3, revised.

7. For the sixth grade, _____ was enrolled in Kealakehe Intermediate School, where he was reported to have severe behavioral problems in the classroom. _____ was placed in a fully self-contained special education class. Petitioners' Proposed Findings of Fact No. 4, revised.

8. In early November 2001, Respondent referred [redacted] to Shannon Thompson, Ph.D., a DOE school psychologist, for an assessment because [redacted] was having severe behavioral problems at school and difficulty in learning.

9. In her report dated November 15, 2001, Dr. Thompson noted her diagnoses of [redacted]'s condition as:

DSM IV diagnoses

- Axis I 309.41 Post-Traumatic Stress Disorder, Chronic, Severe
- Axis II 799.9 No diagnosis
- Axis III Probable fetal exposure to drugs and/or alcohol
- Axis IV Moderate: adjustment to intermediate school, history of severe physical and emotional abuse
- Axis V Current GAF: 45¹ Past Year: 60

At that time, Dr. Thompson's recommendations regarding [redacted] needs were:

Treatment recommendations

1. [redacted] needs to have the usual classroom accommodations made for a child with severe attention deficit and difficulty with concentration. He will probably do well with a seat away from others when he is asked to complete assignments independently. This location could also serve the purpose of providing a time-out setting which [redacted] could access when he is beginning to escalate or feel over stimulated.
2. [redacted] should be given the opportunity to go to the time out location when his behavior is beginning to escalate or if he feels the need. He does not tolerate environmental stimulation and appears to be overwhelmed by the complexity and activity level at the intermediate school.
3. [redacted] requires intensive individual supervision during school. He would do well with someone whom he feels comfortable with, particularly in the area of physical space and personal boundaries. His grandmother noted that he seems to feel more comfortable with females than males when in close physical proximity. This person could be given some directions for physically soothing interventions, at the instruction of his grandmother.
4. [redacted] needs to have his time at school completely structured. He is most volatile and likely to have trouble when he is out with other children during recess. His grandmother has requested that he be allowed to work in the school garden during these times. This is an excellent idea in that it allows

¹ The "GAF" is the Global Axis of Functioning scale. The GAF scale goes from 0 to 100, with 100 reflecting no problems in any of the areas examined or evaluated.

to have some physical exercise while giving him detailed instructions in how he should behave.

5. might do well with holding an object to fiddle with while he is receiving instructions or listening to material presented verbally. This could be a lump of clay or silly putty, a rock or something with texture, like a koosh ball. If this becomes distracting, it should be temporarily removed, then given back when is appropriate.
6. Materials presented to should be given in multiple modalities, including kinesthetically, whenever possible. If verbal instructions are given, the speaker should face so as to give him the visual cue of watching the speaker's lips. will need some training in using these strategies to help him in school.
7. L attention span is so short and he is so easily distracted that he probably does not make the connection between his behavior and consequences if there is a time delay. Whenever possible, consequences (both positive and negative) should be immediate, to help him in directing his behavior.
8. should be given a complete physical examination by a physician specializing in pediatric urology and/or gastroenterology. A local physician, Dr. John Lattimer, specializes in urology and could provide an initial exam to determine if more specialized care is necessary.

Respondent's Exhibit 21. Based on the results of cognitive testing, Dr. Thompson concluded that had an average IQ with a significant difficulty in distractibility.

10. Sometime prior to November 16, 2001, Dr. Thompson met with school staff from Kealakehe Intermediate School regarding and expressed her opinion that should not continue in Kealakehe Intermediate School because of his high level of stimulation, the severity of his behavioral difficulties, and concerns for safety and as well as any educational progress. Dr. Thompson felt that needed to be placed in a day treatment program, a highly structured environment where he would have immediate feedback and consequences. However, Dr. Thompson was informed by Kealakehe Intermediate School staff that placement in a day treatment program was not an option and should not be recommended.

11. At the end of the 2001-2002 school year, Terry Fujioka, Ph.D., who had been treating psychologist since 1999, recommended that be placed in a day treatment program to address his behaviors.

12. On June 3, 2002, an IEP meeting was held at Kealakehe Intermediate School, and the IEP team agreed that would most benefit from "a small student body environment with structure and consistent enforcement of expectations." During the June 3, 2002 IEP meeting at Kealakehe Intermediate School, Ms. as the representative of Konawaena Middle School, expressed her disagreement with the IEP team's determination to place at Konawaena Middle School, because although smaller in total enrollment, Konawaena Middle School did not have a lower student-to-teacher ratio than Kealakehe Intermediate School. Ms. dissent notwithstanding, the Kealakehe Intermediate School IEP team decided that the appropriate placement for for the 2002-2003 school year would be Konawaena Middle School. Petitioners' Proposed Findings of Fact No. 6, revised.

13. On August 14, 2002, an IEP meeting was held at Konawaena Middle School, and an IEP was developed. A true and accurate copy of the services grid from the August 14, 2002 IEP is attached hereto as Appendix A, and by this reference incorporated herein.

14. By Prior Written Notice dated August 14, 2002, Ms. Thomas was notified of placement at Konawaena Middle School:

1. Description of the proposed or refused action:

will attend core academic classes – English, Social Studies, Math, and Science, as well as PE – with his peers. He will receive assistance from the Special Education Staff in the form of pull-out and/or in class assistance on a daily basis. He will receive one period of Basic Skills, a resource class, to assist in organization and reteaching of important concepts introduced in his core classes

2. Explanation of why the action is proposed or refused:

begins a new school year at a new school. His ability to comprehend grade level reading materials, the need to increase social skills with peers and adults, and lack of progress in other programs are reasons for suggesting the implementation of this new placement.

3. Description of other options considered:

Self-contained [fully self-contained classroom]

4. Reasons these options were rejected:

Self-contained has not benefited _____ academic progress in the past.

5. Description of the evaluation procedures, tests, records, or reports used as a basis for the proposed/refused action:

Discussion between guardians, teachers, administrator, and specialists looked at _____ records, teacher reports, informal reading assessments previous IEP, and current classroom behavior over the past few weeks to determine program and placement as Konawaena Middle School.

Petitioners' Exhibit 24.

15. Pursuant to the August 14, 2002 IEP, _____ enrolled in Konawaena Middle School in the fall of 2002. Petitioners' Proposed Findings of Fact No. 7.

16. At the start of the 2002-2003 school year at Konawaena Middle School, _____ was placed in the regular education setting for the entire school day. Respondent's Proposed Findings of Fact No. 2.

17. Shortly after the start of the 2002-2003 school year at Konawaena Middle School, _____ was placed in a special education class for math and English, but remained in the regular education classes for the science, social studies, and advisory class. Respondent's Proposed Findings of Fact No. 3.

18. At the beginning of the 2002-2003 school year, _____ teachers noted that he:

- Was easily distracted;
- Had a hard time focusing;
- Was confrontational with other students, in some ways;
- Would annoy, and disrupt the provision of education to his fellow students at his table by sliding his binder against their books, or by kicking them;
- Would hide behind his binder during class;
- Would read books unrelated to any assignment;
- Would draw pictures unrelated to any assignment;
- Got into a fight;
- Had an educational assistant ("EA") assigned to him to be at his side to help him refocus, and pay attention to class and homework assignments; and
- Refused to do any work.

Respondent's Proposed Findings of Fact No. 5, revised.

19. By the end of the 2002-2003 school year at Konawaena Middle School, _____ was no longer engaging in most of these behaviors in Mr. Sergius Palakiko's social studies class, and was engaging in the remaining behaviors with a significantly reduced frequency in his other classes. Respondent's Proposed Findings of Fact No. 6, revised.

20. For the 2002-2003 school year at Konawaena Middle School, _____ received passing grades in science, social studies, and advisory. Respondent's Proposed Findings of Fact No. 7, revised.

21. At the end of the school year at Konawaena Middle School _____ did not require an EA to be at his side at all times in order to complete his class work and homework. Respondent's Proposed Findings of Fact No. 8, revised

22. During the 2002-2003 school year at Konawaena Middle School, _____ made significant behavioral and academic progress in Ms Sandy Carneli's science and advisory classes. Respondent's Proposed Findings of Fact No. 9, revised

23. During the 2002-2003 school year at Konawaena Middle School, _____ made significant behavioral and academic progress in Mr. Palakiko's social studies class during the 2002-2003 school year. Respondent's Proposed Findings of Fact No. 10.

24. During the 2002-2003 school year at Konawaena Middle School, _____ made significant behavioral and academic progress in the math and English classes taught by Mr. Kevin Birkshire during the 2002-2003 school year. Respondent's Proposed Findings of Fact No. 11, revised.

25. _____ was responsible for doing his own class work. Because of _____ continuing difficulties in completing homework assignments, _____ was allowed to do all of his "homework" during school. Respondent's Proposed Findings of Fact No. 12, revised.

26. _____'s EA, counselor, and teachers did not do _____ class and homework for him. However, because _____ exhibited significant difficulties with the physical exercise of handwriting, as an accommodation, for some assignments _____ was allowed to dictate his assignments to his EA, who would type or write the information being dictated. Respondent's Proposed Findings of Fact No. 13, revised.

27. At the beginning of the 2002-2003, school year _____ did not have any friends at Konawaena Middle School. By the end of the 2002-2003 school year _____ had

developed at least casual relationships with several other students at Konawaena Middle School. Respondent's Proposed Findings of Fact Nos. 14 and 15, revised.

28. Over the course of the 2002-2003 school year at Konawaena Middle School, [redacted] made progress on most of his IEP goals and objectives. Respondent's Proposed Findings of Fact No. 17, revised.

29. Toward the end of the 2002-2003 school year, [redacted] exhibited negative behaviors in the home and at Konawaena Middle School, after Ms. Thomas informed [redacted] that he might be going to a foster home. Respondent's Proposed Findings of Fact No. 18, revised.

30. During the 2002-2003 school year, there were reported incidents that [redacted] was incontinent at Konawaena Middle School. Respondent's Proposed Findings of Fact No. 24, revised.

31. During the summer of 2003, [redacted] attended the Excel Summer Program (a non-DOE summer program). Isaac Hu, the Program Leader for [redacted]'s Excel group, testified that [redacted] was not incontinent, and that [redacted] did not exhibit negative behaviors with his peers, or in the community setting when the summer program engaged in community service activities. Respondent's Proposed Findings of Fact No. 25, revised.

32. Because of his disabilities, [redacted] has extremely high needs. Petitioners' Proposed Findings of Fact No. 9.

33. Based upon cognitive and achievement testing, [redacted] has an average IQ, and has the intelligence to: a) read and write at grade level, b) count money, and c) do grade level math. However, [redacted]'s behavior significantly impacts his academic progress. Petitioners' Proposed Findings of Fact No. 10, revised.

34. At various times, [redacted] has demonstrated that he has good reading comprehension, and can write with proper writing mechanics. However, most of the time [redacted] refuses to write down his classroom or homework assignments. Petitioners' Proposed Findings of Fact Nos. 11 and 12.

35. For at least the last two years, the special education and related services provided to [redacted] were insufficient to permit him to master all of his annual goals or benchmarks:

- a. _____ has not mastered any writing goals, and frequently refuses to write; his writing often has the appearance of a first or second grader.
- b. In the 2001-02 school year, _____ was able to add or subtract with regrouping. In the 2002-03 school year, _____ refused to do regrouping and worked the entire year on simple addition and subtraction without regrouping.
- c. A comparison of _____'s 2001-02 and 2002-03 IEPs and progress reports shows that many of the academic goals were the same or similar. Although services were modified at various times, _____ did not make consistent progress on any objectives, he failed to make any significant progress on some, and he failed to master any in two years. _____ showed "no progress" or "emerging" (not yet making progress) on 11 of 13 indicators across the entire 2002-2003 school year. _____ continued to refuse to write or to demonstrate that he could count money.

Petitioners' Proposed Findings of Fact No. 13, revised.

36. For the past three years, the behavioral goals in _____ IEP have been identical or very similar. _____ made little progress toward meeting his behavioral goals in 2001-2002, and made little or no progress on his behavioral goals during the 2002-2003 school year. Petitioners' Proposed Findings of Fact No. 14, revised.

37. At times, _____ would not begin work in class until he was prompted by a teacher or EA. If not redirected, _____ attempts to read books of his choice instead of doing the work assigned in class. _____ often shows defiance verbally and through body language. Petitioners' Proposed Findings of Fact No. 15, revised.

38. In seventh grade, _____ experienced a number of changes as his IEP team and others attempted to determine how to address his behaviors and to limit his opportunities to engage in disruptive or antisocial behavior.

- a. _____ was initially enrolled in regular education, but moved to two special education classes in October 2002.
- b. _____ was subsequently removed from the physical education class after the first quarter because of his refusal to participate.
- c. Although initially Mr. Berkshire provided up to 30 minutes of assistance to _____ in his general education classes, in early October 2002, _____ IEP

was modified to increase special education, and he was moved to special education classes for those subjects where he received 1:1 instruction. It was also determined that [redacted] needed an educational aide provided to him in his general education classes. Ms. Nazarra was hired for that purpose in November 2002, and she also provided instruction in math and English.

d. In January 2003, Ms. Nazarra left, and thereafter three other aides were used to provide assistance to [redacted]. In May 2003, another aide was hired for [redacted].

Dr. Liepack reported that this aide appeared to be ineffectual with [redacted] and was heard to call [redacted] "weird."

e. [redacted] refused or failed to do or hand in homework. As a result, in November 2002 the need for him to do homework was eliminated, and he was allowed to complete all assignments at school. Other school work was modified to provide more time for [redacted] to complete. Ms. Nazarra often had to "nudge, cajole and prod" [redacted] to keep him on task in the regular classrooms. [redacted] often refused to work with her.

f. In December, because of [redacted]; stealing and hoarding, his right to use a backpack or school locker was terminated and his recess privileges were revoked.

g. As a result of [redacted] deteriorating behaviors, intensive in-home treatment was started for [redacted] and his family in the fall of 2002.

h. In March 2003 [redacted] was observed masturbating in public, and he spoke about killing himself. There were other reports of sexualized behaviors in and out of school.

i. During spring break camping trip, [redacted] alienated both his peers and accompanying adults with his encopresis, oppositional and risky behaviors.

j. At the end of the school year, [redacted] was suspended from school for shining a laser in another student's eye and stealing a year book. He was running away from home, stealing, and saying he hated school. He pushed his aide at school.

Petitioners' Proposed Findings of Fact No. 16, revised.

39. Although there was testimony from _____ s teachers and Mr. Terry Tokuda, (the Konawaena Middle School counselor) that _____ behavior and school performance had improved over the 2002-2003 school year, other records reflect great variation in his functioning from week to week. Petitioners' Proposed Findings of Fact No. 17, revised.

40. Comparisons of mental health instruments used to measure _____ s functioning between 2001 and June 2003 show a marked decline in _____ s functioning at school and home.

a. In the 2001-02 school year, Dr. Thompson rated _____ global assessment of functioning ("GAF") score at 45, down from 60 earlier in the year.

b. In June 2003, Dr. Scot Liepack found _____'s GAF score was 35, and had remained there for the year. Ex. D17. This reflects severely impaired functioning for a child in public school, and indicates an inpatient or residential level of need.

c. According to Dr. Liepack's June 16, 2003 report:

_____ exhibits depressed mood, including irritability, most of the day nearly every day. He exhibits a diminished interest and pleasure in most activities. He suffers from insomnia, fatigue, and psychomotor agitation. He experiences feelings of worthlessness as well as inappropriate guilt, a diminished ability to think or concentrate, and has recurrent thoughts of death including suicidal ideation." Respondent's Exhibit 17 at 8.

d. On the Child and Adolescent Functional Assessment Scale ("CAFAS"), the instrument used by _____ Department of Health care coordinator to determine _____ ; functioning status, _____ score went from 90 at the beginning of the 2002-03 school year, to 150 at the end of the year. This score, which was based on information provided by _____ s teachers and school personnel as well as his care givers, showed him to be in the highest category of overall dysfunction. _____ disruptive behavior and school functioning sub-scores both deteriorated markedly over the year. By June 2003, _____ perceived himself as "having severe difficulties in all aspects of functioning."

Petitioners' Proposed Findings of Fact No. 18, revised.

41. In May 2003, _____ : continued to deteriorate, and his grandparents urged the IEP team to consider placement in a day treatment center.

42. By Prior Written Notice dated June 19, 2003, the IEP informed Ms. Thomas that her request to have _____ placed at the _____ program was rejected for the following reasons:

- a. _____ was achieving academic success at Konawaena Middle School;
- b. _____ transitions were challenging for _____;
- c. _____ academic and remediation curriculum at _____ program was unsubstantiated;
- d. _____ ; behavior were being addressed and managed in the current school environment;
- e. _____ r did not meet criteria for ESY other than SBBH Individual Counseling; and
- f. _____ E Ala Ike Day Treatment Program was a 1.5 hour ride each way for _____ and supervision of _____ ; during that time was unknown.

Petitioners' Proposed Findings of Fact No. 19, revised.

43. In May and June 2003, the Konawaena Middle School SSC and the Family Guidance Center identified the need to investigate the possibility of placement at a day treatment center, and Konawaena Middle School did make inquiries. However, there was no day treatment programs in the area at the time, and the school was unaware that one would be opening in Kona in August 2003. Petitioners' Proposed Findings of Fact No. 20, revised.

44. During the latter part of the 2002-03 school year, _____ behavior also deteriorated at home, in part because of the stress on his family because of the amount of support _____ required at school. Petitioners' Proposed Findings of Fact No. 21.

45. Multiple sources testified to the love and discipline _____ receives at home:

- a. Dr. Shannon Thompson reported that _____ ; and _____ have worked hard to provide adequate structure in the home, and have devoted themselves to raising _____
- b. The Department of Health described _____ grandmothers as "committed to _____," "consistent" and "educated about his diagnosis and recommended treatment."
- c. Dr. Scot Liepack reported that _____ grandmothers "value and teach the importance of a strong and supportive family," and that Ms. _____ ; "provides _____ with a well structured and disciplined home environment," and has a "deep and abiding commitment to him."

Petitioners' Proposed Findings of Fact No. 22.

46. For the past two years, the Department of Health has also provided intensive in-home services for [redacted] Petitioners' Proposed Findings of Fact No. 23, revised.

47. In his report dated June 16, 2003, Dr. Liepack noted his test data and diagnoses in relevant part:

Test Data

Behavioral and Emotional Functioning:

[redacted] 8-scale score on the Child and Adolescent Functional Assessment Scale (CAFAS) was 130, indicating severe impairment in his functioning at home, moderate impairment in his functioning at school, in the community, in his behavior towards others, and in his moods and emotions and mild impairment in terms of self-harm and substance use.

Four of the five reporters, including [redacted], endorsed items that resulted in the Total Problems scale being elevated in the Clinical range.

A large number of specific behaviors were rated by all five reporters as being either Very or Somewhat True. Problems related to attention included: fails to finish tasks, difficulty concentrating, frequently daydreams, is impulsive, is inattentive, and does poor school work. Rule Breaking and Aggressive Behaviors include: breaking rules, lying and cheating, stealing other's things, disobeying school rules, being stubborn, and having frequent mood changes. All five reporters also endorsed [redacted] being secretive and being teased. Four of the five reporters endorsed that [redacted] has talked about suicide, prefers to be alone, appears sad, is not liked by peers, stores up things, and has difficulty sitting still. [redacted] completed the Personality Inventory for Youth (PK), an instrument that provides information about emotional functioning in 9 domain areas encompassing 24 subdomains. His responses to this instrument yielded a marginally valid profile, suggesting severe emotional disturbance, an exaggeration of problems, or both. [redacted] responses resulted in every one of the nine scales being clinically elevated, as well as 11 of the 24 subscales. However this test is interpreted, it represents a significant cry for help and a self-perception of having severe difficulties in all aspects of functioning.

Diagnostic Impressions:

- Axis I 313.89 Reactive Attachment Disorder, Primarily Inhibited Type
- 309.81 Posttraumatic Stress Disorder
- 296.32 Major Depressive Disorder, Moderate, Chronic
- 314.01 Attention Deficit/Hyperactivity Disorder
- Axis II 799.9 Diagnosis Deferred on Axis II

- Axis III Dexedrine for treatment of ADHD
- Axis IV Problems with primary support group, substantial attachment deficits, educational problems, legal involvement
- Axis V Current = 35, High for Year = 35

Respondent's Exhibit 17A.

48. On June 19, 2003, an IEP meeting was held at Konawaena Middle School.

According to the June 19, 2003 IEP meeting notes:

[Ms. _____, said L_____ behavior directly affects academics, he's not performing at grade level, she had spoken directly to the director of E Ala Ike Day Treatment Center and wants _____ here during the regular and extended school year. Reviewed _____ report card & discipline referral summary. _____ started the year with Ds and Fs in the 1st quarter and finished with Bs and Cs in the 4th quarter. Principal offered FAPE: Services existing in the IEP since supports for _____ at school are appropriate. Guardian/Paulette disagreed and informed the team she would be contacting an attorney. Guardians terminated the meeting and left. As they left, guardians refused SBBH services for the summer.

Respondent's Exhibit 1. As a result of the June 19, 2003 IEP meeting, an IEP was developed. A true and accurate copy of the services grid from the June 19, 2003 IEP is attached hereto as Appendix B, and by this reference incorporated herein.

49. The June 19, 2003 IEP contained goals which were substantially similar if not identical to the goals in IEPs for the two prior years, with the exception of a reading goal. Petitioners' Proposed Findings of Fact No. 14, revised.

50. The June 25, 2003 Scoring Sheet for the Child and Adolescent Level of Care Utilization System ("CALOCUS") prepared by Monica Dey (_____ mental health care coordinator, Family Guidance Center) as part of the Department of Health's process for determining _____ needs, indicated that _____ required placement in a day treatment program and/or a therapeutic foster home.

51. In July 2003, _____ was placed in a therapeutic foster home. This service, along with other services, was provided by the Department of Health to meet _____ needs under the IDEA. Petitioners' Proposed Findings of Fact No. 23.

52. The DOE has contracted with _____ to provide a year-round community based day treatment program in Kona, Hawaii. The program opened in late August 2003, and currently has openings. _____ provides cognitive behavioral therapy to youths who have difficulty managing a regular school environment because of behavior or

mental health issues. While Konawaena Middle School's general education classes have a student teacher ratio of 30:1, [REDACTED] has a ratio of three staff to each student; there is contact with the student's family several times a week. For youths with reactive attachment disorders like [REDACTED] close communication between school and home promotes a needed sense of safety. Petitioners' Proposed Findings of Fact No. 24, revised.

53. In terms of the continuum of placements, the community based instruction programs at [REDACTED] and [REDACTED] are more restrictive than [REDACTED] placement at Konawaena Middle School with special education classes and supports. Respondent's Proposed Findings of Fact No. 20, revised.

54. The educational or psychological professionals called as witnesses by Petitioners had no first hand knowledge of how [REDACTED] was doing socially, behaviorally, or academically in the classrooms at Konawaena Middle School. Respondent's Proposed Findings of Fact No. 22.

55. The educational or psychological professionals called as witnesses by Petitioners had no first hand information of how [REDACTED] was doing socially, behaviorally, or academically in the classrooms at Konawaena Middle School from the educational professionals who were actually providing educational services to [REDACTED] in the classrooms. Respondent's Proposed Findings of Fact No. 23.

56. At the hearing, [REDACTED] teachers and his school counselor from his 2002-2003 school year, as well as Dr. Liepack, testified that they believed that [REDACTED] did not need to be placed in a day treatment program because [REDACTED] was making academic, behavioral, and social progress at Konawaena Middle School.

57. At the time of the hearing, neither the school based therapist nor [REDACTED] special education teacher had visited the [REDACTED] program. Petitioners' Proposed Findings of Fact No. 20, revised.

58. [REDACTED] emotional, social and behavioral needs, which require frequent intervention and redirection, must be addressed in order for him to benefit from his education. Petitioners' Proposed Findings of Fact No. 25.

59. [REDACTED] lacks independent living skills that an average youth his age would have. Petitioners' Proposed Findings of Fact No. 26.

60. needs a high degree of structure and supervision and a consistent approach, in a program in which both his school, community and home behavior is addressed. Petitioners' Proposed Findings of Fact No. 27.

61. Both Drs. Thompson and Fujioka testified credibly at the hearing that without very intensive interventions, prognosis is poor. Both Drs. Thompson and Fujioka were of the opinion that needed to be placed in a day treatment program. Petitioners' Proposed Findings of Fact No. 26.

62. At the hearing, Dr. Fujioka testified:

In my experience working with children with similar backgrounds, is one of the more difficult kids that I have worked with not just here, but also at - when I was practicing at Yale. And I think that's reflected by some of the recent evaluations. His GAF score, stands for Global Assessment of Function score, which is just a real basic 0 to 100 scale score that's used in the psychiatric diagnostic classification system, you know, I think Dr. Roth, who just did a psychiatric evaluation, gave him a GAF score of 40, I believe, which is very low. That is usually akin to what you would see in inpatient or residential. Inpatient or residential treatment. I think Dr. Liepack gave him a 35 or similar, similar. That you would expect to see for residential level or inpatient level functioning, not as an outpatient.

IV. CONCLUSIONS OF LAW

The primary issue to be determined in this case is whether should have been placed in a day treatment program or community based instruction program, instead of being placed at Konawaena Middle School with special education and regular education classes for the 2003-2004 school year.

First, the Hearings Officer finds the testimony of Drs. Thompson and Fujioka to be credible and compelling in regards to diagnoses and continued psychological decline. The preponderance of evidence clearly established that GAF declined from 60 in 2001, to 35 by July 2003.² Moreover, CAFAS scores also reflected a significant decline in his emotional condition from 90 at the beginning of the 2002-03 school year, to 150 at the end of the year. Consequently, both Drs. Thompson and Fujioka were of the opinion that required placement in a day treatment program, or his prognosis would be poor.

² According to Dr. Liepack's June 16, 2003 report, highest GAF score for the entire year up to June 16, 2003 was 35.

Next, the evidence also established that [redacted] behavior at home declined to the point where placement in a therapeutic foster home was warranted. However, the evidence also indicated that a significant amount of the conflict between [redacted] and his grandmothers at home concerned [redacted] ing his homework. As a result of [redacted] - behavior at home and at school, [redacted] s Mental Health Care Coordinator recommended that [redacted] be placed in a day treatment center and/or therapeutic foster home.

As to [redacted] s academic progress at Konawaena Middle School, the Hearings Officer finds and concludes that [redacted] r did make educational progress during the 2002-2003 school year. [redacted] s educational progress appears to have been largely due to the monumental efforts of his teachers, Mr. Berkshire, Ms. Carneli, and Mr. Palakiko, and the continuing efforts of the administration including Ms. Okada and Terry Tokuda in endeavoring to implement the IEP. Indeed, without the truly exceptional efforts of [redacted] teachers, particularly Mr. Palakiko, [redacted] s academic and behavioral difficulties would have been more pronounced by the end of the 2002-2003 school year.

However, in light of the reports and testimony of Drs. Thompson, Fujioka, and Liepack, the Hearings Officer must conclude that while [redacted] - behavior may have become somewhat more manageable during the 2002-2003 school year, his overall psychological condition declined.

As such, the Hearings Officer must conclude that although the staff of Konawaena Middle School made every effort to carry out the June 19, 2003 IEP, the preponderance of the evidence established that [redacted] placement pursuant to the June 19, 2003 IEP was not appropriate and therefore did not provide [redacted] with a free and appropriate public education.

V. DECISION


For the reasons stated above, the Hearings Officer finds and concludes that Petitioners proved by a preponderance of the evidence that: 1) [redacted] requires special education services and mental health services that can only be adequately provided at a day treatment program or community based instruction program; 2) the June 19, 2003 IEP did not provide an appropriate placement for [redacted]; and 3) Petitioners are deemed to be the prevailing party in this matter.

IT IS ORDERED that Respondent shall reconvene the IEP team within 30 days from the date of this order and take all necessary measures to place at Ho'okupuono as expeditiously as possible.

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, January 5, 2004


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