

I. BACKGROUND

On August 7, 2003, a Request for Impartial Due Process Hearing was filed by Student, by and through his mother ("Petitioners"). The request was not transmitted to the Office of Administrative Hearings until August 18, 2003. A Notice of Hearing and Pre-Hearing Conference was issued to the parties on August 19, 2003.

On August 28, 2003, the hearing in this matter was convened by the undersigned Hearings Officer in Wailuku, Maui, Hawaii with Petitioners represented by Mother and with Respondent represented by SM.

Following Respondent's case-in-chief, Petitioners moved the Hearings Officer to direct a verdict in their favor. After hearing the arguments of the parties, the Hearings Officer took the motion under advisement. Upon further consideration, the Hearings Officer hereby denies the motion.

At the conclusion of the hearing, the parties were directed to submit written closing briefs. On September 3, 2003, Respondent filed its closing brief and on September 5, 2003, Petitioners filed their closing brief. The Hearings Officer, having reviewed and considered the evidence presented by the parties, together with the exhibits, records and files herein, hereby renders the following findings of fact, conclusions of law, and decision.

II. FINDINGS OF FACT

1. Student was deemed eligible for Special Education Services under the Individuals with Disabilities Education Act ("IDEA") on or about his fourth birthday.
2. Student is currently 15 years old.
3. Student is currently attending King Kekaulike High School in Pukalani, Maui.
4. Student's latest Individualized Education Program ("IEP") is dated May 29, 2003.
5. Student's IEP team last met on May 29, 2003.
6. Student's IEP provides for, among other things, services by a behaviorist, once a month between February 18, 2003 and February 18, 2004. Up until June 30, 2003, those services were provided by DW.
7. DW's contract was terminated after June 30, 2003.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

Petitioners' complaint arises from the termination of DW as Student's behavior consultant. There is no dispute that Student's IEP calls for behavioral services. According to Petitioners, however, Student has not received any behavioral services since June 30, 2003 and there is no plan in place to replace DW with another qualified behaviorist. On the other hand, Respondent contends that VN has been providing Student with both behavioral as well as autism consulting services since DW's departure. As such, the question here is whether the IEP has been properly implemented after June 30, 2003 with respect to the services of a behaviorist.

Although Respondent argued that VN has been providing the required behavioral services, very little, if any evidence was presented to substantiate this. There was no indication from the evidence what those services consisted of, when they were provided¹, and how those services differed from the services being provided by VN as Student's autism consultant.² Moreover, it was not altogether clear from the witnesses called by Respondent who had replaced DW as Student's behaviorist after June 30, 2003 and when.³ On this record, the Hearings Officer finds and concludes that Respondent has failed to prove that Student has been provided with a Free Appropriate Public Education ("FAPE") after June 30, 2003.

IV. DECISION

Based on the foregoing findings and conclusions, the Hearings Officer concludes that Respondent has failed to establish by a preponderance of the evidence that it has provided FAPE to Student and consequently, finds in favor of Petitioners.

Petitioners request that the Hearings Officer order Respondent to immediately retain the services of DW to continue as Student's behavioral consultant. However, no evidence was presented of DW's qualifications,⁴ availability or willingness to serve in that capacity.⁵

¹ Some of this information was included in Respondent's closing brief. However, the Hearings Officer's decision is based solely on the record developed at the hearing.

² VN was not called to testify at the hearing.

³ For example, KM, the Special Education Teacher, thought that DW's contract had been extended through July 2003.

2003-011


Consequently, there is no basis at this point for the issuance of such an order. Instead, the Hearings Officer orders as follows:

1. The IEP team shall reconvene as soon as reasonably possible but no later than September 30, 2003, to develop a plan for the retention of a qualified behavioral consultant for Student. The plan shall include a detailed description of the behavioral services to be provided to Student.
2. The plan shall be implemented and a behavioral consultant shall be retained to provide the agreed-upon services to Student no later than October 10, 2003.
3. Behavioral services to Student shall thereafter continue to May 31, 2004.

RIGHT TO APPEAL

This is a final administrative decision and shall be binding on all parties hereto. Any party aggrieved by this decision is entitled to file a notice of appeal to a court of competent jurisdiction within thirty (30) days of the issuance of this decision.

DATED at Honolulu, Hawaii: SEP 19 2003



 CRAIG UYEHARA
 Administrative Hearings Officer
 Department of Commerce
 and Consumer Affairs

⁴ There was some evidence that DW had failed to prepare certain monthly reports required by his contract with Respondent.

⁵ DW was not called to testify at the hearing.