

12-10-03

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

In the Matter of
STUDENT, by and through his Mother, MOTHER,
Petitioners,
vs.
DEPARTMENT OF EDUCATION, STATE OF HAWAII,
Respondent.

DOE-2003-097

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

**I. CHRONOLOGY OF CASE**

On or about August 17, 2003, Mother requested a due process hearing on behalf of her son Student (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 September 11, 2003, the pre-hearing conference in the above-captioned matter was conducted by the undersigned Hearings Officer. Petitioners were represented by their attorney Keith H.S. Peck, and Respondent was represented by its attorney Lono P.V. Beamer.

On September 25, 2003, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer in Wailuku, Maui. Petitioners were not present, but were

represented by their attorney Keith H. S. Peck. Respondent was represented by its attorney Lono P. Beamer, Esq.

On November 10, 2003, the hearing was reconvened by the undersigned Hearings Officer in Wailuku, Maui. The parties were represented by their respective attorneys, Keith H. S. Peck and Lono P. Beamer, and Father and Mother (Student parents) subsequently appeared at the hearing as witnesses. At the close of the Respondent's evidentiary presentation, Petitioners moved for a directed verdict regarding Student eligibility. Respondent also made a motion for a directed verdict regarding the Petitioners' failure to provide the Respondent with the required notice of private placement and the request for reimbursement. The Hearings Officer took both motions under advisement.

At the close of the hearing conducted on November 10, 2003, the parties were given leave to submit post-hearing briefs by November 24, 2003. Consequently, the Hearings Officer granted the parties' request to extend the forty-five day period specified by Hawai'i Administrative Rules (HAR) §8-56-77(a), from October 1, 2003, to two weeks after the receipt of the final hearing transcript.

On November 24, 2003, Petitioners, by and through their attorney Keith H.S. Peck, submitted Petitioners' Closing Brief.

On November 25, 2003, Respondent, by and through its attorney Lono P.V. Beamer, submitted Respondent's Closing Brief.

On November 26, 2003, the final hearing transcript was received by the Office of Administrative Hearings.

On November 26, 2003, Petitioners, by and through their attorney Keith H.S. Peck, noted Petitioners' objections to the submittal of Respondent's Closing Brief.

## **II. ISSUES PRESENTED**

The issues to be decided in the present matter, as identified in Petitioners' Request for Impartial Hearing dated August 17, 2003, are as follows:

1. Whether Student was improperly denied eligibility under Section 504 of the Rehabilitation Act of 1973, and the Individuals with Disabilities Education Act ("IDEA"), thereby denying Student a free and appropriate public education ("FAPE");
2. Whether there were substantiated breaches of FAPE; and

3. Whether Student program was inappropriate.

### **III. FINDINGS OF FACT**

1. On September 3, 1999, and on October 6, 1999, Student was referred twice for aggressive behavior/fighting while attending the First Grade at Pukalani Elementary School.

2. From March 7, 2001, through June 6, 2001, Student was referred six times for aggressive behavior/fighting, and once for other behavior at Pukalani Elementary School.

3. On or about November 12, 2001, Student was diagnosed as having attention deficit hyperactivity disorder ("ADHD") combined type, and was prescribed Ritalin by his physician.

4. On or about November 13, 2001, Student began taking medication for his ADHD, and subsequently, Student behavior at school improved noticeably.

5. During his second grade year at Pukalani Elementary School (2001 - 2002 school year), Student received satisfactory grades.

6. By letter dated September 25, 2002, Mother informed Student teachers and the principal of Pukalani Elementary School that Mr. and Mother along with Student, had decided that as of September 25, 2002, Student would no longer take Ritalin because of their concerns regarding the adverse side effects of the medication on Student.

7. In December 2002, Mr. and Mother were provided with a DIBELS Benchmark Goals (Reading Assessment) for Student, which reflected that Student was reading 66 words per minute in December 2002, which placed Student at risk. The December 2002 Reading Assessment also indicated that Student Fall reading score was 49 words per minute. The December 2002 Reading Assessment recommended that Student needed to read every day with someone who could help him "unlock new words and ask him questions about what he [had] read. The one to one attention will help him stay focused because he is very easily distracted." Petitioners' Exhibit 14.

8. In the Teacher's Comments section of Student progress report for the second quarter ending in January 2003, Gladys Hayashi, Student teacher at Pukalani Elementary School, indicated:

Student is easily distracted when he has work to do. Therefore, he often requires extra time to complete his work. When he is blamed for something, he is quick to deny it. Later the truth is revealed.

Respondent's Exhibit 8, at 70.

9. Sometime prior to January 29, 2003, as part of the Pukalani Elementary School's comprehensive student support service ("CSSS") process, a Core meeting was held at the Pukalani Elementary School, because of concerns expressed by Mr. and Mother regarding Student academics and behavior at Pukalani Elementary School.

10. On January 29, 2003, a Student Support Team ("SST") meeting was held at Pukalani Elementary School, as a result of the concerns expressed by Mr. and Mother at the Core meeting. The SST consisted of: Maude Yamakawa, Principal of Pukalani Elementary School; Gladys Hayashi, general education teacher at Pukalani Elementary School; Cheryl Thebeau, Student Support Coordinator at Pukalani Elementary School; Alice Monoogan, School Counselor at Pukalani Elementary School; and Mr. and Mother. Pursuant to the concerns expressed by Mr. and Mother at the Core meeting, and based upon Mr. and Mother's request for testing, the SST agreed to request cognitive, academic, speech and language, and psychiatric evaluations for Student.

11. On January 29, 2003, Ms. Hayashi prepared a Student Status Report regarding Student. A true and accurate copy of Ms. Hayashi's January 29, 2003 Student Status Report is attached hereto as Appendix A, and by this reference incorporated herein.

12. On January 29, 2003, Mother executed a Request for Evaluation in which she requested that Student have cognitive, academic, speech/language, and psychiatric evaluations conducted.

13. On January 29, 2003, Mother executed a Consent for Assessment as Part of an Initial Evaluation, and a Consent for Release of Information, whereby Mother consented to have Student undergo a psychiatric evaluation.

14. On February 18, 2003, J. H. Draeger, M.D., conducted a psychiatric evaluation of Student. In his Psychiatric Evaluation report, Dr. Draeger stated:

Diagnoses: Axis 1 - ADHD, inattentive type (314.00)  
Axis II - none  
Axis III - none  
Axis IV - problems of education  
Axis V - 68; CAFAS - 30

Recommendations: Individualized education or classroom accommodations are appropriate for Student to be successful as a student. Customary strategies to promote attentiveness are indicated, including preferential seating, providing instruction in oral

and written form, asking him to repeat directions back to the speaker, and speaking to ly [sic] when his direct gaze is established. He is a candidate for a trial on a different medication, and we reviewed the indications, alternatives, benefits versus risks, possible side effects, and desired outcomes. If a trial on an alternative stimulant is not helpful, one of the newer agents that is not a stimulant might be considered. Parents will be in contact with the school personnel to promote classroom accommodations that are helpful with ADHD.

Petitioners' Exhibit 23.

15. On March 6, 2003, Student and two other students were referred for disciplinary reasons.

16. On March 6, 2003, Linda Correa-Javier administered the Wechsler Intelligence Scale for Children – Third Edition (“WISC III”) to Student. The interpretive report of Student WISC-III concluded that Student general cognitive abilities, as well as verbal and performance abilities scores fell within average ranges. The interpretive report also noted that Student abilities to sustain attention, concentrate, and exert mental control is within the high average range and was better than that of approximately 79% of his age-mates. The interpretive report noted:

Findings suggest that:

- Student, in general, is stronger in processing verbal than nonverbal information
- He learns best by discussing things through in a step-by-step order
- He has some difficulty understanding visual part/whole relationships and this may influence the understanding of math concepts in the upper grades when concepts require a lot of visualization and visual-spatial understanding (fractions, decimals, geometry etc.)
- Uses lots of visual aids supplemented to verbal instruction when learning new math concepts
- Theoretically, scores on the WISC-III suggest that his academic achievement scores, more than likely, will correspond to his FSIQ.

Petitioners' Exhibit 18.

17. On March 10, 2003, Cheryl Thebeau administered the Wechsler Individual Achievement Test (“WIAT”) to Student. As of March 10, 2003, Student was nine years and 2 months of age.

18. By Meeting Announcement dated March 13, 2003, Ms. Yamakawa informed Mr. and Mother that the Eligibility Team was going to be meeting on March 17, 2003, to determine Student eligibility for services under Section 504 or the IDEA.

19. On March 13, 2003, Jill Ottinger conducted a Speech-Language evaluation of Student.

20. By letter dated March 13, 2003, Mother asked Ms. Yamakawa if Student could be placed in Mrs. Kathy Pilotin's class for the next school year, because Mother felt that Student needed a teacher who was "positive and not easily frustrated with Student ADHD activity."

21. On March 15, 2003, Cheryl Thebeau prepared an Interpretive Report of Student WIAT testing; Student WIAT Composite Scores were as follows:

WIAT COMPOSITE	SCORE
Reading	101
Mathematics	99
Language	120
Writing	102

The March 15, 2003 Interpretive Report reflected that Student tested within average ranges in reading, mathematics, and writing, and tested above average in language skills. The Interpretive Report recommended that Student might benefit from "teacher wait time" in order to provide him with the necessary amount of time to formulate a response.

22. On March 16, 2003, Jill Ottinger prepared a report regarding her March 13, 2003 Speech-Language evaluation of Student, which concluded:

**SUMMARY:** Student demonstrated age appropriate voice, fluency, language and speech/articulation skills. Standardized testing revealed age appropriate receptive/expressive language skills and articulation. Student does not meet the criteria for speech/language impaired.

Petitioners' Exhibit 17.

23. On March 17, 2003, the Eligibility Team consisting of Ms. Yamakawa, Ms. Thebeau, Ms. Hayashi, and Mr. and Mother, met to discuss the results of Student testing and evaluations. According to the Meeting Notes:

The team agreed that Student did not meet the eligibility criteria for Specific Learning Disability, as his academic performance is commensurate, and often time exceeding, his cognitive ability. The parents have agreed to investigate further with a trial medication for Student. The SBBHC will simultaneously work on a behavioral support plan with Student and his teacher(s). The possibility of placing Student with a carrel to decrease external stimuli was suggested and considered.

Respondent's Exhibit 3, at 12. The Eligibility Team also considered Student eligibility under the Other Health Impaired (OHI) category for IDEA, as well as under Section 504. However, the Eligibility Team determined that Student was not eligible under the OHI category of the IDEA, or under Section 504 because Student was doing satisfactorily in class. Additionally, during the discussion regarding Student eligibility under the OHI category, Mr. [redacted] stated that he did not believe that Student required special education services, based upon Mr. [redacted] understanding that special education services under the OHI category were for children with significant cognitive and/or physical disabilities.

24. As of March 17, 2003, Student teacher had already made the following accommodations to help Student in the classroom:

- Student teacher would repeat directions to him, and he would repeat directions back to clarify understanding;
- Student teacher would cue him and monitor him frequently to be sure that Student was on task; and
- Student was provided with preferential seating in front of the teacher where he could focus on them;
- Student was given additional time in which to submit his assignments; and
- Student was participating in a Title I remedial reading program to help improve his reading abilities.

25. By Prior Written Notice dated March 17, 2003, Ms. Yamakawa informed Mr. [redacted] and Mother that the eligibility team had "refused eligibility for special education and/or related services" for Student, because "Student did not meet the eligibility criteria for Specific Learning Disability, and the eligibility team agree[d] that he is not in need of special education services." Petitioners' Exhibit 7. The March 17, 2003 Prior Written Notice indicated that the eligibility team had considered a 504 Modification Plan, but rejected the 504 Modification Plan because Student ADHD diagnosis was not substantially impacting on his ability to learn,

March 20, 2003 incident, and decided to keep [redacted] home after the Spring recess ended on March 30, 2003. Mrs. [redacted] also declined any counseling services offered by Elementary School if Mr. Flavin was going to be involved.

By letter dated March 31, 2003, Mrs. [redacted] thanked Ms. Yamakawa for allowing [redacted] to do his school work at home for that week, and described her concerns regarding [redacted]. A true and accurate copy of Mrs. [redacted] March 31, 2003 letter is attached hereto as Appendix B, and by this reference incorporated herein. At that time, Ms.

Hayashi and Ms. Yamakawa were of the understanding that Mrs. [redacted] intended to have return to school the following week, and Ms. Hayashi continued to send school work home to [redacted].

By letter dated April 7, 2003, Mrs. [redacted] asked Ms. Yamakawa if [redacted] could remain at home for another week or two to help "stabilize his behavior." Mrs. [redacted] also wanted to know what kind of school based support the Maui District had to offer [redacted] "other than the distrust of Jr. Jim Flavin."

By letter dated April 8, 2003, Mrs. [redacted] asked Ms. Yamakawa about the "behavioral plan" that had been discussed, and requested that [redacted] eligibility under Section 504 be revisited.

By letter dated April 9, 2003, Ms. Yamakawa informed Mr. and Mrs. [redacted] that a meeting had been scheduled with Mrs. Monoogan, Mrs. Hayashi, and Dr. Gilbertson (the Maui District Psychologist) for April 15, 2003. Ms. Yamakawa's April 9, 2003 letter stated that, "We would all like [redacted] to return to school as soon as possible, so I am hoping we can work and agree on a plan that will help [redacted]." Respondent's Exhibit 5, at 35.

On April 14, 2003, Mrs. [redacted] requested that the April 15, 2003 meeting be rescheduled to April 16, 2003.

On April 16, 2003, a meeting was held with Ms. Yamakawa, Mrs. [redacted], Mrs. Monoogan, Mrs. Hayashi, and Dr. Gilbertson.

On or about April 21, 2003, Mrs. [redacted] submitted a Request for Home-Hospital Instruction Services for [redacted] and Beth Fox, M.D., noted that the bases for the request was [redacted] "ADHD = disruptive behavior," and "Difficulty with other children in school." Respondent's Exhibit 2, at 7.



33. By letter dated April 9, 2003, Ms. Yamakawa informed Mr. and Mother that a meeting had been scheduled with Mrs. Monoogan, Mrs. Hayashi, and Dr. Gilbertson (the Maui District Psychologist) for April 15, 2003. Ms. Yamakawa's April 9, 2003 letter stated that, "We would all like Student to return to school as soon as possible, so I am hoping we can work and agree on a plan that will help Student." Respondent's Exhibit 5, at 35.

34. On April 14, 2003, Mother requested that the April 15, 2003 meeting be rescheduled to April 16, 2003.

35. On April 16, 2003, a meeting was held with Ms. Yamakawa, Mother, Mrs. Monoogan, Mrs. Hayashi, and Dr. Gilbertson.

36. On or about April 21, 2003, Mother submitted a Request for Home-Hospital Instruction Services for Student, and Beth Fox, M.D., noted that the bases for the request was Student "ADHD = disruptive behavior," and "Difficulty with other children in school." Respondent's Exhibit 2, at 7.

37. On or about April 22, 2003, Ms. Yamakawa disapproved Mother's Request for Home-Hospital Instruction Services for Student. Ms. Yamakawa noted that:

School will be able to address his needs by developing a behavior modification plan. Student needs to learn social skills through school's social skills group with school counselor, as well as receive school based behavioral health counseling. Mother, however, is keeping the child at home. Teacher has been supplying /providing work, however, it is vitally important that child attend school to receive maximum educational and social/behavioral services. Student needs to be with his peers in order for them to learn to get along.

Respondent's Exhibit 2 at 8.

38. By letter dated April 22, 2003, Ms. Yamakawa informed Mr. and Mother that a meeting had been scheduled with the King Kekaulike Complex School Psychologist, J. J. Stafford, for April 28, 2003. Ms. Yamakawa's April 22, 2003 letter stated that, "We could have the 504 eligibility modification plan meeting at that time if you wish." Respondent's Exhibit 5, at 33.

39. By letter dated April 23, 2003, Catherine Critz, Ph.D., informed Maude Yamakawa that Ms. Critz had been asked by Mr. and Mother to review Student case, and that Ms. Critz was of the opinion that although Student was not eligible under the Specific Learning Disability ("SLD") category, Student could be eligible for IDEA services under the

OHI category. A true and accurate copy of Ms. Critz's letter is attached hereto as Appendix C, and by this reference incorporated herein.<sup>1</sup>

40. By letter dated April 25, 2003 addressed to Ms. Yamakawa, Mother requested that Student be considered for special education and related services under the OHI category.

41. On April 28, 2003, Ms. Yamakawa, J. J. Stafford, and Ms. Thebeau met as scheduled and as provided for in Ms. Yamakawa's April 22, 2003 letter to Mother. However, Mr. and Mother did not attend the April 28, 2003 meeting, and consequently the issue of Student eligibility for IDEA services under the OHI category, and/or for services under Section 504 was not pursued.

42. By letter dated April 28, 2003, Ms. Yamakawa informed Mr. and Mother of Student absences from school and the applicability of the compulsory education law, which could result in the matter being referred to Family Court. Ms. Yamakawa's April 28, 2003 letter requested that a conference with Mr. and Mother be scheduled as soon as possible to discuss Student situation.

43. Between May 9, 2003, and May 12, 2003, pursuant to Ms. Yamakawa's instructions, the school's social worker attempted to make contact with Mr. and Mother, via telephone as well as making a home visit, to discuss Student situation. However, the school's social worker was not able to make direct contact with Mr. and Mother.

44. By letter dated May 12, 2003, Ms. Yamakawa responded to Mother's May 7, 2003 letter. Ms. Yamakawa reiterated that at no time did she tell Mother to keep Student at home indefinitely. A true and accurate copy of Ms. Yamakawa's May 12, 2003 letter is attached hereto as Appendix D, and by this reference incorporated herein.

45. On or about May 20, 2003, Ms. Yamakawa referred Student case to the Department of the Attorney General, as a result of Student absence from school.

46. By letter dated May 29, 2003, Mother responded to Ms. Yamakawa's May 12, 2003 letter, and requested that Student be considered for special education and related services under the OHI category.

47. Student received satisfactory grades during his third grade year at Pukalani Elementary School, up until the time Student stopped attending Pukalani Elementary School.

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<sup>1</sup> Ms. Yamakawa and Ms. Thebeau testified that as far as they were aware, Ms. Critz had not spoken to any staff member of Pukalani Elementary School regarding Student, nor had Ms. Critz requested any of Student records from Pukalani Elementary School.

48. On June 4, 2003, a Petition for Compulsory School Attendance was filed in the Family Court of the Second Circuit regarding Student and Mr. and Mother.

49. On or about June 17, 2003, Student began attending Horizons Academy of Maui.

50. By letter dated June 25, 2003, Michael O'Neal, Program Director of Horizons Academy of Maui, informed Judge Geronimo Valdriz, Jr., that Student had been enrolled at Horizons Academy of Maui since June 17, 2003.

51. By letter dated August 17, 2003, Mr. Peck informed Maude Yamakawa that that Student would not be attending Pukalani Elementary School and instead would be remaining at Horizons Academy. Mr. Peck's August 17, 2003 letter also stated that Student would be seeking reimbursements for tuition and related costs. Mr. Peck stated that he believed that Student was eligible under the IDEA and Section 504, and as such, should have been offered FAPE.

#### **IV. CONCLUSIONS OF LAW**

The primary issues of the instant case are whether Student was eligible for special education and related services under the IDEA, or for services under Section 504.

Based upon the credible evidence presented at the hearing, the Hearings Officer concludes that the Respondent proved by a preponderance of the evidence that as of March 17, 2003, the results of Student assessments and evaluations, as well as his progress reports and observations, indicated that Student was within average ranges in his cognitive and achievement scores.

Accordingly, the Hearings Officer concludes that Student was not eligible for special education and related services under the SLD or OHI categories because Student disability (ADHD) did not adversely affect Student educational performance. (*See* HAR §8-56-25).

As to Student eligibility under Section 504, the Hearings Officer concludes that Respondent proved by a preponderance of the evidence that Student was not eligible to receive services under Section 504 because the available information did not establish that Student disability substantially limited one or more of his major life activities.

Because the Hearings Officer concludes that Respondent properly determined that Student was not eligible for services under the OHI category of the IDEA, or under Section 504, the Hearings Officer must further conclude that Respondent is not required to reimburse Petitioners for Student tuition to attend Horizons Academy of Maui.

**V. DECISION**

For the reasons stated above, the Hearings Officer finds and concludes that Respondent proved by a preponderance of the evidence that: 1) Respondent properly determined that Student was not eligible for special education services under the SLD or OHI categories of the IDEA; 2) Respondent properly determined that Student was not eligible for services under Section 504; and 3) because there was no denial of FAPE, Respondent is not required to reimburse Petitioners for Student tuition to attend Horizons Academy of Maui.

**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, December 10, 2003

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