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

In the Matter of)	DOE-2003-106
)	
STUDENT, by and through her Mother,)	
MOTHER,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
Petitioners,)	AND DECISION
vs.)	
)	
DEPARTMENT OF EDUCATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

The Department of Education, State of Hawaii ("Respondent" or "DOE") received a September 1, 2003 request for a due process hearing under Hawaii Administrative Rules ("HAR") Title 8, Chapter 56 from Student, by and through her mother, Mother (collectively referred to as "Petitioners"). A prehearing conference was held on September 12, 2003. Petitioners were represented by Keith Peck, Esq., and Respondent was represented by Joanna Fong, Esq.

On October 21, 2003, the hearing was commenced at the offices of Iwado Court Reporters in Wailuku, Maui, by the undersigned Hearings Officer. Petitioners were represented by Keith Peck, Esq., and Respondent was represented by Joanna Fong, Esq. and by Special Education Resource Teacher Denise Guerin. The evidentiary portion of the hearing was completed on October 22, 2003.

At the close of the hearing, it was requested that the parties file written closing arguments. Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. Student is 15 years old (dob 9/28/88) and currently attends Horizons Academy in Maui, Hawaii.
2. In November 2001, Mrs. Mother requested that the DOE set up an eligibility team to determine whether Student was eligible to receive benefits under the IDEA. Student was attending the 7th grade at St. Anthony's School at this time. The eligibility team consisted of the following individuals:
 - Catherine Kilborn, principal at Iao School;
 - Mother, parent of Student;
 - Pat Anbe, special education teacher;
 - Roy Yamaguchi, student services coordinator;
 - Ernest Mendoza, St. Anthony School counselor; and
 - Patricia Rickard, St. Anthony School academic dean.
3. On February 4, 2002, the eligibility team concluded that Student was ineligible to receive benefits under the IDEA. The team found that Student was highly motivated and with her strong family support was succeeding in school. However, the team observed that Student needed more time than other students to complete certain tasks. The team concluded that Student would probably struggle, given her level of intelligence, but would benefit from an environment in which she struggled. It was concluded that Student achieves beyond what is expected due to her motivation and home environment.
4. The eligibility team based its decision in large part by considering Student's grades and test scores relative to her intelligence test score. The DOE used the WISC-III test to measure intelligence. Student scored a 65 on the full scale intelligence test. According to Ms. Kilborn, an intelligence score of 100 is average.

5. The WIAT test was administered by Student Services Coordinator Roy Yamaguchi to measure Student's performance in various academic areas. Student demonstrated personal strength in oral expression. However, the test showed that Student was weak in math reasoning (3rd grade, 8 month level) and listening comprehension (2nd grade, 8 month level). Although Mr. Yamaguchi concluded that Student was not eligible for special education, he also stated that Student may experience great difficulty keeping up with other students when these skills are needed. Indicative of Mr. Yamaguchi's concern about Student's cognitive abilities, was his statement to Mother that if Student came to school and had problems, then accommodations would be made for her.

6. The DOE used a standard deviation factor of 1.5 (22 points) to determine whether a student qualifies as being impaired under the category of a specific learning disability (SLD). Student did not qualify as SLD, as she did not score 22 points below her intelligence score.

7. The criteria used by the DOE in assessing SLD is found in HAR §8-56-26, Specific learning disability.

(b) Eligibility. A student shall be eligible under the disability category of specific learning disability if, provided with learning experiences appropriate for the student's age and ability levels, the student does not achieve commensurate with the student's age and ability levels; and the student has a severe discrepancy between actual achievement and intellectual ability as demonstrated by one of the following:

(1) The student shall have a severe discrepancy between actual achievement and intellectual ability by a difference of at least one and one-half standard deviations in one or more of the following areas:

- (A) Oral expression;
- (B) Listening comprehension;
- (C) Written expression;
- (D) Basic reading skill;
- (E) Reading comprehension;
- (F) Mathematics calculation;
- (G) Mathematics reasoning.

8. The eligibility team also considered whether Student was speech language impaired (SLI). Speech therapist Richard Beilke found that Student's performance on standardized language testing did not meet the criteria for language disorder. The team did not formally consider any other impairment categories, although mental retardation was informally discussed.

9. On February 4, 2002, the eligibility team concluded that Student did not meet the criteria for special education based upon her test scores, grades, teacher reports and other factors. Student scored higher academically than would have been expected, given her intelligence scores.

10. Mother did not voice an objection to the February 4, 2002 denial of benefits at the time she was given prior written notice.

11. In a June 2003 letter from Mother, the DOE first learned that Mother was dissatisfied with the determination of ineligibility.

12. On September 1, 2003, Petitioners filed a Request for Impartial Hearing, claiming a substantive breach of FAPE, as Student should have been eligible under the IDEA and provided an IEP. Petitioners listed their proposed resolutions to include a finding that Student was eligible under the IDEA, but was not offered a FAPE. Further, Petitioners requested that the present private placement be found not inappropriate, and that reimbursement for the costs of substitute educational services, including related services, be ordered.

13. Principal Kilburn, and other DOE teachers testified that they did not feel special education was appropriate for Student, as there was no disability that impaired Student's ability to learn.

14. Special education teacher Pat Anbe testified that although Student was a slow learner and processor, she was capable of learning and therefore not qualified under SLD. Ms. Anbe also stated that the adverse impacts of being labeled as a special education student included emotional distress and social stress.

15. Psychological examiner Lester Yokote testified as a witness for Respondent. Mr. Yokote stated that an IQ score of 69 and below was in the deficit range. Mr. Yokote described Student as a borderline functioning child.

16. The Hearings Officer finds that Student's IQ score of 65 was deficient.
17. Student had previously received benefits under the IDEA while attending Kula Elementary School. Student was decertified from being qualified under special education on March 11, 1999.

III. CONCLUSIONS OF LAW

The issue in this case is whether Student qualifies as a student with a disability and is therefore entitled to special education services pursuant to HAR Title 8, Chapter 56. The Hearings Officer concludes that Respondent's incorrectly deemed Student ineligible for special education services. As a result, Respondent did not provide Student a FAPE; and therefore, Student is entitled to reimbursement for placement at Horizons Academy and for related services.

The IEP team met on February 4, 2002 and determined that Student was ineligible for special education benefits as she did not meet the eligibility requirements under SLD and SLI. Although the team informally discussed whether Student was mentally retarded, no decision was made under this criteria. Given Student's 65 IQ, which Respondent's witness, Mr. Yokote, stated was in the deficient range, Respondent fell short of its duty to provide a FAPE by not assessing Student's qualifications under mental retardation criteria.

It is Respondent's responsibility to ensure that a student is assessed in all areas related to the suspected disability. HAR §8-56-9(8). Further, the DOE shall ensure that a variety of assessment tools and strategies are used to assist in determining whether a student falls within the various disability classifications. HAR §8-56-9(2).

The standard for mental retardation is found under HAR §8-56-22. Under this section a student shall be eligible under the disability category of mental retardation when all of the following are met:

- i. The student has sub average general intellectual functioning, as demonstrated by evidence of intellectual functioning two or more standard deviations below the mean;
- ii. The sub average intellectual functioning exists concurrently with deficits in at least two adaptive skill areas; and

- iii. The sub average intellectual functioning and deficits in adaptive skill areas were manifested during the developmental period and adversely affect the student's educational performance.

Based upon the evidence presented, Student's 65 IQ was greater than 2 standard deviations below the mean. Respondent's Exhibit 14 lists adaptive behavior deficits with tardiness, difficulties with changing routines, and under activity. Additionally, Mr. Yokote testified that Student would struggle, given her level of intelligence. And Mother testified that Student exhibited developmental delay at an early age. It is also noted that Student was earlier deemed eligible for special education services. Further, members of the IEP team and Mother testified that Student struggled to perform her school work and needed extra time to complete her assignments.

While the testimony did not appear to establish that Student met the criteria under a specific learning disorder, it is Student's extraordinary efforts in her school work and her strong parental support which causes Student to overachieve in her academic endeavors. The testimony at hearing was that Student routinely sought extra help during recess and after school to keep up with her school work. Student's teachers testified about Student's outstanding attitude and perseverance. Mother testified that Student would spend up to 3 hours a night, on math homework alone. Indicative of their dedication as parents, Mother admitted to actually doing some of Student's work herself. Although admittedly not the proper method of getting the work done, such example shows the strong parental support given to Student. Such dedication by the student and her parents is commendable.

The Hearings Officer concludes that a student whose IQ is in the deficient range should have been assessed for an impairment under mental retardation. The DOE's failure to do so resulted in a failure to produce an IEP and a denial of FAPE. A student with a deficient IQ who is performing well above expectations due to an exceptional work ethic and parental support should not be denied benefits because of her efforts. Rather, every effort to qualify her under all relevant impairment criteria should be made. To do anything less, would discourage the exceptional efforts exhibited by Student. Therefore, the Hearings Officer concludes that Respondent improperly denied Student a FAPE by failing to assess her under the criteria for mental retardation.

Although the question of whether Student actually met the criteria for mental retardation need not be reached, the Hearings Officer concludes that Student would qualify under the mental retardation criteria.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court set out a two-part test for determining whether Respondent offered a FAPE: (1) whether there has been compliance with the procedural requirements of the Individuals with Disabilities Education Act and (2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Rowley*, at 206-207.

Under the IDEA, procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity or seriously infringe on the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992).

In this case, the DOE's failure to assess Student under the criteria for mental retardation is a procedural inadequacy that resulted in the loss of educational opportunity and seriously infringed on the Parent opportunity to participate in the IEP formulation process. Therefore, Petitioners were denied a FAPE as they were not assessed qualification under all applicable disability criteria - in this case, mental retardation. The Hearings Officer concludes that this was a procedural violation and a denial of FAPE.

The Hearings Officer concludes that the DOE had not made a FAPE available to Student, and therefore orders that the DOE reimburse Petitioners for the cost of enrollment in Horizons Academy and for related services under HAR §8-56-51.

Because FAPE was denied, the Hearings Officer concludes that Petitioners are entitled to reimbursement for the costs of an education at Horizons Academy and related expenses for the 2003-2004 academic year. This does not preclude the DOE from conducting an assessment in future school years to determine whether Student qualifies for special education. If Student is found eligible, then the DOE may offer a FAPE at Student's home school in future academic school years.

IV. DECISION

IT IS HEREBY ORDERED THAT Petitioners' claims for relief through their September 1, 2003 Request for Impartial Hearing be granted. Petitioners are deemed to be eligible under the IDEA, but were not offered a FAPE as Student was not assessed eligibility under the mental retardation criteria in HAR §8-56-22. Petitioners' present private placement at Horizons Academy is not inappropriate. Petitioners shall be reimbursed for the costs of substitute educational services, including related services.

RIGHT TO APPEAL

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. The appeal must be made within thirty (30) days after receipt of this decision.

DATED: Honolulu, Hawaii, December 9, 2003

RICHARD A. YOUNG
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs