

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

In the Matter of

STUDENT, by and through her Mother,
MOTHER,

Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Respondent.

DOE-2003-111

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION;
APPENDICES A - D

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

I. CHRONOLOGY OF CASE

On or about September 2, 2003, Mother requested a due process hearing on behalf of her daughter 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 16, 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. The Respondent was represented by its attorney Lono P. Beamer. During the course of the pre-hearing conference, the parties requested that the hearing be rescheduled, and consequently the undersigned 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 17, 2003, to November 20, 2003.

On October 20, 2003, the hearing in the above-captioned matter was conducted 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 October 23, 2003, the hearing was reconvened by the undersigned Hearings Officer. Mother participated via telephone from Maui, and the attorneys for the parties, Keith H. S. Peck and Lono P. Beamer, appeared at the Office of Administrative Hearings in Honolulu, Hawai'i.

On November 18, 2003, the parties agreed to extend the forty-five day period specified by HAR §8-56-77(a), from November 20, 2003, to November 25, 2003.

II. ISSUES PRESENTED

The issues to be decided in the present matter, as identified in Petitioners' Request for Impartial Hearing dated September 2, 2003, are as follows:

1. Whether Student's May 12, 2003 individualized education program ("IEP") reflected Student's current level of educational performance, particularly as to Student's reading abilities and needs;
2. Whether the IEP team considered any assistive technology that may have been required by Student;
3. Whether the goals and objectives in the May 12, 2003 IEP allowed for the adequate monitoring of progress;
4. Whether Student should have been placed in general education classes for social studies and science, with appropriate adaptations and supports;
5. Whether the May 12, 2003 IEP contained a generalized description of the type of special education and related services and supplementary aids and services to be provided to Student, or a statement of the program modifications or supports for school personnel that will be provided for Student.

6. Whether the May 12, 2003 IEP provided an appropriate program for Student.

III. FINDINGS OF FACT

1. On or about May 2, 2000, Student was initially identified as a student with a disability during her first grade year.

2. As part of Student's IEP, mental health services were offered as part of the Respondent's offer of FAPE, and during the 2000-2001 school year, Student received school based behavioral health ("SBBH") services, which included meeting with a counselor once a week.

3. Mother understood that Student had been diagnosed by DOE personnel as having overanxious disorder with a tendency towards conversion disorder.

4. Although Student was receiving SBBH services, Mother and her husband felt that Student's anxiety condition was escalating. Consequently, in or around February 2001, Mr. and Mother found a private therapist for Student, through their health maintenance organization.

5. Subsequently, Mother was informed by Student's private therapist that it would be in Student's best therapeutic interest to have only one person provide mental health services/therapy to Student. Mother decided to continue having Student receive therapy from her private therapist, and in or around February or April 2001, Mother declined further SBBH services.

6. After Student stopped receiving SBBH services, Mother continued to seek a functional behavioral assessment ("FBA") for Student through the IEP process, so that Student's mental health needs could be identified and addressed in subsequent IEPs. However, the IEP team did not authorize a complete FBA and instead, authorized an initial line of inquiry.

7. Student attended Kamali'i Elementary School until the end of her third grade year. During her time at Kamali'i Elementary School, Student received special education support and related services in speech and occupational therapy.

8. Pursuant to an eligibility determination made on September 23, 2002, Student became eligible for services under the Individuals with Disabilities Education Act ("IDEA") under the category of Other Health Impairment due to attention deficit hyperactive disorder ("ADHD").

9. Pursuant to the terms of a Settlement Agreement, Student attended Horizons Academy of Maui during the 2002-2003 school year.

10. On or about May 12, 2003, an IEP meeting was held at Kamali'i Elementary School, and the IEP team identified Student's present levels of educational performance, including Student's physical and emotional conditions. The IEP team noted:

According to a psycho-educational assessment on 6/27/01, Student has significant anxiety and indicated that "there is evidence to suggest that emotional disturbance may interfere in development and may cause continued problems in the areas of self-esteem, self-insight, body image and social interaction."

See, Present Levels of Educational Performance from Student's May 12, 2003 IEP, attached hereto as Appendix A, and by this reference incorporated herein.

11. After considering Student's present levels of educational performance and the other information pertaining to Student's strengths and needs, the IEP team developed an IEP for Student. The IEP included goals and objectives that were part of Student's previous IEPs, as well as additional areas that had been part of Student's educational program at Horizons Academy. A true and accurate copy of the services grid for the May 12, 2003 IEP is attached hereto as Appendix B, and by this reference incorporated herein.

12. According to the Meeting Notes from the May 12, 2003 IEP meeting, Mother declined the Respondent's offer of placement for Student (special education placement at Kamali'i Elementary School). A true and accurate copy of the Meeting Notes from the May 12, 2003 IEP meeting is attached hereto as Appendix C, and by this reference incorporated herein.

13. The May 12, 2003 IEP did not provide mental health or SBBH services for Student, nor did Mother indicate or express that she would have declined such services if offered.

14. By Prior Written Notice of Department Action dated May 14, 2003, Petitioners were informed of the Respondent's offer of a free and appropriate public education ("FAPE"). A true and accurate copy of the Prior Written Notice of Department Action dated May 14, 2003, is attached hereto as Appendix D, and by this reference incorporated herein.

15. By letter dated August 12, 2003, Mother informed the Principal of Kamali'i Elementary School that Student would not be attending Kamali'i Elementary School, and would instead, be remaining at Horizons Academy. Mother also informed the Principal that Mother would be seeking reimbursement for Student's tuition and related costs. Mother also identified the areas of the IEP that she believed to be inappropriate for Student.

IV. CONCLUSIONS OF LAW

A. Mental Health Services

First, the Hearings Officer must conclude that the preponderance of the evidence established that Student had significant mental health issues as of May 12, 2003, and that there were no intervening circumstances that might have obviated the need to address these mental health needs in the May 12, 2003 IEP.

The May 12, 2003 IEP did not address Student's mental health needs for the 2003 - 2004 school year, and although Mother previously declined to continue SBBH services for Student in 2001, Mother did not inform the IEP team on May 12, 2003, that Mother would not accept or consider SBBH services for Student.

Therefore, the IEP Team was still required to offer to provide appropriate mental health/SBBH services to Student as part of the May 12, 2003 IEP.

Accordingly, the Hearings Officer must conclude that the May 12, 2003 IEP did not provide FAPE for Student.

B. Other Procedural and Substantive IEP Issues

In light of the determination made above, it is not necessary for the Hearings Officer to substantively address all of the other issues identified by Petitioners. However, the Hearings Officer finds and concludes that the preponderance of the evidence proved that:

- a. The IEP team did consider appropriate assistive technology for Student, as reflected in the resulting May 12, 2003 IEP;
- b. The goals and objectives in the May 12, 2003 IEP allowed for adequate monitoring of progress.
- c. The May 12, 2003 IEP contained a sufficient generalized description of the type of special education and related services and supplementary aids and services to be provided to Student, as well as a statement of the program

modifications or supports for school personnel that will be provided for Student.

C. Private Placement

Because the May 12, 2003 IEP did not offer FAPE to Petitioners, the Hearings Officer finds and concludes that Petitioners proved by a preponderance of the evidence that Horizons Academy is an appropriate private placement for Student and that Petitioners are entitled to reimbursement for tuition payments made to Horizons Academy.

V. DECISION

For the reasons stated above, the Hearings Officer finds and concludes that the May 12, 2003 IEP did not offer FAPE.

Based upon the foregoing, IT IS HEREBY ORDERED THAT:

1. Respondent shall reconvene Student's IEP team at the first mutually convenient date to revise Student's IEP; and
2. Respondent shall reimburse Petitioners for the cost of Student's tuition at Horizons Academy.

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, **November 25, 2003**_____.

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