



## I. BACKGROUND

On January 22, 2003, a Request for Impartial Due Process Hearing was filed by Student, by and through his legal guardian and mother. ("Petitioners"). The request was transmitted to the Office of Administrative Hearings on January 24, 2003. On January 27, 2003, a Notice of Hearing and Pre-Hearing Conference was issued to the parties.

On February 20, 2003 the hearing in this matter was convened by the undersigned Hearings Officer with Petitioners represented by their attorney, Irene E. Vasey, Esq. and with Respondent Department of Education ("Respondent") represented by its attorney, George S.S. Hom, Esq. Thereafter, this matter was reconvened for further hearing on February 21, April 1 and April 2, and was concluded on April 3, 2003.<sup>1</sup>

On March 7, 2003, Petitioners filed a motion to prohibit Respondent from calling Student as a witness. On March 25, 2003, the Hearings Officer issued an Order Granting Petitioners' motion.

At the conclusion of the hearing, the parties were directed to submit written closing briefs. On April 21, 2003, Respondent filed its Closing Memorandum and on May 2, 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 has been deemed to be and remains eligible for Special Education Services under the Individuals with Disabilities Education Act ("IDEA").
2. On or about February 13, 2002, Petitioners filed a request for due process hearing with Respondent. On May 14, 2002, the Hearings Officer issued a decision in the matter ("First Proceeding").
3. The Hearings Officer concluded that Respondent had failed to provide a Free Appropriate Public Education ("FAPE") to Student by refusing to reevaluate Student for suspected Traumatic Brain Injury ("TBI"). Consequently, the Hearings Officer ordered among other things, that:

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<sup>1</sup> By letter dated February 12, 2003, Petitioners' attorney advised the Hearings Officer of her unavailability on March 11-18 and March 24-26.

1. The Student shall promptly be evaluated at public expense, by a qualified medical provider, to determine, if possible, whether the Student has sustained a traumatic brain injury.

2. That an IEP be promptly convened, in no event later than 30 days from the date of the Student's evaluation for TBI, to review and to consider all relevant evaluations conducted on the Student by medical providers and/or psychologists since the filing of the Request for Impartial Due Process Hearing, and to modify if necessary, the IEP to address the unique needs of the Student.

4. In June 2002, Respondent appealed the Hearings Officer's decision in the First Proceeding to the United States District Court. During the pendency of this appeal, Respondent repeatedly declined to have Student evaluated for TBI.

5. Since the appeal, Student has gone from residing in the family home, to acute care at Hospital, to an emergency residential care at in to a residential treatment facility on back to acute hospitalization at , and finally to the , a residential treatment program on Oahu where he currently resides.

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.

In this case, Petitioners allege that FAPE was denied to Student on a number of grounds: Petitioners allege that Respondent (A) failed to evaluate Student for TBI; (B) failed to provide cognitive rehabilitation therapy to (C) failed to reimburse for mileage, her out-of-pocket expenses including medical co-payments, and lost wages, resulting from her visits with her son; (D) failed to provide Student with extended school year ("ESY") services; (E) failed to provide measurable math goals; (F) refuses to allow to treat Student as the family therapist once he is discharged from the and (G) failed to correct a psychiatric report by that contained a factual inaccuracy.

A. Traumatic Brain Injury Evaluation.

Notwithstanding the Hearings Officer's decision and order in the First Proceeding, Respondent did not arrange to have Student evaluated for TBI. Instead, it appealed that decision and apparently took the position that it was not obligated to comply with the Hearings Officer's decision until the appeal was resolved.

Prior to the conclusion of this hearing, Respondent's attorney represented to the Hearings Officer and to Petitioners that Respondent's appeal had been resolved and would therefore be dismissed; and as a result, Respondent would proceed to have Student evaluated for TBI.<sup>2</sup> As such, Respondent is of the position that this issue has been rendered moot.

While the question concerning Student's entitlement to a TBI evaluation has been addressed, the *delay* in providing Student with that evaluation has not. Respondent has not cited to nor can the Hearings Officer find any authority under the IDEA or related case law that allowed Respondent to delay its compliance with the Hearings Officer's order in the First Proceeding pending the appeal of that decision. Accordingly, by failing to provide Student with the TBI evaluation in a timely manner as ordered in the First Proceeding and in the absence of a court order staying Respondent's compliance with the decision, it stands to reason that Respondent has again failed to provide FAPE to Student in this case. Moreover, having initiated this action and having obtained the evaluation they sought, Petitioners are the prevailing party here.

B.

Petitioners complain that Respondent's refusal to provide Student with cognitive rehabilitation therapy at the \_\_\_\_\_ and \_\_\_\_\_

\_\_\_\_\_ ) is also a denial of FAPE. Respondent is currently providing neurotraining services through \_\_\_\_\_ a neurotraining therapist. As a neurotraining therapist, \_\_\_\_\_ works "with the teachers, so it's a relationship between myself and the school teams and teachers to help them to put together teaching strategies, educational programming for the students with brain function disorders."

<sup>2</sup> By letter dated April 16, 2003, to the principal of \_\_\_\_\_ Intermediate School, RB confirmed his diagnosis of Student as having traumatic brain injury.

According to the evidence, [redacted] was employed by the State Department of Health for approximately 29 years. In 1974, [redacted] transferred to the [redacted] of the State Hospital as an assessment technician. From approximately 1994 to 2000, [redacted] served as a neurotraining therapist with the Health Department. In 2000, [redacted] transferred to the Department of Education:

Q. What type of strategies do you employ or try to teach the teachers who have students who have had traumatic brain injury?

A. Well, first of all, it's a matter of discovering what the processing deficits are. If the student has an auditory processing deficit, so therefore, auditory learning is a problem, then we would advise the teachers of that, that they need repetition, that they need rehearsal, auditory rehearsal, that they probably need visual representation of auditory information, and so forth, so that the teacher knows firsthand what the student's problems are and employ strategies so that the student can learn easier.

\* \* \* \*

Q. Have you reviewed the recommendations by [redacted] in this case with regard to [Student]?

A. Yes. I have reviewed the records, yes.

\* \* \* \*

Q. Do you feel that with your assistance, you could help teachers from the Department of Education implement the strategies that are -- the goals and strategies that are being recommended by [redacted]

A. First of all, what I would need to do would be to consult with the teachers. I would need to know what they have tried, what works, what doesn't work, so forth.

Reading the goals of this particular training plan, yeah, what I would do is try to integrate the curriculum, you know, to make sure that the

activities that the teachers will be doing with [Student] in this particular training plan, make sure that there is a connection to the curriculum, connection to what he is studying in the classroom, so that the actual activities that the teacher would be doing within the classroom would relate to that particular curriculum aspect.

So minimizing difficulties in executive brain function, well, again, I would have to ask the teacher, you know, what seems to be the problem in that area, whether [Student] can strategize, whether he's planning his activities well or not, whether he can plan his homework, or things like that. And if he is not, then to put together some kind of a plan. For example, to structure his day better or to put together some sort of a visual schedule if he's having problems with that. So I would really have to consult the teachers first.

Q. Because your suggestions would be in the realm of assisting the student make educational progress?

A. Would be in the realm of assisting the teacher, working with the teacher to put together a plan to enhance the student's progress in the classroom. Yes. Not so much to work with the student directly, but to work with the teacher.

\* \* \* \*

Q. In the letter, in the first paragraph, says that his treatment plan is a complex plan which requires precise judgment and expert decision-making in order to produce an effective therapy, and we would not even remotely consider attempting to try to teach [Student's] teachers to provide this kind of therapy. This would be totally beyond their expertise. Do you agree with [ ] assessment?

A. Yes, I do, in that the kind of therapy that they're proposing is not something that the teachers are trained to do.

Q. Do you feel that you could teach the teachers to implement the strategies that [redacted] is recommending?

A. No. I wouldn't attempt to teach the teachers those kind, those kind of activities.

Q. Why is that?

A. Because it's totally outside of the realm of an educational program. It is not -- it is a -- this is something that you would go to a clinic to do rather than the classroom, and it's not within the realm of teachers to learn this within a short period of time. So I would not attempt to teach the teachers the treatment plan that is being proposed by [redacted].

Q. But there are neuropsych strategies that you're aware of that teachers can learn to help a student like [Student] make educational progress if he had, let's say, some form of brain dysfunction?

A. Yes, in the educational sense. Basically, the strategies would involve what the teachers already know how to do, you know, to the extent that they may not know that the student needs these kinds of strategies, and so forth.

The kinds of -- the treatment plan that is being proposed by [redacted] is more restorative strategy where they're trying to restore the impaired function, and what we try to do is to try to teach strategies to reduce the impact of impaired functioning in everyday situations in terms of students, then in the classroom. So it's not a matter of -- we don't try to restore the function, but we try to reduce the impact of it in the classroom.

So we can teach teachers or train teachers to recognize that they need to employ certain kinds of teaching methods that may not be the usual method, you know, to use strategies that they may not consider. For instance, teachers may not think that it is necessary to provide some sort of visual representation for something that they're saying, but

certain students certainly need that. So in that sense.

The Hearings Officer credits the testimony of \_\_\_\_\_ and concludes that Respondent was not required to provide Student with cognitive rehabilitation therapy through the \_\_\_\_\_. On the one hand, the evidence sufficiently established that \_\_\_\_\_ was fully capable of providing Student's teachers with neuropsychological training and support in devising a plan to meet Student's individual needs. On the other hand, it was clear from the evidence that the program contemplated by \_\_\_\_\_ went far beyond and did not target the educational needs of Student. The cognitive rehabilitation program proposed by \_\_\_\_\_ was aimed at improving neuro pathways in the brain and accordingly, constituted a medical treatment rather than an educational program. This was confirmed by \_\_\_\_\_ in his testimony. Thus, while treatment at the \_\_\_\_\_ may very well prove to be beneficial to Student, the Hearings Officer cannot conclude from the record that Respondent's failure to authorize treatment for Student at the \_\_\_\_\_ amounted to a denial of FAPE.

#### C. Reimbursements for Expenses.

Petitioners also seek reimbursement for Mother's mileage, out-of-pocket expenses including medical co-payments, and lost wages resulting from her visits with her son. Petitioners, however, do not cite and the Hearings Officer cannot find any authority entitling Petitioners to such an award. Petitioners' suggestion that such expenses are for "related services" under 34 C.F.R. §300.24 is misplaced. "Related services" is defined in 34 C.F.R. §300.24 generally as:

... transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic and evaluation purposes. The term also includes school health services, social work services in school, and parent counseling and training.



"Medical services" is defined as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. 300.24(4). Based on the foregoing, the Hearings Officer cannot conclude that medical co-payments for Student's medication is a reimbursable item under the IDEA. Furthermore, "Transportation" is defined in 34 C.F.R. §300.24(15) as

- (i) Travel to and from school and between schools;
- (ii) Travel in and around school buildings; and
- (iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

The regulation clearly contemplates transportation for the *student* with a disability. As such, the Hearings Officer must conclude that reimbursement for mileage, out-of-pocket expense including medical co-payments, and lost wages would be inappropriate and does not constitute a denial of FAPE.

D. Extended School Year Services.

At the end of the school year in 2002, the IEP team met to decide whether Student required ESY services. \_\_\_\_\_, the Department's chairperson for Special Education at \_\_\_\_\_ School, testified that the subject of ESY services for Student was brought up at his last IEP meeting. According to \_\_\_\_\_ "if you attain growth, you're not in need of ESY. ESY is determined by a loss of growth over a period of time and the inability to recoup that information, and based on that, [Student] had continual growth. We didn't see the need for ESY. Services for that can be provided through probably summer school or whatever, but that's not the realm of ESY." \_\_\_\_\_ also explained:

Academically, he was progressing. He didn't need the ESY for academics. There was progression all along. What you look at academically is the loss of information and that inability to recoup that information. He wasn't having that problem.

\_\_\_\_\_ also described Student as "academically [he] was very successful" and although "his weak area was math, but not noticeably." \_\_\_\_\_ explained that:

Math is sequential learning. I mean, you have to follow—it follows grades one, two, three and four. If you lose any time within that frame of learning, that you fall back in math . . . . And in order to move forward in math, you have to have had the understanding the grade before . . . . It moves forward. And what we did see was even though [Student's] math grades were low, they were climbing once identified and they were being addressed. That was the area of weakness.

Furthermore, according to . . . “[Student's] scores in reading are above average” and “his ability to read and solve, I mean, and understanding and comprehend is within the average range and above average.”

on the other hand, testified in support of her recommendation for ESY services for Student in math:

Q. Another thing that you asked for [Student] in your petition was extended school year for mental health services and math.

A. Yes.

Q. Can you explain why you believe [Student] needs those things?

A. I feel that academics and his mental health needs to go hand in hand. They granted [Student] to have mental health services continue over the summer and, you know—like I said, you know, we struggled during the whole school year for [Student] to be, you know, academically well, you know. If I didn't think he needed it, I wouldn't ask for it.

The Hearings Officer credits the testimony of . . . and, on balance, concludes that Respondent's denial of ESY services to Student for math did not violate the IDEA or HAR Chapter 56, and did not constitute a denial of FAPE.

E. Math Goals.

Petitioners also allege that the IEP does not adequately address Student's math learning disability. . . testified that:

[The IEP] states that he will improve at least one grade level and that will be determined by the end of the school year. At the next new date of the IEP, you would give part B of the WIAT and it could tell you exactly what growth had occurred in those two areas.

also explained that the math goal in Student's current IEP was to improve his math skills at least one level from his current functioning level because, "You can't expect a child to get three years' growth in one year. If you do, you're setting him up for failure. It's ongoing." Based on the preponderance of the evidence, the Hearings Officer concludes that the IEP sufficiently addressed Student's math needs.

#### F. Family Therapist.

Petitioners also complain that Respondent's refusal to allow to transition Student's family therapy to the next family therapist is a denial of FAPE. According to the evidence, was removed from his IEP in June 2002. Respondent, however, correctly points out that decisions on personnel are properly left to the IEP team. Nothing in the record suggests that the IEP team is incapable of making that determination in accordance with the applicable laws and Student's individual needs.

#### G. Correction of Psychiatric Report.

Finally, Petitioners seek to have a psychiatric report by corrected. The report, dated November 12, 2002, admittedly contained a factual inaccuracy concerning Student's family history. By letter dated February 21, 2003 from that error has been corrected. Accordingly, this issue has been resolved and is therefore moot.

### IV. DECISION

Based on the foregoing findings and conclusions, the Hearings Officer determines that the delay in arranging for the TBI evaluation for Student within a reasonable period of time following the decision in the First Proceeding amounted to an ongoing denial of FAPE. Thus, having succeeded on this issue and having subsequently obtained the relief sought, to wit, evaluation of Student for TBI by Petitioners have prevailed on this issue. On the other hand, the evidence presented by Respondent was sufficient to prove that Respondent offered FAPE to Petitioners in the other areas set forth in the request for hearing.

For the violation found, Petitioners urge the Hearings Officer to award Student compensatory education services for the three years<sup>3</sup> he was denied classification as being traumatically brain injured. In determining whether compensatory education is appropriate here, the Hearings Officer notes that such a remedy is an equitable rather than a legal one. As such, compensatory education should be determined on the basis of the student's individual needs and circumstances. A student with a disability is entitled to only so much compensatory education time as is required to provide him with an appropriate education.

From the evidence presented in this case, Student continues to progress at the

a. \_\_\_\_\_, the center's Program Director, testified that academically, Student was doing "good":

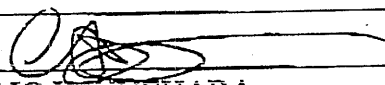
He's one of our better students. He completes his homework tasks. He reads quite well because I hear him read every Friday because they read out loud to me, and he's doing well in math. He's doing okay in his subjects. He's one of our better students.

\_\_\_\_\_ also indicated the Student may be considered for discharge in the next few months. In view of all of these considerations, the Hearings Officer cannot conclude that compensatory education would be an appropriate remedy here.<sup>4</sup>

V. RIGHT TO APPEAL

This is a final administrative decision and shall be binding on all parties hereto. Any person/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: \_\_\_\_\_  
MAY 23 2003

  
CRAIG H. UYEHARA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs.

<sup>3</sup> According to Petitioners, it has been almost three years since the recommendation was made by PMH for Student to begin cognitive rehabilitation training.

<sup>4</sup> It is also significant to note that Petitioners did not seek to enforce the decision in the First Proceeding as soon as it became apparent that Respondent did not intend to comply with the decision until its appeal had been resolved. See *Parents of Student W v. Puyallup School District*, 31 F.3d 1489 (9<sup>th</sup> Cir. 1994) (The behavior of the parents may also be relevant in fashioning equitable relief).