



DEPT. OF COMMERCE AND CONSUMER AFFAIRS

2003 MAY 15 P 1:19

HEARINGS OFFICE

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

In the Matter of	)	DOE-2003-028
	)	
, by and through	)	FINDINGS OF FACT, CONCLUSIONS
her legal guardian,	)	OF LAW AND ORDER GRANTING
	)	RESPONDENT'S MOTION FOR
Petitioners,	)	SUMMARY JUDGMENT;
	)	APPENDICES "A" AND "B"
vs.	)	
	)	
DEPARTMENT OF EDUCATION,	)	
STATE OF HAWAII,	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER  
GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On March 4, 2003, the Department of Education ("Respondent") received a request for a due process hearing under Hawaii Administrative Rules ("HAR") Title 8, Chapter 56 ("Chapter 56") from [redacted] by and through her legal guardian [redacted].

(collectively referred to as "Petitioners"). A prehearing conference was held on March 19, 2003, and attended by [redacted] Esq., attorney for Petitioners, and [redacted] Esq. attorney for Respondent. At the prehearing conference, the parties agreed to reschedule the hearing from March 28, 2003 to April 30, 2003. At a second prehearing conference held on April 23, 2003, the parties agreed to postpone the hearing set for April 30, 2003 in order to have a hearing on Respondent's Motion for Summary Judgment that would be filed by April 25, 2003.

Respondent filed its Motion for Summary Judgment on April 25, 2003. Petitioners filed their Memorandum in Opposition to the Motion for Summary Judgment, as well as a Motion for Summary Judgment on April 29, 2003.

On April 30, 2003, a hearing was conducted on Respondent's Motion for Summary Judgment. Petitioners were represented by Ms. [REDACTED] and Respondent was represented by Mr. S. [REDACTED]. The Motion was taken under advisement. The parties agreed to schedule the hearing for June 12 and 13, 2003, and that Respondent would have an opportunity to respond to Petitioners' Motion for Summary Judgment if its Motion for Summary Judgment was denied. The parties agreed that a hearing on Petitioners' Motion was not necessary.

By a letter dated May 7, 2003, the Hearings Officer informed the parties that Respondent's Motion would be granted and accordingly, (1) the hearing set for June 12 and 13, 2003 was taken off the calendar and (2) no further action would be taken on Petitioners' Motion.

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. On March 4, 2003, Petitioners filed a request for impartial hearing with Respondent. The attachment to Petitioners' request described their concerns regarding placement and the provision of a free and appropriate public education, as well as Petitioners' proposed resolutions to their concerns. In particular, Petitioners wanted Respondent to: (1) "commit to having [REDACTED] remain in residential treatment at [REDACTED] until such time as an appropriate therapeutic residential placement can be secured," and (2) "ensure that [REDACTED]'s behaviors are acceptable and appropriate prior to returning her to [REDACTED] Elementary." A true and correct copy of the attachment is attached hereto and incorporated herein as Appendix "A".

2. [REDACTED]'s Individual Educational Program ("IEP") team met on March 7, 2003 and March 27, 2003. At both meetings, the IEP team agreed that [REDACTED] would continue to be placed at a hospital-based residential facility, and planned to transition her to a day treatment program.

3. After an IEP meeting on April 15, 2003, Respondent issued a Prior Written Notice of Department Action ("Prior Written Notice") dated April 15, 2003 which stated that:

1. [redacted] will continue to receive services at a Hospital-Based Residential Facility.
2. [redacted] will be transitioned from the Hospital-Based Residential Facility to a Day treatment program.
3. [redacted] will be provided with Intensive In-Home Therapy services.

A true and correct copy of the Prior Written Notice is attached hereto and incorporated herein by reference as Appendix "B".

4. The principal of [redacted] Elementary School will act in good faith to implement [redacted] s IEP.

### III. CONCLUSIONS OF LAW

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 3 (1986).

Respondent contends that summary judgment is proper because the requested resolutions in the Petitioners' request for impartial hearing have occurred, and therefore, there are no issues left to be decided. Petitioners contend that summary judgment should not be granted because:

1) There continue to be disputes about material facts, including how long the State will provide residential treatment for I [redacted] and what services will be provided to assist in her return home by May 5, 2003;

2) There is no evidence that DOE would have complied with the IEP without pending litigation (the stay-put provision of IDEA); and

3) Evidence exists in DOE's own records (Prior Written Notice of Department Action, dated March 7, 27 and April 15, 2003) that other options to residential treatment continue to be considered.

As to the first argument, Petitioners' proposed resolution did not request that remain in residential treatment for a specific time period or that specific services would be provided after [redacted] returned home, just that [redacted] remain in residential treatment "until an appropriate therapeutic residential can be secured." As to whether or not Respondent "would have complied with the IEP without pending litigation", the evidence presented showed that Individualized Education Program ("IEP") team meetings were being held about every three weeks to monitor [redacted]'s progress and adjust her IEP accordingly. While Petitioners argue that the Respondent would not have complied with the IEP without this pending litigation, no evidence was presented to support this contention. An opponent to a motion for summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Lastly, although the evidence showed that Respondent continues to consider other options besides residential treatment, the evidence also showed that the IEP team either rejected those options or modified [redacted] IEP based on the information it received at each IEP team meeting. The mere fact that the IEP team considered other options is not a basis for denying Respondent's Motion.

Petitioners argued that this matter should not be dismissed on the grounds of mootness because Petitioners have a basis for believing that Respondent will discharge [redacted] from residential care without notice or services in place because it has happened before, and if the act is capable of repetition, yet evading review, the case is not moot. However, Petitioners have not presented evidence in support of its contention that Respondent discharged [redacted] without notice or services in place. Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Board v. Boeing Co.*, 585 F. 2d 946 (9<sup>th</sup> Cir. 1978). The nonmoving party is required to set forth by affidavit specific facts showing that there is a genuine issue for trial. *T.W. Electric Service, Inc. v. Pacific Electric Contractors Ass'n*, 809 F. 2d 626 (9<sup>th</sup> Cir. 1987). While previous IEP team meeting notes and Prior Written Notices were attached to Petitioners' Memorandum in Opposition to Respondent's Motion for Summary Judgment, those documents do not support Petitioners' contention that [redacted] was discharged from residential placement without notice or services in place.

Based on the evidence presented, the Hearings Officer finds that Respondent has shown, through its Prior Written Notice of Department Action dated April 15, 2003, that Respondent has committed to: (1) having . . . remain in residential treatment at . . . until such time as an appropriate therapeutic residential placement can be secured, and (2) ensuring that . . . behaviors are appropriate and acceptable prior to her returning to her home school. Accordingly, the Hearings Officer concludes that Petitioners have received credible assurances from Respondent that the relief requested has been and will be implemented and accordingly, a hearing is not necessary because there are no justiciable issues left to be decided.

As Respondent's Motion for Summary Judgment is granted, Petitioners' Motion for Summary Judgment need not be addressed.

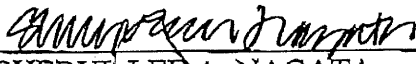
IV. DECISION

IT IS HEREBY ORDERED that Respondent's Motion for Summary Judgment is granted, and Petitioners' due process request is dismissed.

**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 days after receipt of this decision.

DATED: Honolulu, Hawaii,                     MAY 15 2003                    .

  
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SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs