

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2003 OCT 28 A 11:46

HEARINGS OFFICE



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

In the Matter of

[REDACTED], by and through his
Parents, [REDACTED] A and [REDACTED],
Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Respondent.

DOE-2003-052

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION; APPENDICES "A"
AND "B"

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

The Department of Education, State of Hawaii ("Respondent") received an April 8, 2003 request for a due process hearing under Hawaii Administrative Rules ("HAR") Title 8, Chapter 56 from [REDACTED], by and through his parents, [REDACTED] (collectively referred to as "Petitioners"). A prehearing telephone conference was held on June 30, 2003, at which the parties agreed to reschedule the hearing to September 2, 2003.

On September 2, 2003, the hearing was conducted at the [REDACTED] courthouse by the undersigned Hearings Officer. Mr. and Mrs. [REDACTED] were present and represented Petitioners, *pro se*. Respondent was represented by the [REDACTED] Educational Specialist, [REDACTED] and by [REDACTED] District Resource Teacher.

I HEREBY CERTIFY THAT THIS IS A
TRUE AND CORRECT COPY OF THE
ORIGINAL ON FILE IN THE DEPARTMENT
OF COMMERCE & CONSUMER AFFAIRS.

Alisa [Signature]

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. [REDACTED] is 15 years old (DOB [REDACTED]) and currently attends [REDACTED] High School in the [REDACTED] District of Hawaii. [REDACTED] has cerebral palsy, which requires him to use a walker while attending school. [REDACTED] is orthopedically impaired, and has been qualified as a student with a disability.

2. On May 22, 1997, the parties had entered into a Stipulation of Settlement (Stipulation). A copy of this Stipulation is attached hereto and incorporated herein by reference as Appendix "A".

Among the terms of the Stipulation, were the following:

1. The Department of Education agrees that a transportation provision has been included in [REDACTED] IEP for the years 1990-1997, and further agrees to provide retro-active mileage reimbursement compensation for those years.... Mileage reimbursement after April 21, 1997 is to be provided through filing by [REDACTED] all of the necessary forms which are provided with this settlement agreement including form CS-101 and Monthly Personal Automobile Mileage Vouchers. Daily mileage to and from school of 14 miles is accepted by the Department of Education as stated in [REDACTED]'s request for private car reimbursement letter of March 6, 1997... Upon execution of settlement, the DOE will process payment as soon as possible....

2. The Department of Education has already provided a laptop computer for [REDACTED]'s use at school. The Department of Education agrees to allow [REDACTED] the opportunity to bring the laptop computer home for use in completing his homework assignments and back to school again for daily use during school hours.

3. On April 8, 2003, Petitioners filed a Request for Impartial Hearing. A copy of this Request is attached hereto and incorporated herein by reference as Appendix "B".

Petitioners' concerns are described in the Request as follows:

"Failure to pay mileage reimbursement as per the student's IEP from April 21, 1997 to date of due process hearing"...

"Possible prejudice and humiliation; noncompliance with computer assistance and protocol as per IEP of student"...

Petitioners list their proposed resolutions to include:

"Immediate payment of prearranged mileage reimbursement as per student's IEP, plus vehicle maintenance and purchase totaling [redacted] or more";

"Possible damages (punitive, compensatory, statutory, et al.) and immediate assistance with computer keyboarding, new computer lap top with DVD and internet"; and

"...non-taxable reimbursement and a strict settlement without monthly vouchers..."

4. As testified by Ms. [redacted] the DOE was prepared to pay Petitioners reimbursement for their mileage expenses if Petitioners could show that they possessed valid no-fault insurance.

5. Through correspondence, beginning in October 2001 and continuing until April 2003, Ms. [redacted] and DOE superintendents repeatedly informed Petitioners that the [redacted] needed to submit monthly mileage vouchers and show proof of no-fault insurance in order to obtain mileage reimbursement.

6. During a December 12, 2002 meeting, [redacted] admitted to [redacted] a High School Principal [redacted], that the [redacted] did not have automobile insurance.

7. However, at hearing, Mrs. [redacted] testified that the [redacted] could not prove they had no-fault insurance; but did not state that they did not have no-fault insurance.

8. Superintendent Patricia Hamamoto's April 7, 2003 letter to Mrs. [redacted] also noted that in prior telephone conversations, Mrs. [redacted] had stated that the [redacted] did not have automobile insurance.

9. Mrs. [redacted] testified that the correct form for Petitioners to fill out for mileage reimbursement is Form CS-103. The Stipulation listed the wrong form, CS-101,

a form applicable to DOE employees. The [REDACTED] were not employed by the DOE. Petitioners submitted into evidence Exhibit H, a Parent/Guardian Information form regarding mileage transportation reimbursement, stating that Form CS-103 was the proper form to file. However, Petitioner's Exhibit H also states that the person seeking mileage reimbursement must also provide proof of minimum required automobile insurance coverage and up-dated policies as insurance policies are renewed. Exhibit H tracks the language of Hawaii Administrative Rule, Title 8, Chapter 27-5(c), which states:

"the person who will be receiving the mileage reimbursement ... must provide the... minimum required automobile insurance coverage and updated policies as insurance policies are renewed."

10. Petitioners' Exhibit I contains information and notes regarding a February 28, 2002 IEP Meeting. It states that transportation has been provided by the [REDACTED] on a daily basis since August 23, 2001.

11. The Stipulation does not specifically state that the [REDACTED] need to have no-fault insurance.

12. Between April 21, 1997 and the request for impartial hearing, Mr. [REDACTED] owned several used cars that were often in need of repair. These vehicles were used to transport [REDACTED] to and from school. According to Mr. [REDACTED], these vehicles were intermittently insured.

13. Currently, the [REDACTED]'s vehicle used to transport [REDACTED] to and from school is properly insured.

III. CONCLUSIONS OF LAW

It is not disputed that [REDACTED] is a student with a disability and entitled to special education services pursuant to HAR Title 8, Chapter 56. In addition to special education services, [REDACTED] is entitled to related services. These include transportation services. The parties had entered into a May 22, 1997 Stipulation of Settlement in which Respondent agreed to pay the [REDACTED]'s mileage reimbursement at the agreed upon rate of \$.30 a mile, and for the agreed upon distance of 14 miles per day.

It is also undisputed that under the terms of the Stipulation, the [REDACTED] were to file the necessary forms after April 21, 1997 to obtain reimbursement. Although the Stipulation identified the wrong form to be filed, it is not disputed that the [REDACTED] failed to file any form to obtain reimbursement for transportation services.

Petitioners' assert that the Stipulation required that they fill out Form CS-101, a form applicable to DOE employees seeking mileage reimbursement. Petitioners argue that this is the wrong form, since the [REDACTED] were not DOE employees. Although form CS-101 may not have been the proper form for Petitioners to file, the evidence shows that Petitioners apparently refused to fill out any form to show proof of no-fault insurance coverage. By Petitioners' admissions, their no-fault insurance coverage had lapsed, at least intermittently, during the time Petitioners sought mileage reimbursement.

At hearing, Mrs. [REDACTED] testified that Petitioners did not admit that they did not have no-fault insurance, but merely told Respondent that they did not have proof of insurance. Mr. [REDACTED] testified that he was continuously changing vehicles and no-fault carriers, and did not retain proof of no-fault insurance. However, Mr. [REDACTED] admitted that there were times when no-fault insurance coverage may have lapsed.

The Hearings Officer concludes that despite Respondent's continued requests that Petitioners provide proof of no-fault insurance, Petitioners were less than candid to Respondent about their no-fault coverage.

Therefore, the issue to be determined is whether Respondent was correct in withholding mileage reimbursement previously agreed upon pursuant to the terms of the Stipulation.

The Hearings Officer concludes that Respondent properly withheld mileage reimbursement from April 21, 1997 until present. This conclusion is made as Petitioners' failed to show that they were properly insured throughout this period.

The Stipulation is an agreement made between Respondent and Petitioners. Respondent agreed to reimburse Petitioners for mileage expenses. It is Respondent's duty to provide transportation or mileage reimbursement as this is a related service. Although Respondent is expected to abide by the terms of this agreement, Petitioners also have certain statutory obligations and obligations under the Stipulation.

Although maintaining no-fault insurance is not a specific term of the Stipulation, it is a requirement of all drivers. Petitioners' failed to abide by no-fault laws and did not file any documentation regarding mileage reimbursement under the Stipulation.

It is not Respondent's obligation to assist Petitioners in obtaining no-fault insurance. As Respondent correctly points out, the person receiving the mileage reimbursement must show proof that he has the required automobile insurance. HAR, Title 8, Chapter 27-5(c).

Respondent's denial of mileage reimbursement was a result of Petitioners' admitted failure to maintain no-fault insurance and Petitioners' failure to submit any paper work to obtain reimbursement. The Hearings Officer concludes that Respondent did not act in bad faith in withholding mileage reimbursement.

The next issue to be decided is whether Petitioner was denied a FAPE as [REDACTED] was not provided with a new computer with DVD and internet capabilities. The facts show that Respondent had previously supplied [REDACTED] with a lap top computer, a printer and paper and ink. As stated in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the DOE must provide [REDACTED] with some educational benefit. The DOE has met its burden regarding the provision of a computer and accompanying supplies. Therefore, Petitioners' request for a new computer with DVD and internet capabilities is denied.

Hawaii Administrative Rules Title 8 Chapter 56 requires that Respondent make available to students with a disability a FAPE that emphasizes special education and related services designed to meet their unique needs. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court set out a two-part test for determining whether Respondent was offered a FAPE: (1) whether there has been compliance with the procedural requirements of the Individuals with Disabilities Education Act ("IDEA") and (2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Rowley*, at 206-207.

Procedural Violations

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).

The Hearings Officer concludes that there were no procedural violations in this case.

Substantive Denial of FAPE

Petitioners contend that Respondent did not offer [REDACTED] FAPE because terms in the May 22, 1997 Stipulation were not implemented. Based upon the evidence presented, the Hearings Officer concludes that Petitioners' were not denied a FAPE as Petitioners did not fulfill their statutory duty to maintain no-fault insurance and did not submit any documentation to claim mileage reimbursement.

Respondents accurately cite HAR Title 8, Chapter 27-5(c), which states that Petitioners must be properly insured in order to receive mileage reimbursement. Further, Petitioners have not complied with the terms of the Stipulation requiring them to fill out a form when requesting mileage reimbursement.

The parties had entered into a Stipulation, calling for mileage reimbursement. There is no dispute that Petitioners would have been entitled to mileage reimbursement if they had filled out the proper forms indicating that they were insured. It is also noted that Petitioners were insured intermittently during the period in question, and that they currently have valid no-fault insurance.

IV. DECISION

IT IS HEREBY ORDERED THAT Petitioners obtain proof of the no-fault insurance they possessed on the vehicles they used to drive [REDACTED] to and from school activities from April 21, 1997 until present. Petitioners are to provide Respondents with this proof within 3 months of their receipt of this Decision.

Upon receiving proof that the vehicles used to transport [REDACTED] were insured, Respondent shall reimburse Petitioners for mileage expenses for [REDACTED] transportation to

23-05

Patricia C. Bergin
District Superintendent, Hawaii District
Department of Education

James Scanlon
Educational Specialist, Hawaii District
Special Education

Representatives for
DEPARTMENT OF EDUCATION

BEFORE THE CHAPTER 36
ADMINISTRATIVE HEARING OFFICER
APRIL 30, 1997

In re: matter of
[REDACTED] L
on behalf of
[REDACTED] L

Petitioner,

STIPULATION OF SETTLEMENT

vs.

DEPARTMENT OF EDUCATION,

Respondent.


STIPULATION OF SETTLEMENT

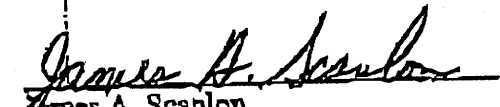
IT IS HEREBY STIPULATED by the parties hereto, through their representatives, that the parties have settled the above entitled case, and the projected administrative hearing, scheduled for May 22, 1997, is not required. The terms of the settlement are as follows:

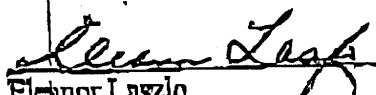
1. The Department of Education agrees that a transportation provision has been included in [REDACTED]'s IEP for the years 1990-1997, and further agrees to provide retro-active mileage reimbursement compensation for those years. The rate of compensation for mileage reimbursement is \$.30 per mile as established in Section 8-27-2 of Chapter 27 (Hawaii Administrative Rules, Title 8, Department of Education, Subtitle 2, Education Part 1). This reimbursement to be paid through the Department of Accounting and General Services. Mileage reimbursement will be for verifiable dates of attendance at school and at Extended School Year, Summer School. The cumulative number of days of attendance for that period is 1,190 up to and including April 21, 1997. Mileage reimbursement after April 21, 1997 is to be provided through filing by Alexa Russell of the necessary forms which are provided with this settlement agreement including form CS-101 and Monthly Personal Automobile Mileage Vouchers. Daily mileage to and from school of 14 miles is accepted by the Department of Education as stated in [REDACTED]'s request for private car reimbursement letter of March 6, 1997. The total reimbursement amount is \$4,998.00. Upon execution of settlement, the DOE will process payment as soon as possible. The payment process normally takes about

2. The Department of Education has already provided a laptop computer for [redacted] use at school. The Department of Education agrees to allow [redacted] the opportunity to bring the laptop computer home for use in completing his homework assignments and back to school again for daily use during school hours.
3. The Department of Education, [redacted] Elementary School, agrees to assign Julia Rooney or another qualified individual to assist [redacted] in learning computer programs such as WRITING CENTER and CLARISWORKS.
4. The Department of Education, [redacted] Elementary School, agrees to develop a new Individualized Educational Program in May or June of 1997 to be implemented for [redacted] during his 5th grade year 1997-98.
5. The Department of Education, Hawaii District Office, agrees to arrange a meeting with a representative from the State Department of Education's Facilities & Support Services Branch, [redacted] Eleanor Laszlo, and James Scanlon at [redacted] Elementary School and [redacted] Intermediate & High School's Halaula Annex for the purpose of discussing accessibility requirements for Laak as he enters his 5th grade year at [redacted] Elementary School and as he enters his 6th grade year at the Halaula Annex. This meeting is to be arranged on a mutually agreeable date prior to July 30, 1997.
6. Nothing contained in this document shall be construed as an admission of fault or guilt by the Department of Education or any of its employees in this matter.
7. It is agreed by both the Department of Education and [redacted] that the terms of this settlement are and shall remain confidential with the understanding that parties which may need to approve, certify, or otherwise implement any part or parts of the agreement are accepted as needing to know to the extent of their required participation.

DATED: [redacted] Hawaii, July 22, 1997.


Mother of [redacted]


James A. Scanlon
Department of Education, Special Education


Eleanor Laszlo
Principal, [redacted] Elementary School