

DEPT. OF COMMERCE AND CONSUMER AFFAIRS

2003 DEC 29 A 8:48



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

In the Matter of ) DOE-2003-070
Mother, )
, by and through his ) FINDINGS OF FACT, CONCLUSIONS
) OF LAW AND DECISION;
) APPENDICES "A" and "B"
Petitioners, )
vs. )
DEPARTMENT OF EDUCATION, )
STATE OF HAWAII, )
Respondent. )

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On June 16, 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 his mother [redacted] (collectively referred to as "Petitioners"). A prehearing conference was held on July 21, 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 to August 6, 7, and 12, 2003, and extend the date for the issuance of the final decision to September 16, 2003.

On August 1, 2003, Petitioners filed a Motion for Leave to Allow Expert's Observance of [redacted] Middle School. On August 6, 2003, Respondent filed a Motion in Limine to Strike Dr. [redacted] as an Expert.

On August 6, 2003, the hearing was convened and oral arguments on the motions were heard by the undersigned Hearings Officer. Mr. and Mrs. ( "Parents" ) were present and were represented by Mr. [REDACTED] Respondent's representative. [REDACTED] was present and Respondent was represented by Mr. [REDACTED]. On August 8, 2003, the Hearings Officer issued written orders denying Respondent's Motion and granting Petitioners' Motion.

The hearing continued on August 7 and 12, 2003. At the end of Respondent's presentation, Petitioners orally moved for a directed verdict. Respondent also requested that the Hearings Officer order Dr. [REDACTED] to submit a written report to Respondent. Petitioners also filed a written Motion for Directed Verdict or in the Alternative, for Summary Judgment. On September 5, 2003, the Hearings Officer issued orders denying Respondent's request and Petitioners' Motion. On September 19, 2003, Petitioners filed a Motion for Clarification of Order Denying Motion for Directed Verdict or in the Alternative for Summary Judgment Dated September 5, 2003 to Comply With HRS § 91-12 or in the Alternative Motion for Reconsideration. On September 26, 2003, the Hearings Officer issued an Order Granting in Part and Denying in Part Petitioners' Motion.

The hearing continued on September 30, 2003 and October 1, 2003. At the close of Petitioners' case, Respondent moved for leave to present rebuttal evidence, in the form of testimony from [REDACTED]. Petitioners objected, and the matter was taken under advisement. On October 8, 2003, the Hearings Officer issued an order granting Respondent's Motion. By a letter dated October 14, 2003, Respondent withdrew its request to present rebuttal evidence, and requested that a briefing schedule be issued, and that the 45-day decision deadline be extended to accommodate the briefing schedule and the subsequent issuance of the decision and order. By a letter dated October 15, 2003, the Hearings Officer requested that Respondent file its Closing Brief on November 3, 2003, that Petitioners file its Closing Brief on November 21, 2003, and that Respondent file its rebuttal on November 28, 2003. Respondent's request to extend the decision deadline was granted, and the decision deadline was extended to December 15, 2003. Petitioners and Respondent filed their respective briefs on the dates set by the Hearings Officer. On December 10, 2003, Respondent's request to extend the decision deadline to December 31, 2003 was granted.

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] ("Student") is 14 years old (DOB [redacted]) and is an eighth grader at [redacted] School [redacted]. Student has attended [redacted] since Fall 2002. [redacted] Middle School [redacted] is Student's home school. Student has been qualified as a student with a disability.

2. After a due process hearing, on August 16, 2002, a Hearings Officer ordered that Respondent reimburse Petitioners for actual out of pocket costs for extended school year summer school and regular school for the school year 2002-2003 at [redacted]. The Hearings Officer found that Student had an educationally related need for a small campus as a result of his disabilities, and because the need for a small campus was not included in the Individualized Education Program ("IEP") or embodied in the offer of placement, Respondent breached its duty to offer student a free appropriate public education.

3. On June 2, 2003, Student's IEP team held a meeting in order to conduct the annual review of Student's IEP. On June 5, 2003 Respondent issued a Prior Written Notice of Department Action, which offered Student a special education program at [redacted] MS. Student would be in special education classes for language arts and math, and general education, with support, for social studies, science and electives. A copy of the Prior Written Notice is attached hereto and incorporated herein as Appendix "A". A more detailed description of services, contained in section 21 of the IEP is attached hereto and incorporated herein by reference as Appendix "B".

4. Parents did not agree with Respondent's offer of placement, as outlined in the IEP and Prior Written Notice.

5. The IEP team reviewed [redacted] M.D.'s report dated May 8, 2003, which stated in part:

[Student]...changed schools this academic year and [is] now at [redacted] [He] has done extremely well at [redacted] School making the transition to the new school and adjusting well to a modified middle school structure. The school structure is less

complex than most middle schools, since they mostly have the same teachers for the basic courses except for math and do not have to change classes or buildings as much.

Both boys were tested by the DOE and Mrs. E. says that for [Student] the testing seems to be more traumatic because he sees testing as a threat to return him to public school.

...

It was my opinion that... [Student] continued to have substantial developmental impairments that were addressed at both [redacted] and [redacted] and they needed to continue in a private school setting if they were to receive a FAPE.

On the basis of today's visit, this opinion remains the same.

6. The IEP team reviewed a report dated May 15, 2003 from [redacted] Ph.D., Respondent's District School Psychologist, who conducted an observation at [redacted] School and [redacted] MS. Dr. Lamoureux found the climate at [redacted] to be "supportive and conducive to learning" and [redacted] MS to be "welcoming and fosters an individualized academic environment." She further found:

Both schools have supportive teachers and warm, welcoming classrooms. Both campuses are well maintained, clean, and comfortable. Both settings appear to be stimulating academically and seem to provide opportunities for positive peer-to-peer and student teacher relationships.

7. Dr. [redacted] described [redacted] MS as follows:

[redacted] MS], overall is larger. However, the sense of community is quite apparent as one walks through the campus. Students are divided by tracks, grade level, and further divided into Core Groups and Advisories, thus creating smaller units of students. Activities (in addition to academics) are designed to foster small group interaction. Lunches, and recess are timed so that only particular groups of students are scheduled. This way, students maintain their sense of smaller communities during these times, rather than having the whole school, or mixed grades gathering in the cafeteria or on the lawns at recess. [redacted] MS] also provides a small teacher to student ratio in the Special Education classes observed (two adults to between five and fifteen students). The climate, overall, is welcoming and fosters an individualized academic environment.

8. The IEP team reviewed a report dated May 29, 2003 from [REDACTED] Student's speech therapist, who recommended that Student's current school placement continue because he needs "small class size, skilled teachers, attention to possible fluctuations in his hearing, frequent counseling, and balance of structured teaching with opportunities for generalization."

9. The IEP team also reviewed [REDACTED] Spring 2003 Student Profile. Student's optimal learning environment was described as: age-related peers, small-group instruction, remedial, self-contained class and highly-structured setting.

10. At [REDACTED], Student maintained a B to B+ average during the first three quarters of the 2002-2003 school year.

11. [REDACTED] MS is a three-track school, with two-thirds of its 1,800 student population (1,200) on campus at the same time. Each track is composed of grades six, seven and eight, and has about 600 students, 200 per grade level. The tracks are divided into teams, and the eighth grade is divided into two teams (100 per team) with four teachers on each team. Each teacher teaches a core grade area (language arts, math, social studies and science) and works in a team. There is also an advisory program that has six teachers per team, so there are sixteen to eighteen students in a class for advisory. In advisory, they use the tribes program, which helps students to develop communication skills, resiliency, and relationships of trust with an adult and with small groups of students.

12. At [REDACTED] MS, each grade level has a separate building where the students are taught the core subjects. There is limited exchange between the different grade levels. The only time all the students are together is during recess.

13. At [REDACTED] MS, there are about 25 students in a regular education class, and one to twelve students in a special education class.

14. [REDACTED] Psy.D., has treated Student since 2002. Student's diagnosis is cognitive disorder, a brain dysfunction that occurs subsequently to some kind of medical insult to the brain. In Student's case, it was due to his early birth (at six months) and a subdural hemorrhage that was treated while he was in the neonatal ICU. It is her opinion that he has neurological problems making transitions in life, and is something that will not go away.

15. It is also Dr. [REDACTED]'s opinion that Student also carries a psychothymic diagnosis which is "a rapid cycling bi-polar type of thing where there's a depressive component to that, and he does become depressed and withdraw when he's faced with stress and transitions and fear."

16. Because Student is doing well at [REDACTED] it is Dr. [REDACTED] recommendation that Student remain at [REDACTED]. Dr. [REDACTED] does not believe that Student should move to [REDACTED] MS for a variety of reasons:

...starting with his difficulty with transitions, and his responses to transitions in the past have been emotional shutdowns, emotional dysregulation again, some acting out, behaviors around that, but actually have more—had more at that time to do with depressive symptoms than behavioral issues...Another reason is that he's doing very well where he's at and moving to [MMS] sort of belies the point. If it's not broke, don't fix it. And he is—he's also doing well where he's at, so that when he needs support and assistance, the teachers there are familiar with him and able to provide that to him right away, rather than having to wait to see a counselor.

17. It is also Dr. [REDACTED] opinion that:

[Student] has, first of all, difficulty with transitions, so transitioning between classrooms will be difficult for him. Secondly, he has self-esteem, self-efficacy issues as, you know, certainly a lot of kids do, but [Student] has some very solid neurological bases for having those issues because he has neurologic problems that inhibit him from being like the other kids, so this makes him very—it makes it very apparent to himself even if it doesn't to other kids that he's not like the other kids.

The fact that he wouldn't be in a mainstream language arts program would make it very apparent to him that he was in with the special ed kids. Being in a special ed school means that he's in a school that, to him, is—that's regular. Everybody's like that. If he's in a regular school, then he's unique, which is a positive way of saying that. Kids don't use that. Kids use the term they're mental and other pejorative kinds of terminology to describe each other and themselves, and to [Student] that's devastating.

18. Under the appropriate circumstances, Dr. [REDACTED] believes that Student can transition to [REDACTED] MS. She believes that Student would need:

[a] structured setting that would provide him with adequate support and adequate boundaries and structured feedback, ability to receive

help without having to necessarily go and ask for it. So, in other words, to be redirected by teachers that recognized what's going on...So we would be looking at a small—a relatively small student-teacher ratio of skilled, trained teachers in all classrooms that he's in that would be able to provide him with a visual learning experience.

I think other situations or other structures that would need to be a part of the situation would provide him with a successful transition would be to help him understand that he wouldn't be singled out if he needed help and support. That he—that other kids need help and support and that the teaching methods weren't there for him, but they were there for everybody. That the emotional interventions, the effective interventions for that would be there for him, would be there for everybody, and that everybody would be able to access them.

19. [REDACTED] Ph.D., saw Student once in 2002 and once in 2003 for an evaluation. It is her opinion that moving Student from [REDACTED] to [REDACTED] MS would be a significant change in placement.

20. Dr. [REDACTED] believes that Student needs a:

very consistent, very safe, very intimate setting where the rules and expectations are very structured from teacher to teacher, class to class, where all the kids are following the same rules so that he can follow their lead, and where he's protected from kids who might be a bad influence, like conduct disorder kids. He'd be very vulnerable to being manipulated by them. And some place where emotionally he's got the kind of support that he needs in order to get through a school day. So he needs not just modifications in his IEP, but particular kinds of instructional methodologies that go across all of his coursework throughout the whole day, and a lot of emotional support as well as counseling support.

21. Dr. [REDACTED] testified that Student is afraid to go back to public school. Student doesn't feel like there is a place for him because he hasn't been in special education because he is bright, but he can't keep up in regular education. Student wants to fit in "like a regular guy" and at [REDACTED] he does.

22. All tuition contracts at [REDACTED] are drawn up between the school and the parents. [REDACTED] personnel do not attend IEP meetings and will not comment on objectives written by other professionals for use in other programs.

### III. CONCLUSIONS OF LAW

It is not disputed that Student is a student with a disability and entitled to special education services pursuant to HAR Title 8, Chapter 56. Therefore, the issue to be determined is whether Respondent made a free appropriate public education ("FAPE") available to Student.

Respondent is required to 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 offered Student a FAPE: (1) whether there has been compliance with the procedural requirements of the Individuals with Disabilities Education Act ("IDEA"), and (2) whether Student's IEP is reasonably calculated to enable him 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 (9<sup>th</sup> Cir. 1992).

Petitioners renewed their Motion for Summary Judgment, wherein they argued that Respondent denied Student a FAPE by failing to follow the provisions of HAR § 8-53-11 because Respondent did not reevaluate Student before it proposed a significant change in placement. Students who are eligible for special education services under IDEA and HAR Title 8, Chapter 56 are also eligible as a student with a disability under Section 504 and HAR Title 8 Chapter 53.

Hawaii Administrative Rules § 8-53-11 provides:

§ 8-53-11 **Reevaluation.** (a) The department shall ensure that a reevaluation of each student, in accordance with section 8-



53-9 on the determination of needed assessment data and section 8-53-10 on assessment is conducted if conditions warrant a reevaluation, including prior to a significant change in placement, or if the student's parent or teacher requests a reevaluation, but at least once every three years.

HAR § 8-53-9 provides that, as part of any reevaluation, the Section 504 team shall review existing assessment data on the student, including, "(1) assessments and information provided by the parent of the student; (2) current classroom-based assessments and observations; and (3) observations by teachers and related service providers[.]" Based on the evidence presented, the Hearings Officer finds that a reevaluation was required, as the proposed change of placement from [REDACTED] to MS was a significant change in placement. However, because a reevaluation can be a review of existing information and does not necessarily entail new testing or the administration of formal assessments, the Hearings Officer concludes that the reevaluation, as required by HAR § 8-53-11, was conducted by Student's IEP team at the June 2, 2003 IEP team meeting.

#### Substantive Denial of a FAPE

Hawaii Administrative Rules § 8-56-43 requires that Respondent ensure that students with a disability are, to the maximum extent appropriate, educated with students without a disability, and that special classes, separate schooling or removal of students with a disability from the regular educational environment should only occur if "the nature or severity of the disability is such that education, including special education, in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

Petitioners contend that Respondent did not provide a FAPE to Student because:

[Respondent's] offer of placement in regular education is totally contrary to [Student's] unique needs of a small school, small class, small student teacher ratio with low noise and low distraction.

Petitioners' proposed resolution is to continue placement at public expense at [REDACTED] based on the actual costs as presented in an invoice from Parents.

The evidence presented showed that most of the information available to the IEP team at the meeting on June 2, 2003 recommended that Student remain at [REDACTED] for the

2003-2004 school year.<sup>1</sup> However, Respondent believed that Student could transition to [REDACTED] MS and a FAPE could be provided to Student at [REDACTED] MS based on the [REDACTED] reports indicating that Student was doing better, and [REDACTED] MS's track/team/advisory system which, Respondent argued, would be appropriate for Student.

Hawaii Administrative Rules § 8-56-45 provides in part:

§ 8-56-45 Placements. In determining the educational placement of a student with a disability, including a preschool student with a disability, the department shall ensure that:

- (4) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs[.]

Based on the evidence presented, the Hearings Officer finds that Respondent did not give sufficient consideration to the potential harmful effects placement at [REDACTED] MS would have on Student, and accordingly, the Hearings Officer concludes that Respondent did not offer Student a FAPE for the 2003-2004 school year. The majority of the reports available to the IEP team recommended that Student remain at [REDACTED] for the 2003-2004 school year. Although Student successfully transferred from [REDACTED] to [REDACTED] for the 2002-2003 school year, the evidence presented showed that Student has difficulty with transitions, and requiring Student to attend [REDACTED] MS for eighth grade would result in Student having to attend three different schools in three years, as Student would have to leave [REDACTED] MS to go to a high school for ninth grade. While Petitioners objected to placement at [REDACTED] MS because Student needed a "small school" or "small campus", the evidence presented did not establish that this was a requirement for Student, as it was Dr. [REDACTED]'s opinion that Student could transition to [REDACTED] MS under the appropriate circumstances.

#### Tuition Reimbursement

Because the Hearings Officer has determined that a FAPE has not been offered to Student, it must be determined whether [REDACTED] is an appropriate school for Student, and

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<sup>1</sup> Dr. Lamourcaux's report appeared to say that both school environments were suitable for Student.

whether there are any factors that would require a reduction or denial of the cost of reimbursement.

Hawaii Administrative Rules § 8-56-51 states in part:

**§ 8-56-51 Placement of students by parents if a free appropriate public education is at issue.**

(c) If the parent of a student with a disability, who previously received special education and related services under the authority of the department, enrolls the student in a private...secondary school without the consent of or referral by the department, a court or a hearing officer may require the department to reimburse the parent for the cost of that enrollment if the court or hearing officer finds that the department had not made a free appropriate public education available to the student in a timely manner prior to the enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the state standards that apply to education provided by the department.

(d) The cost of reimbursement described in subsection (c) may be reduced or denied:

(1) If:

(A) At the most recent IEP meeting that the parent attended prior to removal of the student from the public school, the parent did not inform the IEP team that the parent was rejecting the placement proposed by the department to provide a free appropriate public education to the student, including a statement of the concerns and the intent to enroll the student in a private public school at public expense; or

(B) At least ten business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parent did not give written notice to the department of the information described in subparagraph (A);

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parent[.]

Based on the evidence presented, the Hearings Officer finds that [redacted] is an appropriate school for Student and accordingly, the Hearings Officer concludes that Petitioners are entitled to be reimbursed for the cost of enrollment at [redacted] for the 2003-2004 school year.

Next, it must be determined whether there is any reason that the cost of reimbursement should be reduced or denied. Respondent argued that "the equities would argue against reimbursement given the unwillingness of Petitioners to cooperate in providing mental health information to the IEP team to support Petitioners' contention that the offer of FAPE made by the [Respondent] was inappropriate." The Hearings Officer finds that the evidence presented did not support Respondent's allegations.

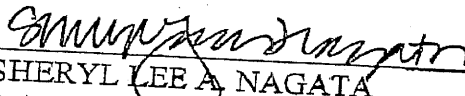
IV. DECISION

IT IS HEREBY ORDERED that Respondent reimburse Petitioners for the actual costs incurred to enroll Student at ASSETS for the 2003-2004 school year.

**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, DEC 29 2003

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