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

In the Matter of)	DOE-2003-105
)	
STUDENT, by and through his Father,)	FINDINGS OF FACT,
FATHER,)	CONCLUSIONS OF LAW
)	AND DECISION; APPENDIX "A"
Petitioners,)	
vs.)	
)	
DEPARTMENT OF EDUCATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

The Department of Education, State of Hawaii ("Respondent") received a September 1, 2003 request for a due process hearing under Hawaii Administrative Rules ("HAR") Title 8, Chapter 56 from Student, by and through his father, Father (collectively referred to as "Petitioners"). A prehearing conference was held on September 12, 2003, at which the parties agreed that pre-trial motions would be heard on October 2, 2003.

On October 2, 2003, Respondent's Motion for Sumfathery Judgment was heard as Respondent asserted that a prior recommended order, currently on appeal, was *res judicata*. This motion was denied, as the previous decision by a prior Hearings Officer concerned the 2002-2003 school year, not the current school year. Further, the current request for hearing is factually different from the prior case as Student's current academic progress had changed.

Petitioner's Motion for Stay Put was also denied as the prior Hearings Officer's decision is the stay put during the pendency of the appeal.

On October 3, 2003, the hearing was commenced at the Department of Commerce and Consumer Affairs in Honolulu by the undersigned Hearings Officer. Mr. Father was present for Petitioners and was represented by Keith Peck, Esq. Respondent was represented by George Hom, Esq. and by District Resource Teacher Joseph Kernan. The hearing was furthered and completed on October 20, 2003, with Eric Krening, Esq. representing Petitioners.

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. Student is 13 years old (dob [REDACTED]) and currently attends Assets School in Honolulu, Hawaii. Student has been diagnosed with autism/Aspergers, a condition which may lead to difficulty in social interaction and qualifies him as a mother with a disability. Student also has a central auditory processing disorder which may cause confusion.

2. On September 1, 2003, Petitioners filed a Request for Impartial Hearing, claiming substantive breaches of FAPE. A copy of this Request is attached hereto and incorporated herein by reference as Appendix "A".

Petitioners' concerns are described in the Request as follows:

"...The Present Levels of Academic Performance is inaccurate. The Goals and Objectives are inappropriate and not measurable. There was not discussion of needed Assistive Technology. Adaptive PE is inappropriate...Mother should have been in regular education for some classes...no generalized description of the type of special education and related services and supplementary aids and services ...or a statement of the program modifications or supports...Extended School Year services...not defined...Program was inappropriate"

Petitioners list their proposed resolutions to include:

“A finding that Mother’s IEP was inappropriate...that Mother’s present private placement is not inappropriate. An Order that Mother’s parent be reimbursed for the costs of substitute educational services including related services.”

3. Kaimuki Middle School principal Mr. Frank Fernandes testified that he was familiar with Student and with his disability.

4. On June 5, 2003, an IEP meeting regarding Student was held. Mr. Fernandes, special education teacher Charlene Fong-Choy, counselor Clyde Ibarra, speech pathologist Ann Matsumoto, and Honolulu district specialist Karen Sakurai were present. Although Student’s father, Mr. Father, had been given notice of the IEP meeting, Mr. Father forgot to attend. Mr. Fernandes called Mr. Father and invited Mr. Father to participate by telephone. Mr. Father declined.

5. Previously, in a November 22, 2002 decision, a prior hearing officer had denied Petitioners’ request for reimbursement of tuition and costs at Assets School. The prior decision found that an offer of FAPE had been made by the DOE at Kaimuki Middle School during the 2002-2003 school year. The Fathers are appealing this decision.

6. During the June 5, 2003 telephone call with Mr. Father, Mr. Fernandes told Mr. Father that he could attend a June 9, 2003 IEP meeting. Mr. Father did not attend the June 9, 2003 IEP meeting, as he wanted to wait until the appeal was decided.

7. On June 5, 2003, Mr. Fernandes sent Petitioners a Prior Written Notice of Department Action. In this notice the DOE stated that the IEP will allow for special education classes for 6 of 6 periods each day, with individual counseling of 1 hour per week. Additionally, Student also qualified for the extended school year, SBBH (School Based Behavioral services), Individual/Group services, speech/language therapy, and transportation services at his home school, Kaimuki Middle School.

8. Petitioners, through their attorney Keith Peck, Esq., wrote an August 12, 2003 letter to Mr. Fernandes stating that they chose to retain Student at Assets School, and that they were seeking reimbursement for the related costs. Petitioners’ reasons for

staying at Assets School are mainly set out in the Request for Due Process Hearing. Petitioners stated in this letter that Mr. Father was interested in availing Student of the public school system yet failed to update the IEP.

9. The Hearings Officer finds that it was Mr. Father's failure to attend the IEP sessions which resulted in any failure to update the IEP. As testified by Mr. Fernandes, parental input was extremely important in developing such things as a transition plan, present level of academic achievement, goals and objectives, and an extended school year.

10. In response to Petitioners' letter, Mr. Fernandes wrote to Petitioners on August 20, 2003, indicating that the DOE remained willing to meet with the Fathers to work through their concerns with Student's IEP. Petitioners did not contact the DOE to update the IEP or goals and objectives.

11. The previous IEP did not mention any need for assistive technology for Student.

12. Although Kaimuki Middle School offered an extended school year to Student, the Fathers declined this offer.

13. Kaimuki Middle School offered the least restrictive environment as Student would interact with age appropriate children who were both special education and regular mothers.

14. Mr. Father testified that he had received notice of the June 5, 2003 IEP meeting, but admitted that he forgot to attend. Mr. Father also admitted that the DOE offered another meeting on June 9, 2003 which the Fathers could not attend. According to Mr. Father, Mr. Fernandes said the June 9, 2003 meeting was optional as the IEP was frozen pending the appeal. Mr. Father testified that Mr. Fernandes told him that if the Fathers did not attend the IEP meetings, the prior IEP would remain the same, except for the dates.

15. According to Mr. Father, Student has attended Assets School since June 2003 and is making progress. However, Student's test scores at Assets show that he improved in some subjects, but regressed in others.

16. Special education teacher Charlene Fong-Choy was part of Student's IEP team. The IEP team considers the present levels of academic performance, goals and

objectives, services and accommodations, and the least restrictive environment. According to Ms. Fong-Choy, it is difficult to update the IEP without parental input. Mr. Father did not want to have another IEP until the appeal was resolved.

17. According to Ms. Fong-Choy, Student needed small groups with routines in a structured setting, and was not ready for regular education classes. Ms. Fong-Choy observed Student at Assets School and found that Student's instruction at Kaimuki Middle School would be more individualized. Kaimuki Middle School was willing to take Student as a mother and could provide a FAPE.

18. Kaimuki Middle School counselor Clyde Ibarra and speech pathologist Ann Matsumoto testified that they were also a part of the IEP team. Both Mr. Ibarra and Ms. Matsumoto felt that they could help Student at Kaimuki Middle School.

III. CONCLUSIONS OF LAW

It is not disputed that Student is a mother with a disability and entitled to special education services pursuant to HAR Title 8, Chapter 56. The issue is whether the DOE provided Student with a FAPE at Kaimuki Middle School for the 2003-2004 school year.

The Hearings Officer concludes that Respondent's provided a FAPE at Kaimuki Middle School.

The IEP was not updated in terms of the present levels of academic performance, goals and objectives, assistive technology, extended school year, and other areas. This was a result of Petitioners' admitted failure to attend the IEP meetings, and Petitioners' desire to wait for the outcome of their appeal of the prior hearings officer's decision. Mr. Father forgot about the June 5, 2003 IEP meeting; declined to attend after a courtesy call; and did not attend the June 9, 2003 IEP meeting or accept the DOE's offer to discuss this case further.

As testified by numerous witnesses, parental input is an essential part of updating the IEP. The Father's failure to provide any input resulted in a substantively unchanged IEP. This can not be construed as a denial of FAPE by Respondent.

Hawaii Administrative Rules Title 8 Chapter 56 requires that Respondent make available to mothers 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 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 mother 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).

In this case, the Fathers can not claim an infringement on their right to participate in the IEP process. Clearly, the Fathers were given the opportunity to provide input regarding Student's progress and current condition. Petitioners declined to exercise this right. However, Petitioners can not now say that they were denied the opportunity to participate in the IEP process. The Hearings Officer concludes that there were no procedural violations in this case.

Substantive Denial of FAPE

Petitioners contend that there were substantive breaches of FAPE for the reasons set out in their Request for Impartial Hearing. However, Petitioners can not fail to provide input during the IEP process and then claim that the present levels of academic performance are inaccurate, and that the goals and objectives are inappropriate and not measurable. Petitioners complain that there was no discussion of assistive technology and that adaptive PE was inappropriate. Petitioners assert that the extended school year was not defined and that the type of special education and related services was not described. Yet it is Petitioners own failure to participate in the IEP process which causes these results. Therefore, the Hearings Officer concludes that there were no substantive denials of FAPE in this case.

IV. DECISION

IT IS HEREBY ORDERED THAT Petitioners' claims for relief through their September 2, 2003 Request for Impartial Hearing be denied. Petitioners claims that Student's IEP was inappropriate; that Student's private placement at Assets School is not inappropriate; and for reimbursement for the costs of substitute educational services, including related services; are denied.

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 (30) days after receipt of this decision.

DATED: Honolulu, Hawaii, November 14, 2003

RICHARD A. YOUNG
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs