

2004 FEB -5 A 11: 41

HEARINGS OFFICE



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

In the Matter of)
)
) by and through his)
Mother,)
)
) Petitioners,)
)
) vs.)
)
) DEPARTMENT OF EDUCATION,)
) STATE OF HAWAII,)
)
) Respondent.)

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FACT
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2003-120

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

The Department of Education, State of Hawaii ("Respondent" or "DOE") received a September 9, 2003 request for a due process hearing under Hawaii Administrative Rules ("HAR") Title 8, Chapter 56 from _____, by and through his mother, _____ (collectively referred to as "Petitioners"). A prehearing conference was held on October 3, 2003, with Cynthia Nakamura, Esq. representing Petitioners, and Aaron Schulaner, Esq. representing Respondent.

On October 24, 2003, subsequent to oral argument, Petitioners' Motion for Summary Judgment was denied, and Respondent's Motion for a More Definite Statement was granted. On November 3, 2003, Petitioners filed an Addendum to Petitioners' September 9, 2003 Request for Due Process Hearing.

On December 16, 2003, the hearing was commenced at the Department of Commerce and Consumer Affairs in Honolulu by the undersigned Hearings Officer. The parties were represented by their respective counsel. Mrs. _____ was also present for Petitioners; and _____ vice-principal of Jefferson Elementary School, was present for Respondent. The hearing continued from December 16, 2003 through December 19, 2003. Although Respondent had originally requested the opportunity to present rebuttal evidence at the end of Petitioners' case-in-chief, Respondent subsequently withdrew this request.

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. _____ is 9 years old (dob _____) and has been diagnosed with multiple disabilities, including progressive hearing loss, visual perception difficulties, attention deficit, and motor and sensory impairments. _____ was born prematurely at 25 weeks, at birth weighed less than 2 lbs., and has not had normal sensory development.

_____ principal neurological diagnosis is periventricular leukomalacia, a condition which inhibits his sensory pathways and affects his learning and social abilities.

2. On September 9, 2003, Petitioners filed a Request for Impartial Hearing. On November 3, 2003, an Addendum to this request was filed. Petitioners main claims are that Respondent unilaterally changed _____ placement from Lokahi-Montessori School to Jefferson Elementary School; that the individualized education program (IEP) was developed with inappropriate programs and placement and while ignoring Mrs. _____ input; that the DOE unilaterally terminated services, including transportation services and the biopsychosocial program (BPSR); and that the DOE violated procedural requirements.

3. _____ currently attends Lokahi-Montessori School (Lokahi-Montessori), a part of Loveland Academy. Lokahi-Montessori is a small, gated campus composed of two 2-story buildings, with about 30 feet of playground space between buildings. The

school has developmental tools and toys which teach students using a multi-sensory approach to learning. Lokahi-Montessori class has a total of 5 children in a small, structured setting.

4. Lokahi-Montessori has a BPSR program which includes speech therapy, cooking, art, ceramics, occupational therapy, adaptive PE, and philosophy. There are 7 other students in s BPSR class. receives BPSR at Lokahi-Montessori 5 days a week, for approximately 2 hours each day, to help socialize with his peers. Lokahi-Montessori's BPSR starts at 2:30 p.m. and continues until 6:00 p.m. daily. s social skills have improved during the time he has been attending BPSR. Currently, the entire BPSR program at Lokahi-Montessori has 27-28 students.

5. Prior to attending Lokahi-Montessori, went to a New York school with 8-10 students. In 1998, attended Ala Wai Preschool. attended kindergarten and 1st grade at Lunalilo Elementary School. The 1st grade class at Lunalilo Elementary had 21 or 22 regular education students and 7 special education students, taught by 1 teacher and an aide. did not do well at these public schools because of the large class sizes.

6. started attending Lokahi-Montessori during the 2001-2002 school year, his 2nd grade.

7. Through Prior Written Notices, the DOE refused to pay for attendance at Lokahi-Montessori, as Respondent asserted that a free appropriate public education (FAPE) could be provided at Jefferson Elementary.

8. Respondent presented evidence contending that it had provided an offer of FAPE to ; testified as a special education teacher at Jefferson Elementary, and a member of IEP team. Ms. observed at Lokahi-Montessori and met with teachers. Ms. concluded that was not academically and socially stimulated as he was not pushed toward his potential at Lokahi-Montessori. According to Ms. the goals and objectives in s IEP could be implemented at Jefferson Elementary's resource room. A multi-sensory approach to learning is used in the resource room. Currently, there are 16 students in the resource room, although this number fluctuates. Jefferson Elementary's total enrollment is about 400 students.

9. [redacted] also testified that the DOE could provide a FAPE at Jefferson Elementary. Jefferson Elementary utilizes educational assistants to assist the special education teacher, and provide one-to-one support for the students. However, Mr. [redacted] also stated that the DOE did not provide small class sizes, and that the average regular education class had 22 to 25 students.

10. Mr. [redacted] observed [redacted] at Lokahi-Montessori, but did not notice any special education methodology being used.

11. Respondent further points to the December 4, 2001 Prior Written Notice, in which Mrs. [redacted] agreed that [redacted] would be placed at Jefferson Elementary after a year (2001-2002 school year) at Lokahi-Montessori at public expense. In this notice the DOE acknowledged that [redacted] had been at Lokahi-Montessori since summer 2001. As Mr. [redacted] testified, this notice did not obligate the DOE to duplicate Lokahi-Montessori services at Jefferson Elementary.

12. However, this December 4, 2001 Prior Written Notice also stated that a transition plan would be in place prior to [redacted] placement in his home school, to transition [redacted] from Lokahi-Montessori into Jefferson Elementary. According to Mrs. [redacted] the DOE failed to properly transition [redacted] as the 2 schools did not meet to duplicate the services and environment provided at Lokahi-Montessori.

13. [redacted] transition plan involved sending textbooks used at Jefferson Elementary to Lokahi-Montessori teachers, having Jefferson Elementary teachers and staff observe Lokahi-Montessori classes, and having discussions with Lokahi-Montessori teachers.

14. Mrs. [redacted] visited Jefferson Elementary as part of the transition plan. Jefferson Elementary's campus was large, with many buildings and students. The resource room at Jefferson Elementary, where special education services are offered, contained 17 students, and the teacher appeared to be overwhelmed. Mrs. [redacted] felt that [redacted] would be lost and regress in this type of environment.

15. Subsequent to the 2001-2002 school year, the DOE allowed [redacted] to continue at Lokahi-Montessori for extended school year services, through a June 6, 2002 Prior Written Notice.

16. At April 30, 2002 and June 6, 2002 IEP meetings, the IEP team confirmed that the appropriate placement for [redacted] for the 2002-2003 school year was Jefferson Elementary.

17. [redacted] did not attend Jefferson Elementary as Mrs. [redacted] felt that the class size, resource room for special education, student population, and campus size at Jefferson Elementary were too large. According to Mrs. [redacted], [redacted] needs the small class size and campus setting that Lokahi-Montessori provided.

18. In October 4, 2002 and June 20, 2003 Prior Written Notices, the DOE again refused to pay for [redacted]'s attendance at Lokahi-Montessori as Respondent claimed that a FAPE could be provided at Jefferson Elementary. As its offer of FAPE, the DOE offered special education, occupational therapy, speech/language therapy, individual counseling, parent intervention, and transportation services. Mrs. [redacted] rejected this offer as it did not meet all [redacted] needs and did not include a proper transition plan.

19. Petitioners presented evidence that a small classroom setting was appropriate for [redacted], and that he should continue his current enrollment at Lokahi-Montessori. Dr. Robert Bart, Jr., a pediatric neurologist, stated that [redacted] should continue at Lokahi-Montessori as it is a multi-sensory, very good approach, where [redacted] is making good progress.

20. Dr. Wallace Matthews, Jr.'s May 22, 2001 and April 19, 2002 letters to the DOE stated that [redacted] needed a small classroom setting, preferably in a Montessori type school.

21. Dr. Jeffrey Okamoto's April 24, 2002 letter notes that [redacted] was making good progress in communication, social, and fine motor skills while at Lokahi-Montessori. Dr. Okamoto recommended that the transition to Jefferson Elementary include careful planning, teacher training, and an evaluation of any strategies implemented.

22. Nichole Rowles is a communication aide at Lokahi-Montessori. Lokahi-Montessori has a total of 20 students, of which 6 are special education students. Ms. Rowles testified that she works with [redacted] for approximately 90 minute sessions, 3 times a week, in the after school program. [redacted] speech and social skills have been getting progressively better.

23. Jeffrey Bock was teacher at Lokahi-Montessori for 2 years, commencing in the 2001-2002 school year. In the first year exhibited spatial problems, causing him to appear clumsy. Lokahi-Montessori provided an adaptive environment which helped adjust and increased his self-esteem and leadership abilities. Mr. Bock testified that the Montessori method involves following the child and takes into account the child's individual needs.

24. Occupational therapist Leslie Tamashiro observed and tested while she was employed at Loveland Academy. disabilities caused him to have difficulty with writing and in his manual dexterity and other movements. In 2001, Ms. Tamashiro found that exhibited deficits in vision, hearing, spatially, and with fine and gross motor skills. Although these deficits were still apparent in 2003, had improved and exhibited more appropriate social behavior, as well as decreased impulsive behavior.

25. Dr. Patricia Dukes is the administrator and director at Loveland Academy, as well as a speech language pathologist. In 2001, Dr. Dukes performed intelligence tests and speech and language tests on Justin. Dr. Dukes found that strengths were his hard working nature and his ability to compensate for his disabilities. Since attending Lokahi-Montessori, has dramatically improved his social skills with his attendance in the BPSR program. is motivated at Lokahi-Montessori and wants to learn.

26. In November 2003, Dr. Kevin Baize, O.D., tested vision in different areas and assessed that development was delayed. Dr. Baize found that had vision problems including spatial and sensory integration deficits which affected his writing and other fine and gross motor skills. Dr. Baize concluded that therapy was necessary for to develop his vision skills.

27. Deborah Gabe, an audiologist at Kapiolani Hospital, testified that she tested hearing a number of times beginning on January 17, 2000. Ms. Gabe found hearing loss in both ears, causing to have problems hearing if there was background noise. adapts by processing visual cues and by lip reading. Ms. Gabe recommended that be taught in a multi-sensory curriculum, be seated in the front of the class, and use hearing aids.

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. The issue is whether the DOE provided [redacted] with a FAPE.

Hawai'i 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 analyzing whether the DOE provided a FAPE, [redacted] unique needs must be considered.

The Hearings Officer concludes that the DOE's offer, given [redacted] needs, was not sufficient to be an offer of FAPE.

As indicated by the testimony of medical doctors, audiologist Deborah Gabe, optometrist Dr. Baize, occupational therapist Leslie Tamashiro, and teachers at both Lokahi-Montessori and Jefferson Elementary, [redacted] has many sensory problems which inhibit his learning ability.

Although the DOE is not obligated to provide the best in educational services to a student, in [redacted] case, the DOE's offer did not adequately address the many needs of this child.

While every child is unique, not every child is burdened with the same disabilities. [redacted] situation calls for a program that will address his sensory impairments in order to further his educational goals. The Montessori program offered at Lokahi-Montessori is a multi-sensory approach to learning. It provides [redacted] the type of environment in which he can derive an educational benefit by adapting to compensate for his sensory disabilities.

The DOE's offer at Jefferson Elementary appears to be a valid attempt to provide educational services for [redacted]--offering special education, speech and occupational therapy, individual and parental counseling, a primary school adjustment program (PSAP), and one-to-one adult support as needed. However, [redacted] unique needs, with his visual and auditory deficiencies, call for an environment that the DOE has not offered or adequately addressed--a small, structured environment which emphasizes a multi-sensory approach to learning. As stated by Dr. Matthews and Dr. Dukes, [redacted] needs this type of environment as his strength lies in his ability to adapt through a multi-sensory

approach. Lokahi-Montessori along with its BPSR program, with its small, structured setting, and multi-sensory approach to learning, offers such an environment.

If the DOE can structure its program to offer a similar type of situation to in the future, an offer of FAPE may be achieved.

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 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).

In this case, Petitioners can not claim an infringement on their right to participate in the IEP process. Clearly, Mrs. . . . was given the opportunity to provide input regarding . . . progress. Respondent gave Mrs. . . . this procedural right and received her input. However, the DOE is not obligated to strictly follow the wishes of the parent.

Under HAR Section 8-56-37, the IEP team shall consider the strengths of the student and the concerns of the parent for enhancing the education of the student. However, the rule does not mandate that the IEP team must follow the parent's concerns.

Therefore, the Hearings Officer denies Petitioners' claim that their procedural rights were violated as Respondent ignored Mrs. . . . nput in the IEP process.

Substantive Denial of FAPE

However, the Hearings Officer agrees with Petitioners contention that there were substantive breaches of FAPE for the reasons set out in their Request for Impartial Hearing and their Addendum. Respondent's proposed plan for placement at Jefferson

Elementary was not sufficient to meet ; individual needs, as it did not adequately address sensory deficits, and his need for learning in a small, structured environment which emphasizes a multi-sensory approach to learning. Therefore, the Hearings Officer concludes that there were substantive denials of FAPE in this case. Lokahi-Montessori is an appropriate placement for , given its small class size and environment, and its multi-sensory approach to learning. Additionally, the BPSR program continues to benefit .

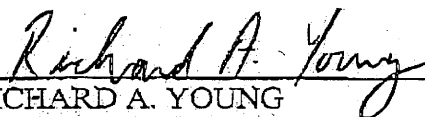
IV. DECISION

IT IS HEREBY ORDERED THAT Petitioners' claims for relief through their November 3, 2003 Addendum to Petitioners' September 9, 2003 Request for Due Process Hearing be granted. Petitioners' claims that s IEP was inappropriate; that private placement at Loveland Academy-Lokahi Montessori is not inappropriate; and for reimbursement for the costs of substitute educational services, including related services, retrospective as well as prospective reimbursement for counseling and other programs necessary for to obtain a FAPE; are granted.

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, February 5, 2004


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