



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

In the Matter of) DOE-SY0607-020
)
STUDENT, by and through his/her Parent 1) FINDINGS OF FACT,
and Parent 2,) CONCLUSIONS OF LAW
) AND DECISION
)
Petitioners,)
vs.)
)
DEPARTMENT OF EDUCATION,)
STATE OF HAWAII,)
)
Respondent.)
_____)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION**

I. INTRODUCTION

On August 3, 2006, the Department of Education, State of Hawai'i ("Respondent" or "DOE") received an August 1, 2006 request for a due process hearing under Hawai'i Administrative Rules ("HAR") Title 8, Chapter 56 from Student, by and through his/her Parent 1 and Parent 2, (collectively referred to as "Petitioners"). A prehearing conference was held on August 30, 2006, with Susan Dorsey, Esq. and Bruce Ellis representing Petitioners; and Joelle Chiu, Esq. and District Educational Specialist representing Respondent.

On October 30, 2006, Respondent filed a Motion to Dismiss Petitioners' Request for an Impartial Hearing Regarding the Issue of Specialized Reading Instruction. However, prior to the start of the hearing, the parties agreed that specialized reading instruction would not be an issue at the hearing, and Respondent withdrew its motion.

On November 6, 2006, the hearing was commenced at the Department of Commerce and Consumer Affairs in Honolulu, Hawai'i by the undersigned Hearings Officer. Petitioners were represented by Stanley Levin, Esq., Mr. Ellis, Parent 1 and Parent 2; Respondent was represented by Jerrold Yashiro, Esq. and the consultant teacher. The evidentiary portion of the hearing was further conducted and completed on November 8, 2006.

At the close of the evidentiary portion of the hearing, it was requested that the parties file written closing arguments. At Petitioners' request, the 45-day period in which the decision is due under HAR Section 8-56-77, was extended until December 29, 2006. 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 a 9 year old boy/girl who currently attends the current school's 3rd grade class. The current school is a private school with a small campus, and a student/teacher ratio of about 16 to 2. Parent 2 testified that the current school has teachers trained in developmental disabilities and provides specialized instruction for each student. The classrooms at the current school are air conditioned and carpeted. Parent 2 testified that Student enjoys being in the current school and that "he's/she's doing the best he/she ever has."

2. Student has been diagnosed with a developmental disability. Student is also a high functioning child. Student's IQ scores in a July 2004 Comprehensive Test of Nonverbal Intelligence ("CTONI") test showed a nonverbal IQ of 111, a picture IQ of 104, and a geometric IQ of 117.

3. Parent 2 described Student as a bright, caring boy/girl who desires to do what is right. Student likes structured environments, and tends to shy away in large environments.

4. During the 2004-2005 school year, Student had attended 1st grade in the prior public elementary school. The prior public elementary school is a large school with over 1,000 students, and a student/teacher ratio of about 24 to 1. According to Parent 2, Student was stressed at the prior public elementary school and exhibited tantrums at home.

5. The IISC had worked with Student for about 3 years, both prior to Student's placement at the private school and while Student was at the private school. The IISC testified that the prior public elementary school was too big for Student, leading to over-stimulation and affecting Student's ability to understand and follow procedures. According to the IISC, Student had difficulties behaviorally, socially, and academically at the prior public elementary school.

6. The prior public elementary school tried to accommodate Student's needs by providing 1:1 adult support and a modified lunch in a small room. However, according to parents and the IISC this was not successful.

7. During the 2005-2006 school year, Student attended 2nd grade at the private school. The private school is a small school of a few hundred students, with a student/teacher ratio of approximately 14 to 1. The private school only has classes for kindergarten through 2nd grade students.

8. According to Parent 2, Student did well and initiated at both the private school and the current school. Student did not exhibit the shyness he/she had shown in the prior public elementary school's large environment.

9. The IISC also testified that Student did better in all areas at the private school.

10. On March 9, 2006, parents received a letter from the home school which assigned Student to the home school for summer 2006 extended school year ("ESY"). Because ESY had not been discussed prior to this, parents requested a meeting.

11. At a May 30, 2006 individualized education program ("IEP") meeting, parents informed the IEP team that they had placed Student at the current school. Although Parent 2 testified that at the May 30, 2006 IEP meeting the IEP team agreed that the current school would be Student's summer 2006 ESY placement, no written documentation verifies this. Specifically, the May 30, 2006 meeting notes, written by the DOE, also do not verify that the DOE agreed that the current school would be Student's summer 2006 ESY placement.

12. Student graduated from the private school on June 2, 2006.

13. On June 8, 2006, the current school started its summer 2006 program. Student attended this program.

14. During a June 13, 2006 IEP meeting, the IEP team decided that Student's summer 2006 ESY placement would be at the private school. Parents did not agree to this placement as Student had already graduated from the private school and would have been the oldest child in his/her class. Student had earlier repeated the 1st grade.

15. Summer 2006 ESY at the private school was scheduled from June 12, 2006 to July 14, 2006. In a June 20, 2006 letter to parents, the DOE offered Student enrollment in the private school for summer 2006 ESY.

16. Student's IEPs called for ESY services for any school breaks of more than 5 school days.

17. According to parents, Student and his/her family were on vacation on a neighbor island for 4 days, leaving on June 2, 2006, the day the private school ended.

18. Parent 2 testified that he did not feel that parents were allowed meaningful participation at the June 13, 2006 IEP meeting. At this meeting, Parent 2 and Parent 1 testified that they complained that the present level of educational performance ("PLEPs") were not accurate and that the goals and objectives were confusing and without baseline information. Parent 2 claimed that the DOE did not address parents' concerns.

19. At the June 13, 2006 IEP meeting, the IISC presented the IEP team with a list of the advantages of placing Student at the current school and the disadvantages of placing Student at the home school. The DOE responded by trying to modify the home school environment with the same type of modifications previously made at the prior public elementary school. According to the IISC, these modifications made Student feel different from other students, causing Student to feel anxious and leading to withdrawal and a loss of self-esteem.

20. At the June 13, 2006 IEP meeting, the consultant teacher informed the IEP team that he/she had spoken to the director of the current school and was informed that the current school teachers did not attend IEP meetings and that the current school does not implement IEPs.

21. The July 19, 2006 IEP meeting notes list 13 parental concerns and the DOE's response to these concerns. Among the parental concerns was a request for a small class size for Student. The DOE responded that the general education classroom

would be capped at 28 students, and that with the teacher and 2 part-time teachers, this puts the student/teacher ratio at 14 to 1.

22. Through the July 19, 2006 IEP, the DOE offered Student special education, speech language therapy, occupational therapy and a variety of supplemental aides and services, including IISC services.

23. Through the July 19, 2006 IEP, the DOE offered Student placement at the home school. At the IEP meeting, parents complained that the home school campus and the class size were too large. Special Education Teacher testified that the home school has about 830 students. Although Parent 2 admitted that the home school campus was nice, he also complained that the campus was noisy. The DOE offered to cap the class size at 28 students. The DOE also offered Student modifications similar to what he/she had had at the prior public elementary school. This included a “lunch bunch” group that would help Student with his/her social skills.

24. According to the IISC, Student’s needs have stayed the same between the 2005-2006 school year and the present.

25. The IISC testified that the home school was not appropriate for Student as it has a large number of students and would cause Student anxiety. According to the IISC, to meet Student’s individual needs it is essential that Student have a small classroom and campus. The IISC further testified that a classroom at the home school with 28 students would not be appropriate for Student. However, the IISC admitted that she had not visited the home school.

26. The DOE conducted evaluations of Student in October 2005. No new evaluations were done prior to the July 19, 2006 offer of placement at the home school.

27. The consultant teacher testified as an expert in developmental disabilities. The consultant teacher opined that the home school would be an appropriate placement for Student, and that with the accommodations the DOE was offering, Student would be successful at the home school.

28. The consultant teacher noted that through a February 15, 2006 prior written notice parents had rescinded their consent for the DOE to administer an emotional behavioral assessment.

29. The consultant teacher also noted that the home school classroom where it proposed placement for Student was air conditioned.

30. General Education Teacher testified that Student's proposed placement at the home school would be a general education classroom which currently had 23 other students and 2 adults. The classroom has other students with similar disabilities as Student. A "lunch bunch" program is offered, which allows students to socialize. Special Education Teacher further described the "lunch bunch" as a mix of about 5 to 10 special education and general education students in a situation where they played games and practiced social skills.

31. Although General Education Teacher opined that Student would fit in at the home school, neither General Education Teacher nor Special Education Teacher had ever met or observed Student.

32. The speech-language pathologist testified that she had worked with Student since August 2005. Although Student had made progress with his/her social skills, he/she still needed to work at his/her conversational skills.

33. Special Education Teacher attended Student's IEP meetings and testified that the PLEPs and goals and objectives were determined with parental input. Special Education Teacher testified that parents were more concerned with placement than the PLEPs or goals and objectives.

34. Parents submitted receipts for their payments at the current school, including a \$1,250.00 receipt for summer 2006 ESY, and a document indicating that the costs for the 2006-2007 school year was \$14,800.00.

III. ISSUES RAISED IN THE REQUEST FOR HEARING

Petitioners' Request for Impartial Hearing, alleges procedural and substantive violations of the Individuals with Disabilities Education Act ("IDEA") and Hawai'i Administrative Rules, Title 8 Chapter 53, including the following allegations:

- that the DOE failed to conduct an evaluation when the proposed change in placement from the private school to the home school was made, and did not consider the potential psychological harm to Student;
- that the home school was not a proper placement for Student for both summer 2006 ESY and the 2006-2007 school year;
- that the DOE failed to fully implement the 2005-2006 IEP;

- that the IEP for the 2006-2007 school year did not provide baseline information as to the PLEPs, and that the goals and objectives were not measurable; and
- that the DOE did not allow for meaningful input from parents regarding Student's summer 2006 ESY and 2006-2007 school year placements.

Petitioners request reimbursement for Student's placement and related expenses at the current school for the 2006-2007 school year, reimbursement for summer 2006 ESY and related expenses at the current school, and compensatory education.

IV. CONCLUSIONS OF LAW

The main issues in this case are whether the IEPs provided Student with an offer of a free appropriate public education ("FAPE") during both the 2006-2007 school year and during summer 2006 ESY.

It is not disputed that Student has a disability which qualifies him/her for special education services pursuant to HAR Title 8, Chapter 56.

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 IEPs provided a FAPE, Student's unique needs must be considered.

Student is a 9 year old boy/girl who has an IDEA disability. Student's scores on his/her prior non-verbal intelligence tests show that he/she is in the average to high average range. As shown through Student's past placements at the prior public elementary school and the private school, Student is shy and withdrawn in large environments, leading to anxiety and behavioral problems at home. Student also has a history of doing well in the small school environments that the private school and the current school offer. Even with accommodations, such as the "lunch bunch" program and modifications, Student did not do well in a large school environment.

The 2006-2007 school year

In this case, as evidenced by the number of IEP meetings, the modifications and supports offered, and the offer to perform the behavioral assessment, the DOE appears to have made efforts in an attempt to provide Student a FAPE. To address Student's need

for a small class size, the DOE also offered to cap Student's class size at the home school at 28 students to 2 or 3 adult teachers and aides. The DOE's July 19, 2006 meeting notes state that the general education classroom would be capped at 28 students, and that with the teacher and 2 part time teachers, this puts the student/teacher ratio at 14 to 1.

But the ratio of 28 to 2 can not be reduced to 14 to 1, as the total number of students in the classroom remains at 28. Twenty-eight students is a large class. At this time, this is not appropriate to meet Student's needs for a small classroom, a small campus, and a low student/teacher ratio.

The people who know Student best are his/her parents and the IISC. The IISC has taught Student for 3 years and is the most knowledgeable teacher of Student's needs. The IISC clearly testified that at this time, Student needs a small classroom, small student/teacher ratio on a small campus. The DOE's offer, through the July 19, 2006 IEP, even with its accommodations, is too large an environment for Student at this time.

The Hearings Officer notes that the teachers at the home school testified well, and appears to be very capable teachers. As stated in Respondent's closing brief, the learning environment at the home school appears to be conducive to the learning process. Additionally, as the consultant teacher also points out, with his/her abilities, it is likely that Student will eventually have to transition out to a larger setting. Based upon his/her test scores, and Parent 2's and the IISC's testimonies, it appears that Student is an intelligent, motivated learner with unlimited potential. But for now, based upon Student's current needs, the large campus, classroom, and student body that the home school offers is inappropriate.

The Hearings Officer concludes that the proposed placement at the home school for the 2006-2007 school year was not appropriate for Student, given his/her needs.

Summer 2006 ESY

The DOE's offer to place Student at the private school for summer 2006 ESY was not appropriate. The private school only went up to the 2nd grade. Student had already graduated from the private school in June 2006. It is also noted that Student was already the oldest child in his/her class, having repeated the 1st grade. To keep Student at the private school for summer 2006 ESY, with no age appropriate peers would be inappropriate.

Although the DOE argues that ESY is for recoupment and retention purposes, it is noted that the summer 2006 ESY was not timely offered. The DOE's June 20, 2006 letter offers summer 2006 ESY at the private school well after the start of ESY on June 12, 2006. Although Student and his/her family may have been on vacation for a brief period after the start of ESY, the DOE's offer is sent 18 days after the regular school year ended. This is contrary to Student's IEP which calls for ESY services after breaks of more than 5 school days.

ALLEGATIONS OF PROCEDURAL VIOLATIONS

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 IDEA and (2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Rowley*, at 206-207.

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).

Petitioners assert that the DOE failed to perform a re-evaluation when suggesting a significant change in placement and argues a violation of HAR Section 8-53-11. Petitioners also assert that the DOE committed procedural violations by failing to allow meaningful parental participation at the IEP meetings.

The Hearings Officer concludes that the proposed move from the current school to the home school would be a significant change in placement. However, the DOE had already performed assessments on Student in 2005, and the IISC testified Student's needs had not changed since the last assessments were performed. Further, the consultant teacher pointed out that parents had rescinded consent for a behavioral assessment in February 2006.

Under HAR Section 8-53-11, the DOE is required to perform a re-evaluation if conditions warrant a re-evaluation. Because Student's needs had not changed, and

parents had rescinded consent to perform an assessment, the Hearings Officer concludes that no new evaluations were required.

Petitioners also allege that parental input was ignored at the IEP meetings. On the contrary, the evidence showed that at the July 19, 2006 IEP meeting, the DOE listed and addressed 13 parental concerns in the meeting notes. Although the DOE's responses to parental concerns may not have been satisfactory to parents, this does not mean that parental concerns were ignored. The Hearings Officer concludes that parents were not precluded from meaningful participation during the IEP meetings.

Petitioners also assert that the PLEPs did not contain baseline information, and that the goals and objectives were not measurable. To the contrary, the Hearings Officer finds that the PLEPs did establish a baseline, and the goals and objectives were measurable. As Respondent points out in its closing brief, Special Education Teacher testified that parents did not raise concerns about the PLEPs and goals and objectives at the IEP meetings, they were mainly concerned with the placement.

In this case, there appears to be compliance with the procedural requirements of the IDEA. Procedurally, the Hearings Officer does not find the DOE in violation of the IDEA, and denies Petitioners' claim that their procedural rights were violated.

SUBSTANTIVE VIOLATIONS

However, the Hearings Officer agrees with Petitioners contentions that there were substantive breaches of FAPE. The June 13, 2006 IEP calling for placement at the private school for summer 2006 ESY, and the July 19, 2006 IEP proposing placement at the home school for the 2006-2007 school year were not appropriate to meet Student's individual needs. The testimonies of Parent 2 and the IISC indicate that at this time, Student needs a small school setting with a small class size and student/teacher ratio in order to receive meaningful educational gains. The current school offers this type of setting; placement in the large, noisy home school does not.

Petitioners' further request compensatory education because the DOE failed to fully implement the 2005-2006 IEP. Based upon a lack of evidence on the issue, this request is denied.

Finally, based upon the testimonies of Parent 2 and Parent 1 that Student is performing well at the current school and that the current school appropriately meets

Student's needs, the Hearings Officer concludes that the current school is an appropriate placement for Student.

V. DECISION

IT IS HEREBY ORDERED THAT Petitioners' claims for relief through their August 1, 2006 request for impartial hearing be granted as follows:

- The July 19, 2006 IEP did not provide Student a FAPE as the proposed placement at the home school for the 2006-2007 school year was inappropriate for Student;
- The June 13, 2006 IEP did not provide Student a FAPE as the proposed placement at the private school for summer 2006 ESY was inappropriate for Student;
- Placement at the current school for the 2006-2007 school year is appropriate for Student;
- Petitioners are awarded reimbursement for the costs of summer 2006 ESY and related expenses at the current school, and reimbursement for the costs of placement and related expenses at the current school for the 2006-2007 school year;
- Petitioners' claim for compensatory education for the 2005-2006 school year is denied; and
- Petitioners shall be deemed the prevailing party in this matter.

RIGHT TO APPEAL

The parties have the right to appeal this decision to a court of competent jurisdiction within thirty (30) days after receipt of this decision.

DATED: Honolulu, Hawai'i, December 21, 2006.

/S/RICHARD A. YOUNG

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