



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of)	DOE-2003-122
)	
STUDENT, by and through his MOTHER,)	
)	FINDINGS OF FACT,
Petitioners,)	CONCLUSIONS OF LAW
vs.)	AND DECISION
)	
DEPARTMENT OF EDUCATION,)	
STATE OF HAWAII,)	
)	
Respondent.)	
_____)	

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

I. INTRODUCTION

On September 12, 2003, the Department of Education, State of Hawaii (“Respondent” or “DOE”) received a request for impartial hearing under Hawaii Administrative Rules (“HAR”) Title 8, Chapter 56 from Student, by and through his Mother (collectively referred to as “Petitioners”). After numerous requests for continuances and hearings on pre-trial motions, a final prehearing conference was held on August 13, 2004. Petitioners were represented by Ramona Hussey, Esq.; and Respondent was represented by Lono Beamer, Esq.

On November 8, 2004, the hearing was commenced at the Honoka’a Courthouse, in Honoka’a, Hawaii, by the undersigned Hearings Officer. Petitioners were represented by Ms. Hussey; and Respondent was represented by Mr. Beamer and the District Education Specialist. The evidentiary portion of the hearing was further conducted and completed on November 9 and 10, 2004.

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 31, 2004. 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 fourteen years old and has been enrolled at the current school since the start of the 2004-2005 school year.

2. Student qualifies for special education benefits due to his behavioral and mental health problems.

3. In March or April 2003, Student's individualized educational program (IEP) team placed Student at the initial CBI placement due to his many absences from the home school and his behavioral and mental health problems. The initial CBI placement is a community based instructional (CBI) program which provides day treatment for students with behavioral problems. The DOE's CBI programs provide intensive services for students with disabilities, falling just one level short of extremely intensive residential treatment programs. The goal of the CBI program is to transition students back to the public school.

4. On July 1, 2003, the Proposed Placement was awarded the State of Hawaii, DOE's contract for CBI providers in West Hawaii, through the bidding process.

5. On July 2, 2003, the Complex Area Superintendent sent letters to parents of affected students, including Mother, indicating that a change in CBI providers would occur and informing them of the transition process.

6. On July 17, 2003, the DOE held an informational meeting at the community public library for parents of the initial CBI placement students. DOE staff, as well as the Proposed Placement's Director and his staff were at the meeting to answer questions and provide parents with information. Transition from the initial CBI placement to the proposed program was discussed. Mother did not attend this meeting.

7. On August 29, 2003, the DOE sent Petitioners a meeting announcement for the September 12, 2003 IEP meeting. According to the announcement, the Student's educational placement and an IEP review would be discussed at this meeting.

8. On September 12, 2003, Student's IEP team held an IEP meeting and discussed Student's program and transition to the Proposed Placement. The IEP team reviewed Student's present levels of educational performance (PLEPs) and determined that Student still required CBI services. Mother was present at this meeting and agreed with the change from the initial CBI placement to the Proposed Placement.

9. Also present at this meeting was the Proposed Placement Director, who discussed the program at the Proposed Placement. The initial CBI placement staff were invited to the September 12, 2003 IEP meeting, but did not attend.

10. Student's September 12, 2003 IEP provides for special education, transportation, and counseling services. However, no specific therapist or methodology is listed.

11. After Mother left the September 12, 2003 meeting, Mother contacted the initial CBI placement personnel. After speaking with the initial CBI placement personnel, Mother filed a request for due process hearing, requesting that Student remain at the initial CBI placement with existing and related services and therapists until he is ready to transition back to public school. Mother made this request on September 12, 2003, the same day she had agreed to the change in providers.

12. Mother did not appear or testify at the hearing. It is unclear why Mother filed the request for hearing on the same day she had agreed to the change in providers at the IEP meeting. Although Petitioners argue that Mother was confused about the change in location, this was not established at the hearing. Mother's affidavit stating in part that "I never understood nothing at that IEP Meeting" is given little evidentiary value.

13. In Petitioners' September 12, 2003 request, Mother cites a need for "consistency in Student's therapeutic education milieu", written in a language style very different from that in her affidavit. As testified by the District Educational Specialist, this request was made after Mother met with the initial CBI placement personnel. The initial CBI placement had lost its contract to provide CBI services, and the CBI contract had been awarded to the

Proposed Placement. The initial CBI placement and the Proposed Placement were business competitors.

14. Although the DOE had contracted to provide CBI services at the Proposed Placement, and Mother had agreed to the change in location to the Proposed Placement, in a September 18, 2003 letter the District Educational Specialist agreed to allow Student to stay put at the initial CBI placement. According to the District Educational Specialist and the Sped teacher, Student's services at the initial CBI placement were not terminated or interrupted. Student remained at the initial CBI placement for the entire 2003-2004 school year.

15. Although the District Educational Specialist, the Proposed Placement Director and Clinical Director testified that Student did not register at the Proposed Placement, Petitioners submitted a referral form and Mother's consent to release information to the Proposed Placement. Both the referral form and Mother's consent were dated on September 12, 2003, the date of the IEP meeting.

16. The initial CBI placement program ended in September 2004.

17. After the Proposed Placement had been awarded the DOE's CBI contract and had begun providing services, it was discovered that its original location was not properly zoned. Further, the Proposed Placement's original location was not ADA compliant. In March 2004, the Proposed Placement moved to its new location and has been operating at this location since then.

18. Proposed Placement Director and Clinical Director testified regarding the program offered at the Proposed Placement. The Proposed Placement provides both educational and mental health services on a structured, consistent basis, using a cognitive/behavioral model which rewards good behavior and imposes consequences for inappropriate behavior. Although the strategies employed by the Proposed Placement and the initial CBI placement differed, both were CBI programs designed to provide day treatment for students with behavioral or emotional disabilities.

19. Both the Proposed Placement Director and the Clinical Director testified that therapists can be interchangeable, depending on the needs of the student. The Proposed Placement Director was qualified as an expert in psychology. In his opinion, the therapeutic bond between a student and therapist is helpful, but not necessary. Further, any therapy

should not create an emotional dependence for the student. According to the Clinical Director, students need to develop independence, rather than a dependency on the therapist.

20. Student has a history of many absences at the home school. At one point, the DOE filed an educational neglect case against Mother because of these absences.

21. The IEP team decided to return Student to the current placement at the start of the 2004-2005 school year. Student is doing well in his current placement. Student is a member of the current placement's football team.

22. According to Sped Teacher, Student's poor attendance and social problems, which included harassing other students and inappropriate touching, led him to be placed at the initial CBI placement. Subsequent to the September 12, 2003 IEP meeting and Mother's filing for due process hearing, Sped Teacher testified that Mother said she had made a mistake filing for due process.

23. Sped Teacher also testified that the IEP team did not think that Student needed to go through any transition process from the initial CBI placement to the Proposed Placement. Student had not gone through a transition into the initial CBI placement or into his current placement.

24. The IEP team considered the treating psychologist's evaluations at the September 12, 2003 IEP meeting.

25. Student's treating psychologist testified as an expert in the area of clinical psychology. Treating psychologist was a consultant to the initial CBI placement and started as Student's therapist in April 2003. Treating psychologist saw Student on the Thursdays he was present at the initial CBI placement and consulted with the initial CBI placement staff regarding his observations.

26. Treating psychologist testified that he was not invited to the September 12, 2003 IEP meeting. However, it is noted that the DOE did invite the initial CBI placement to attend this IEP meeting. Further, according to the August 29, 2003 meeting notice, Mother was welcomed to invite any person knowledgeable about Student. Treating psychologist testified that he would have recommended that Student remain at the initial CBI placement as Student needed stability, had made gains there, and the initial CBI placement was an appropriate placement.

27. Mental health therapist testified that at the September 12, 2003 IEP meeting, Mother agreed to the Proposed Placement and signed the necessary consent form to enroll Student at the Proposed Placement. Mother appeared to understand what was being discussed at the September 12, 2003 IEP meeting.

28. Petitioners' Request for Impartial Hearing requests that Student be allowed to stay at the initial CBI placement until he is ready to return to public school. The District Educational Specialist testified that the request appears to have been written by the initial CBI placement personnel, not Mother.

III. CONCLUSIONS OF LAW

The issue in this case is whether the DOE's proposed change in location of its CBI program from the initial CBI placement to the Proposed Placement was a denial of a Free Appropriate Public Education (FAPE). Petitioners allege that the proposed move was not a mere change in location, as it would have amounted to a complete change in programs, teachers, and therapist. Petitioners argue that such changes for Student, with his serious mental health issues, would amount to a change in program, not merely a change in location. Petitioners assert that Student's unique needs required that he be allowed to continue at the initial CBI placement where he had made progress during the few months he was there before the proposed change in location occurred.

Petitioners' characterize the DOE's decision to change service providers to be one of administrative convenience. This characterization is too harsh. The Proposed Placement was awarded the CBI contract as it prevailed in the bidding process. Further, whether the DOE proposed the change in location for administrative convenience or otherwise, is not the real issue. The question is whether the Proposed Placement's program offered Student a FAPE.

Respondent asserts that the initial CBI placement and the Proposed Placement are on the same level of educational service providers. Both are CBI programs offering day treatment programs for Students with emotional disabilities. In Respondent's closing argument, Respondent points out that Student never actually moved to the Proposed Placement, and remained at the initial CBI placement with continued services. Because of this, Respondent argues there was no denial of FAPE.

However, just because Student did not actually attend the Proposed Placement, does not mean that the proposed change was irrelevant. As Petitioners argue, the only reason Student did not actually attend the Proposed Placement, was their decision to file for a due process hearing.

In determining the appropriateness of the Proposed Placement, Student's needs must be considered. However, as mentioned above, neither Mother nor Student appeared at the hearing, so there was no live testimony establishing Student's unique needs through them. Student's treating psychologist testified, but besides testifying about Student's need for stability and that the initial CBI placement was an appropriate program where Student had made some gains, added little else regarding Student's unique needs. Even Mother's affidavit adds little in regards to Student's specific needs.

Both parties agree that Student is eligible for benefits as he has emotional and behavioral disabilities. Although Petitioners assert that the initial CBI placement was the proper placement, the evidence shows that the Proposed Placement would also be appropriate for this Student. Petitioners assert that Student has developed a therapeutic bond with his therapist at the initial CBI placement. However, as testified by the Proposed Placement's Director and Clinical Director, any therapeutic bond between the therapist and Student should not be one of dependence. Rather, one of the goals of therapy is for the Student to develop his independence.

The Hearings Officer concludes that based upon the evidence presented at the hearing, Respondent's decision to change CBI providers was a change in location, not a change in program. The Proposed Placement was an appropriate placement for Student, and Student was not denied a FAPE.

Petitioners also argue that there were procedural violations as the primary therapist and the initial CBI placement teachers were not at the September 12, 2003 IEP meeting. However, as testified by the District Educational Specialist and as evidenced in the August 29, 2003 meeting announcement, the initial CBI placement staff was invited to attend the September 12, 2003 IEP meeting, but chose not to attend. Further, Mother was welcomed to invite any person knowledgeable about Student.

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

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 initial CBI placement staff was invited to the September 12, 2003 IEP meeting, but chose not to attend. The DOE's change of service providers did not result in a loss of educational opportunity. Student's IEP was not changed. The only change was a change in the location where services would be given.

This is not a case where the DOE is denying special education benefits to a child with a qualified disability. The parties agree that Student is entitled to benefits under the IDEA. The issue is whether the change in CBI providers amounted to a change in program for this Student.

Based upon the weight of the evidence, Respondent's proposed change from the initial CBI placement to the Proposed Placement was a change in location, not a change in Student's program. The Hearings Officer concludes that this proposed change was not a denial of FAPE.


IV. DECISION

IT IS HEREBY ORDERED THAT Petitioners' claims for relief through their September 12, 2003 Request for Impartial Hearing be dismissed.

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, December 30, 2004.


RICHARD A. YOUNG
Administrative Hearings Officer
Dept. of Commerce & Consumer Affairs