

2005 FEB -2 P 2: 07

HEARINGS OFFICE



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

In the Matter of	)	DOE-2003-126
	)	
STUDENT, by and through her 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 15, 2003, the Department of Education, State of Hawaii ("Respondent" or "DOE") received a request for impartial hearing under Hawaii's 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 rescheduling of prehearing and hearing dates, a final prehearing conference was held on August 13, 2004. Petitioners were represented by Ramona Hussey, Esq.; and Respondent was represented by Laura Kim, Esq.

On October 29, 2004, argument was heard on Respondent's Motion to Dismiss, or in the Alternative, for Summary Judgment; and on November 1, 2004, said motion was denied.

On November 16, 2004, the hearing was commenced at the Honoka'a Courthouse, in Honoka'a, Hawai'i, by the undersigned Hearings Officer. Petitioners were represented by Ms. Hussey; and Respondent was represented by Ms. Kim and the district educational specialist. The evidentiary portion of the hearing was further conducted and completed on November 17, 2004 at the Honoka'a Courthouse, and on November 18, 2004 at Our Lady of Lourdes Church.

At the close of the evidentiary portion of the hearing, it was requested that the parties file written closing arguments. Although Respondent originally requested filing closing and rebuttal briefs, in a December 21, 2004 letter from Respondent, the parties agreed to file simultaneous briefs. At Petitioners' request, the 45-day period in which the decision is due under HAR Section 8-56-77, was extended until February 2, 2005. 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 17 years old and has been enrolled at the home school since September 20, 2004.

2. Student qualifies for special education benefits. Student had been previously diagnosed with emotional problems. Student has had suicidal thoughts and had previously purposefully cut herself. Student has had a poor home environment and a history of multiple home placements.

3. Since September 23, 2004, Student has been under the care of the Department of Human Services. Mother no longer has custody of Student.

4. During the 2002-2003 school year, Student was enrolled at the initial community based instructional (CBI) placement. The initial CBI placement is a 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.

5. On July 1, 2003, the proposed placement was awarded the State of Hawai'i, DOE's contract for CBI providers in West Hawai'i, through the bidding process.

6. 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.

7. On July 17, 2003, the DOE held a meeting regarding the change in CBI providers and the transition process. Petitioners did not attend this meeting.

8. On August 6, 2003, Student's IEP team held an IEP meeting to discuss 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. According to the district educational specialist and principal, Mother and her boyfriend were present at this meeting and voiced their opposition to the change from the initial CBI placement to the proposed placement. Mother requested that Student remain at the initial CBI placement as Student had been through 9 home placements. Mother also wanted Student to maintain her primary therapist. Mother did not appear to be open to any change in CBI providers.

9. No one from the initial CBI placement was at the August 6, 2003 meeting.

10. At the August 6, 2003 meeting, the proposed placement director provided Petitioners information about the proposed placement.

11. The proposed placement works with students with conflicts in a structured environment, using a cognitive/behavioral model which rewards appropriate behavior and imposes consequences for inappropriate behavior.

12. According to the proposed placement director, the approach used by the initial CBI placement was different than that of the proposed placement. In documents, the initial CBI placement describes itself as using a naturalistic, holistic approach to re-educate Student. The proposed placement and the initial CBI placement were not interchangeable programs.

13. The proposed placement director testified that the proposed placement would have been able to implement Student's IEP. Further, the proposed placement would work with Student's primary therapist in transitioning Student to the proposed

placement. However, the proposed placement director did not know if he would have allowed the primary therapist to continue as Student's therapist.

14. According to the proposed placement director, Mother was hesitant and resistant to what the proposed program had to offer, even before the proposed placement director detailed the program.

15. Mother and her boyfriend were opposed to the proposed placement. According to the district educational specialist and the proposed placement director, Mother and her boyfriend were not willing to listen to any transition plan. According to the proposed placement director, Student tried to calm Mother and tried to listen to what the proposed placement had to offer. During the meeting, Mother swore at the IEP team and abruptly left, ending the meeting.

16. The vice-principal testified that at the August 6, 2003 meeting, Student acted with more maturity than Mother. Mother and her boyfriend swore, yelled and made gestures at the IEP team. If Mother had not left the meeting, the IEP team would have discussed transition.

17. The district educational specialist testified that the initial CBI placement and the proposed placement were substantially identical as both were CBI programs. According to the district educational specialist, Student's IEP could be implemented at any CBI program. The district educational specialist admitted that Student was successful at the initial CBI placement.

18. The sped teacher testified that Student was strong academically, performing at or above her grade level. Sped teacher testified that no prior written notice resulted from the August 6, 2003 meeting, as the IEP team considered the proposed change to the proposed placement a change in location, not a change in program. However, in retrospect, sped teacher now testified that a prior written notice should have been issued.

19. Sped teacher also pointed out that the initial CBI placement had been mistakenly written into the December 11, 2002 prior written notice as the service provider. However, it is noted that the applicable IEP does not specify the initial CBI placement as the service provider.

20. Sped teacher's May 15, 2003 ISPED note states that the team strongly recommended that no transitions occur now as Student had gone through many changes

in the past 12 months. Further, it was important that Student's therapeutic team remain stable.

21. Sped teacher also testified that Student had successfully transitioned from the initial CBI placement to the home school. Student is currently achieving A's and one B in her classes at the home school.

22. Vice-principal testified that Student's primary therapist was opposed to Student's transition to the proposed placement. According to the Student's primary therapist's September 2004 progress summary, Student had made substantial progress in all areas at the initial CBI placement. Earlier, in a November 4, 2003 note, Student's primary therapist had indicated that Student's attendance at the initial CBI placement was the only stable and predictable aspect of her life, and that it would be psychologically detrimental to change placement.

23. Proposed placement's mental health therapist testified that Mother and boyfriend both opposed the proposed change in CBI providers, and swore at the proposed change. Mother left the August 6, 2003 meeting before the proposed placement's director had finished his presentation and before the team had an opportunity to discuss transition.

24. Student's treating psychologist did not testify in this case. However, documents show that Student's treating psychologist was opposed to Student's transition to the proposed placement. In an October 25, 2003 letter, treating psychologist stated he was concerned about imposing change upon Student. While at the initial CBI placement, treating psychologist had treated Student's emotional needs.

25. Parent consultant testified that Student was upset about changing service providers to the proposed placement. Mother was concerned as this proposed change in service providers occurred at the same time Student had changed foster homes. Parent consultant confirmed that Student's primary therapist and psychologist recommended that Student stay at the initial placement. Parent consultant felt that the DOE did not act fairly by not having her and Student's primary therapist at IEP meetings. According to the parent consultant, the initial CBI placement was a great school where Student had excelled.

26. The initial CBI placement closed on September 30, 2004.

27. Student did not attend the proposed placement, but instead is enrolled at the home school. Student is doing well and is currently on track to graduate in June 2005.

28. Student continues to be treated by her primary therapist.

29. Petitioner's Request for Impartial Hearing requests that Student be allowed to stay at the initial CBI placement.

### **III. CONCLUSIONS OF LAW**

The issue in this case is whether the DOE's proposed change in Student's 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 amounted to a complete change in programs, teachers, and therapist. Petitioners argue that such changes for Student, with her serious emotional issues, would amount to a change in program. Petitioners assert that Student's unique needs required that she be allowed to continue at the initial CBI placement.

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. The proposed placement director testified that the cognitive/behavioral model used in the proposed placement could have been used to implement Student's IEP.

Although the proposed placement may have been an appropriate placement for Student, the issues regarding whether the DOE procedurally and substantively followed the IDEA requirements in proposing Student's move to the proposed placement still remain.

The proposed placement was awarded the CBI contract over the initial CBI placement as it had prevailed in the bidding process. In order to determine whether the DOE's proposed change in service providers amounted to a change in Student's program or was merely a change in location, the Student's unique needs must be considered.

Student has a history of emotional problems, involving episodes of cutting herself and suicidal ideations. Student's home environment is poor, and Student has undergone

9 home placements. Although Student's difficulties at home are not caused by the DOE, these past problems must be taken into account when considering Student's unique needs.

In July 2003, the CBI contract was awarded to the proposed placement, and the DOE proposed that Student be moved. Considering Student's emotional disabilities, the opinions of her primary therapist and treating psychologist opposing the proposed move, the fact that Student had just changed foster homes, and the fact that the initial and proposed placements were philosophically very different, the Hearings Officer concludes that at the time the DOE proposed the move to the proposed placement, such a change in placement would have amounted to a change in program for this Student. Student's primary therapist would have changed, as well as the environment in which she received mental health services. The initial CBI placement and the proposed placement practiced very different teaching styles, a major adjustment for this Student with her emotional disabilities.

Petitioners argue that Student did not actually move to the proposed placement. However, the only reason Student continued at the initial placement was Petitioners' filing of the request for due process hearing, which invoked stay put at the initial CBI placement.

Additionally, the DOE also committed procedural violations by failing to have the treating psychologist and primary therapist at the August 6, 2003 IEP meeting. Even the proposed placement's mental health therapist testified that the primary therapist was essential to an IEP meeting for this Student. Because this Student's disability is emotional, it was essential that the treating psychologist and/or the primary therapist be present when a change of providers is at issue.

Mother acted inappropriately in swearing and leaving the August 6, 2003 IEP meeting; and the DOE can not be faulted for not having a transition plan. However, this does not excuse the DOE's procedural violations.

The IDEA imposes the following duties on Respondent:

The department shall ensure that the IEP team for each student with a disability includes ...at the discretion of the parent or the department, other individuals who have knowledge or special expertise regarding the student. HAR Section 8-56-34(a)(6).

§ 8-56-11 Procedures for determining eligibility and placement.

(a) In interpreting evaluation data for the purpose of determining if a student is a student with a disability in accordance with sections 8-56-15 to 8-56-29, and the educational needs of the student, the department shall:

- (1) Draw upon information from a variety of sources, including, as appropriate, aptitude and achievement tests, parent input, teacher recommendation, physical condition, social or cultural background, and adaptive behavior; and
- (2) Ensure that information obtained from all of these sources is documented and carefully considered.

Because of this Student's emotional disability, and because Mother was opposed to the placement change, the DOE should have consulted student's primary therapist and treating psychologist regarding the proposed change in CBI providers.

The Hearings Officer concludes that, based upon the evidence presented at the hearing, Respondent's decision to change Student's CBI provider was a change in programs for Student; was made without following the substantive and procedural protections of the IDEA; and was, therefore, a denial of FAPE. Petitioners are deemed the prevailing party and are therefore entitled to reasonable attorney's fees and costs.

However, the current placement at the home school appears to have been successful, and Student appears to be on track to graduate in June 2005. Student is doing well academically, and her future appears bright. Not only does Student possess intellectual skills, but she also showed maturity and courage at the August 6, 2003 IEP meeting. When the DOE offered the proposed placement, Student actively listened to the DOE's offer, despite Mother's conduct.

**IV. DECISION**

IT IS HEREBY ORDERED THAT Petitioners be deemed the prevailing party. However, as the initial placement is no longer in existence, and Student appears to be doing well at the current placement at the home school, Petitioners' claims for relief

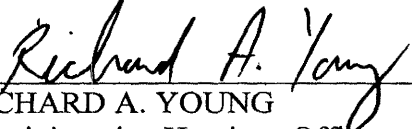


through their September 15, 2003 Request for Impartial Hearing, and Closing Brief are granted in regards to reasonable attorneys fees and costs only.

**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 2, 2005.

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