



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-2003-134 |
| |) | |
| Parents, by and through his |) | FINDINGS OF FACT, |
| Parents, |) | CONCLUSIONS OF LAW |
| |) | AND DECISION |
| |) | |
| 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" or "DOE") received a September 23, 2003 request for a due process hearing under Hawaii Administrative Rules ("HAR") Title 8, Chapter 56 from _____, by and through his parents, _____ s (collectively referred to as "Petitioners"). A prehearing conference was held on October 13, 2003, with Jerel Fonseca, Esq. representing Petitioners, and Gary Kam, Esq. representing Respondent.

On November 14, 2003, the hearing was commenced at the Department of Commerce and Consumer Affairs in Honolulu by the undersigned Hearings Officer. Mrs. _____ was present for Petitioners and was represented by Jerel Fonseca, Esq. Respondent was represented by Gary Kam, Esq. Lea Albert, complex area

superintendent for the Windward District in the Kahuku and Castle complexes, was also present.

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 a 17-year old student (dob [REDACTED]) who had been diagnosed with psychosis and who has a history of substance abuse, self-harm and other issues. had been previously declared eligible to receive special education benefits.

2. On September 23, 2003, Petitioners filed a Request for Impartial Hearing, claiming needed to be in a residential treatment facility where he can receive psychiatric treatment, medication monitoring, counseling and educational services. Petitioners are seeking payment/reimbursement of the costs of placement and related expenses. Petitioners' proposed resolution is compensatory education as deemed necessary by the Individualized Education Plan ("IEP") team.

3. Ms. Albert testified that she had served on a previous IEP team that had found eligible for benefits under the Individuals with Disabilities Education Act ("IDEA").

4. Ms. Albert further testified that Mr. and Mrs. currently live in Los Angeles, California, and that both parents were employed by the Los Angeles school system.

5. had been found 504 eligible in 2001. Since then, (has had numerous stays at various school or residential facilities commencing on the following dates:

FACILITY/LOCATION

DATES

Halau Ku Mana, a charter school

2001-2002

CEDU, California

8/30/02

| | |
|---|----------|
| U.C. Irvine Medical Center, California | 9/13/02 |
| Progress House | 10/11/02 |
| Red Rock Canyon, Utah | 11/4/02 |
| UCLA Medical Center, California | 11/27/02 |
| Devereux Residential Facility, California | 12/23/02 |

was placed and then moved from these various facilities as they could not handle all of the various problems presented, including psychosis, self-harm and sexually inappropriate behavior.

6. While staying at these various facilities, I showed little interest in engaging in academic activity and did little, if any, course work.

7. At Devereux, I exhibited some sleep problems. I would get up late and appear groggy and unfocused in class, behavior which adversely affected his school work. Mrs. requested that Devereux do a sleep study. According to Mrs. Devereux agreed to do the sleep study, but did not do it.

8. While at Devereux, I had 3 incidents in which he inflicted self-harm, including twice cutting himself.

9. According to Mrs. I gained 70 pounds while at Devereux. Mrs. claimed that Devereux was not complying with the IEP. Mrs. could not accept this and raised questions. I was discharged from Devereux as Mrs. was deemed problematic by the treatment team.

10. Devereux claimed that Mrs. I did not work with the treatment team. Further, I had a propensity to abuse illegal substances.

11. In Devereux's February 27, 2003 Clinical Discharge Summary, I was diagnosed with psychosis, NOS; polysubstance abuse; and had problems with education, social environment and primary support. The Discharge Summary indicated that I had a history of mental illness, depression, self-harming, and substance abuse.

12. Devereux recommended that I be placed in a residential level of care due to his significant symptoms of mental illness, and his propensity to abuse illicit substances.

13. On February 7, 2003, Respondent wrote a prior written notice stating that because of _____'s significant mental health needs, a residential treatment facility is the least restrictive environment to implement the IEP program.

14. In March or April 2003, _____ was placed in Queen's residential facility in Hawaii to receive treatment for his emotional problems and to receive educational benefits. The Queen's residential facility was for acute patients, not set up for those needing rehabilitative treatment. Mrs. _____ was hesitant about the placement at Queen's as acute facilities had not been able to successfully treat _____.

15. _____ did little academic activity at Queen's and did not do well. _____'s report card showed poor attendance and lack of motivation. It is noted that _____ refused to wake up for group sessions, elicited poor motivation, and slept much of the time. In the 2 months _____ was at Queen's, he gained an additional 20 pounds.

16. Dr. Donna Ching, a Queen's psychiatrist, stated that nothing else could be done for _____ due to his lack of motivation. Dr. Ching stated that _____ needed rehabilitative treatment. In her May 2, 2003 Master Treatment Plan, Dr. Ching noted that _____'s emotional problems prevented full benefit from a Free Appropriate Public Education ("FAPE"). Truancy, low motivation, and lack of interest in school caused achievement to be below ability.

17. Dr. Ching noted that _____ was not making much progress because he had not engaged in the treatment plan.

18. At a June 3, 2003 IEP meeting it was concluded that a residential setting was counter-productive to _____'s social and academic needs.

19. A June 19, 2003 prior written notice considered a Cognitive/Academic Assessment which found that _____ was in the average range of intellectual ability.

20. Ms. Albert testified that in her lay opinion, _____ was a bright student who manipulates through certain behavior. However, _____'s medication could also cause his lack of motivation.

21. Ms. Albert testified that Mrs. _____ did not respond to an August 14, 2003 e-mail, asking Mrs. J _____ if she was in Hawaii to schedule an IEP meeting.

22. Mrs. I _____ testified that she resides here and there. Mrs. _____ brought

to Los Angeles on June 26, 2003, and has been there since then. Mrs. intends to return to Hawaii when receives services.

23. Mrs. had lived in Hawaii for 14 years and was employed as a school counselor for for the past 9 years. Currently, Mrs. is on family leave in her attempt to obtain services for Mrs. as been on family leave since August 2002. Mrs. started working for the State of California on September 29, 2003.

24. Mr. moved to Los Angeles in August 2002. Mr. employed by the Los Angeles School District as a special education teacher.

25. Mrs. testified that every doctor who saw stated that should be in a residential treatment facility as exhibited self-harm, substance abuse, and psychosis.

26. According to DOE records, is no longer a student at Castle High School as he did not register for classes for the 2003-2004 school year. School started at the end of August 2003, and the DOE's official count was due on September 13, 2003.

27. Mrs. is seeking placement for at Intermountain Treatment Facility ("Intermountain"). As of October 21, 2003, had been accepted into the Chemical Dependency Dual Diagnosis Psychiatric Treatment Program. However, Petitioners' insurance company has not agreed to pay for this placement.

28. is currently living in California. He is on various medications and is being treated by Dr. Reiss. Mrs. currently maintains a room rental in a house in Hawaii and has many of her personal belongings in Hawaii. However, Mrs. is presently living in Los Angeles.

29. is not registered as a student in the Los Angeles County School district.

III. CONCLUSIONS OF LAW

It is not disputed that is a student with a disability and entitled to special education services pursuant to HAR Title 8, Chapter 56. The first issue is whether the

DOE still has jurisdiction over this case for the 2003 – 2004 calendar year. If so, the next question is whether the DOE provided [redacted] with a FAPE.

The Hearings Officer concludes that although neither [redacted] nor his parents have resided in Hawaii for the 2003-2004 school year, it is Respondent's failure to successfully place [redacted] in a residential treatment facility which caused Petitioners to move to the mainland to care for [redacted].

Petitioners argue that the only reason that they left Hawaii and secured jobs in California was that [redacted] was there, and it was the only place he could receive his services/treatment. Mr. and Mrs. [redacted] found jobs as they needed the money to survive. Petitioners argue that this was a temporary relocation, that Mr. and Mrs. [redacted] would have maintained their jobs in Hawaii as well as their household, but for the fact that the DOE could not properly place [redacted] in a residential program.

Respondent argues that in order to qualify for benefits under the law, the student must reside in the State. HAR Section 8-56-2. As neither [redacted] nor his parents, currently reside in the State of Hawaii, Respondent argues that Petitioners are not entitled to benefits.

Further, Respondent points to the testimony of the witnesses which shows that [redacted] was not registered as a student in the State of Hawaii for the 2003- 2004 school year. Mrs. [redacted] had accepted employment in California on September 29, 2003. Mr. [redacted] was also working for the California school district.

However, the evidence also shows that [redacted] was never successfully placed in a residential program by the DOE. Although it is acknowledged that the failure to successfully place [redacted] is due in large part to [redacted] numerous mental problems and lack of motivation, it is Respondent's duty to provide a FAPE which enables the student to achieve some educational benefit. Since [redacted] has not reached the point where an educational benefit has been achieved, Respondent's duty continues. Petitioners only moved to California to be with [redacted]. Respondent still has the responsibility to provide a FAPE which provides some educational benefit. Because Respondent has not done this, the Hearings Officer concludes that Petitioners were denied a FAPE.

The next step is to determine whether the proposed placement at Intermountain is appropriate.

Respondent argues that placement at Intermountain would be no different from the numerous other placements the DOE had previously offered and had failed. Although this argument appears to have merit, it is important to consider the underlying reasons for the prior failed placements. The DOE must address _____ problems which qualify him as a student with a disability. Although these problems are numerous, and include sleep disorder, psychosis, and self-harm, they must be addressed in conjunction with the offered placement in order to achieve the goal of having _____ receive some educational benefit.

HAR Title 8 Chapter 56 requires that the Respondent make available to students 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 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, the DOE's failure to deal with _____ underlying problems resulted in the loss of educational opportunity. As seen by the number of prior placements, it is apparent that the DOE has made great efforts in attempting to provide _____ a FAPE. Unfortunately, these efforts have not resulted in _____ receiving an educational benefit, in large part because _____ does not appear to be trying. The DOE must address this lack of effort as well, as it is a symptom of _____ underlying

problems. Although this is an additional burden that the DOE must bear, it appears to be necessary if [redacted] is to have any chance of deriving an educational benefit.

The Hearings Officer concludes that the failure to address [redacted] underlying problems was a procedural violation in this case.

Substantive Denial of FAPE

There were also substantive breaches of FAPE as the IEP was not reasonably calculated to enable the student to receive educational benefits. In order for [redacted] to receive an educational benefit, his underlying problems must first be addressed. As this was not done, Petitioners were denied substantive benefits. Therefore, the Hearings Officer concludes that there was a substantive denial of FAPE in this case.


IV. DECISION

IT IS HEREBY ORDERED THAT Petitioners' claims for relief through their September 23, 2003 Request for Impartial Hearing be granted. Petitioners' claim for a residential treatment facility where [redacted] can receive psychiatric treatment, medication monitoring, counseling and educational services is granted. Petitioners are awarded payment/reimbursement of the costs of placement and related expenses.

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 22, 2003


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