



OFFICE OF DISPUTE RESOLUTION
DEPARTMENT OF THE ATTORNEY GENERAL
STATE OF HAWAI'I

In the Matter of STUDENT, by and through
PARENT,¹

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAI'I,

Respondents.

DOE-SY2223-018

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: November 18, 2022

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On October 5, 2022, the Department of Education, State of Hawai'i (hereinafter "Respondents" or "Hawai'i DOE") received a Request for an IDEA Impartial Due Process Hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act, from Student, by and through Parent (hereinafter "Petitioners"). Respondents submitted a response to Petitioners' Complaint

on October 17, 2022. Respondents also submitted a Notice of Insufficiency on October 20, 2022, alleging that Petitioners' Complaint did not comply with the requirements under Hawai'i Administrative Rules (hereinafter "H.A.R.") Section 8-60-62. A Determination of Insufficiency was issued on October 20, 2022, wherein Petitioners' Complaint was deemed to be insufficient, and leave was granted for Petitioners to file an amended complaint. Petitioners' Amended Complaint was filed on October 21, 2022. Respondents filed DOE's Response to Petitioners' Amended Complaint on November 14, 2022.

A status conference was held on November 7, 2022, with this Hearings Officer, Eric A. Seitz, Esq. (hereinafter "Mr. Seitz"), on behalf of Petitioners, and District Educational Specialist (hereinafter "DES") and Gregg M. Ushiroda, Esq. (hereinafter "Mr. Ushiroda") on behalf of Respondents. At the status conference, the parties discussed the urgency of Petitioners' situation and requested that an expedited Due Process Hearing (hereinafter "Hearing") be set. The parties discussed a tentative expedited hearing date of November 18, 2022.

A prehearing conference was held on November 17, 2022, before this Hearings Officer with Mr. Seitz representing Petitioners, and Mr. Ushiroda representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter "Hearing") was scheduled for November 18, 2022 at 1:00 p.m. At the prehearing conference, the parties waived their right to prohibit the introduction of witnesses or evidence disclosed later than five (5) business days before the Hearing, pursuant to H.A.R. 8-60-66(a)(3).

Due to the expedited nature of the Hearing, the parties stipulated to the Hearing being conducted via video conference. An Order Regarding Video Conference Due Process Hearing was issued on November 17, 2022, which set forth the parameters for the video conference hearing. These parameters included: the instructions to participate via the Zoom video

conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

The Hearing commenced on November 18, 2022, using the Zoom video conferencing platform. Each attendee to the Hearing was sent a link through email to access the Hearing by the Office of Dispute Resolution. Present in the video conference Hearing were this Hearings Officer; Parent and Mr. Seitz, on behalf of Petitioners; and DES and Mr. Ushiroda on behalf of Respondents, as well as the assigned court reporter.

At the Hearing, Petitioners called Parent as their witness, submitted three (3) exhibits, and rested. Respondents called DES as their witness, submitted three (3) exhibits, and rested. Petitioners did not present any rebuttal evidence. Both sides stipulated to the admission of the exhibits presented by the opposing party. The parties agreed to present oral closing arguments to summarize their case, which were presented at the conclusion of the Hearing. A List of Exhibits Received at Due Process Hearing was issued on November 23, 2022.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the undersigned Hearings Officer renders the following findings of fact, conclusions of law and decision.

II. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act (hereinafter “IDEA”), as amended in 2004, codified at 20 U.S.C. § 1400, *et seq.*; the federal regulations implementing the IDEA, 34 C.F.R. § 300.1, *et seq.*; and the Hawai‘i Administrative Rules § 8-60-1, *et seq.*

III. ISSUES PRESENTED

Petitioners assert the following issue and proposed remedy in the Amended Complaint to be addressed at the Hearing:

Issue - Student's July 21, 2022 individualized education program (hereinafter "IEP-07/21/2022") calls for Student to receive special education and related services in a therapeutic residential treatment facility setting. Due to Student being removed from and/or not placed in such a facility by the State of Hawai'i Department of Health, Student has not been receiving the special education and related services under the IEP-07/21/2022.

Proposed Remedy - Placement of Student in a therapeutic residential treatment facility and/or compensatory education or other equitable relief as available.

IV. FINDINGS OF FACT

Student's background

1. Student is [REDACTED] years old and is eligible for IDEA services under the category of [REDACTED] and has areas of concern in reading comprehension, written expression, math computations, and behavior. Petitioners Exhibit 1, page 002 (hereinafter referenced as "P-Ex.1, p.002").
2. Student was adopted by Parents when Student was [REDACTED] years old. When Student was adopted, Student was noted to be [REDACTED]. [REDACTED]. Testimony of Parent, Transcript of Proceedings, page 11, line 21, through page 12, line 5 (hereinafter referenced as "Tr.11:21-12:5").
3. Student was first made eligible for special education and related services when Student was in the [REDACTED] grade. Student was referred for evaluation due to Student not doing well in school, acting out in school and at home, being aggressive, and ingesting non-food items. Testimony of Parent, Tr.12:6-18.
4. Student has had [REDACTED], including [REDACTED],

- [REDACTED]
- [REDACTED] (hereinafter “[REDACTED]”), [REDACTED]
- [REDACTED]. Testimony of Parent, Tr.12:24-13:8; *see also* P-Ex.2, p.19-20; P-Ex.3, p.22-28.
5. When Student was approximately [REDACTED] years old, Student was hospitalized for mental health concerns due to Student being aggressive and making threats to kill Parent. Student was taken to and admitted into Hospital for treatment and later released to Mental Health Facility (hereinafter “MH Facility”) for further residential mental health treatment. Testimony of Parent, Tr.13:9-19.
 6. Due to Student’s severe mental health concerns, some of which required Student to be hospitalized in Hospital or in MH Facility, the State of Hawai‘i Department of Health Child/Adolescent Mental Health Division (hereinafter “CAMHD”) became involved in providing mental health services for Student. Testimony of DES, Tr.34:7-25, 37:14-39:8.
 7. Student was placed in two (2) residential therapeutic treatment facilities on the mainland when Student was approximately [REDACTED] years old until around January 2020. Testimony of Parent, Tr.13:20-14:19.
 8. In November and December 2019, a series of IEP meetings was held to determine a suitable placement for Student. Representatives from CAMHD were present at these IEP meetings. Testimony of Parent, Tr.14:9-16.
 9. In March 2020, the COVID-19 global pandemic affected Hawai‘i and most parts of

² This term refers to the condition in which a patient swallows or inserts foreign objects into one or more body orifice. Testimony of Parent, Tr.13:2-4.

- the mainland United States, which caused many facilities to close or refuse to accept new patients. Testimony of DES, Tr.42:20-43:6.
10. In January 2020, Student was brought back to Hawai‘i by CAMHD due to not being able to find a suitable facility that would accept Student. Student was placed in a halfway house but eloped and was later found by the Honolulu Police Department (hereinafter “HPD”) in a tent and doing drugs. Testimony of Parent, Tr.14:17-15:6.
 11. Upon HPD’s involvement, Student was admitted into Hospital again for approximately six (6) to eight (8) months. Testimony of Parent, Tr.15:7-15.
 12. CAMHD was able to find a placement for Student in the State of [REDACTED] at a facility that treated [REDACTED]. The [REDACTED] facility is the only facility in the United States that treats [REDACTED]. Testimony of Parent, Tr.15:16-16:1, 22:4-13.
 13. Student stayed at the [REDACTED] facility for eighteen (18) months before Student eloped. Student was alleged to have broken into houses after Student eloped and at one point was found in possession of a handgun. Testimony of Parent, Tr.16:2-11.
 14. CAMHD was able to place Student in an acute care facility in [REDACTED] after Student’s discharge from the [REDACTED] facility. Student was at the [REDACTED] facility for approximately four (4) months but engaged in extreme aggression and self-harm and often was taken from the [REDACTED] facility to the area hospitals for acute care/hospitalization. Testimony of Parent, Tr.17:10-18:4; P-Ex.3, p.22-28.
 15. The most extreme behaviors by Student at the [REDACTED] facilities have required multiple staff member intervention, near constant supervision and monitoring, police intervention, medication, and the use of physical restraints on Student. Student has been placed in rooms without any objects in the room to prevent Student from self-

harm but has even managed to assault a staff member by breaking off part of a padded room panel. Student's self-harm behaviors have required serious medical interventions. P-Ex.3, p.22-28.

16. Since Student's discharge from the [REDACTED] facility, Student has been transferred between hospitals in [REDACTED] and has not received special education or related services from the Hawai'i DOE. Testimony of Parent, Tr.18:5-19:6, 20:2-5, 22:14-25.

The Hawai'i DOE's attempts to provide services

17. When Student was placed into the [REDACTED] facility through Student's discharge in February 2022, the Hawai'i DOE arranged for Student to receive special education and related services at the [REDACTED] facility. Testimony of Parent, Tr.22:14-25; Testimony of DES, Tr.35:9-16.
18. After Student's discharge in February 2022, the Hawai'i DOE made attempts to contact the hospitals and facilities in [REDACTED] where Student was being treated to see if arrangements could be made to provide Student with special education and related services. Testimony of Parent, Tr.23:1-25:17; Testimony of DES, Tr.35:17-37:13.
19. The [REDACTED] local educational agencies refused to provide educational services to Student unless Parents changed Student's place of residency to the State of [REDACTED]. Testimony of Parent, Tr.24:8-23; Testimony of DES, Tr.35:22-36:5.
20. The Hawai'i DOE attempted to contact private schools and tutors to arrange for Student to receive educational services while in the acute care facilities, but the acute care facilities could not provide the personnel or equipment necessary for Student to receive services due to Student's aggressive and self-harming behavior. Testimony of DES, Tr.36:6-37:13.

21. Due to the severity of Student's mental health needs, CAMHD makes the determination about what facility would be a suitable placement based on Student's mental health needs. Testimony of DES, Tr.38:24-39:8.
22. Since Student's discharge from the [REDACTED] facility in February 2022, CAMHD and the [REDACTED] hospital where Student is currently being treated have contacted over two hundred (200) therapeutic residential treatment facilities to see if they could provide Student with the treatment and services Student needs. They have not been successful in finding such a placement. Testimony of DES, Tr.39:19-41:14; R-Ex.1; R-Ex.2.
23. The State of Hawai'i does not have a therapeutic residential treatment facility that is suitable to address Student's needs. Testimony of Parent, Tr.19:4-6; *see also*, R-Ex.1; R-Ex.2.
24. Student's least restrictive environment, or educational placement, in the IEP-7/21/2022 is described as follows: "[Student] will not participate with nondisabled students in a general education class, extracurricular and other non-academic activities on a Residential Therapeutic Facility." P-Ex.1, p.7.

V. CONCLUSIONS OF LAW

IDEA framework

The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91, 102 S.Ct. 3034, 3037-3043 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F.Supp.2d 89, 98 (D. D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)). A free appropriate public education (hereinafter

“FAPE”) includes both special education and related services. H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education. *Id.* To provide a FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.” *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

The burden of proof in a request for IDEA impartial due process proceeding falls upon the party making the request. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537 (2005); *see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 820 (9th Cir. 2007). The standard of proof in such cases requires the requesting party to prove the allegations by a preponderance of the evidence. H.A.R. §8-60-66(a)(2)(B). The burden of proof in this case rests upon the Petitioners to demonstrate by a preponderance of the evidence that 1) the Hawai’i DOE is responsible for providing Student’s placement pursuant to the IEP-07/21/2022, and/or 2) the Hawai’i DOE failed to provide Student with the educational services listed in Student’s IEP-07/21/2022.

A. The Hawai’i DOE is not responsible for providing placement for Student’s medically necessary treatment

While the IDEA requires school districts to provide special education and related services, including but not limited to, developmental, corrective, and other supportive services, such as psychological services, physical and occupational therapy, recreation, and social work services, the IDEA does not require school districts to address all a student’s medical concerns.

Ashland School Dist. v. Parents of Student E.H., 587 F.3d 1175, 1185 (9th Cir. 2009); 34 C.F.R. §300.104. The Ninth Circuit Court of Appeals has analyzed a case with similar facts in *Clovis Unified School Dist. v. California Office of Administrative Hearings*, 903 F.2d 635, 641 (9th Cir. 1990). In *Clovis*, the student had severe mental health concerns that prompted a stay in an acute psychiatric hospital. The Court reviewed the facts and determined that the school district, who had determined that the best placement for the student to receive her education was in a residential treatment facility, was not responsible for payment for the student's stay at the acute psychiatric hospital. The Court's analysis focused on determining whether the placement was primarily necessary for educational purposes or whether the placement was a response to medical, social, or emotional problems that is necessary quite apart from the learning process. *Id.* at 643. Similar to the student in *Clovis*, Student was first placed in a residential therapeutic treatment facility based on extreme behaviors of aggression and violence at home. FOF 5-6. CAMHD involved itself in Student's treatment due to the clear dominance that Student's mental health issues had over Student's education. Student's behaviors of self-harm and aggression increased in severity and frequency over the years and Student had been discharged from multiple residential therapeutic treatment facilities due to Student's behaviors. FOF 4, 10, 13, 14. Based on the evidence in the record, Student requires multiple medications and nearly constant monitoring to reign in Student's behaviors for the safety of Student and others. FOF 15. Like the student in *Clovis*, Student's behavior renders Student "not only unable to benefit from education, but, indeed, generally uncontrollable." *Id.* at 645. The services being provided to manage Student's behaviors in the various facilities at which Student has been and continues to be treated clearly indicate that Student's treatment at the facility focused upon treating an underlying medical crisis, rather than being a related service required for Student's education.

B. The Hawai'i DOE made diligent attempts to provide Student with educational and related services pursuant to Student's IEP-07/21/2022

Questions of implementations of a student's educational program are procedural and nature and requires a determination on whether a school district's failure to implement the program was a material failure. *Van Duyn ex rel. Van Duyn v. Baker School Dist.* 5J, 502 F.3d 811, 823 (9th Cir. 2007), *see also L.J. by N.N.J. v. School Board of Broward County*, 927 F.3d 1203, 1211 (11th Cir. 2019) (holding that the standard for the Eleventh Circuit for implementation failure cases is a determination of whether "a school has failed to implement substantial or significant portions of a child's IEP."); *Houston Independent School Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (holding that a party challenging the implementation of an IEP must demonstrate that "the school board or other authorities failed to implement substantial or significant portions of the IEP."). Procedural violations do not necessarily constitute a denial of FAPE. *Amanda J.*, 267 F.3d at 892. If procedural violations are found, a further inquiry must be made to determine whether the violations: 1) resulted in a loss of educational opportunity for Student; 2) significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or 3) caused Student a deprivation of educational benefits. *Id.*

Based on the record, the nature and severity of Student's mental health needs are not simply an educational matter, but a medical necessity. *See FOF 15*. While the Hawai'i DOE is responsible for providing Student with educational and related services even during the periods when Student is being treated at an acute care facility, the record demonstrates that it has made every attempt to do so. *FOF 18-20*. DES testified that the DOE has worked with the numerous therapeutic facilities in which Student had been placed to ensure that Student received educational services. The DOE also attempted to work with the acute care facilities to provide

educational services to Student while Student was hospitalized, but for various reasons beyond the DOE's control, those services were not provided.

In this case, Student's current mental health issues have prevented Student from being stabilized long enough to receive educational services. While it is undisputed that the Hawai'i DOE has not been providing Student with educational and related services since Student's discharge from the [REDACTED] facility, Petitioners have not proven that this failure to provide services resulted in a loss of educational opportunity. Based on the reports from the medical professionals submitted in this case, it is unclear whether Student is able to benefit from any kind of educational services before being medically stabilized. This Hearings Officer cannot conclude that the failure of the Hawai'i DOE to provide special education and related services to Student while Student is being treated for severe medical and mental health conditions is a denial of FAPE under the IDEA.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not proven the allegation contained in the Amended Complaint. Petitioners' request for the Hawai'i DOE to place Student in a therapeutic residential treatment facility is respectfully denied as the Hawai'i DOE is not responsible for the treatment of Student's medical needs. This Hearings Officer also denies Petitioners' request to order the Hawai'i DOE to create a suitable program for Student or to order CAMHD to create such a program.

RIGHT TO APPEAL

The decision issued by this Hearings Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearings Officer shall have 30 days from the date of the decision of the hearings officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a State court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2) and §8-60-70(b).

DATED: Honolulu, Hawai'i, December 2, 2022.

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