



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

In the Matter of

STUDENT, by and through Parent 1,

Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII, and KATHRYN
MATAYOSHI, superintendent of the Hawaii
Public Schools,

Respondents.

DOE-SY1617-005

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION

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I. INTRODUCTION

On August 5, 2016, the Department of Education, State of Hawai`i and Kathryn Matayoshi, Superintendent of the Hawaii Public Schools (“Respondents” or “DOE”) received a request for a due process hearing (“Request”) under Hawai`i Administrative Rules (“HAR”) Title 8, Chapter 60 from Student, by and through Parent 1, (collectively referred to as “Petitioners”).¹

A pre-hearing conference was held on September 6, 2016, before Hearings Officer Rowena A. Somerville, with Keith H.S. Peck, Esq. representing Petitioners; and Gary S. Suganuma, Esq. representing Respondents. The due process hearing (“Hearing”) was scheduled for October 4 and 5, 2016.

On October 4, 2016 the Hearing was commenced by the undersigned Hearings Officer. Petitioners were represented by Mr. Peck and Parent 1 was present. Respondent

¹ The Request is dated July 30, 2016. The facsimile date stamp shows the Request was sent to the DOE at 5:24 p.m. on August 4, 2016, after business hours; therefore, the DOE did not receive the Request until August 5, 2016.

was represented by Mr. Sukanuma. DOE District Educational Specialist (“DES”) was present on behalf of the Respondents.

Respondents requested the 45-day period in which the decision is due under HAR Section 8-60-69 be extended from October 20, 2016 to December 3, 2016. The extension was granted on October 20, 2016.

On November 17, 2016, the undersigned Hearings Officer conducted a telephone status conference with the parties. The parties requested an extension of the Closing Briefs to December 5, 2017. Mr. Sukanuma requested an extension of the 45-day period from December 4, 2016 to January 17, 2017. The extension was granted on November 23, 2016.

On December 5, 2016, the parties requested another extension of the Closing Briefs to December 12, 2016. Mr. Peck requested an extension of the 45-day period from January 18, 2017 to March 3, 2017. The extension was granted on December 6, 2016.

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. ISSUES PRESENTED

In their August 5, 2016 Request, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act (“IDEA”). Specifically, Petitioners allege that the DOE denied Student a free appropriate public education (“FAPE”) based upon the July 21, 2016 Individualized Education Program (“IEP”) meeting. Petitioners raise the following issues:

- A. The DOE failed to include a key person in the IEP development process;
- B. Student’s speech therapy was reduced without sufficient basis;
- C. The behavioral support plan (“BSP”) is insufficient, and the amount of _____ was reduced without consultation;
- D. Student’s placement was pre-determined;
- E. Student’s needs for a reduced class size was not discussed or addressed.
- F. The DOE failed to discuss Student’s transition plan; and
- G. The extended school year (“ESY”) program was developed improperly;
 - 1. The DOE did not discuss the ESY program;
 - 2. The ESY program does not address Student’s social skills needs;

3. The ESY program is not in the least restrictive environment (“LRE”);
4. The ESY program is not sufficiently individualized; and
5. The DOE only used the regression/recoupment criteria.

Petitioners request the following relief:

- A. Respondent to fund and/or reimburse Student’s private educational and related services;
- B. Student’s private services are appropriate for purposes of reimbursement and as Student’s “current educational placement” for “stay put” purposes;
- C. Direct payment for any sum incurred for educational and related expenses provided to Student; and
- D. Compensatory Education.

III. FINDINGS OF FACT

1. Student was born on _____. Pet. Exh. 1 at 001.
2. Student is eligible for special education under Category. Pet. Exh. 1 at 002.
3. In January 2015, Student stopped attending Private Facility 1. Parent 1 testified that Student was ready for a more advanced program. Parent 1 thought that Student had been used as a “crutch” for a more disabled child, and Student began to resent the program and not want to attend school. TR 13:21-14:11.
4. Student was home-schooled after Student left Private Facility 1. Student did not have occupational therapy (“OT”) at that time. TR 14:14-15-15:7.
5. On February 12, 2015, the Home School held an IEP meeting. The IEP team determined that Student would receive special education services for Reading, Writing, and Math in a small group setting. Specialized instruction would be provided in 20 minute increments. Student would be with Student’s peers in the general education setting for all other extra-curricular and non-academic activities. Student would be provided with a “safe spot” and breaks, as needed, as part of Student’s regulation plan. Student received counseling, OT, and Speech/Language Therapy (“SLT”). The IEP also included 17 hours per month of Teacher Consultation. Pet. Exh. 1 022, 038 – 040.
6. The Prior Written Notice (“PWN”) dated February 21, 2015 stated that Parent 2 had requested that Student be placed in a general education setting with no more than eight general education students. This request was rejected because Student’s goals

and objectives could be addressed through specialized instruction in a small group setting as well as in the general education setting with individual supports. Pet. Exh. 1 at 045.

7. A transition plan was to be developed by the IEP team to ease Student's transition from Student's current placement at Private Facility 1 to the Home School. *Ibid.*

8. The Other Options Considered section in the PWN stated, "Parent requested that (Student) be placed in a general education setting with no more than 8 general education students." However, the Other Relevant Factors section stated, "[t]he team considered the harmful effects of a variety of placement options along the least restrictive environment continuum. Although the team agreed that (Student) requires a combination of instruction in the special education and general education setting. A transition plan will be developed by the team to ease (Student's) transition from current placement to (the home school)." Resp. Exh. 7 at 178, *see* Decision page 9 at ¶¶ 60, 61.

9. On March 2, 2015, the DOE received Petitioners' Request for Due Process Hearing in DOE-SY1415-047. The Request alleged that the February 12, 2015 IEP denied Student a FAPE for the following reasons: 1) Parent input regarding ESY with non-disabled peers was not discussed; 2) the IEP team determined the ESY program outside of the IEP meeting; 3) the DOE failed to make sufficient efforts to include input from Private Facility 1; 4) the ESY statement was not sufficiently defined; and, 5) the DOE pre-determined Student's placement and did no LRE analysis regarding a reduced class size for inclusion. Resp. Exh. 7 at 171.

10. The hearing in DOE-SY1415-047 was held on May 6 through 7, 2015. Parent 1 testified that Parent 1's primary concern was to have Student exposed to typical peers. Specifically, Parent 1 testified that Parent 1 wanted neuro-typical peers to interact with Student at all times, including during ESY. Parent 1 wanted eight or nine typical peers to be with Student, and Parent 1 did not want Student to be in SPED classes. Resp. Exh. 7 at 169 – 194; *see* Decision page 6, ¶35.

11. On June 26, 2015, the Hearings Officer rendered a Decision in DOE SY1415-047. The Hearings Officer concluded that Petitioners did not prove that the February 12, 2015 IEP failed to offer Student a FAPE. "Specifically, Petitioners have not shown that the [IEP] fails to offer Student a program and placement through which Student can achieve meaningful educational gains. Further, the evidence has not shown that the DOE did not have sufficient information to develop and appropriate IEP. Rather,

it was Parent 1 who cancelled the agreed upon January 30, 2015 IEP meeting date during which private placement personnel were to provide input. Additionally, Petitioners have not shown that the ESY and other services offered were not appropriate; that parental participation was not allowed in the development of the [IEP]; or that the DOE did not consider placement in the LRE. Finally, Petitioners have not shown that Student's private program was an appropriate private placement." Petitioners' claims for relief were dismissed. Resp. Exh. 7 at 193.

12. Petitioners appealed the Hearings Officer's decision to the U.S. District Court, CV 15-00268 DKW/BMK. The parties reached a Compromise and Settlement Agreement on or about May 24, 2016. The parties agreed to reimburse Plaintiff for privately contracted services for Student incurred after January 2, 2015, in an amount up to \$7,500 and \$10,000 in attorney's fees. Resp. Exh. 7 at 195 – 199.

13. On March 29, 2016, the Home School's Student Services Coordinator ("SSC") sent a letter to Parent 1 to schedule an IEP meeting and observation dates. SSC requested any new relevant information regarding Student's educational progress, the SSC asked Parent 1 to inform SSC of Student's private service providers so that they could request Student's consent to obtain information from them and invite them to the IEP meeting. Resp. Exh. 5 at 058-059.

14. The private Speech Language Pathologist ("SLP") began working with Student on April 20, 2016. Private SLP works with Student for one hour per week at the public library. Private SLP spent the first three sessions assessing Student using standardized assessments. In Student's first session, the private SLP completed the initial assessment which consisted of an articulation/speech clarity assessment, a language assessment, and other informal non-standardized assessments surrounding Student's emotional language, problem solving, interior of mind, and language concepts. The private SLP determined Student's areas of need, and Private SLP structured goals to work on in their ongoing therapy sessions. Private SLP based Student's goals on the results of the assessments. The private SLP provided Student's written goals to the SSC. Resp. Exh. 3 at 046; TR 95:11-96:12.

15. The private SLP noted Student's language needs as: 1) verb +ing at sentence level; 2) pronoun confusion; 3) place objects into appropriate categories; 4) understanding/answering various "wh" questions; 5) use of complete/age appropriate sentence structure; 6) shared attention tasks; and 7) maintaining a topic for multiple

conversational turns, respond appropriately to conversation starters. Private SLP also noted Student's speech needs as: 1) /th/ in the initial and medial position of words; and 2) /r/ distortion in all positions. Resp. Exh. 6 at 166; TR 97:7-23.

16. The private SLP testified that Student's Private Provider 2 attends Student's therapy sessions 90% of the time. The Private Provider 2 is an active participant and takes notes for activities and ways to carry over Student's "targets" outside of the session. TR 98:1-11.

17. On April 27, 2016, the SSC sent another letter to Parent 1 to schedule observation dates in order to gather current information. Resp. Exh. 5 at 061.

18. On May 8, 2016, the SSC received a letter apologizing for Parent 1's lack of contact. Parent 1 stated Parent 1 had been "out of town quite a bit." Parent 1 wrote that Parent 1 would consult with Parent 1's "educational team" to determine a time for the IEP meeting. Resp. Exh. 5 at 063.

19. On May 26, 2016, the SSC sent Parent 1 a third letter requesting IEP meeting and observation dates. Resp. Exh. 5 at 065.

20. On June 9, 2016, Parent 1 left the SSC a voicemail indicating that the observation dates offered in the May 26, 2016 letter would not work, because Student would be attending a camp. Parent 1 stated that Parent 1 would get back to SSC with better dates and times. Resp. Exh. 5 at 069.

21. On June 22, 2016, the SSC received a letter from Parent 1 stating that Parent 1 told SSC on June 9, 2016, via voicemail that Wednesdays could work for an observation date at the public library. Parent 1 stated that the District Teacher 1 "would not be an acceptable observer." Resp. Exh. 5 at 070.

22. The District Teacher 1 testified as an expert in the fields of special education, _____, and educational programming. TR 134:18-25.

23. On July 6, 2016, the SSC sent Parent 1 a fourth letter requesting IEP meeting and observation dates. Parent 1 confirmed the observation date and asked who would be completing the observation. Resp. Exh. 5 at 072 - 74.

24. On July 8, 2016 the Principal left Parent 1 a voicemail that the observation date was confirmed for July 13, 2016, and the observers would include the DOE Psychologist, the District Teacher 1, and the SSC. Resp. Exh. 5 at 075.

25. On July 8, 2016 the SSC sent Parent 1 a fifth letter confirming the July 13, 2016 observation and requested to schedule a second observation on July 20, 2016. The

SSC requested academic, social, behavioral and related services information regarding Student. SSC offered to provide “reasonable monetary compensation for these copies as well as pick up these documents at your convenience.” The SSC again requested Parent 1’s consent for release of information to gather information from Student’s service providers. Resp. Exh. 5 at 075 – 076.

26. On July 11, 2016, Parent 1 sent the Principal a letter responding to the SSC’s July 8, 2016 letter. Parent 1 was concerned that Parent 1 did not have enough time to gather the information the DOE requested. Parent 1 stated, “I am really pleased that you are so concerned about Student’s education that you have taken the time to ask so many detailed questions about Student’s program and progress, even if it is just a last minute afterthought.” Parent 1 also did not want to sign blank consent forms.² Resp. Exh. 5 at 078.

27. On July 11, 2016, Parent 1 sent the Principal a second letter that stated, “I don’t know why you have waited so long to do our IEP...I am the only one currently engaged in trying to put a program together for Student and keep it going.” Parent 1 accepted the IEP meeting date on July 21, 2016. Resp. Exh. 5 at 079.

28. On July 11, 2016, Parent 1 sent a third letter to the Principal stating that the District Teacher 1 was previously the Private Provider 2’s immediate supervisor. The Private Provider 2 stated, “I would like to be as honest as possible during [Student’s] observation, but I feel that with [the District Teacher 1] present, I won’t be comfortable enough to answer any questions honestly, and that my answers and performance may be tainted to please [the District Teacher 1], who again, was my boss at another job. Parent 1 stated that this would be a “conflict of interest.” Resp. Exh. 5 at 080.

29. On July 11, 2016, Parent 1 received a letter from the SSC regarding scheduling a transition meeting for Student. Resp. Exh. 5 at 054.

30. On July 12, 2016, the SSC left two messages for Parent 1 on Parent 1’s voicemail. The first was confirming the observation of Student; the second message stated that the consent forms were left blank because they did not know who Student’s service providers were. SSC had hoped that Parent 1 would complete the forms so that

² DOE sent letters on March 29, 2016, April 27, 2016, May 26, 2016, July 6, 2016, and July 8, 2016 to schedule or confirm dates for the observation and IEP meeting and request consents for release of information.

the IEP team could obtain the necessary information and invite them to the IEP meeting. Resp. Exh. 5 at 082.

31. On July 12, 2016, the Principal left a voicemail for Parent 1 regarding Parent 1's three letters dated July 11, 2016. Parent 1 returned Principal's call and reiterated Parent 1's concern about the District Teacher 1 attending the observation. The Principal left another voicemail for Parent 1, assuring Parent 1 that the District Teacher 1 was not observing Private Provider 2, District Teacher 1 was not in a position to evaluate Private Provider 2, and there was no conflict of interest. Resp. Exh. 5 at 091-092.

32. On July 13, 2016, Parent 1 signed the "Consent for Release of Information" for the Private Provider 2, the private SLP, private OT, and Director. Resp. Exh. 4.

33. On July 13, 2016, the SSC left a voicemail for the private SLP to invite private SLP to the IEP meeting. The private SLP texted SSC back and stated private SLP's calendar was booked out for over a month, and private SLP was unable to attend. Resp. Exh. 5 at 083; TR 98:12-23.

34. On July 13, 2016, the SSC received the Consent for Release of Information for the Private Provider 2. The SSC called the Private Provider 2 to invite Private Provider 2 to the July 21, 2016 IEP meeting. The SSC testified that the Private Provider 2 stated that "she was sure [Parent 1] would let Private Provider 2 know [about the IEP meeting], so it seemed like Private Provider 2 wanted confirmation or invite from [Parent 1] personally." Resp. Exh. 5 at 084; TR 89:3-90:8.

35. On July 13, 2016, the District Teacher 1, SSC, and DOE Psychologist observed Student during a session with Student's private SLP at the public library for one hour. Student was sitting at a table with the private SLP, Parent 2, and the Private Provider 2. Parent 1 was in the library, but not at the table. During breaks in the session the private SLP would teach Parent 2 and the Private Provider 2 how to carry out Student's speech program. Resp. Exh. 3 at 042-045.

36. Parent 2 told the District Teacher 1 that Student attended program for the second time overnight.³ Student spent five days and four overnights at the program without parents. Approximately 100 other children with special needs and 200 staff-members attended the program. Student had two 1:1 aides that were high school

students. Student had not met Student's aides prior to camp. Parent 2 stated Student had a wonderful time there. Resp. Exh. 3 at 045; TR 56:1- 58:10.

37. Parent 1 told the District Teacher 1 that Student's behavior, focus, and calmness improved substantially after left Private Facility 1. Parent 1 thought that Student was too restricted and not given enough latitude to follow Student's own interests there. *Ibid.*

38. On July 15, 2016, Parent 1 left the SSC a voicemail stating that Parent 1 would not attend a transition meeting. Resp. Exh. 5 at 054.

39. On July 15, 2016, the SSC faxed the Director to invite Director to the IEP meeting. Resp. Exh. 5 at 085-086.

40. On July 15, 2016 the SSC sent Parent 1 a letter confirming the July 20, 2016 observation and July 21, 2016 IEP meeting. The SSC again requested academic, social, behavioral and related services information regarding Student. Resp. Exh. 5 at 087-088.

41. On July 15, 2016, the SSC emailed the Private Provider 1 to invite Private Provider 1 to the IEP meeting. Resp. Exh. 5 at 090.

42. On July 15, 2016, program sent Parent 1 a "Parent Authorization for Private Billing Remote Services" form. Parent 1 reviewed and "e-signed" the form on July 16, 2016. The remote services supervision/consultation period was from July 15, 2016 to August 15, 2016. Pet. Exh. 4 at 066-067.

43. On July 16, 2016, the Principal responded to Parent 1's three letters dated July 11, 2016.

44. On July 18, 2016, the District Teacher 1 emailed the Private Provider 2 requested information from Private Provider 2 to help develop Student's IEP. The District Teacher 1 requested information on Student's daily schedule, breaks, access to peers, reinforcement system, strengths, challenges, behaviors, Behavior Support Plan ("BSP"), teachers, curriculum, academics, skills, service providers, and "anything else that we should know so that we can write a thorough and accurate IEP." The Private Provider 2 answered the District Teacher 1's questions on July 20, 2016. The District Teacher 1 requested follow up information and clarification. Resp. Exh. 5 at 094-095, 103-107.

³ Parent 1 testified Student attended program five times. This was the second program that Student stayed

45. Parent 1 testified that Parent 1 only authorized the Private Provider 2 to share information about Student's needs and not about Student's current educational program even though it would have been helpful for the IEP team. TR 61:23 – 63:20.

46. On July 19, 2016 the District Teacher 1 emailed Private Provider 1 requesting information to assist the IEP team with the IEP. The Private Provider 1 responded that Private Provider 1 needed to check with the Parent 1 to determine if Parent 1 wanted Private Provider 1 to attend the IEP meeting. Private Provider 1 stated that the Private Facility Director had not seen Student since November 2015, and Private Provider 1 had not met Student yet. Private Provider 1 stated Private Provider 1 did not “have any information for the IEP.” Resp. Exh. 5 at 096-099.

47. On July 20, 2016, the District Teacher 1 observed Student during a session with Student's private SLP at the public library. Student was seated at a table with the private SLP, Private Provider 2, and Parent 1. Resp. Exh. 3 at 046-047.

48. The private SLP informed the District Teacher 1 that Student had already mastered on or two of Student's speech goals. Student continued to have difficulty with the “wh” questions, and this was one of Student's goals. The private SLP also worked on joint attention. *Ibid.*

49. On July 20, 2016, the SSC emailed the Private Provider 1 regarding information for the IEP meeting. The Private Provider 1 responded, “I have not yet met [Student] or started working with Student's family so I do not have any information to share at this point.” Resp. Exh. 5 at 100-102.

50. On July 21, 2016, the Home School held an IEP meeting. Parents, Principal, District Teacher 1, DOE Psychologist, DOE SLP, SSC, DOE OT, special education (“SPED”) and general education teachers were present. The Private Provider 2 did not attend the meeting. Resp. Exh. 2 at 037; TR 90:9-11.

51. The IEP team used the DOE assessment reports from the DOE Psychologist, SSC, SLP and District Teacher 1 to develop the IEP. The IEP team reviewed Student's February 12, 2015 and June 5, 2015 IEPs, progress reports from Private Facility 1, and input from Parents and Student's current private paraprofessional. The team also reviewed the private SLP's goals and objectives for Student. Resp. Exh. 2 at 040; Pet. Exh. 9, CD 2 at 15:19 – 17:10.

52. At the IEP meeting Parent 1 stated that Student did not like to be around other children with special needs. Parent 1 wanted Student to be mainstreamed. Student reacted poorly to students with special needs and responds “better” around neuro-typical children close to Student’s age. This language was stated four times in the IEP, including the Parent Concern section. Resp. Exh. 2 at 024 – 025; Pet. Exh. 9, CD 2 10:41 – 12:03; Pet. Exh. 9, CD 3 at 1:05 – 3:20.

53. At the IEP meeting, Parent 2 described that when Student has tantrums, Student has an “angry face,” growls, stomps Student’s feet, and raises Student’s voice. The tantrums typically last approximately five minutes. Pet. Exh. 9, CD 1 at 1:17:53 – 1:18:25; CD 2 at 3:59 – 5:16.

54. The Parent Concern section also stated, “Parent would like to see the current strategies and interventions that have worked for [Student] provided by program in order to reach Student’s full potential.” Pet. Exh. 1 at 006; TR 18:5-20.

55. At the IEP meeting, Parent 1 stated that Parent 1 was most concerned about the Home School using correct strategies and interventions. Parent 1 further stated that if Student receives the right strategies, Student could learn. Pet. Exh. 9, CD 2 at 25:30 – 25:40.

56. Parent 1 testified that the Parent Concern section did not include everything Parent 1 stated at the IEP meeting. TR 73:16-23.

57. The Principal stated at the IEP meeting that Student would receive specialized instruction in the general education setting all day. Principal explained that there were small groups in the general education class. Pet. Exh. 9, CD 3 at 1:05 – 3:20.

58. The IEP team reviewed the least restrictive environment (“LRE”) continuum and determined that to meet Student’s academic and behavioral needs, Student would be placed in general education classes with 1:1 individual instructional support. Student could meet Student’s goals and objectives in the general education setting with individualized instructional support. Student would be provided with a “safe spot,” a designated place for Student to go to calm down if needed. Pet. Exh. 9, CD 3 at 20:20 – 24:20, 36:30 – 37:00; Resp. Exh. 2 at 038.

59. Student received 1785 minutes of SPED services per week, 60 minutes of SLT per week, 100 minutes of counseling per week, and transportation two times a day. Student would participate with Student’s non-disabled peers for all curricular and extra-

curricular activities. Student would not participate with Student's non-disabled peers when receiving speech services. Resp. Exh. 2 at 035-036l; TR 117:25-118:7.

60. The IEP team determined that based on Student's level of progress, Student would be able to succeed in the general education setting with paraprofessional support and specialized instruction. The team also determined that Student worked best with neuro-typical peers. Parent requested a general education setting with eight to ten peers. Resp. Exh. 2 at 039.

61. Parent 1 testified that Parent 1 wanted Student to be in a reduced class size with eight to ten other neuro-typical Students, but no decision was made. Parent 1 stated the Principal said that they have 25 students in each classroom. Parent 1 suggested that the Home School consider sectioning parts of the class off or give Student a "little cubical on the side" to retreat to. TR 21:21-22:3; TR 24:6-16; TR 30:1-13; TR 40:22-25.

62. Parent 1 testified that they tried to take Student to see _____ and _____ two times in April or May of 2015, but Student did not feel comfortable in a large environment. Student's Private Provider 2 was not present at these visits. TR 41:1-43:9; TR 44:22-45:13.

63. The IEP team determined that Student met the ESY standard based on the information they had. Parent 1 requested ESY after three calendar days; the previous IEP provided ESY after four calendar days. Parent 1 stated that Student maintained Student's academics, but Student's negative behaviors increased after four calendar days. Student would whine, cry, and be non-compliant. The IEP team agreed to Parent 1's request. Due to the nature and severity of Student's disabling condition, Student received ESY after three calendar days, four hours of SPED services per day, transportation two times a day, SLT for 60 minutes per week, individual instructional support for four hours per day, counseling services for 20 minutes per week, and social learning opportunities would be provided and peers would be invited with parental permission. Resp. Exh. 2 at 035; Pet. Exh. 1 at 038; TR 34:1-14; Pet. Exh. 9, CD 2 at 1.14:03 -1.19:30.

64. The District Teacher 1 testified that the IEP team listened to Parent 1's concerns about Student's regression and recoupment. They also considered the nature and severity of Student's disability to determine that Student receive ESY services after a three-day break. The District Teacher 1 testified that Parents were in agreement. TR 135:23-136:14.

65. The IEP team explained to Parents that only SPED students received ESY in the summer session; however the Home School discussed creating a social program for Student. Pet. Exh. 9, CD 3 at 17:00 – 20:18.

66. The District Teacher 1 testified that the IEP team wanted Student's ESY services to be in a setting with typical children that would still be addressing Student's IEP goals and objectives. The DOE wanted Student to be in an ESY social play group consisting of three to 12 typically developing peers. The peers would be from the DOE summer program; if not, the Home School would invite the Student's friends or families that were interested in the program to participate. TR136:20-21.

67. The Home School had sent invitations and consent forms for the ESY social play group participants in the past. The social groups were held during every school break. The District Teacher 1 testified that if a student was interested in participating in the program, parent permission was required. Resp. Exh. 7; TR 136:25-210 at 201-210

68. Parent 1 testified that ESY socialization programs were not discussed at the IEP meeting. TR 20:9-25.

69. Student received the following supplementary aids and services, program modifications, and supports for school personnel: 1) SLP consult one time per week; 2) individual instructional support for 1785 minutes per week; 3) teacher consultation for 2400 minutes per year; 4) parent education and training for 60 minutes per month; and 5) program consultation for 120 minutes per year. Student also received the following services daily: 1) positive BSP; 2) frequent breaks; 3) social stories; 4) multisensory instruction; and 5) transitional supports. Student received headphones, a safe spot, and a functional behavior assessment ("FBA") as needed. Upon Student's enrollment to the Home School, Student would also have a transition plan. Resp. Exh. 2 at 035.

70. The District Teacher 1 testified that Student's individual instructional support of 1785 minutes per week would be with a paraprofessional. District Teacher 1 described the paraprofessional to be an individual who meets certain educational and training requirements. The IEP team wanted Student's Private Provider 2 to provide this support, because Student was already familiar with Private Provider 2 and worked well with Private Provider 2. TR 171:9-19; TR 176:14-21.

71. The District Teacher 1 testified that if Student exhibited a change in problematic behaviors, they would discuss the functions of the behaviors in an informal

way and either develop the BSP or re-develop the existing BSP. If Student had “extreme behavior problems” the DOE would conduct a more extensive FBA. The District Teacher 1 testified that District Teacher 1 did not observe Student to have any extreme behavior problems. TR 145:22-146:21.

72. The District Teacher 1 testified that the FBA and BSP would be developed outside of the IEP meeting with a DOE Behavioral Health Specialist. District Teacher 1 stated, “the [BSP] has to be really a dynamic, fluid document because a student’s behaviors can change at any time and unpredictably. So as a matter of course, we do not want to put it as part of the IEP because then if we wanted to make some change, we’d have to call an IEP meeting, that doesn’t allow that document to be very responsive to the student’s behaviors.” District Teacher 1 stated that the DOE would include the Private Provider 2 in the development of a BSP. Pet. Exh. 9, CD 3 at 33:15 – 34:00; TR 147:5-14; TR 174:4-8.

73. The IEP team discussed Student’s speech and language goals and objectives drafted by the private SLP. The private SLP created the goals and objectives after assessing Student three times. The private SLP provides Student with one hour of SLT per week. Student had made progress on Student’s goals and had mastered the “verb +ing.” Resp. Exh. 6 at 166; Pet Exh. 9, CD 2 at 15:19 – 17:10, CD 3 at 3:28 – 9:00.

74. Parent 2 stated at the IEP meeting that Student can see an event, describe it, explain the cause and effect, and articulate predictions. Pet. Exh. 9, CD 2 at 17:21 – 18:18.

75. The DOE SLP testified as an expert in the field of speech language pathology. TR 116:9-12.

76. The DOE SLP testified that DOE SLP made the SLT recommendation after reviewing the District Teacher 1’s observation reports and reviewing Student’s 2015 speech-language assessment. The deficits that were identified in the 2015 assessment were similar to the needs that the private SLP identified. Student had been meeting with the private SLP once a week for eight weeks, and Student had made progress on two out of the six language goals. The DOE SLP determined that the same amount of time would be appropriate. The DOE SLP also considered that the goals would be addressed in the educational setting, rather than the clinical setting, and Student would have numerous opportunities to work on Student’s goals with Student’s Private Provider 2 and peers.

DOE SLP testified that students with special needs “have difficulty generalizing certain skills across setting, so we want to make sure what Student can do with me in a one-to-one setting, Student’s able to do in other settings such as in the classroom and with other peers and with other adults.” Resp. Exh. 6 at 166; TR 119:15-120:10; TR 121:25-122:4; TR 126:5-18; TR 129:8-130:14.

77. The DOE SLP stated in DOE SLP professional opinion, 60 minutes of speech-language direct services and weekly speech-language consultation were appropriate, because Student had shown progress with this amount of service time with Student’s private SLP. The DOE SLP testified that the private SLP had a better understanding of Student’s speech needs than DOE SLP did at the time of the IEP meeting. TR 120:11-121:10; TR 130:15-19.

78. The DOE SLP testified that when DOE SLP provides direct SLT services, there could be up to two other students in the group. Even if there were three students in the session, the services would only last for one hour. The direct SLT services would be in a pull-out session. TR 125:8-21; Pet. Exh. 9, CD 3 at 3:28 – 9:00.

79. The DOE SLP testified that the weekly SLP consult would include meetings with the Private Provider 2, teachers, or collecting information regarding Student’s progress in the classroom with Student’s language goals. There was no limitation on the amount of time that could be spent on the weekly SLP consult. TR 118:8-119:18; Pet. Exh. 9, CD 3 at 3:28 – 9:00.

80. The IEP specified that the teacher consult would be broken down into 20 hours per year per provider. This included the Private Provider 1 and Student’s private SLP. *Ibid.*; TR 148:17-149:1.

81. Parent 1 testified that Student’s prior IEP contained 17 hours per month of teacher consultation. The current IEP reduced teacher consultation to 2400 minutes per year, the equivalent of 40 hours per year. Parent 1 stated that the District Teacher 1 determined that Student had progressed under the Private Provider 2’s program and the 17 hours of teacher consultation per month was no longer necessary. Pet. Exh. 1 at 16 and 38; TR 23:5-24:5.

82. The District Teacher 1 testified that the teacher consultation minutes typically addressed problem behaviors. District Teacher 1 stated the minutes were reduced because Student’s behaviors were “really excellent;” however, the IEP team did

want to keep a “fair number” of teacher consultation, because Student would be in a new environment. TR 147:15-148:4.

83. The IEP team determined that the program consultation was needed for two hours per year to ensure continuity of program interventions, supports, and services for Student; however the team could revisit this service to determine if more time was necessary. Student had not received program services since November 2015, but the IEP team determined that program consultation was necessary for Student’s transition to the Home School. Pet. Exh. 9 CD 3 at 42:10; Resp. Exh. 2 at 035; TR 149:6-20.

84. Parent 1 testified that the IEP team recognized that Student’s current program with the Private Provider 2 was successful. The DOE wanted to continue the program by hiring the Private Provider 2 to work with Student directly and to help develop a BSP. Pet. Exh. 9, CD 3 at 29:00 – 29:30; TR 22:7-20; TR 165:24-166:3.

85. The PWN dated July 26, 2016 states that a “transition plan will be developed by the team to ease [Student’s] transition from Student’s current placement to [the Home School]. The transition plan was included in the supplementary aids and services at the 7/21/16 meeting. The team includes the school staff and providers as well as the family. This transition plan will be developed upon [Student’s] enrollment at [the Home School]. Resp. Exh. 2 at 040.

86. The District Teacher 1 testified that the transition plan would be developed after Student registered at the Home School. The DOE needed Student’s registration information such as emergency contacts and tuberculosis clearance. TR 150:6-23.

87. On July 31, 2016, the SSC sent Parent 1 another letter to contact SSC if Parent 1 changed Parent 1’s mind about having a transition meeting.⁴ Resp. Exh. 5 at 054.

88. On August 2, 2016, the Home School started instruction for the 2016-2017 school year.

89. On August 4, 2016, the Principal sent Parent 1 a letter regarding Student’s enrollment at the Home School. Principal wanted to ensure that they were prepared to have Student at school upon Student’s enrollment. The offered two transition meeting dates. Resp. Exh. 5 at 125.

90. On August 10, 2016 the parties held a Resolution Session. The DOE wanted to schedule another IEP meeting. Resp. Exh. 5 at 127.

91. On August 11, 2016, the Principal sent Parent 1 a letter with proposed IEP meeting dates and times. *Ibid.*

92. In mid-August, 2016, the private Pediatric Neuropsychologist assessed Student by conducting assessment. Pediatric Neuropsychologist also contacted the Private Provider 1 and Private Provider 2. Pet. Exh. 5 at 070; TR 67:22-68:1.

93. The private Pediatric Neuropsychologist met with Student two times. Once at the beach, and the other time on Parent 1's boat. Private Pediatric Neuropsychologist spent approximately six hours with Student. TR 70:10-72:6.

94. Parent 1 testified that the role of the private Psychologist was to provide oversight, coordination, and integration of Student's educational program. The oversight included Student's academic and behavioral programs.⁵ TR 48:16-49:2.

95. On August 18, 2016, the SSC sent Parent 1 a letter requesting information on how Student responded when Student was with groups of children with Student's 1:1 assistant and in play/social group settings. The information was needed to develop an appropriate social program and to determine Student's response to crowds of children and large groups. SSC requested Parent 1 to sign a consent form for program. The SSC also inquired about the proposed IEP meeting dates, as Parent 1 had not responded to the Principal's August 11, 2016 letter. Resp. Exh. 5 at 129.

96. On September 12, 2016, the Principal sent Parent 1 a letter confirming the September 16, 2016 IEP meeting date. Principal informed Parent 1 that they had invited the Private Provider 2 to the meeting and asked if there were other service providers that Parent 1 would like to attend the meeting. The Principal requested that the DOE OT be excused from the meeting, and Principal provided Parent 1 with an agreement to "Excuse from Attendance at an IEP Meeting" form and a copy of the IEP meeting agenda. Resp. Exh. 5 at 142-144.

97. On September 13, 2016, Respondents' attorney emailed Petitioners' attorney informing him of the September 16, 2016 IEP meeting and reiterated the

⁴ Parent 1 had previously stated in a voicemail on July 15, 2016 that Parent 1 would not attend a transition meeting. Resp. Exh. 5 at 054.

⁵ Student was not observed in a classroom environment.

contents of the Principal's September 12, 2016 letter to Parent 1. Resp. Exh. 5 at 145-150.

98. On September 13, 2016, Respondents' attorney emailed Petitioners' attorney asking if Parent 1 would be providing Parent 1's consent to enable the DOE to communicate with program. Parent 1 had not responded to the DOE's August 18, 2016 initial request for information. Resp. Exh. 5 at 153, 155, and 158.

99. On September 19, 2016, the Principal sent Parent 1 a letter regarding Parent 1's absence from the September 16, 2016 IEP meeting. Principal proposed three IEP meeting dates: October 7, 21, and 25, 2016. The Principal requested that the DOE OT be excused from the meeting, and Principal provided Parent 1 with an "Agreement to Excuse from Attendance at an IEP Meeting" form and a copy of the IEP meeting agenda. Resp. Exh. 5 at 159-161.

100. Parent 1 testified that Parent 1 received the letter, but did not respond because "I've been very busy." TR 61:4-15.

101. Parent 1 testified that Student's social skills have "blossomed exponentially." Student actively seeks out social engagements and plays with other children in Student's neighborhood. Student has "a little problem communicating Student's thoughts verbally, but Student, nonetheless, gets the message across and they all have a good time." TR 25:19-26:15.

102. The private SLP testified that Student is making steady progress towards all of the targets and goals. Private SLP stated that this progress suggests that Student is receiving the appropriate amount of speech therapy. TR 101:15-24.

103. The private SLP testified that additional SLT for Student "is never a bad thing, but right now I don't see a need strongly needing to increase that at this time since Student is making progress." TR 102:9-16.

104. Parent 1 testified that in mid-September 2016, Student started attending another program for three days a week, for six hours per day.⁶ Student is in a class with seven other nondisabled peers and Private Provider 2, and Student enjoys school. Student continues to see Student's private SLP once a week. Student also has a special education consultant and participated in the program with a __. TR 26:22-29:25; TR 43:18-44:6.

⁶ At the time of the hearing, Student was starting Student's third week of school. TR 44:2-6.

IV. CONCLUSIONS OF LAW

A. Burden of Proof

The Supreme Court held in *Schaffer* that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). “The Court concluded that the burden of persuasion lies where it usually falls, upon the party seeking relief.” *Id.* at 535; *see also Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 803 (8th Cir.2006) (following *Schaffer* in context of claim that IEP was not being implemented). Neither *Schaffer* nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

B. IDEA Requirements

The IDEA provides federal funding to assist state and local agencies with educating disabled children, but funding is conditioned on compliance with certain goals and procedures. *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1207 (9th Cir. 2008); 20 U.S.C. §1400. The ultimate goal of the IDEA is to ensure that children with disabilities receive a FAPE by providing special education and related services to meet each child’s unique needs and prepare each child for the future. 20 U.S.C. §1400(d)(1)(A), 34 C.F.R. §300-101, HAR, Title 8, Chapter 60.

School districts must comply with the IDEA’s procedural and substantive requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). The *Rowley* 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* 458 U.S. 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. *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2008).

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an IEP for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified

representatives of the local educational agency, the child's teacher, parent(s), and where appropriate, the child. The IEP contains, in part, a statement of the PLEPs, a statement of the child's annual goals and short term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1401(19). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. § 1414(d). The IEP is, in effect, a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” *Burlington v. Dep’t of Educ. Of the Commonwealth of Massachusetts*, 471 U.S. 359, 368, 105 S.Ct. 1996, 2002 (1985). An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167 (2012).

A school district provides a FAPE if it: “(1) addresses the child’s unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with the [child’s] individualized education program.” *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995). The IEP must be reasonably calculated to provide a child with a meaningful educational benefit at the time it was developed. *J.W. by J.E.W. and J.A.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 449 (9th Cir. 2010). It must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more than de minimus, and gauged in relation to the potential of the child at issue.” *Blake C. ex rel Tina F. v. Hawaii Dep’t of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009). However, an “appropriate” public education need not be the “absolute best;” it must only provide “a basic floor of opportunity” that is “individually designed to provide individual benefit.” *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) quoting *Rowley* 458 U.S. at 197 n.21, 200-01).

C. Whether the July 21, 2016 IEP Appropriately Offered Student a FAPE

To analyze whether the DOE’s offer of FAPE through the July 21, 2016 IEP was appropriate, the Student’s individual needs at the time the IEP was created and the Parent participation must be considered. The undersigned Hearings Officer has reviewed the recording of the July 21, 2016 IEP meeting. Pet. Exh. 9.

1. Whether the DOE failed to include a key person in the IEP development process.

Petitioners allege in their Request that the DOE failed to include a key person in the IEP development process, specifically Student's Private Provider 2. Petitioners contend that Private Provider 2's information was recognized and important and unavailable to the IEP team. The Petitioners claim that this information was critical to Student's success. Even though the IEP team agreed that Private Provider 2 should be employed to work with Student, the IEP does not provide for Private Provider 2 to be hired and Private Provider 2 was not asked if Private Provider 2 wanted to be hired. Respondents assert that the Private Provider 2 was invited to the meeting and even though Private Provider 2 did not attend, Private Provider 2 had provided extensive information about Student to the District Teacher 1 prior to the meeting. That information was shared with and considered by the IEP team.

Pursuant to 34 CFR §300.321, the IEP team must consist of:

- (a) General. The public agency must ensure that the IEP Team for each child with a disability includes—
- (1) The parents of the child;
 - (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
 - (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
 - (4) A representative of the public agency who—
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (ii) Is knowledgeable about the general education curriculum; and
 - (iii) Is knowledgeable about the availability of resources of the public agency.
 - (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(7) Whenever appropriate, the child with a disability.

(Emphasis added). See also HAR §8-60-45. It is clear that the Private Provider has knowledge or special expertise regarding Student.

On March 29, 2016, the SSC sent Parent 1 a letter to schedule and IEP meeting and observation dates. SSC requested any new relevant information regarding Student's educational progress, the SSC asked Parent 1 to inform SSC of Student's private service providers so that they could request Parent 1's consent to obtain information from them and invite them to the IEP meeting. When Parent 1 did not respond, the SSC sent another letter to Parent 1 dated April 27, 2016. The SSC sent Parent 1 three more letters on May 26, 2016, July 6, 2016, and July 8, 2016.

On July 12, 2016, the SSC left two messages for Parent 1 on Parent 1's voicemail. The first was confirming the observation of Student; the second message stated that the consent forms were left blank because they did not know who Student's service providers were. SSC had hoped that Parent 1 would complete the forms so that the IEP team could obtain the necessary information and invite them to the IEP meeting.

On July 13, 2016, the SSC finally received the Consent for Release of Information for the Private Provider 2. The SSC called the Private Provider 2 to invite Private Provider 2 to the July 21, 2016 IEP meeting. The SSC testified that the Private Provider 2 stated that "Private Provider 2 was sure [Parent 1] would let Private Provider 2 know [about the IEP meeting], so it seemed like Private Provider 2 wanted confirmation or invite from [Parent 1] personally." Nevertheless, the Private Provider 2 **was** invited to the meeting. There was no testimony from the Parent 1 that the meeting should not proceed without the Private Provider 2, and Parent 1 did not request a continuance of the IEP meeting to secure Private Provider 2's presence. Further, Parent 1 provided no testimony or evidence regarding any specific "critical" information the IEP team lacked from the Private Provider 2's non-attendance.

Even though the Private Provider 2 had knowledge or special expertise regarding the Student, Private Provider 2 participation in the IEP meeting is discretionary. 34 CFR

§300.321(a)(6). The court in *Cone ex rel. Cone v. Randolph Cnty. Sch.*, 302 F. Supp. 2d 500, 507 (M.D.N.C. 2004) stated that even though discretionary members could have offered assistance and information at the IEP meeting, they could have been invited by either the school district or Parents. The Home School invited the Private Provider 2 to the IEP meeting, but Private Provider 2 chose not to attend.

The court in *Cone* further held there was no procedural violation of the IDEA, because “all statutorily-required persons were part of the IEP team, especially where the IEP team had access to the information any non-required parties might have provided.” *Id.*, See *Briley v. Board of Educ. of Baltimore County*, 87 F.Supp.2d 441, 444 (D.Md.1999). Here, the IEP team did have specific information regarding Student from the Private Provider 2. On July 18, 2016, the District Teacher 1 emailed the Private Provider 2 requested information from Private Provider 2 to help develop Student’s IEP. The District Teacher 1 requested information on Student’s daily schedule, breaks, access to peers, reinforcement system, strengths, challenges, behaviors, BSP, teachers, curriculum, academics, skills, service providers, and “anything else that we should know so that we can write a thorough and accurate IEP.” The Private Provider 2 answered the District Teacher 1’s questions on July 20, 2016. The District Teacher 1 requested follow up information and clarification; however, Parent 1 testified that Parent 1 only authorized the Private Provider 2 to share information about Student’s needs and not about Student’s current educational program. Parent 1 effectively prohibited the Private Provider 2’s participation in the IEP process before and during its development. The Hearings Officer concludes that the IEP team was properly constituted, and the requirements set forth in 34 CFR §300.321 were satisfied.

Petitioners also assert that the IEP team agreed the Private Provider 2 should be employed to work with Student, but the IEP does not provide for Private Provider 2 to be hired. Further, the Petitioners’ claim that the Private Provider 2 was not asked if Private Provider 2 wanted to be hired. It is true that the DOE was very open to accommodating Parents’ strong preference to have the Private Provider 2 continue to work with Student to allow for a successful transition to the Home School. However, Petitioners have provided no caselaw, statutes, or regulations to show that the inclusion of a specific Private Provider 2 is a requirement under the IDEA. The Hearings Officer concludes that there is no requirement to hire Student’s Private Provider 2, and it is not appropriate to

have a specific Private Provider 2 written into this IEP. The Hearings Officer further finds no procedural violation of the IDEA.

2. Whether the DOE reduced Student's speech therapy without sufficient basis.

Petitioners allege that Student's speech therapy was reduced from 60 minutes per day to 60 minutes per week without sufficient basis. Respondents' assert that the time is appropriate, because it directly corresponds to the amount of time Student receives from the private SLT. Additionally, Student is making progress towards Student's speech goals with the 60 minutes of SLT per week.

The private SLP began working with Student on April 20, 2016. SLP works with Student for 60 minutes per week at the public library. SLP spent the first three sessions assessing Student using standardized assessments. In Student's first session, the private SLP completed the initial assessment which consisted of an articulation/speech clarity assessment, a language assessment, and other informal non-standardized assessments surrounding Student emotional language, problem solving, interior of mind, and language concepts. The private SLP determined Student's areas of need, and private SLP structured goals to work on in their ongoing therapy sessions. Private SLP based Student's goals on the results of the assessments. The private SLP provided Student's written goals to the SSC.

The private SLP noted Student's language needs as: 1) verb +ing at sentence level; 2) pronoun confusion; 3) place objects into appropriate categories; 4) understanding/answering various "wh" questions; 5) use of complete/age appropriate sentence structure; 6) shared attention tasks; and 7) maintaining a topic for multiple conversational turns, respond appropriately to conversation starters. Private SLP also noted Student's speech needs as: 1) /th/ in the initial and medial position of words; and 2) /r/ distortion in all positions.

On July 20, 2016, the District Teacher 1 observed Student during a session with private SLP at the public library. Student was seated at a table with the private SLP, the Private Provider 2, and Parent 1. The private SLP informed the District Teacher 1 that Student had already mastered on or two of Student's speech goals in the brief time Private SLP had worked with Student. Student continued to have difficulty with the "wh" questions, and this was one of Student's goals. The private SLP also worked on

joint attention. Additionally, Parent 2 stated at the IEP meeting that Student can see an event, describe it, explain the cause and effect, and articulate predictions.

The DOE SLP testified as an expert in the field of speech language pathology. The DOE SLP testified that DOE SLP made the SLT recommendation after reviewing the District Teacher 1's observation reports and reviewing Student's 2015 speech-language assessment. The deficits that were identified in the 2015 assessment were similar to the needs that the private SLP identified. Student had been meeting with the private SLP once a week for eight weeks, and Student had made progress on two out of the six language goals. The DOE SLP determined that the same amount of time would be appropriate for the IEP. The DOE SLP also considered that the goals would be addressed in the educational setting, rather than the clinical setting, and Student would have numerous opportunities to work on Student's goals with Private Provider 2 and peers. DOE SLP testified that students with special needs "have difficulty generalizing certain skills across setting, so we want to make sure what Student can do with me in a one-to-one setting, Student's able to do in other settings such as in the classroom and with other peers and with other adults."

The DOE SLP stated in DOE SLP's professional opinion, 60 minutes of speech-language direct services and weekly speech-language consultation were appropriate, because Student had shown steady progress with this amount of service time. The DOE SLP further testified that the weekly SLP consult would include meetings with the Private Provider 2, teachers, or collecting information regarding Student's progress in the classroom with Student's language goals. There was no limitation on the amount of time that could be spent on the weekly SLP consult. The Hearings Officer finds that Petitioners have not met their burden to show Student required more SLT.

3. Whether the behavioral support plan ("BSP") is sufficient.

Petitioners argue that the BSP was insufficient because the amount of ____ was reduced without consultation. Respondents assert that the BSP should be developed, if necessary; however, there is not requirement for the BSP to be included in the IEP.

The IDEA requires the IEP team, in developing the IEP, to consider the use of positive behavioral interventions and supports, and other strategies when a child's behavior impedes learning. 20 U.S.C. § 1414(d)(3)(B)(i). There is no requirement that a particular assessment tool be employed in evaluating a child. The IDEA regulations do

not require the inclusion of a FBA/BSP at any particular date. *County Sch. Bd. Of Henrico Cty. V. Palkovics*, 285 F.Supp. 2d. 701, 709 (E.D. Va. 2003).

District Teacher 1 testified that District Teacher 1 did not observe Student to have any extreme behavior problems, in fact Student's behaviors were "really excellent." The District Teacher 1 testified that if Student exhibited a change in problematic behaviors, they would discuss the functions of the behaviors in an informal way and either develop the BSP or re-develop the existing BSP. If Student had "extreme behavior problems" the DOE would conduct a more extensive FBA. The District Teacher 1 further testified that the FBA and BSP would be developed outside of the IEP meeting with a DOE Behavioral Health Specialist. District Teacher 1 stated, "the [BSP] has to be really a dynamic, fluid document because a student's behaviors can change at any time and unpredictably. So as a matter of course, we do not want to put it as part of the IEP because then if we wanted to make some change, we'd have to call an IEP meeting, that doesn't allow that document to be very responsive to the student's behaviors." District Teacher 1 stated that the DOE would include the Private Provider 2 in the development of a BSP.

The DOE's offer of FAPE included an FBA and BSP. Parents participated in the discussion and agreed to have the Private Provider 2 included in its development. The Hearings Officer finds no procedural violation of the IDEA for not including the actual FBA and BSP in the IEP.

4. Whether Student's placement was pre-determined.

Petitioners allege in their Request that Student's placement in the general education setting was determined prior to determining the supports and modifications Student would need. Respondents reply that it is not clear what harm Petitioners contend resulted from the discussion occurring in this order, as Petitioners are not objecting to the team's LRE determination or that the services and supports cannot be implemented in this setting.

This placement is consistent with Congress's preference for educating children with disabilities in regular classrooms with their peers. The IDEA provides that each state must establish:

[P]rocedures to assure that, to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the

regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...

20 U.S.C. §1412(5)(B).

At the IEP meeting Parent 1 stated that Student did not like to be around other children with special needs. Parent 1 wanted Student to be mainstreamed. Student reacted poorly to students with special needs and responds “better” around neuro-typical children close to Student’s age. This language was stated four times in the IEP, including in the Parent Concern section. The IEP team determined that based on Student’s level of progress, Student would be able to succeed in the general education setting with paraprofessional support and specialized instruction. The Principal stated at the IEP meeting that Student would receive specialized instruction in the general education setting all day.

Now, Petitioners are claiming that Student’s placement was predetermined. A school district violates the IDEA if it predetermines placement for a student *before* the IEP is developed or steers the IEP to the predetermined placement. *W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir.1992), superseded by statute on other grounds, as recognized in *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932 (9th Cir.2007); *see also Spielberg v. Henrico Cnty. Pub. Schs.*, 853 F.2d 256, 258–59 (4th Cir.1988). Predetermination violates the IDEA because the Act requires that the placement be based on the IEP, and not vice versa. *Spielberg*, 853 F.2d at 259. This did not happen here.

The IEP team, based on Student’s data and Parents’ request, placed Student in general education with appropriate services and supports. The IEP team also reviewed the LRE continuum and determined that to meet Student’s academic and behavioral needs, Student would be placed in general education classes with 1:1 individual instructional support. The IEP determined that Student could meet Student’s goals and objectives in the general education setting with individualized instructional support. Student would be provided with a “safe spot,” a designated place for Student to go to calm down if needed. The IEP team determined based on their review of Student’s records and input from Parents, Student worked best with neuro-typical peers. Therefore, the IEP stated that Student would participate with Student’s non-disabled

peers for all curricular and extra-curricular activities. Student would not participate with Student's non-disabled peers when receiving speech services.

Petitioners now argue that placement discussion should have occurred at a different point of time at the meeting. The DOE properly waited until the IEP was developed before it determined Student's appropriate placement. There was no evidence that the DOE predetermined Student's placement. The IEP was specifically tailored to fit the Student's unique needs, *prior* to the determination that Student could be offered a FAPE at the Home School. The Hearings Officer finds that the DOE had not predetermined placement at the Home School.

5. Whether Student's needs for a reduced class size was discussed or addressed.

Petitioners also argue that Student needs for a reduced class size were not discussed or addressed. Parents requested a general education setting with eight to ten peers. Parent 1 testified that Parent 1 wanted Student to be in a reduced class size with eight to ten other neuro-typical Students, but no decision was made. Parent 1 suggested that the Home School consider sectioning parts of the class off or give Student a "little cubical on the side" to retreat to. The Principal explained that there were small groups in the general education class.

The main reason for Parent 1 wanting a small class size is based on two 30-45 minute events that happened in 2015. Parent 1 testified that they tried to take Student to see ___ and ___ classes two times in April or May of 2015, but Student did not feel comfortable in a large environment. Student was not prepared for the visits, and the Private Provider 2 was not present. The Hearings Officer finds Petitioners' argument and reasoning to be unpersuasive. In fact, Student's participation in program proves otherwise. Student attended program five times, two times for overnight sessions. In 2016, Student spent five days and four overnights at the program without Parents. Approximately 100 other children with special needs and 200 staff-members attended the program. Student had two 1:1 aides that were high school students. Student had not met the aides prior to the program. Parent 2 stated Student had a wonderful time there. Clearly Student did not have an issue in being in large group settings with unfamiliar peers.

The IDEA requires the DOE to provide Parents with an opportunity for meaningful participation during the development of an IEP; however, the Act does not

explicitly vest parents with a veto power over any proposal or determination advanced by the educational agency regarding a change in placement. *See Burlington School Committee*, 105 S.Ct. at 2002; 20 U.S.C. §1401(19) (1982). Although a consensus is ideal, if a consensus cannot be reached, the school has a “duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan.” *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1490 (9th Cir. 1986) *aff’d as modified sub nom. Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). “The mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process, nor that the DOE’s determination was incorrect.” *Laddie C. ex rel. Joshua C. v. Dep’t of Educ.*, 2009 WL 855966, at *4 (D. Haw. Mar. 27, 2009).

Parent 1 testified that as of 2016, Student’s social skills have “blossomed exponentially.” Student actively seeks out social engagements and plays with other children in Student’s neighborhood. Student has “a little problem communicating Student’s thoughts verbally, but Student, nonetheless, gets the message across and they all have a good time.” While it is certainly understandable the Parents want a reduced class size, compliance with the IDEA does not require school districts to provide the “absolutely best” or “potential maximizing” education. *J.W.*, 626 F.3d at 439 (citation and internal quotation marks omitted). School districts are required to provide only a “basic floor of opportunity.” *Id.* (quoting *Rowley*, 458 U.S. at 201. The FAPE need only be “appropriately designed and implemented so as to convey [the] [s]tudent with a meaningful benefit.” *Id.* at 433 (citations and quotation marks omitted). The IEP was specifically tailored to meet Student’s unique needs and provide Student with a meaningful educational benefit. The Hearings Officer finds that Petitioners have not presented any credible evidence that Student specific needs require him to be educated in a small group setting.

6. Whether the DOE failed to discuss Student’s transition plan.

Petitioners allege that DOE refused or failed to discuss Student’s transition plan unless Student enrolled at the Home School. Respondents agree that Student needed to be enrolled at the Home School prior to discussing transition; however, they assert they

did try to engage Parents in the transition process prior to Student's enrollment, but they refused to participate.

On July 11, 2016, Parent 1 received a letter from the SSC regarding scheduling a transition meeting for Student. On July 15, 2016, Parent 1 left the SSC a voicemail stating that Parent 1 would not attend a transition meeting. The PWN dated July 26, 2016 states that a "transition plan will be developed by the team to ease [Student's] transition from Student's current placement to [the Home School]. The transition plan was included in the supplementary aids and services at the 7/21/16 meeting. The team includes the school staff and providers as well as the family. This transition plan will be developed upon [Student's] enrollment at [the Home School]."

The District Teacher 1 testified that the transition plan would be developed after Student registered at the Home School. The DOE needed Student's registration information such as emergency contacts and tuberculosis clearance. On July 31, 2016, the SSC sent Parent 1 another letter to contact SSC if Parent 1 changed Parent 1's mind about having a transition meeting. On August 2, 2016, the Home School started instruction for the 2016-2017 school year. On August 4, 2016, the Principal sent Parent 1 a letter regarding Student's enrollment at the Home School. SSC wanted to ensure that they were prepared to have Student at school upon Student's enrollment. The offered two more transition meeting dates. The evidence shows that the DOE was clearly attempting to provide Student with a transition plan *prior* to Student's enrollment; however, Parent 1 either refused or was non-responsive.

Even assuming *arguendo*, a transition plan was contingent upon Student's enrollment at the Home School, a transition plan is not required under 20.U.S.C. §1414 when a Student moves from a private program to a public school. Respondent correctly argues that the IDEA prohibits 20.U.S.C. §1414 from being construed to require additional information to be included in an IEP that is not explicitly required by that section.

The IDEA clearly requires an IEP to include a number of matters, such as a statement of the child's present level of achievement and measurable goals. 20 U.S.C. §1414(d)(A)(i). Nowhere is there a requirement that an IEP include a transition plan when a child moves from a private facility to a public school. The IDEA explicitly prohibits construing §1414 to require "that additional information be included in a child's IEP beyond what is explicitly required in this section." 20 U.S.C. §(d)(1)(A)(ii).

C.B., 2012 WL 1537454 at *5. There was no requirement for the IEP team, under the IDEA to include a transition plan in the IEP.

The Court has recognized that while, “the IDEA requires an IEP to have a statement of needed transition services in some circumstances, the statutory provision of the IDEA specifically addressing transition services does not mandate such services when a transition from private to public school takes place.” *L.M. v. Dept. of Educ.*, 2006 WL 2331031 (D.Haw. 2006)(citing *Bock v. Santa Cruz City Schools*, No. 95-20168, 1996 WL 539715 (N.D. Cal. 1996)). While the IDEA does not mandate the creation of a specific transition plan when student moves from a private school to a public school, in some cases the knowledgeable education experts agree that a particular student would benefit from such a plan. *Id.*

Here, the DOE, out of good faith and due diligence, decided that Student could benefit from a transition plan. Even though the Parents have refused to participate in the development of a transition plan, they now claim that the DOE failed to discuss it. The Hearings Officer finds this argument to be disingenuous, at best. The Hearings Officers finds that the DOE did discuss the transition plan and attempted to develop it, even though it was not required by the IDEA to do so.

7. Whether the extended school year (“ESY”) program was developed improperly.

Petitioners allege that Student’s ESY program was developed improperly at the July 21, 2016 IEP meeting, because the ESY program: 1) was not discussed; 2) does not address Student’s social skills needs; 3) is not in the LRE; 4) is not sufficiently individualized; and 5) the DOE only used the regression/recoupment standard. Respondents argue that Petitioners have not presented any evidence to show that the IEP team’s determination is not appropriate.

The Hearings Officer finds Petitioners first claim that the ESY program was not discussed at the IEP meeting to be completely without merit. The recordings from IEP meeting show that the IEP team discussed the ESY program with Parents’ participation. The Hearings Officer finds that the IEP team properly discussed Student’s ESY.

Next, Petitioners assert that the ESY program does not address Student’s social skills needs. The IEP team explained to Parents that only SPED students received ESY in the summer session; however the Home School discussed creating a social program for Student. The District Teacher 1 testified that the IEP team wanted Student’s ESY

services to be in a setting with typical children that would still be addressing Student's IEP goals and objectives. The DOE wanted Student to be in an ESY social play group consisting of three to 12 typically developing peers. The peers would be from the DOE summer program. If more students were needed, the Home School would invite the Student's friends or families that were interested in the program to participate. The Home School had sent invitations and consent forms for the ESY social play group participants in the past. The social groups were held during every school break. The Hearings Officer finds that the IEP team was addressing Student's specific social needs.

Petitioners further assert Student's ESY was not in the LRE and was not sufficiently individualized. As previously stated, only SPED students receive ESY services in the summer session. Contrary to Petitioners' assertions, the DOE was actually attempting to *create* a program *specifically individualized and tailored* to meet Student's needs in the LRE.

The education of a disabled child should take place in the least restrictive environment. 20 U.S.C. § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities ... are [to be] educated with children who are not disabled"). *See also* Haw. Admin. R. § 8-60-2, 34 CFR § 300.114(a)(2). "While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child's IEP goals." *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1468 (9th Cir. 1996). In determining the least restrictive environment, this Court considers the following four factors: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [Student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [Student]." *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F. 3d 1398, 1404 (9th Cir. 1994). In applying the facts of this case to the LRE standard, the Home School would provide Student with the LRE.

The Court *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Ed.*, 546 F.3d 111 (2d Cir. 2008) stated, "[w]hile mainstreaming is an important objective, we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students. Under the [IDEA], where the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily, mainstreaming is inappropriate." *citing Briggs v. Bd. of Educ. of*

Conn., 882 F.2d 688, 692 (2d Cir.1989); *Id.* at 119. There has been no evidence that Student cannot be educated in the regular classroom with the supports and professional services provided in the IEP. The Home School provides more opportunities for Student to be educated with non-disabled peers.

The DOE must ensure that a “continuum of alternative placements” is available to meet the needs of children with disabilities for special education and related services. 34 CFR §300.115(a). The continuum must:

- (1) Include the alternative placements listed in the definition of special education under § 300.38⁷ (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
- (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 CFR § 300.115(b). This regulation is found in the LRE section of the IDEA. It should be noted that 34 CFR § 300.116 addresses the educational “placement” of the child.

Even though the DOE did not have an established program at the Home School to meet Student’s needs, they actively attempted to create one for Student bringing non-disabled peers to interact with Student. Clearly this specialized instruction, tailor-made for Student was in the LRE. Student would be in a small-group setting with non-disabled peers. The Hearings Officer finds that Student’s ESY was in the LRE.

Lastly, Petitioners allege that the IEP team only considered the regression/recoupment standard. It is unfathomable how Petitioners can make this argument. At the IEP meeting, Parent 1 *requested* ESY after three calendar days, as the previous IEP provided ESY after four calendar days. Parent 1 stated that Student

⁷ 34 C.F.R. § 300.38 **Secretary.** Secretary means the Secretary of Education. It is noted that the special education definition is found at 34 C.F.R. § 300.39.

34 C.F.R. § 300.39 **Special Education.** (a) General.

(1) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

- (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (ii) Instruction in physical education.

(2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section--

- (i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;
- (ii) Travel training; and
- (iii) Vocational education.

maintained Student's academics, but Student's negative behaviors increased after four calendar days. Student would whine, cry, and be non-compliant. The IEP team *agreed* to Parent 1's request. Due to the nature and severity of Student's disabling condition, Student received ESY after three calendar days for four hours of SPED services per day, transportation two times a day, SLT for 60 minutes per week, individual instructional support for four hours per day, counseling services for 20 minutes per week, and social learning opportunities would be provided and peers would be invited with parental permission. How Petitioners can now argue that the IEP team only considered the regression/recoupment standard is absurd, without merit, and completely incredulous.

The District Teacher 1 testified that the IEP team listened to Parent 1's concerns about Student's regression and recoupment and considered the nature and severity of Student's disability. Ultimately, the IEP team agreed with Parent 1 that Student receive ESY services after a three-day break. The District Teacher 1 testified that Parents were in agreement with this decision. Parents' track record shows that even if the IEP includes what they have requested, they will stop at nothing to argue that Student's rights have been violated. Even though Parents' requests are agreed to, they continue to refute the IEP. It is as if they are engaged in a dance with the DOE and change the "steps" after each IEP meeting. They are determined to find fault in every DOE decision, despite the fact the DOE complies with their specific requests. The Hearings Officer finds that the IEP team properly considered and determined Student's ESY services.

D. Whether Student is entitled to relief.

Once a Hearings Officer holds that public placement of learning a disabled child violated IDEA, they are authorized to grant appropriate relief. The Hearings Officer has determined that Petitioners have not met their burden to show that the July 21, 2016 IEP procedurally or substantively violated the IDEA and denied Student a FAPE.

V. DECISION

Based upon the above-stated findings of fact and conclusions of law, the Hearings Officer concludes that Petitioners have not met their burden. Petitioners have not shown that, procedurally and substantively, the July 21, 2016 IEP denied Student a FAPE. The Hearings Officer determines that the July 21, 2016 IEP provided Student a FAPE that

was appropriately designed to convey Student a meaningful educational benefit. Further, the requests for reimbursement and compensatory education are denied.

Respondents shall be deemed the prevailing party in this matter.

Unofficial Redacted Decision

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, _____.

ROWENA A. SOMERVILLE
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

Unofficial Redacted Decision