

OFFICE OF DISPUTE RESOLUTION
DEPARTMENT OF THE ATTORNEY GENERAL
STATE OF HAWAII

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

Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Respondent.

DOE-SY1617-080

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION

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CONCLUSIONS OF LAW AND DECISION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act (“IDEA”), as amended in 2004, codified at 20 U.S.C. §§ 1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R Part 300; and the Hawai‘i Administrative Rules §§ 8-60-1, et seq.

II. PROCEDURAL HISTORY

On May 30, 2017, the Department of Education, State of Hawai‘i (hereinafter “Respondent” or “DOE”) received a Complaint (“Complaint”) under 20 U.S.C. § 1415(i)(2) and Hawai‘i Administrative Rules (“HAR”) § 8-60-70(a) from Student, by and through Parent 1

¹ Personal identification information is provided in Appendix “A”.

(collectively referred to as “Petitioners”). On June 8, 2017, Respondent filed a Response to the Complaint.

A Pre-Hearing Conference was held on June 29, 2017 before Hearings Officer Erin Sugita, with Keith H.S. Peck, Esq. representing Petitioners, and Kris S. Murakami, Esq. representing Respondent. The due process hearing (“DPH”) was scheduled for September 20, 2017, September 21, 2017, and September 22, 2017.

On July 13, 2017, Respondent filed a Declaration of Kris S. Murakami to request an extension of the decisional deadline (“Deadline”) from July 28, 2017 to September 11, 2017 and from September 12, 2017 to October 26, 2017. The extension was granted on July 14, 2017.

At the prehearing conference on June 29, 2017, Petitioners represented that they intended to file a Pre-Hearing Motion. The Hearings Officer ordered the Motion to be filed by August 8, 2017, and a hearing on the Motion was scheduled for August 30, 2017. Petitioners did not file said Motion and, accordingly, on August 10, 2017, the August 30, 2017 hearing was removed from the calendar.

On September 1, 2017, Hearings Officer Denise P. Balanay was appointed to preside over this matter. On September 7, 2017, a Pre-Hearing Conference was held before Hearings Officer Denise P. Balanay, with Keith H.S. Peck, Esq. representing Petitioners and Kris S. Murakami, Esq. representing Respondent.

On September 12, 2017, a Status Conference was held at the request of Petitioners. Petitioners’ counsel represented that grandparent was ill and needed Parent 1 to care for grandparent and to arrange further care for grandparent. Petitioners’ counsel indicated that Parent 1 would need time to arrange for grandparent’s care and therefore would not be able to participate in the DPH on September 20 or 21, 2017. Petitioners thereafter requested a continuance of the DPH and an extension of the decisional deadline. Respondent did not object

to the request for continuance. The DPH was rescheduled to October 18 and 19, 2017.

Petitioners filed a Declaration on September 20, 2017 requesting an extension of the Deadline from October 26, 2017 to November 9, 2017. On September 21, 2017, this Hearings Officer granted Petitioners' Request for an extension of the Deadline from October 26, 2017 to November 9, 2017.

The DPH commenced on October 18, 2017 and was held on two consecutive days.

At the DPH, this Hearings Officer entered into evidence Petitioners' Exhibit "2," 024-028²; Exhibit "4," 031-034 and 036-041; Exhibit "5," Recording of May 12, 2017 IEP meeting; and Exhibit "6." Petitioners withdrew Petitioners' Exhibit "1," 001-023; Exhibit "2," 029-030; Exhibit "3" in its entirety; Exhibit "4," 035 and 042; and Exhibit "5," Recording of May 9, 2017 IEP meeting.

This Hearings Officer also entered into evidence Respondent's Exhibit "2,," 00024-00030³; Exhibit "3," 00035-00058; Exhibit "4," 00059-00082; Exhibit "5," 00085-00086; Exhibit "6," 00087-00178; Exhibit "7," 00179-00287; Exhibit "8," 288-00570; and Exhibit "9," 00571-00578 and 00607-00624. Respondent withdrew Respondent's Exhibit "1," 0001-00023; Exhibit "3," 00031-00034; Exhibit "5," 00083-00084; and Exhibit "9," 00579-00606.

At the DPH, Petitioners presented three witnesses: Provider 1, Provider 2 and Parent 1. Respondent presented three witnesses: Care Coordinator ("CC"), Vice Principal 1 ("VP1") and District Education Specialist ("DES").

III. BACKGROUND

Student is 16 years old and eligible for services under the Individuals with Disabilities Education Act ("IDEA") by meeting the criteria for _____. Student currently attends Private

² Page numbers were marked by Petitioners.

³ Page numbers were marked by Respondent.

School.

The Complaint in this matter alleges procedural and substantive violations of the IDEA relating to the development of an Independent Educational Program dated May 9, 2017 and May 12, 2017 (“IEP”). The Complaint alleges that the IEP denies Student a Free Appropriate Public Education (“FAPE”) because it fails to include certain special education services needed by Student and does not provide for Student’s placement in the least restrictive environment (“LRE”). The Complaint also alleges that the IEP was not properly developed because the IEP team did not adequately discuss important issues and elements of Student’s program and the IEP was developed without necessary information.

IV. ISSUES PRESENTED

- A. Did the IEP fail to offer Student a FAPE because it failed to include a fade plan?
- B. Did the IEP fail to offer Student a FAPE because it failed to include a transition plan⁴?
- C. Is the IEP provided in the LRE?
 - 1. Did the IEP team adequately discuss the LRE?
 - 2. Was Student’s placement in the LRE?
 - 3. Was Student’s extended school year services provided in the LRE?
- D. Does Student require 510 minutes of ___ to receive a FAPE?
- E. Does the IEP include an appropriate behavior support plan?
- F. Did the IEP team properly consider Student’s assistive technology device and service needs?
- G. Was Parents’ opportunity to participate in the decision making process significantly impeded because the IEP restricted Parents’ ability to communicate directly with Student’s service providers?
- H. Has a FAPE denial occurred because the IEP was developed without data from

⁴ The term “transition plan” used in this case is meant a plan delineating measures taken to assist Student in transitioning from Private School to Public School.

current assessments?

- I. Does Student require support staff?
- J. Did the absence of personnel from Private School at the IEP team meetings on May 9, 2017 and May 12, 2017 significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to student?

V. REMEDIES REQUESTED

Petitioners requested, among other remedies⁵, the following relief:

- A. A finding that the actions of the DOE denied Student a FAPE under the IDEA;
- B. Order the IEP team to address the defect(s) found in Student's offer of FAPE;
- C. Order direct payment for any sum incurred, yet not paid by Parents, for education and related expenses provided to Student that were beneficial and appropriate for Student including, but not limited to, mental health services, medications, transportation, uniforms, tutoring tuition, and mental health therapy; and
- D. Compensatory education.

VI. FINDINGS OF FACT⁶

- 1. The IEP team meetings were conducted on May 9, 2017 and May 12, 2017.

Respondent's Exhibit "3", 00035-00056.

- 2. The IEP team included all of the individuals required by the IDEA on May 9, 2017. At the May 9, 2017 IEP meeting, the following individuals were present: Parent 1, Parent 2, CC, Student Services Coordinator ("SSC")

- 3. Provider 1, School Psychologist, Occupational Therapist ("OT"), Behavioral Health Specialist, VP1, Vice Principal 2 ("VP2"), Speech-Language Pathologist ("SLP"), and General Education Teacher. Id. at 00055.

- 4. The IEP team included all of the individuals required by the IDEA on May 12,

⁵ At the Pre-Hearing Conference on September 7, 2017, other remedies listed in the Complaint were withdrawn or stricken from consideration.

⁶ This Hearings Officer considered the entire record, including all testimony and exhibits introduced at the DPH, in issuing this Decision and Order.

2017. At the May 12, 2017 IEP meeting, the following individuals were present: Parent 1, Parent 2, Petitioners' Attorney, Provider 1, DES, CC, SSC, School Psychologist, OT, Behavioral Health Specialist, VP1, VP2, SLP, General Education Teacher, and Respondent's Attorney. Id. at 00056.

5. Provider 1 was only present for approximately the first hour of the May 12, 2017. Petitioner's Exhibit "5", at 1:18:13. During the hour that Provider 1 was present at the IEP meeting on May 12, 2017, Provider 1 did not offer significant input on Student's current program. Provider 1 has not worked directly with Student. TR⁷, 18:17-18:19.

Support

6. Pursuant to a prior IEP, Student was assigned two _____ support staff to address Student's behavioral issues. Id., 104:17-104:19.

7. At Private School, Student's support are trained. Id., 69:23-69:25. Petitioner's Exhibit "4," at 031.

8. At the time of the DPH, Student's special education instruction was being provided by _____s or Private School's staff who are in training to become _____s. TR, 38:11-38:19. The _____s implement Student's IEP and provide all of Student's instruction. Id., 102:24-103:4.

9. Student also has Staff 1, for the entire school day. Id., at 67:23-682 and 208:8-208:18. Staff 1 is also in the classroom and support Student. Id., 103:19-103:21.

10. At the time of the DPH, Private School did not have a special education teacher on staff⁸. Id., 38:11-38:12.

⁷ TR refers to the Transcript of the Due Process Hearing by page number and line number.

⁸ Private School's former special education teacher ("Special Education Teacher") left Private School shortly before Provider 1 began consulting at Private School. The evidence presented at the DPH did not pinpoint a specific date of Special Education Teacher's departure from Private School.

11. At Private School, Staff 2 and Staff 3 rotate throughout the week such that Staff 4 and Staff 5 work with Student during the week. Id., 67:18-67:22. During Student's instructional day, staff teaches Student, and the other staff records data. The staff switch duties in order to facilitate generalization of Student's behavior to more than one person. Sometimes the second staff trains new personnel. Id., 104:20-105:1.

12. CC observed Student at Private School on two occasions in preparation of the development of the IEP. The observations were utilized for purposes of developing the IEP. Id., 168:14-168:21. On those occasions, CC did not observe Student working with two staff at the same time. Id., 207:21-208:10. CC observed Student working with either Staff 1 or one of the staff. CC observed the second individual off to the side, watching the first work with Student. Id., 208:22-209:10.

13. SSC and VP2 also observed Student working with only one staff at a time. Id., 209:11-210:3. SLP also observed Student at Private School and indicated that Student swam with one staff while the other sat and talked with SLP. Petitioner's Exhibit "5", at 2:09:00.

14. At the IEP meeting on May 12, 2017, the IEP team reviewed the data provided by Private School that indicated that Student had not had any behavioral incidents at school from January through May of 2017. Id. at 2:01:45. See also, Respondent's Exhibit "3," 00037. Based on the observations made by CC, SSC, VP2, and SLP, as well as the data provided by Private School, the IEP team determined that Student only required one support staff. The IEP team also took into consideration that Student also has Staff 1 providing support throughout Student's instructional day. TR, 210:4-210:12. The IEP team stated that removing one support staff would allow Student to gain more independence. Petitioner's Exhibit "5", at 2:05:20.

15. At the IEP meeting on May 12, 2017, Parent 1 objected to changing Student's staff support relationship. Parent 1 said the present relationship was working, so Parent 1 did not

want to change it. Id. at 1:57:36.

16. The IEP team offered Student support in the IEP. Respondent's Exhibit "3", 00053; Petitioner's Exhibit "5," at 2:10:19.

Fade Plan

17. The IEP team discussed the need for a "fade plan", whereby Student's support would gradually transition from working with two staff to one, or to provide Student with more independence. TR, 272:4-272:7 and 278:9-278:16.

18. The IEP team determined that the fade plan is "essential" to Student's education. TR, 317:11-317:13.

19. At the IEP meeting on May 12, 2017, the IEP team offered Student support with a fade plan as part of Student's offer for a free and appropriate public education and agreed to include the fade plan in the IEP. Petitioner's Exhibit "5", at 2:10:19 and 2:19:16. TR, 274:1-274:6.

20. The IEP does not include a fade plan or description of a process to transition Student from a supportive relationship. Respondent's Exhibit "3", 00035-00056.

21. The IEP team did not develop the fade plan at the May 12, 2017 meeting but agreed to meet at a later date to develop the fade plan. TR, 296:15-296:16 and 297:1-297:6.

22. When the IEP team discussed the substance of the Prior Written Notice of Department Action ("PWN") dated May 19, 2017, the IEP team included a fade plan under section 1, "Description of proposed or refused action". Petitioner's Exhibit "5", at 3:19:20 and 3:21:09.

23. The PWN does not include a fade plan under section 1, "Description of proposed or refused action". Respondent's Exhibit "3", 00057. The PWN lists a fade plan under section 3, "Description of other options considered", and under section 6, "Other relevant factors", the

PWN states "Fade and Transition Plan will be created with IEP team members". Id. at 0058.

24. When the IEP team discussed section 3 of the PWN, the IEP team did not include a fade plan under that section. Petitioners' Exhibit "5", at 3:24:32.

25. A systematic fade plan to transition Student's support is critical to implement Student's IEP.

Assessments

26. Respondent was diligent in attempting to conduct assessments for Student in the areas of academic, fine motor, gross motor, and speech/language, the results of which would ultimately be used in the development of the IEP. Respondent first contacted Parents on February 17, 2017 to schedule a re-evaluation meeting to discuss the assessments. Respondent's Exhibit "6", 00123; Respondent's Exhibit "5", at 00085.

27. Respondent offered Parents three dates for the meeting, and Parents chose March 28, 2017. Id. at 00124.

28. On the morning of the scheduled re-evaluation meeting, Parent 1 cancelled the meeting. Respondent's Exhibit "6", at 00132.

29. The re-evaluation meeting was rescheduled to May 2, 2017, a date chosen by Parent 1. Respondent's Exhibit "9", at 00140. See also Respondent's Exhibit "2", at 00027.

30. On April 17, 2017, Respondent offered to extend the settlement agreement currently in place in order to complete Student's reevaluation and assessments and thereafter determine Student's eligibility and offer of FAPE. Respondent's Exhibit "6", at 00145.

35. Parents chose to proceed with the annual review of Student's IEP without the completion of the reevaluation and assessments, asserting that "the information that [Private School] has is more current and more thorough than any last-minute assessments conducted by the DOE." Respondent's Exhibit "9", at 00152-00153.

36. Although Parent 1 signed the Consent for Assessment as Part of a Reevaluation form, Parent 1 unilaterally dictated that the assessments were, “*TO BE CONDUCTED IN AN UNFAMILIAR ENVIRONMENT WITH UNFAMILIAR PEOPLE*”. Petitioner’s Exhibit “2”, at 024.

37. When Respondents scheduled the assessments at Public School on June 12, 2017, Parents objected to conducting the assessments at Public School during a school break, calling it a “false environment”. Parents requested to view the assessment “remotely” and to be provided a video recording of the assessment. Respondent's Exhibit "9", at 00159.

38. When Respondent scheduled the assessments at Private School, Parents objected to conducting the assessments at Private School, stating that Respondent was, “ignoring our agreement to an unfamiliar environment with unfamiliar people.” Id. at 00178.

39. Between May 22, 2017 and May 30, 2017, DOE staff attempted to observe Student for purposes of the scheduled assessments. Student was not made available for observation by Private School. Id. at 00163 and 00175.

40. On May 30, 2017, Parents withdrew consent for the assessments. Id. at 00176.

41. The data that would have been collected from the assessments would have been utilized in determining Student’s Present Levels of Educational Performance “PLEPs”. TR, 186:1-186:10.

Present Levels of Educational Performance, and Goals and Objectives

42. Student’s Present Levels of Educational Performance (“PLEPs”) and Goals and Objectives were discussed in depth during the IEP meetings of May 9, 2017 and May 12, 2017. The IEP team reviewed and considered data and progress reports provided from Private School, observations of Student at Private School and in the community conducted by several IEP team

members, Common Core standards, and input from Parents.⁹ TR, 161:24-163:7; 170:18-171:2; and 178:22-181:16; Petitioner's Exhibit "5", at 0:02:00-1:53:16; Respondents' Exhibit "4", 00078-00082; Respondents' Exhibit "7", 00260-00287; Respondents' Exhibit "8", 00294-00296; 00299-308; 00313-00322; and 00512-00570; Respondents' Exhibit "9", 00572-00573 and 00578.

43. Parents were given an opportunity to provide input on Student's present levels of performance, and parental concerns were noted in the IEP for every subject. *See* Respondent's Exhibit "3", 00036-00041.

44. Parents were active participants in developing the annual goals and were invited to offer and/or offered input on every goal discussed. TR, 178:22-181:16. Petitioner's Exhibit "5", 00:22:00-1:53:16.

45. The IEP team considered and incorporated Parents' suggestions in developing the goals and objectives for the Student. Respondent's Exhibit "3", 00043-00052. Petitioner's Exhibit "5", 00:39:00, 2:17:48, and 2:19:28.

46. The Student does not exhibit "past behaviors such as kicking, hitting, spitting, intentional urination, property destruction, and the need for physical intervention for safety." Respondent's Exhibit "3", at 00037. The Student does need to increase "social interactions with peers and adults by learning to initiate conversation and ask for information from others," and "needs to tolerate structured social situations for longer periods of time" like "waiting for people to respond, or when to communicate, social norms, and appropriate personal space." *Id.* at 00038.

47. The IEP includes appropriate annual goals to help the Student to use social skills

⁹ Petitioners were represented by their attorney at the May 12, 2017 IEP meeting. Respondent was also represented at the meeting by its attorney.

appropriate to a given social situation and utilize assistive visual communication device to communicate with a non-disabled peer. Id., 00046-00047.

48. The Parents noted that Student was exhibiting aggressive behavior towards Parents at home. These aggressive behaviors, however, are attributable to a change in services in the home. Id. at 00038.

49. The discussion of Student's PLEPs and Goals and Objectives during the IEP meetings were thoughtful, thorough, and collaborative and included parent participation at every step of the process. Parents' observations and input were respected and noted in the IEP, regardless of whether their input conflicted with data from Private School, other IEP team members' input, or the consensus of the IEP team. Respondent's Exhibit "3", 00036-00041.

Socialization

50. Student is presently in the ___ grade and attending Private School. Id. at 00035. Private School has a total of 6 students, ranging in age from 6 to 17. TR, 38:20-38:24. All students at Private School have special needs. Id., 96:19-96:22. Student does not interact with non-disabled peers at Private School. Student interacts with Student's school-aged peers at Private School. Student interacts with non-disabled individuals in the community and with the staff at Private School. Id., 39:13-39:25.

51. Though Student practices social skill development in Private School by interacting with peers, generalization of those skills are necessary and must be practiced in the community. Id., 26:5-26:10. Generalization of skills means that once a skill is taught in a small environment, the next step is to see if the skill can be demonstrated in new and different environments with new and different people. Id., 27:6-27:10.

52. Student needs more opportunities to practice social skills with different people in different settings. Id., 90:12-91:4. Private School's environment limits Student's independence

because Student is assigned to two staff. Id., 26:11-26:20. The only option Student has for generalization is in the community. Id., 27:11-27:13.

53. Student has been successful in the community despite it being unpredictable and unstructured, and having lots of people. Student was able to achieve success in the community with transitions and supports. Student has the ability to transition to new environments with time, supports and systematic planning. Petitioner's Exhibit "5", 3:12:05-3:12:40.

54. There is indication in the record that Student is able to transfer what Student has learned in the community. For example, DES testified that when visiting Student at Private School for purposes of observing Student, Student would acknowledge DES. On one occasion, Student was throwing a football with an aide and threw the ball to DES to include DES in the interaction. When DES turned to speak with another individual, Student did not continue throwing the ball to DES. DES testified that this interaction showed that Student had an awareness of when someone is attending to Student. TR, 355:15-356:5.

Least Restrictive Environment

55. At the IEP meeting on May 12, 2017, the IEP team discussed, at length, the continuum of placement for purposes of placing Student in the least restrictive environment. Petitioner's Exhibit "5", at 3:01:07.

56. The IEP team determined that although Student's recent behavioral progress may allow for a general education setting, Student's academic level would not be appropriately addressed at Public School or another general education setting, even in a small class size. Id. at 3:06:20.

57. The IEP team discussed the fact that Student's curriculum is vastly different¹⁰

¹⁰ Student's academic levels range from kindergarten through first or second grade. Student's non-disabled peers would be in the ___ grade.

than other students in a general education setting. Student would not be able to access Student's education in that setting, even in a smaller class and other modifications. Id. at 3:07:20.

58. Parent 1 was concerned that Student may be a target for bullies on a DOE campus because of Student's sometimes unkempt appearance and unusual behaviors. Id. at 3:10:50.

59. Parent 1 also felt that the large size of Public School, the noise factor and the presence of security guards would make it difficult for Student to acclimate. Id.

60. Parent 1 stated that Student would not be successful in a general or special education setting on a DOE campus. Id. at 3:11:26-3:12:01.

61. The IEP team addressed Parents' concerns about Student's ability to adjust to Public School by discussing the development of a systematic plan to transition Student from Private School to Public School. See, Findings of Fact #70-#78, *infra*.

62. The consensus of the IEP team was that it would not be appropriate to place Student on a DOE campus in a general education setting¹¹. Id. at 3:14:35.

63. The IEP team next discussed placement of Student in the next step down in the continuum which is a special education setting. Id. at 3:14:46. The special education setting was described as a special education classroom with a special education teacher, small class size, individualized instruction, supports, including support staff. Id. at 3:15:07.

64. The consensus if the IEP team was that Student's program could be carried out on a DOE campus with the services and supports offered in the IEP and with a sound transition plan. Id., 13:15:28-13:16:42.

65. The IEP team noted that Parents did not agree with the least restrictive environment placement decision and that Parents' objection would be noted in the PWN.

¹¹ The general education setting means the student will be with non-disabled peers for 80% or more of the school day. Id. at 3:08:30.

Petitioners' Exhibit "5", at 13:16:50.

66. Placement at Public School will allow Student to be more independent and have relationships with non-disabled peers. Public School can provide all of the services Student requires and will allow Student to meet Student's IEP goals on Public School's campus. *Id.*, at 2:59:47-3:00:19.

67. The IEP statement of the least restriction environment provides, "[Student] will participate with non-disabled peers during passing periods, lunch, recess, assemblies, activity period. [Student] will not participate with [Student's] non-disabled peers during [Student's] core academic instruction." Respondent's Exhibit '3', at 00054.

68. The hearing record suggests that Public School will offer Student opportunities to socialize with non-disabled students in a positive environment. For example, VP1 testified that non-disabled students at Public School actively engage with disabled students. Football players at Public School throw footballs with other students during lunch. TR, 285:13-286:15. VP1 also testified that several of the special education students at Public School have aggressive behaviors. Those students have behavior support plans and receive counseling to learn and practice coping skills and appropriate behaviors. *Id.* at 340:24-341:8.

69. This Hearings Officer finds that the IEP team thoroughly discussed the continuum of placement and the least restrictive environment for Student's placement. This Hearings Officer also finds that Parents and their attorney fully participated in the discussion of the least restrictive environment placement.¹²

Transition from Private School to Public School

70. During the May 12, 2017 IEP meeting, the IEP team determined that, absent an

¹² This Hearings Officer feels compelled to note that both Petitioner's attorney and Parent 1, at different times during the discussion of the least restrictive environment, abruptly interrupted the discussion, which may have inadvertently prevented a more thorough and collaborative discussion on the issue.

extensive transition plan, it would not be appropriate for Student to move from Private School to a DOE public school campus. Petitioner's Exhibit "5", at 370:10-370:13.

71. The IEP team agreed that Student's transition plan would require thoughtful discussion and development by the IEP team, including Parents. Id., at 3:00:25 and 3:16:08; TR, 370:14-370:19.

72. In order to successfully transition Student from Private School to Public School, it would be important to keep as many variables in Student's life constant. Provider 1 testified that Student's staff, class size and program should be kept constant as Student transitions from one school to the next. Id. at 25:9-25:17.

73. The transition plan should be adjusted according to Student's reaction and success in the transition plan. Petitioner's Exhibit "5", at 3:16:34.

74. The IEP team discussed different possibilities to transition Student from Private School to Public School, such as bringing Student to Public School campus during the summer just to visit the campus, or for an hour or two a day, and then increasing Student's time on Public School's campus as much as Student was able to adjust to. TR, 284:2-284:13.

75. The IEP team decided to schedule a meeting to develop the transition plan at a later time. Id., 284:14-284:20.

76. When the IEP team discussed the substance of The Prior Written Notice of Department Action ("PWN") dated May 19, 2017, the IEP team referenced the transition plan as a proposed action. Petitioner's Exhibit "5", at 3:19:20 and 3:21:09. However, the PWN itself does not reference a transition plan under section 1, "Description of proposed or refused action". Respondent's Exhibit "3", at 00057.

77. The PWN references a transition plan under section 3, "Description of other options considered", and under section 6, "Other relevant factors", the PWN states "Fade and

Transition Plan will be created with IEP team members”. Id. at 0058. However, when the IEP team discussed other options considered the IEP team did not reference the transition plan. Petitioners’ Exhibit “5”, at 3:24:32.

78. The IEP team intended to include a transition plan in the IEP and to schedule a meeting after the May 12, 2017 IEP meeting to develop the transition plan but failed to include the transition plan in the IEP itself. The meeting to develop the transition plan was not scheduled. TR, 339:10-340:10.

Extended School Year Services

79. At the IEP meeting on May 12, 2017, the IEP team discussed Student’s need for extended school year (“ESY”) services. The IEP team determined that, Student was receiving less services during ESY than during the regular school year. The IEP team found that the data provided by Private School was inconclusive as to whether Student made significant gains or losses during non-instructional periods. Based on that information, the IEP team decided to include in Student’s ESY program everything that Student would receive in Student’s regular school year program. Id., 278:17-279:23.

80. Public School addresses special education students’ ESY socialization needs by providing opportunities for students to interact with peers and non-disabled peer, such as with summer school students or with activities with the ____ or out in the community. Id., 280:11-281:4.

Instructional Minutes

81. The IEP includes 450 minutes per day of Special Education. Respondent’s Exhibit “3,” at 00053. The IEP also includes 450 minutes of corresponding ____ and Staff 1 for student to facilitate communication”. Id.

82. The IEP team utilized Student’s school schedule that was provided by Private

School in determining the length and duration of Student's instructional day. TR, 201:8-201:20; Respondent's Exhibit "9", at 00573. The schedule indicated that Student's school day began at 8:00 a.m. and ended at 3:30 p.m., totaling 450 minutes¹³. Respondent's Exhibit "9", at 00573.

Assistive Technology

83. At the IEP meeting on May 12, 2017, the IEP team discussed and considered Student's need to communicate with other individuals. In order to achieve one of Student's annual goals for interpersonal communication, the IEP team set out several short-term objectives for Student to learn to use a visual communication device to communicate with a non-disabled peer and to order food in a restaurant setting. Petitioner's Exhibit "5", at 1:06:00; 1:24:03. See also, Respondent's Exhibit "3", at 00047 and 00037-00038.

84. The IEP lists "Assistive Visual Communication Device" as a Supplementary Aid for Student to utilize for communication. Id. at 00053.

Behavioral Support Plan

85. The IEP lists a daily Behavioral Support Plan in the list of Supplementary Aids and Services, Program Modifications and Supports for School Personnel. Respondent's Exhibit "3", at 00053.

86. The IEP team did not describe the plan or discuss when a Behavioral Support Plan would be developed¹⁴. Petitioner's Exhibit "5", at 2:17:23.

87. The PWN does not indicate that a BSP will be developed at a later time.

¹³ The IEP team noted that, according to the schedule provided by Private School, Student's instructional day ended at 2:30, with a community component from 2:30 to 3:30 p.m. However, the IEP team recognized that instruction could be occurring during the community portion of Student's school day. Petitioner's Exhibit "5", at 2:39:40-2:40:16.

¹⁴ There was no testimony regarding the terms of the prior Behavioral Support Plan at the DPH. Respondent's Exhibit "9", at 00618-00622 is a Behavior Support Plan dated February 17, 2016, on Private School's letterhead, written by Provider 3. There was no testimony identifying or explaining this document during the DPH. Provider 3 was not a witness at the DPH.

Respondent's Exhibit "3", at 00058.

Necessity of _____s

88. There was no discussion by the IEP team during the May 12, 2017 IEP team meeting regarding the need for Student's support staff to be trained as providers. See Petitioner's Exhibit "5".

Necessity of direct parental communication with staff

89. During the May 12, 2017 IEP meeting, Parents asked that the need for Parents to be able to communicate directly with Student's service providers be included in the IEP. This item was in the prior IEP. Parents communicate with Student's service providers daily by email. VP1 stated that such communications are expected and are not services, *per se*. VP1 suggested removing the communication item from the IEP but left it in at Parents' request. Id. at 2:17:48.

90. The IEP does not include direct parental communication with Private School staff or Student's service providers. Respondent's Exhibit "3", 00035-00056.

VII. **CONCLUSIONS OF LAW**

A. **IDEA Requirements**

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 (2008) (citing 20 U.S.C. §1400(d)(1)(A)). The IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Andrew F. ex rel. Joseph F. v. Douglas County School Dist., 137 S.Ct. 988 (2017).

The IDEA provides state's with federal funding to educate children with disabilities "but

conditions such funding on compliance with certain goals and procedures”. N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula County, Mont., 541 F.3d 1202, 1207 (9th Cir. 2008) (citing Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1469 (9th Cir.1993)). To qualify for federal funding a state must demonstrate that it has policies and procedure in effect to assure that all handicapped children the right to a free appropriate public education”. Rowley, 458 U.S. 181, 179-91 (1982) (citing 20 U.S.C. § 1412(1)). A Free and Appropriate Education (“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 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 Hawaii v. Leo W. by & through Veronica W., 226 F.Supp.3d 1081, 1093 (D. Haw. 2016).

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the Department of Education (“DOE”) complied with the procedures set forth in IDEA; and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit. Rowley, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051. “A state must meet both requirements to comply with the obligations of the IDEA”. Doug C. v. Hawaii Dept. of Educ., 720 F.3d 1038, 1043 (9th Cir. 2013) (quoting Rowley). See also Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir. 2001).

Harmless procedural errors do not constitute a denial of FAPE. L.M. v. Capistrano Unified Sch. Dist., 556 F.3d 900, 910 (9th Cir. 2008). However, “a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies-

- (i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or
- (iii) Caused the student a deprivation of educational benefit.”

C.F.R. § 300.513 (a)(2). Where a court identifies a procedural violation that denied a student a FAPE, the court need not address the second prong. Id.

B. Did the Individualized Education Program (“IEP”) dated May 9, 2017 and May 12, 2017 fail to offer Student a Free and Appropriate Public Education (“FAPE”) because it failed to include a fade plan?

Petitioners allege that the IEP denied Student a FAPE because it failed to include a fade plan. For the reasons set forth herein, this Hearings Officer finds that the IEP denied Student a FAPE.

Pursuant to a prior IEP, Student is assigned two providers and Staff 1 for the duration of Student’s instructional day. However, the evidence presented at the DPH by both Petitioners and Respondent clearly shows that Student works with only one support staff at a time. Observations by DOE personnel confirmed that while a second support staff is in the vicinity while Student is receiving educational instruction, Student is not working with two support staff at one time. Sometimes the second support staff attends to data collection or training of other personnel and is therefore not assisting with Student’s instruction at all. In spite of Student’s reduced support relationship, the overwhelming weight of the evidence showed that Student has not had behavioral incidents at school for most, if not all, of 2017.

The IEP team offered Student support in the IEP. This offer was based upon data from Private School, observations from DOE staff, and in depth discussion of Student's PLEPs and goals and objectives. This Hearings Officer finds that the IEP team would have been justified in changing Student's support relationship at some point after the Student was appropriately transitioned to the Public School.

The evidence is clear and uncontroverted that the IEP team did not intend to immediately remove one support staff from Student's program altogether. The IEP team stated several times during the May 12, 2017 IEP meeting that a fade plan would be developed to transition Student support relationship. The IEP team discussed meeting with IEP team members at a later time to develop this fade plan.

The IEP is the used as the "centerpiece of the of the statute's education delivery system for disabled children". Honig v. Doe, 484 U.S. 305,311. It is "a written statement for each child with a disability that is developed, reviewed, and revised" according to specific detailed procedures contained in the statute. H.A.R. §8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R §300.22. The IEP is a collaborative education plan created by parents and educators who carefully consider the child's unique circumstances and needs. H.A.R. §8-60-45; 20 U.S.C. § 1414; 34 C.F.R §300.321- 322.

Among other things, the IEP must include,

"A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will provided to enable the child-

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To ... participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section; ..."

34 C.F.R. § 300.320 (a)(4).

The offer of the support included the fade plan. VP1 confirmed this at the DPH. The fade plan is a supplementary aid or service that will enable Student to advance toward attaining Student's annual goals, to participate in extracurricular and other nonacademic activities and to be educated and participate with other disabled and nondisabled children. The fade plan should have been included in the IEP. However, the IEP itself does not include any mention of a fade plan. None of the DOE witnesses at the DPH explained why the fade plan was not included in the IEP.

Additionally, when the IEP team discussed and delineated the items in Section 1 of the PWN, entitled "Description of proposed or refused action," the IEP team specifically stated that Student would be offered support with a fade plan, but the PWN does not reference a fade plan as a proposed action. When the IEP team discussed Section 3 of the PWN, entitled "Description of other options considered", the IEP team did not reference a fade plan in that section, but "Fade Plan" does appear on that section of the PWN document.

The DOE witnesses testified that the fade plan would be developed at a later meeting, and the PWN does indicate "Fade and Transition Plan will be created with IEP team members." Respondent's Exhibit "3", at 00058. The meeting to develop the fade plan has not occurred.

The fade plan is an integral and necessary part of Student's offer of support, and without it, this part of the IEP cannot be implemented. The fade plan is a supplementary aid or service that is required to meet Student's unique needs. Accordingly, this Hearings Officer finds that Respondent did not follow the procedures proscribed by the IDEA when Respondent failed to include a fade plan in the offer of Student's services in the IEP. This Hearings Officer further finds that the failure to include a fade plan in the IEP impeded Student's right to a FAPE.

C. Did the IEP dated May 9, 2017 and May 12, 2017 fail to offer Student a FAPE because it failed to include a transition plan?

Petitioners allege that the IEP denied Student a FAPE because it failed to include a transition plan in the IEP. For the reasons set forth herein, this Hearings Officer finds that the IEP denied Student a FAPE.

The offer of FAPE included a change in Student's placement, from a special education setting for 100% of Student's instructional day, to a special education setting for academic instruction and passing periods, lunch, recess, assemblies, activity periods with non-disabled peers. The IEP team determined that the change in placement was necessary to allow Student to develop socialization skills. See, VII.D. *infra*. The IEP team contemplated that the new placement would occur on a DOE campus, specifically Public School.

The IEP team thoroughly discussed the need for a systematic transition plan to allow Student to move from a very small school environment at Private School, to a large DOE campus. Individual IEP team members, including DOE members and Mr. Peck, were adamant that Student would require a transition plan to change Student's placement. The IEP team discussed specific ways to transition Student from Private School to Public School and a system to collect and analyze data on Student's success. The IEP team determined that, absent an extensive transition plan, it would not be appropriate for Student to move from Private School to Public School.

When the IEP team discussed and delineated the items in Section 1 of the PWN, entitled "Description of proposed or refused action:", the IEP team specifically stated that Student would be offered a transition plan, but the PWN does not include a transition plan under Section 1. When the IEP team discussed Section 3 of the PWN, entitled "Description of other options

considered”, the IEP team did not include a transition plan in that section, but “Transition Plan” does appear on that section of the PWN document.

As stated above, the IDEA provides that IEPs must include, “aids, services and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate ...” C.F.R. § 300.42.

While the IDEA does not specifically mandate the creation of a transition plan “when a student moves from a private placement to a public school, but in some cases, the knowledgeable education experts agree that a particular student would benefit from such a plan. B.B. ex rel. J.B. v. Haw. Dep’t of Educ.”, 483 F. Supp.2d 1042, 1056-57 (D. Haw. 2006). *Accord*, R.E.B. v. State of Haw. Dep’t of Educ., ___F.3d ___, 2017 WL 4018395 (9th Cir. 2017).

In the instant case, the knowledgeable education experts who constituted Student’s IEP team, as well as the witnesses who testified at the DPH agreed not just that Student would benefit from a transition plan, but that Student’s placement in Public School necessitated such a plan. The transition plan in this case is a critical supplementary support that will enable Student to advance toward attaining Student’s annual goals, to participate in extracurricular and other nonacademic activities and to be educated and participate with other disabled and nondisabled children. The transition plan should have been included in the IEP.

This Hearings Officer finds that the IEP team intended to include a transition plan in the IEP. This Hearings Officer further finds that a transition plan is critical to the implementation of the IEP and that the IEP cannot be implemented without it. The transition plan is necessary to meet Student’s unique needs. Accordingly, this Hearings Officer finds that Respondents failed to follow to procedures proscribed by the IDEA when Respondent failed to include a transition

plan in the IEP, as intended by the IEP team. This Hearings Officer further finds that the failure to include a transition plan in the IEP impeded Student's right to a FAPE.

D. Is Student's IEP provided in the least restrictive environment?

Petitioners allege that the IEP, including but not limited to Student's ESY services, is not provided in the least restrictive environment ("LRE"). Petitioners also allege that the IEP team failed to adequately discuss the LRE. For the reasons set forth herein, this Hearings Officer finds that the IEP team thoroughly discussed the LRE and that Parents and their representative participated in the discussion. This Hearings Officer also finds that the Student's placement is in the LRE.

1. Did the IEP team adequately discuss the least restrictive environment?

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] education with children who are not disabled ...") See also Haw. Admin. R. § 8-60-2, 34 C.F.R. § 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) (emphasis added).

The IEP team determined Student's placement based upon the goals and objectives developed during the IEP meetings. The IEP team discussed Student's PLEPs and goals and objectives in detail during the IEP meeting on May 12, 2017. Objective data from Private School was reviewed and observations by DOE staff were shared.

There was a focus on functional goals and objectives for Student. Goals were adjusted to ensure that Student's efforts were focused on skills that would assist Student in daily life.

Communication and socialization skills were emphasized throughout the discussion of Student's goals and objectives.

The IEP team noted that Private School is very small. Student has no opportunity to interact with non-disabled students at Private School. Student's interaction with non-disabled individuals is with staff and with unidentified persons in the community. Student would have more opportunity to generalize Student's social skills with non-disabled peers at Public School. All IEP team members agreed that this is an important skill for Student to master.

The IEP team also discussed each of Student's academic PLEPs and goals and objectives. With the exception of a few things parents had not observed with respect to Student's math goals, Parents had no concerns regarding Student's academic progress.¹⁵

There was agreement and consensus by the IEP team on all of Student's PLEPs and goals and objectives. Parents gave input where they felt they had something different or supplemental to offer. This Hearings Officer found that the discussion of Student's goals and objectives was collaborative and thorough and involved Parents' participation on every issue.

Building upon the development of Student's goals and objectives, the IEP discussed the continuum of placements.

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 C.F.R. § 300.115(a). The continuum must:

- (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home

¹⁵ Parents did note that Student was having behavior problems at home because of a change in the schedule and support personnel at home. Respondent's Exhibit "3", at 00041.

- 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 C.F.R. § 300.115(b).

The IEP team first discussed Student's placement in a general education setting. The IEP team agreed that a general education setting would not be appropriate for Student, not because of Student's behavior, but because Student's academic curriculum would be so different than Student's non-disabled peers that it would not be feasible to include Student with Student's non-disabled peers in a general education classroom, even with modifications and supports. This conclusion is supported by the extensive discussion of Student's PLEPs and goals and objectives.

The IEP team next discussed placement in a special education setting for Student's academic instruction. The IEP team also stated that Student would participate with non-disabled peers during passing periods, lunch, recess, assemblies, and activity periods.

Parent 1 objected to Student being on a DOE campus for any portion of Student's program. Parent 1 was concerned that Student would be a target for bullying because of Student's appearance and behaviors. Parent 1 was also concerned that the large number of people on Public School's campus would confuse Student.

34 C.F.R. § 300.116 (d) provides,

“In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs. ...”

In response to Parent 1's concerns and as a part of the general discussion, the IEP team asserted that Student would not be moved from Private School to a DOE campus without a detailed and systematic transition plan. See VII.C., *supra*. As discussed herein, the IEP team discussed options for transitioning Student from Private School to Public School, including

specific steps that could be taken to ensure that Student could adjust to the new placement, such as having Student incrementally spend time on Public School's campus and having Student's current support staff accompany Student as Student transitions to Public School.

The IEP team also noted that Student has been successful in the community where the environment is unpredictable and unstructured. The IEP team discerned that Student's success in the community with supports is an indication that Student may be able to generalize that success in a general education environment.

While Parents' concerns over Student's acceptance and acclimation to Public School are understandable, Petitioners presented no evidence at the DPH or in the IEP meeting that Student might be the target of bullying at Public School.

The IDEA requires the DOE to provide the parents of a student with an opportunity for meaningful participation during the development of an IEP. 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).

This Hearings Officer finds that the IEP team considered Parents' concerns over the possible harmful effects of moving Student from Private School to Public School. The IEP team

reassured Parents that Student would be slowly transitioned, with Student's support staff, from one placement to the other and that Student's past success in the community gave every indication that Student would be able to transition to the new placement in time.

This Hearings Officer finds that Parents had an opportunity to meaningfully participate in the IEP meeting, in the discussion of the LRE as well as other elements of the IEP. Parents, specifically Parent 1, spoke freely and honestly during the meetings. Petitioner's attorney also participated on behalf of Petitioners. The IEP team considered input from all members of the IEP team, including Parents and their attorney. While full consensus was not reached on the issue of LRE, Parents were active participants in the discussion. Petitioners have not proven by a preponderance of the evidence that the IEP team failed to adequately discuss or address the LRE or the potential harmful effects of the change in Student's placement.

2. Was Student's placement in the least restrictive environment?

This Hearings Officer also finds that the IEP is provided in the LRE. As stated above, the placement in a special education setting for academic instruction and general education for all nonacademic activities is consistent with the goals and objectives in the IEP. The evidence is uncontroverted that Student cannot achieve academic success in a general education classroom. However, Student will benefit greatly from participating with non-disabled peers in nonacademic activities at Public School. Student's socialization needs can be better addressed at Public School than in the limited environment that Private School offers. Student has better opportunities to generalize social skills with non-disabled peers at Public School than with individuals in the community. Accordingly, the IEP provides Student's placement in the LRE.

3. Are Student's ESY services provided in the least restrictive environment?

Petitioners also argue that Student's ESY services are not provided in the LRE. VP1 testified that it is difficult to detail with any specificity where and how ESY services would be provided to Student because the summer school environment is not predictable. However, Public School addresses the socialization needs of special education students during the ESY by creating opportunities for special education students to interact with summer school students or with community groups like the Boys and Girls Club. This Hearings Officer has already determined that the IEP is provided in the LRE. Student's ESY services are identical to Student's program during the regular school year. Petitioners have introduced no evidence to support the claim that Student's ESY services are not provided in the LRE. Accordingly, this Hearings Officer finds that Student's ESY was provided in the LRE.

E. Does Student require 510 minutes of ____ to receive a FAPE?

Petitioners allege that the IEP fails to provide Student a FAPE because the duration of Student's Individual Instruction Support was reduced from 510 minutes to 450 minutes. For the reasons set forth herein, this Hearings Officer finds that the IEP reflected the correct duration of Student's ____.

Student's prior IEP included 510 minutes of ____ and special education services. When the IEP team met on May 12, 2017, the team reviewed Student's school schedule provided by Private School, which indicated that Student's school day, including community time, started at 8:00 a.m. and ended at 3:30 p.m. Based on the schedule, the IEP team calculated Student's ____ and special education services at 450 minutes.

Petitioners did not introduce any evidence at the DPH that contradicted the duration of 450 minutes of instruction provided by Private School. Petitioners did not introduce any evidence at the DPH to support a finding that Student requires 510 _____ and special education

services. Accordingly, this Hearings Officer finds that Petitioners have failed to prove the claim that the IEP denied Student a FAPE for including 450 and not 510 minutes of _____ and special education services.

F. Does the IEP include an appropriate behavior support plan?

Petitioners allege that the IEP does not include an appropriate behavior support plan (“BSP”). The IEP lists a Behavior Support plan to be implemented daily. Respondent’s Exhibit “3”, at 00053. While the IEP lists a BSP as a service, the IEP does not include the actual support plan. The IEP team did not discuss the BSP during the IEP meetings. The IEP team did not describe the plan or indicate when a BSP would be developed. Unlike the fade plan and transition plan discussed herein, the IEP did not mention meeting at a later time to develop a BSP in the PWN.

This Hearings Officer finds Petitioner failed to prove by a preponderance of the evidence that the IEP team intended to include a BSP in the IEP. There was no discussion on the issue during the IEP meeting. There was no testimony at the DPH explaining what the IEP team intended regarding the BSP.

Additionally, this Hearings Officer also finds that Petitioners have failed to prove by a preponderance of the evidence that Respondent’s failure to develop a BSP impeded Student’s right to a FAPE, significantly impeded Parent’s opportunity to participation the decision-making process, or caused Student a deprivation of educational benefit. Petitioners introduced no evidence or testimony at the DPH proving Student was denied a FAPE due to Respondent’s failure to develop a BSP, and in fact, the record in this case suggests otherwise.

The IDEA does not mandate that a behavioral support plan be included in an IEP. The IDEA requires the IEP team to consider “the use of positive behavioral interventions and

supports, and other strategies, to address” a child’s behavior only when that behavior “impedes the child’s learning or that of others”. C.F.R. § 300.324 (a)(2)(i).

The record in this matter is clear, Student has not had any behavioral incidents at Private School since before January of 2017. Data from Private School reviewed by the IEP team shows that Student has had no behavioral incidents at school from January through May of 2017.

Parents have experienced Student’s behavioral issues at home. The DOE is only required to address a student’s behavioral issues that occur outside of school if the issues affect the student’s academic progress. San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office, 482 F.Supp.2d 1152, 1161 (N.D. Cal. 2007) (“[N]ot every need of a particular child is the legal responsibility of the District.”). However, Petitioners have introduced no evidence that the behavioral issues at home are affecting Students learning or that of others. Student’s IEP does not extend to Student’s home. There are no services provided in Student’s home pursuant to the IEP. The behavioral issues experienced at home do not impede Student’s learning.

The IDEA does not require the IEP team in this matter to consider the use of positive behavioral interventions and supports, and other strategies to address Student’s “behaviors” because Student has exhibited no behavioral issues. Petitioners cannot show that the failure to include a BSP has caused Student a deprivation of educational benefit. The Hearings Officer finds that the Petitioners have failed to prove that the IEP required a BSP or that Student was denied a FAPE as a result of Respondent’s failure to develop a BSP.

G. Did Student’s IEP team properly consider Student’s Assistive Technology Device and Service needs?

The Complaint states that the IEP team failed to discuss, “Student requires the use of and skill development for assistive technology to communicate with others.” Complaint at 4. The

IEP team discussed Student's need for a visual communication device at length when discussing Student's PLEPs and goals and objectives during the IEP meeting. The IEP team discussed using a device such as an iPad or smart phone to assist Student in communicating with individuals to enable Student to achieve Student's goals in the area of interpersonal communication, enhancing behaviors and reducing health risks, and language arts. The IEP lists "Assistive Visual Communication Device" as a daily supplementary aid for Student's use. Accordingly, Petitioners' allegation that the IEP team failed to discuss Student's need for assistive technology is without merit.

H. Was Parents' opportunity to participate in the decision making process significantly impeded because the IEP restricted Parents ability to communicate directly with Student's service providers?

Petitioners allege that the IEP failed to include a provision allowing Parents to communicate directly with Private School staff. Petitioners claim that this failure significantly impeded Parents' opportunity to participate in the decision-making process, in violation of the IDEA. This Hearings Officer finds that the IEP did in fact fail to include the provision for direct parental communication with Private School staff, but for the reasons set forth herein, no violation of the IDEA has been established.

Student's prior IEP included a provision that Parents would be able to communicate directly with Private School staff. At the IEP meeting, VP1 proposed removal of this provision, indicating that direct communication between parents and school personnel was expected. However, upon the insistence of Parents, it was decided to keep the provision in the IEP. However, when drafted, the IEP did not include a provision enabling parents to communicate directly with Private School staff.

This Hearings Officer finds that Respondent failed to follow the procedures proscribed by the IDEA when Respondent failed to include in the IEP the provision that Parents are able to communicate directly with Private School staff. However, Petitioners have introduced no evidence to show that the omission of this provision has significantly impeded Parents' opportunity to participate in the decision-making process. As VP1 stated, direct communication between parents and school personnel is expected. Petitioners have introduced no evidence to show that Parents have ever had difficulty in communicating with Private School personnel. Accordingly, this Hearings Officer finds that Petitioners have failed to prove that the omission of the parental communication provision in the IEP constitutes a violation of the IDEA.

I. Has a FAPE denial occurred because Student's IEP was developed without data from current assessments?

Petitioners allege that the IEP team had insufficient information to develop the IEP. Specifically, Petitioners allege that the IEP denied Student a FAPE because it was developed with data from current assessments.

The IDEA requires the DOE to ensure reevaluation of a child with a disability,

“(1) If the public agency determine that the educational or related services need, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation.”

34 C.F.R. § 300.303(a).

In anticipation of the IEP, Respondent contacted Parents in February 2017 to schedule a reevaluation meeting. The record in this case shows that Respondent acted in a timely manner to begin the reevaluation process. Parents chose the March 28, 2017 date for the reevaluation meeting, only to cancel the meeting on the morning of March 28. Respondent thereafter contacted Parents again to reschedule the reevaluation meeting, which was ultimately scheduled

for May 2, 2017.

On April 19, 2017, Respondent wrote to Parents, proposing an extension of the settlement agreement while the assessments were being conducted. Respondent stated that the offer to extend the settlement agreement would allow “the new annual review IEP for [Student] to be developed with the most current assessment data and also respects the process and your participation.” Respondent’s Exhibit “6”, at 00145. In a written response dated May 5, 2017, Parents rejected Respondent’s offer and stated,

“We feel that the information that [Private School] has is more current and more thorough than any last-minute assessments conducted by the DOE. Again, we acknowledge the DOE's failure to timely conduct assessments, but we certainly do not excuse it and will hold the DOE accountable for this inaction.”

Respondent’s Exhibit “9”, at 00152.

At the same time Parents signed an acknowledgement which stated, “I DO NOT agree to the offer made extending the Settlement Agreement¹⁶ in case 1516-083. I understand the annual review IEP will therefore be held prior to the completion of new assessments.” Respondent’s Exhibit “9”, at 00153. While Parent 1 signed the Consent for Assessment as Part of a Reevaluation form, Parent 1 also wrote on the form that the assessment(s) were, “TO BE CONDUCTED IN AN UNFAMILIAR ENVIRONMENT WITH UNFAMILIAR PEOPLE.” Petitioner’s Exhibit “2”, at 024.

Parents objected to Respondent scheduling Student’s assessments at Public School on June 12, 2017 because the assessments would be conducted during a school break, which Parents called a “false environment.” Respondent Exhibit “9”, at 00159. Respondents explained that the assessments needed to be conducted in a “conducive, quiet, distraction free location,” and rescheduled the assessments to be conducted at Private School. Parents then objected to

¹⁶ A settlement agreement was referred to throughout the DPH but was not introduced into evidence.

conducting the assessments at Private School, indicating this location was “not in accordance with our agreements from the re-evaluation meeting.” Id. at 00178.

On May 22 and May 30, 2017, DOE personnel made several unsuccessful visits to Private School to observe Student for purposes of conducting the assessments. On May 30, 2017, Parents withdrew consent for the assessments.

The IDEA requires parental consent for reevaluations. 34 C.F.R. §300.300 (c)(1)(i) provides that the DOE must obtain “informed parental consent prior to conducting any reevaluation of a child with a disability.”

The IDEA further provides that, if a parent refuses to consent to a reevaluation, the DOE “may but is not required to, pursue the reevaluation by using the consent override procedure ...” 34 C.F.R. § 300.300 (c)(1)(ii). However, the DOE “does not violate its obligation under §300.111 if it declines to pursue the evaluation or reevaluation.” 34 C.F.R. § 300.300 (c)(1)(iii).

This Hearings Officer finds that Respondent made every effort to reevaluate Student for purposes of the IEP. Parents were less than cooperative with Respondent’s efforts. Although Parent 1 refers to Parent 1’s handwritten addendum to the consent for reevaluation as “our agreement”, there is no evidence that Respondent agreed to conduct the assessments at Public School. However, when Respondent tried to accommodate Parents’ request to schedule the assessments at Public School, Parents objected because Public School was on a break. It is clear that Parents wanted Student to be assessed on Public School’s campus during a regular school day. However, there is no evidence that the IDEA requires that assessments take place in a particular location, nor has Petitioner proven why conducting the assessments at Public School during the regular school year was required.

When Respondent attempted to conduct Student’s assessments at Private School, Respondent’s efforts were thwarted. Parents ultimately withdrew their consent for the

assessments on May 30, 2017.

Petitioners argue that the IEP was conducted with insufficient evidence because the most-current data was not obtained. While it is true that the assessments were not conducted, this Hearings Officer finds that Parents agreed to proceed with the IEP without these assessments. Parents even stated that the information Private School had at the time of the IEP meetings was more current and thorough than any last-minute assessments conducted by Respondents. However, Parents' actions throughout this process reflect their opposition to cooperating in the IEP process. It is significant that Parents withdrew their consent four days after the filing of the Complaint in this matter.

The United States District Court for the District of Hawaii has stated, "the filing of a due process complaint that invokes the stay-put provision does not excuse a parent from cooperating with the DOE in its good faith attempts to address the concerns with the IEP that the parent has identified." J.M. v. Dep't. of Ed., State of Hawai'i, 224 F.Aupp.3d 1071, 1093 (D.Haw. 2016).

The Court, in J.M. stated that the filing of the Due Process Complaint in that case did not allow the parent "to ignore the Home School's good faith attempts to schedule further meetings to review the ... IEP" at issue and to address specific outstanding issues related to the student's services. Id.

Similarly, in this case, the Complaint was filed on May 26, 2017. Parents withdrew their consent on May 30, 2017, effectively stopping Respondent from proceeding with the assessments that Petitioners now complain denied Student FAPE. Petitioners cannot now allege that the IEP denied Student a FAPE because Parents themselves refused to allow the assessments to be conducted.

The IDEA requires the DOE to obtain parental consent prior to conducting a reevaluation. Parents' withdrawal of their consent made it impossible for the assessments to be

conducted. The IDEA specifically states that the DOE need not pursue an override of Parents' lack of consent, and in this case, this Hearings Officer finds that the DOE acted reasonably.

This Hearings Officer finds that Petitioners have failed to prove that the IEP denied Student a FAPE because current assessments were not conducted or included in the IEP.

J. Does Student require a support staff?

Petitioners allege that the IEP fails to provide Student a FAPE because the IEP does not include a specific description of Student's _____ as staff. This Hearings Officer finds this claim to be meritless.

The Ninth Circuit Court of Appeals, in R.E.B. v. State of Haw. Dep't of Educ., ___F.3d ___, 2017 WL 4018395 (9th Cir. 2017), summarily dismissed a similar claim by a parent, stating, "[n]othing in [20 U.S.C. Section 1414(d)] indicates that an IEP must specify the qualifications or training of service providers.", citing, S.M. v. Haw. Dep't of Educ., 808 F.Supp. 2d 1269, 1274 (D. Haw. 2011). As in R.E.B., nothing in this record established that the DOE agreed to provide such an aide at the IEP meetings.

Further, although Petitioners may prefer Student's support staff, this Hearings Officer found the record in this matter insufficient to prove staff specifically are necessary to provide Student a FAPE. Neither Provider 2 nor Provider 1 offered any testimony which established that utilizing a staff, as opposed to another staff, was necessary or critical to Student's needs.

This Hearings Officer finds that the IEP did not deny Student a FAPE by failing to require Student's support staff.

K. Did the absence of personnel from Private School at the IEP team meetings on May 9, 2017 and May 12, 2017 significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to student?

The IDEA requires the IEP team to include:

- (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 resource 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.

34 C.F.R. § 300.321(a).

Petitioners allege that Parents were denied the opportunity to participate in the decision-making process because Private School personnel were not present the IEP meetings. This Hearings Officer finds this allegation to be without merit. First, the IEP team included all of the individuals required by 34 C.F.R. § 300.321(a), and Petitioners do not allege otherwise.

Additionally, the IDEA specifically states, “at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding this child, including related services personnel as appropriate,” may be included in the IEP team. Id., at 34 C.F.R. § 300.321(a)(6). Parents could have included any or all of Student’s educational and support staff from Private School in the IEP meetings. Parents noted in the IEP meeting that they have daily

contact with Student's support staff by email. Parents certainly would have been able to identify those individuals involved in Student's education who might "have knowledge or special expertise regarding Student". Further, Petitioners did not introduce any evidence at the DPH regarding what personnel from Private School should have been at the IEP meetings or why the absence of these individuals significantly impeded Parents' opportunity to participate in the decision-making process.

Additionally, Respondent invited Provider 1 to attend the IEP meetings. Provider 1 only attended the meeting on May 12, 2017 for a little more than one hour. No one, including Parents and their attorney, objected to Provider 1 leaving the meeting or continuing the meeting without Provider 1. This Hearings Officer also finds that Provider 1 offered little to the discussion during the time Provider 1 was present. Parents knew that Special Education Teacher was no longer with Private School at the time of the IEP meetings and could have invited other Private School staff who may have had knowledge regarding Student.

This Hearings Officer finds that Petitioners have failed to prove that Parents' opportunity to participate in the decision-making process was significantly impeded by the absence of Private School personnel at the IEP meetings.

L. Payment of educational expenses

Petitioners request an Order directing Respondent to pay for any sum incurred, yet not paid by Parents, for education and related expenses provided to Student. Petitioners have introduced no evidence of any educational or related expenses incurred on Student's behalf, nor have Petitioners provided any authority supporting this request. Accordingly, Petitioners' request for payment of educational or related expenses is denied.

M. Compensatory education

Petitioners request an Order directing Respondent to pay for compensatory education expenses allegedly incurred by Petitioners. Petitioners have introduced no evidence regarding compensatory education services or expenses. Accordingly, Petitioner's request for compensatory education is denied.

VIII. DECISION AND ORDER

Based upon the above-stated findings of fact and conclusions of law, this Hearings Officer finds and concludes that Petitioners have proven by a preponderance of the evidence that Respondent denied Student a FAPE through the IEP, as:

1. Respondent failed to include a fade plan in the IEP; and
2. Respondent failed to include a transition plan in the IEP.

Based upon the findings of fact and conclusion of law herein, it is hereby:

ORDERED THAT BY December 9, 2017, Respondent shall convene an IEP meeting to develop a transition plan to enable Student to transition from Student's present placement to the placement described in the IEP;

IT IS FURTHER ORDERED that the transition plan will include a fade plan which will enable Student to transition to support staff;

IT IS FURTHER ORDERED that Respondent will invite at least one representative of Private School who has knowledge or expertise regarding Student to participate in the IEP meeting;

IT IS FURTHER ORDERED that the transition plan shall be completed no later than January 9, 2018; and

IT IS FURTHER ORDERED that Student will remain in Student's current placement until the transition plan is developed and implementation of the transition plan commences.

XI. NOTICE OF APPEAL RIGHTS

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, as provided in 20 U.S.C. § 1415 (i)(2) and § 8-60-70(b).

DATED: Honolulu, Hawaii, November 9, 2017.

DENISE P. BALANAY
Hearings Officer