

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

In the Matter of STUDENT¹, by and through
Parents,

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAI'I, and CHRISTINA
KISHIMOTO, Superintendent of Hawai'i
Public Schools,

Respondents.

DOE-SY1718-012

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

FINDINGS OF FACT,

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 §§ 300.1, et seq.; and the Hawai'i Administrative Rules §§ 8-60-1, et seq.

¹ Personal identification information is contained in Legend.

II. PROCEDURAL HISTORY

On October 2, 2017, Petitioners filed a Complaint against Respondents DEPARTMENT OF EDUCATION, STATE OF HAWAI'I and CHRISTINA KISHIMOTO, Superintendent of Hawai'i Public Schools (hereinafter collectively referred to as "Respondents" or "DOE"). Respondents filed a Response to the Complaint on October 13, 2017. This Hearings Officer was appointed to preside over this case on October 13, 2017.

On October 12, 2017, the parties participated in a resolution meeting but did not resolve the Complaint. The resolution period ended on November 11, 2017.

A Prehearing Conference ("PHC") was conducted on November 7, 2017. Participating in the PHC were DENISE P. BALANAY, Hearings Officer; KEITH H.S. PECK, Esq. for Petitioners and Parent 2; and GREGG M. USHIRODA, Esq. for Respondents. At the PHC, by agreement of the parties and the Hearings Officer, the due process hearing ("DPH") was scheduled for December 11, 2017 through December 15, 2017. Respondents' counsel submitted a Declaration requesting the extension of the decisional deadline ("Deadline") from December 17, 2017 to January 30, 2018. The extension was granted on November 15, 2017.

A Prehearing Order was issued on November 15, 2017, setting forth the issues discussed in the PHC. The Prehearing Order restated the issues in the Complaint as understood by the Hearings Officer. The parties were allowed to submit objections or clarifications to the Prehearing Order.

On November 16, 2017, Respondents requested a continuance of the Hearing in this matter due to the unavailability of three witnesses Respondents intended to call at the Hearing.

On November 20, 2017, Petitioners submitted Petitioners' Notice of Omissions (sic) and/or Missatements (sic) of the Prehearing Order ("Notice"). The Notice restated the issues to be considered at the Hearing in this matter.

A second Prehearing Conference was conducted on November 24, 2017 to address the Notice and Respondents' request for a continuance. Participating at the second PHC were DENISE P. BALANAY, Hearings Officer; KEITH H.S. PECK, Esq. for Petitioners, and Parents; and GREGG M. USHIRODA, Esq. for Respondents. At the second PHC, Respondents' counsel indicated there were four DOE witnesses who were unavailable during the week of December 11, 2017 to December 15, 2017. The parties requested that the DPH be continued to the week of January 8, 2018. Respondents' request for a continuance of the DPH was denied. The DPH remained scheduled for December 11, 2017 through December 15, 2017. Additional hearing dates were scheduled for January 8, 2018 and January 9, 2018 to accommodate the DOE witnesses who were unavailable in December as well as Petitioners' rebuttal witnesses as appropriate.

Also, at the second PHC, Petitioners' Notice was addressed. Further clarification of the issues to be determined at the DPH in this matter was discussed over the objection of Respondents' counsel. A second Prehearing Conference Order was issued on November 29, 2017, setting forth the issues certified in this matter as well as the Hearings Officer's ruling on Respondents' request to continue the DPH.

The DPH was held on December 11, 2017 through December 15, 2017. At the DPH, the Hearings Officer entered into evidence Petitioners' Exhibits "1" – "9". The Hearings Officer also entered into evidence Respondents' Exhibits "3" – "33", "35" – "46". Respondents withdrew Respondents' Exhibits "1", "2", and "34".

At the DPH, Petitioners presented 5 witnesses: Private School Principal, DOE Provider 1, DOE Provider 2, Tutor, and Parent 2. Respondents presented 5 witnesses: DOE Principal, Student Services Coordinator (“SSC”), General Education Teacher (“Gen Ed Teacher”), Behavioral Health Specialist (“BHS”), and District Education Specialist (“DES”).

The parties submitted Closing Briefs on January 19, 2018.

III. CASE SUMMARY

Student is ___ years old and eligible for services under the Individuals with Disabilities education Act (“IDEA”) by meeting the criteria for Eligibility Category. Student currently attends Private Program. Student previously attended Public School.

The Complaint in this matter alleges procedural and substantive violations of the IDEA relating to the development of an Individualized Education Program dated April 28, 2017, May 2, 2017, and May 11, 2017 (“May 2017 IEP”). The Complaint alleges that the IEP denies Student a Free Appropriate Public Education (“FAPE”) because changes were made to the provision of services and Student’s special education instruction. The Complaint further alleges several failures to implement the May 2017 IEP and failures to include certain provisions and terms necessary for Student’s education. The Complaint alleges that the May 2017 IEP does not provide for Student’s extended school year services in the least restrictive environment and does not address Student’s behavioral deficits and need for socialization. The Complaint also alleges that the May 2017 IEP was not properly developed because the IEP team did not adequately discuss several key issues and was developed without including data from Private Teacher.

IV. ISSUES PRESENTED

- A. **Issue 1** – Whether the Individualized Education Program dated April 28, 2017, May 2, 2017, and May 11, 2017 (“May 2017 IEP”) was developed to address the needs of Student when:
- a. Changes were made to the services;
 - b. Changes were made to the instructional time; and
 - c. The K-12 testing format was employed.
- B. **Issue 2** – Whether the IEP dated December 13, 2016, January 9, 2017, January 25, 2017 and February 8, 2017 (“February 2017 IEP”) and May 2017 IEP were appropriately implemented regarding:
- i. Authorization, support, and/or direction regarding implementation of accommodations;
 - ii. Provision of data regarding Student’s goals;
 - iii. Commencement of a technology assessment;
 - iv. Parental access to Communication Log Folder;
 - v. Changes to Student’s program without following an agreed upon process; and
 - vi. Chronic staffing changes
- C. **Issue 3** - Whether Student’s program and Parents’ opportunity to participate in the IEP development was impacted by the school preventing appropriate discussion of the need for the services to be delivered directly to Student and/or Private Teacher.
- D. **Issue 4** – Whether Student’s program and Parents’ opportunity to participate in the May 2017 IEP development was impacted by the school preventing appropriate discussion of the need for Student’s aide to use certain methodologies.
- E. **Issue 5** – Whether the DOE’s failure to use data provided by Private Teacher for May 2017 IEP development purposes impeded Student’s right to a free and appropriate public education (“FAPE”) and/or significantly impeded Parents’ opportunity to participate in the decision-making process.
- F. **Issue 6** – Whether by removing a clarification in the May 2017 IEP that “all adults working with [Student] will be trained and experienced in Eligibility Criteria,” due to staffing concerns and turnover at Student’s school, Student was denied a FAPE.
- G. **Issue 7** - Whether by refusing to put in key behavioral interventions into the May 2017 IEP, the DOE denied Student a FAPE.
- H. **Issue 8** – Whether the failure to describe in the May 2017 IEP Student’s aversion to techniques denied Student a FAPE.

- I. **Issue 9** – Whether the failure to discuss Parents’ concern that Student’s instructional time at school should be limited to 2 ½ hours per week denied Parents an opportunity to participate in the decision-making process.
- J. **Issue 10** – Whether Student’s extended school year (“ESY”) program in the May 2017 IEP denies Student a FAPE for the following reasons:
 - i. The ESY program contains no definition or description for the provision of the least restrictive environment;
 - ii. There was insufficient discussion regarding how Student’s ESY program will address Student’s social skills and behavioral deficits;
 - iii. There was insufficient description regarding how Student’s ESY program will address Student’s social skills and behavioral deficits;
 - iv. The frequency, location and/or duration of Student’s services was not sufficiently discussed;
 - v. The frequency, location and/or duration of Student’s services was not sufficiently described; and
 - vi. The May 2017 IEP did not include a statement of when Student would participate with non-disabled peers because the DOE could not guarantee this setting.

V. **REMEDIES REQUESTED**

- A. **Remedy 1-** Find that the DOE failed to provide a FAPE;
- B. **Remedy 2-** Find that Student’s private services are appropriate for purposes of tuition reimbursement and current educational placement;
- C. **Remedy 3-** Amend the May 2017 IEP to address the alleged deficits;
- D. **Remedy 4-** Order direct payment for any sum incurred for educational and related expenses provided to Student; and
- E. **Remedy 5-** Compensatory Education as appropriate.

VI. FINDINGS OF FACT²

STUDENT'S DISABILITY

1. Student is diagnosed with disability. Respondents' Exhibit "4", at 065; Testimony of Parent 2.
2. Student has difficulty with transitions and new situations. Student has difficulty adjusting to new people, including teachers and support staff. Respondents' Exhibit "4", at 069-70; Respondents' Exhibit "7", at 105-106; Testimony of Parent 2; Testimony of Gen Ed Teacher.
3. Historically, Student has had difficulty in class at the beginning of a new school year. Testimony of Gen Ed Teacher.
4. One of Student's anxiety or behavioral triggers is being asked to do something or work on a subject Student has already worked on previously that day. Testimony of Parent 2; Respondents' Exhibits "6" and "7".
5. Student struggles with the mechanics of writing and often becomes dysregulated when asked to write or when Student anticipates that a task, such as math problems, will require writing. Testimony of Gen Ed Teacher; Respondents' Exhibit "4", at 67, 69, 71-72; Respondents' Exhibit "7", at 105, 107-108.
6. During the 2016-2017 school year, prior to the implementation of the May 2017 IEP, there were several instances where Student refused to perform work, left the classroom and/or hid under classroom furniture when Student became dysregulated. These instances coincided with several triggers, such as being asked to do work that Student had already worked on at home, being asked to perform written work, and having returned from a school break.

² The Hearings Officer considered the entire record, including all testimony and exhibits introduced at the DPH, in issuing this Decision.

Testimony of Gen Ed Teacher; Petitioners' Exhibit "5", at 221-224, 235-236, 238-240, Respondents' Exhibit "43" at 359, 372-373.

2017-2018 SCHOOL YEAR

7. During the 2017-2018 school year, Student attended Public School on three days. On August 15, 2017, Student attended a one-hour an informal meet-and-greet session with Student, Gen Ed Teacher, Sped Teacher and DOE Provider 3. The meeting was to build rapport between Student and Student's new team members. The meeting went well. Testimony of Gen Ed Teacher. Student was ill and did not attend Public School the following week. Testimony of Gen Ed Teacher.

8. Student attended Public School two days the following week, on Tuesday, August 29, 2017 and Wednesday, August 30, 2017. Each day, Student was on campus for approximately two and-a-half hours. Testimony of Gen Ed Teacher; Petitioners' Exhibit "5", at 254-258; Respondents' Exhibit "43", at 388-393.

9. On August 29, 2017, Student refused to participate in any activity except lunch. Respondents' Exhibit "43", at 388-391.

10. On August 30, 2017, Student participated in all activities without behavioral incident from 12:35 to 1:30 p.m. Respondents' Exhibit "43", at 392. In response to requests to complete a math worksheet and other writing activities, Student exhibited typical behaviors by refusing to do the requested work, leaving the classroom and lying down under a table. *Id.* At 392-393.

11. Sped Teacher rated Student's engagement behavior during math and writing as a "2"³, and explained in the communication log, "[Student] seemed impatient and made a few negative comments, but didn't yell or whine. Although, Student was under the table, Student's body appeared relaxed. Student laid flat on Student's stomach on the floor." *Id.* at 393.

12. Sped Teacher followed Student's regulation plan, FBA and BSP and gave Student "space" and allowed Student to regulate self. Testimony of Gen Ed Teacher; Respondents' Exhibits "6" and "7".

13. Student did not return to Public School after August 30, 2017. Testimony of Gen Ed Teacher. Parents withdrew Student from Public School⁴ on September 26, 2017. Testimony of DOE Principal; *see also* Respondents' Exhibit "39".

DELIVERY OF SERVICES

14. Both the IEP dated December 13, 2016, January 9, 2017, January 25, 2017, February 8, 2017 ("February 2017 IEP") and the May 2017 IEP included services to be provided. Services are provided in two parts – consultation, and parent education and training. Testimony of SSC. Respondents' Exhibits "3", at 45-47 and "4", at 89-91.

15. The services provided support for the teachers and support staff working with Student. The providers worked directly with Student to model and instruct Student's teachers and providers on how to provide Student with behavioral support. Testimony of DOE Principal.

16. Parent education and training involved the services providing behavioral support and instruction to _____. The contracted service provider instructed Private Teacher on how to carry out accommodations and behavioral supports in the home and community so that

³ On a scale of 0-4, with "0" being the highest level of engagement.

⁴ Student's withdrawal was formally received and processed by Student's geographic home school. Testimony of DOE Principal.

Student could learn the curriculum. Testimony of Gen Ed Teacher; Testimony of DOE Provider 1.

17. The February 2017 IEP included 180 minutes per week for consultation and 60 minutes per week for parent education and training. Respondents' Exhibit "4", at 46.

18. On September 1, 2016, _____. Testimony of SSC; Testimony of Gen Ed Teacher.

19. _____. Testimony of Gen Ed Teacher; *see also*, Respondents' Exhibit "3", at 46.

20. _____, _____. Testimony of DOE Principal; Testimony of SSC; Testimony of Gen Ed Teacher; Respondents' Exhibit "4", at 90.

21. At the May 2, 2017 IEP meeting, Parent 2 expressed concern that, Private Teacher would not have sufficient support. The IEP team explained that _____. Testimony of SSC; Petitioner's Exhibit "9", Recording of May 2, 2017 IEP meeting, part 2, at 43:30-51:57; 57:07; 1:12:00-1:14:00.

22. Parent education and training time was increased from 60 to 180 minutes per week to support Parent 2 in the home. Testimony of SSC; Testimony of DOE Principal.

23. The May 2017 IEP included 60 minutes per week for consultation and 180 minutes per week for parent education and training. Respondents' Exhibit "4", at 90.

24. DOE Provider 1 provided services to Student and Student's educational team from July 2016 to July 2017. Testimony of DOE Provider 1. DOE Provider 2 provided services to Student and Student's educational team from August to September 2017. Testimony of DOE Provider 2.

25. Parent 2 received the same support and instruction regarding Student's behavioral needs from DOE Provider 1 and DOE Provider 2. Testimony of DOE Provider 1; Testimony of DOE Provider 2.

26. During the May 2, 2017 and May 11, 2017 IEP meetings, Parent 2 requested that the provider of the parent education and training have the same qualifications as those required in the DOE. Testimony of SSC; Petitioners' Exhibit "9", recording of May 2, 2017 IEP, part 2, at 1:14:00-1:25:00.

27. At Parent 2's request, the May 2017 IEP also included the following in the "Clarification of Services and Supports":

"Parent Educator and Teacher Consult provider will be an individual who possesses a Master's Degree in Education with a specialty in the area of special education, or Psychology, or Speech Pathology and having at least (5) years of experience working with student with special needs in an educational setting and have knowledge and experience of behavioral/instructional approaches for the target population."

Respondents' Exhibit "4", at 91.

28. The service was going to be implemented for Student's program at the beginning of the 2017-2018 school year, but it did not occur because Student withdrew from Public School shortly after the school year began. Testimony of Gen Ed Teacher; Respondents' Exhibit "32", at 192.⁵

CHANGE TO STUDENT'S SPECIAL EDUCATION INSTRUCTION

29. The May 2017 IEP included a goal for Student to learn appropriate social interactions with peers. Respondents' Exhibit "4", at 84.

⁵ DOE Provider 1 stopped working with Student at the end of April, 2017. Testimony of DOE Provider 1.

30. During the February 8, 2017 IEP meeting, the IEP team agreed that Student should begin to integrate into a classroom setting on a more frequent basis to allow Student to make progress in Student's goals. Testimony of SSC; Petitioners' Exhibit "9", recording of February 8, 2017 IEP meeting at 1:30:41-2:22:50.

31. Prior to the 2017-2018 school year, Student was receiving special education instruction, _____. Testimony of SSC; Testimony of Parent 2.

32. Prior to the development of the May 2017 IEP, Parent 2 had requested that Student's special education instruction be changed from _____. Testimony of SSC; Testimony of Parent 2.

33. Public School hired a special education teacher to provide special education instruction on Public School's campus for the 2017-2018 school year. Testimony of DOE Principal.

34. Although DOE Provider 1 thought a second day at Public School would be beneficial for Student, DOE Provider 1 wanted Student to have four consecutive weeks with good ____ and low anxiety prior to transitioning Student to a second day at Public School. Testimony of SSC; Testimony of DOE Provider 1; Petitioners' Exhibit "9", recording of January 28, 2017 IEP meeting, at 1:38:04.

35. Student was unable to attend Public School for four consecutive weeks during the remainder of the 2016-2017 school year. Testimony of Gen Ed Teacher.

36. During the February 8, 2017 IEP meeting, Parent 2 cut off the discussion of having Student attend Public School a second day. Petitioners' Exhibit "9", recording of February 8, 2017 IEP meeting, at 2:22:50.

37. At the May 11, 2017 IEP meeting, the IEP team did not change Student's special education instruction. The method of delivery of Student's special education instruction was changed from _____. Testimony of SSC.

38. Sped Teacher was using a _____ approach for Student's language arts instruction. A _____ would be more effective to provide _____ instruction to Student, as well as allow Sped Teacher to address Student's _____ needs. Testimony of SSC; Respondents' Exhibit "4", at 97.

39. Student's specialized instruction would eventually be provided in a small group setting in order to give Student more opportunity to address _____ goals set forth in the May 2017 IEP. However, in order to address Student's anxiety and to build rapport with the new special education teacher, Student's specialized instruction would be delivered in an individual setting. Once the data suggested that Student was finding success in the individual setting, Student would be transitioned to a small group setting. Id.

40. The IEP team's decision to transition Student to a second day on Public School's campus was based upon consideration of Student's needs for _____ instruction in language arts, _____ and the provision of Student's program in the least restrictive environment. *See Findings of Fact, #29-39, supra.*

TESTING FORMAT

41. Curriculum included appropriate checks for understanding and mastery of the subject matter. Testimony of Gen Ed Teacher.

MODIFICATIONS TO CURRICULUM AND ACCOMMODATIONS

42. To address Student's needs, modifications were made to Public School's pacing guide by Gen Ed Teacher by withdrawing certain pieces of lessons in order to focus on quality over quantity of Student's work. Testimony of Gen Ed Teacher.

43. DOE Provider 1 instructed Student's teacher on chunking of information, using a visual schedule, and utilizing sensory breaks. Testimony of Gen Ed Teacher.

44. Gen Ed Teacher, Sped Teacher, as well as Former Gen Ed Teacher responded to Parent 2's questions regarding following Public School's pacing guide and requests to modify Student's lessons. Testimony of Gen Ed Teacher; Respondents' Exhibits "9", "10", "14", "16", "18-20", "22", "23", "25", "26", "29", "31", and "33".

45. Prior to the beginning of the 2016-2017 school year, DOE Principal and Gen Ed Teacher worked with Contractor to revise the Curriculum and the pacing guide to better address the needs of all students at Public School. A new pacing guide was provided at the beginning of the 2016-2017 school year and parents were advised to use the updated pacing guide provided on Public School's website. Parent 2 was unaware that updated pacing guides were accessible on Public School's website. Petitioners' Exhibit "9", recording of January 25, 2017 IEP meeting, at 30:00-32:50.

46. At the May 11, 2017 IEP meeting, the IEP team discussed developing a "[Student]-specific" pacing guide. The [Student]-specific pacing guide was going to be developed during a face-to-face meeting which was supposed to occur in the beginning of Student's third grade year. Student withdrew from Public School prior to the meeting being conducted. Testimony of Gen Ed Teacher; Petitioners' Exhibit "9", recording of May 11, 2017 IEP meeting, at 45:38-46:32.

PROVISION OF DATA REGARDING STUDENT'S GOALS

47. All members of Student's educational team entered data regarding Student's progress in _____. Sped Teacher, Gen Ed Teacher, and Parent 2 had access to the _____ containing all of the data entered. Testimony of DOE Provider 1.

48. _____ compiled all data and DOE Provider 1 would incorporate the data into graphs and an analysis for each of Student's goals, which was shared with each member of Student's team, including Parent 2. *Id.*

49. Communication logs were compiled by Student's team members relating to Student's behaviors in each setting. Parent 2 had access to these logs. Testimony of DOE Provider 1; Testimony of Parent 2.

50. Parents were provided with Progress Reports, which contained data and information on Student's progress and goals and objectives. Respondents' Exhibits "40" and "41"; Testimony of Gen Ed Teacher.

TECHNOLOGY ASSESSMENT, ETC.

51. Both the February 2017 IEP and May 2017 IEP contained the accommodation "allow handwriting portion of assignments to be completed via electronic means". Petitioners' Exhibit "1", at 69-70; Respondents' Exhibit "4", at 90. The Clarification of Services and Supports" section in the May 2017 IEP also states, "[h]andwriting assignments need to be done via electronic means and handwriting skills worked on in isolation to reduce anxiety, frustration and to promote learning/desire to complete the writing assignments." Respondents' Exhibit "4", at 91.

52. Student used a _____ application that allowed Student to _____. Private Teacher found the application and OT supported the use of it. The IEP team agreed that the use of the application was beneficial to Student and accordingly included the aforementioned language in

the February 2017 and May 2017 IEPs. Testimony of DOE Provider 1; Petitioners' Exhibit "1", at 69-70; Respondents' Exhibit "4", at 90.

53. At the May 2, 2017 IEP meeting, Parent 2 requested a "technology assessment". The IEP team agreed to contact the DOE technology consultant to assess Student's assistive technology needs. Petitioners' Exhibit "9", recording of May 2, 2017 IEP meeting part 1, at 28:50-33:38.

54. On July 19, 2017, SSC informed Parent 2 that SSC had contacted the assistive technology consultant to determine the next steps in exploring assistive technology options for Student. Petitioners' Exhibit "8", at 416.

PARENTAL ACCESS TO COMMUNICATION LOGS

55. The May 2017 IEP, in the section entitled "Clarification of Services and Supports", states in part, "Communication log will be in an online format accessible by teacher, parent and service providers." Respondents' Exhibit "4", at 91.

56. On or about September 1, 2017, DOE Principal locked and reorganized the communication log folder to protect Student's private information from being disseminated to unauthorized individuals. During this time, Parent 2 was unable to access the communication logs for a period of less than a week. Testimony of DOE Principal; Testimony of DOE Provider 3; Respondents' Exhibit "8", at 449-451.

USE OF PRIVATE TEACHER'S DATA IN IEP DEVELOPMENT

57. All members of Student's educational team, including Private Teacher, entered their data into the data collection system called _____. Testimony of Parent 2; Testimony of SSC; Testimony of Gen Ed Teacher; Testimony of DOE Provider 1.

58. All data collected in _____ was used in evaluating Student's progress. Quarterly IEP reports included data from Student's teachers. Testimony of SSC; Petitioners' Exhibit "9", recording of January 25, 2017 IEP meeting, at 22:50-26:30.

59. DOE Provider 1 used Private Teacher's data to inform the rest of the team members of Private Teacher's input. All parents at Public School, Parent 2 included, help set goals for their students. Teachers included parents' input in the progress reports. Petitioners' Exhibit "9", recording of January 25, 2017 IEP meeting, at 22:50-26:30.

60. Communication logs, which included information provided by Parent 2, were also used by the IEP team in developing Student's IEP. Testimony of Gen Ed Teacher.

TRAINING OR EXPERIENCE FOR ALL ADULTS WORKING WITH STUDENT

61. At the December 13, 2016 IEP meeting, Parent 2 requested that the IEP contain the requirement that all adults working with Student shall have training in Disability and _____. Parent 2 stated that Student had a prior support staff person who "triggered" Student. OT stated that Student "couldn't tolerate" this staff person. OT felt that this person wasn't properly trained in Disability and did not know how to interact with Student. Petitioners' Exhibit "9", recording of December 13, 2016 IEP meeting, at 2:12:00-2:12:48.

62. All members of Student's educational team were very well-educated on Student's needs, as set for the in Student's IEP, behavioral support plan and _____. DOE Provider 1 also provided support to Student's teachers and related service providers. *Id.*; Testimony of SSC; Petitioners' Exhibit "9", recording of December 13, 2016 IEP meeting, at 2:07:31-2:08:52.

63. Student made progress in Student's behaviors without having all adults who worked with Student trained in _____. Petitioners' Exhibit "9", recording of December 13, 2016 IEP meeting, at 2:10:20.

BEHAVIORAL SUPPORTS/INTERVENTIONS

64. The May 2017 IEP lists Student's social, emotional and behavioral progress, including Student's strengths and needs. The May 2017 IEP contains information about Student's behavioral "triggers" and other deficits. The May 2017 IEP further offers numerous specific strategies to assist Student in regulating Student's behavior. Respondents' Exhibit "4", at 68-77.

65. The May 2017 IEP includes the following under "Supplementary Aids and Services": "Intervention Plan", "Sensory regulation plan", "clear prompts for upcoming transitions", "teacher and/or student directed breaks", "one simple instruction at a time", "Provide Shadowing support when change in service providers", "Positive Behavior Supports". Respondents' Exhibit "4", at 89-90.

66. Student has a Functional Behavior Analysis/Behavior Support Plan, as well as a Regulation Plan. Respondents' Exhibits "6" and "7".

67. The May 2017 IEP sections on "Social/Emotional/Behavioral" and "Sensory Regulation" reflect the same information provided in Student's Functional Behavioral Assessment/Behavior Support Plan and Regulation Plan. Respondents' Exhibit "4", at 68-73; Respondents' Exhibits "6" and "7".

68. In the section entitled, "Clarification of Services and Supports", the May 2017 IEP further explains Student's needs with respect to counseling, shadowing, and positive behavior supports a _____. Respondents' Exhibit "4", at 90-91.

AVERSION TO AND DISCUSSION RE METHODOLOGY

69. DOE Provider 1 found that Student did not respond well to direct instruction, and _____. Instead, DOE Provider 1 found that Student responded well to positive behavior instructional support and _____. Testimony of DOE Provider 1.

70. The IEP team discussed Parents' request that the May 2017 IEP contain a specific prohibition from using _____ with Student. The IEP team determined that it would be better to include the methods which were effective. Testimony of SSC.

71. Direct instruction, and _____ are only a few techniques which fall under _____. These techniques are not usually utilized for children Student's age or with Student's level of functioning. Testimony of DOE Provider 1; Testimony of DES.

72. The May 2017 IEP, in the "Clarification of Services and Supports" section, states: "[Student] responds best to positive behavior supports and _____." Respondents' Exhibit "4", at 91. The May 2017 IEP lists "Positive Behavior Supports" under "Supplementary Aids and Services". *Id.* at 90.

EXTENDED SCHOOL YEAR

73. The May 2017 IEP provided extended school year ("ESY") services for student after breaks exceeding ten calendar days. The ESY services included 60 minutes per week of occupational therapy services, 260 minutes per week of special education instruction, and counseling for 40 minutes per week, all to be delivered in a general or special education setting. Respondents Exhibit "4", at 89.

74. The May 2017 IEP contained detailed descriptions of the counseling and individualized instructional support services in the "Clarification of Services and Supports" section. *Id.* at 90-91.

75. *See also*, Finding of Fact #29, *supra*.

76. The May 2017 IEP contained the following least restrictive environment statement, “[Student] will participate with nondisabled students in all general education settings and extracurricular settings with accommodations and supplementary supports in areas of need such as writing, social/behavioral and fine motor skills.” Respondents’ Exhibit “4”, at 92.

77. During the regular school year, Student was educated in the general education setting, with numerous accommodations and supports. Respondents’ Exhibit “4”, at 89-92; Testimony of Gen Ed Teacher; Testimony of Parent 2.

78. The IEP team discussed Student’s need for ESY services at the IEP meetings on February 8, 2017 and May 11, 2017. Parent 2 was an active participant during both meetings and the IEP team considered Parent 2’s concerns and input in developing the ESY program. *See Findings of Fact #79, infra.*

79. Student was _____. The team rejected the option of having Student in an individual instruction setting at Public School because Student needed socialization. The IEP team considered an ESY program at Student’s geographic home school, but could not guarantee a general education setting of _____. To accommodate Student’s need for socialization, small class-size and Parent 2’s request for “familiar” typically developing peers, the IEP team planned to create an ESY program at Public School with other Public School students. Testimony of SSC; Petitioners’ Exhibit “9”, recording of February 8, 2017 IEP meeting, at 1:16:07, and recording of May 11, 2017 IEP meeting, at 3:22:04-3:29:50.

80. The ESY program offered by the IEP team met Student’s ESY needs. *Id.*

81. Within a few days of the May 11, 2017 IEP meeting, Parent 2 approached SSC with a private program that Parent 2 had found which would offer Student opportunity to be

educated with at least one familiar, typically developing peer. The program was approved and funded by DOE. The ESY program began in mid-July, at Parents' request. Testimony of SSC.

82. The private program met Student's ESY needs. *Id.*; Testimony of Parent 2; Testimony of Tutor.

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)). 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).

The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” *Rowley*, 458 U.S. at 200. However, the United States Supreme Court, in *Endrew F. V. Douglas County School Dist.*, 137 S.Ct. 988 (2017), held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S.Ct., at 1001; *See also, Blake c. ex rel Tina F. v. Hawaii Dep’t of Educ.*, 593 F.Supp. 2d 1199, 1206 (D. Haw. 2009).

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.

An IEP adequately provides a FAPE if it is 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). The IEP 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.*, 593 F. Supp.2d, at 1206. 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).

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. Services

1. Whether the May 2017 IEP was developed to address Student’s needs when changes were made to the Services?

Petitioners argue that the change made to the services as a result of _____ denied Student a FAPE because, _____, DOE provider was not able to work directly with Student or Student’s related service providers. However, the services provided were substantively the same

as provided _____. Accordingly, Student was not denied a FAPE as a result of the change in the services.

Both the February and May 2017 IEPs included services, which included training. On September 1, 2016, the DOE _____.

Under the __ model, _____.

Under _____, _____. The support provided to the team members and to Student did not change, the _____ changed.

The other aspect of the service was to provide education and training to Parents. _____. Parent 2's concern with _____. However, the IEP team addressed this concern by increasing the hours dedicated to parent education and training to allow _____. The services changed at the beginning of the 2017-2018 school year. DOE Provider 1 provided services through July of 2017, when DOE Provider 3 took over. The services provided to Parent 2 under DOE Provider 1 and DOE Provider 3 was essentially the same. Both provided Parent 2 with support to help Parent 2 address Student's needs at home and in the community.

Petitioners argue that, because of the change in the delivery of the services, Student's _____ regressed. However, there is insufficient evidence to support the argument that any alleged regression was caused by a change in the services.⁶ The change from _____ did not take place until the beginning of the 2017-2018 school year.⁷ Student only attended Public

⁶ At the DPH, Parent 2 stated that Student regressed. Testimony of Parent 2. However, these general statements were unsupported by the documentary evidence in the record. *See* Petitioners' Exhibit "5"; Respondents' Exhibits "42"- "45".

⁷ DOE Provider 1 stopped _____ at the end of April 2017.

School on three days during the 2017-2018 school year. Student's behavior during those days displayed expected behavior for the beginning of a school year.

Student is diagnosed with Disability. Student has difficulty with new situations and new people. It is uncontroverted that the beginning of a new school year is always difficult for Student. The beginning of the 2017-2018 school year was no different.

Student attended Public School for only two instructional school days before Parents decided to withdraw Student. Student came to school for a one hour session to build rapport with Sped Teacher and DOE Provider 3. Student was ill the following week and did not attend Public School at all that week. The next week, Student attended Public School on August 29, 2017 and August 30, 2017, for two and-a-half hours each day. During these two days, Student exhibited predictable behavior for the beginning of the school year. Student refused to participate in non-preferred activities such as math, which Student said Student had already worked on at home, and written work. Student hid under furniture and ran out of the classroom.

Sped Teacher said that Student appeared relaxed when Student laid down under the table in the classroom. Gen Ed Teacher said that Sped Teacher handled the situation correctly, according to Student's behavioral support plan. Sped Teacher gave Student space and did not attempt to engage Student.

Student's behaviors during the two days Student attended Public School are not out of the ordinary. Student's triggers and behaviors are well-documented. These dates were at the beginning of a new school year, where Student was getting used to a new special education teacher and support staff. Additionally, Student had missed school the week before these dates, affecting any rapport Student had built with New Sped Teacher and DOE Provider 3. Student

was being asked to perform non-preferred tasks. The record contains several communication logs dating back to the beginning of the 2016-2017 school year confirming Student has responded similarly in the past. Student's behavior on August 29 and 30, 2017 is insufficient to prove that Student regressed.

2. Whether Student's program and Parents' opportunity to participate in the IEP development was impacted by the school preventing appropriate discussion of the need or the services?

Petitioners also argue that Parents were significantly impeded from participating in the decision-making process when the IEP team failed to adequately discuss the change in the services. Parents had ample opportunity to discuss this issue and the IEP team considered and responded to each of Parent 2's questions and concerns. Accordingly, there is no procedural violation of the IDEA with respect to this issue.

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).

The discussion held by the IEP team regarding the change in the services was lengthy and thorough. The DOE representatives of the IEP team explained the change in the method of delivery of services, including both the consultation and parent education and training portions of the service. Parent 2 was concerned that Parent 2 would not have the requisite level of support in the home. The IEP team reassured Parent 2 that Parent 2 would have the same level of support and increased the parent education time to address this concern. Parent 2 then requested that the IEP contain a requirement that the service provider have certain qualifications. The IEP agreed to this requirement as well. While Parents are clearly not happy with the change in the method of delivery of the services, their concerns were considered and addressed at the IEP meetings. Parents actively participated in the decision-making process. Accordingly, Petitioners have failed to prove by a preponderance of the evidence that IEP discussion regarding the change in the delivery of the service denied Student a FAPE or significantly impeded Parents' opportunity to participate in the decision-making process.

C. Change to Student's special education instruction

1. Whether the failure to discuss Parents' concern that Student's instructional time at school should be limited to two and-a-half hours per week denied Parents an opportunity to participate in the decision-making process?

Petitioners argue that Respondents failed to adequately discuss Parents' concern that Student's instructional time at Public School should be limited to two and-a-half hours per week. The IEP team discussed this issue at several IEP meetings. Student's socialization goals were stated in the May 2017 IEP. It was the consensus of the IEP team that Student should begin to spend more time at Public School to address Student's socialization needs. The IEP team first discussed this issue in the January 28, 2017 IEP meeting. At that time, DOE Provider 1 indicated that DOE Provider 1 would like to see Student attend Public School without significant

behaviors for four consecutive weeks. Unfortunately, Student was not able to attend Public School for four consecutive weeks for the remainder of the 2016-2017 school year.

Prior to the 2017-2018 school year, Student was receiving special education instruction _____. Parent 2 was unhappy with special education instruction delivered. In the interim, Public School had hired a special education teacher to provide special education instruction at Public School for the 2017-2018 school year.

The IEP team revisited the issue at the February 8, 2017, April 28, 2017, May 2, 2017 and May 11, 2017 IEP meetings. DOE members of the IEP team explained that Student's needs in the areas of writing and spelling would be better served by working with Sped Teacher _____. Student would be receiving the same specialized instruction Student was previously receiving, however the method of delivery of that instruction would be changed to better accommodate Student's needs.

The IEP team decided that Student's specialized instruction would eventually be provided in a small group setting in order to give Student more opportunities to address social and behavioral goals set forth in the May 2017 IEP. However, in order to address Student's anxiety and to build rapport with Sped Teacher, Student's specialized instruction would be delivered in an individual setting. Once data suggested that Student was ready, Student would be transitioned to a small group setting.

Parents, Parent 2 specifically, were active participants in the discussion of this issue. In fact, Parent 2 abruptly cut off the discussion on this issue during the February 8, 2017 IEP meeting. Parents came to the IEP meetings prepared with a four-page, single-spaced list of their

concerns⁸, including the concern that Student should only attend Public School for 2 ½ hours per week. The IEP team discussed the reasons for transitioning Student to a second session at Public School, which were to meet Student’s academic and socialization needs. The IEP team understood that this transition could not be rushed and initially, waited to see if Student could attend Public School without significant behaviors for four consecutive weeks, which was not observed as Student was did not attend Public School for four consecutive weeks during the remainder of the 2016-2017 school year.

While Parents may not agree with the decision of the IEP team related to this issue, the issue was sufficiently discussed, Parents concerns were respected and considered, and Parents’ opportunity to participate in the decision-making process was not significantly impeded.

2. Whether the May 2017 IEP was developed to address the needs of Student when changes were made to Student’s instructional time?

Petitioners further argue that the IEP team’s decision to change Student’s special education instruction from _____ denied Student a FAPE. Petitioners argue that the change was made not to meet Student’s needs but because of Public School’s decision to _____. For the reasons set forth above, the IEP team’s decision to transition Student to a second session at Public School was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. The decision was based upon Student’s needs, both academically and behaviorally, and was developed with sensitivity to Student’s anxiety and difficulty with new situations. *See also*, section VII.B.1., *supra*, regarding Petitioners’ claim that Student’s behavior regressed.

⁸ *See* Petitioners’ Exhibit “1”, at 33-36.

Accordingly, Petitioners have failed to prove by a preponderance of the evidence that the change in Student's instructional time at Public School denied Student a FAPE.

D. Whether the May 2017 IEP was developed to address the needs of Student when the Curriculum testing format was employed?

Petitioners did not introduce any evidence regarding the claim that the Curriculum's testing format denied Student a FAPE. Gen Ed Teacher testified that the Curriculum included checks for understanding and mastery of the subject matter. Testimony of Gen Ed Teacher. Additionally, Respondents appropriately responded to and addressed Parent 2's concerns regarding modifying the Curriculum to suit Student's needs. *See infra*, at VII.E.1. Petitioners did not address this issue in their Closing Brief. Petitioners did not meet their burden of proving that the testing format of the Curriculum denied Student a FAPE.

E. Material Failure to implement IEP

The IDEA defines a free appropriate public education as "special education and related services that ... are provided in conformity with an IEP". 34 C.F.R. § 300.17 (d) The Ninth Circuit Court of Appeals, in *Van Duyn ex. Rel. Van Duyn v. Baker School Dist.* 5J, 502 F.3d 811, 821 (2007) stated that the language of the IDEA, "counsels against making minor implementation failures actionable given that "special education and related services" need only be provided "in conformity with" the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education."

The Court in Van Duyn held that only "a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the

services a school provides to a disabled child and the services required by the child's IEP." *Id.* at 822.

1. Whether the February 2017 and May 2017 IEPs were appropriately implemented regarding authorization, support, and/or direction regarding implementation of accommodations?

Petitioners allege that Respondents failed to provide Private Teacher with proper instruction on how to implement Student's accommodations in the home learning environment. Petitioners allege this failure constitutes a failure to implement the February and May 2017 IEPs.⁹

Student has many accommodations listed in both the February and May 2017 IEPs. Petitioners' specific complaints focus on Private Teacher's need for instruction on chunking of information and pacing of Student's assignments. Gen Ed Teacher and Former Sped Teacher gave Private Teacher detailed instructions on which portions of the assignments could be removed. DOE Provider 1 instructed Private Teacher on chunking, using a visual schedule and sensory breaks. *See also, infra*, discussion regarding provision of Parent Education and Training. Additionally, Public School revised the pacing guide prior to the beginning of the 2016-2017 school year and advised Private Teacher to utilize the updated pacing guide provided on Public School's website, but apparently, Private Teacher was not aware that the pacing guide was updated.

Petitioners claim that Respondents failed to implement the May 2017 IEP with respect to a "[Student]-specific pacing guide". However, this pacing guide was going to be developed by Gen Ed Teacher with Parent 2's assistance, at the start of the 2017-2018 school year. As Student

⁹ Petitioners' Exhibit "1", at 110-135 and 84-109 are IEPs dated September 26, 2016 and November 7, 2016, respectively. These IEPs would also have been in effect for the relevant time period. The accommodations and supports in these two IEPs are substantively the same as the services described in the February 2017 IEP.

withdrew from Public School after only a few weeks, the “[Student]-specific pacing guide” was never developed.

Private Teacher was provided with appropriate instructions on how to implement the accommodations listed in the February and May IEPs. Any discrepancy in the provision of this instruction was not material. Petitioners’ have failed to prove by a preponderance of the evidence that there was a material failure to implement any accommodation in the February or May 2017 IEP.

2. Whether the May 2017 IEP was appropriately implemented regarding the provision of data regarding Student’s goals?

Petitioners claim that the May 2017 IEP was not appropriately implemented regarding “the provision of data regarding Student’s goals”. The evidence presented at the DPH showed that Parents had access to all of the relevant data regarding Student’s goals. Parent 2 had access to all data entered into ____ and all communication logs which detailed every behavioral incident Student may have had in any setting. Parents were also given quarterly reports which included data as well as analyses of that data. Petitioners introduced no evidence regarding this claim and did not address it in their Closing Brief. Accordingly, Petitioners have failed to prove that there was a material failure to implement the May 2017 IEP regarding the provision of data regarding Student’s goals.

3. Whether the May 2017 IEP was appropriately implemented regarding commencement of a technology assessment?

The Complaint raises the issue of whether the May 2017 IEP was appropriately implemented regarding the commencement of a technology assessment. However, the May 2017 IEP does not include a technology assessment. The DOE agreed to contact the technology consultant to determine Student’s needs. The technology consultant was contacted in July of

2017, but there is no evidence as to whether any further progress was made on this issue. The May 2017 IEP did not include an offer to provide a “technology assessment”, and therefore any implementation argument, without further explanation, must fail.

It is unclear whether Petitioners are in fact arguing that this claim is an implementation issue or whether Petitioners meant to argue that the IEP *should have* included a formal technology assessment. Either way, the claim fails. Student was using an application that Parent 2 had presented to the IEP team and the IEP team agreed to. The May 2017 IEP included a statement that handwriting portion of Student’s assignments were to be completed via electronic means. Student’s assistive technology needs that *were* identified in the May 2017 IEP were met. Petitioners introduced no evidence or argument that Student’s assistive technology needs were not met. Petitioners’ have failed to prove that Respondents’ failed to implement the May 2017 IEP with respect to a technology assessment. Petitioners further failed to prove that the May 2017 IEP denied Student a FAPE because it did not include a formal technology assessment.

4. Whether the May 2017 IEP was appropriately implemented regarding parental access to communication log folder?

Petitioners allege that the May 2017 IEP was not appropriately implemented because Parent 2 did not have access to the communication log folder.

The May 2017 IEP, in the section entitled “Clarification of Services and Supports”, states in part, “Communication log will be in an online format accessible by teacher, parent and service providers.” On September 1, 2017, DOE Principal locked the communication log document and reformatted folders and accessibility to protect Student’s private information from being disseminated to unauthorized individuals. Parent 2, along with other members of Student’s educational team, did not have access to the communication log for less than one week, during

which time, Student was not attending Public School. Petitioners have failed to prove that this short period of inaccessibility of the communication logs is a material failure to implement the IEP.

5. Whether the May 2017 IEP was appropriately implemented regarding changes to Student's program without following an agreed upon process?

Petitioners presented no evidence or argument at the DPH regarding their claim that the May 2017 IEP was inappropriately implemented regarding changes to Student's program without following an "agreed upon process". Additionally, there was no mention of this claim in Petitioner's Closing Brief. Accordingly, Petitioners have failed to prove this claim by a preponderance of the evidence.

6. Whether the May 2017 IEP was appropriately implemented regarding chronic staffing changes?

Petitioners introduced no testimony other than passing remarks by Parent 2 that there was "chronic staffing changes" at Public School. Petitioners Exhibit "6", at 300, which was introduced into evidence, is a list of staff and related service providers created by Parent 2. There was no testimony or reference made to this exhibit by any witness at the DPH. Petitioners did not address this issue in their Closing Brief. Petitioners have failed to prove that there were chronic staffing changes at Public School and that any such changes denied Student a FAPE.

F. Whether Student's program and Parents' opportunity to participate in the May 2017 IEP development was impacted by Public School preventing appropriate discussion of the need for staff to use certain methodologies?

Petitioners introduced no evidence or argument on this issue. Petitioners' Closing Brief does not address this issue either. Petitioners have failed to prove this claim by a preponderance of the evidence.

G. Whether the DOE's failure to use data provided by Private Teacher for May 2017 IEP development purposes impeded Student's right to a FAPE and/or significantly impeded Parents' opportunity to participate in the decision-making process?

Petitioners allege that Respondents failed to use data provided by Private Teacher in developing the May 2017 IEP. However, the testimony at the DPH and the recording of the February 8, 2017 IEP meeting show that Private Teacher's data was collected and used by members of the IEP team and Student's educational team in determining Student's progress. Private Teacher entered the data into _____, as did the other teachers and related service providers. This data was considered when reviewing Student's progress across all settings. Additionally, DOE Provider 1 shared Private Teacher's data with other members of the team.

This issue was discussed at the February 8, 2017 IEP meeting. At that meeting, the IEP team also explained that _____ data was not the only data being used for IEP purposes. The communication logs, which included information provided by Private Teacher, was also used in evaluating Student's progress. Parent 2 stated that the communication logs were "not data" because they involved subjective ratings. Testimony of Parent 2. However, Parent 2's input in the communication logs was useful information that the IEP team used in developing the IEP.

The IEP team considered Parent 2's input and data in developing the May 2017 IEP. Petitioners have failed to describe how any alleged failure to consider Parent 2's data denied Student a FAPE or significantly impeded Parents' opportunity to participate in the decision-making process. This issue is not even addressed in Petitioners' Closing Brief. Accordingly,

Petitioners have failed to prove that Respondents did not consider Parent 2's data in developing the May 11, 2017 IEP or that any alleged failure denied Student a FAPE.

H. Whether, by removing a clarification in the May 2017 IEP that “all adults working with [Student] will be trained and experienced in _____,” due to staffing concerns and turnover at Student’s school, Student was denied a FAPE?

Petitioners allege that the IEP team’s removal of a clarification requiring “all adults working with [Student] will be trained and experienced in _____” denied Student a FAPE.

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).

Petitioners failed to show by a preponderance of the evidence that having “all adults” working with Student trained and experienced in _____ was critical to providing Student a FAPE. Further, there was no testimony or evidence presented indicating what kind of “training” and “experience” Petitioners are alleging is necessary.

In their Closing Brief, Petitioners argue that their claim is based on Respondents’ failure to hold a discussion regarding the removal of the clarification “in any substantive manner”. Petitioners’ Closing Brief, at 7. On the contrary, the record in this matter shows that the IEP team discussed this issue and that Parent 2 was an active participant in the discussion.

The IEP team discussed this issue at the December 13, 2016 IEP meeting. OT’s stated that Student “couldn’t tolerate” a prior support staff person, and Parent 2 stated that person “triggered” Student. The IEP team explained that Student’s team members are all thoroughly

educated on Student's behavioral needs as set forth in Student's IEP, behavioral support plan. DOE Provider 1 was also an additional resource on Student's behavioral deficits. The IEP team determined that it was not necessary for every adult working with Student to have that level of training. Student made progress on Student's behaviors without having every adult working with Student trained. The discussion held at the December 2016 IEP meeting regarding the removal of this clarification was appropriate. The IEP team's decision not to include this clarification in the May 2017 IEP was based upon Student's needs and the reasonable requirements to ensure that those needs were met.¹⁰

Petitioners have not introduced any evidence that establish that Student's behavioral needs could only be met if every adult working with Student had training. Petitioners have not explained what the necessary training should be. Petitioners have failed to show that Student was denied a FAPE or that Parents' opportunity to participate in the decision-making process was significantly impeded by the removal of this requested requirement.

I. Whether by refusing to put in key behavioral interventions into the May 2017 IEP, the DOE denied Student a FAPE?

Petitioners allege that the May 2017 IEP denied Student a FAPE because the IEP did not include "key behavioral interventions". However, the May 2017 IEP appropriately contains positive behavioral interventions and supports to meet Student's behavioral needs.

The IDEA does not mandate that a behavioral support plan be included in an IEP. The IDEA specifically states, "[n]othing in this section shall be construed to require [] that additional information be included in a child's IEP beyond what is explicitly required in this section." 20

¹⁰ Parent 2 raised the same concern when Gen Ed Teacher first became Student's services, prior to becoming Student's general education teacher. After a transition period, Student grew to trust Gen Ed Teacher. Petitioners' Exhibit "9", recording of December 13, 2016 IEP meeting, at 2:10:00.

U.S.C. § 14149d)(1)(A)(i). 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).

Student has a Functional Behavior Assessment/Behavioral Support Plan, as well as a Regulation Plan, which specifically detail Student’s behavioral triggers, manifested behaviors, and strategies to address those behaviors. The May 2017 IEP includes an “Intervention Plan” and “Sensory Regulation Plan” as supplementary aids and services, program modification and supports. The May 2017 IEP also includes “Positive Behavior Supports” as a support. The IEP contains a comprehensive discussion of Student’s behavioral needs. The IEP also includes a description of many strategies that address Student’s behaviors. The information in the May 2017 IEP sections on “Social/Emotional/Behavioral” and “Sensory Regulation” reflect the same information in Student’s Functional Behavior Assessment/Behavior Support Plan and Regulation Plan. The May 2017 IEP adequately addresses Student’s behavioral needs.

Petitioners do not state which interventions are “key” and therefore should be included in the IEP. Petitioners presented insufficient evidence at the DPH as to which interventions should be included in the IEP or the reason for having those interventions in the IEP. Petitioners have failed to prove by a preponderance of the evidence that the May 2017 IEP failed to offer Student a FAPE because it did not include certain, unspecified key behavioral interventions.

J. Whether the failure to describe in the May 2017 IEP Student’s aversion to techniques denied Student a FAPE?

Petitioners argue that the IEP’s failure to include Student’s aversion to techniques denied Student a FAPE. Specifically, DOE Provider 1 testified that DOE Provider 1 found that Student did not react positively to direct instruction. The foregoing techniques are only a few of the

techniques which fall under _____. DES testified that these techniques would normally not be used for children that were Student's age or level of functioning. DOE Provider1 found that Student responded well to positive behavior instructional support and _____.

The IEP team discussed Parent 2's request to include Student's aversion to techniques and determined that it would be better to include the strategies that Student does respond to. Accordingly, the IEP included "Positive Behavior Supports" as a supplementary aid and service and also included the clarification that "[Student] responds best to positive behavior supports and _____."

The IEP team's decision was appropriate. The IEP included the techniques which are effective in working with Student. The IEP team did not determine that it was necessary to include techniques that are ineffective for Student. Petitioners did not introduce sufficient evidence at the DPH to show that inclusion of ineffective strategies played a critical role in Student's educational plan. Petitioners do not even address this issue in their Closing Brief. Petitioners have failed to prove by a preponderance of the evidence that the failure to include a reference to Student's aversion to techniques denied Student a FAPE.

K. Extended School Year Services

1. Whether the IEP team's failure to discuss Student's socialization and behavioral needs and the frequency, location and duration of Student's ESY services denied Student a FAPE or significantly impeded parent's opportunity to participate in the decision-making process?

Petitioners allege that the IEP team failed to discuss Student's socialization and behavioral needs, as well as the frequency, location and duration of Student's ESY services. Petitioners allege that this failure denied Student a FAPE and/or significantly impeded Parents' opportunity to participate in the decision-making process.

The requirement that a student be educated in the least restrictive environment (“LRE”) applies to the provision of extended school year (“ESY”) services. *See, Letter to Myers*, 213 EHLR 255 (OSEP letter dated August 30, 1989).

In determining an ESY program for a Student in the LRE, a school district, “first must consider an appropriate continuum of alternative placements; it then must offer the disabled student the least restrictive placement from that continuum that is appropriate for his or her needs.” *T.M. ex rel. A.M. v. Cornwall Cent. School Dist.*, 752 F.3d 145 (2014). That continuum must include at least “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 C.F.R. § 300.115(b)(1).

A school district “is not required itself to operate all of the different educational programs on this continuum of alternative placements.” *T.M.*, 752 F.3d at 165. And “the IDEA does not require a school district to create a new mainstream program from scratch just to serve the needs of one disabled child.” *Id.* at 166. A school district can, instead, “choose to place the child in a private mainstream summer program, or a mainstream summer program operated by another public entity.” *Id.*

The IEP team discussed Student’s ESY program at both the February 8, 2017 and May 11, 2017 IEP meetings. Public School did not plan on having an ESY program for the summer of 2017. The IEP team, taking into consideration Student’s need to build social skills, Student’s specific needs of being in a classroom of _____, and Parent 2’s request that Student be in a classroom with “familiar” typically developing students, discussed several possibilities for Student’s ESY program. The team noted that, pursuant to the relevant IEP, Student’s LRE needs required that Student be educated in a general education setting. However, the team ruled out

Student's geographic home school because Student would not be guaranteed to be in a small class size of _____ in a general education setting. Additionally, there would be no guarantee that Student would know any student at the geographic home school summer program. Parent 2 rejected the proposal of having Student come to Public School for one-on-one ESY services because Parent 2 wanted Student to be with other students. The IEP team determined that it could meet Student's ESY needs if other students from Public School were invited to attend an enrichment program at Public School with Student. The team planned to send out a letter inviting students to participate in the program.

A school district is not required to create an ESY program for a Student. *T.M.*, 752 F.3d at 166. However, due to Student's unique needs and Parent 2's requests, the IEP team decided to create an ESY program for Student. The offer of ESY was appropriately suited to meet Student's ESY socialization and behavioral needs. The IEP team considered Parent 2's input and discussed general and special education settings, as well as options on other campuses to provide an appropriate ESY program for Student. Parent 2 had sufficient opportunity to participate in the decision-making process, and Parent 2 actively participated in that process.

Accordingly, Petitioners have failed to prove by a preponderance of the evidence that the IEP team's alleged failure to discuss Student's ESY program denied Student a FAPE or significantly impeded Parents' opportunity to participate in the decision-making process.

2. Whether Student's ESY program in the May 2017 IEP denied Student a FAPE?

Petitioners raise several claims that the extended school year ("ESY") program offered to Student in the May 2017 IEP denied Student a FAPE. As discussed, *supra*, the DOE

appropriately considered several options to provide Student's ESY program. The *T.M.* case asserted that one of the options a school district can consider is a private program. In this case, the DOE approved and paid for a private ESY program which was proposed by Parent 2. There is no contention that the private ESY program proposed by Parent 2 denied Student a FAPE. The private placement offered Student the opportunity to be educated with at least one other familiar, typically developing peer. Testimony of Parent 2. The ESY program, including the private placement, adequately met Student's ESY needs.

The *T.M.* case also stated that, if a school district failed to offer an ESY program in the Student's LRE, the Student would be entitled to tuition reimbursement if an appropriate private ESY placement was found. *T.M.*, 752 F.3d, at 167. Thus, even if Respondents' offer of the ESY program was not in Student's LRE, Petitioners' remedy would be tuition reimbursement of the private ESY program which Parent 2 found. The issue is moot as Respondents approved and paid for the private ESY program. As such, Petitioners' claim that the ESY program denied Student a FAPE is without merit.

Petitioners further argue in their Closing Brief, "the DOE may argue that the DOE provide[d] (sic) the Student ESY services in the least restrictive environment when Parent found a program for Student to attend. The IEP still lacks this element." Petitioners' Closing Brief at 14. Petitioners allege that the ESY statement in the May 2017 IEP fails to offer Student a FAPE because it lacks a description of the least restrictive environment, Student's need for social skills and behavioral deficits, and the frequency, location and duration of Student's individual instructional support services. On the contrary, the May 2017 IEP adequately addressed each of the items raised by Petitioners.

34 C.F.R. § 300.320(d) states, in pertinent part, “Nothing in this section shall be construed to require [] [t]he IEP Team to include information under component of a child’s IEP that is already contained under another component of the child’s IEP.”

The May 2017 IEP sets forth the services to be provided in Student’s ESY in sections #20 and #21 of the IEP. Both the ESY statement (section #20) and the statement of special education and related services (section #21) sections provide that Student will have 60 minutes per week of occupational therapy service; 260 minutes per week of special education; and 40 minutes per week of counseling, all in a general education or special education setting. The LRE statement is contained in section #23 of the IEP. Additionally, there are detailed descriptions of the counseling and individualized instructional support services listed in the “Clarifications of Services and Supports” section of the IEP. The May 2017 IEP provides for Student’s ESY program in the least restrictive environment, contains a statement of the frequency, location, and duration of the program, and adequately addresses Student’s socialization and behavioral needs.

Petitioners cite no authority for their claim that the ESY section in the IEP must contain a specific statement of the least restrictive environment. To the contrary, the IDEA specifically states that this is not a requirement. The May IEP meets Student’s needs and accordingly, the provision of Student’s ESY program in the May 2017 IEP does not deny Student a FAPE. Petitioners have failed to prove by a preponderance of the evidence that the ESY statement in the IEP is insufficient or denies Student a FAPE.

VIII. DECISION

Petitioners have failed to prove their claims by a preponderance of the evidence, and accordingly, are not entitled to an award of any remedy in this matter.

IX. 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 thirty 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, January 30, 2018.

DENISE P. BALANAY
Hearings Officer