

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

In the Matter of STUDENT, by and  
through Parent 1,<sup>1</sup>

Petitioners,

vs.

DEPARTMENT OF EDUCATION,  
STATE OF HAWAII,

Respondent.

DOE-SY 1718-015

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DECISION

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**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 the IDEA, 34 C.F.R §§ 300.1, et seq.; and the Hawaii Administrative Rules §§ 8-60-1, et seq.

**II. PROCEDURAL HISTORY (“BACKGROUND”)**

Petitioners are the parents of a student (“Student”) with a disability. On October 24, 2017, Petitioners filed a due process complaint (“Complaint”) against Respondent alleging violations of the IDEA.<sup>2</sup>

<sup>1</sup> Personally identifiable information is provided in the Legend.

<sup>2</sup> Respondent did not challenge the sufficiency of the complaint.

On October 27, 2017, this Hearings Officer was assigned to preside over this case and Eric A. Seitz, Esq. confirmed representation of Petitioners.

On October 30, 2017, the prehearing conference notice was provided to the parties which scheduled the conference for November 8, 2017, at 10:00 a.m. This same day, Respondents filed an objection because the prehearing conference was scheduled prior to the end of the 30-day resolution period. Petitioners responded requesting that the prehearing conference proceed as scheduled, informing the undersigned that Student was hospitalized and the resolution meeting would occur two days prior to the prehearing conference (November 6, 2017).

On October 31, 2017, this Hearings Officer notified the parties that the prehearing conference would proceed as scheduled and Petitioner should be prepared to address “Stay Put” and how Student’s hospitalization relates to this claim.<sup>3</sup>

On November 6, 2017, the parties participated in a resolution meeting but were not able to resolve the Complaint.

On November 8, 2018, the Hearings Officer held a prehearing conference in which Counsel for both Petitioner and Respondent participated and it was determined that “Stay-Put” was not an issue at that time. Respondent also provided Hearings Officer and Petitioner with their response to the Complaint dated October 26, 2017. On November 15, 2017, the prehearing conference summary and order (“Prehearing Order”) was issued.

The 30-day resolution period ended on November 23, 2017. The parties agreed that the 45-day due process hearing timeline began on November 24, 2017.

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<sup>3</sup> The IDEA only limits when a hearing may occur. *See* 34 C.F.R. § 300.510 (“If the LEA has not resolved the due process complaint to the satisfaction of the parent *within 30 days* of the receipt of the due process complaint, *the due process hearing may occur*”) (Emphasis added).

The due process hearing commenced on December 12, 2017. Petitioners presented six witnesses on their behalf: Petitioner Witness 1, Parent 1, Doctor 1, Doctor 2, Clinical Therapist, and Principal. Respondent presented two witnesses on its behalf: Principal and Doctor 3.

On December 14, 2017, after both parties presented their case in chief, the undersigned Hearings Officer determined that the record was missing an integral educational assessment regarding Student's educational needs, paused the hearing and orally Ordered a limited independent educational evaluation ("IEE"), pursuant to 34 C.F.R. § 300.502(d). More specifically, this Hearings Officer ordered Assessment. Respondents verbally objected to the oral IEE order.

On December 19, 2017, Petitioner filed a declaration requesting to extend the 45-day deadline within which a decision must be issued from January 8, 2018, until February 22, 2018.

On December 21, 2017, a written Order followed the oral IEE Order that required IEE report completion by January 19, 2018, granting Petitioners request to extend the 45-day deadline until February 22, 2018, and scheduling a further hearing date of Tuesday, January 30, 2018. Respondent submitted its written objection to the IEE Order on December 22, 2017.

On January 9, 2018, Respondent filed a further statement regarding the IEE Order asserting that the DOE met with Doctor 4 on December 29, 2017, who stated that Doctor 4 was currently performing the same evaluation for the Department of Health ("DOH"), would not perform a second evaluation on Student and could not bill the Department of Education for Doctor 4's contract with the Department of Health.

On January 12, 2018, an Order setting aside the December 21, 2018 Order for Limited Independent Educational was issued and the parties were informed that the Assessment report

prepared by Doctor 4 would be admitted into evidence because the evaluation and report fulfills the objective of the IEE Order.

On January 23, 2018, a status conference was held and the parties determined that a few hours were sufficient to review Doctor 4's assessment and that the Hearing would resume as scheduled on January 30, 2018 at 9:00 a.m. Petitioner agreed to contact Doctor 4 regarding the assessment completion date.

Petitioner informed Hearings Officer and Respondent immediately after the status conference that Petitioner had contacted Doctor 4, who confirmed that the report would be completed by Saturday, January 27, 2018. Petitioner agreed to distribute the report to Hearings Officer and Respondent as soon as it was made available to the Parents.

On January 29, 2018, parties and the undersigned received the Assessment.

On January 30, 2018, the rebuttal, sur-rebuttal and closing arguments of the hearing commenced.

At the close of the hearing, this Hearings Officer entered into evidence all of Petitioner's proposed exhibits,<sup>4</sup> all of Respondent's proposed exhibits,<sup>5</sup> and the Assessment.

### **III. BACKGROUND**

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<sup>4</sup> This Hearings Officer admitted into evidence Petitioner's exhibits 1-10, inclusive. Neither party objected to the admission of the other party's exhibits.

<sup>5</sup> This Hearings Officer admitted into evidence Respondent's exhibits 1-25, excluding Ex. 3 (IEP) as bate stamping conceals text p. the bottom of the page. Neither party objected to the admission of the other party's exhibits.

Student is eligible for services under the IDEA by meeting the criteria for Eligibility Category 1. More specifically, Student is diagnosed with disability<sup>67</sup> On June 3, 2017, an event occurring in the home triggered Student's hospitalization and Student remained hospitalized throughout the duration of the hearing. The Complaint in this matter alleges procedural and substantive violations of the IDEA related to Student's needs. The current Individualized Educational Program ("IEP") is dated May 23, 2017.

#### **IV. ISSUES PRESENTED**

The Complaint alleges that the IEP denies Student a Free Appropriate Public Education ("FAPE"). The following issues were certified for determination:

1. Did the DOE fail to complete a reevaluation of Student when appropriate?
2. Did the failure to include annual goals to address Student's needs in the May 23, 2017 IEP deny the Student a FAPE?
3. Does the Student require placement to receive a FAPE in the Least Restrictive Environment?

#### **V. FINDINGS OF FACT<sup>8</sup>**

##### *Student's Profile*

1. Student's diagnoses are an integral component of Student's intellectual development and education.<sup>9</sup>
2. Student's diagnoses adversely impede Student's learning.<sup>10</sup>

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There is speculation on whether Eligibility Category 2 is appropriate. Parent's Testimony; Clinical Therapist Testimony; Doctor 1 Testimony; Petitioner's Ex.2 p.11 and IEE p.6. For purposes of this decision, whether the Student is appropriately diagnosed with Eligibility Category 2 is inconsequential.

<sup>7</sup> Doctor 1 Testimony; Petitioner's Ex. 4.

<sup>8</sup> The undersigned Hearings Officer considered the entire record, including all testimony and exhibits introduced p. the DPH, in issuing this Decision and Order.

<sup>9</sup> Clinical Therapist Testimony.

<sup>10</sup> Clinical Therapist Testimony.

3. Student requires an IEP that concurrently address both Student's diagnoses and Student's educational needs.<sup>11</sup>
4. Student has a disorder, which includes \_\_\_\_.<sup>12</sup> The central component of Student's diagnose is disability.<sup>13</sup>
5. \_\_\_\_\_ should not be used to describe Student's behavior or the type of treatment Student requires.<sup>14</sup> The focus of treatment should be on the specific behavior Student exhibits.<sup>15</sup>
6. Student is "experiencing difficulties in an unusual array of areas, including: impulsivity, inattention and hyperactivity; oppositional and rule breaking behavior; inappropriate social interactions and communication; identifying and communicating emotions; sensory sensitivity and insensitivity; inflexibility to changes in routines, and insomnia."<sup>16</sup>
7. Student is intelligent, engaging and superficially charming.<sup>17</sup>
8. Student requires a high level of monitoring supervision.<sup>18</sup> Student is easily redirected.<sup>19</sup> Student requires prompts to make healthy and appropriate decisions.<sup>20</sup>

#### *Emotional Processing*

9. Student lacks a reflective quality, leading Student to appear somewhat disengaged, distant and uninvolved with the world.<sup>21</sup>
10. Student has difficulty empathizing with others and does not see \_self as the agent of Student's own actions.<sup>22</sup>
11. Student's \_\_\_\_\_.<sup>23</sup>

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<sup>11</sup> IEE; Clinical Therapist Testimony.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> IEE p. 31, 35.

<sup>15</sup> *Id.*

<sup>16</sup> The Assessment 2 was completed on November 14, 2014. Parent's Testimony; Clinical Therapist Testimony; Petitioner's Ex. 2. p.6.

<sup>17</sup> Parent's Testimony; Clinical Therapist Testimony.

<sup>18</sup> Clinical Therapist; Petitioner's Ex. 1; IEE p.9-10, 12.

<sup>19</sup> *Id.*

<sup>20</sup> Clinical Therapist Testimony.

<sup>21</sup> Parent's Testimony; Clinical Therapist Testimony; IEE p. 22.

<sup>22</sup> Parent's Testimony; IEE p. 22.

<sup>23</sup> Clinical Therapist Testimony; Parent's Testimony.

12. Student shows limited or inhibited social reactions.<sup>24</sup>
13. Student is averse to feeling controlled or pressured by others.<sup>25</sup>
14. Student's interpersonal misunderstandings are likely to compromise effective day to day functioning.<sup>26</sup>
15. Student has propensity to view \_\_\_self as \_\_\_\_.<sup>27</sup>
16. Student is suffering from \_\_\_\_.<sup>28</sup>

*Cognitive Processing*

17. Student illustrates an impaired ability to accurately perceive events and experiences (poor reality testing).<sup>29</sup> Student has an inability to perceive the world as others do.<sup>30</sup>
18. Student exhibits disorganized thought processes that inhibit Student's reasoning, conceptualization, communication and thought organization.<sup>31</sup>
19. Student shows a high level of difficulty thinking clearly and logically and seeing things accurately.<sup>32</sup>
20. Student's interpersonal misunderstandings compromise effective day to day functioning.<sup>33</sup>
21. Student is vulnerable to \_\_\_ states.<sup>34</sup>

*Behavior*

22. Student has \_\_\_\_.<sup>35</sup>
23. Student is less likely than other peers to think before acting.<sup>36</sup>

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<sup>24</sup> *Id.*; IEE p. 22.

<sup>25</sup> IEE p. 23.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> IEE p. 32.

<sup>29</sup> *Id.*

<sup>30</sup> Clinical Therapist Testimony; Parent 1's Testimony; IEE p. 23.

<sup>31</sup> IEE p. 22. Clinical Therapist Testimony.

<sup>32</sup> IEE p. 22.

<sup>33</sup> *Id.*

<sup>34</sup> IEE p. 22; Parent 1's testimony.

<sup>35</sup> Parent's Testimony; IEE p. 22.

<sup>36</sup> *Id.*

24. Student lies on a daily and weekly basis about inconsequential matters and believes Student's lies.<sup>37</sup>
25. Student can be rude and disrespectful to peers and staff.<sup>38</sup>
26. Getting ready to go to school in the morning is a challenge for Student and Student's family.<sup>39</sup> Student must be monitored to complete standard hygiene such as brushing Student's teeth every day and eating.<sup>40</sup> Student requires additional supports.
27. Student requires a high level of monitoring and benefits from prompts to make healthy and appropriate decisions.<sup>41</sup>
28. Student has significant discord at home, arguing with parents, but specifically Parent 1 who had been the primary caregiver.<sup>42</sup>
29. Student has had nightmares; wakes Parents up in the middle of the night stating that Student wanted to kill people and on occasion Parents woke up to Student standing over them while they were sleeping.<sup>43</sup>

#### *Misconduct Allegations*

30. Student has verbally coached younger sibling to \_\_\_ and threatened to hurt younger sibling if younger sibling told others about the incident.<sup>44</sup>
31. Student's comments and conduct to sibling constitute misbehavior but not an offense.<sup>45</sup>
32. Student reports that Student has an addiction and is preoccupied with the addiction.<sup>46</sup>
33. \_\_\_\_.<sup>47</sup>
34. Student is poorly regulated.<sup>48</sup> A less disruptive youth would not have breached familial and social protocols.<sup>49</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> Clinical Therapist Testimony.

<sup>39</sup> Parent's Testimony; IEE p. 14.

<sup>40</sup> Clinical Therapist Testimony.

<sup>41</sup> *Id.*

<sup>42</sup> Parent 1's Testimony; IEE p.31.

<sup>43</sup> Parent 1's Testimony.

<sup>44</sup> Clinical Therapist Testimony; Parent 1's Testimony.

<sup>45</sup> IEE p. 34.

<sup>46</sup> IEE p. 33.

<sup>47</sup> IEE p. 34.

<sup>48</sup> *Id.*; Clinical Therapist Testimony.

<sup>49</sup> IEE p. 34.

35. While in Hospital 2, Student drew a picture.<sup>50</sup> Student was discovered \_\_\_ at Hospital 2.<sup>51</sup>
36. While Student's knowledge is typical, Student is atypical because Student does not regulate Student's impulses.<sup>52</sup>
37. Student does not anticipate the consequences.<sup>53</sup>
38. Student has not been the recipient of education and socialization on what constitutes appropriate behavioral norms.<sup>54</sup>
39. Student requires appropriate intervention to regulate Student's conduct.<sup>55</sup> Student requires education and socialization on what constitutes appropriate behavioral norms.<sup>56</sup> Student requires proper and consistent treatment.<sup>57</sup>
40. Student's comments and conduct towards younger sibling represent "a precursor for future poorly regulated misconduct if there is not appropriate intervention".<sup>58</sup>
41. Student requires proper and consistent treatment, as Student's clinical condition will have greater impact later.<sup>59</sup>

Timeline of Events Leading to Reevaluation

42. Student requires on-going, data driven assessment, with adjustments to Student's modifications and interventions as needed based on the assessments.<sup>60</sup>
43. Parent 1 requested a reevaluation on May 16, 2017.<sup>61</sup> Parent 1 notified Student's School through a letter that Student's academic difficulties resulting from Student's emotional disability were not adequately captured in the IEP proposed on dated May 9, 2017.<sup>62</sup> Although Parent 1 did not use the specific term reevaluation in Parent 1's letter, Parent 1's objective was Student's reevaluation. Parent 1's specific reasons for the request for reevaluation were: to rectify the IEP's inadequacy by reassessing Student in "every area

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<sup>50</sup> Clinical Therapist Testimony.

<sup>51</sup> *Id.*

<sup>52</sup> Parent 1 testified that Student's previous school had previously contacted Parent 1 regarding an inappropriate drawing and that staff from Student's current school program also observed inappropriate images on a computer that Student was using during an after-school program. Educational Aide denied that Student ever utilized inappropriate sites on Educational Aide's computer. IEE p. 11, 34.

<sup>53</sup> IEE p. 34.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> IEE p. 35.

<sup>58</sup> IEE p. 34.

<sup>59</sup> IEE p. 35.

<sup>60</sup> Petitioner's Ex. 2 p. 12.

<sup>61</sup> Parent 1's Testimony; Petitioner's Ex.10 p. 2.

<sup>62</sup> Petitioner's Ex. 10, p. 2.

possible, as soon as possible” to ensure that Student is “placed correctly” the following school year; to have “accurate information ... required to make any assessments or decisions for Student’s future educational needs; and, because Parent 1 was also concerned that Student’s proposed IEP did not capture the diagnosis.<sup>63</sup>

44. Student’s IEP was finalized on May 23, 2017 (“IEP”).<sup>64</sup> Parent 1 informed the Principal and Vice Principal via an email dated May 25, 2017, that the IEP included a more accurate view of who the Student “really is and what Student’s strengths and needs are,” and Parent 1 thanked the IEP team for their diligence. Parent 1 further stated that Parent 1 appreciated the IEP team’s efforts to “get this done correctly,” when referring to the IEP.<sup>65</sup>

45. During the night of June 2, 2017, Parent 1 awoke to sounds, entered Student’s and younger sibling’s bedroom to observe Student over younger sibling attempting to hurt younger sibling while younger sibling was sleeping.<sup>66</sup>

46. On the morning of June 3, 2017, Parent 1 took Student to a pre-existing appointment with Student’s counselor.<sup>67</sup> Parent 1 informed counselor of the previous night’s events.<sup>68</sup> Student was unable to speak of the events with counselor but was visibly twitching and anxious.<sup>69</sup> Counselor recommended that Parent 1 immediately take Student to a hospital for an evaluation<sup>70</sup>.

47. Student has admitted to Hospital 1 on June 3, 2018.<sup>71</sup>

48. The DOH has funded Student’s hospitalization.<sup>72</sup>

49. Parent 1 notified Principal and Vice Principal on June 5, 2017, that Student was admitted to Hospital 1 and requested behavioral information regarding Student’s 2016-2017 School Year.<sup>73</sup>

50. The DOE attended numerous team meetings at Hospital 1 and Hospital 2 during the summer of 2017.<sup>74</sup> During team meetings, Student’s diagnoses were discussed as well as the characteristics and behaviors attributed to each diagnosis.<sup>75</sup> Student’s treatment progress was also discussed.

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<sup>63</sup> Parent 1’s Testimony; Petitioners Ex. 10, p. 2.

<sup>64</sup> Principal’s Testimony; Petitioner’s Ex. 1; Respondent’s Ex.5.

<sup>65</sup> *Id.*

<sup>66</sup> Parent 1’s Testimony.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Parent 1’s Testimony; Respondent’s Ex. 6; Doctor 2 Testimony; Doctor 3 Testimony.

<sup>72</sup> Parent 1’s Testimony; Principal’s Testimony; Doctor 3 Testimony.

<sup>73</sup> Parent 1’s Testimony; Respondent’s Ex. 6.

<sup>74</sup> Doctor 2 Testimony; Clinical Therapist Testimony; Parent 1’s Testimony.

<sup>75</sup> *Id.*

51. The school learned of Student's alleged misconduct and aggression towards the younger sibling, as well as Student's diagnosis as early as June 11, 2017."<sup>76</sup>
52. Although Parent 1 requested a full Assessment 3 for Student during the June 11, 2017, meeting, Parent 1 did not specifically request Assessment 1.<sup>77</sup> Assessment 1 indicates if a person has a maladaptive proclivity and evaluates the risk of offenses for such individuals.<sup>78</sup>
53. On September 1, 2018, Student was admitted to Hospital 2 as a result of a DOH contract change.<sup>79</sup>
54. On September 8, 2017, Parent 1 requested an emergency IEP meeting, which convened on September 13, 2017. The IEP team<sup>80</sup> was provided with a letter from Doctor 1 identifying Student's diagnoses.<sup>81</sup> Doctor 1 recommended that Student receive "the level of intensive therapy that Student needs to address the diagnosis."<sup>82</sup> Parents requested that Student's IEP include Placement 1 that specializes in the treatment of students with disability.<sup>83</sup>
55. Principal was not able to make a placement decision because Principal felt the IEP team "needed more information, basically from the reports from the medical experts, which would be the Department of Health".<sup>84</sup> Parents signed a consent for said records.<sup>85</sup>
56. During the September 13, 2017, IEP team meeting, no revisions were made to the IEP and reevaluation was not agreed. The DOE requested that the IEP team reconvene at a later date after the DOE reviewed Student's medical records.<sup>86</sup>
57. The second IEP meeting was delayed due to the DOE's failure to secure Student's medical records in a timely manner. The DOE had not provided Parent 1's signed consent form to Hospital 1 to enable Hospital 1 to release Student's medical records.<sup>87</sup> Hospital 1 received the consent form approximately two weeks after the first IEP meeting.<sup>88</sup> Sixteen days after the first meeting, Principle e-mailed Parent 1 with two proposed dates for the second IEP meeting.<sup>89</sup>

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<sup>76</sup> Doctor 2 Testimony; Respondent's Ex. 8-9.

<sup>77</sup> Parent 1's Testimony; Respondent's Ex. 10.

<sup>78</sup> Doctor 3 Testimony; Clinical Therapist Testimony.

<sup>79</sup> Parent 1's Testimony.

<sup>80</sup> The IEP team was composed of professionals, including but not limited to: Principle, Vice Principle, General Education Teacher, Clinical Psychologist, Parents, Petitioner's Attorney, Respondent's Attorney, and Doctor 3.

<sup>81</sup> Respondent's Ex. 15.

<sup>82</sup> Petitioner's Ex. 4.

<sup>83</sup> Parent 1's Testimony, Principle's Testimony.

<sup>84</sup> Principal's Testimony.

<sup>85</sup> Parent 1's Testimony; Principal's Testimony; Respondent's Ex. 16.

<sup>86</sup> *Id.*

<sup>87</sup> Respondent's Ex. 16-17; Parent 1's Testimony.

<sup>88</sup> *Id.*

<sup>89</sup> Parent 1's Testimony; Clinical Therapist Testimony.

58. About six weeks after the emergency IEP meeting, on October 24, 2017, Student's IEP team met. The meeting was concluded after 45-60 minutes.<sup>90</sup> It was a contentious meeting.<sup>91</sup>
59. At this meeting, Parents' provided consent for the DOH<sup>92</sup> to perform Assessment on Student.<sup>93</sup> As of December 14, 2017, the Assessment had not been conducted.
60. There was disagreement at the meeting as to whether Student requires Placement 1.<sup>94</sup> The DOH had offered Placement 2 upon Student's discharge from Hospital 2. Parents are concerned because properly qualified staff have not been identified for Placement 2.<sup>95</sup>
61. The meeting was concluded after Petitioner's attorney called Doctor 3 a "Whore" because Doctor 3 reported that the DOH would not support placing Student in Placement 1.<sup>96</sup>
62. Petitioner's attorney and Parents stated their intention to file a Due Process Complaint at the end of the meeting.<sup>97</sup> Ultimately, the DOE did not offer to evaluate, add goals, or place Student in Placement 1.<sup>98</sup>
63. Principal e-mailed Parent 1 after the IEP meeting on the evening of October 24, 2017, requesting Parent 1's availability for two additional meetings.<sup>99</sup> Principal wished to schedule another IEP meeting and a separate meeting regarding Student's required triennial evaluation process, which was due December 4, 2018.<sup>100</sup>
64. On October 27, 2017, Petitioner's attorney informed Principal via e-mail that Principal was not to communicate directly with parents, as they were in litigation.<sup>101</sup>
65. November 6, 2017, a resolution session occurred where Parents requested an evaluation for Student's diagnosis. Principal did not believe that the resolution meeting was an appropriate venue to discuss evaluation, instead requesting that Parents make themselves available for a meeting to discuss evaluation at Student's triennial evaluation.<sup>102</sup> The DOE has not re-evaluated Student.

### Student's Placement

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<sup>90</sup> Principal's Testimony.

<sup>91</sup> Parent 1's Testimony; Doctor 3 Testimony.

<sup>92</sup> The DOH is involved in this matter because the DOH funds Student's treatment.

<sup>93</sup> Parent 1's Testimony.

<sup>94</sup> Parent 1's Testimony; Principal's Testimony; Psychiatrist 2 Testimony.

<sup>95</sup> Parent 1's Testimony; Psychiatrist 2 Testimony

<sup>96</sup> Parent 1's Testimony; Psychiatrist 2 Testimony.

<sup>97</sup> *Id.*

<sup>98</sup> Parent 1's Testimony.

<sup>99</sup> Respondent's Ex. 23, 24; Principal's Testimony.

<sup>100</sup> *Id.*

<sup>101</sup> Respondent's Ex. 25; Principal's Testimony.

<sup>102</sup> Principal's Testimony.

*IEP*

66. Student's IEP describes two general social and behavioral needs for Student: help with utilizing coping skills during negative situations and, help with decision making (choosing to be honest rather than lie about a situation, and playing games fairly).<sup>103</sup>
67. Student's only Health Goal is vague, stating that Student will "use decision making and goal setting skills to enhance health", however the goal does not address Student's specific need regarding the utilization of coping skills during negative situations or specifically how Student's decision making will enhance health.<sup>104</sup>
68. The measurement indicator listed in the "Health Goal" states that Student will utilize correct coping skills (count to 10, talk to a trusted adult, take a break, etc.) in four out of five opportunities, over five date collection days.

*Academic Performance*

69. \_\_\_\_\_.<sup>105</sup>
70. Student often rushes through the classwork and assignments. In Math class Student "often needs to be prompted and reminded to slow down, and read each problem many times thoroughly and use Student's paper and pencil to solve the problem and not just guess."<sup>106</sup> Student's Language Arts teacher states "independently Student hurries through a task and will announce that Student's done. When checking Student's work, there are many errors that don't impact the meaning of Student's work, but don't reflect correct English conventions."<sup>107</sup>
71. Student must be prompted to identify Student's own errors when completing school work, but when prompted, Student can identify and correct errors if prompted to work through one concept at a time.<sup>108</sup>

*Behavior at School*

72. Educational aide provides the necessary support in order for Student to benefit from Student's education.<sup>109</sup> The educational aide has helped Student achieve average to above average grades by keeping Student focused and promptly addressing disruptive behavior.<sup>110</sup>

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<sup>103</sup> Petitioner's Ex. 1 p. 4.

<sup>104</sup> Petitioner's Ex. 1 p. 10; Principal's Testimony.

<sup>105</sup> Principals Testimony; Respondent's Ex. 21.

<sup>106</sup> Petitioner's Ex. 1 p. 3.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> IEE p. 35.

<sup>110</sup> *Id.*

73. Student performs better in highly structured environments.<sup>111</sup>

74. Student's teachers describe Student as cooperative, polite and respectful.<sup>112</sup>

75. During the 2016-2017 School Year, Student had two documented behavioral incidents at school, one incident involved a verbal argument and the other instance involved pushing and shoving. Student had no incidents that warranted suspension.<sup>113</sup>

76. Student eloped from school on one occasion in February of 2017.<sup>114</sup>

## VI. CONCLUSIONS OF LAW

The IDEA is a comprehensive scheme set up by Congress to aid the states in complying with their Constitutional obligations to provide public education for children with disabilities.<sup>115</sup>

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.”<sup>116</sup> A free and appropriate public education (“FAPE”) includes both special education and related services.<sup>117</sup> Special education is “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.<sup>118</sup> A FAPE requires that the special education and related services are:

1. provided at public expense, under public supervision and direction, and without charge;
2. meet the standards of the State Education Agency;

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<sup>111</sup> EBA; IEE p. 35.

<sup>112</sup> IEP.

<sup>113</sup> Principal's Testimony.

<sup>114</sup> Parent 1's Testimony; Principal's Testimony.

<sup>115</sup> *Smith v. Robinson*, 468 U.S. 992 (1984).

<sup>116</sup> *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. §1400(d)(1)(A)).

<sup>117</sup> H.A.R. § 8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

<sup>118</sup> *Id.*

3. include an appropriate preschool, elementary school or secondary school education in the state involved; and,
4. provided in conformity with the individualized education program (“IEP”) requirements.<sup>119</sup>

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.”<sup>120</sup>

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (1) whether the Department of Education (“DOE”) complied with the procedures set forth in IDEA; and (2) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit.<sup>121</sup> “A state must meet both requirements to comply with the obligations of the IDEA”.<sup>122</sup>

Harmless procedural errors do not constitute a denial of FAPE.<sup>123</sup> However, a Hearings Officer may find that a child 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.<sup>124</sup>

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<sup>119</sup> H.A.R. § 8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R § 300.22.

<sup>120</sup> *Dep’t of Educ. of Hawaii v. Leo W. by & through Veronica W.*, 226 F. Supp. 3d 1081, 1093 (D. Haw. 2016).

<sup>121</sup> *Rowley*, 458 U.S. p. 206-7.

<sup>122</sup> *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).

<sup>123</sup> *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008).

<sup>124</sup> 34 C.F.R §300.513.

Where a court identifies a procedural violation that denied a student a FAPE, the court need not address the second prong requiring the IEP to be reasonably calculated to enable the student to receive educational benefit.<sup>125</sup>

In determining the second prong whether the student's IEP is reasonably calculated to enable the student to receive educational benefit a school district need not maximize the potential of the child, however, the standard is more demanding than "*de minimis*" progress.<sup>126</sup> The standard "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>127</sup> The IEP must be "appropriately ambitious in light of [the child's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives."<sup>128</sup>

The burden of persuasion is properly placed upon the party seeking relief.<sup>129</sup> Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.<sup>130</sup> The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.<sup>131</sup> In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.<sup>132</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *Andrew F. ex rel. Joseph F. vs. Douglas County School Dist.* 137 S. Ct. 988.

<sup>127</sup> *Id.* at 1001.

<sup>128</sup> *Id.* at 1000.

<sup>129</sup> 20 U.S.C. § 1415 (i)(2)(c).

<sup>130</sup> *Id.*

<sup>131</sup> *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622(1993) (internal quotation marks omitted).

<sup>132</sup> *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730. *Greenwich* 736 (3<sup>rd</sup> Cir. 1993), *aff'd*, 512 U.S. 246 (1994).

## VII. DISCUSSION

### **1. Petitioner Proved that Respondent Denied the Student a FAPE from June 11, 2017 to December 14, 2017 by Failing to Reevaluate Student.**

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,<sup>133</sup> establishes annual goals related to those needs,<sup>134</sup> and provides appropriate specialized instruction and related services.<sup>135</sup>

An evaluation requires a variety of assessment tools to gather relevant functional, developmental, and academic information about the child, including information provided by Parent 1.<sup>136</sup> Functional performance refers to skills or activities that are not considered academic, but support a child's academic achievement and is often used in the "context of routine activities of daily living."<sup>137</sup> The assessments and other evaluation tools must include assessments in *specific areas of educational need* and not merely those designed to provide a single general intelligence quotient.<sup>138</sup> The Student must be assessed in all areas related to the suspected disability, including if appropriate, social and emotional status.<sup>139</sup> The assessments must be used for the purposes for which the assessments or measures are valid and reliable, administered by trained and knowledgeable personnel.<sup>140</sup>

The DOE must also review existing data such as prior evaluations and information provided by the parents of the student and related service providers.<sup>141</sup> After the data is

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<sup>133</sup> 34 C.F.R § 300.320(a)(1).

<sup>134</sup> 34 C.F.R § 300.320(a)(2).

<sup>135</sup> 34 C.F.R § 300.320(a)(4).

<sup>136</sup> See § 8-60-36; 34 CFR § 300.304.

<sup>137</sup> Federal Register/Vol. 71, No. 156, 8/14/06, page 46661. Some examples of functional tasks are: learning how to get dressed; learning how to brush one's teeth; understanding that to alleviate hunger one should eat; how to ask for assistance and who is an appropriate person to ask assistance.

<sup>138</sup> See H.A.R. § 8-60-36 (c)(2); 34 CFR § 300.304 (emphasis added).

<sup>139</sup> See H.A.R. § 8-60-36; 34 CFR § 300.304.

<sup>140</sup> *Id.*

<sup>141</sup> See H.A.R. § 8-60-37; 34 CFR § 300.305.

reviewed, the DOE must, with the Parent 1's input, identify what additional data is needed to determine:

- 1) the educational needs and related developmental needs of student;
- 2) whether student continues to need special education and related service; and,
- 3) whether any additions or modifications to special education and related services are needed so the child may meet Student's IEP goals and participate, if appropriate, in the general education curriculum.<sup>142</sup>

Ultimately, the DOE must also ensure that the evaluation is comprehensive in order to identify all of the student's special education and related service needs.<sup>143</sup>

Reevaluation must be conducted in accordance with the rigorous evaluation standards discussed above.<sup>144</sup> The DOE must ensure that a reevaluation of each student with a disability is conducted if either: the parent requests an evaluation; or the DOE determines that the educational or related service needs of the child warrant reevaluation.<sup>145</sup> If the DOE refuses to conduct a reevaluation, they must provide the parents with prior written notice.<sup>146</sup> The notice must explain why the DOE has refused to take the action,<sup>147</sup> describe other options that the IEP team considered and the reasons why those options were rejected,<sup>148</sup> and describe each evaluation procedure, assessment, record, or report the LEA used as a basis for the proposed or refused

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<sup>142</sup> Id.

<sup>143</sup> See H.A.R. § 8-60-36; 34 CFR § 300.304.

<sup>144</sup> 34 CFR § 300.303; 20 U.S.C. §§ 1414(a)(2).

<sup>145</sup> See H.A.R. § 8-60-35; 34 CFR § 300.303.

<sup>146</sup> See 34 C.F.R. § 300.503(a)(2).

<sup>147</sup> See 34 C.F.R. § 300.503(b)(2).

<sup>148</sup> See 34 C.F.R. § 300.503(b)(6).

action.<sup>149</sup> The failure to conduct a reevaluation to ensure that a student has been assessed in all areas of a suspected disability can constitute a procedural denial of FAPE.<sup>150</sup>

Three different instances could have triggered Student's reevaluation: Parent 1's written request on May 16, 2017; Parent 1's verbal request for a full evaluation on June 11, 2017; or, when the DOE determined that the educational or related service needs (including functional performance) of Student warranted reevaluation.<sup>151</sup>

Parent 1's written request on May 16, 2017

Parent 1 requested a reevaluation of Student on May 16, 2017.<sup>152</sup> Parent 1 wrote a letter to the DOE on May 16, 2017, as Parent 1 did not believe that Student's academic difficulties resulting from Student's emotional disability were adequately captured in the proposed IEP. While Parent 1 did not use the specific wording, "reevaluation," in the letter, Parent 1's objective was clear. Parent 1 sought data-driven information from assessments to design appropriate academic and functional goals for Student. While Parent 1 framed the request in precatory language, i.e., "the most desired approach," Parent 1's objective was to have Student assessed in "every area possible" to ensure that Student's academic and functional goals were properly ascertained and Student secured the necessary related services required for the upcoming school year.

Parent 1 did not accept the proposed IEP and an IEP team met again to create the May 23, 2017 IEP, which Parent 1 accepted. Although Parent 1 testified that Parent 1 rejected the IEP, Parent 1's testimony is contradicted by an e-mail Parent 1 wrote to the Principal and Vice

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<sup>149</sup> See 34 C.F.R. § 300.503(b)(3).

<sup>150</sup> *Aaron P. v. Dep't of Educ., Hawaii*, Civil. No. 10-00574 LEK-KSC, 2011 WL 5320994, p. \*27 (D. Hawai'i Oct. 31, 2011).

<sup>151</sup> See H.A.R § 8-60-35; 34 CFR § 300.303.

<sup>152</sup> Parent 1's Testimony. Petitioners Ex. 10, p. 2.

Principal on May 25, 2017. Parent 1 e-mailed Principal and Vice Principal, thanking the IEP team for their diligence, stating that the IEP showed a more accurate view of who Student “really is and what Student’s strengths and needs are.” Parent 1 further stated in the e-mail that Parent 1 appreciated the IEP team’s efforts to “get this done correctly.” The e-mail confirms that on May 25, 2017, Parent 1 accepted the IEP. Parent 1’s May 16, 2017, request for a reevaluation was rendered unnecessary by Parent 1’s acceptance of the May 23, 2017 (“IEP”), which “correctly” identified Student’s strengths and needs.

*Parent 1’s Verbal Request for Evaluation on June 11, 2017*

The second request for reevaluation occurred when Parent 1, Vice Principal and Hospital 1 treatment team met on June 11, 2017. Although the DOE was notified on June 5, 2017, of Student’s hospitalization, Hospital 1 staff would not have confirmed the details of Student’s specific diagnosis and the characteristics of each diagnosis until this meeting. During this meeting Parent 1 requested a full evaluation.

Although Parent 1 did not use the specific word “reevaluation” the objective of Parent 1 request for a “full evaluation” was to gather relevant functional and developmental information about Student.<sup>153</sup> Parent 1 wanted to fully understand Student’s social and emotional status.

An assessment I was at issue in this case, the assessment provides relevant functional and developmental information regarding Student. More specifically, the assessment provides information regarding Student’s socialization, development, and helps to determine under what circumstances Student can interact on a school campus.

Principal asserted that it was the DOH’s responsibility to provide assessment’s such as the assessment because the assessment relates to a “medical” condition or health condition. The

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<sup>153</sup> See H.A.R. § 8-60-36; 34 CFR § 300.304.

DOE's argument was that the DOH monitors and funds Student's medical condition and the event that triggered Student's hospitalization occurred in the home setting as opposed to a DOE campus, therefore, Student's health status is separate and apart from Student's education.

This argument inappropriately shifts the DOE's comprehensive evaluation mandate to DOH because of an underlying medical issue. Vice Principal attended the treatment team meeting at Hospital 1 on behalf of the DOE because of the DOE's ongoing obligation to offer Student a free and appropriate public education.

The DOE is tasked with utilizing a variety of assessment tools in an effort to gather relevant functional, developmental, and academic information of Student.<sup>154</sup> Student is deemed IDEA eligible and must be assessed in all areas related to the suspected disability, including Student's social and emotional status.<sup>155</sup> On June 11, 2017, Student's functional needs were unknown and the DOE via Vice Principal was informed by Parent 1 that Parent 1 was seeking further assessments to determine Student's specific needs. Ultimately, it is the DOE that must ensure that Student receives an evaluation that is comprehensive enough to identify all of the student's special education and related service needs.

Student was not assessed. The DOE was obligated to perform a reevaluation and failed to perform the reevaluation when the reevaluation was requested by Parent 1. This is a procedural defect.

*The DOE's obligation to determine that the educational or related service needs of Student warrant reevaluation on June 11, 2017*

The third instance that could have triggered Student's reevaluation is when the DOE determines that the educational or related service needs (including functional performance)

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<sup>154</sup> See H.A.R. § 8-60-36; 34 CFR § 300.304.

<sup>155</sup> See H.A.R. 8-60-36; 34 CFR § 300.304.

warrant reevaluation.<sup>156</sup> The DOE should have determined that Student's educational and related service needs warranted reevaluation on June 11, 2017.

Since November 19, 2014, the DOE has had notice that Student requires on-going data-driven assessments to determine Student's modifications and interventions, and that it is, "critical that Student receive a high degree of monitoring and ongoing assessment" because "without increased supports, it is likely that Student's behavior and functioning across domains will continue to worsen."

On June 5, 2017, the DOE became aware that Student's disability had worsened because Parent 1 notified Principal and Vice Principal that Student had been admitted to Hospital 1 on June 5, 2017. Then on June 11, 2017, the DOE learned the details of Student's specific diagnoses, the characteristics of each diagnosis and were presented with behavior that Student was presenting resulting from the diagnoses. The DOE also became aware of the circumstances that led to Student's hospitalization. The DOE should have determined that Student's circumstances had changed since the May 23, 2017, IEP and started Student's reevaluation.

*September 8, 2017, IEP Meeting*

The DOE was aware that Student was admitted to Hospital 1 and remained hospitalized throughout the entire summer. On September 8, 2017, Parents requested an emergency IEP meeting, as no IEP meeting had been conducted in the three months that Student was hospitalized. During the September 8, 2017, meeting, a letter from Doctor 1 was provided to the IEP team, which confirmed Student's diagnosis and recommended that Student receive "the

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<sup>156</sup> See H.A.R. § 8-60-35; 34 CFR § 300.303.

level of intensive therapy that Student needs to address Student's diagnosis." Parents requested a mainland residential treatment facility specializing in \_\_\_\_\_ treatment.

The Principal stated that the IEP team could not make a determination on September 8, 2017, regarding placement or discuss Student's Least Restrictive Environment without additional information, including medical records.<sup>157</sup> Parents signed a medical records release and provided the signed release to the DOE. The Principal suggested that the IEP team meet again, after the DOE was able to review Student's medical records. However, the DOE should have determined as early as June 11, 2017, that along with medical records, additional assessments regarding Student's social and emotional status were needed to determine Student's academic needs and began the reevaluation process.

*October 24, 2017, IEP Meeting*

The DOE failed to secure Student's medical records in a timely manner causing further delay and a second IEP team meeting was not conducted until October 24, 2017. The meeting was contentious. The DOE declined to include additional health goals and objectives to Student's IEP and declined to conduct Assessment for Student. The DOE had still not determined that Student's educational or related service needs warranted reevaluation, even though Student had been hospitalized for almost five months when the October 24, 2017 IEP meeting occurred.

During the October 24, 2017 meeting, the DOH agreed to perform Assessment on Student and Parent 1's signed consents for the assessment. However, the assessment had still not been conducted as of the last day of hearing in December. The DOE may not excuse their own

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<sup>157</sup> The DOE had not determined that they needed to review medical records until after Parent 1's request for an emergency IEP meeting.

obligation to conduct assessments required for reevaluation because another administrative agency is involved with the Student.<sup>158</sup> The DOE's obligation to Student is separate and apart from the DOH's obligation to Student.<sup>159</sup> The DOE is singularly responsible for compliance with the IDEA.<sup>160</sup>

During the October 24, 2017 meeting, Parents requested a residential treatment facility specializing in \_\_\_\_\_ on the mainland for Student. The DOH disagreed with Student's need for such placement. Parent 1's attorney called Doctor 3 (who was representing the DOH) a "whore" and the meeting concluded without any determination by the DOE that it would conduct a reevaluation of Student.

*November 6, 2017, Resolution Meeting*

On November 6, 2017 a resolution meeting occurred where Parents requested an evaluation for Student's diagnosis. Principal did not believe that the resolution meeting was an appropriate venue to discuss evaluation, instead requesting that Parents make themselves available for a meeting to discuss Student's triennial evaluation. The objective of the resolution meeting is to achieve prompt and early resolution of a Parent 1's due process complaint, to avoid the need for a more costly, adversarial, and time-consuming due process hearing and the potential for civil litigation. Pursuant to 34 CFR §300.510(a)(2), the purpose of the resolution meeting is for the parent of the student to discuss the due process complaint, and the facts that

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<sup>158</sup> 20 U.S.C. § 1412(a)(11)(A)(i) (2000). S. Rep. No. 94-168 at 24 (1975). Congress sought to assure a single line of responsibility ("The committee considers the establishment of single agency responsibility for assuring the right to education of all handicapped children of paramount importance. Without this requirement, there is an abdication of responsibility for the education of handicapped children... While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency").

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint. Additionally, the parent and LEA may agree to amend an IEP during the resolution session without the need for the full process of the IEP meeting.<sup>161</sup> “The IDEA does not place any restrictions on the types of changes that may be made, so long as the parent and the public agency agree”.<sup>162</sup>

Ultimately, the DOE should have begun Student’s reevaluation by June 11, 2017. Assessment to gather relevant functional and developmental information about the student was necessary. Additional assessments may also prove necessary for Student. In this instance Student was denied the comprehensive evaluation required to create an accurate IEP.

*FAPE Denial*

The DOE's failure to conduct a reevaluation upon Parent 1's request and the DOE's independent failure to determine that Student's condition warranted evaluation are procedural violations of the IDEA. The next issue to determine is whether the procedural violation resulted in Student being denied a FAPE. A denial of FAPE occurs when the procedural error significantly impedes the parent's opportunity to participate in the decision-making process or causes a deprivation of educational benefit for the Student.<sup>163</sup>

The IEP is a document that requires a comprehensive evaluation of the Student because the remainder of the IEP is aimed alleviating and remedying deficiencies identified in the evaluation. The lack of information from assessments regarding Student made a conversation regarding the addition of health goals, the least restrictive environment for Student and possible need for residential treatment, difficult if not impossible. Parents could not discuss a proper

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<sup>161</sup> *Letter to Cohen*, 67 IDELR 217 OSEP (2015).

<sup>162</sup> *Id.* p. 1; 71 Fed. Reg. 46540, 46685 (August 14, 2006).

<sup>163</sup> See 34 C.F.R. § 300.513.

offer of FAPE, as the required assessments were not completed. Student's right to a FAPE was impeded, Parents opportunity to participate in the decision-making process regarding the provision of FAPE for Student was significantly impeded and Student was deprived an educational benefit.<sup>164</sup>

The DOE argued that it was Parent 1 who refused to propose dates to meet with the DOE regarding reevaluation. Principal e-mailed Parent 1 on the evening of October 24, 2017, after the contentious IEP meeting requesting future dates that Parent 1 could possibly meet regarding Student's triennial evaluation (due December 4, 2017). On October 27, 2017, Petitioner's attorney improperly notified Principal, that Principal was no longer able to communicate with Parent 1's due because Parents and the DOE were in litigation, and threatened a court order if Principal did not comply. The DOE has an ongoing obligation to provide Student with a FAPE and the filing of a request for an impartial due process hearing does not negate the DOE's duty to provide Student with a FAPE. This will be considered as an equitable factor when determining the remedy for Student's FAPE denial.

**2. The DOE's failure to include annual goals addressing Student's Health Needs Denied Student a FAPE.**

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,<sup>165</sup> contains a statement of the child's present levels of academic achievement and functional performance,<sup>166</sup> establishes annual goals related to the

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<sup>164</sup> 34 C.F.R. § 300.513 (a) (2)(i-iii).

<sup>165</sup> 34 C.F.R. § 300.320 (a)(1).

<sup>166</sup> *Id.*

needs identified and present levels,<sup>167</sup> and provides appropriate specialized instruction and related services.<sup>168</sup>

The IEP is a layered document in which the subsequent layers build upon the preceding layer. After evaluation, each IEP must include a statement of the Student's present levels of academic achievement and functional performance ("PLAAFP").<sup>169</sup> The PLAAFP is the starting point for determining annual goals.<sup>170</sup> Without a baseline of current performance, it is difficult to draft measurable and relevant annual goals,<sup>171</sup> and to measure future progress.

The IDEA requires that each IEP include a statement of the Student's PLAAFP, including how the student's disability affects the student's involvement and progress in the general education curriculum.<sup>172</sup> The information in the statement should be reasonably specific and understandable so that it may be interpreted by the participants in the IEP process and by those tasked to implement the agreed upon program. The PLAAFP must be all encompassing and reflect the *entire range of strength's deficits, interests, and learning style of the student, in both academic and non-academic domains*.<sup>173</sup> The absence of a PLAAFP statement can result in a denial of FAPE.<sup>174</sup> So too, does any statement that lacks

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<sup>167</sup> 34 C.F.R. § 300.320 (a)(2).

<sup>168</sup> 34 C.F.R. § 300.320 (a)(4).

<sup>169</sup> See 34 C.F.R. § 300.320 (a)(1)-(3).

<sup>170</sup> Bend-Lapine Sch. Dist. v. K.H., 2005 WL 1587241 (D.Or.2005), *aff'd* Bend-Lapine Sch. Dist. v. K.H., 234 F App'x 508 (9<sup>th</sup> Cir.2007) (unpublished). See also Analysis and Comments to the Regulations, Federal Register, Vol.71 No. 156, Page 46662 (August 14, 2006).

<sup>171</sup> *Id.*

<sup>172</sup> See 34 C.F.R. § 300.320 (a)(1)-(3).

<sup>173</sup> See 34 C.F.R. § 300.324 (a). See also Letter to New, 211 IDELR 464 (OSEP 1987) (noting that the PLAAFP should be individualized to each student's unique needs and abilities).

<sup>174</sup> *Ravenswood City Sch. Dist. v. J.S.*, 870 F. Supp. 2d 780, 59 IDELR 77 (N.D. Cal. 2012).

specificity, fails to establish a baseline from which measurable goals can be written, or compromises the parent's ability to meaningfully participate in the IEP process.<sup>175</sup>

In this case, the evaluation was not completed. Assessments regarding Student's health and functional needs did not occur. Student's PLAAFP statement is not all encompassing, it does not reflect Student's entire range of strengths, deficits, interests, and learning style of the student, in both academic and non-academic domains.<sup>176</sup> The failure to accurately define Student's needs in the PLAAFP statement resulted in health goals that were not individualized for Student.

The DOE's response to Petitioner's request to add health goals was that at the time of the IEP's development the health goals were appropriate and that the IEP must be evaluated in light of the "snapshot" rule. The snapshot rule "instructs us to judge an IEP not in hindsight, but instead based on the information that was reasonably available to the parties at the time of the IEP."<sup>177</sup>

The DOE contends that the information provided in the IEE was not available to the DOE for consideration during the May 23, 2017 IEP meeting, nor the September 17, 2017 IEP meeting or the October 24, 2017 IEP meeting. Although the information was not available during the September 17, 2017 IEP meeting nor the October 24, 2017 IEP meeting, the information *could have* been available if the DOE conducted an evaluation of Student, which included assessment. The snapshot rule does not apply in this instance because the deficiency which denied Student a FAPE is a failure to evaluate, in spite of Parent 1 requesting a reevaluation of Student as early as May 2017. Student's PLAAFP and annual goals may have been proper in IEP in May.

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<sup>175</sup> *Friedman v. Montgomery County Bd. of Educ.*, 24 IDELR 654, (D. Md. 1996).

<sup>176</sup> See 34 C.F.R. § 300.324 (a). See also Letter to New, 211 IDELR 464 (OSEP 1987) (noting that the PLAAFP should be individualized to each student's unique needs and abilities).

<sup>177</sup> See *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1187 (9th Cir. 2016).

However, Student had exhibited different behavior and Student's needs have changed after the May 23, 2017, IEP was created. Additional assessments should have been conducted, in an effort to provide current information regarding Student's functional needs. The snapshot rule does not shield the DOE from failing to procure additional assessments when a reevaluation is warranted and denied.

Student's right to a FAPE was impeded, Parents opportunity to participate in the decision-making process regarding the provision of FAPE for Student was significantly impeded and Student was deprived an educational benefit.<sup>178</sup>

During the course of testimony during this hearing, the IEE, and the entire record, findings regarding Student's Profile have been established. Student's IEP team is directed to consider the findings of fact presented above and the IEE, revise Student's PLAAFP and create specific health goals according to Student's needs. The team is not precluded from using additional assessments created as a result of evaluation.

**3. Petitioner did not prove by a preponderance of evidence that Student requires placement in a treatment center to receive a FAPE in the Least Restrictive Environment.**

The IDEA anticipates that a treatment program may be *necessary* to provide special education and related services to a child with a disability.<sup>179</sup> The "test" regarding whether a residential program is "necessary" is not set forth in any law or rule, but case law is instructive.

Most courts look to "distinguish between placement that is a necessary predicate for learning and the provision of services that are unrelated to learning skills."<sup>180</sup> The analysis "must

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<sup>178</sup> 34 C.F.R. § 300.513 (a) (2)(i-iii).

<sup>179</sup> See 34 C.F.R. § 300.104. (emphasis added).

<sup>180</sup> *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 552 IDELR 350 (3d Cir. 1981).

focus ... on whether full-time placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social or emotional problems that are segregable from the learning process.”<sup>181</sup>

While it may be possible in some situations to determine whether the medical, social or emotional problems are segregable from the learning process, the emotional, medical and educational problems may be “so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them.”<sup>182</sup> In such case, “the unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning.”<sup>183</sup>

Student does not exhibit the same behavior at school, as Student does in the home.

Students –

“issues can to be distinguished between school and family. The picture of disrupted and conflictual behavior in Student’s family, particularly with Parent 1, who has served as the primary caregiver, contrasts with the picture presented by [] teachers, the 1:1 educational aide, and current reports from Hospital 2.”

Student is relatively functional during the school day. Educational aide provides the necessary support in order for Student to benefit from Student’s education, as the educational aide has

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<sup>181</sup> *Id.* See also *Ashland Sch. Dist. v. E.H.*, 587 F.3d 1175, 53 IDELR 177 (9<sup>th</sup> Cir. 2009) citing *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, (9<sup>th</sup> Cir. 1990) (“Accordingly, ‘our analysis must focus on whether [the residential] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process.”); *Taylor v. Honig*, 910 F.2d 627; 16 IDELR 1138 (9<sup>th</sup> Cir. 1990) (finding that placement in a psychiatric hospital was necessary to meet student’s educational needs).

<sup>182</sup> *North v. Dist. of Columbia Bd. of Educ.*, 471 F. Supp. 136, 551 IDELR 157 (D.D.C. 1979); but see *Forest Grove Sch. Dist. v. T.A.*, 638 F.3d 1234, 56 IDELR 185 (9<sup>th</sup> Cir. 2011) (affirming the lower court’s decision denying the parents’ request for tuition reimbursement for the student’s residential placement because the nature of the placement was for non-educational purposes).

<sup>183</sup> *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 552 IDELR 350 (3<sup>d</sup> Cir. 1981); *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585 (9<sup>th</sup> Cir. 1992).

helped Student achieve average to above average grades by keeping Student focused and promptly addressing disruptive behavior.

Student's teachers describe Student as cooperative, polite and respectful. During the 2016-2017 school year, Student had two behavioral incidents at school; one verbal argument and one altercation which included pushing and shoving another student. Neither instance warranted suspension. Student eloped from the school in February of 2016.

Independently Student rushes through classwork and assignments. Student is quick to announce that Student has completed a task but when the work is checked there are many errors. In Math class Student "often needs to be prompted and reminded to slow down, and read each problem many times thoroughly and use Student's paper and pencil to solve the problem and not just guess." During Language Arts, Student "hurries through a task and will announce that he's done. When checking Student's work, there are many errors that don't impact the meaning of Student's work, but don't reflect correct English conventions." Student must be prompted to identify Student's own errors when completing school work. However, if prompted, Student can identify and correct Student's own errors if presented with one concept at a time to review. Student performs better in highly structured environments with close monitoring.

Although many individuals testified regarding Student's need for a treatment facility, their testimony was not as fact specific or compelling as Doctor 4's testimony. Doctor 2 testified that Doctor 2 believed that a treatment facility specializing in \_\_\_\_\_ would be appropriate for Student. Doctor 2 believed that Student required treatment consisting of more than one session per week for Student's diagnosis. Doctor 2's concern stemmed from Student's purported behavior. The record presented limited evidence of physical aggression. Doctor 2's opinion, was given less weight because Doctor 2 has not provided treatment for Student since September 1,

2017, after Student was discharged from Hospital 1. Doctor 2 conceded that Doctor 2 “can’t speak to what is appropriate for Student after Hospital 2, as I am not treating Student there at this time.”

Doctor 1 testified that a facility experienced in treating diagnosis would be superior to treat Student and that Student requires more than one hour a week of therapy. Doctor 1’s concern stems from concerns of behavior and Student’s family’s safety. Doctor 1 further testified that Doctor 1’s concerns would be alleviated by a model of therapy that could give family members and those providing care for Student some level of confidence that family members were going to be safe.

Clinical Therapist’s testimony is compelling. Clinical Therapist clearly knows Student very well and is invested in Student’s well-being, treatment and progress. However, Clinical Therapist stated that Clinical Therapist was unable to make any specific recommendations without additional testing including but not limited to assessment. Clinical Therapist stated that Clinical Therapist did not have adequate information to understand what Student’s complete needs were because of a lack of additional assessments. Clinical Therapist believed that the assessments would provide the necessary information to determine what an appropriate and safe placement for Student consisted of.

Doctor 4 performed the IEE and greater weight is given to Doctor 4’s assessment of Student, as Student is independent and highly qualified.<sup>184</sup> The undersigned requested the following information from Doctor 4: 1) To the maximum extent possible, [an opinion] whether or not student has behavior that is atypical for Student’s age and development; 2) if atypical behavior is present, 3) the impact the behavior has on student's development, socialization,

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<sup>184</sup> See CV.

functional behavior, and overall learning; 4) whether \_\_\_ impact student's behavior; 5) if student's possible atypical behavior can be segregated from student's learning; 6) if student poses a risk to peers and to what extent; and 7) an opinion on what type of placement would be most appropriate for student given student specific diagnosis.

Doctor 4 suggested intensive community based services, rather than a placement. Student stated that “intensive community-based services is appropriate and has several positive justifications. First, it is the least restrictive level of care that is consistent with an informed assessment of [Student’s] specific needs. Second, it will keep [Student] connected”

For the reasons above, Petitioner has not proven by a preponderance of evidence that placement is necessary for educational purposes.

### **ORDER**

Based upon the findings of fact and conclusion of law herein, it is this 21<sup>st</sup> day of February 2018 hereby:

ORDERED THAT, Respondent shall conduct an IEP meeting whereby the participants review the findings of fact made regarding Student's Profile (FOF #1-41), the IEE and any other relevant assessments to properly determine Student's PLAAFP and construct annual goals that are consistent with Student's Profile (FOF# 1-41) as well as, the IEE. The IEP team shall also review and discuss Student's Least Restrictive Environment, consistent with Student's Profile (FOF #1-41) and the IEE. Nothing in this order shall be interpreted to preclude the IEP team from reviewing new or additional information.

IT IS FURTHER ORDERED that the entire IEP be completed by Friday, March 23, 2018. The parties may extend the above timeline by mutual consent.

By: \_\_\_\_\_  
HEARINGS OFFICER SIGNATURE

#### 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).

Unofficial hearing decision