

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

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

Petitioners,

vs.

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

Respondents.

DOE-SY1718-024

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

¹ Personal identifiable information is provided in the Legend.

II. BACKGROUND

Student is ____ years old and eligible for services under the Individuals with Disabilities Education Act (“IDEA”) by meeting the criteria for Eligibility Category 1. Student currently attends School 1.

The Due Process Complaint (“Amended Complaint”²) in this matter alleges procedural and substantive violations of the IDEA relating to the development of an Individualized Education Program (IEP) dated November 21, 2017. The Amended Complaint alleges Student was denied a free appropriate public education (“FAPE”) because Respondents failed to accurately describe a transition plan in the IEP, failed to include a transition plan and/or behavioral support plan in the IEP, and developed an IEP which does not meet Student’s individualized educational needs including but not limited to Student’s behavioral and transition needs.

The Amended Complaint seeks remedies of tuition reimbursement and/or direct funding for Student’s special education and related services, as well as an order that DOE provide a social-skills program developed and administered to Student by School 1.

III. PROCEDURAL HISTORY

Petitioners, Student, by and through Parent 1, (“Petitioners”), filed the Complaint herein on January 8, 2018. Respondents Department of Education, State of Hawai‘i and Christina Kishimoto, Superintendent of Hawai‘i Public Schools (hereinafter “Respondents” or “DOE”), filed their Response to the Complaint on January 19, 2018. This Hearings Officer was appointed to preside over this matter on January 8, 2018.

² See Procedural History, *infra*.

A Resolution Session was conducted on January 19, 2018. Present at the Resolution Session were Keith Peck, Esquire, on behalf of Petitioners, and Parent 1. Ryan Roylo, Esquire, appeared at the Resolution Session on behalf of Respondents. The parties did not agree on a settlement at that time.

On February 6, 2018, Petitioners filed a Revised Clarification of the Complaint (“Amended Complaint”). Respondents filed a Response to the Amended Complaint on February 15, 2018. A second Resolution Session was conducted on February 13, 2018. Mr. Peck appeared on behalf of Petitioners, along with Parent 1. Mr. Roylo appeared on behalf of Respondents. The parties were unable to agree on a settlement at that time.

A prehearing conference was conducted on March 1, 2018. Denise P. Balanay, Esquire, Hearings Officer; Mr. Peck on behalf of Petitioners; and Mr. Roylo on behalf of Respondents participated in the prehearing conference. At the prehearing conference it was determined that the 45-day timeline to issue a decision in this matter would commence on March 9, 2018. A due process hearing (“Hearing”) was scheduled for May 3 and May 4, 2018. A deadline to file any dispositive motions was set for March 23, 2018, with memoranda in opposition to be filed by April 2, 2018, and a hearing on any such motion to be heard on April 4, 2018³. The parties were ordered to submit a declaration requesting permission to call any witness by telephone by April 19, 2018. The parties were further ordered to disclose their proposed witnesses and exhibits and file any written opening statements by 3:00 p.m. on April 26, 2018. By April 30, 2018, the parties were to exchange in writing all objections to the other party’s proposed exhibits and/or witnesses and to discuss resolution of said objections. The parties were to notify the Hearings Officer by May 2,

³ No dispositive motions were filed by either party.

2018 of all objections which remained unresolved. Petitioners requested an interpreter to assist Parent 1 at the Hearing.

On March 5, 2018, Petitioners filed Petitioners' Notice of Omissions and /or Missatements (sic) of the Prehearing Order, objecting to the recitation of the issues for consideration in the Prehearing Order.

On March 7, 2018, Respondents filed a Request to Extend the 45-Day Time Line, requesting to extend the period in which a decision in this matter would be issued from April 22, 2018 to June 6, 2018. On March 7, 2018, the Hearings Office issued an Order Granting Respondents' Request to Extend the 45-Day Time Line. Accordingly, the deadline to file the Decision in this matter is June 6, 2018.

On April 24, 2018, the Hearings Officer issued an Amended Prehearing Order, incorporating revisions to the issues set forth in Petitioners' Notice of Omissions and /or Missatements (sic) of the Prehearing Order and instructing the parties to conduct direct examination of any witness during the party's case-in-chief. By email dated April 28, 2018, Petitioners' counsel further objected to the recitation of the issues for consideration in the Amended Prehearing Order.

Petitioners and Respondents each filed their Witness Lists, Exhibit Lists and Exhibits on April 26, 2018. The parties notified the Hearings Officer of their unresolved objections to the proposed exhibits by email on April 30, 2018.

A status conference was conducted on May 2, 2018 at Petitioners' request. During the status conference, Respondents' counsel agreed to make available three DOE witnesses on May 3, 2018 to allow Petitioners to conduct direct examination of those witnesses.

The Hearing was conducted at ____, on May 3, and May 4, 2018. Present at the Hearing on May 3, 2018 were Denise P. Balanay, Hearings Officer; Mr. Peck on behalf of Petitioners; Parent 1; Mr. Roylo on behalf of Respondents; and District Education Specialist 1. Present at the Hearing on May 4, 2018 were Denise P. Balanay, Hearings Officer; Mr. Peck on behalf of Petitioners; Mr. Roylo on behalf of Respondents; and District Education Specialist 2.

At the Hearing, Petitioners called the following witnesses: Administrator, Private Provider 2, Parent 1, Sped Teacher, Behavioral Health Specialist (“BHS”), and Student Services Coordinator (“SSC”). Administrator was qualified as an expert witness in the area of analysis. At the Hearing, Respondents called the following witnesses: Sped Teacher and SSC.

At the Hearing, the following exhibits were received into evidence by the Hearings Officer:

- a. Petitioners’ Exhibit “1”, pages 001-004, 014-048; Exhibit “2”, pages 051-081 and 051A-060A; Exhibit “3”, pages 082-087; Exhibit “4”, pages 102-118, 122; Exhibit “5”, pages 126, 131-143, and Audio Recording and Guide to 11/21/17 IEP, which contained specifically designated portions of the Audio Recording; Exhibit “6”, pages 144-188, 195-198; Exhibit “7”, pages 208-241, 243-254.
- b. Respondents’ Exhibits “1”, pages 011-021; Exhibit “2”, pages 022-118; Exhibit “3”, pages 119-127; Exhibit “4”, pages 128-131; Exhibit “5”, pages 132-205; and Exhibit “6”, pages 206-208, page 208 are recordings of November 6, 2017 and November 21, 2017 meetings.

Petitioners’ Exhibit “3”, pages 088-101A, and Exhibit “4”, pages 119-120, 123-125 were excluded.

Petitioners withdrew Petitioners' Exhibits "1", pages 005-013, 049-050; Exhibit "4", page 121; Exhibit "5", pages 127-130; Exhibit "6", pages 189-194; Exhibit "7", pages 199-207, 242. Respondents withdrew Respondents' Exhibit "1", pages 001-010.

IV. ISSUES PRESENTED

The issues being presented for determination are as follows:

Issue 1 – Whether determining the beginning date of the transition from School 1 “outside of the IEP meeting was improper”?

Issue 2 – Whether the start date of the services and supports (04/19/2017, which may have been meant to read 04/19/2018) was determined by the IEP team?

Issue 3 – Whether the “Projected Beginning Date” and/or “Projected Ending Date” for the “Implementation of current transition plan” was determined during the IEP development process? Whether the beginning and/or ending dates of the transition plan were necessary aspects of the implementation of the IEP placement?

Issue 4 – Whether Student's November 21, 2017 IEP was implemented as scheduled. Whether DOE's failure to fund Student's current placement and transition supports from December 2017 to April 17, 2018 denied Student a FAPE?

Issue 5 – Whether the “transition plan” in the November 21, 2017 IEP failed to address Parent 1's concerns about changes in Student's program and the location of Student's program?

Parent 1 was concerned that transition from School 1 to School 2 might expose Student to bullying. Parent 1 was also concerned about the size of the classrooms at School 2.

Issue 6 – Whether the IEP provisions, supports and services are insufficient to address Student's attendance at Student's home school, behaviorally and/or emotionally?

Issue 7 – Whether a reference to “Implementation of current transition plan” and “Implementation of Current Behavioral Support Plan” is a sufficient description of the supports and modifications Student needs? Whether the development of an integral aspect of an IEP (behavioral support plan

and/or transition plan) is appropriate where they can be altered outside of the IEP process?

Issue 8 – Whether the November 21, 2017 IEP accurately reflects the decisions made during the 3 parts of the November 21, 2017 meetings regarding the commencement of Student’s related services, supplementary aids and services, and program modifications and supports as well as the transition process?

1) Petitioners propose the consideration of the following resolutions:

Remedy 1 – Order tuition reimbursement or direct payment for any sum incurred for educational and related expenses provided to Student for the 2017-2018 school year.

Remedy 2 – Order provision of social-skills program, designed, developed and administered by School 1.

Remedy 3 – Such other further relief as appropriate and justified in equity and/or in law.

V. FINDINGS OF FACT⁴

Student’s Profile

1. Student is eligible for special education and related services under the IDEA under Eligibility Category 1, which impacts Student’s ability to maintain grade level performance.⁵
2. Student’s disability, delay in communication, fine motor, adaptive behavior, and social-emotional development impedes Student’s ability to access the general education curriculum and make progress on grade level standards without modifications, supports and specially designed instruction.⁶

Reading

3. Student is able to recognize letters _ through _, Student’s first and last name, and real world words, “____, _____, _____, and _____”. Student can also recognize real world symbols for “____, _____, _____, _____, _____, and _____”.⁷

⁴ Hereinafter “Findings of Fact” or “FOF”. The Hearings Officer considered the entire record, including all testimony and exhibits introduced at the Hearing, in issuing this Decision and Order.

⁵ Petitioners’ Exhibit “2”, at 052A.

⁶ Petitioners’ Exhibit “2”, at 056A.

⁷ Petitioners’ Exhibit “2”, at 052A.

4. Student needs to increase Student's whole word/symbol(s) vocabulary. Student needs to be able to match words to pictures and increase Student's vocabulary.⁸

Writing

5. Student is able to imitate forming upper and lower case “_ , _ , and _” with maximum cues. Student is able to copy Student's first name legibly with assistance and verbal cues to write Student's last name. Student can also copy numbers ___with assistance and verbal model.⁹
6. Student needs to continue working on using correct stroke sequence for upper and lower case letters. Student needs to continue to copy short sentences when given a model. Student needs to copy Student's home address.¹⁰

Math

7. Student is able to identify a _____, _____, and _____, but cannot identify a _____ or _____ shape independently. Student can count from __ to __ independently and from __ to __ with prompts. Student is able to repeat numbers up to __ with prompts.¹¹
8. Student needs to continue working to independently count from __ to __. Student needs to learn 1 to 1 correspondence up to __ and whole dollar recognition.¹²

Functional Skills - Behavioral

9. When Student is provided with visual supports, reinforcement system, a communication system, and a structured and consistent program, Student is able to function within behavioral expectations.¹³
10. Student is quick to emit behaviors or attempt to avoid or escape demands and tasks if the demands become too high. Student is difficult to work with without using reinforcement. Student recovers quickly from behavior, even if Student does not get what Student wants.¹⁴
11. Student requires prompts.¹⁵

⁸ Petitioners' Exhibit “2”, at 052A.

⁹ Petitioners' Exhibit “2”, at 052A.

¹⁰ Petitioners' Exhibit “2”, at 052A.

¹¹ Petitioners' Exhibit “2”, at 053A.

¹² Petitioners' Exhibit “2”, at 053A.

¹³ Petitioners' Exhibit “2”, at 053A.

¹⁴ Petitioners' Exhibit “4”, at 109-110.

¹⁵ Petitioners' Exhibit “4”, at 103-118; Petitioners' Exhibit “2”, at 051-059, 053A.

12. Student needs to continue to use supports, reinforcement to encourage behavior. During transitions, Student needs prompting, ____ or support to reduce behavioral problems that occur when moving from preferred to non-preferred activities.¹⁶
13. Student has difficulty with transitions between tasks.¹⁷
14. *See also* Findings of Fact 29-39, and 41, *infra*.

Fine Motor

15. When writing, Student tends to rest Student's head on the table and positions Student's head close to Student's paper. Student is able to copy Student's name with some difficulty. Student can imitate Student's last name with verbal cues for correct spelling but Student forms incorrect stroke sequences. Student has difficulty imitating drawing. Student tends to press letter key on a computer keyboard while visually attending to the screen. Student requires assistance to fasten a ____ but can _____ independently.¹⁸
16. Student needs to continue to need more practice with activities that facilitate development of visual motor integration for writing and typing. Student needs to continue to practice engaging _____.¹⁹

Life Skills

17. Student is able to eat independently. Student is able to use a microwave oven with minimal prompting. Student is able to wash with maximum support, wipe, and clean. Student is able to use _____, put on and take off Student's _____, and put on Student's _____ independently. Student is able to remain on task for up to one hour while engaged. Student will follow simple 1 and 2 step directions/tasks with minimal support.²⁰
18. Student needs to be able to do _____, wash _____ with minimal support. Student needs to be able to follow 3-step directions and work up to 5 steps. Student needs to learn to initiate _____ using _____ and verbally when entering or passing peers appropriately. Student needs to continue to respect personal space of others during large group activities. Student needs to follow directions when told to "_____" to prevent further behavioral problems.²¹

¹⁶ Petitioners' Exhibit "2", at 053A; testimony of Administrator.

¹⁷ Testimony of Private Provider 2; Petitioners' Exhibit "2", at 053A.

¹⁸ Petitioners' Exhibit "2", at 053A-054A.

¹⁹ Petitioners' Exhibit "2", at 054A.

²⁰ Petitioners' Exhibit "2", at 054A.

²¹ Petitioners' Exhibit "2", at 054A.

Communication

19. Student guesses at identifying. Student requires multiple prompts to respond to one step commands, such as “_____”. Student responds inconsistently and often incorrectly when asked to show Student’s _____, _____, _____, etc. Student is inconsistent and requires multiple prompts to articulate. Student has begun to attempt to _____, but Student’s _____ continue to be largely _____.²²
20. Student needs a new simple, functional communication for use at home and school. Student needs to improve Student’s skills in order to improve _____ to familiar and unfamiliar listeners. Student also needs to increase Student’s ability to follow commands and answer yes/no questions.²³
21. Student requires prompts due to Student’s limited skills.²⁴

skills

22. Student does not _____ with peers.²⁵
23. Student’s skills scores are falling behind the other _____ scores and should be considered for development. _____ training should be included in Student’s program.²⁶
24. *See also* Findings of Fact 25, 26, 29, 30 and 48.

Student’s Program at School

25. There are _____ students at School 1. There are _____ non-disabled students at School 1.²⁷
26. There are _____ students, including Student, in Student’s academic class at School 1. _____ of the students in Student’s classroom are non-disabled.²⁸
27. School 1 does not have a special education teacher licensed in the state of Hawai‘i.²⁹ Administrator has been on staff at School 1 since January of 2018. Administrator was qualified as an expert.³⁰

²² Petitioners’ Exhibit “2”, at 054A-055A; testimony of Administrator.

²³ Petitioners’ Exhibit “2”, at 055A; Petitioners’ Exhibit “4”, at 112.

²⁴ Petitioners’ Exhibit “4”, at 111.

²⁵ Testimony of Administrator.

²⁶ Petitioners’ Exhibit “4”, at 110-111.

²⁷ Testimony of Administrator.

²⁸ Testimony of Administrator.

²⁹ School 1 has a special education teacher consultant who is not a Hawai‘i licensed special education teacher. Testimony of Administrator.

³⁰ Testimony of Administrator; Petitioners’ Exhibit “3”, at 082-084.

28. Student's program includes a 1:1 educational aide, occupational therapist, speech therapist, and _____.³¹
29. _____ strategies are used at School 1 to address Student's issues. Specific strategies used with Student include _____ training, _____ training, and _____ training.³²
30. School 1 involves other students to facilitate interactions with Student.³³
31. School 1 tracks and graphs Student's data daily. Specific behaviors that are tracked are dropping to the ground, task refusals, non-compliance, and ignoring instruction. School 1 conducts a visual analysis of the daily graphed data.³⁴
32. School 1 did not share the daily data with the DOE.³⁵
33. Since January 2018, Student has made gains at School 1.³⁶
34. At School 1, Student exhibits behaviors³⁷ as a reaction to other incidents.³⁸
35. School 1 staff utilizes interventions keeping Student engaged and _____ Student to address Student. These interventions are effective. These interventions are listed in Student's current behavioral support plan ("BSP").³⁹
36. Administrator developed Student's current BSP. Student's prior BSP was developed by _____.⁴⁰
37. Student's current BSP was not shared with the DOE.⁴¹
38. Student's academic goals are kept in Student's program binder. Student's program binder was not shared with the DOE.⁴²
39. Observations of Student's program conducted by DOE staff from January 10, 2017 to September 29, 2017 revealed that Student required _____ and _____ and was often noncompliant and uncooperative with School 1 staff.

³¹ Petitioners' Exhibit "5", at 135-142. Student's aide, therapist, and therapist did not testify at the Hearing.

³² Testimony of Administrator.

³³ Testimony of Administrator.

³⁴ Testimony of Administrator. Student's data, and _____ School's graphs and analysis of Student's progress were not introduced as evidence at the Hearing.

³⁵ Testimony of Administrator.

³⁶ Testimony of Administrator.

³⁷ For example, hiding Student's _____, _____, _____, and _____.

³⁸ Testimony of Administrator.

³⁹ Testimony of Administrator.

⁴⁰ Testimony of Administrator. Student's current BSP was not introduced as an exhibit at the Hearing. The prior BSP was not introduced as an exhibit at the Hearing.

⁴¹ Testimony of Administrator.

⁴² Testimony of Administrator. The program binder was not introduced as an exhibit at the Hearing.

suggested that Student's behavior was less than optimal because observers were present.⁴³

40. Student attended School 1 for _____ and _____ grade. Student attended School 2 for _____ months ending in January of 2015. Student has been attending School 1 since 2015.⁴⁴
41. Parent 1 testified that, when Student was at a DOE school, Student's behavior declined. Student was _____, _____, _____, and _____ and had "_____". At School 1, Student is "_____" and _____, but _____ and has been trying to _____.⁴⁵

Annual IEP

42. Student's annual IEP was developed on March 1, 2017, March 8, 2017, March 29, 2017, April 5, 2017, and April 19, 2017 (hereinafter "Annual IEP").⁴⁶
43. The effective period of the Annual IEP was April 19, 2017 through April 19, 2018.⁴⁷
44. The Annual IEP included a start date of April 19, 2017 for Student's special education and related services.⁴⁸
45. Parent 1 participated in the Annual IEP meeting with the assistance of Advocate and _____ provided by the DOE.⁴⁹
46. At the meetings for the Annual IEP, by and through Advocate, Parent 1 presented Parent 1's concerns regarding bullying and the increased classroom size when Student transitioned from School 1 to School 2.⁵⁰
47. Parent 1's concerns were discussed and addressed by the IEP team. The Annual IEP lists "_____class size and academic grouping" as a supplementary aid and service.⁵¹
48. During the Annual IEP meetings, the IEP team agreed that Student would benefit from inclusion classes with non-disabled peers to work on skills.⁵²

⁴³ Petitioners' Exhibit "2", at 051-059.

⁴⁴ Testimony of Parent 1.

⁴⁵ Testimony of Parent 1.

⁴⁶ Respondents' Exhibit "2", at 00022-00053; testimony of Sped Teacher.

⁴⁷ Testimony of Sped Teacher; Respondents' Exhibit "2", at 00022.

⁴⁸ Respondents' Exhibit "2", at 00046.

⁴⁹ Respondents' Exhibit "2", at 00053.

⁵⁰ Testimony of Parent 1; testimony of Sped Teacher; Petitioners' Exhibit "1", at 002-004; Respondents' Exhibit "2", at 00022-00055.

⁵¹ Respondent's Exhibit "2", at 00046; testimony of Sped Teacher.

⁵² Respondents' Exhibit "2", at 00055.

November 21, 2017 IEP and proposed transition plan

49. The IEP team met on November 21, 2017 to discuss and develop a plan to transition Student from School 1 to School 2.⁵³ Administrator was not present at the November 21, 2017 IEP meeting.⁵⁴
50. The November 21, 2017 IEP was a revision of the Annual IEP.⁵⁵
51. School 1 developed a proposed transition plan for Student, dated October 18, 2017, which was reviewed at the November 21, 2017 IEP meeting.⁵⁶ The proposed transition plan was only a summary of the transition plan drafted by _____.⁵⁷ The actual transition plan was very detailed.⁵⁸
52. At the November 21, 2017 IEP meeting, the DOE agreed to the terms of the proposed transition plan, except for the starting date of the transition.⁵⁹
53. The DOE wanted to start the transition process on or about December 4, 2017. School 1 wanted to start the transition process during the summer of 2018.⁶⁰
54. Private Provider 1 and Private Provider 2 participated in the November 21, 2017 IEP meeting. Private Provider 2 informed the IEP team that the author of the proposed transition plan, would have to be consulted regarding the timeline for Student's transition.⁶¹
55. Parent 1 wanted Student to remain at School 1. However, during the November 21, 2017 IEP meeting, Parent 1 first agreed to begin Student's transition in December 2017 but then changed Parent 1's mind and stated that Parent 1 would agree to any plan proposed by School 1.⁶²
56. _____'s position was that School 1 would cooperate with any transition plan that was not harmful to Student as long as Parent 1 consented to it, but School 1 recommended starting the transition in the summer of 2018.⁶³

⁵³ Testimony of Sped Teacher.

⁵⁴ Testimony of Administrator.

⁵⁵ Testimony of Sped Teacher.

⁵⁶ Petitioners' Exhibit "7", at 215; testimony of Administrator; testimony of Private Provider 2; testimony of Sped Teacher; testimony of SSC. _____, the former _____ of _____ School, authored the proposed transition plan. Testimony of Private Provider 2.

⁵⁷ Testimony of Private Provider 2.

⁵⁸ Testimony of Private Provider 2. The detailed transition plan drafted by _____ was not introduced as evidence at the Hearing.

⁵⁹ Petitioners' Exhibit "2", at 077; testimony of Sped Teacher; testimony of SSC

⁶⁰ Petitioners' Exhibit "2", at 077; testimony of Private Provider 2; testimony of Sped Teacher; testimony of SSC.

⁶¹ Testimony of Private Provider 2.

⁶² Testimony of Parent 1; Respondents' Exhibit "6", at 00208, 2:36:35.

⁶³ Testimony of Private Provider 2.

57. A start date for Student's transition plan was not determined by the IEP team at the November 21, 2017 IEP meeting.⁶⁴
58. There have been no IEP meetings since the November 21, 2017 IEP meeting.⁶⁵
59. The proposed transition plan provides that the DOE will have their DOE providers shadow School 1's providers for 2 weeks.⁶⁶ The specific plan is for the DOE provider(s) to shadow School 1's provider(s), at School 1, for one hour per day for three days, then two hours per day for three days, until the DOE provider(s) have successfully shadowed School 1's provider(s), for three full school days. The plan would be adjusted depending on Student's response to the shadowing. Then, Student, School 1's provider(s) and DOE's provider(s) would spend one hour per day at School 2 for three days, then two hours for three days, until Student could spend a full school day at School 2.⁶⁷
60. The proposed transition plan stated that Student should not have classes of more than ___ peers in ___ classes, ___, and other ___ classes. Student would receive special education instruction for ___, ___, ___, and ____.⁶⁸
61. The proposed transition plan stated that ___ should be used as a methodology to address Student's ____.⁶⁹
62. The proposed transition plan stated that ___ who is licensed in Hawai'i and in good standing should be responsible for adjusting Student's program weekly.⁷⁰
63. The proposed transition plan stated that there should be daily communication between Parent 1 and the Private Providers(s).⁷¹
64. The proposed transition plan required a plan of action to prevent Student from being bullied and a course of action if Student is bullied by peers or adults.⁷²
65. The proposed transition plan states that School 1 will review the appropriateness of School 2's classrooms and number of peers in Student's classes.⁷³

⁶⁴ Testimony of Private Provider 2; testimony of Sped Teacher; testimony of SSC.

⁶⁵ Testimony of Private Provider 2.

⁶⁶ Petitioners' Exhibit "7", at 215.

⁶⁷ Testimony of SSC.

⁶⁸ Petitioners' Exhibit "7", at 215.

⁶⁹ Petitioners' Exhibit "7", at 215.

⁷⁰ Petitioners' Exhibit "7", at 215.

⁷¹ Petitioners' Exhibit "7", at 215.

⁷² Petitioners' Exhibit "7", at 215.

⁷³ Petitioners' Exhibit "7", at 215.

66. The proposed transition plan states that, if Student experiences regression, behaviorally, at home or in school, transition efforts should be suspended and additional supports or planning should occur.⁷⁴
67. A detailed, methodical but flexible transition plan is critical to Student's successful transition from School 1 to School 2.⁷⁵
68. The start date of Student's transition plan is a necessary element of the plan.⁷⁶
69. At the end of the November 21, 2017 IEP meeting, a transition plan for Student's return to School 2 had not been completed.⁷⁷
70. Prior to and during the November 21, 2017 IEP meeting, the DOE requested that School 1 provide Student's data regarding Student's daily progress, including information regarding what interventions and strategies were successful with Student, as well as Student's quarterly progress report.⁷⁸ Access to data regarding Student would allow the DOE to establish a baseline and to determine if Student was regressing after the transition to School 2.⁷⁹
71. At the November 21, 2017 IEP meeting, Private Provider 2 agreed to provide the requested data by December 1, 2017.⁸⁰
72. School 1 did not provide the information requested by DOE, despite Sped Teacher's repeated attempts to obtain the information and Parent 1's consent to release said information to DOE.⁸¹
73. School 1 was evasive and uncooperative in responding to DOE's requests for Student's program information. School 1 only provided the DOE with general information regarding Student's program.⁸²
74. School 1 treated Student's daily data, as well as School 1's analyses and reports of Student's data, as proprietary. _____, _____ School 1's former _____, informed the DOE that, "[e]ven if a parent consents to something, [School 1] has the right to maintain its own policies on observations and access to information."⁸³

⁷⁴ Petitioners' Exhibit "7", at 215.

⁷⁵ See FOFs 9-14, 29, 33-35, 39, 41, 49, 51, and 59-66; testimony of Administrator; testimony of Private Provider 2; Petitioners' Exhibit "2", at 051A-079.

⁷⁶ Testimony of Administrator; testimony of Sped Teacher; *see also* FOFs 53 and 59.

⁷⁷ Testimony of SSC; *see also* OTHER FOFs

⁷⁸ Testimony of Sped Teacher; *See also* Petitioners' Exhibit "7", at 239.

⁷⁹ Testimony of SSC.

⁸⁰ Testimony of SSC.

⁸¹ Testimony of Sped Teacher; testimony of Parent; Respondents' Exhibit "4", at 00130-00131; Respondents' Exhibit "5", at 00138-0150. _____ School provided general information regarding the interventions used with Student.

⁸² Testimony of Private Provider 2; Respondents' Exhibit "5", at 00138-00146, 00170-00171, 00175-00176, 00178-00180, 00182, 00188-00189, and 00192-00193.

⁸³ Respondents' Exhibit "5", at 00142.

75. The DOE ceased all efforts to obtain Student’s data from School 1 once the initial due process complaint was filed in this matter.⁸⁴
76. At the November 21, 2017 IEP meeting, Advocate raised Parent 1’s concerns regarding bullying and the size at School 1.⁸⁵ The IEP team addressed Parent 1’s concerns regarding class size by noting that Student would be in groups of ___ to ___ students for ___ and classes of no more than ___ students.⁸⁶ The IEP team addressed Parent 1’s concerns regarding bullying by asserting that Student would always have a support staff.⁸⁷
77. The November 21, 2017 IEP included the following behavioral interventions, supports and strategies to assist Student in accessing Student’s educational program:
- a. Information read and using _____;
 - b. _____ supports – transition board “_____”, _____ system for reinforcement;
 - c. cues and supports during _____ and _____;
 - d. Access to _____ Strategies (e.g. scheduled movement breaks);
 - e. Access to alternative seating methods;
 - f. Access to communication system and _____;
 - g. Frequent large muscle movement breaks; and
 - h. Deliver instructions verbally and using _____.⁸⁸
78. Parent 1 agreed with the interventions, supports and strategies listed in the November 21, 2017 IEP.⁸⁹
79. The November 21, 2017 IEP includes the implementation of plan, starting on April 19, 2017, as a supplementary aid and service, program modification and support for school personnel.⁹⁰
80. The November 21, 2017 IEP includes the implementation of current transition plan, starting on December 4, 2017, as a supplementary aid and service, program modification and support for school personnel.⁹¹
81. The November 21, 2017 IEP states, under “Clarification of Services and Supports”:

⁸⁴ Testimony of SSC.

⁸⁵ Testimony of Parent 1; testimony of Sped Teacher.

⁸⁶ Testimony of Sped Teacher.

⁸⁷ Testimony of Sped Teacher; *see also* testimony of.

⁸⁸ This is not an exhaustive list of the interventions included in the November 21, 2017 IEP. *See also* Petitioners’ Exhibit “2”, at 055A-056A, 076-077.

⁸⁹ Petitioners’ Exhibit “2”, at 056A.

⁹⁰ Petitioners’ Exhibit “2”, at 076.

⁹¹ Petitioners’ Exhibit “2”, at 077.

“Individual Instruction Support will consist of support with the following qualifications: multiple modality of communication, understanding of current support plan, knowledge of students with disorder, knowledge of [Student’s] needs, awareness of Student’s daily programming.”⁹²

82. The November 21, 2017 IEP states, under “Clarification of Services and Supports”:

“Current Transition Plan: 11/21/2017: Proposed transition was discussed with starting Private Provider shadowing at [School 1] for a period of two weeks then sharing the same amount of time shadowing at [School 2]. [Student] should start entering [School 2] during period where there is not a lot of students. Per [School 1] Aug. 2018 would be a better time for the transition to take place, per [School 2] we could start transitioning of Private Contracted Workers on 12/04/2017 then work on transitioning [Student] during winter break since students would be off and [Student] would be able to visit room, teacher, and adding ESY students, then including [Student’s] entire class of _____ students. Per [School 1] they needed to take information back to _____ and check on start date, they will call Principle with information on Monday 11/27/2017 and they will provide data information by Friday 12/01/2007 (sic).”⁹³

83. During the November 21, 2017 IEP meeting, the IEP team assured Parent 1 that the transition plan would be flexible and that there was no predetermined completion date for Student’s transition to School 2.⁹⁴

Prior History regarding payment of Student’s placement

84. Pursuant to two separate settlement agreements, the DOE paid for Student’s special education and related services provided by or through School 1, from August 1, 2016 through May 31, 2017 and August 1, 2017 through November 30, 2017.⁹⁵
85. Although Parent 1 testified that Parent 1 did not know the content of the settlement agreements, Parent 1 was represented by counsel and executed both settlement agreements along with the approval of Parent 1’s attorney.⁹⁶

⁹² Petitioners’ Exhibit “2”, at 077.

⁹³ Petitioners’ Exhibit “2”, at 077.

⁹⁴ Petitioners’ Exhibit “5”, recording of November 21, 2017 IEP meeting, at 2:11:50-2:30:45.

⁹⁵ Respondents’ Exhibit “1”, at 00011-00021.

⁹⁶ Testimony of Parent 1; Respondents’ Exhibit “1”, at 00011-00021.

86. Parent 1 entered into a contract with School 1 on January 8, 2018 to enroll Student at School 1 for the remainder of the 2017-2018 school year.⁹⁷

Parent 1's Credibility

87. Throughout the IEP process and the Hearing, Parent 1 has been accompanied by at least one advocate and/or _____. Despite this assistance, Parent 1 presents as confused and/or unable to understand the proceedings. Parent 1's testimony is given limited weight due to Parent 1's inconsistent responses and questionable understanding of questions posed to Parent 1 during the hearing.⁹⁸

VI. 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”.⁹⁹ A Free and Appropriate Education (“FAPE”) includes both special education and related services.¹⁰⁰

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.¹⁰¹ 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”.¹⁰²

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;

⁹⁷ Petitioners' Exhibit “5”, at 126; testimony of Parent 1.

⁹⁸ Testimony of Parent 1; Respondents' Exhibit “1”, at 00011-00021; Petitioners' Exhibit “1”, at 002-004; Respondents' Exhibit “5”, at 0132; *see also* FOFs 84-86.

⁹⁹ *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)).

¹⁰⁰ H.A.R. §8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

¹⁰¹ *Id.*

¹⁰² *Dep't of Educ. of Hawai'i v. Leo W. by & through Veronica W.*, 226 F.Supp. 3d 1081, 1093 (D. Haw. 2016).

and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit.¹⁰³ “A state must meet both requirements to comply with the obligations of the IDEA”.¹⁰⁴

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.”¹⁰⁵ However, the United States Supreme Court, in *Endrew F. V. Douglas County School Dist.*,¹⁰⁶ 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.”¹⁰⁷

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children”.¹⁰⁸ 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.¹⁰⁹ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.¹¹⁰

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.¹¹¹ The IEP must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more

¹⁰³ *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

¹⁰⁴ *Doug C. v. Hawai’i 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).

¹⁰⁵ *Rowley*, 458 U.S. at 200.

¹⁰⁶ 137 S.Ct. 988 (2017).

¹⁰⁷ *Endrew F.*, 137 S.Ct., at 1001; See also, *Blake c. ex rel Tina F. v. Hawai’i Dept of Educ.*, 593 F.Supp. 2d 1199, 1206 (D. Haw. 2009).

¹⁰⁸ *Honig v. Doe*, 484 U.S. 305, 311.

¹⁰⁹ H.A.R. §8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R §300.22.

¹¹⁰ H.A.R. §8-60-45; 20 U.S.C. § 1414; 34 C.F.R §300.321- 322.

¹¹¹ *J.W. by J.E.W., and J.A.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 449 (9th Cir. 2010).

than de minimus, and gauged in relation to the potential of the child at issue.”¹¹² An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible.¹¹³

Harmless procedural errors do not constitute a denial of FAPE.¹¹⁴ 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.”¹¹⁵

Where a court identifies a procedural violation that denied a student a FAPE, the court need not address the second prong.¹¹⁶

VII. DISCUSSION

A. Respondents denied student a FAPE when the IEP team failed to develop a completed transition plan to transfer student from School 1 to School 2.

Among other things, the IEP must include,

“A statement of the special education and related services and supplementary aids and services, [...], to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child-

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To ... participate in extracurricular and other nonacademic activities; and

¹¹² *Blake C.*, 593 F. Supp.2d, at 1206.

¹¹³ *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167 (2012).

¹¹⁴ *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008).

¹¹⁵ 34 C.F.R. § 300.513 (a)(2).

¹¹⁶ *Id.*

- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section; ...”¹¹⁷

The IDEA does not specifically require that an IEP include transition services to assist a student’s transition from school to school. However, the IDEA does require the DOE to provide the student with a FAPE that is “appropriately designed and implemented so as to convey [the] [s]tudent with a meaningful benefit.”¹¹⁸ The United States District Court for the District of Hawai‘i, in *B.B. ex rel. J.B. v. Haw. Dep’t of Educ.*¹¹⁹, noted that, “in some cases, the knowledgeable education experts agree that a particular student would benefit from” a transition plan. An appropriate transition plan should be individualized and address the student’s needs as they are outlined in the IEP.

It is undisputed that Student requires a transition plan to assist Student in moving from School 1 to School 2. The transition plan in this case is a necessary supplementary support that will enable Student to advance toward attaining Student’s annual goals, to participate in extracurricular and other nonacademic activities and to be educated and participate with other disabled and nondisabled children.¹²⁰ The purpose of the November 21, 2017 IEP meeting was to develop a transition plan for Student’s transition.¹²¹ The DOE agreed to the terms in the proposed transition plan prepared, except for the start date for the transition.¹²²

At the end of the November 21, 2017 IEP meeting, the start date of the transition plan had not been determined.¹²³ At the end of the meeting, Private Provider 2 agreed to discuss the DOE’s suggestion that the transition begin in December of 2017 with _____ and report back to the DOE.

¹¹⁷ 34 C.F.R. § 300.320 (a)(4).

¹¹⁸ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 203-204 (1982).

¹¹⁹ 483 F. Supp.2d 1042, 1056-57 (D. Haw. 2006).

¹²⁰ FOFs 9-14, 22-24, 49, 51, 55, 56, and 59-67.

¹²¹ FOF 49.

¹²² FOF 52.

¹²³ FOF 57.

Private Provider 2 informed Principal on November 27, 2017 that School 1 would cooperate with any transition plan that did not harm Student as long as Parent 1 was in agreement, but School 1 reiterated its recommendation that the transition start in the summer of 2018.¹²⁴

At the same time, Sped Teacher was still in the process of obtaining the data and analysis of Student's daily progress. Sped Teacher received some information from School 1, but not the requested information.¹²⁵ After attempting to decipher the information provided, Sped Teacher made no further attempts to obtain the requested information. SSC testified that, once the due process complaint in this matter was received by the DOE, all efforts were focused on responding to the complaint.¹²⁶ No further IEP meeting was scheduled to decide the start date for Student's transition plan.

The start date of Student's transition from School 1 to School 2 is a necessary factor of the transition plan.¹²⁷ The transition plan is incomplete without a start date.¹²⁸ Accordingly, the Hearings Officer finds that the DOE failed to complete the transition plan at the time the November 21, 2017 IEP meeting concluded, and the IEP itself inaccurately lists December 4, 2017 as the commencement of the transition plan. Concluding the IEP process without a proper start date for the transition plan rendered the transition plan, and therefore the November 21, 2017 IEP, incomplete and denied Student a FAPE by failing to meet Student's unique needs.

Petitioners' specific claims

Petitioners assert that determining the beginning date of Student's transition from School 1 to School 2 "outside of the IEP meeting was improper".¹²⁹ Similarly, Petitioners raise the issue

¹²⁴ FOF 54 and 56.

¹²⁵ FOFs 70-74.

¹²⁶ FOF 75.

¹²⁷ FOF 68.

¹²⁸ FOF 69.

¹²⁹ Issue 1.

of whether the “Projected Beginning Date” and/or “Projected Ending Date” for the implementation of the current transition plan was determined during the IEP development process.¹³⁰ As stated above, the start date of the transition plan was not determined either during or after the November 21, 2017 IEP meeting. For the reasons stated above, the DOE’s failure to include a start date for Student’s transition from School 1 to School 2 rendered the transition plan incomplete and therefore denied Student a FAPE. Petitioners failed to present sufficient evidence to address the propriety of the determination of an “ending date” of the transition plan and accordingly, this claim fails.

Petitioners further raise the issue of whether the beginning and/or ending dates of the transition plan were necessary aspects of the implantation of the IEP placement.¹³¹ As discussed herein, the start date of the transition plan was a necessary aspect of the implementation of Student’s placement in School 2. At the November 21, 2017 IEP meeting, the DOE assured Parent 1 that Student’s transition plan would be flexible and that there was no predetermined completion or end date for Student’s transition.¹³² The proposed transition plan anticipates assessing Student’s reaction to each step of the transition plan and adjusting the plan accordingly. The very nature of an effective transition plan is flexibility. Petitioners introduced no evidence or authority to the contrary. As such, the Hearings Officer finds that Petitioners have failed to prove that the ending date of the transition plan was a necessary aspect of the implementation of Student’s placement.

Petitioners allege that the November 21, 2017 IEP was not implemented “as scheduled”.¹³³ The issue is moot as to the transition plan for the reasons stated herein, namely,

¹³⁰ Issue 3.

¹³¹ Issue 3.

¹³² FOF 81.

¹³³ Issue 4.

the transition plan did not include a start date and therefore was not scheduled to start at any time, regardless of the start date listed in the November 21, 2017 IEP.

Mootness of the aforementioned issue notwithstanding, it is evident from the record in this case that School 1 was resistant to and uncooperative with the DOE's plan to transition Student from School 1 to School 2. However, the DOE's position that School 1's uncooperativeness prevented the DOE from proceeding with the implementation of Student's transition plan is unpersuasive. The DOE has an affirmative duty to revise Student's IEP to meet Student's educational and related needs.¹³⁴ Similarly, the filing of a due process complaint does not bar or suspend the DOE's affirmative duty.¹³⁵

The DOE could have proceeded with the transition plan without the specific daily behavioral data and analysis that School 1 withheld.¹³⁶ The transition plan called for a DOE provider to shadow at School 1 in incremental amounts of time during Student's program. The DOE provider would have had first-hand knowledge of the interventions being used with Student and which interventions were successful.

With respect to any other part of the IEP or Student's program, Petitioners introduced no evidence of what special education and/or related services were not implemented as scheduled. Accordingly, Petitioners' claims on this issue are without merit.

¹³⁴ 34 C.F.R. 300.324 (b); *Letter to Watson*, 48 IDELR 284 (2007); *see also, Dep't. of Educ., Hawai'i v. Z.Y. ex rel. R.Y.*, 2013 WL 6210637 (D. Haw. 2013).

¹³⁵ *Anchorage School Dist. v. M.P.*, 689 F.3d 1047, 1056 (9th 2012) ("it would be antithetical to the IDEA's purposes to penalize parents – and consequently children with disabilities – for exercising the very rights afforded to them under the IDEA." (citation omitted)).

¹³⁶ However, *see also* section VII.B. *infra*.

B. Respondents significantly impeded Parent 1’s opportunity to participate in the decision-making process regarding the provision of FAPE to Student when the November 21, 2017 IEP included an incomplete and inaccurate transition plan developed, in part, without Parent 1’s participation.

Petitioners argue that the reference in the November 21, 2017 IEP to “Implementation of current transition plan” is an insufficient description of the supports and modifications Student needs.¹³⁷ First, this assertion is inaccurate. The November 21, 2017 IEP also included a description of the proposed transition plan as well as the discussion and disagreement between the DOE and School 1 regarding the start date of the transition plan.¹³⁸ This additional description gives further information regarding the implementation of the transition plan. However, this section of the IEP only provides a brief and inaccurate description of the implementation (terms) of the transition plan. The IEP states that Private Providers will shadow at School 1 for two weeks followed by two weeks of shadowing at School 2.¹³⁹ SSC testified that the shadowing process would be much more detailed than what is described in the IEP. DOE Providers were expected to shadow at School 1 for one hour per day for at least three days, adding one hour per day for at least three days until shadowing achieved a full day, for at least three days.¹⁴⁰ Adjustments would be made according to Student’s response to the new Private Providers. Then shadowing would take place at School 2 in the same manner.¹⁴¹

The Hearings Officer finds that the IEP inaccurately and insufficiently described the proposed transition plan. Additionally, as discussed above, the transition plan was incomplete without a start date. Despite the fact that no start date had been decided, the November 21, 2017 IEP included a start date of December 4, 2017 for the implementation of current transition plan.

¹³⁷ Issue 7.
¹³⁸ FOF 82.
¹³⁹ FOF 82.
¹⁴⁰ FOF 59.
¹⁴¹ *Id.*

The IDEA requires the DOE to provide the parents of a student with an opportunity for meaningful participation during the development of an IEP.¹⁴² This is an affirmative duty that the DOE cannot abdicate.¹⁴³ The DOE issued the November 21, 2017 IEP without completing the transition plan.¹⁴⁴ At the end of the November 21, 2017 IEP meeting, the DOE was waiting for _____'s input regarding the commencement of the transition plan.¹⁴⁵ Once the DOE obtained that information, the DOE should have reconvened the IEP meeting to allow Parent 1 the opportunity to meaningfully participate in the determination of the commencement of Student's transition to School 2 as well as any other issues related to the terms and implementation of the transition plan. Additionally, the DOE could have required Parent 1 to bring to the next IEP meeting the data and analysis which School 1 had been unwilling or unable to provide to the DOE.

By issuing the November 21, 2017 IEP as drafted without reconvening a further IEP meeting, Respondents significantly impeded Parent 1's opportunity to participate in the decision-making process relating to the development and implementation of Student's transition plan, and therefore, Student's IEP.

Petitioners allege that the November 21, 2017 IEP does not accurately reflect the decisions made during the November 21, 2017 IEP meeting regarding the commencement of Student's related services, supplementary aides and services, and program modifications and supports as well as the transition process.¹⁴⁶ As stated above, the November 21, 2017 IEP does

¹⁴² See Burlington School Committee, 105 S.Ct. at 2002; 20 U.S.C. §1401(19) (1982).

¹⁴³ *Dep't. of Educ., Hawai'i v. Z.Y. ex rel. R.Y.*, 2013 WL 6210637.

¹⁴⁴ FOF 57.

¹⁴⁵ FOF 54.

¹⁴⁶ Issue 8.

not accurately reflect the start date, or lack thereof, of the transition plan nor the details of the Private Provider shadowing process.

With respect to the other supplementary aides and services, program modifications and supports in the November 21, 2017 IEP, the Hearings Officer finds Petitioners have failed to prove by a preponderance of the evidence that the IEP inaccurately reflects decisions made during the IEP meeting regarding the commencement of these services and supports.

C. The November 21, 2017 IEP addressed Parent 1’s concerns about changes in student’s program relating to the size of the classrooms at School 2 and potential bullying issues.

Petitioners allege that the transition plan in the November 21, 2017 IEP failed to address Parent 1’s concerns about the size of the classrooms at School 2 and potential bullying issues.¹⁴⁷ For the reasons set forth herein, the Hearings Officer finds that the IEP team and the November 21, 2017 IEP addressed Parent 1’s concerns.

Parent 1 was given ample opportunity at the Annual IEP and November 21, 2017 IEP meetings to raise Parent 1’s concerns regarding the classroom size at School 2.¹⁴⁸ Parent 1 presented Parent 1’s concerns in writing on at least two occasions with the help of Advocate.¹⁴⁹ The DOE did not significantly impede Parent 1’s opportunity to participate in the decision-making process relating to Student’s classroom size at School 2.

Additionally, 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 issue of

¹⁴⁷ Issue 5.

¹⁴⁸ FOFs 45-48, and 76.

¹⁴⁹ Parent 1 relied upon Advocate to explain Parent 1’s concerns at the Annual IEP meeting and the November 21, 2017 IEP meeting. At the Hearing, Parent 1 was unable to articulate the details of the discussion regarding Parent 1’s concerns. Advocate did not testify at the Hearing.

class size was discussed and incorporated into the Annual IEP and November 21, 2017 IEP. Under the section entitled Supplementary Aides and Services, Program Modifications and Supports, the November 21, 2017 IEP lists “small class size and small academic grouping”. The IEP also states, under “Clarification of Services and Supports” that Student’s class size will be _____ students. Accordingly, the November 21, 2017 IEP adequately addresses Parent 1’s concerns regarding the size of Student’s classroom at School 2.

Parent 1 was also given ample opportunity to discuss Parent 1’s concerns regarding bullying.¹⁵⁰ The IEP team asserted that Student would have support with Student at all times at School 2 which should prevent bullying. Petitioners presented no evidence regarding what strategies should have been implemented to prevent or address bullying at School 2.

The IDEA requires the DOE to provide the parents of a student with an opportunity for meaningful participation during the development of an IEP.¹⁵¹ 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 Hearing in regard to that plan.”¹⁵² “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.”¹⁵³

Parent 1 was afforded an opportunity to participate in the discussion regarding potential bullying. Although Parent 1 may not be satisfied with the IEP team’s response to Parent 1’s concerns about bullying, Parent 1’s dissatisfaction is inadequate to show that Parent 1 was denied

¹⁵⁰ Parent 1 testified that Parent 1 and Advocate saw students at School 2 laughing and looking at Student when they attended an IEP meeting at School 2. Parent 1 testified that Advocate characterized this behavior as bullying. Advocate did not testify at the Hearing.

¹⁵¹ See *Burlington School Committee*, 105 S.Ct. at 2002; 20 U.S.C. §1401(19) (1982).

¹⁵² *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).

¹⁵³ *Laddie C. ex rel. Joshua C. v. Dep’t of Educ.*, 2009 WL 855966, at *4 (D. Haw. Mar. 27, 2009).

full participation in the decision-making process or that the IEP team's reliance upon a 1:1 Private Provider to prevent bullying was incorrect.

D. The November 21, 2017 IEP adequately provides for positive behavioral strategies and supports to address Student's behavioral issues.

Petitioners allege that the reference to "Implementation of Current Behavioral Support Plan" in the November 21, 2017 IEP is an insufficient description of the supports and modifications Student needs.¹⁵⁴ Petitioners also raise the issue of whether the development of Student's behavioral support plan outside of the IEP process, an integral aspect of an IEP, is appropriate where they can be altered outside of the IEP process.¹⁵⁵ Petitioners further raise the issue of whether the November 21, 2017 IEP's provisions, supports, and services are sufficient to address Student's attendance at School 2, behaviorally and/or emotionally.

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."¹⁵⁶ 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".¹⁵⁷

At the time of the November 21, 2017 IEP meeting, Student had a BSP created by _____.¹⁵⁸ Unfortunately, Petitioners presented no evidence or testimony of the content of the BSP which was in effect at or around the time of the November 21, 2017 IEP meeting. The only reference to the BSP in effect during that time was made by Administrator, who testified that _____, _____ School

¹⁵⁴ Issue 7.

¹⁵⁵ Issue 6.

¹⁵⁶ 20 U.S.C. § 1414(d)(1)(A)(i).

¹⁵⁷ 34 C.F.R. § 300.324 (a)(2)(i).

¹⁵⁸ FOF 36.

l's prior _____, created Student's prior BSP.¹⁵⁹ The prior BSP was not attached to nor incorporated into the November 21, 2017 IEP, or Student's annual IEP. Although Administrator testified about interventions used under Student's current BSP, which Administrator developed in January of 2018, there was no testimony or evidence that any of these interventions were also incorporated into the prior BSP which was in effect at the time of the November 21, 2017 IEP meeting.¹⁶⁰ Petitioners did not offer any argument as to which interventions should have been included in the Annual IEP or the November 21, 2017 IEP.

The November 21, 2017 IEP lists several interventions, supports and strategies to assist Student in accessing Student's educational program.¹⁶¹ The IEP also requires individual instructional support by a Private Provider who is knowledgeable regarding Student's needs, including Student's BSP and daily programming.¹⁶² The Hearings Officer finds that the supports and interventions in the November 21, 2017 IEP are sufficient to address Student's behavior. The Hearings Officer further finds that Petitioners have failed to raise any specific need or intervention which the IEP fails to address or should have been included. Accordingly, Petitioners failed to prove by a preponderance of the evidence that the IEP provisions, supports and services are insufficient to address Student's behavioral and/or emotional needs as they relate to Student's attendance at School 2.

E. The start date of the service and supports in the November 21, 2017 IEP, listed as April 19, 2017, was determined by the IEP team.

Petitioners raise an issue of whether the start date of services and supports in the November 21, 2017 IEP, which was identified as April 19, 2017, was determined by the IEP team. The

¹⁵⁹ FOF 36.

¹⁶⁰ FOFs 29 and 35.

¹⁶¹ FOF 77.

¹⁶² FOF 81.

November 21, 2017 IEP was a revision IEP, revising the Annual IEP to include Student’s transition plan.¹⁶³ The effective period of the Annual IEP was April 19, 2017 through April 19, 2018.¹⁶⁴ Petitioners introduced insufficient testimony or evidence at the Hearing to refute that the start date of Student’s services, identified as April 19, 2017, was determined by the IEP team. Accordingly, this claim is without merit.

F. Petitioners are not entitled to tuition reimbursement.

The IDEA allows for parental reimbursement for the cost of enrollment of a student in a School 1, “if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to the enrollment and that the ____ placement is appropriate.”¹⁶⁵ Parent 1 bears the burden of proving that Student’s placement at School 1 is appropriate to prevail on Petitioner’s claim for tuition reimbursement.¹⁶⁶

In this case, the DOE denied Student a FAPE by failing to complete Student’s transition plan and by significantly impeding Parent 1’s opportunity to participate in the decision-making process relating to the development of Student’s transition plan. As such, the first part of the analysis is established. The next question is whether Parents’ placement of Student at School 1 is “appropriate”. The IDEA specifically addresses this issue, by stating,

“A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.”¹⁶⁷

¹⁶³ FOFs 42-44.

¹⁶⁴ FOF 43.

¹⁶⁵ 34 C.F.R. § 300.148 (c).

¹⁶⁶ *C.L. v. Scarsdale Union Free School Dist.*, 744 F.3d 826 (2d Cir. 2014), *citing R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 184-85 92d Cir. 2012), *cert. denied*, ___ U.S. , 133 S.Ct. 2802, 186 L.Ed. 2d 861 (2013); *M.S. ex re. S.S. v. Bd. Of Educ. of the City Sch. Dist. of Yonkers*, 231 F.3d 96, 104 (2d Cir. 2000), *abrogated in part on other grounds*, *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

¹⁶⁷ *Id.*

The Ninth Circuit Court of Appeals adopted the relaxed standard set forth by the Second Circuit, stating,

*“To qualify for reimbursement under the IDEA, parents need not show that a _____ placement furnishes every special service necessary to maximize their child’s potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.”*¹⁶⁸

Despite Administrator’s generalized testimony that Student’s whole program at School 1 is “modified”, the record before this Hearings Officer is inadequate to conclude that Student’s program and placement at School 1 is appropriate.

Administrator testified that Student had a current BSP created by Administrator.¹⁶⁹ The BSP was not offered as evidence at the Hearing. Administrator testified that Student made “steady but not drastic” progress and the interventions used by School 1 were “pretty effective”.¹⁷⁰ Additionally, although Administrator was qualified as an expert witness in the field, Administrator has only been on staff at School 1 for four months, since January of 2018.¹⁷¹ Administrator was not present at the November 21, 2017 IEP meeting.¹⁷² As such, Administrator’s general and otherwise unsupported opinion carries little weight.

Petitioners introduced no documentary evidence to support Administrator’s general statements regarding the effectiveness of Student’s program at School 1. Administrator referred to Student’s program binder and daily data and analysis prepared by School 1 regarding Student’s progress, but none of these items were introduced as evidence in the Hearing.¹⁷³ Petitioners

¹⁶⁸ *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (2011) (italics in original), citing *Frank G. v. Bd. Of Educ.*, 459 F.3d 356, 365 (2d. Cir. 2006).

¹⁶⁹ FOF 36

¹⁷⁰ FOFs 33 and 35.

¹⁷¹ FOF 27.

¹⁷² FOF 49.

¹⁷³ FOFs 31 and 38.

submitted no work samples, progress reports or report cards for Student's program at School 1. Petitioners presented insufficient evidence regarding School 1's program for Student's academic, communication, and other needs.¹⁷⁴

Student's speech language pathologist, occupational therapist and educational assistant did not testify at the Hearing.¹⁷⁵ Petitioners did not offer evidence of any reports, lesson plans, or assessments conducted or prepared by these related service providers. Private Provider 1, the supervising Private Provider at School 1, did not testify at the Hearing. Private Provider 2, who did testify at the Hearing, did not testify regarding Student's program or needs.¹⁷⁶ The observations of Student's program at School 1 conducted by DOE staff reflected School 1 staff's difficulty in managing Student.¹⁷⁷

School 1 is a _____ school. There are _____ students, including Student, at School 1.¹⁷⁸ There are _____ non-disabled students at School 1.¹⁷⁹ There are _____ non-disabled students in Student's academic classroom.¹⁸⁰ While _____ placements need not adhere to the least restrictive environment ("LRE") requirement of the IDEA, LRE is a factor which can be considered in the determination of the appropriateness of a _____ placement.¹⁸¹ Student's _____ is an area of deficit and an established need.¹⁸² The composition of School 1's student body limits Student's access to _____ peers. Petitioners did not present sufficient evidence to show how School 1's program addresses Student's need for _____ with _____ peers.

¹⁷⁴ See FOFs 3-24.

¹⁷⁵ FOF 28.

¹⁷⁶ Private Provider 2 was only on staff at _____ School for two months at the time of the November 21, 2017 IEP meeting.

¹⁷⁷ FOF 39.

¹⁷⁸ FOF 25.

¹⁷⁹ FOF 25.

¹⁸⁰ FOF 26.

¹⁸¹ *C.L. v. Scarsdale Union Free School Dist.*, 744 F.3d at 836.

¹⁸² FOFs 22-24.

Parent 1 testified that Student is happier at School 1 and that Student has been trying.¹⁸³ While this testimony is uncontroverted, the totality of the record before this Hearings Officer is insufficient to establish that Student's ____ placement is appropriate to meet Student's needs.

The Hearings Officer finds that Petitioners have failed to prove by a preponderance of the evidence that Student's program and placement at School 1 is appropriate. Accordingly, Petitioners are not entitled to tuition reimbursement for Student's education and related services provided by School 1.

Petitioners raised the issue of "[w]hether DOE's failure to fund Student's current ____ placement and transition supports from December 2017 to April 17, 2018 denied Student a FAPE?"¹⁸⁴ Petitioners presented no argument or any discernable evidence regarding this issue. To the extent that this issue is or may be seeking tuition reimbursement, the claim must fail as discussed herein.

VIII. ORDER

Based upon the findings of fact and conclusions of law herein, it is hereby ORDERED THAT,

1. Respondents shall convene an IEP meeting within fourteen days of the date of this Decision to finalize the terms of Student's transition plan, utilizing the transition plan proposed by School 1 as a basis. The transition plan shall be made a part of Student's revised IEP, either as an attachment or fully incorporated therein;

2. Parent 1 shall make Parent 1 available to attend the aforementioned IEP meeting within fourteen days of the date of this Decision;

¹⁸³ FOF 41.

¹⁸⁴ Issue 4.

3. Prior to the aforementioned IEP meeting, Parent 1 shall obtain all daily behavioral data, graphs, analyses, and reports prepared by School 1 for Student from June 1, 2017 to present, as well as the fully detailed transition plan drafted by _____, and shall bring said information to the IEP meeting;

4. Respondents shall invite Representatives of School 1 knowledgeable of Student's program at School 1 to attend the IEP meeting;

5. Student's transition plan shall commence within thirty days of the date of this Decision.

Nothing in this Order shall be interpreted to preclude the IEP team from reviewing new or additional information.

DATED: Honolulu, Hawai'i, June 6, 2018

DENISE P. BALANAY
Hearings Officer

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 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).