



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-SY1819-027

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: November 19, 2019

Hearings Officer : Chastity T. Imamura

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act (“IDEA”), as amended in 2004, codified at 20 U.S.C. §§ 1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R §§ 300.1, et seq.; and the Hawai‘i Administrative Rules §§ 8-60-1, et seq. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973 (“Section 504”), as amended in 1974, codified at 29 U.S.C. 794, et seq.; the federal

¹ Personal identifiable information is provided in the Legend.

regulations implementing Section 504, 34 C.F.R §§ 104.1, et seq.; and the Hawai‘i Administrative Rules (“HAR”) §§ 8-61-1, et seq.; and Hawaii Revised Statutes (“HRS”) Chapter 91 in their claims and requests for relief.

II. INTRODUCTION

Petitioner Student, by and through Parent 1 (hereinafter collectively referred to as “Petitioners”), by and through their counsel, filed a Due Process Complaint (“Complaint”) against Respondents DEPARTMENT OF EDUCATION, STATE OF HAWAI‘I, and CHRISTINA KISHIMOTO, Superintendent of the Hawai‘i Public Schools (hereinafter collectively referred to as “DOE” or “Respondents”), pursuant to the Individuals with Disabilities Education Act (“IDEA”) and Section 504 of the Rehabilitation Act (“Section 504”), on December 26, 2018. Respondents filed their Response to the Complaint on January 4, 2019. Prior Hearings Officer Denise P. Balanay (hereinafter “PHO Balanay”) was appointed to preside in this matter on or about December 26, 2018.

A Prehearing Conference (“PHC”) was conducted on January 22, 2019. Participating in the conference were: PHO Balanay, Keith H.S. Peck, Esquire, for Petitioners; and Deputy Attorney General Anne T. Horiuchi, Esquire, for Respondents.

At the PHC, a due process hearing (“Hearing”) was scheduled for April 1 through April 5, 2019. On January 24, 2019, Petitioners requested an extension of the original decision deadline (“Deadline”) due to the scheduling of an IEP meeting on March 7, 2019 which was expected to facilitate settlement in this matter. PHO Balanay granted Petitioners’ request for an extension of the Deadline on January 24, 2019. The deadline for PHO Balanay to issue a decision was accordingly set for April 25, 2019.

The parties were directed to file any substantive motions by March 4, 2019. Memoranda in Opposition were to be filed by March 11, 2019. On March 14, 2019, the parties informed PHO Balanay that they were actively involved in settlement negotiations and requested that the Hearing be taken off the calendar. PHO Balanay granted the request and removed the Hearing from the calendar of the Office of Dispute Resolution.

On April 12, 2019, PHO Balanay issued an Amended Prehearing Order, wherein new Hearing dates were set for May 20 through May 22, 2019 and new deadlines were set for witness and exhibit disclosures. On April 15, 2019, PHO Balanay granted Petitioners Request for an extension of the deadline from April 25, 2019 to June 9, 2019.

On May 1, 2019, the undersigned Hearings Officer was appointed to this case. A status conference was held with the parties on May 1, 2019, and a further status conference was held on May 10, 2019. At both status conferences, the attorneys indicated that they were still working to resolve the case through a settlement agreement. On May 14, 2019, another status conference was held, wherein the attorneys requested that the Hearing be removed from the calendar, as they believed that they would be able to reach an agreement.

A prehearing conference was again held in this case on May 24, 2019 and participating in the conference were Hearings Officer Chastity T. Imamura, Keith H.S. Peck, Esq., for Petitioners, Parent 1 (by telephone), and Anne T. Horiuchi, Esq. for Respondents. The parties again requested that the case be calendared for a Hearing, and new dates of August 13-15, 2019 were set. On May 30, 2019, Respondents' Request for Extensions of the Deadline was granted, and the new deadline for the decision was September 7, 2019.²

² The request filed by Respondents included a request for two 45-day extensions, from June 9, 2019 to July 24, 2019, and from July 24, 2019 to September 7, 2019.

Once again in August 2019, the parties notified the Hearings Office that they were close to reaching a settlement agreement in this matter to resolve the case. Another request was made to remove the Hearing from the calendar, which was granted. Respondents requested an extension of the deadline, which was granted from September 7, 2019 to October 22, 2019.

On October 16, 2019, a status conference was held, and the parties notified this Hearings Officer that they were not going to be able to reach a settlement in this case and requested that new Hearing dates be set. The Due Process Hearing was scheduled for November 19 through November 21, 2019. Petitioners requested an extension of the deadline, which was granted from October 22, 2019 to December 4, 2019.

The Due Process Hearing was held on November 19, 2019. Present at the Hearing were Hearings Officer Chastity T. Imamura, Keith H.S. Peck, Esq. for Petitioners, Parent 1, Anne T. Horiuchi, Esq. for Respondents, and DOE District Educational Specialist (hereinafter “DES”). At the Hearing, Petitioners called two witnesses: Parent 1 and Private School Clinical Supervisor. Respondents called one witness: Home School Vice Principal. All the documents submitted by Petitioners and Respondents in their respective binders were received into evidence. Although the Hearing was expected to last three days, the parties completed the presentation of evidence and witness testimony on that same date. Both attorneys expressed an interest in submitting closing briefs and wanted time for transcripts of the Hearing to be prepared. Respondents requested an extension of the deadline from December 4, 2019 to January 17, 2020.

A deadline for submitting closing briefs was set for Monday, December 23, 2019. However, due to transcripts not being provided to the parties until December 16, 2019, the

deadline for submission of closing briefs was extended to Monday, January 6, 2020. Both parties timely submitted their closing briefs.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the undersigned Hearings Officer renders the following findings of fact, conclusions of law and decision.

III. ISSUES PRESENTED

1. Whether failing to provide Parent with a copy of an Individualized Education Program (hereinafter “IEP”) dated on or about March 14, 2018 is a denial of a free and appropriate public education (hereinafter “FAPE”).

2. Whether, during the March 14, 2018 through October 18, 2018 IEP meetings, restricting the discussion of Student’s eligibility for extended school year services (“ESY”) to regression and/or recoupment and/or finding Student ineligible for academic instruction during ESY denied Student a FAPE.

3. Whether failing to sufficiently discuss Parent’s concerns about appropriate behavioral interventions Student needs during the October 18, 2018 IEP meeting and/or previous IEP meeting of July 27, 2018, and/or failing to revisit this concern within a reasonable time denied Student a FAPE.

4. Whether failing to sufficiently discuss and/or determine Student’s need for a provider during the October 18, 2018 IEP meeting and/or failing to revisit this concern within a reasonable time denied Student a FAPE.

5. Whether the IEP provides appropriate supports of tutoring and counseling for Student while Student remains in Home Placement.

6. Whether Student's placement is overly restrictive and/or otherwise improper. Petitioners allege that Student is Home-bound and without access to any educational services. Petitioners further allege that the DOE has failed to develop a modified schedule to facilitate Student's return to school or provide Student an appropriate means to access academic services or counseling.

7. Whether the IEP was properly completed and/or implemented. Petitioners allege the DOE failed to develop supportive services or accommodations for Student and/or failed to provide Student an appropriate means to access Student's home-bound services. Petitioners further allege that the DOE has not implemented the July 27, 2018 IEP which calls for Homebound tutoring and counseling.

8. Whether Student's regular or special education and related aids and services was or are designed to meet Student's individual educational needs as adequately as the needs of nonhandicapped persons are met, pursuant to 34 CFR § 104.33(b). Petitioners allege Student was not provided adequate behavioral or academic interventions and/or tutoring or counseling.

9. Whether Student's program under Section 504 is or was appropriate as a placement determination, pursuant to 34 CFR § 104.34(a). Petitioners allege that Student is in an overly restrictive and inappropriate placement. Student is or, at all times relevant herein, was Home-bound without access to any educational or related services.

10. Whether Student and/or Parents received the required notice of procedural safeguards.

IV. FINDINGS OF FACT³

1. Student is ___ years old.⁴
2. Student is diagnosed with ___.
3. Student had been determined eligible for IDEA under the category of Eligibility Category 1 since 2015.⁵ On September 10, 2018, Student's eligibility criteria was changed from Eligibility Category 1 to Eligibility Category 2.⁶
4. Student had an Individualized Education Program (hereinafter "IEP") dated March 14, 2017 (hereinafter "IEP-3/14/2017"), while Student attended School 2.⁷
5. In the IEP-3/14/2017, Student's educational placement was at School 2, but in special education classes, although Student was encouraged to participate in non-academic and extra-curricular activities with Student's general education peers.⁸
6. Student was kept home from School 2 for the last two (2) months of the 2016-2017 school year.⁹
7. On or about September 15, 2017, a manifest determination meeting was held to review a suspension for Student conduct violation that included bringing an illegal substance to campus. The team determined that the violation was not a

³ The Hearings Officer considered the entire record, including all testimony and exhibits introduced at the Hearing, in issuing this Decision and Order. Only the Findings of Fact that are pertinent to the Conclusions of Law and Decision in this matter are referenced herein.

⁴ Testimony of Parent 1, *Transcript page 86, lines 5-8* (hereinafter referenced as *Tr. 86:5-8*), *see also* Respondents' Exhibit 3, page 028 (hereinafter referenced as R-Ex.3, p.028).

⁵ R-Ex.2, p.016.

⁶ R-Ex.3, p.107-108.

⁷ R-Ex.3, p.028-045.

⁸ R-Ex.3, p.044.

⁹ R-Ex.3, p.092.

manifestation of Student's disability and decided that Student would serve a thirty (30) day suspension.¹⁰

8. On or about December 14, 2017, another manifest determination meeting was held to review another suspension for Student. The team determined that the student conduct violation was not a manifestation of Student's disability and that Student would serve a ninety (90) day suspension.¹¹
9. As part of the suspension, Student was offered tutoring for three (3) hours per week to begin on January 8, 2018 and conclude on May 8, 2018.¹²
10. Tutor made attempts to contact Parent 1 to arrange for Student's home-bound tutoring during Student's suspension, but the telephone number and address that Home School had for Parent 1 were not accurate.¹³
11. Home School attempted to contact Parent 1 to schedule an IEP transition meeting in anticipation of Student's return to Home School after Student's suspension but was unable to get in touch with Parent 1 to schedule said meeting.¹⁴
12. On March 15, 2018, Parent 1 contacted Home School with Parent 1's corrected contact information and informed Home School that Parent 1 will get back to them regarding IEP meeting dates.¹⁵
13. Student returned to Home School from Student's suspension on April 2, 2018, however Student did not want to be in school and became disorderly. Parent 1

¹⁰ See R-Ex.3, p.055-056.

¹¹ See R-Ex.3, p.060-062.

¹² R-Ex.3, p.061.

¹³ See email chain in R-Ex.6 p.231-234.

¹⁴ R-Ex.6, p.245-247.

¹⁵ R-Ex.6, p.253-254.

took Student home.¹⁶ Student was suspended again on April 9, 2018 for three (3) days.¹⁷

14. Two IEP team meetings were held in April 2018,¹⁸ and Parent 1 participated in both of those meetings. During the IEP meeting on April 27, 2018, Parent 1 informed Home School that Parent 1 will not be returning Student to Home School as Parent 1 does not believe it is a good fit.¹⁹
15. Between April 27, 2018 and July 27, 2018, Home School made some attempts to schedule the IEP continuation meeting with Parent 1.²⁰ Doctor 1's staff also made several attempts to re-schedule Student's evaluation with Parent 1 at or around this time.²¹ Parent 1 had cancelled Student's initial exam date on June 1, 2018 due to a family emergency.²²
16. On July 27, 2018, another IEP meeting was held, however Parent 1 was not present during that meeting.²³ According to Vice Principal, at least six (6) attempts were made to contact Parent 1 to secure Parent 1's presence at the meeting, including a telephone call the morning of the meeting and one at the start of the meeting.²⁴ However, written documentation of these attempts by Home School were not presented as evidence during the Hearing.

¹⁶ R-Ex.6, p.187.

¹⁷ R-Ex.6, p.196.

¹⁸ Parent 1 participated in IEP meetings on April 19, 2018 and April 27, 2018. *See* R-Ex.3, p.092.

¹⁹ R-Ex.3, p.092.

²⁰ *See e.g.*, R-Ex.6, p.206-207, p.212, p.280, p.282-285.

²¹ *See* R-Ex.6, p.209-211, p.282-285.

²² *See* R-Ex.3, p.089, *also* Testimony of Parent 1, *Tr.54:5-8*.

²³ Testimony of Vice Principal, *Tr. 98:1-11*, R-Ex.3, p.90.

²⁴ Testimony of Vice Principal, *Tr. 97:23-98:1*, R-Ex.6, p.291-292.

17. A new IEP dated July 27, 2018 was created (hereinafter “IEP-7/27/2018”) that changed Student’s educational placement²⁵ to a home-bound setting with services including tutoring and counseling to be provided to Student by DOE personnel.²⁶
18. This IEP-7/27/2018 consisted of two (2) pages of notations of Student’s Present Levels of Educational Performance (hereinafter “PLEPs”),²⁷ three (3) annual goals,²⁸ and eight (8) defined supplementary aids and services.²⁹
19. IEP-7/27/2018 indicated that Student was eligible for extended school year and would receive “ESY services for Counseling to work on behaviors after 10 calendar days at 300 minutes per week.”³⁰
20. In the description of the clarification of supports and services, it notes that “Tutoring will start on 8/8/2019³¹ in the Home-bound setting at 300 minutes per week.”³² Further clarification of services and supports indicates that “Individual Instructional Support is for the school setting an [*sic*] will be revisited after psychological evaluation completed and LRE is revisited.”³³
21. The Least Restrictive Environment (hereinafter “LRE”) section of the IEP-7/27/2018 indicates that “[Student] will not participate with Student’s non-

²⁵ In Student’s IEP prior to 7/27/2018, Student was placed in a “blend of general education and special education classes with supervision.” Prior Written Notice dated 3/28/2017, R-Ex.3, p.046.

²⁶ *Parties’ Stipulation as to Certain Facts*, filed with the Office of Dispute Resolution on November 14, 2019.

²⁷ R-Ex.3, p.082-083.

²⁸ R-Ex.3, p.085-087.

²⁹ R-Ex.3, p.088.

³⁰ R-Ex.3, p.088.

³¹ Although it is unimportant to the substance of the IEP, it appears that while the start date indicates 8/8/2019 this was a typographical error and was meant to say 8/8/2018.

³² R-Ex.3, p.088.

³³ R-Ex.3, p.088.

disabled peers and will be on Home-bound placement until Evaluation has been completed. Evaluation was scheduled for June 1, 2018 and was canceled by Parent 1 stating they had to go to mainland because of a death in the family. Numerous attempts have been made to reschedule with no response from Parent 1.”³⁴

22. A prior written notice (hereinafter “PWN”) was issued on August 3, 2018 (hereinafter “PWN-8/3/2018”) for the IEP meeting on July 27, 2018. The PWN-8/3/2018 indicated that Student would receive “close adult supervision” that was clarified to say “(parent or other family member present).”³⁵ The PWN-8/3/2018 also clarified that Student was to be placed in home-bound placement with tutoring services.³⁶
23. Further explanation offered in the PWN-8/3/2018 as to Student’s placement indicated that “[Student] will be on Home-bound placement until Assessment is completed.” Additionally, the PWN-8/3/2018 indicated that “[Student’s] placement was determined based on current performance and progress data provided to the team. Assessment was proposed and parent consent was given. Parent cancelled and numerous attempts have been made to reschedule with no response.”
24. Finally, the PWN-8/3/2018 indicated the following:

4-19-18 IEP meeting parent stated that [Student] was kept home for the last 2 months of ___ grade.
4-27-18 meeting parent stated that Parent 1 will keep not return [Student] to school as it is not a good fit.

³⁴ R-Ex.3, p.089.

³⁵ R-Ex.3, p.091.

³⁶ R-Ex.3, p.091.

On June 1st, [Parent 1] called to cancel [Student's] Eval with Doctor 1. They had a family emergency.

Numerous attempts to reschedule Evaluation and IEP meeting with no response from parent.

7/27/18; IEP meeting was held and 2 attempts to call parent during the meeting with no answer. Due to constraints meeting was continued with IEP team members in attendance.³⁷

25. On August 3, 2018, Doctor 1 conducted an Evaluation (hereinafter "E-8/3/2018") that had been requested by the IEP team for Student.³⁸
26. On one day during the week of August 6-10, 2018, Student met with Tutor for a tutoring session at Home School. An incident happened between Parent 1 and Student and Student left tutoring. Another tutoring session had been scheduled for that same week but was cancelled by Parent 1. At that time, Parent 1 informed Tutor that Student did not want to have any tutoring done at school.³⁹
27. After the tutoring session in the first week of August 2018, Vice Principal testified that Parent 1 instructed Tutor and Counselor that Student was not to receive Student's services at the home for safety reasons, which was prompted by an incident where Tutor claimed that Student was abusive to Tutor, however the evidence presented does not support Vice Principal's understanding of the incident that took place.⁴⁰
28. In an email dated August 13, 2018, Tutor informed Counselor that there was an incident during their tutoring session where they "had fifteen minutes working together nicely. Later, there was an incident between Parent 1 and [Student], and

³⁷ R-Ex.3, p.092.

³⁸ See R-Ex.2, p.020-025.

³⁹ R-Ex.6, p.306.

⁴⁰ Testimony of Vice Principal, *Tr. 104:6-105:17*.

Student started to insult Parent 1 and left the classroom. Parent 1 ran after Student, but Student never came back.”⁴¹

29. The recitation of the incident that took place by Parent 1 is consistent with what was written in the email by Tutor, which is that Tutor attempted to leave the tutoring session, but Student got upset and walked out of the session. Parent 1 testified that at no time during the conversation between Student and Parent 1 during that session did Student threaten or even address the tutor.⁴²
30. Tutor did not testify during the Hearing.
31. On August 15, 2018, Parent 1 informed Vice Principal that Student did not want tutoring or counseling at an outside location while Student is in home-bound placement and requested that the school supply additional personnel if someone needed to be present for Student’s tutoring sessions.⁴³ In response, Vice Principal informed Parent 1 that “the school does not provide additional supervision during tutoring, the tutor and [Student] work individually. Your presence provides the opportunity to know what work is being done and what assignments are due.”⁴⁴
32. Several attempts were made by Counselor and Tutor to schedule counseling and tutoring sessions for Student, however they were only willing to meet Student in a setting other than Student’s home.⁴⁵ Parent 1 restated to Vice Principal, Counselor, and Tutor that Student was unwilling to meet for sessions in public

⁴¹ R-Ex.6, p.306.

⁴² Testimony of Student, *Tr. 59:2-13*, see also P-Ex.5, p.159, P-Ex.9, recording of IEP meeting on 10/18/18, part I, time stamp [13:21-15:50] (hereinafter referenced as P-Ex.9, part I, [13:21-15:50]).

⁴³ R-Ex.6, p.308

⁴⁴ R-Ex.6, p.308.

⁴⁵ See P-Ex.5, p.157-158, 161, 162, 165, and R-Ex.6, p.311, 313, 314, 317, 318, 319.

settings and again requested that they come to Student's home to work with Student.⁴⁶

33. In September 2018, the IEP team held a meeting to re-evaluate Student's eligibility for IDEA services. A PWN was issued from the September 2018 meeting (hereinafter "PWN-9/10/2018") and Student was determined to qualify for IDEA services, however Student's eligibility criteria was changed from Eligibility Category 1 to Eligibility Category 2.⁴⁷
34. During the IEP eligibility meeting, the IEP team considered the E-8/3/2018 completed by Doctor 1 to make the determination of Student's eligibility for IDEA services.⁴⁸ No concerns regarding the validity and/or credibility of the E-8/3/2018 were raised.
35. On October 18, 2018, an IEP meeting was held and Parent 1 was present for this meeting.⁴⁹
36. At the meeting, the IEP team did not discuss or consider Parent 1's concerns about Student's behavioral plan, a provider being assigned to Student, and the fact that Student had not been receiving either counseling or tutoring from Home School.
37. At the start of the meeting, Parent 1 read Parent 1's concerns to the IEP team and asked that it be put into the IEP,⁵⁰ and later provided the team with a copy of the

⁴⁶ See P-Ex.5, p.157-158, 159-160, 163, 164, 166, 167-168, 169, 170-171.

⁴⁷ R-Ex.3, p.107-108

⁴⁸ See R-Ex.3, p.107-108.

⁴⁹ Testimony of Parent 1, *Tr. 49:10-50:10*, see also P-Ex.9, parts I & II.

⁵⁰ P-Ex.9, part I, [3:09-3:30], [3:45-5:04].

written concerns.⁵¹ These concerns were not written into the IEP-10/18/2018, contrary to the request of Parent 1 to have them put into the IEP.⁵²

38. When Parent 1 raised Doctor 1's recommendation that Student be assigned a provider, Vice Principal dismissed the idea without significant discussion.
39. Initially, Vice Principal told Parent 1 that "they didn't contact a provider because Student hasn't been on campus."⁵³ Vice Principal then went on to explain why Vice Principal did not believe that the provider would be useful to Student⁵⁴ and stated at least twice during the meeting that the provider was "a recommendation, not a requirement."⁵⁵
40. Parent 1 also requested several times throughout the meeting that the IEP team discuss Student's behavioral plan, as Parent 1 believed that it was necessary to have a behavioral plan in place prior to transitioning Student back to Home School. Each time the issue was raised by Parent 1, the team dismissed it without discussion.⁵⁶

⁵¹ P-Ex.9, part I, [6:14-6:22].

⁵² Compare R-Ex.3, p.097-098 and R-Ex.9, p.480, see also Testimony of Principal, *Tr. 125:20-127:4*, and P-Ex.9, part I, [3:09-3:30].

⁵³ P-Ex.9, part I, [17:15-17:19].

⁵⁴ P-Ex.9, part I, [13:33-19:31].

⁵⁵ P-Ex.9, part I, [17:55-18:00], [19:50-19:55].

⁵⁶ See P-Ex.9, part I, [3:09-3:30] Parent 1 reads the written concerns to the team and they note them but move onto the discussion about Student's placement; P-Ex.9, part I, [23:09-23:16] Parent 1 again attempts to discuss the behavioral plan and Parent 1 is told that "we'll get to that after this;" see also P-Ex.9, part II, [17:06-17:09] Parent 1 again says that they need to discuss Student's behavioral plan and Vice Principal interrupts to let the team know that they "only have fifteen (15) minutes left for the meeting;" P-Ex.9, part II, [20:13-21:17] Parent 1 again informs the team that they need to work on the behavioral plan before they bring Student back to school because the plan in place is old and not working, and Vice Principal informs Parent 1 that the BSP had been revised in March 2018; P-Ex.9, part II, [21:44-21:45] Parent 1 informs IEP team that Parent 1 wants to be part of the process for formulating Student's behavioral plan, P-Ex.9,

41. During the October 18, 2018, IEP meeting, Parent 1 learned that Student's behavioral services plan (hereinafter "BSP") had been revised in March 2018, and Parent 1 requested a copy of the BSP.⁵⁷ A copy of Student's revised BSP was mailed to Parent 1 on October 18, 2018 by Vice Principal.⁵⁸
42. No attempt was made at the IEP meeting to discuss other options for getting Student tutoring and counseling services, such as sending additional personnel to accompany Tutor and Counselor to the house or any possible transition plan to get Student from home back to school.⁵⁹ Vice Principal simply informed Parent 1 that the tutoring and counseling would not be done at Student's home⁶⁰ and Parent 1 stated that Student would not meet outside the school to receive the services.⁶¹
43. Contrary to Vice Principal's testimony during the Hearing,⁶² at the October 18, 2018 IEP meeting, Vice Principal informed Parent 1 that they were refusing to send Counselor and Tutor to Student's home because they believed it would enable Student to simply learn at home and not return to school.⁶³
44. The IEP team, including Parent 1, was aware that Doctor 1 had recommended that Student would likely benefit from receiving Student's education in a classroom that has a dedicated special education teacher who is well trained in managing

part II, [24:00-24:30] Parent 1 reiterates that Parent 1 wants to discuss Student's behavioral plan because it needs to be in place before they try to send Student back to school.

⁵⁷ P-Ex.9, part II, [21:17-21:44].

⁵⁸ R-Ex.6, p.333-336.

⁵⁹ See generally P-Ex.9, part I & II.

⁶⁰ P-Ex.9, part II, [25:00-25:05].

⁶¹ P-Ex.9, part II, [25:11-25:20].

⁶² At the Hearing, Vice Principal testified that the reason that they refused to send Tutor and Counselor to provide services at Student's home was for safety reasons since Parent 1 was refusing to be present during the sessions. See *Tr. 119:4-120:3*.

⁶³ P-Ex.9, part I, [12:14-13:00].

behaviors with both interpersonal and cognitive-behavioral strategies.⁶⁴ Doctor 1 had also recommended that Student have a provider. Doctor 1 had recommended that the provider be well-trained and know how to use de-escalation techniques, how to safely respond to aggression and threats, how to help Student resolve interpersonal conflicts, how to implement the cognitive and behavioral strategies listed in Student's behavioral support plan.⁶⁵

45. At the end of the October 18, 2018 IEP meeting, no changes had been made to Student's IEP by the team due to the team wanting to discuss 'Rachel H.- educational placement' options, but none of the team members having any significant information about possible alternative placements for Student.⁶⁶
46. The IEP team did not make any changes or revisions to Student's IEP during the October 18, 2018 IEP meeting, and simply re-printed Student's IEP-7/27/2018 with the new date of October 18, 2018.⁶⁷
47. On December 25, 2018, Mr. Peck emailed the Complaint and Request for Due Process Hearing in this case to Vice Principal.⁶⁸
48. On January 14, 2019, Parent 1 responded to Vice Principal's request to clarify if Parent 1 was refusing counseling services from Home School.⁶⁹ Parent 1 indicated that Parent 1 wanted Home School's counseling services, but that Student continued to be unwilling to meet for Student's home-bound placement in

⁶⁴ R-Ex.2, p.024.

⁶⁵ R-Ex.2, p.024.

⁶⁶ *See e.g.*, P-Ex.9, part II, [2:09-11:20].

⁶⁷ *Compare* IEP-7/27/2018, R-Ex.3, p.081-090, and IEP-10/18/2018, R-Ex.3, p.096-105.

⁶⁸ R-Ex.6, p.341.

⁶⁹ P-Ex.6, p.170-171.

a public place and Home School continued to refuse to send Counselor and Tutor to their home. Parent 1 informed Vice Principal that Parent 1 had made arrangements for Student to receive services at Private School.⁷⁰

49. In March 2019, Private School set up a program for Student to receive services from a provider from Private School.⁷¹
50. Private School did its initial intake for Student in March 2019, where they sent Private Clinical Supervisor and provider to Student's home to conduct assessments and meet Student.⁷²
51. Between March 2019 and May 2019, Private School began with working with Student at Student's home to transitioning Student into the school environment at Private School.⁷³
52. Private School established a behavior contract with Student while Student was still at the home environment to transition Student into the school environment at Private School.⁷⁴
53. Private School also developed a curriculum at the recommendation of another public school (not Home School) for Student, although consultation was not made with Home School to assure that Student would receive credit from Home School for graduation.⁷⁵

⁷⁰ P-Ex.5, p.169.

⁷¹ Testimony of Clinical Supervisor, *Tr. 22:13-26:12*, P-Ex.S3, p.208-209.

⁷² Testimony of Clinical Supervisor, *Tr. 22:13-23:4*.

⁷³ Testimony of Clinical Supervisor, *Tr. 23:5-25:14*.

⁷⁴ Testimony of Clinical Supervisor, *Tr. 24:11-25:5*.

⁷⁵ Testimony of Clinical Supervisor, *Tr. 16:3-16, 25:12-17, 32:20-33:12*.

54. After working with Student for almost a month, Private School was able to transition Student into the school environment where Student attended classes at Private School.⁷⁶
55. Student was making progress and completing assignments while Student was in the school environment at Private School.⁷⁷
56. Student had a summer break from Private School from approximately May 16, 2019 to July 23, 2019.⁷⁸
57. Upon completion of Student's break, Student had regressed and had refused to re-enter Private School's school environment, but Private School made plans to work with Student again at Student's home to transition Student back to the school environment and worked with Student from July 23, 2019 to August 28, 2019.⁷⁹
58. In August 2019, due to a lack of funding for Student's services, Private School terminated the services being provided to Student.⁸⁰
59. In October 2019, Clinical Supervisor prepared an invoice for provider services that Private School provided to Student between March 2019 and August 2019. Private School only billed for provider services during this period.⁸¹
60. The total amount of the invoice for Private School for services for Student from March 2019 to August 2019 was Four Thousand Four Hundred Eighty Dollars (\$4,480.00) that is still outstanding.⁸²

⁷⁶ Testimony of Clinical Supervisor, *Tr. 23:19-24:14*.

⁷⁷ Testimony of Clinical Supervisor, *Tr. 26:23-27:8*.

⁷⁸ Testimony of Clinical Supervisor, *Tr. 27:20-28:6*, P-Ex.S3, p.308-309.

⁷⁹ Testimony of Clinical Supervisor, *Tr. 28:9-29:6*, P-Ex.S3, p.308-309.

⁸⁰ Testimony of Clinical Supervisor, *Tr. 29:13-30:3, 43:23-44:7*.

⁸¹ Testimony of Clinical Supervisor, *Tr. 13:20-15:6*, P-Ex.S3, p.308-309.

⁸² Testimony of Clinical Supervisor, *Tr. 14:15-17, 44:15-21*, P-Ex.S3, p.309.

V. 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”.⁸³ A Free and Appropriate Education (“FAPE”) includes both special education and related services.⁸⁴

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.⁸⁵ 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”.⁸⁶

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures set forth in IDEA; and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit.⁸⁷ “A state must meet both requirements to comply with the obligations of the IDEA”.⁸⁸

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

⁸³ *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)).

⁸⁴ H.A.R. §8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

⁸⁵ *Id.*

⁸⁶ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp. 3d 1081, 1093 (D. Haw. 2016).

⁸⁷ *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

⁸⁸ *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).

and related services which are individually designed to provide “some educational benefit.”⁸⁹

However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,⁹⁰ 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.”⁹¹

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children”.⁹² 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.⁹³ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.⁹⁴

An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible.⁹⁵ 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

⁸⁹ *Rowley*, 458 U.S. at 200.

⁹⁰ 137 S.Ct. 988 (2017).

⁹¹ *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).

⁹² *Honig v. Doe*, 484 U.S. 305, 311.

⁹³ H.A.R. §8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R §300.22.

⁹⁴ H.A.R. §8-60-45; 20 U.S.C. § 1414; 34 C.F.R §300.321- 322.

⁹⁵ *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167 (2012).

- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section; ...”⁹⁶

Harmless procedural errors do not constitute a denial of FAPE.⁹⁷ 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.”⁹⁸

Where a court identifies a procedural violation that denied a student a FAPE, the court need not address the second prong.⁹⁹

B. Petitioners have failed to prove that failing to provide Parent with a copy of an IEP during the relevant time was a denial of FAPE.

Petitioners first argument is that Respondents failed to provide Parent 1 with an IEP dated on or about March 14, 2018, as that would have been the relevant time for an annual revision of Student’s IEP. Student had an IEP that was created on March 14, 2017 (hereinafter “IEP-3/14/2017”), which would have needed to be reviewed and/or revised prior to its expiration on or about March 14, 2018. Parent 1 asserts that if one was created prior to the expiration of the old IEP, not providing a copy to Parent 1 in a timely fashion was a denial of FAPE.

⁹⁶ 34 C.F.R. § 300.320 (a)(4).

⁹⁷ *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008).

⁹⁸ 34 C.F.R. § 300.513 (a)(2).

⁹⁹ *Id.*

Based on the stipulation of facts submitted by the parties, it has been agreed upon by both Petitioners and Respondents that no IEP was created in the immediate period surrounding March 14, 2018.¹⁰⁰ Since no IEP exists that could have been provided to Parent 1 during that time period, this Hearings Officer finds that Petitioners have not proven any failure on Respondents' part to provide Parent 1 with a timely IEP or PWN. Even if a meeting was held, as asserted in Petitioners' Closing Brief,¹⁰¹ Petitioners have presented no evidence or legal argument to support the assertion that failure to provide meeting notes would be a denial of FAPE in this case.

C. Petitioners have failed to prove that Respondents did not make a sufficient ESY eligibility determination in denying Student ESY academic instruction.

Petitioners argue that during the October 18, 2018 IEP meeting, the DOE did not review sufficient data or have sufficient discussions about Student's eligibility for ESY academic instruction. Petitioners assert that Respondents were responsible for gathering further information on Student's academic performance while Student was not in school to determine whether Student should be provided academic instruction in Student's ESY services.

"[A] claimant seeking an ESY must satisfy an even stricter test, because 'providing an ESY is the exception and not the rule under the regulatory scheme.'¹⁰² The Ninth Circuit Court of Appeals held that under the IDEA, schools are required to provide ESY services when the team determines that ESY services are necessary for the provision of a FAPE.¹⁰³ It is generally

¹⁰⁰ See *Parties' Stipulation as to Certain Facts*, filed with the Office of Dispute Resolution on November 14, 2019.

¹⁰¹ See *Petitioners' Closing Brief*, filed with the Office of Dispute Resolution on January 6, 2020, page 2.

¹⁰² *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008), citing *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315, *cert denied*, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d 513 (2007).

¹⁰³ *Id.*

recognized that school districts need only provide ESY services “when the benefits a disabled child gains during a regular school year will be significantly jeopardized if Student is not provided with an educational program during the summer months.”¹⁰⁴

Here, Petitioners assert that Respondents should have discussed further factors in determining whether Student should have qualified for ESY academic services. In the IEP-10/18/2018, Student was provided ESY counseling services starting ten (10) calendar days after the end of school for three hundred (300) minutes per week.¹⁰⁵ At the time the IEP-10/18/2018 was created, Student had not been attending school or receiving academic services through tutoring,¹⁰⁶ so Respondents were not able to determine if Student needed the additional ESY services based on regression of Student’s academic performance. The IEP-10/18/2018 did note that Student would receive counseling to work on behaviors in light of Student’s eligibility criteria.

Petitioners have put forth no specific evidence or law that supports their position that the ESY eligibility discussion needed to be longer or consider other factors. Student was provided ESY counseling services and based on Student’s refusal to participate in the tutoring services that were offered to Student during the school year, Respondents refusal to provide Student academic ESY services in the IEP-10/18/2018 did not amount to a denial of FAPE.

D. Respondents’ refusal to discuss Parent 1’s concerns about Student’s behavioral concerns, the request for Student to be assigned a provider, the proper implementation of Student’s current IEP, and concerns regarding Student’s placement seriously infringed upon Parent 1’s opportunity to participate in the IEP formulation process and resulted in a denial of FAPE.

¹⁰⁴ *Id.*, quoting *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002).

¹⁰⁵ Findings of Fact, paragraph 19 (hereinafter referenced as FOF 19).

¹⁰⁶ FOF 42.

Petitioners' arguments in Issues 3, 4, 5, 6, and 7 concern Student's IEP-7/27/2018 and IEP-10/18/2018 and the failures of Respondents to allow parent meaningful participation in the IEP process by refusing to address the issues relating to Student's behavioral concerns, a provider, the proper implementation of the IEP and the improper placement of Student in the home-bound setting. For the reasons set forth below, to address Petitioners' issues in 3 through 7, the undersigned Hearings Officer concludes that Respondents denied Student a FAPE by seriously infringing on Parent 1's opportunity to participate meaningfully in the IEP formulation process.

The IDEA places great importance upon parent involvement and protection to assure that appropriate services are provided to a handicapped child.¹⁰⁷ Courts have repeatedly recognized that procedural errors that result in the loss of educational opportunity, or seriously infringe on the parents' opportunity to participate in the IEP formulation process, or that cause a deprivation of educational benefits, result in a denial of FAPE.¹⁰⁸

In this case, Respondents created an IEP for Student in July 2018 without the participation of Parent 1. While it was due in part to Parent 1's lack of communication and responsiveness concerning meeting dates, Respondents during that meeting changed the educational placement of Student. Prior to the IEP-7/27/2018, Student's placement was in general education setting but with special education classes.¹⁰⁹ While it does appear that Parent 1 did participate in the April 2018 meetings when the IEP team supposedly discussed Student's placement, and Parent 1 initially made the decision to keep Student at home, the IEP

¹⁰⁷ *Amanda J.*, 267 F.3d at 891.

¹⁰⁸ *Id.* at 892 (citations and quotations omitted).

¹⁰⁹ IEP-3/14/2017

team changed Student’s placement to home-bound with “close adult supervision (parent or other family member present)” to be a part of Student’s IEP.¹¹⁰ No evidence supports that Parent 1 or another adult from Student’s family agreed to be an essential part of the services to be provided by Student. Further, it is incumbent upon Respondents to clarify exactly what and how the parent or other family member would be providing services to Student in lieu of Respondents’ personnel providing such services and whether they had agreed to provide a service that would otherwise be Respondents’ responsibility to provide.¹¹¹

Further, while Respondents’ claim that they made repeated efforts to arrange meetings with Parent 1 only to have Parent 1 cancel or not show up to them, sufficient documentation does not exist to support the claims. The only evidence of attempts to contact Parent 1 regarding the July 2018 IEP meeting dates are the testimony of Vice Principal and a letter in which Vice Principal informs Parent 1 that six attempts were made to contact Parent 1 prior to the meeting. In *Doug C. v. Hawaii Dept. of Educ.*,¹¹² the Ninth Circuit Court of Appeals reiterated the duty of educational agencies to ensure participation of a parent who was willing to participate in the IEP process. Similar to the situation in this case, the school district in *Doug C.* was pressed up against a deadline of doing Student’s IEP and went forward with an IEP meeting without the parent due to parent being ill and asking to reschedule. The Ninth Circuit determined that parent participation is paramount to the principles of the IDEA and when pressed up against two procedural violations of the IDEA, the school district “must make a reasonable determination of

¹¹⁰ FOF 21-23.

¹¹¹ The IDEA requires that FAPE be provided at public expense, *under public supervision and direction*, and without charge. 34 C.F.R. §§300.17(a), 300.39(a)(1); HAR §8-60-2 (emphasis added).

¹¹² 720 F.3d 1038 (9th Cir. 2013).

which likely course of action promotes the purpose of the IDEA and is least likely to result in the denial of a FAPE.”¹¹³

Here Respondents arguments that they reasonably held the July 27, 2018 meeting without Parent 1 fails. Even though Respondents had problems contacting Parent 1 prior to the April 2018 meetings, they had received updated contact information from Parent 1 by the time of the two April 2018 meetings.¹¹⁴ Parent 1 participated in both IEP meetings in April 2018.¹¹⁵ Parent 1 did not refuse to participate in Student’s IEP process and had informed the team that Parent 1 had a family emergency in the beginning of June.¹¹⁶ Respondents did not carefully document their attempts to contact Parent 1 about the July 27, 2018 meeting to secure Parent 1’s presence there.¹¹⁷ Because the IEP team changed the current educational placement of Student at the July 27, 2018 meeting, it was incumbent upon them to secure the presence of Parent 1 at the meeting. Respondents reasoning that they needed to have an IEP in place prior to the beginning of the school year does not justify their holding a meeting during which such a significant change was made to Student’s IEP.

In the October 18, 2018 meeting, which the team members called a ‘revision meeting,’ Parent 1 clearly stated all Parent 1’s concerns at the beginning of the meeting and even provided the team with a printed copy of Parent 1’s written concerns.¹¹⁸ Parent 1 repeatedly stated at different times during the IEP meeting that Parent 1 wanted to talk about Student’s behavioral concerns and that Parent 1 believed Student needed a plan in place prior to sending Student back

¹¹³ *Doug C.*, 720 F.3d at 1046.

¹¹⁴ FOF 12.

¹¹⁵ FOF 14.

¹¹⁶ FOF 15.

¹¹⁷ FOF 16.

¹¹⁸ FOF 37.

to Home School.¹¹⁹ Parent 1 also attempted to get the team to discuss the recommendations provided in the E-8/3/2018 that talked about getting Student a provider to work with Student.¹²⁰ Instead of discussing the recommendation in the E-8/3/2018, Vice Principal simply shared Vice Principal's reasons why Vice Principal did not agree with Doctor 1's recommendation and the topic was dismissed.¹²¹

Parent 1 raised Parent 1's concerns about Student not receiving any services while Student was currently in Student's home-bound placement and requested that the team work with Parent 1 to get Student the services that Student was due, the IEP team did not discuss any possible in-home services or transition plan for Student. The IEP simply insisted that the services were still being offered, but that Student and Parent 1 were refusing them.¹²²

While Respondents contend that they were unable to revise Student's IEP during the October 18, 2018 meeting, it was clear from the recording of the meeting that the IEP team refused to discuss any of Parent 1's concerns, despite Parent 1's repeatedly informing the team that Student is currently not receiving any services, and that Student needs to have a behavioral plan in place before any kind of return to Home School. Respondents' claims that they continued to work with Parent 1 to no avail after the October 18, 2018 meeting are irrelevant for purposes of this Decision. The IEP-7/27/2018 and IEP-10/18/2018 are the two IEPs in dispute in this matter.

¹¹⁹ FOF 40.

¹²⁰ FOF 38.

¹²¹ FOF 39.

¹²² FOF 42.

In determining the adequacy of a student's IEP, courts should look to whether the IEP was appropriately designed and implemented the student with a meaningful benefit, and courts look to what was objectively reasonable at the time the IEP was drafted.¹²³

Here, at the time of the drafting of Student's IEP-7/28/2018 and IEP-10/18/2018, the IEP team was clearly aware that Student was refusing to receive counseling and tutoring services in any setting other than Student's home.¹²⁴ The IEP team was also familiar with Student's behavioral concerns and the contents of the E-8/3/2018 that documented Student's mental and physical health concerns, behavioral issues and recommendations for successfully providing Student a FAPE.¹²⁵ None of those issues were addressed or even discussed during the IEP meeting of October 18, 2018, despite repeated attempts by Parent 1 to raise the issues.

Respondents' failure to discuss and address Parent 1's significant concerns about Student's current placement, Student's behavioral concerns and Student's lack of services during the October 18, 2018 meeting seriously infringed on Parent 1's meaningful participation in the IEP formulation process, which resulted in a denial of FAPE.

E. Petitioners abandoned their claims under Section 504 of the Rehabilitation Act of 1973, 34 C.F.R. Part 104, Subpart D.

Petitioners have presented no evidence or argument to support their claims under Section 504 of the Rehabilitation Act of 1973 (hereinafter "Section 504"). First, Petitioners argue that Respondents violated Section 504 by not providing Student with regular or special education and related aids and services that were or are designed to meet Student's individual educational needs

¹²³ *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (citations and quotations omitted).

¹²⁴ FOF 26, 31, 32.

¹²⁵ FOF 34.

as adequately as the needs of nonhandicapped persons are met, pursuant to 34 CFR § 104.33(b). Petitioners allege Student was not provided adequate behavioral or academic interventions and/or tutoring or counseling.

Petitioners further argue that Student's program under Section 504 was not appropriate as a placement determination, pursuant to 34 CFR § 104.34(a). Petitioners allege that Student is in an overly restrictive and inappropriate placement. Student is or, at all times relevant herein, was Home-bound without access to any educational or related services.

Based on the lack of evidence or argument to support the aforementioned claims, the undersigned Hearings Officer concludes that Petitioners have effectively abandoned those claims and have not met their burden of proof.

F. Petitioners have not proven that the determination of whether Student and/or Parent has received the required notice of procedural safeguards resulted in a denial of FAPE.

Petitioners' last argument in the Complaint is whether Student and/or Parent 1 received the required notice of procedural safeguards. As with their Section 504 claims, Petitioners have presented no evidence or arguments to support their claim of a denial of FAPE. Further, based on the Stipulation by the parties,¹²⁶ Parent 1 was offered the procedural safeguards at the beginning of the October 18, 2018 IEP meeting. This Hearings Officer concludes that Petitioners have not met their burden of proof under this claim.

G. Tuition Reimbursement for Private School

¹²⁶ *Parties' Stipulation as to Certain Facts*, filed with the Office of Dispute Resolution on November 14, 2019.

Petitioners seek tuition reimbursement for Private School for the period from March 2019 to August 2019 when Student received services from Private School. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in private school and request reimbursement for tuition at said private school from the local educational agency.¹²⁷ However, parents are entitled to reimbursement for placement at a private school only if a court concludes both that the public placement violated the IDEA and the private school placement was proper under the Act.¹²⁸ The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in *Frank G. v. Bd. of Educ.*,¹²⁹ where “to qualify for reimbursement under the IDEA, parents need not show that a private 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 the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.”¹³⁰

In this case, the public placement of Student violated the IDEA in a manner such that Student was denied a FAPE. This Hearings Officer now examines whether the unilateral placement of Student at Private School from March 2019 to August 2019 was proper under the IDEA. Private School’s Clinical Supervisor testified at length at the Hearing and Private School Clinical Supervisor’s credibility was unchallenged, although none of Student’s records or

¹²⁷ *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 364-365, 126 L. Ed.2d 284 (1993), citing *School Comm. Of Burlington v. Department of Ed. Of Mass.*, 471 U.S. 359, 369-370, 105 S.Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985), see also 20 U.S.C. §1415(b)(6), (f)(1)(A).

¹²⁸ *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

¹²⁹ 459 F.3d 356, 365 (2nd Cir. 2006).

¹³⁰ *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011), citing *Frank G. v. Bd. of Educ.*, 459 F.3d at 365.

evaluations were submitted or offered into evidence. Based on Clinical Supervisor's testimony it appears that at the time that Private School offered its services to Student, it was an appropriate placement for Student. Private School conducted assessments and tailored a program for Student, which included having a provider work with Student at Student's home to transition Student into the school environment.¹³¹ While in the school environment, Student was making progress on the curriculum and was motivated to do the work Student was given.¹³² Student was making gains at Private School until their extended summer break, after which, Student displayed signs of regression.¹³³ Private School had planned to work with Student again from where they had initially, in the home, to transition Student back to the school environment.¹³⁴ Private School stopped working with Student due to a lack of payment and/or potential funding.¹³⁵

It is clear that even though Private School did not arrange for Student to have a curriculum that would enable Student to graduate from the public school system, they did in fact provide educational instruction specially designed to meet the unique needs of Student. In this case, Student had behavioral issues and Student was refusing at that time to leave Student's home environment for Student's education. Private School sent a provider to work with Student at the home environment to provide academic instruction and transitional services to get Student into the school environment. Private School was able to get Student into the school setting to work on an academic curriculum there until Student went on an extended break. The fact that

¹³¹ FOF 49-51.

¹³² FOF 54-55.

¹³³ FOF 57.

¹³⁴ FOF 57.

¹³⁵ FOF 58.

Student regressed during the break does not diminish the fact that Private School had designed a program that was tailored to permit Student to benefit from the instruction they were providing.

Further, in balancing the equities of awarding tuition reimbursement at Private School, this Hearings Officer notes that although Private School worked toward providing Student with Student's education prior to March 2019, their request for reimbursement only focused on the services provided by the providers to Student from March 2019 through and including August 2019.¹³⁶ No request was indicated for the assessments and the in-school tuition that was utilized for Student while Student attended Private School.

The undersigned Hearings Officer concludes that Private School was an appropriate placement at the time Student attended from March 2019 to August 2019, and that Parent 1 is entitled to tuition reimbursement under the IDEA.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have proven that Respondents denied Student a FAPE by failing to allow Parent 1 significant and meaningful participation the formulation of Student's IEP by refusing to discuss Parent 1's concerns regarding Student's behavioral plan, a provider to be assigned to Student, and the fact that Student had not been receiving any services while in Student's home-bound placement. Respondents further failed to revisit and revise the supports and services in Student's IEP when it became aware that Student was not receiving Student's supports and services while Student was in home-bound placement, resulting in Student not receiving academic tutoring or behavioral counseling from Respondents since May 2018.

¹³⁶ FOF 60.

For the reasons stated above, IT IS HEREBY ORDERED –

1. The Home School members of Student’s IEP team shall, within ten (10) school days of this Order, decide if any additional tests or assessments are necessary to determine Student’s current needs and revise Student’s IEP.¹³⁷ Any assessments are to be scheduled and completed within forty-five (45) calendar days of this Order. Any delay in meeting the deadline(s) in this Order because of an act or acts of Parent 1 and/or Parent 1’s representatives, will extend the deadlines set herein by the number of days attributable to Parent 1 and/or Parent 1’s representatives’ actions. Respondents shall document every telephone call, email, or other communication with Parent 1, as well as Parent 1’s response, for scheduling the assessments. The assessments shall be given at a location agreed upon by Home School and Parent 1 including, if necessary, at Student’s home.¹³⁸ Respondents are responsible for making any necessary arrangements for the assessments.
2. An IEP revision team meeting shall be held within thirty (30) days of the completion of all aforementioned assessments. It is expected that Parent 1 shall make ___self available for the full duration of this IEP meeting and any necessary follow up IEP meeting(s). Any delay in meeting the deadline(s) in this Order because of an act or acts of Parent 1 and/or Parent 1’s representatives, will extend

¹³⁷ This Hearings Officer notes that during the Hearing, Respondents and Parent 1 had agreed upon Student being administered at least two different assessments to determine Student’s current needs. *See* FOF (Tr. 1109:1-110:22).

¹³⁸ This Hearings Officer also notes that [SSC] was willing to meet with Student at Student’s home to conduct the two assessments in November 2019, and that Vice Principal determined that safety was no longer a concern for SSC to conduct the assessments at Student’s home.

the deadlines set herein by the number of days attributable to Parent 1 and/or Parent 1's representatives' actions. Respondents shall carefully document each telephone call, letter, or email sent to Parent 1 and Parent 1's responses to scheduling the aforementioned IEP meeting(s).

3. Student shall remain home-bound as the current educational placement, however, Student's revised IEP shall contain a transition plan for transitioning Student from home-bound placement back to Home School or another school. This transition plan shall include a description of any supplemental aids and services to be provided at Student's home prior to Student's re-entry into Home School or other school, a description of any modified schedule, a description of the classroom in which Student will be placed upon Student's return to Home School or other school, the proposed curriculum for Student upon Student's return to Home School or other school, and a proposed start date and end date for the transition plan's implementation.
4. Respondents shall reimburse Private School directly for the services provided to Student from March 12, 2019 to and including August 28, 2019, in the total amount of Four Thousand Four Hundred Eighty Dollars (\$4,480.00), as requested in the Invoice dated October 20, 2019.¹³⁹

RIGHT TO APPEAL

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

¹³⁹ FOF 60.

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

DATED: Honolulu, Hawai‘i, January 16, 2020.

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