



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

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

Petitioners,

vs.

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

Respondents.

DOE-SY1819-028

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: February 7, 2019;
March 5, 2019

Hearings Officer : Jennifer M. Young

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§ 1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R §§ 300.1, et seq.; and the Hawai'i Administrative Rules §§ 8-60-1, et seq.

¹ Personal identifiable information is provided in the Legend.

II. PROCEDURAL HISTORY (“BACKGROUND”)

Petitioner is the parent of a student with a disability. On December 26, 2018, Petitioners filed a Due Process Complaint and Resolution Proposal (“Complaint”) against the DEPARTMENT OF EDUCATION, STATE OF HAWAI‘I, and CHRISTINA KISHIMOTO, Superintendent of the Hawai‘i Public Schools pursuant to the Individuals with Disabilities Education Act (“IDEA”).² This Hearings Officer was appointed to preside over this case on or about January 2, 2019.

On January 3, 2019, the prehearing conference notice; and subjects to be considered agenda was provided to the parties. The prehearing conference was scheduled for January 17, 2019, at 9:00 a.m.

On January 4, 2019, Respondents filed their “Response to Petitioners’ Complaint”³ and “Resolution Session Announcement”, scheduling the Resolution Session for January 8, 2019, at 9:00 a.m. On January 8, 2019, the parties participated in the scheduled resolution session from 1:00 p.m. until 1:29 p.m. but were not able to resolve the issues alleged in the Complaint.

On January 14, 2019, Respondents filed “Respondents’ Objection to Administrative Hearings Officers Request for Documents” requested in this Hearings Officers’ prehearing conference notice.⁴ More specifically, Respondents objected to the Hearings Officers request for Students’ relevant Individualized Education Program’s (“IEP”) and Prior Written Notice (“PWN”). Respondents’ Objection was overruled on January 15, 2019.

On January 16, 2019, Petitioners submitted Student’s March 31, 2017, IEP and PWN. Respondents failed to submit Student’s relevant PWN(s) as Ordered by this Hearings Officer on January 15, 2019.⁵

On January 17, 2019, an in person prehearing conference was held from about 9:00 a.m. to about 9:30 a.m. Participating in the conference were: Jennifer M. Young, Hearings Officer; Keith H. S. Peck, Esq. for Petitioners; and Kevin M. Richardson, Esq. for Respondents. On January 22, 2019, the prehearing conference summary and order (“Prehearing Order”) was issued.

² Respondents did not challenge the sufficiency of the Complaint.

³ If Respondent has not sent a prior written notice under 34 C. F. R. § 300.503 to the parent regarding the subject matter contained in the parent’s due process complaint, Respondent must, within 10 days of receiving the due process complaint, send to the parent a response that includes (i) an explanation of why the agency proposed or refused to take the action raised in the due process complaint; (ii) a description of other options that the IEP team considered and the reasons why those options were rejected; (iii) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) a description of the other factors that are relevant to the agency’s proposed or refused action. 34 C. F. R. § 300.508 (e).

⁴ Prehearing conference notice is dated January 3, 2019.

⁵ The DOE issued the following three relevant PWN’s to Student: February 1, 2017; March 17, 2017, and; March 31, 2017.

The 30-day resolution period ended on January 25, 2019. The parties agreed that the 45-day due process hearing timeline began on January 26, 2019.

On January 23, 2019, Petitioners filed “Petitioners’ Motion for Partial Summary Judgment; Memorandum in support of Motion for Partial Summary Judgment; Declaration of Keith H.S. Peck; Declaration of Parent; Exhibits “1” to “4”; and a Certificate of Service. On January 29, 2019, Respondents filed “Respondents’ Memorandum in Opposition to Petitioners’ Motion for Partial Summary Judgment Filed January 23, 2019; Declaration of Student Services Coordinator (SSC); Declaration of Kevin M. Richardson; Exhibits “A”-“E”; and a Certificate of Service. On January 31, 2019, Petitioners’ Motion for Partial Summary Judgment was denied.

The due process hearing commenced on February 7, 2019. Petitioners presented one witness on their behalf, Parent.

At 7:16 a.m. on February 11, 2019, Petitioners counsel requested a continuance of the due process hearing scheduled for 9:00 a.m. on February 11, 2019, due to a medical issue. Respondents did not object to the request for a continuance. Therefore, the hearing scheduled for that day was taken off calendar.

A status conference to establish the second date of hearing was conducted on February 15, 2019, at 9:30 a.m. Petitioners, Respondents and the undersigned participated in the status conference via telephone. Availability was confirmed for March 5, 2019, therefore the second day of the due process hearing was scheduled for March 5, 2019, at 9:00 a.m.

On March 5, 2019, Respondents presented one witness on their behalf, SSC.

At the close of the hearing, this Hearings Officer entered into evidence all of Petitioner’s proposed exhibits,⁶ and all of Respondent’s proposed exhibits.⁷

III. BACKGROUND

No one disputes that Student is disabled for the purposes of IDEA. Student meets the criteria for Eligibility Criteria 1 and has been diagnosed with Disability. At issue are procedural and substantive challenges to the offers, or lack of offers, of a free and appropriate public education by the Department of Education from 2017 to 2019. Petitioner is seeking tuition reimbursement for Student’s Private Placement during the 2018-2019 school year.

⁶ This Hearings Officer admitted into evidence Petitioners’ exhibits 1-8, inclusive. Neither party objected to the admission of the other party’s exhibits.

⁷ This Hearings Officer admitted into evidence Respondents’ exhibits 1-8, inclusive. Neither party objected to the admission of the other party’s exhibits.

IV. ISSUES PRESENTED

This Hearings Officer certified the following three issues for adjudication:

- A. Whether or not the DOE failed to offer FAPE, by not contacting Parent to develop Student's subsequent IEP on or about March 31, 2018, and / or if Student's March 31, 2017, IEP became stale, denying Student a FAPE.
- B. Whether or not Student should have been deemed eligible for extended school year services and if the discussion regarding extended school year was sufficient.
- C. Whether or not Student's IEP is provided in Student's least restrictive environment.

V. FINDINGS OF FACT

I have carefully reviewed all of the evidence, but make findings only as necessary to resolve the issues before me. Consequently, not all evidence entered into the record is cited below.

1. Student is a student, eligible for special education and related services under the IDEA.⁸ Student has Disability and qualifies for services under the Eligibility Category 1.⁹

Time Line

School Year 2013-2014

2. Student attended Public School for School Year ("SY") 13-14¹⁰ and from July to December of SY14-15.¹¹

School Year 2014-2015

3. Parent attended an IEP meeting for Student sometime before SY14-15.¹² During this meeting Parent voiced opposition to a special education placement, wanting Student to remain in the general education classroom.¹³ Parent understood the concept of placement, actively participated during the IEP meeting and advocated for Student's placement in a general education setting.¹⁴ Although, SSC initially

⁸ Testimony of Parent; SSC; Respondents' Exhibit 2 at 34-44.

⁹ Testimony of Parent; Respondents' Exhibit 4 at 92.

¹⁰ Student was in grade ___ during SY13-14. SSC was Student's teacher.

¹¹ Student was in grade ___ during SY14-15.

¹² Testimony of SSC.

¹³ *Id.*

¹⁴ *Id.*

advocated for a special education setting, SSC's concerns were alleviated when Student's IEP team proposed a general education setting placement consisting of a grade ___ classroom.¹⁵ This option would allow Student's teacher to provide both grade ___ and ___ instruction to Student, allow Student to remain in a general education placement.¹⁶

4. During the first half of SY14-15 Student's negative behavior in the classroom was impacting Student's ability to receive instruction and learn at Public School.¹⁷ Student was disruptive to ___self and Student's peers, and unable to focus.¹⁸
5. SSC provided assistance to Student's grade ___ general education teacher in an effort to help teacher enable Student to learn.¹⁹ However, Student continued to have behavioral issues and was not making educational progress.²⁰
6. Student's IEP team met in December 2015, to discuss Student's on-going educational challenges.²¹ Data and behavior illustrated that Student had made no educational gains; therefore, the IEP team agreed that Student required specialized education in the areas of Math and Language Arts.²² Parent was present at the IEP meeting and voiced no objection to Student's change of placement.²³
7. Parent believed that a 1:1 aide during the school day would help improve Student's behavior, However, Parent did not believe that Public School was able to provide Student with a 1:1 aide during the school day.²⁴ SSC testified that 1:1 aides are typically used when a Student has a severe medical issue.²⁵
8. In December 2015, Parent verbally informed Student's grade ___ general education teacher that Student would no longer attend Public School after SY14-15 winter break, and Student would be attending Private Placement.²⁶ Parent verbally informed SSC a few weeks later that Student would not be attending Public School after winter break and that Student would attend Private Placement.²⁷ Parent did not provide a reason for the change in schools and SSC did not ask.²⁸

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Testimony of Parent; SSC.

¹⁸ *Id.*

¹⁹ Testimony of SSC.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

9. In December 2015, Parent did not provide written notice to Public School stating that Parent was rejecting Public School's offer of FAPE and enrolling Student in Private Placement at public expense.²⁹ Nor did Parent provide written revocation of consent, disallowing the DOE from providing special education and related services to Student.³⁰
10. Student began attending Private Placement in January 2015, completing SY14-15 at Private Placement. Student remained at Private Placement for SY15-16,³¹ SY16-17,³² SY17-18,³³ and is currently attending SY18-19 at Private Placement.
11. Parent actively communicated with Public School about Student's IDEA eligibility and special services while Student was attending Private Placement from SY14-15 and SY15-16.³⁴ Parent actively communicated with Public School and participated in Private School Participation Project meetings ("PSPP") to secure services for Student while Student attended Private Placement.³⁵

School Year 2016-2017

12. On May 13, 2016, Public School sent Parent a letter in regarding Student's SY16-17, the letter is referred to as the "FAPE" letter.

The DOE's FAPE Letter states:

"Our records indicated that your child has been identified by the Hawai'i State Department of Education (DOE) as a student with a disability, under the Individuals with Disabilities Education Act (IDEA) and Chapter 60 of the Hawai'i Administrative Rules, and is not currently enrolled in a Hawai'i public school." As a parent of a student with a disability, you continue to have protection under the procedural safeguards of Chapter 60 (see attached "Procedural Safeguards Notice of Parents and Student") and are eligible for the following:

²⁹ Testimony of Parent; SSC.

³⁰ Testimony of Parent; SSC.

³¹ Student was in grade ___ during SY15-16.

³² Student was in grade ___ during SY16-17.

³³ Student was in grade ___ during SY17-18.

³⁴ (In April of 2015, the DOE sent Parent a letter regarding "FAPE" and "PSPP", Parent contacted the SSC after receiving the letter. After four months with no progress, Parent then contacted SSC again) Respondents' Exhibit 6 at 116-118; Testimony of Parent. (In May of 2016, the DOE sent Parent a letter regarding "FAPE" and "PSPP". Parent responded to the letter with a phone call because on August 3, 2016, SSC called Parent to schedule a PSPP meeting) Respondents' Exhibit 6 at 118-121; Testimony of Parent.

³⁵ (In March, 2016, Parent participated in a PSPP meeting regarding Student's PSPP Services Plan for SY15-16) Respondents' Exhibit 8 at 145. (In 2016, Parent participated in a PSPP meeting regarding Student's PSPP Services Plan) *Id.*

✓ **Free Appropriate Public Education (FAPE)**

Although your child is not currently enrolled in a DOE public school, your child is still eligible to receive a FAPE which includes special education and related services through an individualized education program (IEP). *If you intend to have your child receive a FAPE and to have an IEP developed, you must contact the principal at the number listed above.*

If we do not hear from you by ____ expressing your intent to have your child receive a FAPE, this will serve as acknowledgment that you do not want your child to receive a FAPE and:

- *An IEP **will not** be developed for your child*
- *The DOE **will not** be responsible for developing subsequent IEPs until you contact your child's current DOE home school to request one.*³⁶

✓ **Private School Participation Project (PSPP)**

Our records indicated that your child has been identified by the DOE as having a disability, but is enrolled in a private school. Your child may be eligible for services under the PSPP, see the attached description for details. If you wish to pursue this option, please contact the principal at the phone number listed above.³⁷

13. On January 17, 2017, SSC contacted Parent via telephone regarding Student's a reevaluation for continued IDEA eligibility for Student, as Student had ___ of Student's previous disability category.³⁸ Parent agreed that Student needed a reevaluation,³⁹ attended a conference with Public School on February 1, 2017, and signed consent forms for reevaluation forms. The forms indicate that Parent had "concerns for Student".⁴⁰
14. On February 22, 2017, the SSC observed Student at Private Placement for about 50 minutes.⁴¹
15. Parent Participated in Student's Reevaluation Eligibility Meeting at the DOE Public School on March 15, 2017.⁴² On March 17, 2017, Student was deemed eligible for IDEA services by meeting the criteria for Eligibility Category 1, Student's PWN was issued reflecting this criteria and an IEP meeting was scheduled for March 31, 2017.⁴³

³⁶ Emphasis added.

³⁷ Respondents' Exhibit 6 at 111.

³⁸ (Student's previous disability eligibility category was Eligibility Category 2) Petitioners' Exhibit 3 at 40; Respondents' Exhibit 2 at 30.

³⁹ *Id.*

⁴⁰ Respondents' Exhibit 2 at 26-27.

⁴¹ Respondents' Exhibit 4 at 71.

⁴² Respondents' Exhibit 2 at 33.

⁴³ Respondents' Exhibit 2 at 38-44.

Student's March 31, 2017, IEP

16. On March 31, 2017, Parent participated in Student's IEP meeting.⁴⁴
- a. Student's IEP team determined that Student was eligible for 1260 minutes of special education per week and 360 minutes of speech and language therapy per quarter.⁴⁵
 - b. The IEP team determined that Student will not "participate with the general education classroom for Language Arts, Math and pull out speech services."⁴⁶ Student requires "specialized instruction due to deficits in the areas of basic reading and writing, math and language skills, which affects Student's ability to access the curriculum in the content areas of Language Arts, Math, Science, and Social Studies."⁴⁷
 - c. Student's Placement requires "a separate and smaller classroom setting that provides Student with individualized instruction in order to access the academic curriculum for Language Arts, Math, and speech and language skills".⁴⁸
 - d. Student's Supplementary Aids and Services, Program Modifications and Supports for School Personnel are as follows:
 - Use short, simple sentences when giving directions;
 - Preferential seating to include a quiet area, grouped with appropriate role models, and or limited distractions in the surrounding environment;
 - Provide verbal, visual, and physical cues to gain Student's attention before giving directions;
 - Provide visual supports for problem-solving and classroom expectations;
 - When giving verbal directions, be clear, concise simple and specific,
 - Provide visual supports when tasks require [] multiple steps;
 - Provide additional instruction, repetition, and chunking of information as needed;
 - Provide positive praise and rewards for on -task behavior as needed.⁴⁹

⁴⁴ Respondents' Exhibit 3 at 46; Testimony of Parent.

⁴⁵ Respondents' Exhibit 3 at 59.

⁴⁶ (Student's LRE) *Id.*

⁴⁷ Respondents' Exhibit 3 at 62.

⁴⁸ *Id.*

⁴⁹ Respondents' Exhibit 3 at 59.

- e. SSC's observation at Private Placement, various assessments, and input from IEP team members were used to determine Student's proper placement.⁵⁰ Inclusion is inappropriate for Student as Student's deficits in Language Arts and Math are significant, making modification of material inappropriate as Student must learn the basic concepts before Student may move on to more advanced concepts.⁵¹ Student's placement was properly discussed during Student's March 31, 2017 IEP meeting.
 - f. Parent testified that Student's IEP team determined that Student was ineligible for ESY services because Student attended Private Placement and the DOE Public School did not have enough data for Student to determine Student's eligibility.
 - g. Student's IEP team utilized progress reports, observation, assessments, and information from Student's Private Placement teacher to determine that Student did not meet the standard to qualify for extended school year services.⁵² SSC went over the factors for extended school year services during the meeting.⁵³
 - h. Parent did not object, voice concerns for regression, or advocate for extended school year services.⁵⁴
 - i. After Student's IEP team meeting, School Principal told Parent that if Student were to attend Public School in the future the IEP team would collect data for 6 weeks to determine if Student would qualify for ESY services.⁵⁵
17. On April 21, 2017, Parent participated in a PSPP meeting regarding Student's PSPP Services Plan and a PSPP plan was created for Student.⁵⁶ The plan enables Student to receive tutoring and speech language therapy from April 21, 2017 to May 27, 2017.⁵⁷

School Year 2017-2018

18. On May 30, 2017, the DOE mailed Parent what is referred to as the FAPE letter regarding SY17-18.⁵⁸ The FAPE letter is identical to the FAPE letter sent on May

⁵⁰ Testimony of SSC.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Testimony of Parent; SSC.

⁵⁴ *Id.*

⁵⁵ Testimony of SSC.

⁵⁶ Petitioners' Exhibit 5 at 86.

⁵⁷ *Id.*

⁵⁸ The May 30, 2017 FAPE letter was not presented or offered to enter into evidence.

13, 2016, except for the dates.⁵⁹ The pertinent excerpt of the FAPE letter reads as follows:

“Our records indicated that your child has been identified by the Hawai‘i State Department of Education (DOE) as a student with a disability, under the Individuals with Disabilities Education Act (IDEA) and Chapter 60 of the Hawai‘i Administrative Rules, and is not currently enrolled in a Hawai‘i public school. As a parent of a student with a disability, you continue to have protection under the procedural safeguards of Chapter 60 (see attached “Procedural Safeguards Notice of Parents and Students) and are eligible for the following:

✓ **Free Appropriate Public Education (FAPE)**

Although your child is not currently enrolled in a DOE public school, your child is still eligible to receive a FAPE which includes special education and related services through an individualized education program (IEP). *If you intend to have your child receive a FAPE and to have an IEP developed, you must contact the principal at the number listed above.*

If we do not hear from you by _____ expressing your intent to have your child receive a FAPE, this will serve as acknowledgment that you do not want your child to receive a FAPE and:

- *An IEP **will not** be developed for your child*
- *The DOE **will not** be responsible for developing subsequent IEPs until you contact your child’s current DOE home school to request one.*⁶⁰

19. On June 1, 2017, Parent called SSC because Parent was confused, as Parent received the May 30, 2017, FAPE letter but thought Parent completed “everything” for Student during the February 2017, meetings.⁶¹ SSC assured Parent that Parent did not need to complete anything else for Student.⁶² Parent testified that SSC stated that the next time Parent would need to “do something” is in 2020.⁶³
20. Student’s IEP team did not meet in March 31, 2018, to review Student’s IEP.⁶⁴

School Year 2018-2019

21. On June 6, 2018, Student was evaluated by a Physician. On June 13, 2018, Public School confirmed that they had received Student’s assessment from Physician and requested that Parent complete consent forms to receive and release information

⁵⁹ Testimony of SSC.

⁶⁰ (Emphasis added).

⁶¹ Testimony of Parent

⁶² *Id.*

⁶³ Student’s next reevaluation date is 2020.

⁶⁴ Testimony of Parent; SSC.

with Physician. The forms stated “Your consent will allow us to communicate with Physician and share information as needed.”⁶⁵ The purpose listed on the consent forms was Student’s “Educational Planning”⁶⁶. Parent completed and returned the forms to Public School June 18, 2018.⁶⁷

22. On June 26, 2018, the DOE mailed what is referred to as the FAPE letter to Parent regarding SY18-19. The following pertinent excerpt reads as follows:

✓ **Free Appropriate Public Education (FAPE)**

Although your child is not currently enrolled in a DOE public school, your child is still eligible to receive a FAPE which includes special education and related services through an individualized education program (IEP). *If you intend to have your child receive a FAPE and to have an IEP developed, you must contact the principal at the number listed above*

If we do not hear from you by ___ expressing your intent to have your child receive a FAPE, this will serve as acknowledgment that you do not want your child to receive a FAPE and:

- *An IEP **will not** be developed for your child*
- *The DOE **will not** be responsible for developing subsequent IEPs until you contact your child’s current DOE home school to request one.*⁶⁸

23. On June 29, 2018, Parent contacted the DOE Public School and had a two minute conversation with SSC.⁶⁹ Parent asked if Parent had to “do anything” more for Student as Parent had received the letter above.⁷⁰ SSC asked Parent if Student was returning to Public School, Parent stated probably not and SSC said if Student is not returning to Public School then Student does not need an IEP.⁷¹
24. Student’s last known IEP is dated March 31, 2017. Student did not have an IEP in place at the beginning of SY18-19.
25. SSC conceded that Parent has never revoked consent, in writing, for the DOE to provide special education and related services to Student.⁷²

Student’s Behavior

⁶⁵ Respondents’ Exhibit 5 at 101.

⁶⁶ *Id.*

⁶⁷ Respondents’ Exhibit 5 at 102-103.

⁶⁸ (Emphasis added) Respondents’ Exhibit 6 at 114.

⁶⁹ Testimony of Parent.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Testimony of Parent; SSC.

26. In October 2015, Student began taking Medication.⁷³ Student's behavior improved, Student is able to focus for longer periods of time, and negative behavioral outbursts subsided.⁷⁴ While Student's disability is controlled with the use of medication taken by Student during school hours, the medication wears off late in the day and Student becomes unfocused and exhibits high energy levels around 2:00 p.m.⁷⁵
27. Student can become hyper focused or fixated on objects and tasks, which interferes with Students ability to receive instruction and learn.⁷⁶
28. Student's social skills are in the low range.⁷⁷
29. Student exhibits significant delays in receptive and expressive language.⁷⁸ Difficulties with categorizing or classifying words can impair Student's ability to make connections between known and newly acquired information. Student's deficits in auditory memory and Student's understanding of lengthy, complex sentences, can impair Student's ability to follow oral and written directions.⁷⁹
30. Student requires clear behavioral expectations and classroom structure.⁸⁰
31. Student has difficulty expressing thoughts and ideas.⁸¹

Student's Academics

32. Student has deficits in listening comprehension, oral expressions, basic reading, reading comprehension, written expression, math calculation, math reasoning, and speech intelligibility.⁸²
33. Student has consistently been 2 grades behind developmentally typical peers Student's age.⁸³
34. Student requires a systematic approach to reading and phonics.⁸⁴

⁷³ Petitioners' Exhibit 5 at 88.

⁷⁴ *Id.*; Testimony of Parent.

⁷⁵ Respondents' Exhibit 4 at 71.

⁷⁶ *Id.*

⁷⁷ Respondents' Exhibit 3 at 48.

⁷⁸ Petitioners' Exhibit 4 at 60.

⁷⁹ *Id.*

⁸⁰ Respondents' Exhibit 4 at 72.

⁸¹ Testimony of Parent; Petitioners' Exhibit 5 at 89.

⁸² Testimony of Parent; SSC; Respondents' Exhibit 2 at 34-37.

⁸³ *Id.*

⁸⁴ Respondents' Exhibit 4 at 72.

35. Student requires Speech and Language Therapy.⁸⁵
36. Student needs to solve double digit or multi digit subtraction problem, solve one step word problems using addition or subtraction, count groups of like coins and solve single digit multiplication problems.⁸⁶

Private Placement

37. Private Placement specializes in education to “exceptional” students.⁸⁷ Exceptional students can be children “_____”. The DOE would use the term “Student with a Disability”.⁸⁸ Private Placement and Parent use the term “Exceptional Students” instead of “Student with a Disability”.⁸⁹
38. Student’s classroom at Private Placement has a low student to teacher ratio, typically one teacher, one adult aide, and 2-4 students.⁹⁰ Student receives a high level of individual instruction and support at Private Placement.⁹¹
39. Student receives listening comprehension, oral expression, basic reading, reading comprehension, written expression, and speech intelligibility instruction at Private Placement.⁹²
40. Student receives systematically provided phonics instruction.⁹³ Private Placement teaches Student letter sounds in isolation, blended letter sounds, and words in their entirety.⁹⁴
41. Student utilizes a tablet at Private Placement to work with online applications for Math and Language Arts.⁹⁵
42. Student utilizes an _____ while Student remains seated.⁹⁶
43. Private Placement utilizes a behavior modification system based on rewards or points.

⁸⁵ Testimony of Parent; SSC.

⁸⁶ Respondents’ Exhibit 3 at 50.

⁸⁷ Testimony of Parent.

⁸⁸ Testimony of Parent.

⁸⁹ Testimony of Parent.

⁹⁰ Testimony of Parent; SSC; Respondents’ Exhibit 4 at 70.

⁹¹ Testimony of Parent; Respondents’ Exhibit 4 at 70-72.

⁹² *Id.*

⁹³ Testimony of SSC; Petitioners’ Exhibit 3 at 46-50.

⁹⁴ Testimony of SSC; Respondents’ Exhibit 4 at 76. Petitioners’ Exhibit 3 at 46-50.

⁹⁵ Testimony of Parent; Petitioners’ Exhibit 4 at 77.

⁹⁶ Testimony of Parent; Respondents’ Exhibit 4 at 70.

44. Student uses math manipulatives to assist Student to learn mathematics concepts and to help Student focus at Private Placement.⁹⁷
45. Student is “able to sit attend and follow all teachers instructions. Student participated upon request and was on–task during independent work time...”⁹⁸
46. Student “is showing gains in both behavioral skills and academics, however, Student continues to be significantly behind in reading as compared to same aged peers”.⁹⁹
47. Private placement does not provide speech and language therapy.
48. In April 2018, Parent submitted a refundable deposit to Private Placement to secure a spot for Student for SY 18-19 and conceded that Parent intended for Student to remain at Private Placement for SY 18-19, if everything financially went as planned.

Credibility

49. Parent was forthcoming and sincere in Parent’s testimony. However, Parent’s memories of specific facts and statements made during the various IEP/PSPP meetings during the past five years is very limited. Therefore, Parent’s testimony regarding specific information presented during the various meetings is given reduced weight.
50. Parent’s testimony and information asserted in Parent’s declaration are in direct conflict.¹⁰⁰ I find Parent’s testimony that Parent received the DOE’s June 26, 2018, FAPE letter credible because Parent stated that Parent’s cellular records indicate Parent called Public School on or about June 29, 2018 credible. This testimony is consistent with Parent’s prior conduct of contacting Public Placement by telephone after receiving the FAPE letter from Public Placement. However, Parent’s testimony regarding what SSC told Parent during the conversation is given no weight as Parent did not initially recall the phone call until Parent checked Parent cellular telephone records.
51. Parent defers to the SSC and DOE employees as experts and does not fully understand Student’s rights under IDEA as Parent does not differentiate between IEP and PSPP meetings.¹⁰¹

⁹⁷ Testimony of Parent; SSC; Respondents’ Exhibit 4 at 77.

⁹⁸ Testimony of SSC; Respondents’ Exhibit 4 at 71.

⁹⁹ Testimony of SSC; Petitioners’ Exhibit 4 at 47.

¹⁰⁰ (Parent’s Declaration asserts that Parent did not recall receiving the FAPE letter dated June 26, 2018, and if Parent had received the letter Parent may have not called the Public School, as Public School sent the same letter in error in 2017).

¹⁰¹ FOF 19, 23.

52. SSC was very familiar with Student, as SSC was Student’s teacher and has been Student’s SSC from 2014 to present day. SSC was able to recall specific facts, provide details, and speak with certainty. SSC is credible.

VI. CONCLUSIONS OF LAW

Free Appropriate Public Education (“FAPE”)

The IDEA was enacted 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 and prepare them for further education, employment, and independent living.”¹⁰² The act further requires that a FAPE “is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive”.¹⁰³ States receive federal funding if they have in effect policies and procedures that comply with federal requirements designed to provide a FAPE to disabled students.¹⁰⁴

A FAPE requires that special education and related services are:

1. provided at public expense, under public supervision and direction, and without charge;
2. meet the standards of the State Education Agency;
3. include an appropriate preschool, elementary school or secondary school education in the state involved; and
4. provided in conformity with the individualized education program (“IEP”) requirements.¹⁰⁵

A FAPE provides eligible students with both, special education and related services.¹⁰⁶ Special education is defined as, the “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.¹⁰⁷ The IDEA requires, that the Hawai‘i Department of Education “evaluate [], determine whether that student is eligible for special education, and formulate and implement an IEP”.¹⁰⁸ The IEP is the means by which special education and related services are “tailored to the unique needs” of a particular child.¹⁰⁹

¹⁰² 20 U.S.C. §1400(d)(1)(A).

¹⁰³ 20 U.S.C. §1412(a)(1)(A).

¹⁰⁴ *Id.*

¹⁰⁵ H.A.R. § 8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R. § 300.22.

¹⁰⁶ H.A.R. §8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

¹⁰⁷ *Id.*

¹⁰⁸ *Dep’t of Educ., State of Haw. v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Haw. 2016).

¹⁰⁹ *Andrew F. ex rel. Joseph F. vs. Douglas County School Dist.* 137 S. Ct. 988 (citing *Rowley*, 458, U.S., at 181,102 S.Ct. 3034).

When Parents and Public School disagree whether or not a child is being provided with a FAPE, the IDEA provides procedural safeguards to resolve the dispute.¹¹⁰ Parents of a disabled child who claim violations of the IDEA can file a complaint with a due process hearings officer under 20 U.S.C. § 1415(b)(6)(A).

Three (3) Step Analysis

A basic three-step analysis is used to determine whether a qualified disabled student is entitled to reimbursement for a private placement from the State under the IDEA.¹¹¹ The first step is to determine whether a procedural or substantive violation occurred. A school district may violate the IDEA'S statutory or regulatory procedures. "Or a school district may violate the IDEA substantively by offering an IEP that is not reasonably calculated to enable the child to receive educational benefit."¹¹² "Moreover, when a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP."¹¹³

The second step of the analysis is determining whether or not a substantive denial of FAPE occurred, as harmless procedural errors do not constitute a denial of FAPE.¹¹⁴ A Hearings Officer may find a FAPE violation, only if the procedural violation:

1. Impeded the child's right to a FAPE;
2. Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or
3. Cause the student a deprivation of educational benefit.¹¹⁵

The third and last step of the analysis, is the remedy. If an IDEA violation results in denial of a FAPE, the IDEA empowers a hearings officer or court to grant relief that the hearings officer or court determines to be appropriate.¹¹⁶ One such remedy is reimbursement of tuition and related expenses.¹¹⁷ The DOE may be required to reimburse for tuition and the services obtained for the student if: 1) the services offered by the DOE were inadequate or inappropriate; 2) the services selected by the parents were appropriate; and 3) equitable considerations support the parents' claim for reimbursement.¹¹⁸

¹¹⁰ 20 U.S.C. §§ 1415(a), (b)–(h).

¹¹¹ *Dep't of Educ., State of Haw. v. M.F. ex rel. R.F.*, at 1227, 840 F.Supp.2d 1214, 1225–27 (D. Haw. 2011), clarified on denial of reconsideration sub nom. *Dep't of Educ. v. M.F. ex rel. R.F.*, No. CIV. 11-00047 JMS, 2012 WL 639141 (D. Haw. Feb. 28, 2012).

¹¹² *M.F.* 840 F.Supp.2d.

¹¹³ *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238–39, 129 S.Ct. 2484, 2491, 174 L.Ed.2d 168 (2009).

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

¹¹⁵ 34 C.F.R. § 300.513.

¹¹⁶ 34 C.F.R. 300.516(c)(3).

¹¹⁷ *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993); *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985).

¹¹⁸ *Id.*

The burden of persuasion is properly placed upon the party seeking relief.¹¹⁹ Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹²⁰ The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.¹²¹

VII. DISCUSSION

A. Petitioners Proved that Respondent’s denied Student a FAPE from March 31, 2018 until present because Student’s March 31, 2017, was not reviewed annually, and the DOE failed to have an IEP in place for Student at the beginning of the School Year 2018-2019. Additionally, the DOE did not meet the “safe harbor” requirement excusing the DOE from developing a further IEP for student.

Analysis- Step 1

A FAPE requires that special education and related services are provided in conformity with specified individualized education program (“IEP”) requirements.¹²² The IEP is “the centerpiece of the statute’s education delivery system for disabled children”¹²³, it is the written document memorializing the collaborative effort between parents, teachers, and school staff to develop an educational plan for a student with a disability.¹²⁴ Each public agency must ensure that an IEP team meet and review the student’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved, and to revise the IEP as appropriate to address any lack of expected progress.¹²⁵ At the beginning of each school year, each public agency must have in effect an IEP for each child with a disability within its jurisdiction.¹²⁶

The DOE is not required to convene an IEP Team meeting or develop an IEP for a student¹²⁷ if at any time after the initial provision of services, the parent revokes consent in writing for the continued provision of special education and related services.¹²⁸ This regulation essentially acts as a “safe harbor” provision. By its unambiguous terms, however, the revocation

¹¹⁹ 20 U.S.C. § 1415 (i)(2)(c).

¹²⁰ *Id.*

¹²¹ *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622(1993) (internal quotation marks omitted).

¹²² H.A.R. § 8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R. § 300.22.

¹²³ *Honig v. Doe*, 484 U.S. 305, 311 (1988)

¹²⁴ 20 U.S.C. § 1414 (d)

¹²⁵ 34 C.F.R. § 300.324 (b)(i-ii).

¹²⁶ 34 C.F.R. § 300.323(a).

¹²⁷ for the further provision of special education and related services

¹²⁸ *M.F.* 840 F.Supp.2d.

of consent, must be “in writing”.¹²⁹ An oral notification that the student will no longer attend the public school, is not sufficient and does not satisfy this requirement.¹³⁰

The writing requirement reinforces the notion that Parent provide informed consent when rejecting services and supports their Student is entitled to under the IDEA. “While parents certainly are free to reject public services and choose a private placement, the IDEA’s mandate centers on the concept that parents be given proper notice so that their consent (or withdrawal of consent) and corresponding educational decisions are *informed ones*”.¹³¹

Here, Student is eligible for services under the IDEA and a FAPE requires that special education and related services are provided in conformity with specified individualized education program (“IEP”) requirements.¹³² Student’s last IEP was created as a result of an IEP team meeting on March 31, 2017.¹³³ It is undisputed that the DOE did not review Student’s March 30, 2017, IEP annually or periodically. It is also undisputed that the DOE failed to have an IEP in place for Student for the beginning of SY18-19.

Here, Parent verbally informed Student’s grade ___ general education teacher and SSC that Student would no longer attend Public School after winter break of SY14-15.¹³⁴ Parent verbally notified Public School that Student would attend Private Placement beginning January of 2015.¹³⁵ Parent never provided written notice that Parent was rejecting the Public School’s offer or FAPE and enrolling Student in Private Placement at public expense. Nor did Parent, provide written revocation of consent, disallowing the DOE from providing special education and related services to Student.¹³⁶

Parent did not provide a reason for the change from Public to Private Placement and the DOE did not inquire why Parent was changing placements.¹³⁷ Given the timing of Parent’s decision to enroll Student in Private Placement, one can infer that it was the result of Student’s placement change to a special education setting for Math and Language Arts.¹³⁸ Parent wanted student to remain in general education with the assistance of a 1:1 aide for Student but believed

¹²⁹ (The written revocation requirement was purposefully promulgated in 2008 with particular thought and attention given to the parents revocation of services to be provided done in *writing*, as writing was not required in the 2006 Code of Federal Regulations.) *M.F.* 840 F.Supp.2d. at 1228.

¹³⁰ *Id.*

¹³¹ *M.F.* 840 F.Supp.2d at 1230 citing *JG v. Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 793 n. 4 (9th Cir. 2008) (reasoning the IDEA’S procedural requirements are “[t]o guarantee parents the ability to make informed decisions about their child’s education”); *Amanda J. v. Clark County School Dist.*, 267 F.3d 877, 891 (9th Cir. 2001) (indicating the purpose of the IDEA’S notice procedures is to assure parents are “fully inform[ed]”); *see also* 34 C.F.R. § 300.9(a) (defining “consent” to mean “[t]he parent has been fully informed of all information relevant to the activity for which consent is sought”) & (b) (further defining “consent” to mean “[t]he parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought”).

¹³² FOF 1.

¹³³ FOF 16.

¹³⁴ FOF 8.

¹³⁵ *Id.*

¹³⁶ FOF 9.

¹³⁷ FOF 8-9.

¹³⁸ FOF 3-11.

that the DOE could not provide this for Student.¹³⁹ SSC's testimony supports Parent's conclusion that a 1:1 aide would have been available, as SSC testified that aides are typically provided for Student's extreme medical needs and did not mention aides for behavioral issues.¹⁴⁰ However, Parent did not voice an objection to the placement and advocate for additional modifications and supports for Student.¹⁴¹ This could have been because of Parent defers to the DOE and SSC as experts and does not fully understand Student's rights under IDEA.¹⁴² Further communication between Parent and Public Placement may have resolved or alerted the DOE an issue Parent had regarding Student's education. At any point since 2015, the DOE could have sought written confirmation from Parent that Parent was revoking consent for the DOE to provide Student with special education and related services, as Parent met with the DOE numerous times while Student was attending private placement since January of 2015.¹⁴³

Regardless of Parent's reasoning for Private Placement, the fact remains that Parent's oral notification that Student would no longer attend Public School in favor of Private Placement, does not satisfy the IDEA's written revocation requirement and provide the DOE with "safe harbor" from developing further IEP's for Student.

Additionally, the IDEA requires that the DOE provide prior written notice ("PWN") to Parent reiterating Parent's revocation of consent for services. The record is void of PWN regarding Parent's revocation of consent for services. While it appears that Parent may have rejected public services in favor of private placement, the IDEA's mandate requires written confirmation so that the DOE can ensure that Parent's decision is indeed an informed educational decision. Before special education and related services are terminated, the IDEA requires PWN.¹⁴⁴ The DOE should have sent Parent a PWN confirming that Student was withdrawing from public placement and that Parent was revoking Parent's consent for the DOE to provide special education and related services to Student.

The DOE did not secure Parent's revocation of consent in writing and failed to produce a PWN detailing Parent's revocation of consent for Services by the DOE. The DOE did meet the "safe harbor" requirement necessary to extinguish the DOE's obligation to conduct an IEP meeting and develop an IEP for Student. Therefore, the DOE should have reviewed Student's March 31, 2017, IEP on or before March 31, 2018. The DOE should have also had an IEP in place for Student before SY18-19 began.

The DOE argues that it is not obligated to develop an annual IEP for a parentally placed private school student until a parent contacts their DOE public home school to request an IEP meeting. This argument is not consistent with legal precedent of this jurisdiction.¹⁴⁵ In 2011, the District Court ruled that a parents verbal withdrawal with no written follow-up did not excuse the

¹³⁹ FOF 7.

¹⁴⁰ *Id.*

¹⁴¹ FOF 6.

¹⁴² FOF 51.

¹⁴³ FOF 10-19, 21, 23.

¹⁴⁴ 34 C.F.R. 300.503.

¹⁴⁵ *M.F.*

DOE from ensuring that an IEP was in effect for that Student at the beginning of each school year nor from ensuring that the Student's IEP was reviewed at least annually.¹⁴⁶

Here, the DOE is not excused from conducting an IEP meeting and developing an IEP for Student because the "FAPE" letter was sent to Parent.¹⁴⁷ While, the FAPE letter confirms that Student is a Student with a disability and eligible to receive a FAPE, the letter inappropriately shifts the State's obligation to offer FAPE to Parent.¹⁴⁸ Parent is not required to contact the Public School for an offer of FAPE in these circumstances¹⁴⁹. The FAPE letters sent to Parent are essentially "offers to offer FAPE", while Student is entitled to an offer FAPE.

Here, the DOE's committed two procedural errors: 1) failing to review and revise Students IEP on or before March 30, 2018; and 2) failing to have an IEP in place for Student at the beginning of SY18-19.

Analysis- Step 2

This Hearings Officer may find the DOE committed a FAPE violation only if the procedural inadequacies:

1. Impeded Student's right to a FAPE;
2. Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Student; or
3. Cause Student a deprivation of educational benefit.¹⁵⁰

Failing to review and revise Students IEP periodically and annually, impeded Student's right to a FAPE. Student has not had an IEP document for Student's individual and unique needs, nor has the DOE determined the proper placement and services necessary to meet Student's unique needs since March 31, 2017.¹⁵¹ Moreover, Student requires special-education services, the DOE's failure to propose an IEP of any kind after March 31, 2018 impedes Student's right to a FAPE, as Student was never offered FAPE. The DOE's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.¹⁵²

Additionally, Parent's ability to participate in the decision-making process was significantly impeded. Parent cannot participate in the decision making process regarding the provision of FAPE to Student, absent a meeting and an offer of FAPE. No meeting occurred

¹⁴⁶ *M.F.* at 1231. (But the State has not cited, and the court has not found, a statutory or regulatory provision that specifically relieves a public agency of a duty to comply with the IEP provisions (§§ 1414(d)(2)(A) and 1414(d)(4)) where—as here—the student withdraws *orally*, and where the public agency does not then obtain confirmation in writing and assure that the parents are doing so in an informed manner.)

¹⁴⁷ FOF 12, 18, 22.

¹⁴⁸ *Id.*

¹⁴⁹ FOF 29.

¹⁵⁰ 34 C.F.R. § 300.513.

¹⁵¹ FOF 24.

¹⁵² *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238–39, 129 S.Ct. 2484, 2491, 174 L.Ed.2d 168 (2009)

where Parent could provide input regarding Students' present levels of academic and functional performance, the proper goals, or placement and necessary supports for Student.¹⁵³ An IEP meeting did not occur and an IEP was not developed, therefore Parent could not participate regarding the State's offer of FAPE.

B. Petitioner Failed to Prove that the IEP Team's discussion on March 31, 2017 regarding extended school year was insufficient and that Student should have been deemed eligible for extended school year services.

Extended school year services are special education and related services that are provided to a student with a disability, beyond the normal school year; in accordance with the student's IEP and are at no cost to the parents of the student.¹⁵⁴ The services must also meet the standards of the Department of Education and are provided only if a student's IEP team determines, on an individual basis, that the services are necessary for the provision of a FAPE to the student.¹⁵⁵

Parent was in attendance at the March 31, 2017, IEP meeting and participated in the discussion.¹⁵⁶ Parent's memory of the IEP meeting was very limited.¹⁵⁷ However, Parent's testimony asserted that Parent believed that the IEP team determined that Student was ineligible for ESY services because Student attended Private Placement and the DOE Public School did not have enough data for Student to determine Student's eligibility.¹⁵⁸ SSC testified that the team had sufficient data and SSC discussed the extended school year service eligibility factors.¹⁵⁹ There is no testimony that Parent objected, or voiced concern regarding Student's eligibility for Extended School Year Services.¹⁶⁰

Petitioners argue that School Principal's statement that if Student were to attend Public School in the future, the IEP team would take data for 6 weeks to determine if Student would qualify for ESY services is evidence that the team did not have sufficient data at the time of ESY eligibility determination.¹⁶¹ However, this statement from Principal is more consistent with the fact that Student's ESY eligibility is not predetermined and eligibility is dependent on Students changing needs.

Petitioner presented insufficient testimony and evidence to prevail on this claim.

¹⁵³ *Id.*

¹⁵⁴ Haw. Admin. Rules (HAR) § 8-60-7. (Hawaii has fully implemented the purposes, guarantees, and protections of the IDEA into its own regulatory structure. *See* Haw. Code R. §§ 8-60-1 to 8-60-84; *see also* § 8-60-1(b) ("This chapter shall be construed as supplemental to, and in the context of, the Individuals with Disabilities **Education** Act and other federal laws and regulations relating to the provision of a free appropriate public **education** to a student with a disability.")). **Hawai'i's** regulations mirror the language in the IDEA regarding the IDEA's purposes, the guarantee of a FAPE, and the requirement of parent participation. *See also* 34 C.F.R. § 300.106.

¹⁵⁵ *Id.*

¹⁵⁶ FOF 16, 47.

¹⁵⁷ FOF 47.

¹⁵⁸ FOF 16h.

¹⁵⁹ FOF 16f.

¹⁶⁰ FOFh.

¹⁶¹ FOF 16i.

C. Petitioner failed to Prove that Students IEP was not provided in Students least restrictive environment.

The IDEA requires that “to the maximum extent appropriate” children with disabilities are educated with children without disabilities.¹⁶² Placing a child in the LRE is not an option, it is a mandate. But, the student does not have an absolute right to be in a general education classroom. The student only has the right to have such considered first and rejected for good reason.¹⁶³

The LRE for each student must be determined based upon the child’s individualized situation and the LRE requirement is subordinate to the IDEA’s requirement that educational placements be based on individual needs.¹⁶⁴

Petitioners allege that Student’s March 31, 2017, IEP should have provided Student with additional modifications allowing Student to be placed in an inclusion setting for Math and Language Arts.

Students IEP team determined on March 31, 2017 that Student will not “participate with the general education classroom for Language Arts, Math and pull out speech services”.¹⁶⁵ As student requires “specialized instruction due to deficits in the areas of basic reading and writing, math and language skills, which affects Student’s ability to access the curriculum in the content areas of Language Arts, Math, Science and Social Studies.”¹⁶⁶ Student requires accommodations and modifications in the classroom in order to access the general education curriculum”.¹⁶⁷ Student’s Placement requires “a separate and smaller classroom setting that provides Student with individualized instruction in order to access the academic curriculum for Language Arts, Math, and speech and language skills”.¹⁶⁸

Here, Student has consistently been 2 grades behind developmentally typical peers Student’s age.¹⁶⁹ Student has deficits in listening comprehension, oral expressions, basic reading, reading comprehension, written expression, math calculation, math reasoning, and speech intelligibility.¹⁷⁰ Student requires a systematic approach to reading and phonics.¹⁷¹ Student exhibits significant delays in receptive and expressive language.¹⁷² Student has

¹⁶² 34 C.F.R. § 300.114.

¹⁶³ See *Letter to Cohen*, 25 IDELR 516 (OSEP 1996) “Mainstreaming which results in total failure, where separate teaching would produce superior results, is not appropriate and satisfactory”; *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 22 IDELR 804 (9th Cir. 1995).

¹⁶⁴ See *Letter to Lott*, 16 IDELR 84 (OSEP 1989); *Letter to Vergason*, 17 IDELR 471 (OSERS 1991); and *Letter to Goodling*, 18 IDELR 213 (OSERS 1991).

¹⁶⁵ FOF 16.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ FOF 32.

¹⁷⁰ FOF 31.

¹⁷¹ Respondents’ Exhibit 4 at 72.

¹⁷² FOF 28.

difficulties with categorizing or classifying words can impair Student's ability to make connections between known and newly acquired information.¹⁷³ Student's deficits in auditory memory and Student's understanding of lengthy, complex sentences, can impair Student's ability to follow oral and written directions.¹⁷⁴

General Education is inappropriate for Student as Student's deficits in Language Arts and Math are significant, making modification of material inappropriate as Student must learn the basic concepts before Student may move on to more advanced concepts.¹⁷⁵ Student must learn how to read before Student is able to read for comprehension.¹⁷⁶ Student requires specialized, individualized instruction for Language Arts and Math.¹⁷⁷ Student requires Speech and Language Therapy.¹⁷⁸ Student's LRE/ placement was properly discussed and determined during Student's March 31, 2017 IEP meeting.

Petitioner did not prove that Student's IEP was not provided in Student's LRE.

VIII. REMEDY (*Analysis-Step 3*)

The third and last step of the analysis in this matter, is the remedy. The DOE may be required to reimburse for tuition and the services obtained for the student if: 1) the services offered by the DOE were inadequate or inappropriate (denial of FAPE); 2) the services selected by the parents were appropriate; and 3) equitable considerations support the parents' claim for reimbursement.¹⁷⁹ The receipt of special education and related services through the public school system is not a prerequisite for reimbursement. As such, the mere failure to make FAPE available to a student with a disability can expose a district to a claim for tuition reimbursement.¹⁸⁰

Appropriate Placement

Here, an IDEA violation resulted in the denial of FAPE. However, in order for tuition reimbursement to be an appropriate remedy, the private placement be appropriate. The private placement is appropriate where it offers educational instruction that is specially designed to meet the child's unique needs, along with the support services the child needs to benefit from instruction.¹⁸¹ A parental placement can be appropriate, even if it does not meet state

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Forest Grove Sch. Dist. v. T.A.*, 52 IDELR 151 (U.S. 2009); and 71 Fed. Reg. 46,599 (2006).

¹⁸¹ *S.L. v. Upland Unified Sch. Dist.*, 63 IDELR 32 (9th Cir. 2014).

standards.¹⁸² Parents need not show that the private placement furnishes every special service necessary to maximize Student potential in order for them to receive tuition reimbursement.¹⁸³

Here, parents' unilateral placement is appropriate to meet both Student's behavioral and academic needs. Private Placement has a low student to teacher ratio and student requires a low student to teacher ratio.¹⁸⁴ While at Private Placement Student is "able to sit, attend, and follow all teachers' instructions".¹⁸⁵ At Private Placement Student uses a ___ to help Student remain seated and focused.¹⁸⁶ While at Private Placement Student is on task and motivated by a behavior modification system based on rewards.¹⁸⁷ Private Placement is appropriate for Student's behavior.¹⁸⁸

Student "is showing gains in both behavioral skills and academics, however, Student continues to be significantly behind in reading as compared to same aged peers".¹⁸⁹ Private Placement specializes in educating Students with a disability.¹⁹⁰ Student requires and receives systematically provided phoenix instruction, as Private Placement teaches Student letter sounds in isolation, blended letter sounds, and word in their entirety.¹⁹¹ Student requires and receives listening comprehension, oral expression, basic reading, reading comprehension, written expression, and speech intelligibility instruction at Private Placement.¹⁹² Student utilizes a tablet at Private Placement to work with online applications for Math and Language Arts.¹⁹³ Student is provided with math manipulatives to assist Student in learning math concepts and stay focused.¹⁹⁴

Private Placement does not provide speech and language therapy.¹⁹⁵ While it is uncontroverted that Student needs speech and language therapy, Private Placement is not inappropriate solely because Student does not receive speech and language therapy services Private Placement.

Petitioners have demonstrated that Private Placement provides educational instruction specifically designed to meet Student's unique needs, therefore, Private Placement is appropriate.¹⁹⁶

¹⁸² 34 CFR 300.148 (c). See, e.g., *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993).

¹⁸³ *Frank G. v. Board of Educ. of Hyde Park Cent. Sch. Dist.*, 46 IDELR 33 (2d Cir. 2006), *cert. denied*, 109 LRP 29770, 552 U.S. 985 (2007). See also *C.B. v. Garden Grove Unified Sch. Dist.*, 56 IDELR 121 (9th Cir. 2011), *cert. denied*, 111 LRP 68912, 132 S. Ct. 500 (2011).

¹⁸⁴ FOF 16, 38.

¹⁸⁵ FOF 45.

¹⁸⁶ FOF 42.

¹⁸⁷ FOF 43, 45.

¹⁸⁸ FOF 16, 26-31, 38-43.

¹⁸⁹ FOF 46.

¹⁹⁰ FOF 37, 1.

¹⁹¹ FOF 40-42.

¹⁹² FOF 39.

¹⁹³ FOF 41-44.

¹⁹⁴ FOF 45.

¹⁹⁵ FOF 47.

¹⁹⁶ FOF 16, 26-47

Equities

The final consideration in determining tuition reimbursement is the balancing of the equities. During this step, the hearing officer must examine the actions of the parents and DOE. Consideration is given to the determination of whether the parents' actions were reasonable,¹⁹⁷ whether the costs of the private placement is unreasonable¹⁹⁸ whether there was a lack of parental cooperation with the school district.¹⁹⁹ Should the hearings officer determine that the equities do not favor the parents; the hearings officer may reduce or deny reimbursement?²⁰⁰

Parent participated in numerous PSPP and IEP meetings, is committed to Student's education, and was overall cooperative while working with the DOE.²⁰¹ However, here, Parent did not come with entirely clean hands. Student has attended Private Placement since January 2016 to present.²⁰² At no point from December 2015, to the filing of this Complaint did Parent inform the DOE in writing that Parent was rejecting Public's School's FAPE offer or lack of FAPE offer and enrolling Student in Private Placement at Public Expense.²⁰³ Additionally, in April 2018, Parent submitted a refundable deposit to Private Placement to secure a spot for Student during SY18-19 and conceded that Parent intended for Student to remain at Private Placement for SY18-19, if everything financially went as planned.²⁰⁴ Parent's intent was and is for Student to remain at Private Placement if Parent is financially able to afford placement.

Parent did not know what the DOE's offer of FAPE consisted of and could not make an informed decision whether to accept or reject the DOE's offer and enroll Student in Public Placement, absent an offer. Parent's intent to stay at Private Placement may have changed based on Public Placements offer of FAPE. Parent continued to share medical information with the DOE as recent as June 2018²⁰⁵. The DOE failed to properly communicate and document Parent's position regarding the DOE's provision of special education and related services to Student.²⁰⁶ The DOE is obligated to offer FAPE to Student and failed to do so.

¹⁹⁷ 20 U.S.C. § 1412 (a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).

¹⁹⁸ *Florence County Sch. Dist.*, 510 U.S. at 16.

¹⁹⁹ *Burlington, Carter*, nor the IDEA mandates this consideration, but other courts have weighed parental cooperation in deciding whether to award reimbursement. *See e.g., C.G. v. Five Town Community Sch. Dist.*, 513 F.3d 279 (1st Cir. 2008)(stating that reimbursement is contingent upon a showing that the parents diligently pursued the provision of appropriate services from the school district); *Glendale Unified Sch. Dist. v. Almasi*, 122 F. Supp. 2d 1093 (C.D. Cal 2000) (affirming the hearings officer finding that he parent's actions of withholding information from the school district impaired the district's ability to make decisions related to the student's education.)

²⁰⁰ 20 USC sec 1412 (a)(10)(C); 34 C.F.R. sec 300 148(d).

²⁰¹ FOF 2, 11-13, 15-17, 19, 21-23.

²⁰² FOF 2, 10.

²⁰³ FOF 9.

²⁰⁴ FOF 48.

²⁰⁵ FOF 21.

²⁰⁶ *See supra* (Parent defers to the DOE as experts and did not fully understand Parent's rights, this combined with lack of informed consent provided in the form of Parent's written revocation for DOE services and the DOE's obligation to provide FAPE under the IDEA create an equitable factor in favor of Parent).

The DOE will not be responsible for Student's aftercare, speech and language therapy, tutoring services or transportation during SY18-19. Parent chose to place Student at Private Placement which does not provide speech and language therapy. There was insufficient evidence for a compensatory education claim and Parent chose to utilize a tutor outside of Student's PSPP plan.

Based upon the above, the DOE shall be responsible for **80%** of Student's Private Placement Tuition for SY18-19 and Parent shall be responsible for **20%** of Student's Private Placement Tuition for SY18-19. While Parent provided amounts debited from Parent's account from Private Placement she did not provide a monthly detailed invoice from Private Placement for a specific amount determination.

ORDER

Based upon the findings of fact and conclusion of law herein, it is this 11th day of March 2019, hereby:

ORDERED THAT, Petitioners are responsible for 20% of Parent's incurred costs for Student's Private Placement during the 2018-2019 School Year.

IT IS FURTHER ORDERED that Respondents are responsible for 80% of Parent's incurred costs for Student's Private Placement during the 2018-2019 School Year. Respondents shall reimburse Parent for 80% of Parent's incurred costs for Student's Private Placement during the 2018-2019 School Year.

IT IS FURTHER ORDERED THAT, Parent shall provide the DOE with invoices from Private Placement outlining the costs per month for Private Placement's services rendered, along with the amount debited from Parent's Account. The DOE shall reimburse Parent for 80% of Private Placement costs that Parent has incurred from August 2018 to June 2019. The DOE shall have 60 calendar days to reimbursement Parent, after Parent submits Student's July 2018 – March 2019 invoices to the DOE.

Parent shall then submit Private Placement invoices and the amounts debited from Parent's account for the months of April 2019, to June 2019,²⁰⁷ within 30 days from Student's last date of Private Placement attendance for SY18-19 to the DOE. The DOE will have 60 calendar days to reimburse Parent after Parent submits the invoices to the DOE. The DOE is responsible for 80% of Parent's incurred costs.

IT IS FURTHER ORDERED THAT, Respondents shall convene an IEP team meeting for Student on or before May 1, 2019. The DOE shall have an IEP in place for Student before SY19-20 or receive written confirmation from Parent that revokes consent for the DOE to provide special education and related services to Student.

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

DATED: Honolulu, Hawai'i, March 11, 2019.

/s/ Jennifer M. Young
JENNIFER M. YOUNG
Hearings Officer
Richards Building
707 Richards St., Suite 403
Honolulu, Hawai'i 96813
Phone: (808) 587-7680
Fax: (808) 587-7682
atg.odr@hawaii.gov

²⁰⁷ June 2019 or the last day Private Placements academic calendar for SY18-19.

NOTICE OF APPEAL RIGHTS

The decision issued by this Hearings Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearings Officer shall have 30 days from the date of the decision of the hearings officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a State court of competent jurisdiction, as provided in, as provided in 20 U.S.C. § 1415 (i)(2) and § 8-60-70(b).

Unofficial Redacted Hearing Decision