



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

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

Petitioners,

vs.

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

Respondents.

DOE-SY1819-040

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing: July 2, 2019

Hearings Officer : Chastity T. Imamura

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On April 3, 2019, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawaii Public Schools (hereinafter "Respondents" or "DOE") received a request for a due process hearing under the Hawaii Administrative Rules ("HAR")

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

Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act (“IDEA”), from Student, by and through Parent 1 (hereinafter “Petitioners”).

A Pre-Hearing conference was held on May 23, 2019, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Kunio Kuwabe, Esq. (hereinafter “Mr. Kuwabe”), representing Respondents. At the Pre-Hearing Conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for July 2, 2019.

On June 3, 2019, Respondents filed a Motion for Summary Judgment, and on June 20, 2019, Petitioners filed their Memorandum in Opposition to the Respondents’ Motion for Summary Judgment. The hearing on the Motion for Summary Judgment was held on June 25, 2019, before Hearings Officer Chastity T. Imamura, with Mr. Peck representing Petitioners, and Mr. Kuwabe representing Respondents. The Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Respondents’ Motion for Summary Judgment was issued on June 27, 2019 (hereinafter “FOF, COL and Order dated 6/27/2019”), which limited the issues to be determined at the Hearing to the Respondents’ alleged failures to provide a Free Appropriate Public Education (hereinafter “FAPE”) that occurred after the execution of the prior Settlement Agreement on January 16, 2019.<sup>2</sup>

The Hearing commenced on July 2, 2019. Present at the hearing were Hearings Officer Chastity T. Imamura; Parent 1 and Mr. Peck, on behalf of Petitioners; and DOE District Educational Specialist (hereinafter “DES”) and Mr. Kuwabe on behalf of Respondents.

At the conclusion of the Hearing, Petitioners expressed an interest in providing closing briefs to the undersigned Hearings Officer, and the Respondents did not have any objection.

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<sup>2</sup> More information on the background and issues related to the Motion for Summary Judgment are outlined in the FOF, COL and Order dated 6/27/2019.

Respondents requested an extension of the 45-day Decision Deadline (hereinafter “Deadline”) to allow for the production of transcripts of the proceeding, as well as to provide the parties with sufficient time to prepare their closing briefs. The Petitioners had no objection to the deadline being extended. The Respondents’ request was granted on July 3, 2019, which extended the Deadline from August 1, 2019 to September 14, 2019.

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.

## **II. ISSUES PRESENTED**

Petitioners asserted three issues in the original complaint. In the FOF, COL and Order dated 6/27/2019, the issues in the Complaint dated April 3, 2019 were clarified and limited pursuant to the Respondents’ Motion for Summary Judgment. Based on the FOF, COL and Order dated 6/27/2019, the remaining issues for the Hearing were as follows:

1. In the time period after January 16, 2019, Respondents failed to gather sufficient information to determine eligibility for Extended School Year (hereinafter “ESY”) services (academic and/or behavioral) and/or mental health/behavioral interventions.
2. In the time period after January 16, 2019, Respondents had a responsibility to review and/or revise the Individualized Educational Plan (hereinafter “IEP”) that was created on November 16, 2018, when and/or if it became apparent it needed revision.

## **III. PROCEDURAL HISTORY**

On September 27, 2017, Parent 1 submitted to the DOE a request for evaluation of Student for educational and related services from age 3 to 22. This request was for

determination of eligibility for services under the IDEA/HAR Chapter 60.<sup>3</sup>

In November 2017, Student was determined to be eligible for IDEA/HAR Chapter 60 services under Eligibility Category 1.<sup>4</sup>

On November 30, 2017, an IEP meeting was held, from which an IEP was created for Student (hereinafter “IEP-11/30/2017”).<sup>5</sup> The DOE also issued a Prior Written Notice of Department Action (“PWN”) on that same date (hereinafter “PWN-11/30/2017”).<sup>6</sup>

In the PWN-11/30/2017, the DOE indicated that Student was not eligible for ESY and that the team needed more data for a determination that Student was eligible for ESY services.

On November 14, 2018, a Complaint and Request for Due Process Hearing (hereinafter “Complaint-11/14/18”)<sup>7</sup> was filed, which was based in part on the IEP-11/30/2017.

On November 16, 2018, the annual review IEP meeting was held, from which another IEP was created (hereinafter “IEP-11/16/2018”).<sup>8</sup> The DOE also issued a PWN on the same date (hereinafter “PWN-11/16/2018”).<sup>9</sup> In the PWN-11/16/2018, the DOE indicated that Student was not eligible for ESY.<sup>10</sup>

On November 28, 2018, a resolution session was held as part of the Complaint-11/14/18 process, and during the resolution session, the parties came to an agreement as to services that Student would receive for the duration of the 2018-2019 School Year (hereinafter “SY”) ending May 31, 2019. A settlement agreement was executed on January 16, 2019.<sup>11</sup>

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<sup>3</sup> Respondents’ Exhibit 2, page 15 (hereinafter referenced as “R-Ex.2, p.15”).

<sup>4</sup> R-Ex.2, p.33.

<sup>5</sup> R-Ex.3, p.51-60.

<sup>6</sup> R-Ex.3, p.64-65.

<sup>7</sup> R-Ex.9, p.318-323.

<sup>8</sup> R-Ex.3, p.69-81.

<sup>9</sup> R-Ex.3, p.85-86.

<sup>10</sup> R-Ex.3, p.85.

<sup>11</sup> R-Ex.9, p.324-325.

The Settlement Agreement executed on January 16, 2019 (hereinafter “SA-1/16/19”) indicated that it “settles any and all claims arising out of or connected to the student’s education for the period up to, through, and including the date of execution of this Agreement.”<sup>12</sup>

On March 27, 2019, an IEP meeting was held, from which another IEP was produced (hereinafter “IEP-3/27/19”).<sup>13</sup> On the same date, a Manifest Determination Review (hereinafter “MDR”) meeting was also held,<sup>14</sup> after which a determination was made that Student’s behavior requiring the MDR was caused or had a direct or substantial relationship to Student’s disability.<sup>15</sup>

On March 28, 2019, the DOE issued two PWNs related to the IEP<sup>16</sup> and MDR<sup>17</sup> meetings held on March 27, 2019.<sup>18</sup>

On April 3, 2019, the instant Complaint and Request for Due Process Hearing was filed by Petitioners.<sup>19</sup>

#### **IV. FINDINGS OF FACT**

##### **Student’s school behaviors and attendance**

1. Student is \_\_\_\_\_ years old<sup>20</sup> and had attended the \_\_\_\_\_ grade at Home School for the 2018-2019 SY.<sup>21</sup>

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<sup>12</sup> R-Ex.9, p.324.

<sup>13</sup> R-Ex.3, p.90-102.

<sup>14</sup> While none of the witnesses could recall which meeting took place first, it is clear that both the IEP meeting and the MDR meeting were held on March 27, 2019.

<sup>15</sup> R-Ex.3, p.104-105.

<sup>16</sup> R-Ex.3, p.109-110.

<sup>17</sup> R-Ex.3, p.112.

<sup>18</sup> Although the PWNs for both meetings list the “Principal” as Former Principal, the undersigned Hearings Officer finds that this was inadvertent, and that Principal was the “Principal” at the time the PWNs were issued.

<sup>19</sup> R-Ex.1, p.2-8.

<sup>20</sup> Parent 1’s Testimony, Transcript page 21, lines 18-19 (hereinafter referenced as Tr. 21:18-19).

<sup>21</sup> R-Ex.9, p.289-291.

2. Parent 1 was often at or near the campus while Student was attending school,<sup>22</sup> until sometime early in 2019, when Parent 1 began to stay home.<sup>23</sup>
3. Student's documented behavioral problems began in the fall of 2017, when Student was in Fall 2017 Teacher's class.<sup>24</sup>
4. Student's behavioral incidents at school included leaving class, running from teachers and other administrators, climbing onto objects such as a basketball rim or a fence.<sup>25</sup> Student also engaged in negative and physical aggression toward others.<sup>26</sup>
5. These behavioral incidents resulted in Student being taken home approximately twelve (12) times.<sup>27</sup>
6. A Behavioral Support Plan (hereinafter "BSP") was created for Student by Former Behavioral Health Specialist (hereinafter "BHS"), which included a behavioral checklist, which allowed Student to rate how Student was feeling in school, with "1" meaning "going well," and "3" meaning "not well."<sup>28</sup>
7. Part of the behavioral checklist allowed Student to go to see Parent 1 if Student was rating \_\_\_ self high. At some point, Student began to use the checklist to avoid doing things Student did not want to do.<sup>29</sup>

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<sup>22</sup> *Id.*, Tr. 26:22-27:3.

<sup>23</sup> *Id.*, Tr. 27:1-16.

<sup>24</sup> Based on the Student Incident Reports provided in Respondent's Exhibit 8, pages 223-241, it appears that Student had extensive behavioral problems with Fall 2017 Teacher, who documented a total of 19 Incident Reports involving Student's inappropriate behaviors between August 2017 and November 2017. *R-Ex.8, p.223-241.*

<sup>25</sup> *Parent 1's Testimony*, Tr. 22-23.

<sup>26</sup> *SPED teacher's Testimony*, Tr. 126:8-127:16.

<sup>27</sup> *Parent 1's Testimony*, Tr. 23:13-24.

<sup>28</sup> *Id.*, Tr. 24:7-26:5.

<sup>29</sup> Parent 1 believed that at one point, Student began to "play with [Home School]" by saying that Student was a "\_\_\_\_," at which time they would send Student to Parent 1. Parent 1 would then

8. SPED teacher was one of Student's teachers in the 2017-2018 SY and the 2018-2019 SY. SPED teacher was also one of the people tasked with monitoring Student's academic programs and the IEP implementation.<sup>30</sup>
9. SPED teacher is a licensed Special Education teacher and is nationally certified in the area of exceptional needs.<sup>31</sup>
10. SPED teacher's credible testimony demonstrated that SPED teacher had knowledge of Student's behaviors, had opportunities to speak with Student, was present at relevant IEP and other meetings, and was familiar with Student's IEP.
11. During the 2018-2019 SY, Student had a number of absences, which increased from the first semester to the third quarter.<sup>32</sup> Between August 2018 and December 2018, Student had ten (10) excused absences, where Parent 1 would call the school to notify of Student's absence. Between January 2019 and March 2019, Student had twelve (12) excused absences, where Parent 1 called the school, and six (6) unexcused absences.<sup>33</sup>
12. When SPED teacher had been able to ask Student on occasion about the absences, Student had at least once informed SPED teacher that Student did not go to school because 'Student no like,' as opposed to giving a reason like illness, etc.<sup>34</sup>

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tell Student that Student needed to go back to class and do what Student was supposed to do.  
*Parent 1's Testimony, Tr. 26:14-27:1.*

<sup>30</sup> *SPED teacher's Testimony, Tr. 96:3-16.*

<sup>31</sup> *Id., Tr. 95:18-24.*

<sup>32</sup> *Id., Tr. 116:14-117:4.*

<sup>33</sup> *R-Ex.9, p.289-291.*

<sup>34</sup> *SPED teacher's Testimony, Tr. 139:6-12.* The IEP-11/16/2018 and IEP-3/27/2019 both also note that Student also voices that Student does not like school and wants to go home frequently.  
*R-Ex.3, p.71 & p.92.*

13. When Student was absent from school it affected Student's ability to be caught up with Student's school work, which also led to Student unwinding and feeling less successful.<sup>35</sup>
14. BHS is a certified behavioral health specialist who began to work with Student in December 2018.<sup>36</sup>
15. Student's behaviors began to 'pick up' in around late January, early February of 2019,<sup>37</sup> which prompted BHS to create a revised BSP for Student.<sup>38</sup>
16. In March 2019, an incident occurred where Student had kicked and broken an object at the school.<sup>39</sup>
17. Though Parent 1 attempts to mitigate Student's behaviors as "just playing,"<sup>40</sup> substantial evidence in the record supports a different conclusion. The record includes four (4) incidents between September 2018 and February 2019, in addition to the nineteen (19) incidents that occurred between August and November 2017, in which Student was disruptive, disrespectful to school personnel, and aggressive to other students and school personnel.<sup>41</sup>
18. After the incident, Student stopped attending school.<sup>42</sup>

### **Relating to Extended School Year**

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<sup>35</sup> *SPED teacher's Testimony, Tr. 116:9-13.*

<sup>36</sup> *BHS Testimony, Tr. 143:7-144:8.*

<sup>37</sup> It appears from Parent 1's testimony, Student's behavioral problems started to increase after Parent 1 no longer stayed at the school. Parent 1 testified that early in 2019 "about a month before all these incidents started," Parent 1 began to stay at home during the school day. *Tr. 27:1-16.*

<sup>38</sup> *BHS Testimony, Tr. 149:18-150:1.*

<sup>39</sup> *See Generally, Parent 1's Testimony, Tr. 19:14-21:17, Principal's Testimony, Tr. 68:2-21.*

<sup>40</sup> *Parent 1's Testimony, Tr. 19:14-21:17.*

<sup>41</sup> *R-Ex.8, p.219-241.*

<sup>42</sup> *Parent 1's Testimony, Tr. 21:24-22:1.*



19. On November 30, 2017, an IEP meeting was held where the team, consisting of: SPED teacher, Fall 2017 Teacher, Former BHS, Caregiver, Counselor, and Former Vice Principal were present.<sup>43</sup>
20. In Student's IEP-11/30/2017, the IEP team noted that Student was not eligible for ESY.<sup>44</sup>
21. In the PWN-11/30/2017, it was noted that the IEP Team "decided that we would need more data for [Student] to be eligible for ESY ..." as a reason why the option of ESY was considered and rejected.<sup>45</sup>
22. SPED teacher, as Student's care coordinator, was responsible for monitoring any regression issues with respect to Student.<sup>46</sup>
23. On November 16, 2018, Student's annual IEP meeting was held and the IEP team, consisting of: SPED teacher, Student Services Coordinator, Former Principal, Parent 1, Relative 1, GenEd teacher, and Educational Assistant were present at the meeting.<sup>47</sup>
24. At the IEP meeting, SPED teacher presented information regarding the teachers' observations right after break, including a formative assessment and another assessment that were reviewed together.<sup>48</sup> During this conversation, the team determined that they did not see any regression by Student that would make Student eligible for ESY.<sup>49</sup>
25. Student's IEP-11/16/2018 noted that Student was not eligible for ESY.<sup>50</sup>

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<sup>43</sup> *R-Ex.3, p.60.*

<sup>44</sup> *R-Ex.3, p.58.*

<sup>45</sup> *R-Ex.3, p.64.*

<sup>46</sup> *SPED teacher's Testimony, Tr. 96:17-23.*

<sup>47</sup> *R-Ex.3, p.81.*

<sup>48</sup> *SPED teacher's Testimony, Tr. 129:7-17.*

<sup>49</sup> *Id., Tr. 129:7-17.*

<sup>50</sup> *R-Ex.3, p.100.*

26. In the PWN-11/16/2018, the DOE noted that “[Student] does not meet the standard for an extended school year.” The PWN further noted that “[t]he team has not see [sic] any academic regression after long breaks from school, therefore [Student] does not qualify for extended school year.” Two more sections of the PWN-11/16/2018 discussed extended school year, noting that it was discussed and that “[t]he team didn’t see Student’s academic skills regress after fall break but will be aware to assess after Christmas break.”<sup>51</sup>
27. On March 27, 2019, an IEP meeting was held, and IEP team members: SPED teacher, Principal, Vice Principal, Second SPED teacher, BHS, Behavioral Analyst, and Parent 1 were present.<sup>52</sup>
28. SPED teacher reviewed matters regarding academic regression for Student after Christmas break and presented it at the March IEP meeting. During that meeting, the team again determined that Student was not eligible for ESY.<sup>53</sup>
29. After spring break, the IEP team was going to again review data, including the assessments and teacher observations, to determine whether Student would be eligible for ESY, however no observations were done and no subsequent IEP meeting was held due to Student not attending school after the incident.<sup>54</sup>
30. No one at the March 27, 2019 IEP meeting identified any need for reviewing regression and behaviors after long breaks. Further, SPED teacher, who had been monitoring Student’s behaviors before and after Christmas break, did not see any changes in

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<sup>51</sup> *R-Ex.3, p.85-86.*

<sup>52</sup> *R-Ex.3, p.102.*

<sup>53</sup> *SPED teacher’s Testimony, Tr 129:18-130:20.*

<sup>54</sup> *Id., Tr. 129:18-130:20.*

Student's behaviors that warranted some discussion or possible discussion at the IEP meeting.<sup>55</sup>

31. Parent 1 participated in the discussions regarding ESY at the March 2019 IEP meeting where the team decided that Student was not eligible for ESY and did not raise any concerns regarding ESY for Student.<sup>56</sup>

32. Student's IEP-3/27/2019 again notes that Student does not meet the standard for ESY.<sup>57</sup>

33. In the PWN-3/27/2019, the DOE noted that Student did not meet the standard for ESY and the reasoning given was that "[t]he team has not see [sic] any academic regression after long breaks from school, therefore [Student] does not qualify for ESY."<sup>58</sup>

34. The first time the issue of providing an ESY for Student was raised was by Petitioners during the hearing on the Respondents' Motion for Summary Judgment, wherein the Petitioners' argued that ESY should have been used as an option to bring Student back to school after Student had stopped attending in March 2019.<sup>59</sup>

#### **Relating to Student's Behavioral needs/supports**

35. On January 23, 2019, a conference was held to discuss Student's behaviors. Present at the conference were: SPED teacher, Vice Principal, BHS, and Parent 1. This meeting was held because of an 'incident,' and a determination was made at the meeting that the

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<sup>55</sup> *Id.*, Tr. 102:3-16.

<sup>56</sup> *Principal's Testimony*, Tr. 93:2-10.

<sup>57</sup> *R-Ex.3*, p.100.

<sup>58</sup> *R-Ex.3*, p.109.

<sup>59</sup> At the hearing on Respondents' Motion for Summary Judgment, Petitioners' attorney argued: "At this point with the child unable to return, one way they could have helped the child return was to say you know what, ESY isn't just for maintenance. It isn't just for this or that. It's for any reason under case law. And we're going to use ESY to roll this kid back into school in a less harmful environment and in an environment Student can handle. And so, therefore, we're going to revisit not just behavioral interventions, but use of the ESY in this way." *Transcript of Motion for Summary Judgment, June 25, 2019, Tr.14:7-15.*

‘incident’ was not a manifestation of Student’s disability. At the conference, a discussion was held regarding Student’s behaviors where the members discussed concerns and ideas on how to handle Student’s behaviors.<sup>60</sup>

36. In January or February of 2019, BHS had drafted a revised BSP for Student, and scheduled a behavioral meeting in February 2019. The behavioral meeting consisted of members of the IEP team, including Parent 1, but it was not an IEP meeting. The BHS ran the behavioral meeting, which took place on February 19, 2019. At the behavioral meeting, the draft BSP was adopted after it was discussed, and no changes were made.<sup>61</sup>

37. On March 11, 2019, another conference was held and present were: SPED teacher, School Psychologist, Vice Principal, Second SPED teacher, BHS, Parent 1 and Relative 1. At that time, the participants discussed a possible emotional behavioral assessment (hereinafter “EBA”) for Student, a formal observation to be done by BHS, and decided that a Structured Developmental History needed to be completed. Parent 1 was also to be interviewed by a Complex School Social Worker.<sup>62</sup>

38. On March 27, 2019, during the IEP meeting, the revised BSP was discussed with the team to ensure that the revised BSP aligned with the goals and objectives of the IEP. The resulting IEP-3/27/2019 also included a reference to the implementation of the revised BSP as an additional support and service.<sup>63</sup>

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<sup>60</sup> *R-Ex.9, p.279.*

<sup>61</sup> *BHS Testimony, Tr. 149:9-151:15.*

<sup>62</sup> *R-Ex.9, p.285.*

<sup>63</sup> *BHS Testimony, Tr. 151:16-153:24; R-Ex.3, p.100.*

39. The IEP-3/27/2019 also had an additional support and service listed as daily check-in with “SBBH<sup>64</sup> counselor or other specified adult.”<sup>65</sup>

40. On March 27, 2019, a MDR meeting was held to discuss the incident, and present at the meeting were: Second SPED teacher, BHS, SPED teacher, Parent 1, Principal, Vice Principal, and one additional person.<sup>66</sup>

41. At the meeting, the team considered Student’s IEP, BSP, and behavior incidents, in addition to input from Student’s teachers and Parent 1.<sup>67</sup>

42. At the MDR meeting, the team also determined that the behavioral intervention plan had been implemented and followed and that Student was using the strategies that Student was taught in Student’s counseling group. The team determined that Student’s disability pertained to Student’s difficulty in managing Student’s own behaviors and reactions to situations.<sup>68</sup>

43. The team present at the MDR meeting also discussed other behavioral supports, including a more restrictive, self-contained environment on campus, but this idea was rejected because the team did not believe it was the least restrictive environment to meet Student’s needs.<sup>69</sup>

44. The MDR team determined that Student needed a functional behavioral assessment (hereinafter “FBA”) and an EBA to further determine Student’s needs and how to

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<sup>64</sup> It is not clear from the record what the letters “SBBH” stands for, but BHS did testify that BHS was the “SBBH counselor.” *BHS testimony, Tr. 153:23-24.*

<sup>65</sup> *R-Ex.3, p.100.*

<sup>66</sup> It is unclear what position the other additional person at the MDR meeting held, but it is irrelevant for purposes of this decision. *R-Ex.3, p.104.*

<sup>67</sup> *R-Ex.3, p.104.*

<sup>68</sup> *R-Ex.3, p.112.*

<sup>69</sup> *R-Ex.3, p.112.*

accomplish Student's goals.<sup>70</sup> A follow up IEP meeting was to be held once the FBA and EBA were both completed.<sup>71</sup>

45. The EBA was completed.<sup>72</sup>

46. The FBA was not completed due to Student's refusal to return to school. Part of the FBA required the assessor to observe Student at school to determine what triggers Student's behavioral problems at school.<sup>73</sup>

47. While many attempts were made by the School to encourage Parent 1 to bring Student to school,<sup>74</sup> Parent 1 allowed Student to decide whether Student would attend school, and Student chose not to return to school.<sup>75</sup>

48. Parent 1 also kept Student home from school for a period after consulting with Student's attorney.<sup>76</sup>

49. Parent 1 testified that Student was willing to go back to school if Student was assigned a one-on-one educational assistant to go with Student around school so that Student would

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<sup>70</sup> *Principal's Testimony, Tr. 70:1-12; SPED teacher's Testimony, Tr. 110:2-12 and Tr. 133:8-11.*

<sup>71</sup> *Principal's Testimony, Tr. 71:17-22; R-Ex.3, p.112.*

<sup>72</sup> No evidence was presented as to what the results of Student's EBA were, however the undersigned Hearings Officer finds Principal's and SPED teacher's testimony regarding the completion of the EBA to be credible. *Principal's Testimony, Tr. 70:13-17, SPED teacher's Testimony, Tr. 114:1-2.*

<sup>73</sup> *Principal's Testimony, Tr. 70:19-71:1, SPED teacher's Testimony, Tr. 114:1-23.*

<sup>74</sup> *Parent 1's Testimony, Tr. 42:6-9; R-Ex.6, p.202.*

<sup>75</sup> Parent 1 testified at different times that Parent 1 attempted to get Student to go to school, but Student refused, saying things like "no, I'm done," and "because of everything happened in school, I'm not repeating myself again, you know why I no like go school." *Tr. 40:23-41:4.* Parent 1 also testified that when the BHS called Parent 1 to ask if Parent 1 would bring Student to school just so Student could have counseling sessions with the BHS, Parent 1 said that "I would ask Student because Student's the one. And so I did, and Student said no, Student no like come. And so I told BHS that Student no like come, so Student's not coming." *Tr. 39:15-19.*

<sup>76</sup> *Parent 1's Testimony, Tr. 42:15-19, R-Ex.6, p.202.*

not get into trouble as much.<sup>77</sup> However, Parent 1 did not convey any such request to the school until after the instant Complaint was filed and the subsequent resolution session was held.<sup>78</sup>

50. Prior to March 2019, Student did not demonstrate any need for a one-to-one aide.<sup>79</sup>

51. Student does not like to be singled out and does not like people to tell Student what to do or be on Student constantly.<sup>80</sup>

52. Student works best when Student is given instruction and allowed to work on it with space and choices so Student feels like Student is in control.<sup>81</sup>

53. Student is receptive to having an educational assistant or aide in the classroom that is also working with other students, but Student does not want someone assigned specifically to Student, as a one-to-one aide would be.<sup>82</sup>

## V. CONCLUSIONS OF LAW

### A. Burden of Proof

The U.S. Supreme Court held in *Schaffer ex rel. Schaffer v. Weast* held that “[t]he burden of proof in administrative hearing challenging an IEP is properly placed upon the party seeking relief.”<sup>83</sup> The Court concluded that “[a]bsent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls,

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<sup>77</sup> *Parent 1’s Testimony, Tr. 43:25-44:7.*

<sup>78</sup> *Id. Tr. 40:10-12, Principal’s Testimony, Tr. 79:22-80:2.*

<sup>79</sup> *SPED teacher’s Testimony, Tr. 117:12-25.*

<sup>80</sup> *Id., also Tr. 139:25-140:17*

<sup>81</sup> *Id., Tr. 117:21-25.*

<sup>82</sup> *Id., Tr. 131:16-20.*

<sup>83</sup> 546 U.S. 49, 62, 126 S.Ct. 528, 537 (2005); *see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 820 (9<sup>th</sup> Cir. 2007).

upon the party seeking relief.”<sup>84</sup> Here, the burden of proof falls upon Petitioners as the party seeking relief.

## **B. 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.”<sup>85</sup> A free and appropriate public education (“FAPE”) includes both special education and related services.<sup>86</sup>

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.<sup>87</sup> To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether the student is eligible for special education, and formulate and implement an IEP.”<sup>88</sup>

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the Department of Education (“DOE”) complied with the procedures of the IDEA; and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit.<sup>89</sup> “A state must meet both requirements to comply with the obligations of the IDEA.”<sup>90</sup>

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<sup>84</sup> *Id.* at 57-58, 126 S.Ct. at 535.

<sup>85</sup> *Bd. of Educ. v. Rowley*, 452 U.S. 176, 179-191, 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)).

<sup>86</sup> Hawaii Administrative Rules (“H.A.R.”) §8-60-2; 34 Code of Federal Regulations (“C.F.R.”) §300.34; 34 C.F.R. §300.39.

<sup>87</sup> H.A.R. § 8-60-2; 34 C.F.R. §300.34, 300.39.

<sup>88</sup> *Dep’t of Educ. of Hawai`i v. Leo W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai`i 2016).

<sup>89</sup> *Rowley*, 458 U.S. at 206-207; 102 S.Ct. at 3050-3051.

<sup>90</sup> *Doug C. v. Hawai`i Dept. of Educ.*, 720 F.3d 1038, 1043 (9<sup>th</sup> Cir. 2013) (quoting *Rowley*; citations omitted). *See also Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9<sup>th</sup> Cir. 2001).



An IEP adequately provides a FAPE if it is reasonably calculated to provide a child with a meaningful educational benefit at the time it was developed.<sup>91</sup> The IEP must be tailored to the unique needs of the child and reasonably designed to produce the benefits that are “significantly more than *de minimus*, and gauged in relation to the potential of the child at issue.”<sup>92</sup> The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.”<sup>93</sup>

The United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*, held that the educational benefit must be more than *de minimus*.<sup>94</sup> 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.”<sup>95</sup>

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”<sup>96</sup> 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.<sup>97</sup> The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.<sup>98</sup>

**C. Petitioners have failed to meet their burden of proving that the DOE did not sufficiently gather information to determine eligibility for ESY services.**

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<sup>91</sup> *J.W. by J.E.W., and J.A.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 449 (9<sup>th</sup> Cir. 2010).

<sup>92</sup> *Blake C. ex. rel. Tina F. v. Hawai`i Dept. of Educ.* 593 F.Supp.2d 1199, 1206 (D. Hawai`i 2009).

<sup>93</sup> *Rowley*, 458 U.S. at 200, 102 S. Ct at 598.

<sup>94</sup> 137 S.Ct. 988, 1001 (2017).

<sup>95</sup> *Id.*

<sup>96</sup> *Honig v. DOE*, 484 U.S. 305, 311, 108 S.Ct. 592, 598 (1988).

<sup>97</sup> H.A.R. §8-60-2; 34 C.F.R. §300.22.

<sup>98</sup> H.A.R. §8-60-45; 34 C.F.R. §300.321-322.

The first issue raised by Petitioners in the Complaint filed on April 3, 2019 asks this Hearings Officer to find that the DOE failed to gather sufficient information to determine Student's eligibility for ESY services. Petitioners have cited to the November 16, 2018 IEP as the basis of their Due Process Complaint.

Based on the Motion for Summary Judgment, which was granted in part as to any arguments relating to the time period before January 16, 2019, the only pertinent issue for this Hearings Officer to determine is whether Petitioners have proven that the DOE failed gather and obtain necessary information to determine Student's eligibility for ESY after the SA-1/16/2019. Based on the reasons set forth below, and in light of the IEP-3/27/2019 and PWNs issued on March 28, 2019, the undersigned Hearings Officer concludes that the Petitioners have failed to meet their burden.

A school must provide ESY services only if the child's IEP team determines that such services are necessary for the provision of FAPE to the child.<sup>99</sup> In *N.B. v. Hellgate*, the Ninth Circuit Court of Appeals noted that “[t]he federal regulation does not specify the factors to be considered in determining entitlement to ESY services.”<sup>100</sup> The Ninth Circuit also found that “[a] claimant seeking ESY must satisfy an even stricter test, because providing an ESY is the exception and not the rule under the regulatory scheme.”<sup>101</sup> Further, “ESY services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be

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<sup>99</sup> *Leo W.*, 226 F.Supp.3d at 1112 (citations omitted).

<sup>100</sup> 541 F.3d 1202, 1210 (9<sup>th</sup> Cir. 2008)

<sup>101</sup> *Id.* at 1211 (quoting *Bd. Of Educ. Of Fayette County v. L.M.*, 478 F.3d 307, 315 (6<sup>th</sup> Cir. 2007)).

significantly jeopardized if he is not provided with an educational program during the summer months.”<sup>102</sup>

In this case, Petitioners’ appear to argue that while the IEP team had considered and rejected ESY for Student in previous IEPs due to the lack of regression of Student during breaks, they assert that the DOE should have provided ESY to Student as a means of getting Student to attend school. Petitioners have presented no evidence that having a specialized summer program for Student in order to coax Student back to school would have accomplished its goal. No evidence has been presented by Petitioners that ESY concerns were brought up to the IEP team at any time before the resolution session for this current Due Process Complaint. On the contrary, the substantial evidence shows that at prior IEP meetings where Parent 1 was in attendance, ESY was discussed and rejected by the IEP team due to the Student’s lack of regression after each break, although notes were made to make further observations of Student’s performance after each break.<sup>103</sup> No evidence supports that Parent 1 or anyone else on the IEP team had any reason to believe that ESY services would be necessary for Student, as Student had not shown any regression or any other need for ESY services.<sup>104</sup>

**D. The DOE fulfilled its obligations to review and/or revise the IEP that was created on November 16, 2018 when it became apparent that it needed revision.**

Petitioners’ second argument asks this Hearings Officer to decide whether the DOE fulfilled its obligations to review and/or revise the IEP-11/16/2018, when it became apparent that it needed revision.

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<sup>102</sup> *Id.* (quoting *MM ex rel. DM v. Sch. Dist. Of Greenville County*, 303 F.3d 523, 537-537 (4<sup>th</sup> Cir. 2002)).

<sup>103</sup> FOF 24-26, 28-33.

<sup>104</sup> FOF 24 & 28.

Hawaii Administrative Rules Chapter 8-60-48(b)(1)(B)<sup>105</sup> provides that the DOE shall ensure that the IEP team:

Revises the IEP, as appropriate, to address:

- (i) Any lack of expected progress toward the annual goals ..., and in the general education curriculum, if appropriate;
- (ii) The results of any reevaluation conducted under section 8-60-35;
- (iii) Information about the student provided to, or by, the parents, as described under section 8-60-37(a)(2);
- (iv) The student's anticipated needs; or
- (v) Other matters.

In conducting a review of the student's IEP, the IEP team shall consider the special factors described in Chapter 8-60-48(a)(2).<sup>106</sup> Hawaii Administrative Rules Chapter 8-60-48(a)(2) notes, in relevant part, that the IEP team shall "[i]n the case of a student whose behavior impedes the student's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."<sup>107</sup>

As noted in the Findings of Fact, *supra*, Student did have a noticeable difference in behaviors and attendance in the third quarter of the 2018-2019 SY, which culminated in the incident that occurred in March 2019, prior to Spring Break.<sup>108</sup>

As early as January and February 2019, the BHS had noticed that Student's behaviors were beginning to pick up, so it prompted the team to have meetings to try to address Student behavior and determine what supports were needed.<sup>109</sup> The BHS had created a revised BSP for Student and had met with Parent 1 and some members of the IEP team to discuss the revised

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<sup>105</sup> Also 34 C.F.R. §300.324(b)(1)(ii)

<sup>106</sup> H.A.R. § 8-60-48(b)(2); 34 C.F.R. §300.324(b)(2)

<sup>107</sup> H.A.R. §8-60-48(a)(2)(A); 34 C.F.R. §300.324(a)(2)(A).

<sup>108</sup> FOF 11, 15-17, 35.

<sup>109</sup> FOF 15.

BSP.<sup>110</sup> The revised BSP was discussed and adopted and was additionally included in the IEP-3/27/2019.<sup>111</sup>

On March 27, 2019, the IEP team gathered to hold both an MDR and an IEP meeting to address the concerning behaviors of Student, with the incident being the focus of the MDR. The subsequent IEP-3/27/2019 and PWNs that resulted from the MDR meeting noted that a FBA was to be conducted to gather information and to further address any behavioral issues of Student. The team also ordered an EBA to determine if there were any additional disabilities of Student that needed to be addressed.

Various personnel from Home School attempted several times to contact Parent 1 to get the child to participate in the FBA and to attend school so that the FBA could be completed, or at least for Student to receive Student's counseling provided under the IEP.<sup>112</sup> Parent 1's response to the various requests to Home School's pleas to get Student to school was simply that since Student did not want to go, Parent 1 was not going to make Student go to school.<sup>113</sup>

Petitioners' put forth an argument that Parent 1 had requested that the school provide a one-to-one aide to accompany Student in order to get Student to come back to school, however this argument fails to show that the DOE did not fulfill its obligations to provide a FAPE to Student. While Parent 1 indicated in Parent 1's testimony that Student had "agreed" to go back to school only if someone were with Student, there is no evidence in the record to show that this would have been a reasonable measure to accomplish the goal of getting Student to come to

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<sup>110</sup> FOF 36.

<sup>111</sup> FOF 38.

<sup>112</sup> FOF 46-48.

<sup>113</sup> FOF 47-48.

school. In fact, the only evidence that was presented was that Student did not like to be singled out, and therefore a one-to-one aide would not have been helpful.<sup>114</sup>

While Petitioners argue that Home School should have done more to try to get Student to attend school, the evidence presented illustrated that Student did not like to attend school,<sup>115</sup> and given the opportunity to decide whether or not Student would attend school, Student chose to stay home.<sup>116</sup> Since Parent 1 allowed Student not to attend school, the IEP team was in a difficult position of not being able to review a completed FBA, provide services, or develop new strategies for student.

Multiple attempts were made by the school to address behavioral concerns that Student was displaying, including revising the BSP, revising the IEP, ordering an EBA and FBA, and attempting to convince Parent 1 multiple times, in multiple ways to get Student to come to school. The IEP team conducted a review of Student's IEP-11/16/2018 in March 2019, and specifically addressed "the use of behavior interventions and supports, and other strategies to address that behavior,"<sup>117</sup> and the resulting IEP-3/27/2019 included additional supports related to Student's behaviors. Petitioners have failed to meet their burden in proving that the DOE did not review and/or revise the IEP-11/16/2018 when it became apparent it needed revision.

## **VI. DECISION**

Based on the foregoing Findings of Facts and Conclusions of Law, the undersigned Hearings Officer finds that the Petitioners have not proven a denial of FAPE, as Petitioners have not met their burden of proving that the DOE failed to gather sufficient information to determine

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<sup>114</sup> FOF 63.

<sup>115</sup> FOF 12.

<sup>116</sup> FOF 47.

<sup>117</sup> H.A.R. §8-60-48(a)(2)(A); 34 C.F.R. §300.324(a)(2)(A).

ESY eligibility for Student, and that DOE failed to review and/or revise the IEP when it became apparent that it needed revision.

The Hearings Officer denies Petitioners' request for reimbursement of Student's educational and related services and request for compensatory education.

### **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 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, September 11, 2019.

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CHASTITY T. IMAMURA  
Hearings Officer  
Richards Building  
707 Richards Street, Suite 520  
Honolulu, Hawai'i 96813  
Phone: (808) 587-7680  
Fax: (808) 587-7682  
atg.odr@hawaii.gov