



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

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

Petitioners,

vs.

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

Respondents.

DOE-SY1819-053

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: August 20, 2019
September 23, 2019
October 15, 2019

Hearings Officer : Chastity T. Imamura

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On June 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”)

¹ 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 July 15, 2019, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Ryan Roylo, Esq. (hereinafter “Mr. Roylo”), representing Respondents. At the Pre-Hearing Conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for August 20, 2019.

Due to the scheduling of the Hearing, Respondents requested an extension of the deadline by which a decision was to be made from August 17, 2019 to October 1, 2019. Respondents’ request for an extension was granted and the new deadline was set at October 1, 2019. Due to the necessity of additional hearing dates for the Hearing, Petitioners submitted a request for an extension of the deadline, which was granted from October 1, 2019 to November 14, 2019.

The Hearing commenced on August 20, 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. Roylo on behalf of Respondents. Testimony was not completed on that date, so the Hearing was continued to September 23, 2019. On September 23, 2019, the Hearing continued. At the end of the hearing, Petitioners expressed an interest in presenting rebuttal evidence. A continued Hearing date of October 15, 2019 was decided upon. Due to the type of evidence being presented, the parties agreed to continue the October 15, 2019 Hearing, and both attorneys requested to waive their clients’ presence.

At the conclusion of the Hearing, both attorneys expressed an interest in providing closing briefs to the undersigned Hearings Officer. Both parties timely submitted their briefs by October 30, 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 assert four (4) issues in the Complaint:

1. Whether Respondents failed to offer an accessible program. Petitioners argue that the DOE did not provide Student with a program that was appropriately accessible. Parent 1 alleged that Parent 1 repeatedly advised the DOE that Student refused and was emotionally unable to attend the designated location to access Student's services.
2. Update of needed supports. Whether the Individualized Education Program (hereinafter "IEP") provides for the needed supports for Student to successfully access Student's program.
3. Sufficiency of supports and parent participation. Whether the supports and/or descriptions of the supports contained within the IEP are sufficient to address Student's behaviors and/or academic instructional needs and/or whether there were discussions regarding these supports.
4. Extended School Year (hereinafter "ESY") eligibility. Whether Student is provided Student's least restrictive environment in the ESY program provided and/or whether Student's ESY program is accessible without additional supports in Student's IEP. Whether Student

needed the provision of a one-to-one aide to access Student's ESY program and/or whether the IEP so provided.

III. FINDINGS OF FACT

1. Student has been diagnosed with Disability 1.²
2. Student is eligible for special education and related services pursuant to Individuals with Disabilities Education Act³ (hereinafter "IDEA") and Hawaii Administrative Rules (hereinafter "HAR") Chapter 60 under the category of Eligibility Category 1.⁴
3. Student attended Private Facility for educational instruction since about June 2015 until October 31, 2018, for approximately thirty (30) hours a week.⁵
4. Student also attended Private Facility for twenty-six (26) hours per week for services, which was paid for by the Agency 1.⁶ Student continues to receive the services paid for by the Agency 1 at Private Facility at least up until the time of the instant Hearing.⁷
5. Because of Student's disability, transitions are stressful for Student and a transition plan is necessary for Student to transfer from Private Facility to a public school, including Home School.⁸
6. In January 2018, Petitioners filed a Request for Due Process Hearing in DOE-SY1718-024 (hereinafter referred to as "Complaint-SY1718"), in which Petitioners alleged, *inter*

² See Respondents' Exhibit 2, page 11 (hereinafter referenced as "R-Ex.2, p.11.")

³ 20 U.S.C. Ch. 33

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⁵ Testimony of Private Provider Supervisor 1, *Transcript (Volume 2) page 108, lines 22 through page 109, line 8 (hereinafter referenced as "Tr. (V2) 108:22-109:8")*, *Tr. (V2) 147:7-20*, also Prior AHO's Decision, *R-Ex.4, p.131*.

⁶ Testimony of Private Provider Supervisor 1, *Tr. (V2) 123:15-17, 147:16-20*.

⁷ Testimony of Private Provider Supervisor 1, *Tr. (V2) 102:15-103:4, 137:6-117*.

⁸ Testimony of Private Provider Supervisor 1, *Tr. (V2) 108:22-109:8, 138:25-139:16*. See also Decision by Prior AHO, *R-Ex.4, p.134* and Individualized Education Plan (hereinafter "IEP") dated June 29, 2018 (hereinafter referenced as "IEP-6/29/2018"), *R-Ex.2, p.10-43*.

alia, that Student did not have a complete Individualized Education Plan (hereinafter “IEP”) with all components, including a transition plan.⁹

7. On June 6, 2018, a Decision was issued by Prior AHO in DOE-SY1718-024, wherein Prior AHO found that Respondents denied Student a Free Appropriate Public Education (hereinafter “FAPE”) by not developing a complete transition plan to transfer Student from Private Facility to Home School.¹⁰
8. As instructed by Prior AHO in the Decision, IEP meetings were held on June 15, 2018 and June 29, 2018 and an IEP was developed for Student (hereinafter referred to as “IEP-6/29/2018”).¹¹
9. In the “Clarification of Services and Supports” section of IEP-6/29/2018, the “Current Transition Plan” is outlined for Student’s transition from Private Facility to Home School.¹²
10. The “Current Transition Plan” read as follows: “Proposed transition was discussed with a start date no later than Friday, July 6, 2018. The DOE’s provider will observe [Student] at [Private Facility] to determine which will be most compatible with [Student]. DOE Provider 2 will shadow Private Facility Provider 2 for at least two weeks, starting with one hour per day for the first three days, then gradually increasing the time, depending on [Student’s] reaction to the DOE’s Provider 2. This process will continue until [Student] can be redirected consistently by the DOE’s Provider 2 when [Student] reacts negatively to environmental stimuli. Accompanied by the DOE’s Provider 2 and [Private Facility’s]

⁹ *R-Ex.4, p.112-119.*

¹⁰ *R-Ex.4, p.120-156.*

¹¹ *R-Ex.2, p.10-34.*

¹² *R-Ex.2, p.31.*

DOE Provider 2, [Student] will then transfer to [Home School], starting with one hour per day for the first three days, then gradually increasing the time based on [Student's] reaction to the new environment. Transition plan implementation and analysis of behaviors attributed to staff and environmental changes will be monitored by a provider and special education teacher to include request for input and collaboration with [Private Facility's] provider and staff."¹³

11. Any transition plan needed to include a gradual introduction for Student to any DOE personnel Student would be working with, as well as a gradual introduction to the public school that Student would be attending.¹⁴
12. Attempts were made by Respondents as early as July 5, 2018 to start the transition plan by arranging with Private Facility to go and start observations of Student and Student's service providers.¹⁵
13. Private Facility did not allow Respondents to timely start the transition plan due to Parent 1 not providing consent to Private Facility for Student observations.¹⁶
14. On or about July 9, 2018, Parent 1, through the attorney, provided the DOE notice that Parent 1 was rejecting the IEP-6/29/2018 and revoking 'existing consents' for any observations to be done or information to be received by DOE from Private Facility.¹⁷
15. On or about July 6, 2018, Petitioners filed another Request for Due Process Hearing, which was docketed under DOE-SY1819-004.¹⁸

¹³ *R-Ex.2, p.31.*

¹⁴ Testimony of Private Provider Supervisor 1, *Tr. (V2) 137:20-139:16.*

¹⁵ *R-Ex.3, p.82-85.*

¹⁶ *R-Ex.3, p.82-85*

¹⁷ *R-Ex.3, p.86.*

¹⁸ *R-Ex.3, p.87-95.*

16. A settlement agreement was reached in DOE-SY1819-004, which was signed by Parent 1 on October 10, 2018 (hereinafter referenced as “SA-10/10/2018”).
17. Pursuant to SA-10/10/2018, Student would attend Private Facility and DOE would pay for the tuition for Private Facility until October 31, 2018.¹⁹
18. Additionally, the SA-10/10/2018 contained a transition plan for Student to transition into Home School through a process outlined as follows: “Student’s transition plan will include the following: a) allowing DOE Provider 2 and/or other personnel to observe Student and the [Private Facility’s] service providers at [Private Facility]; b) allowing providers and/or other personnel to work with Student at [Private Facility] with [Private Facility’s] service providers; c) gradually increasing the time providers and/or other personnel work with Student at [Private Facility]; d) moving Student to an [sic] HDOE school where DOE Provider 2 will work with DOE providers and/or other service providers where Student will initially attend for a partial day; and, e) gradually increase Student’s time to a full school day at the HDOE school with providers. Student’s transition period will end no later than October 31, 2018.”²⁰
19. DOE Provider 1 was not familiar with the terms of the SA-10/10/2018, including the services of the transition plan.²¹
20. SSC was not familiar with the transition plan included in the IEP-6/29/2018 and believed that the transition plan was to be implemented by DOE Provider 1 and others.²²

¹⁹ *R-Ex.4, p.157-161.*

²⁰ *R-Ex.4, p.158.*

²¹ *Testimony of DOE Provider 1, Tr. (V2) 238:16-239-15.*

²² *Testimony of SSC, Tr. (V2) 194:5-11.*

21. SSC had not been in SSC's position as student services coordinator for more than a year when SSC's was assigned to Student's case.²³
22. SSC believed that since Student had already been assigned a provider, SSC did not have to coordinate the supplemental aids and services, or program modifications that were documented in IEP-6/29/2018.²⁴
23. On or about October 23, 2018, DOE Provider 1 started DOE Provider 1's observations of Student at Private Facility.²⁵
24. DOE Provider 1 observed Student at Private Facility approximately three (3) times for approximately three (3) hours each time between October 23 and October 31, 2018.²⁶ While DOE Provider 1 observed Student at Private Facility, DOE Provider 2 was there with DOE Provider 1.²⁷
25. No evidence was presented that DOE Provider 2 worked with Student at Private Facility as outlined in the "Current Transition Plan" in IEP-6/29/2018 or the transition plan in SA-10/10/2018.
26. Prior to November 1, 2018, Student had not been to Home School for any incremental amounts of time, and November 1, 2018 was Student's first day ever attending Home School.²⁸

²³ Testimony of SSC, *Tr. (V2) 178:18-179:10*.

²⁴ Testimony of SSC, *Tr. (V2) 193:22-194:11*.

²⁵ Testimony of DOE Provider 1, *Tr. (V2) 221:16-23*.

²⁶ Testimony of DOE Provider 1, *Tr. (V2) 221:24-222:6*.

²⁷ Testimony of DOE Provider 1, *Tr. (V2) 257:18-24*.

²⁸ Testimony of Parent 1, *Tr. (V2) 16:14-16*, Testimony of DOE Provider 1, *Tr. (V2) 239:16-19*.

27. On November 1, 2018, Student attended to Home School for a “full day”²⁹ and DOE Provider 1 observed Student at Home School for approximately three (3) hours that day.³⁰ On that day, Student was working with DOE Provider 2, at least for the period that DOE Provider 1 observed Student.³¹
28. While DOE Provider 1 described DOE Provider 2 working with Student on Student’s first day of school and the relationship being “positive,”³² no evidence was presented that DOE Provider 2 was providing the service to Student as outlined in IEP-6/29/2018 on Student’s first day at Home School.
29. Student’s special education class at Home School had approximately seven (7) total students.³³
30. On November 2 and November 7, 2018, Student also attended Home School for full days.³⁴ Student was out sick from Home School on November 5, 2018 and November 6, 2018 was a holiday.³⁵
31. On November 1, November 2, and November 7, 2018, SPED Teacher was away at trainings and did not teach Student on any of those days.³⁶

²⁹ While it is unclear how long a “full day” of school was in school year 2018-2019, it appears from [Home School’s] current 2019-2020 bell schedule.

³⁰ Testimony of DOE Provider 1, *Tr. (V2) 225:22-226:3, 226:16-227:10, see also PWN-1/25/2019, R-Ex.2, p.70.*

³¹ Testimony of DOE Provider 1, *Tr. (V2) 227:11-22.*

³² Testimony of DOE Provider 1, *Tr. (V2) 227:23-228:3.*

³³ Testimony of SPED Teacher, *Tr. (V2) 165:17-23.*

³⁴ Testimony of Parent 1, *Tr. (V2) 16:17-17:1, 17:8-11, R-Ex.2, p.70.*

³⁵ Testimony of Parent 1, *Tr. (V1) 64:11-5, Tr. (V2) 17:2-7.*

³⁶ Testimony of SPED Teacher, *Tr. (V2) 154:3-14.*

32. No credible evidence was provided to show that the teacher for Student's special education classes on November 1, November 2, and November 7, 2018 was a qualified special education teacher or was familiar with Student's IEP.
33. On or about November 7, 2018,³⁷ DOE Provider 1 observed Student for approximately three (3) hours and DOE Provider 2 was providing services to Student during that time.³⁸ DOE Provider 1 described the relationship between DOE Provider 2 and Student as "friendlier" on that date.³⁹
34. DOE Provider 1 testified that DOE Provider 1 consulted constantly with DOE Provider 2 regarding DOE Provider 1's work with Student and got feedback about Student from DOE Provider 2,⁴⁰ however DOE Provider 1 did not provide any testimony or insight into any information about DOE Provider 2's working relationship with Student,⁴¹ other than to describe one specific incident that occurred between Student and DOE Provider 2 on Student's first day of school⁴² and to say that Student's transition at Home School was 'progressively getting better.'⁴³

³⁷ While DOE Provider 1 could not remember the exact date of DOE Provider 1's observation, DOE Provider 1 stated that DOE Provider 1 observed Student on Student's first day, which would have been November 1, and then several days later, but not on the date when Student was laying under the table, and not on Student's last day, therefore, based on the information available, the date of the second observation of Student would be November 7, 2018. *See* Testimony of DOE Provider 1, *Tr. (V2) 225:22-231:21*.

³⁸ Testimony of DOE Provider 1, *Tr. (V2) 229:11-25*.

³⁹ Testimony of DOE Provider 1, *Tr. (V2) 230:2-11*.

⁴⁰ Testimony of DOE Provider 1, *Tr. (V2) 228:23-229:1*.

⁴¹ *See generally* Testimony of DOE Provider 1, *Tr. (V2) 225:22-231:21*,

⁴² Testimony of DOE Provider 1, *Tr. (V2) 228:15:22*.

⁴³ Testimony of DOE Provider 1, *Tr. (V2) 251:3-9*.

35. DOE Provider 1 did not have any discussions with Private Facility's Provider 1 requesting further assistance or consultation from Private Facility in working with Student after November 1, 2018.⁴⁴
36. On November 8, 2018, Student again attended a full day of school and SPED Teacher did observe Student in the special education classroom. On that date, Student had support from DOE Provider 2 in class.⁴⁵
37. On November 8, 2018, at some point during one of Student's classes, Student sat under a table and refused to come out from under the table for a period of approximately fifteen (15) to twenty (20) minutes.⁴⁶
38. DOE Provider 2 was unable to convince Student to come out from under the table, but Student eventually came out when Student observed other students getting ready to go to another classroom.⁴⁷
39. DOE Provider 1 was not present to observe Student on November 8, 2018, so DOE Provider 1 did not observe the incident of Student sitting under the table and refusing to come out.⁴⁸
40. On November 9, 2018, Parent 1 brought Student to Home School late, and Student refused to enter the classroom.⁴⁹
41. Student sat outside the classroom door and refused to enter the classroom for over one (1) hour before Parent 1 took Student away from Home School. Parent 1 contacted Private

⁴⁴ Testimony of DOE Provider 1, *Tr. (V2) 232:9-13*.

⁴⁵ Testimony of SPED Teacher, *Tr. (V2) 154:3-155:19*.

⁴⁶ Testimony of SPED Teacher, *Tr. (V2) 156:10-160:11*.

⁴⁷ Testimony of SPED Teacher, *Tr. (V2) 158:7-160:6*.

⁴⁸ Testimony of DOE Provider 1, *Tr. (V2) 230:21-231:18*.

⁴⁹ Testimony of SPED Teacher, *Tr. (V2) 166:1-167:2*.

Facility and asked if they could take Student that day for the Agency 1's funded services.⁵⁰

42. At the time Student was refusing to enter the classroom, DOE Provider 3 and DOE Provider 2 were attempting to convince Student to go into class.⁵¹ SPED Teacher did not assist with attempting to get Student to go into the classroom.⁵²

43. DOE Provider 1 was not present during the incident where Student refused to enter the classroom, nor did DOE Provider 1 provide guidance to DOE Provider 2 at the time of the incident to assist in getting Student to enter the classroom.⁵³

44. SSC did not observe Student in any of the classes until November 8, 2018, when SSC went to check on Student because SPED Teacher called SSC about Student refusing to come out from under the table.⁵⁴ SSC left the classroom as soon as DOE Provider 4 came to check on Student.⁵⁵

45. On November 9, 2018, after Student refused to enter the classroom, Parent 1 took Student away from the school and contacted Private Facility to ask if they would take Student for the day.⁵⁶

46. Student has been attending Private Facility for twenty-six (26) hours per week since November 9, 2018 for social services care, which is funded by the Agency 1.⁵⁷

⁵⁰ Testimony of Parent 1, *Tr. (V1) 50:20-52:14*.

⁵¹ Testimony of SPED Teacher, *162:11-165:16*.

⁵² Testimony of SPED Teacher, *Tr. (V2) 164:20-165:16*.

⁵³ Testimony of DOE Provider 1, *Tr. (V2) 255:5-10*.

⁵⁴ Testimony of SSC, *Tr. (V2) 179:18-182:9*.

⁵⁵ Testimony of SSC, *Tr. (V2) 181:9-183:9*.

⁵⁶ Testimony of Parent 1, *Tr. (V1) 50:20-51:11*.

⁵⁷ Testimony of Private Provider Supervisor 1, *Tr. (V2) 111:7-17*.

47. Student's social services care does not include classroom instruction, and instead consists of community-based activities that are designed to help Student with skills.⁵⁸
48. Private Facility conducts annual developmental assessments to determine the level of learning ability that Student had developed in Agency 1's funded program.⁵⁹
49. In October 2017, Private Provider Supervisor 1 assessed Student primarily in the areas of skills and determined that Student was at what they considered "Level 1 learner."⁶⁰
50. In October 2018, Private Provider Supervisor 1 again assessed Student in the areas of skills and determined that Student was at what they considered "Level 2 learner," which was considered higher than Student's previous assessment results of "Level 1 learner."⁶¹
51. In July 2019, Private Provider Supervisor 1 again assessed Student in the areas of communication and social skills and determined that Student had regressed back to "pre-primary," which was below "Level 1 Learner."⁶²
52. At Private Facility, when Student attended the educational program prior to November 1, 2018, Student received about thirty (30) hours of educational instruction.⁶³
53. Private Facility has a special education curriculum that was previously tailored to Student's educational needs, and they currently have a special education curriculum at Private Facility that could be tailored to meet Student's educational needs.⁶⁴

⁵⁸ Testimony of Private Provider Supervisor 1, *Tr. (V2) 122:1-124:25*.

⁵⁹ Testimony of Private Provider Supervisor 1, *Tr. (V2) 120:17-121:14*.

⁶⁰ Testimony of Private Provider Supervisor 1, *Tr. (V2) 111:18-112:2*.

⁶¹ Testimony of Private Provider Supervisor 1, *Tr. (V2) 112:2-4, 120:17-22*.

⁶² Testimony of Private Provider Supervisor 1, *Tr. (V2) 112:4-6, 121:23-25*.

⁶³ Testimony of Private Provider Supervisor 1, *Tr. (V2) 147:7-13*.

⁶⁴ Testimony of Private Provider Supervisor 1, *Tr. (V2) 102:15-17, 135:3-20*.

54. Student has not received any school-based educational instruction since November 8, 2018.⁶⁵
55. Private Facility Provider 2 reported to Private Provider Supervisor 1 that when Private Facility Provider 2 went to pick Student up from Home School on two occasions after October 31, 2018, Private Facility Provider 2 observed Student laying under a table and the DOE Provider 2 said that “[Student] couldn’t handle this,”⁶⁶ and on another occasion, Private Facility Provider 2 observed a teacher at Home School yelling at Student “if you want to eat Parent 1’s food, you’d better get up now.”⁶⁷ While Private Facility Provider 2 did not testify at the Hearing, and Private Facility Provider 2’s credibility could not be evaluated in person, this Hearings Officer finds that no credible evidence was presented to refute these allegations, nor was any evidence or argument offered to suggest that these allegations were untrue.
56. While SPED Teacher testified that SPED Teacher did not yell at Student,⁶⁸ SPED Teacher’s testimony acknowledged that SPED Teacher was not present at Home School on the first few days when Student transferred to Home School.⁶⁹
57. DOE Provider 2 did not testify at the hearing, nor were any records, e-mails, documents, or any other types of notes presented on behalf of DOE Provider 2 to provide any insight as to DOE Provider 2’s account of what happened with Student on November 1, 2, 7, and 8 when Student attended Home School.

⁶⁵ Testimony of Private Provider Supervisor 1, *Tr. (V2) 102:15-103:10, 110:11-111:17, 122:1-124:20, 131:4-131:10.*

⁶⁶ Testimony of Private Provider Supervisor 1, *Tr. (V2) 105:1-6.*

⁶⁷ Testimony of Private Provider Supervisor 1, *Tr. (V2) 105:10-24.*

⁶⁸ Testimony of SPED Teacher, *Tr. (V2) 167:17-21.*

⁶⁹ Testimony of SPED Teacher, *Tr. (V2) 154:3-14.*

58. No evidence was presented that DOE Provider 2 had any of the necessary qualifications as outlined in IEP-6/29/2018 as follows: “multiple modality of communication, knowledge of students [*sic*] behavior disorder, knowledge of [Student’s] medical needs, awareness of Student’s daily programming (reinforcements, socialization, behavior, visual supports, and ___ words).”⁷⁰

59. Parent 1 contacted Home School to request an IEP meeting to address the concerns about Student’s refusal to go to Home School after the transition for Student from Private Facility to Home School had failed.⁷¹

60. SSC attempted to contact Parent 1 about Student not attending school by sending an e-mail to Parent 1 on or about November 16, 2018.⁷²

61. An IEP meeting was scheduled for November 19, 2018, and Parent 1 appeared by teleconference. At the time of the meeting, Parent 1 did not have a copy of the IEP-6/29/2018 or access to the IEP, so the IEP team decided that there was “no reason for us to go over this, to go on with the meeting, because [Parent 1 had] no documents to basically refer to.”⁷³

62. No attempt was made at that time by the IEP team to inquire with Parent 1 why Student was not attending Home School and/or if there was anything that could be done to help Student get back to school.

⁷⁰ See *R-Ex.2, p.31*.

⁷¹ Testimony of Parent 1, *Tr. (V1) 54:15-2, 59:4-10, also* Testimony of SSC, *Tr. (V2) 190:11-21*.

⁷² Testimony of SSC, *Tr. (V2) 183:20-15, R-Ex.3, p.100*.

⁷³ Testimony of SSC, *Tr. (V2) 185:4-24*.

63. The IEP meeting was then rescheduled for November 26, 2018, where Parent 1 was again to appear by teleconference by calling into the IEP meeting. On November 26, 2018, the IEP meeting did not proceed due to Parent 1 not calling into the meeting.⁷⁴
64. SSC sent letters to Parent 1 on November 28, 2018 and December 4, 2018 to ask Parent 1 about possible dates for an IEP meeting.⁷⁵ In the December 4, 2018 letter, SSC offered three (3) possible dates, one of which was January 7, 2019.⁷⁶
65. Parent 1 responded to the December 4, 2019 letter and indicated that January 7, 2019 was an agreeable date for the IEP meeting.⁷⁷
66. The IEP meeting was rescheduled from January 7, 2019 to January 23, 2019.⁷⁸
67. Prior to January 12, 2019, DOE Provider 1 contacted Parent 1 and left a message offering to help in getting Student back to school.⁷⁹
68. On January 23, 2019, an IEP meeting was held with Parent 1 being present through teleconference and having a neighbor serve as the interpreter.⁸⁰ Home School also had an interpreter present with the IEP team to provide translation to Parent 1 during the meeting.⁸¹

⁷⁴ Testimony of SSC, *Tr. (V2) 187:16-20*.

⁷⁵ Testimony of SSC, *Tr. (V2) 187:20-23*.

⁷⁶ Testimony of SSC, *Tr. (V2) 187:23-188:1*.

⁷⁷ Testimony of SSC, *Tr. (V2) 188:3-4, R-Ex.3, p.101*.

⁷⁸ Testimony of SSC, *Tr. (V2) 189:1-7*.

⁷⁹ Testimony of Parent 1, *Tr. (V1) 66:19-67:25*. See also E-mail from Parent 1 to SSC re: DOE Provider 1's message asking to help. *R-Ex.3, p.103*.

⁸⁰ Testimony of Parent 1, *Tr. (V2) 92:7-93:3*, Testimony of SSC, *Tr. (V2) 194:18-195:8, 197:10-21*, also *R-Ex.2, p.68-69*.

⁸¹ *R-Ex.2, p. 68-69*.

69. Prior to the IEP meeting on January 23, 2019, no draft IEPs or written proposals were sent to Parent 1 from the Home School members of the IEP team, including SSC or DOE Provider 1.
70. At the January 23, 2019 IEP meeting, the Home School based team members, including DOE Provider 1, proposed to Parent 1 that they send DOE Provider 1 and DOE Provider 2 to Student's home to work with Student and Parent 1 to get Student to come back to school.⁸²
71. In response to the IEP team's proposals, Parent 1 told them to put what they were proposing into the IEP so Parent 1 could discuss it with Parent 1's lawyer.⁸³
72. The IEP team wrote notes documenting the suggestions made at the meeting in the IEP in the Present Levels of Educational Performance Sections (hereinafter "PLEPS") in the IEP dated January 23, 2019 (hereinafter "IEP-1/23/2019"). The IEP team did not make any revisions or changes to any of Student's Annual Goals, ESY plan, or Services, including the "Clarification of Services and Supports" section or the "Current Transition Plan."⁸⁴
73. The IEP team did not document anything about the proposal to send DOE Provider 1 and DOE Provider 2 to Student's home in IEP-1/23/2019, including in the PLEPS, where other notes were documented from the January 23, 2019 meeting.⁸⁵
74. On February 4, 2019, SSC sent Parent 1 IEP-1/23/2019, which SSC called Student's "revised IEP" and a Prior Written Notice (hereinafter "PWN") dated January 25, 2019.⁸⁶

⁸² Testimony of DOE Provider 1, *Tr. (V2) 233:1-234:23*, also PWN, *R-Ex.2, p.71-72*.

⁸³ Testimony of Parent 1, *Tr. (V1) 26:21-23, 29:1-30:11, 31:19-22, 38:16-39:12*, see also Time-stamped portions of the IEP meeting recording, *Petitioners' Exhibits 9 and 10*.

⁸⁴ See IEP-6/29/2018, *R-Ex.2, p.10-43*, and IEP-1/23/2019, *R-Ex.2, p.44-68*.

⁸⁵ *R-Ex.2, p.44-68*.

⁸⁶ *R-Ex.3, p.106*.

75. In the PWN, the IEP team documented: “In response to Parent 1’s concern of [Student] not wanting to attend [Home School], Team proposed to have DOE Provider 1 and DOE Provider 2 to provide behavioral intervention strategies in the home to support [Student] and family in establishing morning routines and addressing behaviors associated with going to school. Team also proposed staff in the bus addressing behaviors associated with going to school.” Further along in the PWN, it is also noted that “providers to be given an opportunity to provide in home support for a smooth home to school [Home School] transition.” Finally, in the PWN under “Other relevant factors” it notes that as of meeting date of January 23, 2019, “Proposed action of DOE Provider 1 and DOE Provider 2 to meet at public location in the morning to address behaviors was considered by Parent 1 and [Parent 1] will provide DOE with a respond [*sic*] to this proposal in two weeks.”⁸⁷

76. The PWN did not provide any projected date for the beginning of the services, or the anticipated frequency, location and duration of the proposal by the DOE. The PWN also did not include a description of any specific services to be done or provided that were being proposed for DOE Provider 1 and DOE Provider 2 to work with Student and Parent 1 either in their home or in a public place.⁸⁸

77. DOE Provider 1’s proposal for the home services with Parent 1 and Student involved “multiple home visits to assist the Parent 1 in decreasing the aversiveness of coming to school and with the aims of establishing something positive with it.”⁸⁹

⁸⁷ *R-Ex.2, p.71.*

⁸⁸ *R-Ex.2, p.70-72.*

⁸⁹ Testimony of DOE Provider 1, *Tr. (V2) 233:24-234:1.*

78. On February 5, 2019, Parent 1 sent Home School notice that Parent 1 was rejecting the IEP that was sent to Parent 1 on February 4, 2019.⁹⁰

79. The Home School based IEP team members did not make any efforts to follow up with Parent 1 to inquire about their proposals (as listed in the PWN), or to have any additional IEP meetings until approximately May 2019, when SSC sent an e-mail to Parent 1 about an annual IEP meeting.⁹¹

80. SSC believed that Parent 1's consent was necessary for DOE Provider 1 and DOE Provider 2 to provide the proposed services to Parent 1 and Student in their home,⁹² but SSC did not attempt to send Parent 1 any consent forms to acquire Parent 1's consent to begin the proposed services.⁹³

81. SSC did send e-mails to Parent 1 in March 2019 informing Parent 1 that Student was eligible for ESY services during Spring Break and Summer Session, along with registration forms for Parent 1 to register Student for the ESY sessions.⁹⁴

82. Parent 1 did not register Student for ESY, nor did Parent 1 contact Home School regarding any follow up IEP meetings or requests for assistance to get Student back to school.⁹⁵

83. Student has not attended any school in an educational setting (either at Home School, Private Facility or any other educational institution) since November 8, 2018.⁹⁶

⁹⁰ *R-Ex.3, p.106.*

⁹¹ *See, e.g. Testimony of SSC, Tr. (V2) 208:5-210:12.*

⁹² *Testimony of SSC, Tr. (V2) 207:7-208:4.*

⁹³ *Testimony of SSC, Tr. (V2) 209:3-5.*

⁹⁴ *R-Ex.3, p.107-111.*

⁹⁵ *Testimony of SSC, Tr. (V2) 207:22-208:4.*

⁹⁶ *Testimony of Parent 1, Tr. (V1) 54:15-25, Tr. (V2) 18:9-20, 50:12-54:12, Testimony of Private Provider Supervisor 1, Tr. (V2) 110:17-111:17, 122:1-126:16, 127:23-128:21, 129:23-131:10.*

84. Private Facility is an organization that currently provides services that has recently gone through a restructuring plan to comply with state and federal requirements with an approach that addresses the needs of all students, including struggling learners and students with disabilities and integrates assessment and interventions.⁹⁷
85. Private Facility currently has multiple special education curriculums and a special education teacher on staff and can create a curriculum and develop programs for Student based on assessments they do to determine what Student's current levels are.⁹⁸
86. Private Facility's monthly tuition is Four Thousand Dollars (\$4,000), and included in the cost for Student's education is also: 1) a provider at One Hundred Sixty-Five Dollars (\$165) an hour for one and a half (1.5) hours a week, 2) a provider for services for Student at Sixty-Five Dollars (\$65) an hour for six (6) hours a day, five (5) days a week, 3) provider at One Hundred Fifteen Dollars (\$115) an hour for one (1) hour a week, and additional costs for assessments as necessary. The total estimated monthly cost for five (5) days a week of school and four (4) weeks a month for Student based on the above-rates is Thirteen Thousand Two Hundred Fifty Dollars (\$13,250). These are the rates for the 2019-2020 School Year.⁹⁹

IV. CONCLUSIONS OF LAW

A. Respondents failed to provide Student with an accessible program with updated supports sufficiently designed to address Student's educational needs.

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

⁹⁷ *Petitioners' Exhibit 9, pages 76-102.*

⁹⁸ *Testimony of Private Provider Supervisor 1, Tr. (V2) 115:3-10, 134:19-136:16.*

⁹⁹ *Petitioners' Exhibit 9, page 64.*

services designed to meet their unique needs.”¹⁰⁰ A FAPE includes both special education and related services.¹⁰¹

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.¹⁰² 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.”¹⁰³

One of the IDEA’s most important mechanisms for achieving its lofty goals is the formulation and implementation of IEPs.¹⁰⁴ Under Hawaii Administrative Rules Chapter 8-60-44, each student with a disability shall have a written statement that is developed, reviewed, and revised in a meeting in accordance with that Chapter, and shall include such matters as the child’s present level of academic achievement, annual goals for the child, how progress toward those goals is to be measured and “(4) a statement of the special education and related services and supplementary aids and services, [] to be provided to the student, or on behalf of the student, and a statement of the program modifications or supports for school personnel that will be provided to the student” to access his or her education in compliance with the IDEA.¹⁰⁵ The IEP shall also include “the projected date for the beginning of the services and modifications described in paragraph (4), the anticipated frequency, location, and duration of those services and

¹⁰⁰ *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)).

¹⁰¹ 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.

¹⁰² H.A.R. § 8-60-2; 34 C.F.R. §300.34, 300.39.

¹⁰³ *Dep’t of Educ. of Hawai’i v. Leo W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

¹⁰⁴ *Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d. 811, 817 (9th Cir. 2007).

¹⁰⁵ Hawaii Administrative Rules §8-60-44, *see also* 20 U.S.C. §1414(d).

modifications.”¹⁰⁶ The IEP is to be formulated by a team that includes the child’s parents, regular and special education teachers, a district representative and other individuals with relevant expertise.¹⁰⁷

The Ninth Circuit Court of Appeals in *Van Duyn*, first considered challenges to the implementation, as opposed to the content, of an IEP.¹⁰⁸ After examining other jurisdictions’ assessments to challenges of implementation, the Ninth Circuit adopted the standard of materiality in determining whether a failure to implement an IEP equated to a denial of FAPE.¹⁰⁹ A material failure to implement an IEP in violation of the IDEA occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.¹¹⁰ In determining whether a material failure has occurred, the child’s educational progress may be probative of whether there has been more than a minor shortfall in the services provided.¹¹¹

Here, Petitioners argue that Respondents failed to provide Student an accessible program when the initial transition from Private Facility to Home School had failed, and Student refused to attend Home School. Petitioners further argue that Student’s IEP needed updating regarding the supports for Student to access the program at Home School, and whether the supports that were contained in the IEP or any discussions regarding the proposed supports were sufficient to address Student’s behaviors and/or academic instructional needs after the failed transition and Student had refused to attend Home School.

¹⁰⁶ Hawaii Administrative Rules §8-60-44, *see also* 20 U.S.C. §1414(d).

¹⁰⁷ *Id.* at 818 (*emphasis added*).

¹⁰⁸ *Id.* at 818.

¹⁰⁹ *Id.* at 821-822 (*examining the Fifth Circuit’s decision in Bobby R. [further cite], 200 F.3d at 349, and the Eighth Circuit’s decision in Clark, 315 F.3d at 1027*).

¹¹⁰ *Id.* at 822.

¹¹¹ *Id.* at 822.

Based on the Findings of Facts, as well as the analysis set forth below, this Hearings Officer concludes that Respondents denied Student a FAPE by failing to provide an accessible program when the initial transition from Private Facility to Home School had failed due to Respondents' failure to follow the transition plans as outlined in both Student's IEP-6/29/2018 and the SA-10/10/2018. Respondents further denied Student a FAPE by failing to follow up with necessary updates and supports for Student once they were informed that Student was refusing to attend school based on the failed transition.

1. Respondents' failure to implement the transition plan as outlined in Student's IEP-6/29/2018 and the SA-10/10/2018 was a material failure to implement the IEP in violation of the IDEA.

In Student's IEP-6/29/2018, the IEP team recognized the necessity of a transition plan for Student to be able to attend Home School. Specific terms of the transition for Student were laid out as part of the transition plan, as required by a prior Decision in DOE-SY1718-024.¹¹² Perhaps most importantly included in the transition plan was the gradual introduction of DOE staff to Student, and the gradual introduction of Student into the DOE environment.¹¹³ The provider to be assigned to Student was to initially observe Student to determine the appropriate provider to be assigned to Student, and after being assigned, the provider was to slowly incorporate his or her services with the Private Facility's assigned provider to work with Student until Student reacted appropriately to the DOE's assigned provider's instructions. A provider from the DOE and Student's Special Education Teacher were to monitor the transition plan and

¹¹² The prior decision in DOE-SY1718-024 also concluded that "[i]t is undisputed that Student requires a transition plan to assist Student in moving from Private Facility to Public School. The transition plan in this case is a necessary supplementary support that will enable Student to advance toward attaining Student's annual goals, to participate in extracurricular and other nonacademic activities and to be educated and participate with other disabled and non-disabled children." *R-Ex.4, p.141*.

¹¹³ FOF 10.

analyze behaviors of Student and request input and collaboration from Private Facility's providers and staff.¹¹⁴

The transition plan was not implemented as of July 6, 2018, due to the non-cooperation of Private Facility and Parent 1, and another Request for Due Process Hearing was filed by Petitioners.¹¹⁵ As a result of negotiations in DOE-SY1819-004, a Settlement Agreement was created and was signed by Parent 1 on October 10, 2018 (hereinafter referred to as "SA-10/10/2019").¹¹⁶ In the SA-10/10/2018, the DOE agreed to pay for Student's tuition at Private Facility for the period ending on October 31, 2018.¹¹⁷ The SA-10/10/2018 also had a transition plan, which again included a plan for DOE personnel to work with Private Facility's personnel to gradually introduce DOE's personnel to Student, and to gradually introduce Student into the DOE environment of Home School, starting with a partial day, and gradually increasing Student's time at Home School to a full day.¹¹⁸ This transition plan was to end no later than October 31, 2018.¹¹⁹ No start date was included in SA-10/10/2018, despite the previous holding by Prior AHO that having a start date was a necessary component of Student's transition plan.¹²⁰

In both transition plans, gradually introducing Student to DOE personnel as well as to the DOE environment at Home School were clearly outlined and were important components of a successful transition for Student. The evidence in this case is that the DOE personnel (DOE Provider 1 and DOE Provider 2) were able to go to Private Facility to observe Student.¹²¹ No

¹¹⁴ FOF 10.

¹¹⁵ The due process hearing request was submitted on or about July 9, 2018 and was docketed under DOE-SY1819-004, *see* FOF 12-15.

¹¹⁶ FOF 16.

¹¹⁷ FOF 17.

¹¹⁸ FOF 18.

¹¹⁹ FOF 18.

¹²⁰ FOF 18.

¹²¹ FOF 23-24.

evidence was presented as to how many hours DOE Provider 2 spent at Private Facility without DOE Provider 1, or whether the DOE Provider 2 gradually increased Student's time working with Student and was able to redirect Student successfully at any point in the observation period at Private Facility.¹²² No evidence was presented Student was able to successfully work with and get along with DOE Provider 2 other than DOE Provider 1's testimony that their relationship was "positive."¹²³

Notwithstanding the specific language in the transition plans in IEP-6/29/2018 and the SA-10/10/2018 for Student's gradual transition from Private Facility to Home School, Student did not transition gradually into Home School. The undisputed evidence is that Student went to Home School on November 1, 2, 7, and 8, 2018 for full school days.¹²⁴ On November 9, 2018, Student was brought to Home School by Parent 1 and refused to go into the classroom, so Parent 1 took Student out of school.¹²⁵

On Student's first three (3) days of school, SPED Teacher was not present to teach Student or monitor the "transition plan implementation and analysis of behaviors attributed to staff and environmental changes," as noted in IEP-6/29/2018.¹²⁶ On Student's first and presumably third days of school, DOE Provider 1 was present for approximately three (3) hours and made observations of Student after which DOE Provider 1 noted that Student's transition was "progressively getting better."¹²⁷ SSC did not meet with or observe Student in school until several days after Student had been attending for full school days,¹²⁸ and SSC had not monitored

¹²² FOF 25.

¹²³ FOF 33.

¹²⁴ FOF 27, 30, 36.

¹²⁵ FOF 40-41.

¹²⁶ FOF 31.

¹²⁷ FOF 27, 33.

¹²⁸ FOF 44.

or assessed whether or not Student was getting Student's required services, as SSC believed it was another person's responsibility.¹²⁹

Despite being the person who would presumably have the most knowledge of whether Student's transition into Home School was successful, DOE Provider 2 did not testify at the Hearing.¹³⁰ Based on this lack of evidence, this Hearings Officer cannot even conclude that DOE Provider 2 had the necessary qualifications as outlined in IEP-6/29/2018, or if DOE Provider 2 even worked with Student to provide any of the services and supports listed in Student's IEP.¹³¹

The DOE had a responsibility to provide Student a FAPE, which in this case included a successful transition from Private Facility into Home School. The importance of a gradual transition into Home School was important enough for Prior AHO, the IEP team and the parties negotiating the settlement agreement in this case to put into various documents. Based on the DOE's failure to follow a clearly outlined transition plan with necessary components, such as a gradual introduction of Student into Home School's staff and environment, they denied Student the ability to access Student's services. This failure was a material failure to implement Student's IEP-6/29/2018 and resulted in Student not receiving any educational opportunities after Student stopped attending Home School on November 8, 2018.

2. Respondents had a responsibility to follow up with necessary updates of Student's supports to provide Student with access to the program under the IEP-6/29/2018.

Petitioners argue that Student's IEP did not provide updates for the needed supports for Student to access services, and the discussion regarding the supports was deficient in that it resulted in an additional denial of FAPE. Based on the discussion below, this Hearings Officer

¹²⁹ FOF 22.

¹³⁰ FOF 34, 57.

¹³¹ FOF 58.

finds that the failure of Respondents to follow up with needed updates for Student's IEP to access Student's services after the failed transition resulted in a loss of educational opportunity to Student and a denial of FAPE.

Hawaii Administrative Rules Chapter 8-60-48(b)(1)(B)¹³² 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.

Hawaii Administrative Rules Chapter 8-60-37(a)(2) further provides, in relevant part,

(a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and *as part of any reevaluation*, the IEP and other qualified professionals, as appropriate, shall:

(1) Review existing evaluation data on the student, including:

- (A) Evaluations and *information provided by the parents of the student*;
- (B) Current classroom-based or State assessments, and *classroom-based observations*; and
- (C) *Observations by teachers and related services providers*; and

(2) On the basis of that review, and input from the student's parents, identify what additional data, if any, are needed to determine:

(D) Whether any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP of the student and to participate, as appropriate, in the general education curriculum.

In this case, Respondents had an affirmative duty to revise Student's IEP to meet Student's educational and related needs.¹³³ Parent 1 requested an IEP meeting to address the problem with Student not attending school after the failed transition from Private Facility to

¹³² Also 34 C.F.R. §300.324(b)(1)(ii).

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

Home School.¹³⁴ The initial meeting was held on November 19, 2018 but did not fully proceed because Parent 1 did not have a copy of the IEP-6/29/2018. Even though Parent 1 did not have the IEP in front of Parent 1, this initial meeting in November 2018 was an opportunity for the IEP team to at least initially inquire with Parent 1 as to the reasons why Student was not attending Home School. Instead of using that opportunity to determine next steps in assisting Student, the IEP team decided that there was no reason to go on with the meeting since they were only going to go over the June 2018 IEP and Parent 1 could not refer to it.¹³⁵

Due in large part to Parent 1's lack of cooperation and communication,¹³⁶ the next IEP meeting did not occur until January 23, 2019.¹³⁷ At this IEP meeting, the IEP team proposed to Parent 1 that DOE Provider 1 and DOE Provider 2 go to Parent 1's home to assist Parent 1 with Student to allow Student to come back to Home School.¹³⁸ This idea was also brought up to Parent 1 prior to the IEP meeting by DOE Provider 1.¹³⁹ Prior to the IEP meeting, no one had sent any draft IEPs, proposals or documents outlining a plan for services by DOE Provider 1 and DOE Provider 2 to be provided to Parent 1 and Student at the home. No evidence was provided to support that the IEP team had even attempted to review any existing data from the four (4) days that Student attended Home School, including observations by SPED Teacher or any other teachers that observed Student on those days, or any observations by DOE Provider 1 or DOE Provider 2. In fact, no evidence was provided to demonstrate that any of that data even existed. During the discussions held at the January 23, 2019 IEP meeting, Parent 1 did not provide

¹³⁴ FOF 60.

¹³⁵ FOF 61-62.

¹³⁶ FOF 63-66.

¹³⁷ FOF 68.

¹³⁸ FOF 70.

¹³⁹ FOF 67.

immediate feedback but instead asked the IEP team to put the information into the IEP, so Parent 1 could discuss it with Parent 1's lawyer.¹⁴⁰

Despite Parent 1's request for the IEP team to put their proposal into the IEP-1/23/2019, and the IEP team's meeting notes from January 23, 2019, nothing about the proposal for DOE Provider 1 and DOE Provider 2 was included in IEP-1/23/2019.¹⁴¹ The IEP team did include some language about the proposal in the PWN provided to Parent 1 on or about February 4, 2019.¹⁴² The IEP team's proposals, included in the PWN, were described as follows: "[i]n response to Parent 1's concern of [Student] not wanting to attend [Home School], Team proposed to have providers to provide behavioral intervention strategies in the home to support [Student] and family in establishing morning routines and addressing behaviors associated with going to school. Team also proposed a behavioral support staff in the bus addressing behaviors associated with going to school." Further along in the PWN, it is also noted that "For providers to be given an opportunity to provide in home support for a smooth home to school [Home School] transition." Finally, in the PWN under "Other relevant factors" it notes that as of meeting date of January 23, 2019, "Proposed action of providers) to meet at public location in the morning to address behaviors associated with going to school was considered by Parent 1 and [Parent 1] will provide DOE with a respond [*sic*] to this proposal in two weeks."

While Respondents argue that they attempted to help work with Petitioners to get Student back to Home School, this proposal was insufficient. Given the failure of Respondents to correctly implement the transition plan for Student to go from Private Facility to Home School, it is understandable that Parent 1 was not inclined to simply agree with a proposal verbally given to

¹⁴⁰ FOF 71.

¹⁴¹ FOF 73.

¹⁴² FOF 75.

Parent 1 at an IEP meeting. Further, Respondents' plan did not have any meaningful content, including proposed start dates, consultations times and/or daily/weekly hours, a description of specific services or strategies that would be used, or any assessments that would be done on Student as part of the proposals.¹⁴³ Respondents' argument that more information was needed in order to propose a specific plan to be put into the IEP is misguided, as DOE Provider 1 already had an initial plan for what services would have been provided.¹⁴⁴ This initial plan, with the requisite proposed details such as a start date and frequency information, could have been proposed as a draft in writing to provide to Parent 1 for Parent 1's consideration and consultation with Parent 1's lawyer.

Additionally, even after issuing the PWN and noting that Parent 1 was to respond to the DOE's proposal within two weeks, Respondents did not make any attempts to follow up with Parent 1 about the proposed plan and/or additional revisions to the IEP.¹⁴⁵ Respondents also did not provide any consent forms to Parent 1 to get Parent 1's consent to the proposal for DOE Provider 1 and DOE Provider 2's in home services.¹⁴⁶ The only attempt that was made by Respondents to contact Parent 1 about the proposed revisions to the IEP after the January 23, 2019 IEP meeting was in May 2019, when SSC sent a letter to Parent 1 about meeting for Student's annual IEP meeting.¹⁴⁷ Prior to that, the only documented contact between Home School and Parent 1 was e-mails sent to Parent 1 about Student's eligibility for ESY and the necessary registration forms.¹⁴⁸ Respondents knew by the January 23, 2019 meeting that Student

¹⁴³ See FOF 75-76.

¹⁴⁴ FOF 77.

¹⁴⁵ FOF 79.

¹⁴⁶ FOF 80.

¹⁴⁷ FOF 79.

¹⁴⁸ FOF 81.

was refusing to attend Home School because of the failed transition, but they took no significant steps to remedy the situation and provide Student a FAPE.

D. Petitioners have failed to prove that Respondents did not provide sufficient supports in Student's Extended School Year program.

Petitioners failed to present evidence on the issue of ESY regarding Student being placed in the least restrictive environment or whether Student's program was written in the IEP was sufficient to address Student's educational needs. While Petitioners submitted a lengthy argument about general ESY considerations in their closing brief, no evidence was presented to support the arguments under this issue. Given the lack of evidence presented on this issue by Petitioners, this Hearings Officer finds that Petitioners have not met their burden of proving this issue by a preponderance of the evidence.

E. Student is entitled to Compensatory Education based on Respondents' failure to provide Student a FAPE since November 2018.

When a child with a disability is deprived of a FAPE in violation of the IDEA, a court and/or hearing officer fashioning appropriate relief¹⁴⁹ may order compensatory education.¹⁵⁰ Generally, said denial must be more than *de minimis*.¹⁵¹ Under this interpretation, only material failures are actionable under the IDEA.¹⁵² Thus, for an award of compensatory education to be granted, a court and/or hearing officer must first ascertain whether the aspects of the IEP that

¹⁴⁹ See 20 U.S.C. 1415(i)(2)(C)(iii); 34 C.F.R. 300.516(c)(3); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985).

¹⁵⁰ *R.P. ex rel. C.P. v. Prescott Unified School Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C.Cir. 2005)).

¹⁵¹ *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 75, 47 IDELR 223 (D.D.C. 2007) (court found no evidence that the handful of missed speech therapy sessions added up to a denial of FAPE) quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348 – 349, 31 IDELR 185 (5th Cir. 2000), *cert. denied*, 531 U.S. 817, 111 LRP 30885 (2000).

¹⁵² *Banks v. District of Columbia*, 720 F. Supp. 2d 83, 54 IDELR 282 (D.D.C. 2010); 583 F. Supp. 2d 169; *S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 51 IDELR 151 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007).

were not followed were “substantial or significant,” or, in other words, whether the deviations from the IEP’s stated requirements were “material.”¹⁵³

Compensatory education is an equitable remedy that attempts to account for the educational deficit caused by a deprivation of educational services that a student should have received in the first place.¹⁵⁴ The goal of compensatory education is to “place disabled children in the same position they would have occupied but for the school district’s violation of the IDEA.”¹⁵⁵ An award of compensatory education “must be reasonably calculated to provide the educational benefits that likely would have accrued.”¹⁵⁶ “This standard ‘carries a qualitative rather than quantitative focus,’ and must be applied with ‘[f]lexibility rather than rigidity.’”¹⁵⁷ In crafting the remedy, the court or hearing officer is charged with the responsibility of engaging in “a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student’s unique needs.”¹⁵⁸ For some students, the compensatory education services can be short, and others may require extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.¹⁵⁹

Compensatory education can come in many forms and both hearing officers and courts have fashioned varying awards of services to compensate for denials of FAPE. Awards have

¹⁵³ *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007).

¹⁵⁴ *Department of Educ., Hawaii v. R.H. ex rel. K.R.*, 2013 WL 3338581 *7 (D. Hawai`i 2013) (citing *R.P.*, 631 F.3d at 1125).

¹⁵⁵ *R.P.*, 631 F.3d at 1125.

¹⁵⁶ *Reid*, 401 F.3d at 524.

¹⁵⁷ *Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland*, 555 F. Supp. 2d 130, 135, 50 IDELR 134 (D.D.C. 2008) (quoting *Reid*, 401 F.3d at 524).

¹⁵⁸ *Mary McLeod*, 555 F. Supp. 2d at 135 (citing *Reid*, 401 F.3d at 524).

¹⁵⁹ *Id.*

included, but are not limited to, prospective tuition award,¹⁶⁰ reimbursement for out-of-pocket educational expenses,¹⁶¹ and private placement.¹⁶²

Here, the undersigned Hearings Officer finds that Petitioners have proven that Respondents denied Student a FAPE by not following the prescribed and agreed upon transition plan for Student to transition from Private Facility to Home School. Respondents further failed to follow up with providing updated supports to address the refusal of Student to attend Home School after the failed transition. As discussed, *supra*, these omissions were substantial.

The undersigned Hearings Officer concludes that, had Respondents followed the transition plans as laid out in the Decision-6/2018, and the SA-10/10/2018, and had IEP-6/29/2018 been implemented as written, Student would have been provided a FAPE. However, because of the failures of Respondents to provide a FAPE, Student is entitled to Compensatory Education.

The evidence presented in the Hearing demonstrates that Student had been receiving a specialized educational program provided by Private Facility when Student attended the program between October 2017 and October 2018.¹⁶³ Private Facility's program had allowed Student to progress over the course of two years.¹⁶⁴ Private Facility is an accredited school that can provide a special education program that would be tailored to Student's educational needs.¹⁶⁵ While

¹⁶⁰ *Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008, *cert. denied*, 131 S. Ct. 342, 110 LRP 57266 (2010)).

¹⁶¹ *Foster v. Bd. of Educ. of the City of Chicago*, 611 F. App'x 874, 65 IDELR 161 (7th Cir. 2015) (unpublished).

¹⁶² *Draper*, 518 F.3d 1275, 49 IDELR 211.

¹⁶³ FOF 3. This is also supported by Prior AHO's Decision-6/2018 (specifically Prior AHO's findings that Student's program included a provider, as well as finding that strategies were used at Private Facility to address Student's issues, and that since January 2018, Student had made steady, but not drastic gains at Private Facility).

¹⁶⁴ FOF 49-50.

¹⁶⁵ FOF 84-85.

Private Facility may not be the Least Restrictive Environment for Student at this time, it is an open question in the Ninth Circuit whether the IDEA's least restrictive environment (LRE) requirement is a consideration in determining whether the private placement is proper under the IDEA.¹⁶⁶ Regardless, placement in Private Facility is intended to compensate for the educational instruction Student has not received since November 2018, at least until Student can transition successfully back to Home School or another public school.

VI. DECISION

Based on the foregoing Findings of Facts and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have proven that Respondents denied Student a FAPE by not following the prescribed and agreed upon transition plan for Student to transition from Private Facility to Home School. Respondents further failed to follow up with providing updated supports to address the refusal of Student to attend Home School after the failed transition.

For the reasons stated above, IT IS HEREBY ORDERED –

1. Student shall attend Private Facility from the first available date after this Order until the end of the 2019-2020 school year or May 31, 2020, whichever comes first.

Monthly tuition for Private Facility, not to exceed Thirteen Thousand Two Hundred Fifty Dollars (\$13,250) shall be paid by Respondents upon submission of invoice and

¹⁶⁶ Other Circuits are divided on this issue. *Compare C.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981 (8th Cir. 2011) (not a consideration); *Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, (3d Cir. 1999) (same); *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss*, 144 F.3d 391, (6th Cir. 1998) (same); *Bd. of Educ. of Murphysboro Community Unit Sch. Dist.*, 41 F.3d 1162 (7th Cir. 1994) (same); *with Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105 (2d Cir. 2007) (not a primary consideration). In *C.B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 500 (2011), the Ninth Circuit adopted the Second Circuit's standard of what constitutes a proper placement within the meaning of the IDEA as articulated in *Frank G. v. Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006), but stop short of addressing the LRE requirement.

Student's continued attendance in Private Facility. In no event should the total payment to Private Facility exceed Ninety-Two Thousand Seven Hundred Fifty Dollars (\$92,750).

2. Placement in Private Facility is intended to compensate Student for the FAPE denials discussed above and should not be considered Student's stay-put placement if a dispute later arises between the parties. As part of this order, Student shall transition from Private Facility to Home School or another appropriate public school by May 31, 2020.
3. The IEP team shall have no less than two (2) IEP meetings prior to April 15, 2020, from which the IEP team shall create a reasonable transition plan for Student to begin to transition from Private Facility to Home School or another public school. The transition plan shall include specifications for gradually introducing Student to DOE personnel and then gradually introducing Student into the public school setting. This transition plan shall start no later than April 15, 2020 and end no later than May 31, 2020.
4. It is expected that Parent 1 will make themselves available for the aforementioned IEP meetings and provide consents as necessary for Respondents to make observations and work with Private Facility's personnel to transition Student from Private Facility to public school.¹⁶⁷ Any delay in meeting any of the deadlines in this

¹⁶⁷ While this Hearings Officer notes that Parent 1 is at least partially responsible for some of the delays and the loss of educational opportunity for Student, it was also incumbent upon Respondents to follow up with Parent 1 and, at a minimum, document their efforts to get Student back to school to minimize lost educational opportunities. Therefore, this Hearings Officer is not reducing the compensatory educational award to Student because of Parent 1's behavior. However, this Hearings Officer would note that any further delay tactics or non-cooperation of

Order because of an act or acts of Parent 1 and/or Parent 1's representatives, will extend the deadlines set herein by the number days attributable to Parent 1 and/or Parent 1's representatives' actions. Respondent shall document any delays caused by Parent 1 and/or Parent 1's representatives, including any delays caused by actions of Private Facility.

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, November 13, 2019.

CHASTITY T. IMAMURA
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Parent 1 in adhering to the terms of this Order could affect future awards and/or decisions related to Student's education.