OFFICE OF DISPUTE RESOLUTION
DEPARTMENT OF THE ATTORNEY GENERAL
STATE OF HAWAIʻI

In the Matter of STUDENT, by and through the Parent 1[1], Petitioners, vs. DEPARTMENT OF EDUCATION, STATE OF HAWAIʻI and CHRISTINA KISHIMOTO, Superintendent of Hawaiʻi Public Schools, Respondents.	DOE-SY1920-026 FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION Due Process Hearing: February 5, 2020 Hearings Officer: Charlene S.P.T. Murata

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R. Part 300; and the Hawaii Administrative Rules §§8-60-1, et seq. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973

[1] Personal identifiable information is provided in the Legend.

("Section 504"), as amended in 1974, codified at 29 U.S.C. §§794, et seq.; and the Hawaii Administrative Rules §§8-61-1, et seq. in their claims and requests for relief.

II. INTRODUCTION

On October 25, 2019, Student, by and through Parent 1 (collectively "Petitioners"), filed a Complaint and Resolution Proposal against the Department of Education, State of Hawaii and Christina Kishimoto, Superintendent of Hawaii Public Schools ("Respondents" or "DOE").

On November 4, 2019, DOE filed a response to Petitioners' Complaint and Resolution Proposal.

On November 19, 2019, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for November 27, 2019.

On November 27, 2019, the prehearing conference was held with Mr. Keith H.S. Peck appearing on behalf of the Petitioners, and Deputy Attorney General Anne T. Horiuchi appearing on behalf of DOE. During the prehearing conference, the parties agreed to have the due process hearing on February 4-6, 2020 with the understanding that Ms. Horiuchi would be requesting an extension of the decision deadline of January 8, 2020.

On November 29, 2019, Ms. Horiuchi filed a Declaration of Anne T. Horiuchi to Extend the Decision Deadline from January 8, 2020 to February 22, 2020. An order granting Ms. Horiuchi's request to extend the decision deadline was issued on the same date.

On January 21, 2020, Paul Herran, Esq. filed a Notice of Appearance of Co-Counsel on Petitioners' behalf.

The due process hearing took place on February 5, 2020. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Herran, and Respondents were represented by Ms. Horiuchi. Parent 1 was present for the first half of the due process

hearing. The Department of Education District Educational Specialist ("DES") was present on behalf of Respondents.

Petitioners called Parent 1 as their only witness during the due process hearing. Respondents called the following witnesses during the due process hearing: Department of DOE-Provider 1 and Department of Education Student Services Coordinator ("SSC").

The following exhibits were admitted into evidence without objection: Petitioners' Exhibits 1 through 4, pages 001 through 143; Respondents' Exhibits 1 through 7, pages 001-271.

On February 13, 2020, Ms. Horiuchi submitted a request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under HAR §8-60-69, from February 22, 2020 to April 7, 2020, so that transcripts could be prepared and post-hearing briefs filed. Petitioners stipulated to the request for an extension. An order granting Ms. Horiuchi's request to extend the decision deadline was issued on February 14, 2020.

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

III. ISSUES PRESENTED

In their October 25, 2019 Complaint, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Specifically, Petitioners allege that the DOE denied Student a free appropriate public education ("FAPE"). Petitioners raise the following issues:

> Issue 1 – Whether the discussion regarding the following areas were insufficient during the August 5, 2019 IEP meeting and thereby denying Student a FAPE: (1) eligibility for extended school year services; (2) the "services, modification/accommodations, and/or supports" to address Student's difficulties with acclimation into the offered location for implementation of Student's IEP; (3) the "services, modification/accommodations, and/or

supports" to address Student's difficulties with behavior, and the need for a provider and behavioral interventions.

Issue 2 – Whether the August 5, 2019 IEP provides Student a FAPE when it (1) does not provide extended school year services; (2) inadequately describes the "services, modification/accommodations, and/or supports" to address Student's difficulties with acclimation into the offered location for implementation of Student's IEP; (3) inadequately describes the "services, modification/accommodations, and/or supports" to address Student's difficulties with behavior, and the need for an aide and behavioral interventions.

Petitioners request the following remedies:

Remedy 1 – Order the DOE to fund, through reimbursement and/or direct payment, Student's private program and educationally related services including transportation and school-required uniforms for the school-year 2019-2020;

Remedy 2 – Find that the DOE denied Student a FAPE under the IDEA, and/or Section 504;

Remedy 3 – Find the Student's private services are appropriate for purposes of reimbursement and/or as Student's "current educational placement" for "stay put" purposes;

Remedy 4 – Award compensatory educational services to address the lost educational opportunity; and

Remedy 5 – Order such other relief that is appropriate and justified in equity and/or in law, under the circumstances.

IV. FINDINGS OF FACT

1. Student is____ years old. DOE Ex. 1 at 002.

Pre-August 5, 2019

2. On January 30, 2017, Parent 1 submitted a "Request for Evaluation" for educational and related services to the DOE. DOE Ex. 2 at 015 and Ex. 5 at 154.

3. On February 3, 2017, Student was diagnosed with Disability by Parent Doctor 1. Pet. Ex. 1 at 001, 010.

4. On April 17, 2017, DOE determined that Student met the eligibility criteria for special education and related services under Eligibility Category 1. DOE Ex. 2 at 029.

5. On April 18, 2017, Parent 1 rejected DOE's provision of special education and related services for Student. DOE Ex. 2 at 030.

6. From September 2018 through June 2019, Student attended Private School 1 where Student received services through Parent 1's private insurance[2]. Pet. Ex. 1 at 001.

7. On January 19, 2019, Private Provider 2, on behalf of Agency 1, drafted a Treatment Plan for Student ("January 19, 2019 Treatment Plan"). DOE Ex. 4 at 104-136; Tr. 34:14-23.

8. Agency 1 is a company that provides services to Student through a private insurance company. Tr. 9:22-25.

9. The January 19, 2019 Treatment Plan contains a Functional Behavior Assessment ("FBA") done by Private Provider 2. DOE Ex. 4 at 104-136.

10. The January 19, 2019 Treatment Plan lists the following target behaviors: Protest/Tantrum (which includes crying, spitting, scratching self and other), Elopement and Mouthing. DOE Ex. 4 at 105-107. The January 19, 2019 Treatment Plan also states that Students' "challenging behaviors include behavioral excesses such as tantrum behavior, aggression, self injurious behavior, and mouthing." DOE Ex. 4 at 104.

11. The January 19, 2019 Treatment Plan contains charts that show no data collection for December 21, 2018 through January 5, 2019, with the notation "Client Vacation" above December 29, 2018. See charts on DOE Ex. 4 at 122-132.

[2] Parent 1 testified that Student attended Private School 1 from June/July 2018 to July 2019 and had a provider while at Private School 1. Tr. 64:5-25.

12. The January 19, 2019 Treatment Plan states that "A provider under the direct supervision of another provider will implement the intervention plan." DOE Ex. 4 at 135.

13. The January 19, 2019 Treatment Plan states under the "Summary and Recommendations" section:

> [Student] is able to actively participate in services as directly observed by this provider and review of current data and graphs.
>
> a. [Student] will receive 20 hours per week, conducted in 5 visits, that will be provided by the provider in the home and community.
>
> Recommended provider protocol modification hours are 16 hours per month due to the following reasons:
>
> - Client engages in challenging behaviors (eloping and high risk attention seeking behaviors) that pose a health and safety risk and require increases protocol modification time
> - Client is a learner and progressing at a fast pace, requiring frequent modifications to protocols to continue rate of mastery (need to probe new skills, need to review data/progress and make protocol modifications)
> - Client struggles to acquire new skills and attention seeking behaviors and treatment requires onsite modeling of skills/targets to address barriers to progress
>
> 1. A provider will direct the overall treatment by designing the sequence of stimulus and response-fading procedures, analyzing the provider recorded progress data, and judging whether adequate progress is being made. The providers will implement the intervention plan.
> a. Protocol Modification will take place for a total of 16 hours per month, 8 times per month.
> 2. Parent 1 involvement is necessary to support the effectiveness of the plan by generalizing the skills across different individuals, different settings, and multiple exemplars.
> a. It is recommended that the…family receive 1 parent training sessions per month. DOE Ex. 4 at 134-135.

14. The January 19, 2019 Treatment Plan does not mention a need for extended school year ("ESY") services.

15. On June 14, 2019, DOE School 1 received the January 19, 2019 Treatment Plan from Parent 1. DOE Ex. 4 at 104.

16. On June 14, 2019, Parent 1 executed, and DOE received, a "Request for Evaluation". In the section regarding "Reason for Request," Parent 1 checked off the following areas of concern: behavior, fine motor, speech/language and gross motor. Parent 1 also handwrote: "[Student] has no sense of danger, safety is also one of the areas of concern, [Student] frequently runs away from an adult (elopement). [Student] is currently receiving services, speech, and OT services through private insurance." DOE Ex. 2 at 031 and Ex. 5 at 157.

17. In response to Parent 1's Request for Evaluation, a Student Needs meeting was set for June 24, 2019 ("June 24, 2019 Student Needs meeting"). The purpose of the June 24, 2019 Student Needs meeting was for the Student Supports Team ("SST") to determine Student's current performance, including strengths and needs; determine what additional data, if any, was needed to define the needs of Student; ask for assessments and observations to be conducted, as needed, to gather information about Student; and determine if a Section 504 or IDEA initial evaluation or reevaluation was warranted. SSC was responsible for inviting to the June 24, 2019 Student Needs meeting professionals who could address Parent 1's concerns. DOE Ex. 2 at 032-033; Tr. 101:1-102:12.

18. Parent 1 was informed through a Conference Announcement, dated June 19, 2019, that Parent 1 could invite any person Parent 1 felt had knowledge about Student who could assist Parent 1 during the June 24, 2019 Student Needs meeting. DOE Ex. 2 at 032.

19. Present at the June 24, 2019 Student Needs meeting were SSC, principal, Department of Education Speech-Language Pathologist ("DOE-SLP"), a school psychologist, a school occupational therapist, Parent 1 and DOE Provider 1. DOE Ex. 2 at 033.

20. During the June 24, 2019 Student Needs meeting, Parent 1 requested a provider for Student. The team explained to Parent 1 that they needed to conduct their own FBA first in

order to determine if Student could have a provider. Parent 1 then requested an FBA. Tr. 54:10-18, 75:3-11, 89:3-5, 114:20-21.

21. At the end of the June 24, 2019 Student Needs meeting, the team decided that speech/language and social/behavior observations would be conducted. Tr. 71:15-72:15.

22. The team decided that an FBA would not be included in the types of assessments to be done because, according to DOE, a provider needed to be present and be part of the team to make the recommendation that an FBA was warranted, and there was no DOE contracted provider present at the June 24, 2019 Student Needs meeting. Tr. 75:12-25, 114:20-115:18.

23. The team explained to Parent 1 that when DOE receives a request for an FBA, the DOE will then invite a provider to a follow-up meeting, and then, if warranted, conduct its own FBA to determine whether Student needed services. Tr. 42:1-5, 81:6-12.

24. Parent 1 shared during the June 24, 2019 Student Needs meeting that Student was currently receiving services through Parent 1's private insurance, and SSC understood that an FBA must have been conducted in order for Student to receive services through a private insurance. Tr. 80:21-81:5.

25. On June 25, 2019, Parent 1 signed a copy of a "Consent for Assessment as Part of an Initial Evaluation" form allowing assessments to be done by a Speech Language Pathologist and provider. DOE Ex. 2 at 035 and Ex. 5 at 158. Parental consent was required to conduct the assessments. Tr. 72:16-73:1.

26. According to a Prior Written Notice of Department Action, dated June 25, 2019 ("June 25, 2019 PWN"), an initial evaluation would be conducted, and the assessments requested were speech/language and behavior/social observations. The June 25, 2019 PWN also stated that "[t]here is sufficient information shared by parents in the area of gross motor, fine motor,

cognitive, pre-academic, and adaptive skills." Under the "Description of the evaluation procedures, test, records, or reports used as a basis for the proposed/refused action" section, the principal wrote: "Team input, current performance information, applied behavioral analysis services assessment and treatment plan through private insurance 8/8/18[3], team discussion and decisions." DOE Ex. 2 at 034.

27. On July 6, 2019, DOE-Provider 1 conducted a social/behavior observation of Student at Private School 1 in Student's classroom to gather information on Student's strengths and potential needs in determining eligibility for special education services. Pet. Ex. 3 at 054-057.

28. On July 11, 2019, SSC informed Agency 3-Provider 6 that Parent 1 had asked for an FBA at a meeting and the SST informed Parent 1 that they would invite a provider to Student's next meeting during the week of August 5th-9th. SSC then asked Agency 3-Provider 6 if Agency 3-Provider 6 was interested in taking on Student's case. Agency 3-Provider 6 responded that Agency 3-Provider 6 would not be able to attend the meeting because Agency 3-Provider 6 was off island the week of August 5th-9th. DOE Ex. 6 at 163.

29. In response to Agency 3-Provider 6's response that Agency 3-Provider 6 was off island, SSC wrote:

> "Thank you for your response. [Student] will start school on August 12th (if FSC) or August 13th or 14th half day (if inclusion placement). We are trying to hold [Student's] eligibility meeting during the week of Aug. 5th-9th, so that [Student] will have an IEP with services in place for the first day of school.
>
> I could let [Parent 1] know that you would like to conduct an observation on this kiddo, prior to the team meeting for an FBA consideration. We could hold [Student's] eligibility during the week of Aug. 5th-9th, then reconvene the team and yourself during the week of August 12th-16th after you've had an opportunity to observe [Student] for the FBA consideration. Let me know what you think."

[3] The phrase "services assessment and treatment plan through private insurance 8/8/18" refers to the January 19, 2019 Treatment Plan. The date "8/8/18" refers to the date of the initial assessment for the January 19, 2019 Treatment Plan. DOE Ex. 4 at 104.

DOE Ex. 6 at 164.

30. On July 19, 2019, DOE-SLP conducted a comprehensive speech and language assessment ("July 19, 2019 speech/language assessment") of Student. Pet. Ex. 3 at 059-063; DOE Ex. 7 at 258.

31. The July 19, 2019 speech/language assessment included a 20 minute observation of Student on June 28, 2019 in Student's Private School 1 classroom. Student's Private Provider 3 was present throughout the observation and frequently provided verbal prompts for Student to follow directions. Pet. Ex. 3 at 060.

32. On July 30, 2019, DOE-SLP submitted DOE-SLP report on DOE-SLP's speech/language assessment of Student ("July 30, 2019 Speech/Language Report"). Pet. Ex. 3 at 059-63; DOE Ex. 4 at 141-144. The report stated in part: "At the time of the assessment, [Student] was not receiving speech/language therapy, however, [Student] received services through a private insurance company. [Student] attended [private] School 1…where [Student's Private] provider…provided services throughout the school day for approximately four hours per day."

33. A Conference Announcement, dated July 29, 2019, set a conference for August 5, 2019, and stated that Parents could invite any person(s) they felt had knowledge about Student who could assist them. The purpose of the conference was to discuss and determine eligibility, and if IDEA eligible, to develop an Individualized Education Program ("IEP") for Student. DOE Ex. 2 at 036, 060; Tr. 73:2-17.

34. On July 31, 2019, DOE-Provider 1 submitted an Assessment Report of DOE-Provider 1's July 6, 2019 social/behavior observation of Student at Private School 1 ("July 31, 2019 Social/Behavior Report"). Pet. Ex. 3 at 054-057; DOE Ex. 137-140. The July 31, 2019

Social/Behavior Report stated in part: Student "displayed emerging strength that can support [Student's] academic performance. But [Student] was also observed to display learner behavioral challenges and communication/social skills were limited, which may have a significant impact on [Student] accessing [Student's] education within the school setting." The following recommendations were made in the report:

> [Student] may benefit from the following supports:
> - Visual supports
> - First, then
> - Modeling on new skills/routines
> - Hands-on manipulatives and work materials
> - Variety of reinforcements made available to [Student] to increase motivation
> - Continued opportunities to practice social interactions and develop more social skills with both adults and peers
> - Task analysis (e.g., daily morning routine, broken into smaller steps to complete, visual may assist with this routine.)
> - Access to reinforcement after completion of non-preferred tasks or reinforcing ability to display more appropriate on task learner behaviors during group instruction.

Pet. Ex. 3 at 057; DOE Ex. 4 at 140.

35. Student matriculated from Private School 1 in July 2019. Tr. 56:20-24.

August 5, 2019

36. As of August 5, 2019, Student was not attending school and was at home with Parent 1 and a provider, who was present five days a week. Tr. 56:25-57:6.

37. Parent 1 described Student's behavior as "pretty difficult" and Student having "difficulty adjusting to a new environment" in August 2019. Parent 1 gave as an example when Parent 1 took Student to DOE School 1 for a meeting and Student threw a tantrum, including inconsolable crying, plugging Student's ears, and dropping and throwing school supplies. Tr. 12:2-13:2.

38. Back-to-back meetings were scheduled for August 5, 2019. The first meeting was to discuss Student's eligibility, and the second meeting was an IEP meeting to develop an IEP for Student, if determined eligible in the first meeting. DOE Ex. 2 at 037 and Tr. 52:11-53:6.

39. Present at the August 5, 2019 eligibility meeting were ten people: SSC, Parent 1, Private Provider 1, DOE-Provider 1, and others. Student was determined eligible during the first meeting under Eligibility Category 1 due to significant delays in the areas of communication, social skills and academics, and the second meeting was held to develop an IEP for Student. Parent 1, Private Provider 1 and DOE-Provider 1 stayed for the IEP meeting, while SSC and two others left. Tr. 74:5-15, 92:15-93:10; Pet. Ex. 1 at 001, 005-006, 009-021; DOE Ex. 3 at 061-073.

40. No DOE contracted provider was present at the August 5, 2019 meetings. Tr. 76:1-3, 91:17-21, 115:19-21.

41. Parent 1 invited Private Provider 1, who was Student's provider at the time, to both meetings because Private Provider 1 was familiar with Student's behavioral needs and could provide information to DOE School 1 about Student. Tr. 53:10-54:9.

42. The August 5, 2019 IEP offered Student the following "Supplementary Aids and Services, Program Modifications and Supports for School Personnel": visual supports, modeling, tactile supports and preferential seating. Pet. Ex. 1 at 019; DOE Ex. 3 at 071.

43. The IEP team determined that Student did not meet the standard for extended school year ("ESY") services because DOE did not have data on Student's current regression rate. Tr. 11:9-16, 106:15-17. Parent 1 disagreed that DOE did not have the needed data. Parent 1 informed the school district members of the IEP team that they could look at the January 19,

2019 Treatment Plan to collect data on Student's rate of regression and determine whether Student would demonstrate regression after a break. Tr. 32:3-33:3, 34:14-36:1.

44. During the August 5, 2019 IEP meeting, it was explained to Parent 1 what ESY entailed and how it was determined. Tr. 106:11-15. Parent 1 was informed by school district members of the IEP team that they would take data and get a "great baseline" of Student in the school setting utilizing a known program, and then take data again during the upcoming one-week fall break[4] and compare it with the baseline DOE had of Student and see if the one-week break interrupted Student's academic programming or progress moving forward. Tr. 106:17-107:3. If Student was able to maintain Student's skills or even progress during the fall break, the data collection would continue with the next break, including winter break, spring break and summer break. Tr. 130:24-131:6.

45. During the August 5, 2019 IEP meeting, Parent 1 suggested to the other members of the IEP team that they consider the January 19, 2019 Treatment Plan by Agency 1 to determine if Student would demonstrate regression after a break and whether Student was eligible for ESY services. Tr. 32:3-33:3, 34:14-36:1. There was no discussion about Student's regression and recoupment.

46. The IEP team had the January 19, 2019 Treatment Plan at the time of the August 5, 2019 IEP meeting.

47. The January 19, 2019 Treatment Plan contained information on Agency 1's expectations for Student after a vacation. Commenting on the January 19, 2019 Treatment Plan, DOE-Provider 1 stated: "So it's indicating that they're actually increasing the demand and making it more challenging. So it's almost like they're expecting progress after a break, which is a great

[4] Fall break began on October 5, 2019 and lasted for one week. Tr. 130:15-22.

thing. You want your kids to be able to maintain the skill and even progress after a break in services. . . . It kind of showed that they had confidence in Student's programming, which is great." Tr. 100:13-22, 109:2-25.

48. DOE-Provider 1 testified as an expert. Tr. 100:13-22.

49. Student's behavior was discussed at the August 5, 2019 IEP team meeting. Tr. 13:3-5. Parent 1 expressed to the other members of the IEP team that Parent 1 was concerned about Student's ability to acclimate to a new environment, including DOE School 1. To help in the acclimation, Parent 1 suggested that Student be allowed to have Student's providers at school as part of a transition plan to DOE School 1. Tr. 57:7-17, 114:8-20, 80:8-20.

50. The other members of the IEP team informed Parent 1 that an FBA was a prerequisite to determining whether a provider is necessary for a student. Tr. 14:7-13.

51. The other members of the IEP team explained to Parent 1 that if the DOE made a determination that Student required services in order to access Student's education, the DOE would provide providers that are either employed by or contracted with the DOE. Tr. 41:11-25.

52. SSC testified that a provider could not have been listed as a supplementary aid in the August 5, 2019 IEP because a request for a provider would require a provider to be a part of the IEP team to make a recommendation for an FBA to determine whether a provider is needed for a student. Tr. 81:18-82:5.

53. It was explained to Parent 1 that the IEP team would meet again after the fall break with a provider present to discuss whether an FBA should be completed. The FBA would either generate a behavior support plan, suggest classroom supports and strategies, or suggest a behavior intervention plan. In order to have services of a provider, the outcome of an FBA

would need to say that the child needs to have a behavior intervention plan, which would be developed by a provider. Tr. 117:14-118:4.

54. Parent 1 did not recall Private Provider 1 providing suggestion on how to help Student acclimate to DOE School 1 during the August 5, 2019 IEP meeting, but Parent 1 recalled Private Provider 1 giving information about Student's behavior[5]. Tr. 57:18-24. Parent 1 testified that while the IEP team did not prevent Private Provider 1 from providing input, Parent 1 did feel that the IEP team did not allow Private Provider 1 to talk because they were rushing Private Provider 1, cutting off Private Provider 1, and they did not seem interested in the Private Provider 1's input. Parent 1 felt the August 5, 2019 IEP meeting was rushed. Tr. 57:21-59:25.

55. Not all children diagnosed with Disability need the services of a provider or services. Tr. 113:3-11.

56. DOE-Provider 1 testified that the discussion about the services that were to be provided to Student and the accommodations or modifications or supports that Student might need, was based on Student's current performance and information provided at the meeting. Tr. 119:15-120:5.

57. DOE-Provider 1 did not feel, based on the information the IEP team had at the time, that Student needed services because it would be too restrictive. DOE-Provider 1's opinion was based on DOE-Provider 1's observations of Student and DOE-Provider 1's reliance on Private Provider 1 speaking up if Private Provider 1 had concerns about Student's behavior after the IEP team indicated that Student would not be provided with services. Tr. 119:15-122:2.

[5] Parent 1 later testified that Private Provider 1 did not provide suggestions at the August 5, 2019 IEP meeting. Tr. 58:17-22. At the October 23, 2019 IEP meeting, Private Provider 2 did provide suggestions to the IEP team. Tr. 58:22-59:15.

58. Student has never been without services for 8-weeks; Student does not receive services during the weekends. Tr. 11:24-12:1.

59. On August 5, 2019, Parent 1 signed a copy of a "Consent for Initial Provision of Special Education and Related Services" form, consenting to the provision of special education and related services to Student. Pet. Ex. 1 at 007; DOE Ex. 2 at 045 and Ex. 5 at 159.

60. Parent 1 rejected the DOE's August 5, 2019 IEP offer of FAPE because "without services, from a trained staff and a behavior plan [Student] will not be able to control [Student's] behaviors and won't learn any academics, and [Student] would really regress behaviorally too."[6] Tr. 20:17-22.

61. On August 5, 2019, Private Provider 1, on behalf of Agency 1, drafted an Assessment and Treatment Plan[7] ("August 5, 2019 Treatment Plan"). Pet. Ex. 3 at 072-121. The August 5, 2019 Treatment Plan contains an FBA. The August 5, 2019 Treatment Plan was through Parents' private insurance. Tr. 28:4-20.

62. Parent 1 received a copy of the August 5, 2019 Treatment Plan on August 14, 2019. Pet. Ex. 3 at 121. DOE did not receive a copy from Parent 1. Tr. 85:8-15.

63. The August 5, 2019 Treatment Plan states under the "Summary and Recommendations" portion:

> Service is recommended in order to decrease behavioral excesses (e.g., Protest) as well as to increase behavioral deficits (e.g., adaptive skills, communication, social skills). In order to achieve maximum results, it is recommended that [Student] receive 30 hours per week of services under

[6] Although Parent 1's testimony is unclear as to which DOE offer Parent 1 was rejecting, the record supports a finding that Parent 1 was referring to the August 5, 2019 IEP offer of FAPE because the October 23, 2019 IEP offer of FAPE does include services and a behavioral intervention plan.

[7] It is noted that the questionnaires completed by Parent 1 and Private Provider 1 are dated August 9, 2019 and August 8, 2019, respectively, which are after the August 5, 2019 Treatment Plan. Pet. Ex. 3 at 076, 084.

> the direct supervision of a provider for 16 hours per month. . . . Private Provider 1. Pet. Ex. 3 at 121.

64. The August 5, 2019 Treatment Plan does not mention anything about the need for ESY services.

65. According to the August 5, 2019 Treatment Plan, Student "will be attending [Private School] starting in September 2019." Pet. Ex. 3 at 072.

Post-August 5, 2019

66. On August 8, 2019, Parent 1 was provided a copy of an Evaluation Summary Report of the initial evaluation ("August 8, 2019 ESR"). Under "Reason for Referral," the August 8, 2019 ESR states: "[Student] is a ___year old…who was referred for an initial evaluation by [Student's] parents due to concerns in the areas of behavior, fine motor, gross motor, and speech/language development. . . . Additional information is needed to determine special education eligibility." It was determined that Student was eligible for special education and related services under Eligibility Category 1 due to significant delays in the areas of communication, social skills, and academics. Pet. Ex. 1 at 001-002, 005-006; DOE Ex. 2 at 042-043, 040-041.

67. On August 12, 2019, SSC submitted a "Request for Evaluation" for educational and related services. SSC noted that "a Functional Behavior Assessment (FBA) was requested by parents." DOE Ex. 2 at 046 and Ex. 5 at 160.

68. A Prior Written Notice of Department Action, dated August 12, 2019, listed the following supplementary aids and services: visual supports (daily), modeling (as needed), tactile support (as needed), and preferential seating (daily). Pet. Ex. 1 at 022; DOE Ex. 3 at 074.

69. On August 15, 2019, a Triennial Re-Evaluation meeting was held. Present at the meeting were SSC, Parent 1, Private Provider 1, DOE-Provider 1, Agency 3-Provider 5, and others. DOE Ex. 2 at 048.

70. The purpose of the August 15, 2019 Triennial Re-Evaluation meeting was to reconvene the team so that a provider, Agency 3-Provider 5, could be present to respond to Parent 1's request for an FBA that Parent 1 made on June 24, 2019. Tr. 74:16-75:5, 76:4-16.

71. DOE contracted with Agency 3 for services. Agency 3-Provider 5 had requested to perform two observations prior to meeting with the team on August 15, 2019. At the meeting, Agency 3-Provider 5 shared what Agency 3-Provider 5 had observed and made recommendations to the IEP team. The IEP team discussed Agency 3-Provider 5's recommendations, and based on Agency 3-Provider 5's recommendations, decided to move forward with conducting an FBA. Tr. 76:17-77:1, 91:22-92:8.

72. DOE asked Agency 3 to conduct the FBA, however, Agency 3 informed DOE that it would be a conflict of interest and advised DOE to contract with another agency to conduct the FBA. DOE then contracted with Agency 2 to conduct the FBA. Agency 2-Provider 4 conducted the FBA. Tr. 77:2-19.

73. A Prior Written Notice of Department Action dated, August 19, 2019 ("August 19, 2019 PWN"), stated that a "triennial re-evaluation…will be conducted…. The following assessments is requested: Functional Behavioral Assessment." The August 19, 2019 PWN went on to explain that a "current Functional Behavioral Assessment is needed to help address social/emotional/behavioral skills in supporting [Student] to access the curriculum." Pet. Ex. 1 at 023; DOE Ex. 2 at 049.

74. On August 19, 2019, a "Consent for Assessment as Part of a Reevaluation" form was "mailed home." DOE Ex. 2 at 050.

75. On August 19, 2019, Parent 1 submitted a "Student Profile" to Private School 2, which was an application for school year 2019-2020 with a proposed entrance date of September 3, 2019[8]. In the Student Profile, Parent 1 asked Private School 2 to allow Student's privately retained provider to accompany Student to school all day because Student needed a provider to address Student's behavioral needs. Pet. Ex. 4 at 122-132; Tr. 16:10-15, 43:15-44:3.

76. Parent 1 did not inform the IEP team at the August 5, 2019 IEP meeting that Parent 1 was rejecting the placement proposed by DOE and of Parent 1's intent to enroll Student in a private school at public expense, nor did Parent 1 provide the information in writing to the DOE. Tr. 50:12-51:8.

77. On September 3, 2019, Student started attending Private School 2. Tr. 52:5-10.

78. On September 5, 2019, SSC found out from Parent 1, during a telephone call, that Student was attending Private School 2. DOE Ex. 6 at 188; Tr. 85:16-87:7.

79. Private School 2's academic school year for SY2019-2020 runs from ___ to ___ Private School 2's extended summer session begins ___ and ends ___. Pet. Ex. 4 at 140.

80. Private School 2 has "extended school year/ . . . Summer School." Pet. Ex. 4 at 136.

81. In Private School 2, Student is in the classroom and the only student in the classroom to have a disability. Pet. Ex. 4 at 140; Tr. 21: 9-10.

82. With respect to how Student is doing at Private School 2, Parent 1 testified: Student is "doing really pretty good…In such a short time [Student] read, [Student] does math. And

[8] Parent 1 testified that Parent 1 contacted Private School 2 "Right after the [August 5, 2019] IEP meeting" about Student attending school there. Tr. 44:4-10.

[Student] sits really nicely in the seat. [Student] doesn't walk around. [Student's] really doing pretty good. [Student] learns things really fast in a short amount of time, academic wise." Tr. 21:11-16.

83. With respect to Private School 2's program for Student, Parent 1 testified: "The core of [Student's] program is with services. And [Student's] behavioral plan, the providers work with [Student] all day…. And they really address [Student's] behaviors pretty well. And so [Student] now focus on learning academics….Besides services, [Student] gets an iPad which really help [Student] good….[Student] likes time with the iPad, so [Student] will do the task because [Student] knows that [Student is] going to get, after doing the task [Student] gets a time with the iPad. And [Student] would sit nicely and complete the task…They also modified [Student's] homework. And the amount of homework that [Student] receives, they modified it. And they also – The way [Student is] being taught is also individualized, so [Student is] not doing grade level work yet….They use a multi-methodology approach where it's being taught visually, kinesthetically and by sound. . . ." Private School 2 also uses repetition in teaching Student. Tr. 21:17-22:18.

84. Parent 1 testified that Parent 1 observed Student at Private School 2 and noticed that Student was different and "you can't tell that [Student] has a disability. [Student] really sits really nicely and does [Student's] task before [Student] gets what [Student] wants. . . ." Tr. 23:3-9.

85. Parent 1 testified that when Parent 1 spoke to Private School 2's personnel, "[t]hey said that [Student] learns fast. [Student is] a fast learner. And they said that [Student is] at grade ___ level academically. We enrolled [Student], but [Student's] academic wise is level ___, grade ___." Tr. 23:10-17.

86. Student receives services at Private School 2, however, Private School 2 does not provide providers to Student. Private School 2 allows a private provider to be with Student all day and a private provider to be with Student all day twice a week. The private providers, implement the services. Tr. 25:12-26:9.

87. Student currently has one teacher at Private School 2. Parent 1 does not know the teacher's qualifications or educational background. The principal of Private School 2 "provides the whole curriculum," and the teacher does the "guiding." Tr. 49:15-50:7.

88. On August 26, 2019, Parent 1 signed and returned a "Consent for Assessment as Part of a Reevaluation" form to DOE School 1, consenting to the administration of an FBA to Student. DOE Ex. 2 at 050 and Ex. 5 at 161.

89. On October 21, 2019, at the request of DOE, Agency 2-Provider 4 submitted a Functional Behavioral Assessment that included a 1.5 hour observation of Student at DOE School 1 on September 13, 2019 ("October 21, 2019 FBA"). Pet. Ex. 3 at 065-071; DOE Ex. 4 at 145-153.

90. Parent 1 was interviewed on October 21, 2019 as part of the assessment for the October 21, 2019 FBA. The October 21, 2019 FBA summarized Parent 1's concerns and comments. Parent 1 reported that Student "does not exhibit maladaptive behaviors in the home setting because [Student] is comfortable there and with the people around [him/her]. Parent 1 reported that [Student] is doing well academically and behaviorally at [Student's] private school, and that Parent 1 believes that similar support would assist [Student] in the transition to DOE School 1." Pet. Ex. 3 at 066; DOE Ex. 4 at 147.

91. Teacher interviews were not conducted for the October 21, 2019 FBA. Pet. Ex. 3 at 066; DOE Ex. 4 at 147.

92. The October 21, 2019 FBA made the following recommendations: BIP[9] be created for Student's maladaptive behaviors; support from a provider to implement the BIP and support Student throughout Student's school day; the staff should be provided with direct supervision from a provider for a minimum of 5% of these hours; move Student's desk away from exit doors to prevent elopement; and ongoing teacher consultations at a minimum of 2 hours per month. Pet. Ex. 3 at 071; DOE Ex. 4 at 152.

93. Efforts were made to schedule the FBA assessment in August, September and October, however, Agency 2 kept cancelling. Pet. Ex. 2 at 43-53; Tr. 16:1-9, 63:9-64:4.

109. On October 22, 2019, Parent 1 received a copy of the October 21, 2019 FBA. DOE Ex. 4 at 146; Tr. 43:1-11.

94. On October 23, 2019, an eligibility conference meeting and IEP revision meeting were held. Present at both meetings were SSC, Parent 1, Private Provider 2, Agency 2-Provider 4, and others. Tr. 79:11-22, 93:17-21. Parent 1 signed that Parent 1 received a copy of the FBA. DOE Ex. 2 at 054.

95. During the October 23, 2019 eligibility meeting, Student's disability continued to be Disability. Pet. Ex. 1 at 026-27; Tr. 17:9-15.

96. The October 23, 2019 IEP meeting resulted in the October 23, 2019 IEP. Pet. Ex. 1 at 029-041; DOE Ex. 3 at 076-088.

97. The August 5, 2019 IEP and October 23, 2019 IEP are identical except that the October 23, 2019 IEP includes additional comments, goals, and supplementary aids. Compare Pet. Ex. 1 at 010 with 030-031, 017 with 037, and 019 with 039.

[9] Although not explained in the October 21, 2019 FBA, "BIP" likely stands for behavior intervention plan.

98. SSC testified that the August 5, 2019 IEP did not include any of the behavioral interventions that are in the October 23, 2019 IEP because the August 5, 2019 IEP was based on information that was shared at the August 5, 2019 meeting. Tr. 90:8-91:9.

99. DOE-Provider 1 testified that the addition of, Services, and Behavior Intervention Plan in the "Supplementary Aids and Services, Program Modifications and Support for School Personnel" section of the October 23, 2019 IEP does not mean Student regressed while at DOE School 1, but rather a result of the information provided in the October 21, 2019 FBA, which was not available during the August 5, 2019 IEP meeting. Tr. 123:4-125:14.

100. DOE-Provider 1 testified that the October 21, 2019 FBA drove the changes in the October 23, 2019 IEP because the "FBA shared that there was more behaviors exhibited during the observation." DOE-Provider 1 testified that "current functional behavior assessment dated October 21, 2019, target behaviors include elopement, flopping, dropping, crying[,] access to tangible items." "But there is [sic] behaviors listed in here that we did not have from our data that we had present at the time, at the August 5th meeting. So that's why these were added because of the FBA that was completed. This is what drove that." Tr. 123:4-127:5.

101. Two Prior Written Notice of Department Action, both dated October 28, 2019, stated that Student continues to be eligible for special education and related services, and listed the additional supplementary aids and services Student would receive, and the IEP team's intention to develop a transition plan for Student. Pet. Ex. 1 at 028, 042; DOE Ex. 2 at 059.

102. On October 29, 2019, the principal of Private School 2 sent Parent 1 a letter regarding "Confirmation of [Student] to [Private School] for SY 2019-2020 as a full-time student placed in the classroom" ("October 29, 2019 confirmation letter"). Prior to the October 29, 2019

confirmation letter, Student had already attended Private School 2 for approximately one month on a probationary basis. Pet. Ex. 4 at 140-141; Tr. 24:11-19.

103. A condition of Student's admission into Private School 2 was that Student "must have a provider when at [Private School 2]; [Student] needs special services and any special services needed will be at parent expense—Example: tutoring services." Pet. Ex. 4 at 140. If Agency 1 was unable to provide a provider for Student on a certain day, Student would not be able to attend Private School 2 on that day. Tr. 27:9-21.

104. The provider is Student's privately funded provider. Tr. 26:19-21.

105. The October 29, 2019 confirmation letter also states that "extended school year is available for [Student] only if the provider is present. During the academic school year, on days where the provider is absent, [Student] will not be able to attend school because [Student's] present needs cannot be met by [Private School 2] staff." Pet. Ex. 4 at 140.

106. Parent 1 testified that in January 2020, Parent 1 participated in a telephonic meeting to discuss a transition plan for Student. Tr. 46:23-47:14. One or two days after the telephonic meeting, DOE emailed Parent 1 a consent form to sign to allow DOE to speak to Private School 2 and Student's private services team to gather information to develop a transition plan. At the time of the due process hearing, Parent 1 had not yet returned the signed consent form to DOE. Without the consent form, DOE is not permitted to contact Private School 2 or Agency 1. Tr. 19:1-11, 48:2-24.

107. During the January 2020 transition meeting, Parent 1 told IEP team that Student should be transitioned to a DOE school in the summer so Student's academics would not be interrupted because Student was already towards the end of the school year. Tr. 48:25-49:5.

108. Annual tuition at Private School 2 for school year 2019-2020 is $11,424.00. There are different installment plans for families to choose from to pay the annual tuition. Pet. Ex. 4 at 138.

109. Based on invoices submitted by Petitioners, the total amount paid by Petitioners is $2,438.00 for Private School 2. Petitioners paid $693.00 on September 4, 2019 for fees and other expenses (Invoice No. 00152/2019), and $1,745.00 in tuition on September 16, 2019 for the months of September and October (00160/2019). Pet. Ex. 4 at 142-143.

V. CONCLUSIONS OF LAW

A. Burden of Proof

Pursuant to Hawaii Administrative Rules ("H.A.R.") §8-60-66(a)(2)(A), "the party initiating the due process complaint has the burden of proof." The Hawaii Administrative Rules also state that "[t]he burden of proof is the responsibility of the party initiating and seeking relief in an administrative hearing under the IDEA or this chapter is to prove, by a preponderance of the evidence, the allegations of the complaint." H.A.R. §8-60-66(a)(2)(B).

The Supreme Court held in Schaffer that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005). The Court "conclude[d] that the burden of persuasion lies where it usually falls, upon the party seeking relief." Id. at 535. Neither Schaffer nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

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." Bd. of Educ. v. Rowley, 458 U.S. 176,179-91,

102 S. Ct. 3034, 3037-3043 (1982); Hinson v. Merritt Educ. Ctr., 579 F.Supp.2d 89, 98 (2008)(citing 20 U.S.C. §1400(d)(1)(A)). A free and appropriate public education ("FAPE") includes both special education and related services. H.A.R. §8-60-1; H.A.R. §8-60-3; 20 U.S.C. §1401(9); 34 C.F.R. §300.34; 34 C.F.R. §300.39; 34 C.F.R. §300.101.

Special education means "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability" and related services are the supportive services required to assist a child with a disability to benefit from special education. 34 C.F.R. §300.34; 34 C.F.R. §300.39; 20 USC 1401(26) and (29). To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must "evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP." Dep't of Educ. of Hawaii v. Leo W. by and through Veronica W., 226 F.Supp.3d 1081, 1093 (D. Haw. 2016).

In Board of Education v. Rowley, the Court set out a two-part test for determining whether the school offered a FAPE: (1) whether there has been compliance with the procedural requirements of the IDEA; and (2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. Board of Education v. Rowley, 458 U.S. 176, 206-207, 102 S. Ct. at 3050-3051 (1982). "A state must meet both requirements to comply with the obligations of the IDEA." Doug C. v. Hawaii Dept. of Educ., 720 F.3d 1038, 1043 (9th Cir. 2013) (quoting Rowley). *See also*, Amanda J. ex rel. Annee J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir. 2001).

The school is not required to "maximize the potential" of each student; rather, the school 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." Rowley, 458 U.S. at 200. However, the United States Supreme Court in Endrew F. v. Douglas County School Dist. held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. v. Douglas County School Dist., 137 S. Ct. 988, 1001 (2017). *See also*, Blake C. ex rel. Tina F. v. Hawaii Dept. of Educ., 593 F.Supp.2d 1199, 1206 (D. Haw. 2009).

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program ("IEP") for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child's teacher, parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child's present levels of academic achievement and functional performance, a statement of the child's annual goals and short term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1414(d). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. § 1414(d). The IEP is, in effect, a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Burlington v. Dep't of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002 (1985). An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2012).

C. Whether the discussion regarding the following areas were insufficient during the August 5, 2019 IEP meeting and thereby denying Student a FAPE: (1) eligibility for extended school year services; (2) the "services, modification/accommodations, and/or supports" to address Student's

difficulties with acclimation into the offered location for implementation of Student's IEP; and (3) the "services, modification/accommodations, and/or supports" to address Student's difficulties with behavior, and the need for an aide and behavioral interventions.

Petitioners allege that Student was denied a FAPE because the discussion regarding (1) ESY eligibility, (2) services to help with acclimation/transition into DOE School 1, and (3) services to help with Student's difficult behavior and need for a provider and behavioral intervention was insufficient. After careful consideration of the entire record, it is determined that Petitioners were denied a FAPE because the discussion regarding the above-listed areas of concerns was insufficient. DOE has in place a procedural requirement that is not supported by legal authority, and it is this procedural requirement that made it impossible for the IEP team to have a sufficient discussion during the August 5, 2019 IEP meeting. Specifically, DOE's position that Haw. Rev. Stat. Chap. 465D created a process where the school was required to have a provider help the school team make the determination of whether or not an FBA is warranted is not backed by legal authority. DOE Closing Brief, p. 4.

During the June 24, 2019 Student Needs meeting, Parent 1 informed the team that Parent 1 wanted a provider for Student (FOF 20). The team informed Parent 1 that the school needed its own FBA done first before a provider could be provided (FOF 20). Parent 1 then requested that the team conduct an FBA (FOF 20). The team declined to request that an FBA be done, stating that a provider had to be a part of the discussion to make a request for an FBA (FOF 22). At the end of the June 24, 2019 Student Needs meeting, the team decided to do speech/language and social/behavior observations of Student (FOF 21).

During the weeks between June 24, 2019 and August 5, 2019, SSC reached out to one person, Agency 3-Provider 6, to inquire if Agency 3-Provider 6 was available to attend Student's next meeting during the week of August 5th - 9th. (FOF 28). When Agency 3-Provider 6

informed SSC that Agency 3-Provider 6 was not available, instead of reaching out to another agency (such as Agency 2), the team decided to proceed with holding Student's IEP meeting for the week of August 5th - 9th without a provider, and reconvene on August 15, 2019 when a provider from Agency 3 was available. Student was scheduled to begin school on August 12, 13 or 14 (FOF 29). At the time of Student's August 5, 2019 IEP meeting, the team still had not requested that an FBA be done, even though Parent 1 had asked for one on June 24, 2019 (FOF 40, 50, 53).

Respondents cite to Haw. Rev. Stat. Chap. 465D as authority that "the School must follow the process of having a provider help the school team make the determination of whether or not an FBA is warranted." Respondents' Closing Brief, p. 4, FN 5. Haw. Rev. Stat. Chap. 465D does not create such a process. First, the decision of whether or not an FBA is warranted is not the "practice of services," and a provider is not required to be present at a meeting to decide whether or not an FBA is warranted. Although Respondents interpret H.R.S. Chap. 465D to create such a requirement, the undersigned respectfully disagrees. The decision to get an FBA is not engaging in "design, implementation and evaluation." H.R.S. §465D-2. Respondents cite to no other legal authority for this mandatory process, and the undersigned is not aware of any[10].

Secondly, it is the local educational agency (i.e., DOE), not an IEP team, that determines the scope of the evaluation process, including which assessments should be conducted. It is the

[10] Although not cited to by Respondents, 20 U.S.C. §1414(c)(1) appears to provide some legal backing to Respondents' position that such a process exists; however, 20 U.S.C. §1414(c)(1) does not state that input from a provider is required before a school district can make a decision about whether or not to request an FBA, much less a school contracted provider. "Other qualified professionals, as appropriate," could mean a provider, both of which were present during the June 24, 2019 Student Needs meeting (FOF 19). Also, DOE received the January 19, 2019 Treatment Plan on June 14, 2019, ten days before the June 24, 2019 Student Needs meeting. The January 19, 2019 Treatment Plan contained an FBA done by a provider (FOF 9).

responsibility of the local educational agency to "provide notice to the parents of a child with a disability…that describes any evaluation procedures such agency proposes to conduct." 20 U.S.C. §1414(b)(1); H.A.R. §8-60-36(a). Also, "[i]n conducting the evaluation, the local educational agency shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining the content of the child's individual education program, including information related to enabling the child to be involved in and progress in the general education curriculum. . . ." 20 U.S.C. §1414(b)(2); H.A.R. §8-60-36(b). It is ultimately the local educational agency's responsibility to "ensure that the child is assessed in all areas of suspected disability." 20 U.S.C. 1414(b)(3)(B); H.A.R. §8-60-36(c)(4)[11]. Parent 1's June 14, 2019 Request for Evaluation (FOF 16), Parent 1's request for an /FBA on June 24, 2019, and the January 19, 2019 Treatment Plan, even if the DOE questions the quality or reliability of FBAs conducted by non-DOE contracted agencies, were enough to raise suspicion that Student's disability was such that Student required an FBA[12]. By only requesting speech/language and

[11] The language of H.A.R. §8-60-36(c)(4) reads: "The department shall ensure that:. . . (4) The Student is assessed in all areas related to the suspected disability. . . ." The Hawaii Administrative Rules place a greater requirement on the DOE than the United States Code because the Hawaii Administrative Rules require the DOE to not only assess a student in all areas of suspected disability, but also in all areas "related to" the suspected disability.

[12] Faced with Parent 1's concerns regarding Student's behavior and Private Provider 2's conclusion that "Client engages in challenging behaviors (eloping and high risk attention seeking behaviors) that pose a health and safety risk and require increases protocol modification time" and "Client struggles to acquire new skills and attention seeking behaviors and treatment requires onsite modeling of skills/targets to address barriers to progress," (FOF 13) there was no reason why the DOE needed to wait for a DOE contracted provider to make a recommendation for an FBA as part of the initial evaluation. Even if DOE were correct that they needed the input from a provider before making a recommendation for an FBA, there is no legal requirement that the provider had to be contracted with the DOE. The input that DOE sought could have been obtained through the January 19, 2019 Treatment Plan where Private Provider 2 clearly indicated that Student had challenging behaviors that needed a provider. The team's review of the January 19, 2019 Treatment Plan would not be the services.

social/behavior observations at the June 24, 2019 Student Needs meeting did not ensure that Student was assessed in all areas of suspected disability (FOF 21).

While there is nothing precluding the DOE from establishing procedures to ensure that the information they receive is reliable—a DOE contracted provider to help decide if an FBA is warranted—adherence to the procedures cannot be to the detriment of the child. Faced with a possible August 12, 2019 beginning school date, it was incumbent upon the DOE to make sure that the August 5, 2019 IEP was the result of "a full and individual initial evaluation." 20 U.S.C. 1414(a)(1)(A). One of the purposes of the June 24, 2019 Student Needs meeting was to determine what additional data, if any, was needed to define the needs of Student (FOF 17). If the team believed that the law prevented them from requesting an FBA without the input of a provider, it was incumbent upon DOE to make sure that a provider was timely found, necessary meeting(s) held, and an FBA conducted prior to the eligibility meeting. Unfortunately for DOE, their reliance on a flawed interpretation of the law resulted in an incomplete initial evaluation which could not fully determine the educational needs of Student.

During the August 5, 2019 IEP meeting, an FBA was again not requested because a DOE contracted provider was not present (FOF 40). It was not until the August 15, 2019 Triennial Re-Evaluation meeting with a DOE contracted provider present did the DOE decide to have an FBA done (FOF 71). By August 15, 2019, Student should have had an appropriate IEP to coincide with the start of school. Instead, DOE sent a "Consent for Assessment as Part of a Reevaluation" form home to Student's Parent 1s on August 19, 2019 (FOF 74). The "Consent for Assessment as Part of a Reevaluation" form, if signed by Parent 1 would allow for an FBA to be conducted. Parent 1 signed the consent form on August 26, 2019, allowing DOE to conduct

an FBA[13] (FOF 88). The FBA was completed on October 21, 2019 (FOF 89). It took approximately two months from the time of Parent 1's consent to when the FBA was completed. It took almost four months from the time of Parent 1's request for an FBA on June 24, 2019 to when the FBA was completed. Had an FBA been requested in June as part of the initial evaluation, an FBA might have been available to the IEP team on August 5, 2019[14]. Due to DOE's flawed procedures, the IEP team did not have the benefit of an FBA done by a DOE contracted provider to conduct a full and individual initial evaluation before the initial provision of special education and related services to Student. Now, turning to each of Petitioners' allegations regarding the sufficiency of the August 5, 2019 discussion into various areas of Student's August 5, 2019 IEP.

(a) ESY Eligibility

The IEP team's discussion regarding ESY eligibility was insufficient. The ESY eligibility standard consists of four-parts: nature and severity of Student's disability; self-sufficiency/independence; regression; and recoupment. Dep't of Educ., State of Haw. v. Leo W., by and through his Parent Veronica W., 226 F.Supp.3d 1081, 1111, 1113, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016). When Parent 1 requested ESY services for Student, the school district

[13] Respondents' argument that DOE "met its requirement to complete the FBA within sixty days of receiving parental consent" is unpersuasive. DOE Closing Brief, p. 8, FN 12. Parent 1 did not have the consent form to sign until DOE gave it to Parent 1 on August 19, 2019 (FOF 74). DOE gave Parent 1 the consent form because the IEP team had determined, with the input of a provider, that an FBA would be done. In this case, the sixty days requirement becomes superfluous if DOE is able to control when the sixty days begin by withholding the consent form until DOE decides that it is ready to conduct an evaluation.

[14] It is noted that it took approximately two months from the time Parent 1 signed the consent form on August 26, 2019 for an FBA to be done to when the FBA was completed on October 21, 2019. According to Respondents, two months was considered long as "[i]t took some time to complete the FBA." DOE's Closing Brief, p. 7. If two months is considered "some time," then it was possible for the DOE to have a completed FBA by August 2019 for Student's IEP meeting.

members of the IEP team explained to Parent 1 what ESY entailed and how it was determined. The school district members of the IEP team also informed Parent 1 that they would take data and get a "great baseline" of Student in the school setting utilizing a known program, and then take data again during upcoming breaks and compare the data they get during the breaks with the baseline (FOF 44). There was no discussion about Student's regression and recoupment (FOF 45). The district school members of the IEP team did not consider the available information they had, such as the January 19, 2019 Treatment Plan, in their discussion. A discussion about a lack of data and what ESY entails and how it is determined is not a discussion about Student's individualized eligibility for ESY services. As such, the discussion regarding Student's ESY eligibility contained procedural errors. However, even though there were procedural errors in discussing Student's ESY eligibility, there was no substantive violation because Petitioners have not shown that ESY services are necessary for the provision of FAPE to Student, as will be discussed below in section D.

(b) Services to Address Difficulties with Acclimation and Difficulties with Behavior and Need for a provider and Behavioral Interventions

During the August 5, 2019 IEP meeting, Parent 1 expressed concerns about Student's ability to acclimate to a new environment. Parent 1 suggested that to help Student with acclimating to a new school, Student should be allowed to have Student's providers at DOE School 1 as part of a transition plan (FOF 49). The IEP team informed Parent 1 that they could not provide provider without first doing an FBA (FOF 50). Parent 1 testified that Parent 1 felt the IEP team was rushing Private Provider 1 during the August 5, 2019 IEP meeting and they did not seem interested in Private Provider 1's input (FOF 54). According to Parent 1, Parent 1 did not recall Private Provider 1 providing suggestion on how to help Student acclimate to DOE

School 1 during the August 5, 2019 IEP meeting, but Parent 1 recalled Private Provider 1 giving information about Student's behavior (FOF 54).

DOE-Provider 1 testified that the discussion regarding what services and accommodations or supports Student might need was based on Student's current performance and information the IEP team had at the time of the meeting (FOF 56). DOE-Provider 1 also testified that based on the information the team had at the time, DOE-Provider 1 did not feel that Student needed a provider (FOF 57).

There is no evidence that the IEP team prevented Private Provider 1 from speaking during the meeting. According to Parent 1, Private Provider 1 did speak during the August 5, 2019 IEP meeting, however, Parent 1 did not recall Private Provider 1 providing suggestion on how to help Student acclimate into DOE School 1. Parent 1's perception that the IEP team rushed Private Provider 1 and did not seem interested in Private Provider 1's input, without more, is not enough to establish that Private Provider 1 was somehow prevented or discouraged from speaking during the August 5, 2019 IEP meeting about services that would help Student acclimate into a new school. Furthermore, Parent 1's change in testimony during the due process hearing casts doubt on Parent 1's recollection of what happened at the meeting. Parent 1 initially testified that Parent 1 did not recall Private Provider 1 providing suggestions about how to help Student transition into DOE School 1, but Parent 1 later stated that Private Provider 1 did not provide suggestions at the August 5, 2019 IEP meeting (FN 6). Based on the foregoing, there is no credible evidence to suggest that Private Provider 1 was prevented from speaking during the August 5, 2019 IEP meeting.

However, as explained above, the information that the IEP team had during the August 5, 2019 IEP meeting was incomplete because DOE chose to wait for a provider to help decide if

an FBA should be done. The basis of DOE-Provider 1's belief that Student did not need services was based on information the team had at the time of the August 5, 2019 IEP meeting is indicative of how a lack of information can affect decisions. Had DOE made reasonable efforts to ensure that an FBA[15] was done by the time of the IEP meeting (whether it be August 5, 2019 or a little later), the IEP team would have had a full initial evaluation to use in their discussion in developing Student's IEP.

Under the IDEA, harmless procedural errors do not constitute a denial of FAPE; however, procedural inadequacies that result in the loss of educational opportunity or significantly impede the parent's opportunity to participate in the IEP formulation process will result in the denial of a FAPE. W.G. v. Bd. of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992). A hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of education benefit. 34 C.F.R. §300.513(a)(2). "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been bettered considered.'" Doug C. v. Hawaii Dept. of Educ., 720 F.3d 1038, 1046 (9th 2013) (quoting M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 657 (9th Cir. 2005). "[A]n IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that student placement would have been different but for the procedural error." Doug C., 720 F.3d 1038,

[15] It is noted that the eventual FBA that was done, dated October 21, 2019, is eight pages in length, consisting of an interview with Parent on October 21, 2019 and a 1.5 hour observation of Student at DOE School 1 on September 13, 2019. No teachers were interviewed (FOF 89-91).

1046 (9th 2013) (citing M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 657 (9th Cir. 2005). If the IEP team had an FBA during the August 5, 2019 IEP meeting, there is a strong likelihood that alternative educational possibilities would have been considered.

Furthermore, even though the IEP team did not intentionally prevent Parent 1 and Private Provider 1 from discussing the services, modification/accommodations, and/or supports to address Student's difficulties with acclimation into DOE School 1 and difficulties with behavior and the need for a provider and behavioral intervention, the IEP team's response to Parent 1's request for providers cut short any meaningful discussion and significantly impeded Parent 1's right to parental participation. Parental participation in the IEP and educational placement process is critical and necessary. Doug C., 720 F.3d 1038, 1043-1044 (9th Cir. 2013). A school has an "affirmative duty" to include parents in the IEP process. Doug C., 720 F.3d 1038, 1044 (9th Cir. 2013). "Because disabled children and their parents are generally not represented by counsel during the IEP process, procedural errors at that stage are particularly likely to be prejudicial and cause the loss of educational benefits." M.C. v. Antelope Valley Union High School District, 858 F.3d 1189, 1195 (9th Cir. 2017). Therefore, the discussion regarding the "services, modification/accommodations, and/or supports" to address Student's difficulties with acclimation into DOE School 1 for implementation of Student's IEP, and difficulties with behavior and the need for a provider and behavioral interventions was insufficient during the August 5, 2019 IEP meeting and denied Student a FAPE.

D. Whether the August 5, 2019 IEP Provides Student a FAPE When It Does Not Provide Extended School Year Services

Petitioners allege that Student was denied a FAPE because the August 5, 2019 IEP did not provide ESY services to Student. Although there were procedural errors committed during the ESY discussion, there was no substantive error because Petitioners have not proven that ESY

services are necessary for the provision of FAPE to Student. The C.F.R. §300.106—Extended school year services--states in pertinent part:

> (a) General.
> (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
> (2) Extended school years services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.
> (3) In implementing the requirements of this section, a public agency may not—
> (i) Limit extended school year services to particular categories of disability; or
> (ii) Unilaterally limit the type, amount, or duration of those services.
>
> (b) Definition. As used in this section, the term extended school year services means special education and related services that—
> (1) Are provided to a child with a disability—
> (i) Beyond the normal school year of the public agency;
> (ii) In accordance with the child's IEP; and
> (iii) At no cost to the parents of the child; and
> (2) Meet the standards of the SEA.

Hawaii Administrative Rule §8-60-7 is substantively identical to C.F.R. §300.106.

DOE must provide ESY services only if the Student's IEP team determines that ESY services are necessary for the provision of FAPE to Student. Dep't of Educ., State of Haw. v. Leo W., by and through his Parent Veronica W., 226 F.Supp.3d 1081, 1112, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016). "The burden is on the parents to establish that ESY services are necessary." Virginia S. ex rel. Rachael M. v. Department of Educ., Hawaii, 2007 WL 80814 at *13, Civil No. 06-00128 JMS/LEK (D.Haw. Jan. 8, 2007). "'[A] claimant seeking an ESY must satisfy an even stricter test, because "providing an ESY is the exception and not the rule under the regulatory scheme."'" N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1211 (9th Cir.2008) (citations omitted). Therefore, the burden

is on Petitioners to establish by a preponderance of the evidence that ESY services are necessary for Student. Petitioners have failed to meet this burden.

Parent 1 testified that Student has never been without services for eight weeks and "gets weekends off" from services (FOF 58). However, never having been without services for eight weeks is not enough to meet the burden of showing necessity. While Petitioners are not required to present empirical proof of actual prior regression, there was no evidence that ESY was necessary. There were no expert opinion testimony or opinions from professionals or any reliable documentation showing that ESY is necessary. N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1212 (9th Cir.2008) (A claimant can rely on expert opinion testimony to make the showing that ESY is necessary to permit a child to benefit from the instruction, and are not required to present empirical proof of actual prior regression). *See also*, Virginia S. ex rel. Rachael M. v. Department of Educ., Hawaii, 2007 WL 80814 at *12, Civil No. 06-00128 JMS/LEK (D.Haw. Jan. 8, 2007) ("'the state should consider the likelihood of regression, slow recoupment, and predictive data based upon the opinion of professionals.'" Todd v. Duneland Sch. Corp., 299 F.3d 899 (7th Cir. 2002)). Although Parent 1 is concerned that Student has never been without services for eight weeks, there is no evidence to corroborate Parent 1's position that Student needs ESY services.

Furthermore, the evidence that came out during the due process hearing regarding Student's need for ESY shows that ESY is not necessary. The January 19, 2019 Treatment Plan did not mention Student's need for ESY (FOF 14). The August 5, 2019 Treatment Plan did not mention Student's need for ESY (FOF 64). DOE-Provider 1, who testified as an expert in the area of behavioral health, testified that the January 19, 2019 Treatment Plan contained information on Agency 1's expectations for Student after a vacation. In reviewing the DOE Ex.

4 at 0122, DOE-Provider 1 testified that "they're actually increasing the demand and making it more challenging. So it's almost like they're expecting progress after a break, which is a great thing. You want your kids to be able to maintain the skill and even progress after a break in services…" (FOF 47). Lastly, Private School 2 offers "extended school year" (FOF 80) but there is no evidence that Student enrolled in it or that anyone, including Private School 2, recommended that Student enroll in it[16].

"'ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if student is not provided with an educational program during the summer months.'" N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1211 (9th Cir.2008) (quoting MM ex rel. DM v. Sch. Dist. of Greenville County, 303 F.3d 523, 537-38 (4th Cir.2002)). Based on the lack of evidence that the benefits Student will gain during a regular school year will be significantly jeopardized if Student is not provided ESY services, Petitioners have failed to meet their burden. As such, DOE did not deny Student a FAPE because the August 5, 2019 IEP did not provide ESY services to Student.

E. Whether the August 5, 2019 IEP Provides Student a FAPE When It Inadequately Describes the "Services, Modifications/Accommodations, and/or Supports" to Address Student's Difficulties with (1) Acclimation into the Offered Location for Implementation of Student's IEP, and (2) Behavior, and the Need for a Provider and Behavioral Interventions

Petitioners allege that the August 5, 2019 IEP denied Student a FAPE because it does not contain specific services, modification/accommodations, and/or supports to address Student's difficulties with acclimation or transition into DOE School 1 and to address Student's behavior

[16] Private School 2 informed Parent that extended school year was available to Student but only if Student has a provider with Student. This conditional availability of ESY for Student is not the same as Student needing ESY (FOF 105).

and need for a provider and behavioral interventions. Where there is a finding of procedural violation that denied a student a FAPE, the second prong—whether the IEP is reasonably calculated to enable the child to receive educational benefits—need not be addressed. Doug C., 720 F.3d 1038, 1043 (9th Cir.2013). However, because Petitioners seek a response to whether there are substantive errors in Student's August 5, 2019 IEP, those issues will be addressed below.

Respondents argue that Student's August 5, 2019 IEP was appropriate and "the August 5th IEP must be assessed based upon information and data available to the team as of that date." DOE Closing Brief, p. 16. Respondents rely on the "snapshot rule" to argue that the sufficiency of the August 5, 2019 IEP should not be judged with information made available after August 5, 2019. "[A]n IEP must be evaluated in light of the 'snapshot' rule, 'which instructs us to judge an IEP not in hindsight, but instead based on the information that was **reasonably available** to the parties at the time of the IEP.'" Dep't of Educ., State of Haw. v. Leo W., 226 F.Supp.3d 1081, 1099, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016) (citing Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1187 (9th Cir.2016)) (emphasis added). While this is the general rule, it is unreasonable for Respondents to employ the snapshot rule to preclude consideration of information that would have been available had the DOE timely obtained an FBA. The information that was available in the October 23, 2019 IEP could have been "reasonably available" to the parties but for DOE's failure to timely obtain an FBA. Therefore, equity requires that the issue of whether the August 5, 2019 IEP was appropriate should be judged by what the DOE knew or should have known at the time of the August 5, 2019 IEP meeting.

According to DOE-Provider 1, the October 21, 2019 FBA drove the changes in the October 23, 2019 IEP because the "FBA shared that there was more behaviors exhibited during the observation" (FOF 100). DOE-Provider 1 testified that "current functional behavior assessment dated October 21, 2019, target behaviors include elopement, flopping, dropping, crying[,] access to tangible items." "But there is [sic] behaviors listed in here that we did not have from our data that we had present at the time, at the August 5th meeting. So that's why these were added because of the FBA that was completed. This is what drove that." (FOF 100). Based on DOE-Provider's testimony, the basis for the changes in the October 23, 2019 IEP was the targeted behaviors in the October 21, 2019 FBA, such as elopement, flopping, dropping, crying and access to tangible items; however, these targeted behaviors were not new and were discussed in the January 19, 2019 Treatment Plan. The January 19, 2019 Treatment Plan stated that Student had "challenging behaviors [which] include[d] behavioral excesses such as tantrum behavior, aggression, self-injurious behavior, and mouthing." (FOF 10). The January 19, 2019 IEP addressed "Protest/Tantrum" which included "crying, spitting, scratching self and other" and elopement (FOF 10). Although the October 23, 2019 IEP lists "access to tangible items" as a targeted behavior, it is not mentioned in the October 21, 2019 FBA as a target behavior. Based on the foregoing, much of the data that drove the changes in the October 23, 2019 IEP actually existed in the January 19, 2019 Treatment Plan. As such, even without the October 21, 2019 FBA, there was sufficient data to justify the need for services to address Student's difficulties with acclimation and behavior, and the need for an aide and behavioral interventions.

Based on the foregoing, the August 5, 2019 IEP did not provide a FAPE to Student because it inadequately described the "services, modification/accommodations, and/or supports"

to address Student's difficulties with acclimation into DOE School 1 and to address Student's difficulties with behavior, and the need for an aide and behavioral interventions.

F. Tuition Reimbursement for Private School

Petitioners seek tuition reimbursement for Private School 2 for school year 2019-2020, including transportation and school-required uniforms; however, Petitioners only entered evidence invoicing a total of $2,438.00 in tuition and fee payments (FOF 109). The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in private school and request reimbursement for tuition at said private school from the local educational agency. Florence County School Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 364-365, 126 L.Ed.2d 284 (1993) (citing School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985)), *see also* 20 U.S.C. §1415(b)(6), (f)(1)(A). A parent who unilaterally places a child in private school pending review proceedings under the IDEA is entitled to reimbursement if the parent can establish that (1) the public placement violated the IDEA, and (2) the private school placement was proper under the IDEA. Doug C., 720 F.3d 1038, 1041, 1047-1048 (9th Cir.2013) (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993)). If both are met, "the district court must then exercise its 'broad discretion' and weigh 'equitable considerations' to determine whether, and how much, reimbursement is necessary." C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir. 2011) (citing Carter, 510 U.S. at 15-16, 114 S. Ct. 361).

The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in Frank G. v. Bd. Of Educ., 459 F.3d 356, 365 (2nd Cir.2006), where "to qualify for

reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Frank G. v. Bd. Of Educ., 459 F.3d at 365). Parental placement can be appropriate, even if it does not meet state standards. 34 C.F.R. 300.148(c). *See e.g.*, Florence County Sch. Dist. Four v. Carter, 20 IDELR 532 (U.S. 1993).

In this case, the public placement of Student violated the IDEA in such a manner that Student was denied a FAPE. This Hearings Officer now examines whether the unilateral placement of Student at Private School 2 was proper under the IDEA.

Parent 1 testified about whether the private school placement was proper under the IDEA. Parent 1 testified that Student threw tantrums and had difficulties adjusting to new environments and Student's behavior was "pretty difficult" in August of 2019 (FOF 37). However, Parent 1 feels that Student is "doing really pretty good" at Private School 2 (FOF 82). Per Parent 1, Student now reads and does math; sits really nicely in the seat; doesn't walk around; performs task before getting what Student wants (FOF 82, 84). Parent 1 also testified that when Parent 1 spoke to Private School 2's personnel, they said that Student was a fast learner and academically Student was at grade ____ level (FOF 85). The Private School 2 allows a private providers to be with Student all day to address Student's behavioral problems (FOF 86). Student is also provided an iPad as incentive to perform tasks which, according to Parent 1, is working. Private School 2 also modified Student's homework and the amount of homework Student receives. Student receives individualized teaching. The Private School 2

uses a multi-methodology approach which entails visual, kinesthetic and auditory learning. Private School 2 also uses repetition to teach Student (FOF 83).

However, the undersigned questions Parent 1's account of how Student is doing at Private School 2 because Parent 1 gave conflicting testimony during the due process hearing when Parent 1 was asked questions regarding how Student was doing at Private School 2. When asked by Petitioners' counsel, "Is there anything else you wish to say about that and the other accommodations?" Parent 1 responded:

> They also modified [Student's] homework. And the amount of homework that [Student] receives, they modified it. And they also – The way Student's being taught is also individualized, so [Student is] not doing grade level work yet. (FOF 83).

Later in Parent 1's testimony when Petitioners' counsel asked Parent 1 what Student's teachers or administrative staff at Private School 2 had said about Student, Parent 1 responded:

> They said that [Student] learns fast. [Student is] a fast learner. And they said that [Student is] at grade ____ level academically. We enrolled Student, but [Student's] academic wise is level ___, grade ___. (FOF 85).

Without corroborating testimony or any reports from Private School 2 to support Parent 1's recollection or account of how Student is performing at Private School 2, the undersigned is unable to give much weight to Parent 1's perception of how Student is performing at Private School 2.

Furthermore, Private School 2 conditioned Student's acceptance into Private School 2 on Student having a provider with Student at all times at parents' expense (FOF 103). Private School 2 informed Parent 1 that if Student did not have a provider on a certain day, then Student would not be able to attend Private School 2 on that day because Student's behavioral needs cannot be met by Private School 2 staff (FOF 105). As for the Private School 2 staff, Parent 1 did not know Student's teacher's qualifications or educational background. Student is placed in

the classroom, and has one teacher at Private School 2 (FOF 81, 87). According to Parent 1 the principal of Private School 2 "provides the whole curriculum," and the teacher does the "guiding." (FOF 87). Without more, it is difficult to determine whether Private School 2 is able to meet even some of Student's unique educational needs and whether Private School 2 is providing an educational program that enables Student to make educational progress in light of Student's circumstances. Based on the foregoing reasons, Petitioners have not proven that Private School 2 placement was proper under the IDEA.

Finally, Petitioners failure to comply with 20 U.S.C. §1412(a)(10)(C)(iii) also warrants denial of reimbursement. Although the IDEA allows for a reduction in the cost of reimbursement for non-compliance with the notice requirement, a denial of reimbursement in its entirety is appropriate in this matter. Parent 1 submitted an application to Private School 2 on August 19, 2019 (FOF 75). Student began at Private School 2 on September 3, 2019 (FOF 77). SSC found out from Parent 1 over the phone that Student was attending Private School 2 on September 5, 2019 (FOF 78). Petitioners did not inform the IEP team on August 5, 2019 that they were rejecting the placement proposed by DOE and of their intent to enroll Student at a private school at public expense, nor did Petitioners give written notice to DOE ten (10) business days prior to removal of Student from public school (FOF 76). 20 U.S.C. §1412(a)(10)(C)(iii). Petitioners' argument that the "10-day notice rule" was somehow satisfied because "Student's probationary period ended and [Student] was officially enrolled in [Student's] private program—the date that parent became contractually obligated to pay for Student school-year tuition—demonstrates that there was a period of time greater than 10 business days between these dates." Pet. Closing Brief, p. 21. Petitioners' argument is unpersuasive. Even though Student was on probation, Student was enrolled and attending Private School 2 when SSC found out about it on

August 5, 2019. Parent 1 had paid $693.00 in fees and other costs on September 4, 2019 (FOF 109), and $1,745.00 in tuition on September 16, 2019 for the months of September and October (FOF 109). DOE School 1 started some time around August 12, 2019 (FOF 29). Based on the evidence, Student was removed from public school on September 3, 2019. As such, Petitioners have not met their burden to show that the private school placement was proper under the IDEA and that they provided DOE with appropriate notice prior to removal, and tuition reimbursement is denied.

G. Petitioners' Section 504 of the Rehabilitation Act of 1974 Claim

Petitioners' Complaint "assert[s] Student's eligibility for rights and protections under Section 504 of the Rehabilitation Act of 1974." Complaint, p. 2. In Petitioners' Prayer for Relief, Petitioners seek a finding that the DOE denied Student a FAPE under the IDEA and/or Section 504. Petitioners, however, did not present any evidence or argument during the due process hearing and their closing brief regarding their Section 504 claim. Based on the lack of evidence or argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have effectively abandoned their Section 504 claim and have not met their burden of proof.

V. DECISION

Based upon the above-stated Findings of Fact and Conclusions of Law, the undersigned Hearings Officer concludes that Petitioners have proven a denial of FAPE by failing to allow Parent 1 significant and meaningful participation in the formulation of Student's August 5, 2019 IEP by failing to sufficiently discuss Student's eligibility for ESY, the "services, modifications/accommodations, and/or supports" to address Student's difficulties with acclimation into DOE School 1 for implementation of Student's August 5, 2019 IEP and to

address Student's difficulties with behavior, and the need for an aide and behavioral interventions. Respondents further failed to provide Student a FAPE when it inadequately described the "services, modification/accommodations, and/or supports" to address Student's difficulties with acclimation into DOE School 1 for implementation of Student's August 5, 2019 IEP and to address Student's difficulties with behavior, and the need for an aide and behavioral interventions.

For the reasons stated above, IT IS HEREBY ORDERED --

1. The IEP team shall, within ten (10) school days of this Order, decide if any additional tests or assessments are necessary to determine Student's current needs and revise Student's IEP. Any assessments are to be scheduled and completed within forty-five (45) calendar days of this Order.
2. An IEP revision team meeting shall be held within ten (10) school days of the completion of all aforementioned assessments.
3. DOE is directed to gather necessary information to develop a transition plan for Student[17].
4. Student's revised IEP shall contain a transition plan to transition Student from Private School 2 to DOE School 1 or another DOE school. This transition plan shall include a description of any supplemental aids and services to be provided at DOE S or another DOE school, and a proposed start date and end date for the transition plan's implementation.

[17] Pursuant to 20 U.S.C. §1414(c)(3), parental consent need not be obtained if DOE can demonstrate that it had taken reasonable measures to obtain such consent and Parent 1 has failed to respond. H.A.R. §8-60-31(c)(2) (FOF 106).

5. Any delay in scheduling and completing any required assessment because it requires the Student's physical presence to complete the assessment will extend the deadlines set herein by the number of days attributable to the delay. Respondents shall document the delays and provide Petitioners with a written explanation as to why completing a required assessment is an impossibility and other alternatives, such as virtual/telephonic conferences, are not viable options for a particular assessment.
6. Any delay in meeting any of the deadlines in this Order because of an act or acts of Petitioners and/or their representatives and/or their private providers, will extend the deadlines set herein by the number of days attributable to Petitioners and/or their representatives and/or their private providers. Respondents shall document in writing any delays caused by Petitioners and/or their representatives and/or their private providers.

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 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, April 7, 2020.

/s/ Charlene S.P.T. Murata

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