



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

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

Petitioners,

vs.

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

Respondents.

DOE-SY1920-027

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing: February 4-7, 2020  
February 12-13, 2020  
February 24-25, 2020

Hearings Officer : Chastity T. Imamura

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On October 29, 2019, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawaii Public Schools (hereinafter "Respondents" or "DOE") received a request for a due process hearing under the Hawaii Administrative Rules (hereinafter "HAR") Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act

---

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

(hereinafter “IDEA”), from Student, by and through Parent 1 (hereinafter “Petitioners”). On November 14, 2019, Petitioners submitted an amended request for due process hearing to Respondents, adding several issues to be addressed at a Due Process Hearing. Respondents submitted a response to Petitioners’ amended request on November 22, 2019.

On December 3, 2019, Petitioners submitted a Motion for Stay Put and Reimbursement, which was scheduled for hearing on December 24, 2019. Respondents filed their response to Petitioners’ Motion for Stay Put and Reimbursement on December 18, 2019. Petitioners’ Motion for Stay Put and Reimbursement was granted in part and denied in part in a written Order filed on December 30, 2019.

A pre-hearing conference was also held on December 24, 2019, before Hearings Officer Chastity T. Imamura, with Sam Shnider, Esq. (hereinafter “Mr. Shnider”), representing Petitioners, and Kunio Kuwabe, Esq. (hereinafter “Mr. Kuwabe”), representing Respondents. At the pre-hearing Conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for February 4, 2020, through and including February 7, 2020.

Due to the scheduling of the Hearing, Respondents requested an extension of the original deadline by which a decision was to be made from January 28, 2020 to March 13, 2020. Respondents’ request for an extension was granted and the new deadline was set at March 13, 2020. Due to the necessity of additional hearing dates for the Hearing and the length of the Hearing, Petitioners submitted a request for an extension of the deadline, which was granted from March 13, 2020 to April 27, 2020.

The Hearing commenced on February 4, 2020. Present at the hearing were Hearings Officer Chastity T. Imamura; Parent 1 and Mr. Shnider, on behalf of Petitioners; and DOE District Educational Specialist (hereinafter “DES”) and Mr. Kuwabe on behalf of Respondents.

Testimony was not completed by February 7, 2020, so the Hearing was extended to February 12, 2020, through and including February 13, 2020. The Hearing was further extended to the additional dates of February 24, 2020, through and including February 25, 2020.

Respondents requested the ability to submit written closing briefs to analyze the facts presented during the hearing with the applicable IDEA law. Petitioners objected to this request and moved for oral closing arguments due to the cost factors that would be incurred by having Petitioners' counsel review the transcripts of the eight-day hearing and conduct legal research. This Hearings Officer decided that since this case involved seven (7) issues being presented by Petitioners, it would be helpful for the attorneys to present what they believe are the relevant cases that support their arguments for each issue. The format for the closing briefs were limited to fifteen (15) pages of case listings with brief summaries and analysis. Oral closing argument on the facts of the case was done at the end of the presentation of evidence. Transcripts were not provided to the parties until after the closing briefs were submitted by counsel.

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

## **II. ISSUES PRESENTED**

Petitioners assert seven (7) issues in the Complaint:

1. Whether Respondents failed to have an Individualized Education Program (hereinafter "IEP") in place for Student for the 2019-2020 school year.
2. Whether Respondents owe reimbursement for Student's private school tuition from August 2019 to October 2019, when the Complaint was filed.

3. Respondents failed to have a valid IEP team in place and a valid IEP meeting due to not having proper local educational agency (hereinafter “LEA”) representatives and not having representatives who had knowledge of Student or the available resources.

4. Whether Respondents failed to provide prior written notice of the change of Student’s educational placement.

5. Whether Respondents predetermined Student’s IEP and Placement.

6. Whether Respondents blocked parent participation.

7. Whether Student’s placement is the Least Restrictive Environment (hereinafter “LRE”) for Student in accordance with the IDEA.

### **III. FINDINGS OF FACT**

1. Student currently attends Private Center pursuant to HAR §8-60-72(a).<sup>2</sup>

2. Student is eligible for special education and related services pursuant to Individuals with Disabilities Education Act<sup>3</sup> and Hawaii Administrative Rules Chapter 60 under Eligibility Category.<sup>4</sup>

3. Parent 1 has been the legal guardian and representative for purposes of IDEA disputes.<sup>5</sup>

4. Parent 1 is familiar with the rights and safeguards provided under the IDEA, having been involved in several of Student’s IEPs and IEP meetings, and having filed several complaints related to Student’s education, three of which went through full due process hearings.<sup>6</sup>

---

<sup>2</sup> See Respondents’ Exhibit 2, page 11 (hereinafter referenced as “R-Ex.2, p.11.”)

<sup>3</sup> 20 U.S.C. Ch. 33

<sup>4</sup> P-Ex.1, p.8; R-Ex.3, p.329.

<sup>5</sup> Parent 1’s testimony, Transcript Volume 1, page 29, line 22 through page 30, line 7 (hereinafter referenced as “Tr.V1, 29:22-30:7”).

<sup>6</sup> Parent 1’s Testimony, Tr.V1, 81:11-17. See also e.g. Parent 1’s Testimony, Tr.V1, 33:22-36:19, Tr.V1, 43:11-15 (regarding Parent 1’s familiarity with Administrative Hearings Officer

5. Parent 1 has been assisted by Private Center Administrator 1 since shortly after Parent 1 became the guardian for Student.<sup>7</sup>
6. Private Center Administrator 1 is very familiar with Student, having worked closely with Student since Private Center Administrator 1 met Student and having established a good relationship with Student where Private Center Administrator 1 could assist Student's service providers in working with Student.<sup>8</sup> Private Center Administrator 1 considers \_\_\_self an advocate for Student.<sup>9</sup>
7. Private Center Administrator 1, Private Center Administrator 2 and Private Provider 1 often speak for Parent 1 and act as advocates for Student during various interactions with DOE representatives.<sup>10</sup>
8. Private Center Administrator 1 is also very familiar with the IDEA provisions, procedures and safeguards, having been involved in several proceedings, including Student's and other student's due process hearings.<sup>11</sup>

---

(hereinafter "AHO") Jennifer M. Young's November 2018 Decision); Tr.V1, 38:10-40:19; Tr.V1, 41:11-12; Tr.V1, 43:4-46:10; Tr.V1, 123:8-11 (regarding Parent 1's experience with IEPs and IEP meetings), see also R-Ex.9, 1164-1196 (AHO Richard A. Young's November 2014 Decision); R-Ex.9, p.1198-1238 (AHO Rowena A. Somerville's September 2015 Decision).

<sup>7</sup> Private Center Administrator's Testimony, Tr.V1, 136:25-137:21.

<sup>8</sup> Private Center Administrator's Testimony, Tr.V1, 137:22-145:13.

<sup>9</sup> R-Ex.9, IEP Meeting recording for October 30, 2019, Part 1, [approximate time stamp 00:00:45-00:00:50] (hereinafter referenced as "10/30/19-meeting, Pt.1 [00:00:45-00:00:50]").

\*This Hearings Officer notes that both Petitioners and Respondents provided audio recordings of the October 30, 2019 IEP meeting, however for reference purposes, all the approximate time-stamps are from the exhibit submitted by Respondents.

<sup>10</sup> See e.g., R-Ex.9, 5/14/19-meeting, and R-Ex.9, 10/30/19-meeting, Pts.1 & 2; also P-Ex.3, p.367-370, R-Ex.9, p.532-535, p.1314-1317.

<sup>11</sup> See e.g., Private Center Administrator 1's Testimony, Tr.V2, 232:21-2, 239:8-15, 251:23-252:19, 253:14-18.

9. Student's previous IEP was last completed on May 3, 2018 (hereinafter "IEP-5/3/2018"), which was a revision of an IEP created in January 2018.<sup>12</sup>
10. The May 3, 2018 IEP team members included Parent 1, Private Center Administrator 1, Private Center Administrator 2, Private Provider 1, Principal, and DES.<sup>13</sup>
11. In July 2018, Parent 1 filed a due process complaint (hereinafter "July 2018 Complaint") citing various problems with the IEP-5/3/2018 created for Student, including but not limited to, the supports and services to be provided to Student by the DOE, and Student's educational placement.<sup>14</sup>
12. Parent 1, Private Center Administrator 1, Private Provider 1, Private Provider 2, DOE Provider 1 and DES were involved in the Due Process Hearing for the July 2018 Complaint.<sup>15</sup>
13. In November 2018, Administrative Hearings Officer Jennifer Young (hereinafter "AHO Young") issued a decision based on the Due Process Hearing for the July 2018 Complaint, in which she determined that Student's IEP-5/13/2018 was deficient, and that Student's educational placement was Private Center.<sup>16</sup> AHO Young further ordered that the DOE pay for Student's tuition and related expenses at Private Center for the 2018-2019 school year, including extended school year (hereinafter "ESY") session.<sup>17</sup>

---

<sup>12</sup> Parent 1's Testimony, Tr.V1, 123:12-124:8; *see also* P-Ex.1, p.122-144, R-Ex.3, 284-306.

<sup>13</sup> R-Ex.3, p.306.

<sup>14</sup> *See* AHO Jennifer Young's Decision dated November 7, 2018, P-Ex.11, p.951-1017, R-Ex.9, p.1240-1306.

<sup>15</sup> R-Ex.9, p.1240-1241.

<sup>16</sup> P-Ex.11, p.951-1017; R-Ex.9, p.1240-1306.

<sup>17</sup> P-Ex.11, p.1015; R-Ex.9, p.1304.

14. The Hawaii Department of Education School Year 2019-2020 for students began on August 5, 2020.<sup>18</sup>

15. Parent 1 was represented by an attorney for the Due Process Hearing on the July 2018 Complaint, and both Parent 1 and Private Center Administrator 1 reviewed and understood the decision issued by AHO Young.<sup>19</sup>

Student's relevant IEP meeting history

16. In January 2019, the DOE sent three (3) notices to Parent 1 to set up an annual IEP meeting, noting that Student's annual IEP review was due in January 2019.<sup>20</sup>

17. Parent 1 refused to meet for an IEP meeting prior to May 2019 and noted that AHO Young's order continued through the end of the school year, and that the annual date from Student's last IEP was May 2018.<sup>21</sup>

18. In Parent 1's response to the January 2019 meeting requests, Parent 1 clearly indicated to the DOE that Parent 1 objects to them having any IEP meetings without Parent 1 being present.<sup>22</sup>

19. Parent 1 and the DOE agreed to an IEP meeting to be held on May 14, 2019.<sup>23</sup>

20. Prior to the May 7, 2019 IEP meeting, DOE sent a request to Private Center for Student's progress records, and behavioral data in preparation for the IEP meeting. DOE also requested that Private Center have their occupational therapist and speech language

---

<sup>18</sup> R-Ex.11, p.1307.

<sup>19</sup> Parent 1's Testimony, Tr.V1, 36:20-38:23, 43:9-15, 124:15-23; Private Center Administrator 1's Testimony, Tr.V2, 251:23-252:9.

<sup>20</sup> Parent 1's Testimony, Tr.V1, 92:17-95:20; R-Ex.6, p.453, p.457, p.459.

<sup>21</sup> Parent 1's Testimony, Tr.V1, 36:20-39:7, 95:7-96:1; P-Ex.2, p.160; R-Ex.6, p.461.

<sup>22</sup> Parent 1's Testimony, Tr.V1, 38:20-21; P-Ex.2, p.160; R-Ex.6, 461.

<sup>23</sup> Parent 1's Testimony, Tr.V1, 39:1-20.

therapist present at the meeting to present current information on Student's performance.<sup>24</sup>

21. The DOE did not receive a complete set of Student's records, specifically Student's behavioral data sheets or charts before the May 14, 2019 IEP meeting.<sup>25</sup> Some behavioral charts were provided to the DOE representatives at the start of the May 14, 2019 IEP meeting.<sup>26</sup>

22. The IEP meeting on May 14, 2019, was held at Private Center and was over one and a half hours.<sup>27</sup> Parent 1 was given a copy of the procedural safeguards at the beginning of the meeting.<sup>28</sup>

23. At the May 14, 2019 IEP meeting, Parent 1 was accompanied by several members from Private Center: Private Center Administrator 1, Private Center Administrator 2, Private Provider 1, and Private Provider 2.<sup>29</sup> Private Provider 3 was sick and unable to attend the meeting.<sup>30</sup>

24. The DOE representatives at the IEP meeting on May 14, 2019 included: DES, Principal, and SSC.<sup>31</sup> DOE Provider 1 was also sick on that date and did not attend the meeting.<sup>32</sup>

---

<sup>24</sup> DES' Testimony, Tr.V5, 942:18-943:1, 995:12-15, Tr.V7, 1324:13-19.

<sup>25</sup> DES' Testimony, Tr.V5, 969:21-970:1, Tr.V7, 1298:23-1300:15.

<sup>26</sup> R-Ex.9, 5/14/2019-meeting, [00:25:30-00:26:40] (*DES saying that they did not get the behavioral charts until today and needed some time to look over them*).

<sup>27</sup> Parent 1's Testimony, Tr.V1, 39:19-22.

<sup>28</sup> R-Ex.9, 5/14/2019-meeting, [00:01:15-00:01:34].

<sup>29</sup> Parent 1's Testimony, Tr.V1, 39:23-40:4; Private Center Administrator 1's Testimony, Tr.V2, 253:14-18; P-Ex.1, p.25, R-Ex.3, p.345.

<sup>30</sup> Private Provider's Testimony, Tr.V3, 468:14-18; R-Ex.9, 5/14/2019-meeting, [00:01:38-00:01:55] (*DES noting that both providers are sick*), [00:28:05-00:28:20] (*discussion of providers being sick*).

<sup>31</sup> Principal's Testimony, Tr.V6, 1096:5-16; P-Ex.1, p.25, R-Ex.3, p.345.

<sup>32</sup> DOE Provider 1's Testimony, Tr.V8, 1516:7-21; R-Ex.9, 5/14/2019-meeting, [00:26:05-00:26:10].

25. The May 14, 2019 IEP meeting included discussions of all Student's IEP Present Levels of Educational Performance (hereinafter "PLEP"),<sup>33</sup> Student's related educational goals, and the necessary supports and services to be provided to Student, except for Student's behavioral goals, since both Private Provider 3 and DOE Provider 1 were sick and unable to attend the meeting.<sup>34</sup>
26. At the May 14, 2019 IEP meeting, it was agreed upon by the IEP team that the meeting should be continued due to both of the providers being sick, and given Student's behavioral needs, resumed when the providers were able to be present for the meeting.<sup>35</sup>
27. Parent 1 did not object to the continuation of the IEP meeting, and the other members of Parent 1's IEP team from Private Center agreed that it would be beneficial for the providers to be present to complete the IEP, noting that Student's behavior is a significant concern that needs to be addressed in Student's IEP.<sup>36</sup>
28. While Parent 1 asserted at the Hearing that Parent 1 objected to the continuation of the meeting, this Hearings Officer did not find any statement made by Parent 1 at the May 14, 2019 meeting to be an objection to the continuation of the meeting. The team spent approximately nine (9) minutes toward the end of the May 14, 2019 IEP meeting

---

<sup>33</sup> While this Hearings Officer recognizes that the more updated terminology for this section of the IEP is considered the 'Present Levels of Academic Achievement and Functional Performance' ("PLAAPP"), both the terminology used by the IEP team in this case and the resulting IEP refer to this section as the "PLEP."

<sup>34</sup> Principal's Testimony, Tr.V6, 1086:17-1087:7; *see also generally* R-Ex.9, 5/14/2019-meeting.

<sup>35</sup> Principal's Testimony, Tr.V6, 1086:7-16; R-Ex.9, 5/14/2019-meeting, [00:26:05-00:27:22] (*initial proposal that meeting should be continued due to not having the providers present*), [00:28:04-00:28:10] (*comment that behavior is such a big issue for Student*), [1:27:00-1:36:05].

<sup>36</sup> Principal's Testimony, Tr.V6 1087:8-18; *see e.g.*, R-Ex.9, 5/14/2019-meeting, [01:29:30-01:30:02] (*Private Center Administrator 2's agreement that providers should be present for meeting*).

discussing the continuation of the meeting and at no time during that discussion did Parent 1 raise any objection to continuing the meeting.<sup>37</sup>

29. At the May 2019 IEP meeting, Student's educational placement was not discussed, as the IEP team wanted to complete the IEP before discussing placement.<sup>38</sup>

30. The new date that was scheduled for the continued IEP meeting was June 7, 2019 at Parent 1's request.<sup>39</sup>

31. For unknown reasons, the meeting was rescheduled by agreement from June 7, 2019 to June 17, 2019.<sup>40</sup>

32. On June 16, 2019, Private Center Administrator 1 gave notice to the DOE that Parent 1 filed a complaint with the State Complaints Office and did not want to proceed with any IEP meetings prior to the resolution of the complaint.<sup>41</sup>

33. Based on the information from Private Center Administrator 1, the DOE cancelled the June 17, 2019 IEP meeting and waited until the State Complaints Office issued a decision on Parent 1's complaint before sending out a new notice for IEP meeting dates.<sup>42</sup>

34. Parent 1's complaint to the State Complaint's Office raised the concern that the next scheduled IEP meeting for June 17, 2019 had been predetermined to change placement of Student from Private Center to a public school. Parent 1 also raised a concern that Parent 1 had not wanted the May 2019 IEP meeting continued but that the school

---

<sup>37</sup> R-Ex.9, 5/14/2019-meeting, [01:27:00-01:36:05] (*discussion of scheduling of the continued meeting due to providers being unavailable*), [01:30:19-01:30:30] (*Parent 1 agreeing that the speech/language and occupational therapists were not necessary at the next meeting since they only needed to discuss behavior*).

<sup>38</sup> See generally R-Ex.9, 5/14/2019-meeting.

<sup>39</sup> R-Ex.6, p.520-522, p.524.

<sup>40</sup> R-Ex.6, p.526, p.528-530.

<sup>41</sup> P-Ex.3, p.367-370, R-Ex.9, p.532-535, R-Ex.9, p.1314-1317.

<sup>42</sup> Principal's Testimony, Tr.V6, 1090:5-1091:18; R-Ex.6, p.543-544

personnel ‘refused to finish the meeting.’ Parent 1 also raised an issue about not wanting several of the IEP team members to continue to be part of the IEP team. These members included Principal, DES and DOE Provider 1. Parent 1 also repeatedly stated in a letter that Parent 1 wanted Student’s placement to remain at Private Center.<sup>43</sup>

35. Student continued to attend Private Center and Private Center submitted payment invoices to the DOE for the period of August 2019 to October 2019.<sup>44</sup>

36. On August 12, 2019, the State Complaints Office issued a decision denying that the DOE committed any violations of the IDEA alleged in Parent 1’s complaint.<sup>45</sup>

37. On August 13, 2019, SSC sent a notice to Parent 1 requesting selection of IEP meeting dates in September 2019.<sup>46</sup>

38. Parent 1 responded that Parent 1’s first available date for the continued IEP meeting was on October 30, 2019. Private Center was also informed of the October 30, 2019 IEP meeting date and was invited to attend.<sup>47</sup>

39. On October 14, 2019, SSC emailed a notice to Parent 1 confirming the continued IEP meeting on October 30, 2019 at Home School.<sup>48</sup> A hard copy of the notice was also mailed to Parent 1 on October 17, 2019.<sup>49</sup>

---

<sup>43</sup> P-Ex.3, p.367-370, R-Ex.9, p.532-535, R-Ex.9, p.1314-1317.

<sup>44</sup> Private Center Administrator 1’s Testimony, Tr.V2, 225:12-18.

<sup>45</sup> Principal’s Testimony, Tr.V6, 1090:17-1091:9; R-Ex.9, p.1318-1319.

<sup>46</sup> R-Ex.6, p.543-544.

<sup>47</sup> Parent 1’s Testimony, Tr.V1, 44:25-45:20; R-Ex.6, p.554-556.

<sup>48</sup> R-Ex.6, p.561-562.

<sup>49</sup> R-Ex.6, p.566-567.

40. In October 2019, Private Center Administrator 1 discovered that the DOE had not made payments for Student's tuition since August 2019 and informed Parent 1 that the payments had not been made.<sup>50</sup>

41. On October 29, 2019, Parent 1 submitted a Request for IDEA Impartial Due Process Complaint to the DOE (hereinafter "Complaint-10/29/19").<sup>51</sup> The Complaint-10/29/19 alleged the following violations:

- a. Respondents failed to prepare an IEP for Student in accordance with the requirements of the IDEA;
- b. Respondents failed to have an IEP in place for Student at the beginning of the 2019-2020 school year;
- c. Respondents failed to pay for Student's private placement through 2019 ESY in violation of the AHO Young's 11/7/18 decision;
- d. Respondents failed to pay for maintenance of Student's private placement at Private Center in violation of legal obligation pursuant to AHO Young's 11/7/18 Decision and not subsequently changed by IEP or other court ruling.<sup>52</sup>

42. At the October 30, 2019 continued IEP meeting, Parent 1 was accompanied by members of Private Center which included: Private Center Administrator 1, Private Center Administrator 2, Private Provider 3, Private Provider 4, Private Provider 1, and Private Provider 2.<sup>53</sup> Parent 1 was provided a copy of the procedural safeguards at the start of the October 30, 2019 continued IEP meeting.<sup>54</sup>

43. DOE members present at the meeting included: Principal, DES, SSC, and DOE Provider 3.<sup>55</sup>

---

<sup>50</sup> Private Center Administrator 1's Testimony, Tr.V2, 252:17-253:13.

<sup>51</sup> R-Ex.1, p.2-83.

<sup>52</sup> R-Ex.1, p.14.

<sup>53</sup> Private Center Administrator 1's Testimony, Tr.V2, 253:14-18; Principal's Testimony, Tr.V6, 1107:12-1108:4; P-Ex.1, p.26, R-Ex.3, p.346; R-Ex.9, 10/30/2019-meeting, Pt.1, [00:00:00-00:01:10].

<sup>54</sup> R-Ex.9, 10/30/2019-meeting, Pt.1, [00:01:30-00:01:40].

<sup>55</sup> P-Ex.1, p.26, R-Ex.3, p.346.

44. The October 30, 2019 continued IEP meeting was held at Home School by agreement of the IEP team for teleconferencing purposes,<sup>56</sup> and lasted almost four (4) hours.<sup>57</sup>

45. At the beginning of the October 30, 2019 continued IEP meeting, Parent 1 informed the DOE for the first time that Student was currently living with Parent 1, which was a different address that the DOE previously had listed for Student. Student had been living with Parent 1 since the summer of 2019.<sup>58</sup>

October 30, 2019 IEP meeting discussion

46. At the meeting on October 30, 2019, although all the Student's areas of performance, goals, and supports and services (except relating to behavior) had been discussed at the May 2019 IEP meeting, they were discussed again at Parent 1's request.<sup>59</sup>

47. At the October 30, 2019 meeting, Student's behavioral performance, goals were discussed and added into the IEP. Additional supports and services were also included in Student's IEP at the recommendations of Private Center IEP team members.<sup>60</sup>

---

<sup>56</sup> See R-Ex.9, 5/14/2019-meeting.

<sup>57</sup> The IEP meeting recording from October 30, 2019, R-Ex.9, 10/30/2019-meeting, Pt.1, was over three (3) hours and R-Ex.9, 10/30/2019-meeting, Pt.2, was approximately forty-eight (48) minutes.

<sup>58</sup> Parent 1's Testimony, Tr.V1, 48:22-49:15; R-Ex.9, 10/30/2019-meeting, Pt.1, [00:03:36-00:04:28].

<sup>59</sup> See generally R-Ex.9, 10/30/2019-meeting, Pt.1.

<sup>60</sup> Private Provider 4's Testimony, Tr.V5, 812:14-814:11; see generally R-Ex.9, 10/30/2019-meeting, Pt.1.

48. Examples of these additional services were added for Student's supports, including but not limited to, the services of two providers working solely with Student,<sup>61</sup> and additional speech<sup>62</sup> and occupational therapy hours.<sup>63</sup>
49. Private Center IEP team members and Parent 1 were all allowed to provide information and suggestions regarding Student's performance, goals and supports during both the May 2019 and October 2019 IEP meetings.<sup>64</sup>
50. At various points during the discussion, Parent 1 was asked specifically if Parent 1 had any additional concerns Parent 1 wanted to raise and/or if Parent 1 was satisfied with what had been discussed.<sup>65</sup>
51. At every point when Parent 1 was asked about Parent 1's input for Student's IEP during the meeting, IEP team members from Private School also provided input and information and expressed any concerns that they had.<sup>66</sup>

---

<sup>61</sup> R-Ex.9, 10/30/2019-meeting, Pt.1, [02:22:00-02:28:04] (*discussion regarding Student's continued need for two providers and the additional requirement that they be safety-certified*).

<sup>62</sup> R-Ex.9, 10/30/2019-meeting, Pt.1, [00:1:15-00:15:30] (*initial recap of the request for more speech hours by Parent 1*), [01:24:04-01:24:11] (*further discussion regarding Parent 1's request*), [01:31:00-01:32:40] (*final addition of speech/language hours with agreement of Parent 1*).

<sup>63</sup> R-Ex.9, 10/30/2019-meeting, Pt.1 [01:25:15-01:25:40] (*Initial discussion regarding increase in OT hours*), [01:35:35-01:35:45] (*increase of OT hours from 90 minutes a week to 60 minutes a week at the request of Parent 1*), [01:50:23-01:51:52] (*increase of OT hours during ESY to include an initial consult*).

<sup>64</sup> See generally R-Ex.9, 5/14/2019-meeting, and 10/30/2019-meeting, Pt.1 & Pt.2.

<sup>65</sup> R-Ex.9, 5/14/2019, [00:06:55-00:06:55] (*going over reading PLEPs*), [00:10:14-00:41:43] (*writing PLEPs*), [00:13:03-00:13:15] (*math PLEPs*), [00:17:01-00:17:05 & 00:22:15-00:22:40] (*speech PLEPs*), [01:07:00-01:07:30] (*SLP goals*), [01:13:10-01:13:20] (*Parent 1 asked if Parent 1 had any other concerns*); R-Ex.9, 10/30/2019, Pt.1 [00:15:00-00:57:37] (*SSC reviewing/reading all of Student's PLEPs covered at the May meeting at Parent 1's request*), [00:57:37-01:22:19] (*SSC reviewing/reading all of Student's IEP goals created at the May meeting at Parent 1's request*).

<sup>66</sup> *Id.*

52. After the discussion of Student's PLEPs, annual goals and supports and services was completed, the IEP team moved onto discussing educational placement for Student.<sup>67</sup>
53. The IEP team, led by Principal, discussed the factors for placement for each of the respective levels of educational placement on the least restrictive environment spectrum.<sup>68</sup> A worksheet was used to assist in this discussion.<sup>69</sup>
54. The IEP team discussed all seven levels of placement on the continuum in turn, from the general education setting to homebound/hospital placement. Notes were taken on the worksheet to reflect some of the ideas discussed.<sup>70</sup>
55. All the IEP team members, including Parent 1 and members from Private Center were able to provide input, ask questions, and raise questions regarding each level of placement.<sup>71</sup>
56. During the discussion of the levels of educational placement, Public Separate Facility was discussed by the team for approximately twenty (20) minutes. Private Center IEP team members listed many concerns about Public Separate Facility based on the knowledge they had about the program at its last location.<sup>72</sup>
57. For example, Private Provider 1 testified that Private Provider 1 expressed concerns that there were only two students at Public Separate Facility and security guards also present

---

<sup>67</sup> R-Ex.9, 10/30/2019-meeting, Pt.1, [02:30:00].

<sup>68</sup> Principal's Testimony, Tr.V6, 1109:7-1111:18; *see generally* R-Ex.9, 10/30/2019-meeting, Pt.1, [02:30:00-03:02:20], and R-Ex.9, 10/30/2019-meeting, Pt.2 [00:00:19-00:37:00].

<sup>69</sup> R-Ex.9, p.1308.

<sup>70</sup> R-Ex.9, p.1308.

<sup>71</sup> *See e.g.*, Parent 1's Testimony, Tr.V1, 57:7-21; Private Center Administrator 1's Testimony, Tr.V2, 233:3-13, 234:6-11; Private Provider 3's Testimony, Tr.V3, 429:6-429:9; Private Provider 4's Testimony, Tr.V3, 588:17-590:22.

<sup>72</sup> *See generally* R-Ex.9, 10/30/2019-meeting, Pt.1, and R-Ex.9, 10/30/2019-meeting, Pt.2.

there.<sup>73</sup> Private Provider 3 testified that Private Provider 3 was asked what Private Provider 3's opinion would be if Student were moved to Public Separate Facility and Private Provider 3 noted Private Provider 3's concerns with Student's history at the prior public home school.<sup>74</sup> Private Provider 4 also testified that Private Provider 4 was able to address during the meeting some of the benefits that the DOE were writing on the worksheet and that Private Provider 4 was concerned that while they said that Student could receive the services at Public Separate Facility, that they did not appear to be in place at that time.<sup>75</sup>

58. Private Center IEP team members also focused primarily on Student's experience when Student was previously placed at a public school in 2017 and were not accepting the explanations provided to them from the Home School IEP team members about what the capabilities were at the Public Separate Facility.<sup>76</sup>

59. At the end of the nearly one (1) hour discussion of the levels of placement, Principal provided the DOE's offer of FAPE to Parent 1, which was to place Student at the Public Separate Facility for implementation of the IEP. Principal explained to Parent 1 and the Private Center IEP team members that Student's IEP could be implemented at the Public Separate Facility and that it was the least restrictive environment for Student.<sup>77</sup>

60. Principal also informed the IEP team that a transition plan would need to be created for Student, that an additional IEP meeting would be scheduled for that purpose, and that any

---

<sup>73</sup> Private Provider 1's Testimony, Tr.V2, 281:11-282:7.

<sup>74</sup> Private Provider 3's Testimony, Tr.V3, 428:7-20.

<sup>75</sup> Private Provider 4's Testimony, Tr.V3, 592:9-19.

<sup>76</sup> See generally R-Ex.9, 10/30/2019-meeting, Pt.1, [02:57:10-03:02:20].

<sup>77</sup> Principal's Testimony, Tr.V6, 1145:23-1146:18, 1196:9-19; R-Ex.9, 10/30/2019-meeting, Pt.2, [00:37:27-00:38:15] (*Principal initially made FAPE offer*), [00:43:50-00:44:00] (*Principal reiterated FAPE offer*).

additional supports or services that may be needed for Student's new placement could be added to the IEP at that time.<sup>78</sup>

61. During the October 30, 2019, Parent 1 and other members of the IEP team from Private Center requested that they be able to visit Public Separate Facility.<sup>79</sup>

62. After Principal provided the offer of FAPE to Parent 1 with placement at the Public Separate Facility, Parent 1 initially asked Principal to listen to more input from the Private Center IEP team members,<sup>80</sup> and after further discussion announced to the team that Parent 1 was rejecting the offer of FAPE.<sup>81</sup>

63. A Prior Written Notice (hereinafter "PWN") from the October 30, 2019 IEP meeting was prepared on November 6, 2019<sup>82</sup> and sent to Parent 1 on or about November 8, 2019.<sup>83</sup>

64. The PWN was three (3) pages long and listed all the services to be provided to Student, along with Supplementary aids and services, as well as Student's extended school year services and the dates and times for the extended school year program.<sup>84</sup>

65. A summary of the discussion for the educational and non-educational benefits, and the effect of Student's placement on the teacher and children in the class was near the end of the PWN, which included discussions of the various levels on the least restrictive environment continuum. While it did not list the specific comments made during the

---

<sup>78</sup> Principal's Testimony, Tr.V6, 1151:13-1153:5; R-Ex.9, 10/30/2019-meeting, Pt.2 [00:38:16-00:38:24], [00:43:20-00:43:44], [00:45:48-00:46:44].

<sup>79</sup> DES' Testimony, Tr.V5, 976:9-977:25; R-Ex.9, 10/30/2019-meeting, Pt.2, [00:47:15-00:47:30].

<sup>80</sup> R-Ex.9, 10/30/2019-meeting, Pt.2, [00:39:20-00:43:45].

<sup>81</sup> Principal's Testimony, Tr.V6, 1153:6-1155:18; R-Ex.9, Pt.2, [00:44:40-00:45:45], [00:47:00-00:47:15].

<sup>82</sup> R-Ex.3, p.324-326.

<sup>83</sup> P-Ex.1, p.1-6.

<sup>84</sup> R-Ex.3, p.324-326.

nearly four (4) hour IEP meeting, it was an accurate summary of the discussions regarding placement of Student.<sup>85</sup>

66. A letter was sent to Parent 1 on or about November 7, 2019, requesting a selection of dates for a further IEP meeting to discuss Student's transition plan to Public Separate Facility.<sup>86</sup>

67. On January 13, 2020, Parent 1, Private Provider 4 and Private Provider 1 visited the Public Separate Facility and spoke with SPED Teacher about the program.<sup>87</sup>

#### Public Separate Facility

68. Public Separate Facility is a special school facility designed to address the needs of students with more extreme behavioral concerns than can be addressed in a public school special education classroom setting.<sup>88</sup>

69. Public Separate Facility is run by a licensed special education teacher, SPED Teacher, and can accommodate many supports and services for students based on their IEPs.<sup>89</sup>

70. These supports can include socialization with neuro-typical peers from neighboring School,<sup>90</sup> community-based instruction,<sup>91</sup> and a functional program to teach life skills to students,<sup>92</sup> while providing a separate, controlled space for students to accommodate their IEPs.<sup>93</sup>

---

<sup>85</sup> R-Ex.3, p.325-326.

<sup>86</sup> R-Ex.9, p.591-594.

<sup>87</sup> P-Ex.13, 1026-1029.

<sup>88</sup> SPED Teacher's Testimony, Tr.V8, 1457:12-21, 1468:23-1469:15, 1498:12-21.

<sup>89</sup> SPED Teacher's Testimony, Tr.V8, 1458:4-1459:16.

<sup>90</sup> SPED Teacher's Testimony, Tr.V8, 1464:24-1466:6, 1473:4-1474:15, 1479:17-1480:10.

<sup>91</sup> SPED Teacher's Testimony, Tr.V8, 1466:19-1467:20.

<sup>92</sup> SPED Teacher's Testimony, Tr.V8, 1478:22-1479:16.

<sup>93</sup> SPED Teacher's Testimony, Tr.V8, 1472:6-25.

71. SPED Teacher is responsible for creating an appropriate curriculum for each student at Public Separate Facility based on their educational level, needs, and IEPs, and SPED Teacher has experience in creating such curriculum, having been a licensed special education teacher for twenty (20) years and a consultant for nine (9) years.<sup>94</sup>
72. SPED Teacher's curriculum for students are created based on grade level standards from the educational guidelines of the State of Hawaii's common core standards and tailored to the student's IEPs.<sup>95</sup>
73. DOE can provide services of providers as required by Student's IEP at the Public Separate Facility.<sup>96</sup>
74. The general goal for SPED Teacher is to create programs through which SPED Teacher can calm students or teach students strategies to calm themselves so that they can integrate into a less restrictive environment. SPED Teacher has successfully been able to return several students to a less restrictive environment upon completion of their program at the Public Separate Facility.<sup>97</sup>
75. Public Separate Facility does not have a kitchen but does have a refrigerator and a hot plate that can be used to assist students in preparing food.<sup>98</sup>
76. Public Separate Facility has the ability to access some of the facilities or programs of the Home School campus for inclusion opportunities and socialization if it is part of a student's IEP.<sup>99</sup>

---

<sup>94</sup> SPED Teacher's Testimony, Tr.V8, 1450:25-1459:16.

<sup>95</sup> SPED Teacher's Testimony, Tr.V8, 1451:8-21, 1458:4-1459:16.

<sup>96</sup> See DES' Testimony, Tr.V5, 863:15-870:20.

<sup>97</sup> SPED Teacher's Testimony, Tr. V8, 1461:2-1462:23.

<sup>98</sup> SPED Teacher's Testimony, Tr.V8, 1503:9-17.

<sup>99</sup> SPED Teacher's Testimony, Tr.V8, 1479:17-24.

77. Public Separate Facility also has access to general education students that can come to the program for inclusion or reverse inclusion activities, such as lunch bunch.<sup>100</sup>
78. SPED Teacher has conducted community-based instructional programs, such as going to a grocery store, purchasing items,<sup>101</sup> and has also done inclusion-focused projects with students at Public Separate Facility like a holiday craft sale, in which students were able to integrate with the general student population in selling items to raise money to purchase the refrigerator for Public Separate Facility.<sup>102</sup>
79. If it is part of the student's program, SPED Teacher can work with providers to ensure that students are receiving the education and related supports and services as indicated in their IEPs.<sup>103</sup>

#### Private Center

80. Student has been attending Private Center for Student's DOE hours since June 2018.<sup>104</sup>
81. Private Center is not accredited as a school, because it does not follow a curriculum that meets graduation requirements as they typically deal with low-functioning students, but Private Center does provide educational services to its clients.<sup>105</sup>
82. Private Center is a center that provides both insurance and DOE services to students, but it does not provide educational services to general education students.<sup>106</sup>

---

<sup>100</sup> SPED Teacher's Testimony, Tr.V8, 1473:4-1474:1.

<sup>101</sup> SPED Teacher's Testimony, Tr.V8, 1507:24-1508:11.

<sup>102</sup> SPED Teacher's Testimony, Tr.V8, 1481:23-1482:13.

<sup>103</sup> SPED Teacher's Testimony, Tr.V8, 1484:16-22, 1473:4-12, 1478:2-17.

<sup>104</sup> Private Center Administrator 1's Testimony, Tr.V1, 181:12-18.

<sup>105</sup> Private Center Administrator 1's Testimony, Tr.V1, 184:20-24

<sup>106</sup> Private Center Administrator 1's Testimony, Tr.V1, 132:7-15, 186:8-12.

83. Private Center has daily access to one home-schooled student that is neuro-typical; the other student is the child of Private Center Administrator 1.<sup>107</sup> On a regular basis, Private Center staff brings their children to the center to interact with the clients of Private Center.<sup>108</sup>
84. Private Center employs at least one individual who is temporarily certified as a general education teacher by the Department of Education in the State of Hawaii.<sup>109</sup>
85. Although Student had serious behavioral problems, no identifiable behavioral support plan (hereinafter “BSP”) or behavioral intervention plan (“BIP”) had been in place for Student at Private Center.<sup>110</sup>
86. Although Private Provider 3 testified that Private Provider 3 created the BSP for Student in May 2019 in preparation for the May IEP meeting,<sup>111</sup> the BSP presented as evidence at the Hearing is undated<sup>112</sup> and Private Provider 3 also does not keep records of previous BSPs that Private Provider 3 may have updated or edited, as Private Provider 3 simply writes over the previously existing ones.<sup>113</sup>
87. Neither Private Provider 3, Private Provider 4, nor Private Provider 1 could identify or produce any other BSP or BIP that was being implemented as part of Student’s program at Private Center.<sup>114</sup> Other than the undated BSP prepared by Private Provider 3, it

---

<sup>107</sup> Private Center Administrator 1’s Testimony, Tr.V1, 187:2-188:20.

<sup>108</sup> Private Center Administrator 1’s Testimony, Tr.V1, 188:15-189:6.

<sup>109</sup> Private Provider 4’s Testimony, Tr.V4, 630:3-632:1; R-Ex.3, p.323.

<sup>110</sup> *See e.g.*, Private Provider 1’s Testimony, Tr.V2, 310:14-21, 315:18-316:11; Private Provider 3’s Testimony, Tr.V3, 453:2-454:20, 467:3-468:13.

<sup>111</sup> Private Provider 3’s Testimony, Tr.V3, 469:21-472:2.

<sup>112</sup> Private Provider 3’s Testimony, Tr.V3, 558:8-13; P-Ex.8, p. 816-829, R-Ex.9, p.1324-1337.

<sup>113</sup> Private Provider 3’s Testimony, Tr.V3, 558:19-559:8, 560:14-21, 567:13-568:12.

<sup>114</sup> Private Provider 3’s Testimony, Tr.V3, 464:3-13, 521:8-522:9; Private Provider 4’s Testimony, Tr.V4, 677:24-680:13

appears that the only other BSP prepared for Student was done by DOE Provider 1 in March 2018.<sup>115</sup>

88. Data collection practices at Private Center raise questions as to the accuracy of the data records that have been produced as evidence for the Hearing.<sup>116</sup>

89. For example, it is unclear whether written instructions or definitions of behaviors is readily available to Student's support staff at Private Center that can be easily recorded or reviewed. Private Provider 3 testified that occasionally definitions of behaviors are given verbally or written on memos to staff.<sup>117</sup> On the other hand, Private Provider 4 initially testified that the definitions are occasionally given verbally, written on 'post-it' notes, or written on a dry-erase board,<sup>118</sup> but then later testified that a list of written definitions of Student's behaviors are clipped to Student's personal clipboard daily.<sup>119</sup> When questioned about the maintenance of those records, neither Private Provider 3 nor Private Provider 4 had no knowledge of how or where the records are kept.<sup>120</sup>

90. Further, Private Provider 4 was questioned about a data entry on a record from November 2019 that was produced by Private Center.<sup>121</sup> On the data sheet, provider had written that Student was observed "running with head along wall with force 14 times" and "threw

---

<sup>115</sup> Private Provider 3's Testimony, Tr.V3, 466:4-24.

<sup>116</sup> P-Ex.8, p.812-815; P-Ex.8, p.847-861, R-Ex.9, p.1343-1346.

<sup>117</sup> Private Provider 3's Testimony, Tr.V3, 461:10-464:3, 483:10-25, 485:5-486:17.

<sup>118</sup> Private Provider 4's Testimony, Tr.V4, 642:12-645:21.

<sup>119</sup> Private Provider 4's Testimony, Tr.V3, 580:19-581:8, Tr.V4 692:13-694:16.

<sup>120</sup> Private Provider 3's Testimony, Tr.V3, 475:2-476:25; Private Provider 4's Testimony, Tr.V4, 696:1-697:5.

<sup>121</sup> While this Hearings Officer recognizes that the records that had been examined during the Hearing were for dates outside of the disputed dates, these were the only records presented that had data sheets and charts that could easily be reviewed. No records were produced from the period of May 2019 to and including October 2019.

chair at provider” on November 4, 2019.<sup>122</sup> On the corresponding graph for a behavior, a data point was charted at the number 14 grid point for November 4, 2019.<sup>123</sup>

91. Private Provider 4 testified that Private Provider 4 was the person responsible for recording the data from the data sheets and entering them into the corresponding charts.<sup>124</sup> When questioned about the data point for November 4, 2019, Private Provider 4 needed to be asked repeatedly about that entry,<sup>125</sup> and finally testified that Private Provider 4 must have mistakenly recorded the data on that date because it was determined that the behavior of Student was not something that would be recorded.<sup>126</sup>

92. Private Provider 4 also testified that when Private Provider 4 spoke with the provider about the behavior note on the data sheet they determined that the behaviors would not be counted because Student simply placed Student’s head on the wall and ran alongside the wall in a harmless fashion.<sup>127</sup> While the provider who made the notation did not testify, the explanation provided by Private Provider 4 causes concern based on the plain language used by the provider classifying the behavior. Further Private Provider 4’s

---

<sup>122</sup> R-Ex.9, p.1362.

<sup>123</sup> R-Ex.9, p.1361.

<sup>124</sup> Private Provider 4’s Testimony, Tr.V5, 804:23-805:1.

<sup>125</sup> This Hearings Officer notes that on cross-examination and during follow-up questioning by this Hearings Officer, Private Provider 4 often needed to be asked repeatedly to obtain a clear answer to straightforward questions that were posed, which appeared to be an attempt to avoid answering certain questions. For example, during this line of questioning, this Hearings Officer asked simply about one data point on the data chart and the corresponding notation on the data sheet. Instead of providing a clear answer, Private Provider 4 appear to try to avoid answering the question by talking about other points on the chart or providing explanations that were non-responsive to the question before finally answering that Private Provider 4 believes Private Provider 4 made an error in the chart. Private Provider 4’s Testimony, Tr.V5, 807:10-810:5.

<sup>126</sup> Private Provider 4’s Testimony, Tr.V5, 809:8-810:5.

<sup>127</sup> Private Provider 4 demonstrated during the hearing by leaning the side of Private Provider 4’s head against the wall and walking alongside the wall. Private Provider 4’s Testimony, Tr.V4, 686:11-23.

explanation is also controverted by the decision to later track behaviors by Student in later data sheets and charts.<sup>128</sup>

93. While data charts and graphs were presented as evidence in this case for the period from June 2018 to May 2019,<sup>129</sup> the underlying data sheets or definitions of behaviors were not included, making it impossible to determine the accuracy of the data collected and the actual progress of Student.

94. No data charts, graphs, or data sheets were presented as evidence for the period from August 1, 2019 to October 12, 2019.

95. Other practices by Private Center raise concerns about the billing and record keeping practices for services being provided to Student during Student's enrollment.

96. No bills and/or invoices were presented as evidence for the time-period of August 2019 through September 2019, however an invoice from Private Center was sent to the DOE for the month of October 2019.<sup>130</sup> This invoice included tuition for the month of October, a fee for the services of two providers, a fee for provider supervision, a package price for occupational therapy, a package price for speech and language therapy, transportation, general excise tax, and an "admin fee" of 15%. The total amount invoiced to the DOE for October 2019 was Thirty-Seven Thousand, Eight Hundred Eighty-Nine Dollars and Eighty-Six Cents (\$37,889.86).

---

<sup>128</sup> Private Provider 4's Testimony, Tr.V4, 691:16-693:3.

<sup>129</sup> P-Ex.8, p.812-815; P-Ex.8, p.847-861, R-Ex.9, p.1343-1346.

<sup>130</sup> R-Ex.9, p.1322.

97. Although Private Center Administrator 1 testified that Student's bill is itemized,<sup>131</sup> the October 2019 invoice that was submitted as evidence does not include any breakdown or explanation as to the service hours being provided by the two (2) providers.
98. Further, a review of Private Center's service logs from November 2019 show that Private Center invoiced DOE service hours by providers, even though no data collection sheets or charts were collected for Student on those same dates, indicating that Student was not receiving services by Private Center on those dates.<sup>132</sup>
99. Private Provider 3 and Private Provider 4 both testified that there were several dates in November that Student was not at Private Center due to illness and possibly holidays or breaks,<sup>133</sup> and Private Provider 4 testified dates where no data was collected indicate that Student was not at Private Center to receive services.<sup>134</sup> Private Provider 1 testified that data is collected whenever Student receives services.<sup>135</sup>
100. For example, on November 20, 21, 22, 2019, no data points are charted, and no data sheets were collected for those dates, indicating that Student was not receiving services from Private Center.<sup>136</sup> However, on the service logs, Private Provider 1 billed 7.5 hours, 8 hours, and 8 hours, respectively on those dates.<sup>137</sup> Private Provider 1 testified that the service logs indicate the staff members who provided DOE services to Student on the

---

<sup>131</sup> Private Center Administrator 1's Testimony, Tr.V1, 173:2-15.

<sup>132</sup> P-Ex.8, p.846-861, R-Ex.9, p.1347-1361, 1362-1394; P-Ex.15, p.1044-1045.

<sup>133</sup> Private Provider 3's Testimony, Tr.V3, 556:10-557:2; Private Provider 4's Testimony, Tr.V5, 810:6-13.

<sup>134</sup> Private Provider 4's Testimony, Tr.V5, 806:14-807:9, 810:6-812:13.

<sup>135</sup> Private Provider 1's Testimony, Tr.V2, 300:6-13.

<sup>136</sup> R-Ex.9, p.1347-1361 (data charts); R-Ex.9, p.1362-1394.

<sup>137</sup> P-Ex.15, p.1044-1045.

respective days,<sup>138</sup> and the notation on the service log itself also indicates that the documented hours are DOE hours.<sup>139</sup>

101. Private Provider 1 also testified that Student has been living with Private Provider 1 since approximately March 2018, and Student continues to live with Private Provider 1 whenever Parent 1 does not take Student to live at Student's legal residence.<sup>140</sup> Private Provider 1 would not provide any average or approximate amount of time that Student lives with Private Provider 1, despite being asked repeatedly on cross-examination.<sup>141</sup>
102. Private Provider 1 further testified that Private Provider 1 gets paid for the time when Student lives with Private Provider 1, which Private Provider 1 testified explains why Private Provider 1's relationship with Student is not a prohibited dual or multiple-relationship,<sup>142</sup> however no investigation was done by Private Center into whether this arrangement falls within the ethical guidelines of Private Provider 1's professional certification.
103. Private Provider 3 and Private Provider 4 both knew that Student was living with Private Provider 1, did not inquire into the parameters of the relationship Student had with

---

<sup>138</sup> Private Provider 1's Testimony, Tr.V2, 367:24-368:18.

<sup>139</sup> P-Ex.15, p.1044-1045.

<sup>140</sup> Private Provider 1's Testimony, Tr.V2, 317:3-318:24.

<sup>141</sup> This Hearings Officer notes that Private Provider 1 appeared to avoid providing answers to opposing counsel during cross-examination, and like in this segment, needed to be asked questions repeatedly or provided non-responsive answers. Private Provider 1's Testimony, Tr.V2, 318:25-320:21.

<sup>142</sup> Dual or multiple-relationship was defined generally as a relationship between a service provider and client in which another relationship exists, that may affect the service provider's ability to provide services or decision-making. *See* Private Provider 1's Testimony, Tr.V2, 320:22-321:18; DOE Private Provider 4's Testimony, Tr.V8, 1585:16-1586:4.

Private Provider 1 and simply concluded that since Private Provider 1 was receiving payment for Private Provider 1's services, it was not a multiple-relationship.<sup>143</sup>

104. Private Center has also not attempted to fade or reduce any services offered to Student in terms of Student's two-to-one providers,<sup>144</sup> despite their data collection showing that Student's maladaptive behaviors have been gradually decreasing and their statements that Student is improving greatly with Student's behaviors at Private Center.<sup>145</sup>

105. At least as of November 2019, Student had displayed new behaviors that Private Center providers began tracking, such as behaviors, even after being at Private Center since June 2018.

Credible Testimony of DOE Provider 3 and DOE Provider 1:

106. DOE Provider 3 was qualified as an expert witness with a doctoral degree with expertise. This Hearings Officer finds DOE Provider 3's testimony to be credible based on DOE Provider 3's extensive experience for around twenty (20) years and DOE Provider 3's demeanor and ability to answer questions on both direct and cross-examination during DOE Provider 3's testimony over the course of two days.<sup>146</sup>

107. DOE Provider 1 was qualified as an expert witness with expertise. This Hearings Officer finds DOE Provider 1's testimony to be credible based on DOE Provider 1's extensive and varied history in DOE Provider 1's capacity and work for various companies and

---

<sup>143</sup> Private Provider 1's Testimony, Tr.V2, 320:22-321:18, Private Provider 4's Testimony, Tr.V4, 730:5-21, 781:13-782:6, Tr.V5, 820:25-826:22.

<sup>144</sup> Private Provider 4's Testimony, Tr.V4, 757:25-760:15, 761:15-765:20, 819:16-820:24.

<sup>145</sup> See e.g. Private Provider 3's Testimony, Tr.V3, 410:12-421:13; Private Provider 4's Testimony, Tr.V4, 678:3-621:21.

<sup>146</sup> DOE Provider 3's Testimony, Tr.V7, 1334:17-1335:11, R-Ex.9, p.1144-1147.

centers, as well as DOE Provider 1's demeanor and ability to answer directions on direct and cross-examination during DOE Provider 1's testimony.

108. The ethical guidelines of the certification provide that records should be kept for a client for seven (7) years after the case is closed.<sup>147</sup>

109. DOE Provider 3 testified that even in creating new records, such as behavioral services plans, it is important to keep the old records to compare data collection and to see how the clients are responding to new plans.<sup>148</sup>

110. Further, DOE Provider 1 testified that BSPs should always be dated and older versions should be maintained for review of the client's progress and/or to see if the behavioral tools being used are effective.<sup>149</sup>

111. Having a client living with a provider would be a possible ethical violation as a dual or multiple-relationship that a supervisor should investigate.<sup>150</sup>

112. DOE Provider 3 testified that guidelines contain a clear statement that multiple relationships should be avoided and if it happened, immediately must be brought to the supervisors' attention.<sup>151</sup>

113. DOE Provider 1 testified that having a client living with their provider would present an ethical concern about a multiple relationship and that DOE Provider 1 would do an investigation into the situation.<sup>152</sup>

---

<sup>147</sup> DOE Provider 3's Testimony, Tr.V7, 1343:5-16; `DOE Provider 1's Testimony, Tr.V8, 1531:19-25.

<sup>148</sup> DOE Provider 3's Testimony, Tr.V7, 1342:17-23.

<sup>149</sup> DOE Provider 1's Testimony, Tr.V8, 1530:23-18.

<sup>150</sup> DOE Provider 1's Testimony, Tr.V8, 1537:23-1538:11.

<sup>151</sup> DOE Provider 3's Testimony, Tr.V7, 1358:16-1359:9.

<sup>152</sup> DOE Provider 1's Testimony, Tr.V8, 1537:23-1538:11.

114. DOE Provider 1 testified that in DOE Provider 1's professional opinion, Student's need for the same amount of provider hours even after receiving those services at Private Center over a one-and-a-half-year period would raise concerns that the program has not been successful, specifically because the provider's job should be to look at ways to fade somewhere along the line and if there is no ability to fade, something is not working.<sup>153</sup>

#### **IV. CONCLUSIONS OF LAW**

##### **A. IDEA Requirements**

The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs."<sup>154</sup> A Free and Appropriate Education includes both special education and related services.<sup>155</sup>

Special education means "specially designed instruction to meet the unique needs of a child with a disability" and related services are the supportive services required to assist a student to benefit from their special education.<sup>156</sup> 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."<sup>157</sup>

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures set forth in IDEA; and (b) whether the student's

---

<sup>153</sup> DOE Provider 1's Testimony, Tr.V8, 1579:10-1581:23.

<sup>154</sup> *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)).

<sup>155</sup> H.A.R. §8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

<sup>156</sup> *Id.*

<sup>157</sup> *Dep't of Educ. of Hawai'i v. Leo W. by & through Veronica W.*, 226 F.Supp. 3d 1081, 1093 (D. Haw. 2016).

IEP is reasonably calculated to enable the student to receive educational benefit.<sup>158</sup> “A state must meet both requirements to comply with the obligations of the IDEA.”<sup>159</sup>

The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.”<sup>160</sup> However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,<sup>161</sup> 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.”<sup>162</sup>

Harmless procedural errors do not constitute a denial of FAPE.<sup>163</sup> However, hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: impeded the child’s right to a FAPE; significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or caused the student a deprivation of educational benefit.”<sup>164</sup>

**B. Respondents failed to have an IEP in place for Student prior to the start of the 2019-2020 school year.**

---

<sup>158</sup> *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

<sup>159</sup> *Doug C. v. Hawai‘i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013) (quoting *Rowley*). See also, *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

<sup>160</sup> *Rowley*, 458 U.S. at 200.

<sup>161</sup> 137 S.Ct. 988 (2017).

<sup>162</sup> *Endrew F.*, 137 S.Ct., at 1001; See also, *Blake c. ex rel Tina F. v. Hawai‘i Dept of Educ.*, 593 F.Supp. 2d 1199, 1206 (D. Haw. 2009).

<sup>163</sup> *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008).

<sup>164</sup> *Amanda J.*, 267 F.2d at 892.

One of the IDEA's most important mechanisms for achieving its lofty goals is the formulation and implementation of IEPs.<sup>165</sup> Under Hawaii Administrative Rules Chapter 8-60-44, each student with a disability shall have a written statement that is developed, reviewed, and revised in a meeting in accordance with that Chapter, and shall include such matters as the child's present level of academic achievement, annual goals for the child, how progress toward those goals is to be measured and "(4) a statement of the special education and related services and supplementary aids and services, [ ] to be provided to the student, or on behalf of the student, and a statement of the program modifications or supports for school personnel that will be provided to the student" to access his or her education in compliance with the IDEA.<sup>166</sup> The IEP shall also include "the projected date for the beginning of the services and modifications described in paragraph (4), the anticipated frequency, location, and duration of those services and modifications."<sup>167</sup> The IEP is to be formulated by a team that includes the child's parents, regular and special education teachers, a district representative and other individuals with relevant expertise.<sup>168</sup>

The IDEA also provides that at the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each student with a disability within its jurisdiction, an IEP.<sup>169</sup> However, federal courts across the country have recognized that while 20 U.S.C. §1414(d)(2)(A) sets forth procedures that must be followed by educational agencies, not all violations of such procedures necessarily

---

<sup>165</sup> *Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 817 (9<sup>th</sup> Cir. 2007).

<sup>166</sup> Hawaii Administrative Rules §8-60-44, *see also* 20 U.S.C. §1414(d).

<sup>167</sup> Hawaii Administrative Rules §8-60-44, *see also* 20 U.S.C. §1414(d).

<sup>168</sup> *Van Duyn*, 502 F.3d at 818.

<sup>169</sup> 20 U.S.C. §1414(d)(2)(A); Hawaii Administrative Rules §8-60-47.

constitutes a denial of a FAPE.<sup>170</sup> In the Ninth Circuit, the Court of Appeals has reasoned that procedural flaws in the IEP process do not always amount to a denial of FAPE; and that once a procedural violation of the IDEA is found, a determination must be made of whether that violation affected the substantive rights of the parent or the child.<sup>171</sup>

In this case, no IEP was in place for Student at the start of the 2019-2020 School Year.<sup>172</sup> This left Student without a plan for Student's education, as the previous IEP-5/3/2018 was deemed insufficient by the prior AHO in her November 2018 decision due to not having an appropriate behavioral support plan.<sup>173</sup> It is undisputed that Student is desperate need of specific and constant supports and services for Student to receive an education, the failure to have an IEP in place at the start of the 2019-2020 school year was a denial of FAPE.

While Respondents rely on *Doug C. v Hawaii Dept. of Educ.*<sup>174</sup> to support their assertion that they were prevented by Parent 1 in having an IEP in place at the start of the school year, this interpretation of *Doug C.* is misplaced. While the Ninth Circuit emphasized the importance of parental participation in the IEP process, it still held that “[w]hen confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the

---

<sup>170</sup> See e.g., *Burke County Bd. of Educ. v. Denton by and through Denton*, 895 F.2d 973, 982 (4<sup>th</sup> Cir. 1990) (noting that while the Court in *Rowley* emphasized a review of states' compliance with procedures set forth in the IDEA, an examination still need to affect the student's educational opportunity to be violations of the IDEA), *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990) (holding that “procedural flaws do not automatically render an IEP legally defective”).

<sup>171</sup> *R.B., ex rel., F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 937-938 (9<sup>th</sup> Cir. 2007); also *L.M. v. Capistrano*, 556 F.3d at 909 (citations omitted).

<sup>172</sup> FOF 9,13, 14.

<sup>173</sup> FOF 13.

<sup>174</sup> 720 F.3d 1038, 1046-1047 (9<sup>th</sup> Cir. 2013)

IDEA and is least likely to result in the denial of a FAPE.”<sup>175</sup> In *Doug C.*, the IEP team in that case held a meeting without the parent to avoid being a few days late on an annual IEP, which is distinguishable from the facts in this case, where the lack of an IEP meeting left Student without any educational plan at the start of the school year. Unlike the facts here, in *Doug C.*, the student had a valid IEP that could have continued while the IEP meeting was pending. The Court in *Doug C.* noted that occasionally, school districts need to have IEP meetings without parents’ presence in order to preserve a student’s educational benefits. For example, the Court in *Doug C.* cited to *A.M. ex rel. Marshall v. Monrovia Unified School Dist.*,<sup>176</sup> in which the Ninth Circuit upheld a decision that the school district took reasonable steps to ensure parental participation and was justified in holding an IEP meeting without the parents’ presence when parents refused to meet until well after the given deadline. In *A.M.*, the school district was justified because there would have been no IEP in place for Student, which would result in a significant deprivation of educational benefit.

In a previous case involving Parent 1’s reluctance to meet with the IEP team, Administrative Hearings Officer Rowena Somerville determined that by making numerous attempts to obtain Parent 1’s presence at the IEP meeting and carefully documenting the notices, responses, cancellations and attempts to contact Parent 1, Respondents in that case did not violate the IDEA by holding an IEP meeting without Parent 1, as it was reasonably necessary to provide Student a FAPE.<sup>177</sup>

---

<sup>175</sup> *Id.*

<sup>176</sup> 627 F.3d 773, 780 (9<sup>th</sup> Cir. 2010).

<sup>177</sup> See R-Ex.9, p.1198-1238.

This case, however, presents concern to this Hearings Officer in that the evidence supports the idea that Parent 1 purposefully delayed the IEP process, placing Respondents in this difficult position of having to choose between violating one procedural requirement or another.

“The core of the IDEA statute is the cooperative process it establishes between parents and schools.”<sup>178</sup> Central to this cooperative process is the creation of the IEP for individual students. The protections provided to parents under the IDEA are not designed to allow parents to cause delays and obstruct school districts ability to provide an appropriate education for students. Here, the evidence supports that Parent 1 delayed the IEP process under the belief that Respondents would then have to continue payments to Private Center. During Parent 1’s testimony, Parent 1 noted that Parent 1 did not want to meet with the IEP team in January, because Parent 1 believed that it was premature and it was very soon after the decision from AHO Young was issued.<sup>179</sup> Further, both Private Center Administrator 1 and Parent 1, despite having extensive experience with IDEA due process hearings, and having reviewed the prior AHO’s November 2018 decision, expressed confusion when Respondents stopped payments to Private Center.<sup>180</sup> Finally, Parent 1 filed two complaints on the eve of the two IEP meetings that were scheduled and expressed Parent 1’s refusal to participate in the June 2019 IEP continuation meeting until the state complaint was resolved.<sup>181</sup>

The IDEA requires that reviewing bodies consider the reasonableness of the actions of the parties and allows leeway in determining the balance of equity in fashioning relief to parties

---

<sup>178</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53, 126 S.Ct. 528, 532 (2005).

<sup>179</sup> FOF 17.

<sup>180</sup> FOF 40-41.

<sup>181</sup> FOF 32.

where a denial of FAPE has occurred.<sup>182</sup> While in this case, Respondents did deny Student a FAPE by not having an IEP in place at the start of the 2019-2020 school year, in balancing the equities, this Hearings Officer finds that the actions of Parent 1 contributed significantly to the Respondents being placed in such a situation.

**D. Petitioners have failed to prove that Respondents owe reimbursement for Student's Private School from August 2019 to October 2019 for stay-put.**

Petitioners' second argument is that Respondents failed to pay for Student's Private School from August 2019 through October 28, 2019, and that they are entitled to reimbursement as a matter of law.<sup>183</sup> While reimbursement of private school tuition has long been acknowledged as a remedy for parents when a denial of FAPE has been found,<sup>184</sup> and this Hearings Officer can certainly consider reimbursement for the time when no due process complaint was pending (August 2019 to October 2019), but nothing in the IDEA provides that Respondents must automatically continue tuition payments or reimburse parents for tuition for private schools. As no due process proceeding was in effect from August 2019 to October 28, 2019, Petitioners are not entitled to stay-put reimbursement for that period.

**E. Petitioners have failed to prove that Respondents committed a procedural violation by not having a valid IEP team in place in the May and October 2019 IEP meetings.**

Petitioners next raise the argument that Respondents committed a procedural violation by not having the correct representatives of Student's home school in place at the May and October 2019 IEP meetings. The IDEA requires that the IEP team consist of the following:

---

<sup>182</sup> *C.B. ex rel. Baquerizo v. Garden Grove School Dist.*, 635 F.3d 1155, 1159 (9<sup>th</sup> Cir. 2011), citing *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

<sup>183</sup> This issue has been previously addressed in the Order Granting in Part and Denying in Part Petitioners' Motion for Stay-Put and Reimbursement, and in the Order Denying Petitioners' Motion for Partial Summary Judgment.

<sup>184</sup> *Baquerizo*, 635 F.3d at 1159.

- (1) The parents of the student;
- (2) Not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;
- (4) A representative of the department who:
  - (A) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;
  - (B) Is knowledgeable about the general education curriculum; and
  - (C) Is knowledgeable about the availability of and has the authority to commit the resources of the department.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (2) through (6);
- (6) At the discretion of the parent or the department, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and
- (7) Whenever appropriate, the student with a disability.<sup>185</sup>

Here, Petitioners argue that Principal and DES were not appropriate IEP team members, and that principals or vice-principals at other local schools should have been invited to the meeting. The reasoning behind their argument is that at the start of the October 30, 2019 meeting, Parent 1 notified the school personnel that Student was now living with Parent 1 in an area that was outside of the school district in which Student was previously enrolled.<sup>186</sup> Parent 1 testified that although Student had moved in with Parent 1 in July 2019, Parent 1 had not told the school personnel until the start of the IEP meeting in October.<sup>187</sup> At that time, Petitioners argue that the meeting should have been delayed to allow other personnel from the correct school district to attend school.

---

<sup>185</sup> HAR §8-60-45.

<sup>186</sup> FOF 45.

<sup>187</sup> FOF 45.

Petitioners have failed to prove that Principal and DES were not valid IEP team members. Both Principal and DES are representatives of the Hawaii Department of Education, and Principal testified that since it was the DOE that would be offering the FAPE to Student, Principal was able to represent the department as the offeror of FAPE.<sup>188</sup> While Petitioners point to the DOE guidelines that recommend that personnel be from the school being considered for placement, it is undisputed in this case that Student was not going to be placed at one of the Department of Education public schools to which Petitioners refer as home schools.

Respondents have demonstrated that both Principal and DES were familiar with the Public Separate Facility and Private Center and were familiar and knowledgeable about the supports and services that were available to Student in Student's placement at the Public Separate Facility or Private Center.<sup>189</sup> Principal and DES were also familiar with Student's needs and the current services that Student was receiving while at Private Center to the extent that the information was shared with them.<sup>190</sup> As Student had been placed at Private Center since June 2018, Petitioners argument that other personnel from a different DOE would have been more appropriate as IEP team members carries no weight. Any general or special education teacher at any DOE school would not have been familiar with the current services and education that Student was getting, as Student was at Private Center for any relevant time periods.

As Petitioners have failed to prove that the members of the IEP team in attendance at the May and October 2019 meetings were invalid, no procedural violation was committed by Respondents on this issue.

---

<sup>188</sup> FOF 59.

<sup>189</sup> FOF 56, 59-60.

<sup>190</sup> FOF 10.

**F. Respondents properly provided Petitioners with a Prior Written Notice of the change of Student's educational placement.**

Petitioners argue that Respondents did not provide a proper prior written notice (hereinafter "PWN") to Parent 1 regarding Student's placement. Petitioners argument is broken down into two separate issues. First, whether the PWN issued on November 4, 2019 was sufficient to allow Parent 1 to decide whether to reject the proposed placement change for in Student's October 30, 2019 IEP; and second, whether Respondents should have provided a PWN to Parent 1 prior to the IEP meetings in 2019 to inform Parent 1 of a proposed change in placement for the 2019-2020 school year.

The IDEA requires that local educational agencies provide written notice to parents whenever they propose to or refuses to initiate a change in the identification, evaluation or educational placement of the student or the provision of a FAPE to a student.<sup>191</sup> This notice must be in understandable language and contain the following information:

- (1) A description of the action proposed or refused by the department;
- (2) An explanation of why the department proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the department used as a basis for the proposed or refused action;
- (4) A statement that the parents of a student with a disability have protection under the procedural safeguards of this chapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this chapter;
- (6) A description of other options that the IEP team considered and the reasons why those options were rejected; and
- (7) A description of other factors that are relevant to the department's proposal or refusal.

---

<sup>191</sup> HAR §8-60-58(a).

First, Respondents' PWN issued on November 4, 2019 contained sufficient information regarding the change in Student's educational placement and the options discussed at the IEP meeting. Respondents are not required to write every objection made by the parents or the IEP team members when providing parents with the department's decision to take or refuse the proposed actions. The PWN in this case was three (3) pages long and contained an accurate summary of the discussion on the levels of placement held at the IEP meeting, which was sufficient in providing Parent 1 with notice of the department's proposed action of changing Student's educational placement from the level of private separate facility to public separate facility.<sup>192</sup> Further, Parent 1 had rejected the IEP and the DOE's educational placement decision prior to the conclusion of the October 30, 2019 continued IEP meeting, so it was unnecessary for the DOE to provide a more detailed summary of the discussions that took place at the meeting.<sup>193</sup>

Petitioners' second argument related to the PWN is that Respondents should have provided Parent 1 with notice prior to the IEP meeting that a change in Student's educational placement was proposed. This argument fails for two reasons: 1) the May 2019 IEP meeting was continued by agreement for completion of Student's annual IEP with the providers present;<sup>194</sup> and 2) it is clear from the IEP meeting recordings and testimony at the Hearing that a decision about Student's educational placement was not made until the end of the October 30, 2019 IEP meeting, when Principal made the decision after listening to all of the concerns, arguments, and discussions with all of the IEP team members, including Parent 1 and the Private Center IEP team members.<sup>195</sup>

---

<sup>192</sup> FOF 65.

<sup>193</sup> FOF 62.

<sup>194</sup> FOF 25-30.

<sup>195</sup> FOF 53-59.

Petitioners have not met their burden of proving that Respondents did not provide Parent 1 with a sufficient PWN.

**G. Respondents did not predetermine Student’s IEP and placement.**

Petitioners next allege that Respondents committed a FAPE violation by predetermining Student’s IEP and placement. In *K.D. ex rel. C.L. v. Department of Educ. Hawaii*,<sup>196</sup> the Ninth Circuit Court of Appeals reiterated the standard that “[a] school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. The IDEA requires that the placement of the student be based on the IEP, not vice versa.”<sup>197</sup> In *K.D.*, the court determined that while the school district had scouted out a potential placement for the student, placement was not predetermined when the record revealed that the school district had considered other options besides the potential placement and reasonably rejected them.<sup>198</sup>

Here, the evidence supports that Respondents did not predetermine Student’s IEP or educational placement. Student’s IEP was developed after two hours-long IEP meetings, in which Parent 1 and Student’s IEP team from Private Center were able to provide input regarding Student’s needs and goals.<sup>199</sup> Additional services and hours of support services were added, and

---

<sup>196</sup> *Id.* at 1123 (citations omitted); see also *Rachel H. v Dept. of Education*, 2014 WL 2800770 (D. Hawaii 2014) (holding that “[a] school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to a predetermined placement.”)

<sup>197</sup> *Id.* at 1123 (citing *Spielberg v. Henrico Cnty. Pub. Schs.*, 852 F.2d 256, 258-259 (4th Cir. 1988).

<sup>198</sup> *Id.* at 1123; see also *KK ex rel. K.S.K v. Hawaii*, 2015 WL 4611947 (the District Court finding that while the process began with a draft IEP, the team members informed [Mother] that the draft was just a starting point, and that they would be considering all options, the district had not predetermined student’s placement).

<sup>199</sup> FOF 22 & 44.

the team came to a consensus that the IEP that was created at the meeting fully addressed Student's unique needs for Student to progress in Student's education.<sup>200</sup>

Once the IEP was created with all the input provided from the various IEP team members, including Parent 1, then a lengthy discussion was held to determine Student's educational placement.<sup>201</sup> During that portion of the discussion, Principal guided the IEP team through each level in the continuum of placements and weighed the factors to consider for each placement.<sup>202</sup> Using the assistance of a worksheet, the team discussed the educational placements of placement, the non-academic benefits of such placement, and the effect of the student on the teacher and the children in the placement.<sup>203</sup> Both the school IEP team members and Parent 1 and the Private Center IEP team members provided input and Principal considered the factors of each placement before coming to a decision that Student would be placed at the Public Separate Facility.<sup>204</sup> Petitioners have not met their burden of proving that Respondents pre-determined Student's IEP or educational placement.

#### **H. Respondents did not block parent participation.**

The IDEA's procedures ensure that every eligible child is provided with a FAPE, and providing meaningful parental participation is oftentimes viewed as one of the more important of these procedures to be followed.<sup>205</sup> As discussed, *supra*, not every procedural violation is sufficient to support a finding of a denial of FAPE.<sup>206</sup> Petitioners in this case had the burden of

---

<sup>200</sup> FOF 46-52.

<sup>201</sup> FOF 59.

<sup>202</sup> HAR §§8-60-15, 8-60-16; *Sacramento City Unified School Dist. Bd. of Educ. v. Rachel H., by and through Holland*, 14 F.3d 1398, 1404 (9<sup>th</sup> Cir. 1994).

<sup>203</sup> FOF 53-54.

<sup>204</sup> FOF 55-59.

<sup>205</sup> *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, Montana*, 541 F.3d 1202, 1208 (9<sup>th</sup> Cir. 2008) (citing *Amanda J.*, 267 F.3d at 890. )

<sup>206</sup> *Id.*, (citing *Amanda J.*, 267 F.3d at 892).

proving that the actions of Respondents significantly impeded Parent 1 from participating in Student's IEP process.

Petitioners have failed to prove that Parent 1 was denied the ability to meaningfully participate in the IEP process for Student. In fact, the record shows that Respondents provided every opportunity for both Parent 1 and the IEP team from Private Center to participate in Student's IEP process. Parent 1 was not only accommodated for each IEP meeting that was scheduled, Parent 1 was also accompanied by several employees or representatives of Private Center, all of whom were allowed to and sometimes requested to provide input at all of Student's relevant IEP meetings.<sup>207</sup> Private Center was also included on emails and Private Center's staff's schedules were also accommodated in scheduling IEP meetings and other events.<sup>208</sup> The recordings from the IEP meetings show clearly that Private Center's staff provided a great deal of information to the IEP team and their comments and input were welcomed and considered.<sup>209</sup> Further, at the both the May 2019 and October 2019 meetings, Parent 1 was specifically asked for Parent 1's input on various portions of Student's IEP throughout the process and Parent 1 and the Private Center IEP team members provided such input.<sup>210</sup>

Petitioners contend that since Principal announced that Principal was the offeror of FAPE and Principal was the one who makes the decision as to Student's placement, that Principal denied Parent 1 participation. While the IDEA does require that the DOE provide parents with meaningful participation, this does not "explicitly vest parents with a veto power over any proposal or determination advanced by the educational agency regarding a change in

---

<sup>207</sup> FOF 10, 23, 27, 32 & 38.

<sup>208</sup> *See e.g.*, R-Ex.9, 5/14/2019-meeting, [01:27:00-01:36:05], R-Ex.6, p.463-465, R-Ex.6, p.528-530.

<sup>209</sup> FOF 42, 46-51, 55-58 & 62.

<sup>210</sup> FOF 50.

placement.”<sup>211</sup> Recognizing that sometimes a consensus cannot be reached between parents and school districts in the creation of an IEP or educational placement, the Ninth Circuit Court of Appeals has held that “the agency has the duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan.”<sup>212</sup> In this case, Principal explained to Parent 1 and the Private Center IEP team members that after listening to all of the discussion had during the IEP meeting on October 30, 2019, Principal concluded that Student’s newly formed IEP could successfully be implemented at Public Separate Facility.<sup>213</sup> Parent 1 was provided the procedural safeguards at the beginning of each of the IEP meetings on May 2019 and October 2019 and was afforded the ability to file a state complaint, and a request for due process hearing for this IEP and educational placement decision.<sup>214</sup> Petitioners have failed to prove that Parent 1 was denied meaningful participation during any part of the IEP process.

**I. Petitioners have failed to prove that Respondents denied a FAPE by placing Student at Public Separate Facility as Student’s least restrictive environment under the IDEA.**

Petitioners argue that the Public Separate Facility in which Respondents placed Student is not the least restrictive environment for Student and request this Hearings Officer to find accordingly. However, courts have cautioned since the start of the IDEA to “avoid imposing their view of preferable education methods upon the States.”<sup>215</sup> Indeed, once a determination is made that the school district has complied with the requirements of the IDEA in developing the

---

<sup>211</sup> *J.G. by and through Greenberg v. Hawaii Department of Education*, 2018 WL 3744015 \*17 (2018) (citing *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 368-369 (1982) and *Laddie C. ex rel. Joshua C. v. Department of Educ.*, 2009 WL 855966 at \*4 (2009)).

<sup>212</sup> *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1490 (9<sup>th</sup> Cir. 1986).

<sup>213</sup> FOF 59.

<sup>214</sup> FOF 23, 33-34, 41-42.

<sup>215</sup> *Rowley* 458 U.S. at 207, 102 S.Ct. at 3051.

IEP, questions of methodology have been left to the expertise of the school districts, who are tasked with “acquiring and disseminating to teachers and administrator of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials.”<sup>216</sup>

Here, Respondents followed the process of developing Student’s IEP and determining educational placement after going through the factors set forth in *Sacramento City Unified School Dist. Bd. of Educ. v. Rachel H. by and through Holland*:<sup>217</sup> 1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; and (3) the effect that Student had on the teacher and children in the regular class.<sup>218</sup> A lengthy discussion was had during the October 30, 2019 IEP meeting, where the team discussed the continuum of placement alternatives for Student.<sup>219</sup> After hearing the discussion and input from all the IEP team members, including Parent 1 and the Private Center IEP team members, Principal determined that the Public Separate Facility was the least restrictive environment in which Student’s IEP may be implemented.<sup>220</sup> Petitioners have failed to demonstrate that Principal’s decision was erroneous and not based on all the factors and reasons set forth by the IEP team.

---

<sup>216</sup> *Id.*, citing 20 U.S.C. §1413(a)(3).

<sup>217</sup> 14 F.3d 1398, 1404 (9<sup>th</sup> Cir. 1994).

<sup>218</sup> The IEP meeting discussion did not consider the cost of mainstreaming Student, which has been recognized as a factor under *Rachel H.*, however federal courts have recognized that not discussing all of the factors in itself does not amount to a denial of FAPE unless it resulted in a loss or educational opportunity or significantly impeded parents’ opportunity to participate. *See e.g., K.K.*, 2015 WL 4611947 at \*20.

<sup>219</sup> FOF 59.

<sup>220</sup> FOF 59.

Petitioners focus on specific details of what is currently in placed at the Public Separate Facility versus what is available currently at Private Center. This argument also fails because Petitioners have failed to demonstrate that all the programs and services that are currently available to Student at Private Center are not or would not be available to Student at the Public Separate Facility. In fact, Respondents have shown that the services and supports that are required for Student's IEP to properly be implemented are available at Public Separate Facility with the additional availability to access a general population of neuro-typical peers as part of Student's program.

This Hearings Officer finds SPED Teacher's testimony that the Public Separate Facility can implement whatever is required under Student's IEP to be credible.<sup>221</sup> SPED Teacher has extensive experience teaching special education in the Hawaii Department of Education and has additional experience in working with students.<sup>222</sup> SPED Teacher has been successful in implementing the IEPs for prior students who have reintegrated back into the public-school system.<sup>223</sup> The Public Separate Facility has the resources to provide required supports and services, such as providers, and SPED Teacher has worked with such support staff in the past.<sup>224</sup> SPED Teacher creates educational programs in accordance with State of Hawaii educational standards, SPED Teacher students' IEPs and unique needs and also integrates activities such as reverse inclusion programs, life skills programs and community-based instruction.<sup>225</sup>

Petitioners have not met their burden of proving that Respondents did not properly determine the least restrictive environment for Student's IEP to be implemented, and this

---

<sup>221</sup> FOF 68-79.

<sup>222</sup> FOF 71.

<sup>223</sup> FOF 74.

<sup>224</sup> FOF 73 & 79.

<sup>225</sup> FOF 71, 74 & 78.

Hearings Officer declines to second-guess the educational programming decision made by the DOE in this case.

**J. Petitioners have failed to prove that Parent 1 is entitled to tuition reimbursement for the period of August 2019 to October 2019.**

Petitioners are seeking reimbursement of Private Center's tuition and related costs from August 1, 2019 to and including October 28, 2019, which is the time from the start of the 2019-2020 school year until the date the complaint was filed in this case and stay-put was initiated. For this Hearings Officer to order reimbursement of tuition for Private Center, a determination must be made as to whether Private Center was an appropriate placement for Student. Thereafter, a consideration must be made to determining the equities of the case, in other words, whether tuition reimbursement is an appropriate relief for the denial of FAPE committed by Respondents.

1. Petitioners have failed to prove that Private Center is an appropriate placement for Student.

First, Petitioners have failed to prove that Private Center is an appropriate placement for Student. While Private Center personnel hold it out to be the best place for understanding and managing Student's maladaptive behaviors, Private Center did not have an identifiable behavioral plan in place for Student during the period in question.<sup>226</sup> The only document submitted purporting to be a behavioral plan for Student developed by Private Center is an undated document prepared by Private Provider 3.<sup>227</sup> What is especially concerning is Private Provider 3's testimony that Private Provider 3 could not confirm the existence of any prior behavioral plans and that Private Provider 3 simply writes over any old plans when updating or

---

<sup>226</sup> FOF 85.

<sup>227</sup> FOF 86.

editing plans for Student.<sup>228</sup> This practice is seemingly directly contrary to the guidelines and best practices as set forth by DOE Provider 3 and DOE Provider 1, both of whom also noted that the prior behavioral plans would be extremely useful in keeping accurate records and data of Student's behaviors to determine if Student is actually making progress.<sup>229</sup>

Private Center's recordkeeping and billing practices also raise concerns of this Hearings Officer and do not support an award of full tuition and related services expenses as billed by Private Center. For example, Respondents presented an invoice from Private Center for the monthly payment for October 2019.<sup>230</sup> In this invoice, no breakdown of provider hours and hourly wage is provided and based on the employee services log submitted by Petitioners, it appears that Private Center's providers continue to bill the DOE, even when Student is not receiving services from Private Center.<sup>231</sup>

Private Center's data collection practices on Student's behaviors are also questionable. While both Private Provider 3 and Private Provider 4 acknowledge that the best practice is for all the individuals working with Student to have a clear understanding of what to look for when documenting Student's behaviors, neither could provide any written example or documentation of how these definitions of behaviors are provided to Student's support personnel.<sup>232</sup>

Notwithstanding the concerning practices of Private Center, this Hearings Officer also notes that Student has developed new behaviors that are being tracked, which have been noted by DOE Provider 3 and DOE Provider 1 as being potentially dangerous to Student.<sup>233</sup> Additionally,

---

<sup>228</sup> FOF 86.

<sup>229</sup> FOF 108-110.

<sup>230</sup> FOF 96.

<sup>231</sup> FOF 98-101.

<sup>232</sup> FOF 87-89.

<sup>233</sup> FOF 105.

Private Center does not have any plans to transition Student to receiving less services, despite their assertions that Student's behaviors and performance overall at Private Center has improved.<sup>234</sup> DOE Provider 1 noted that the goal of applied behavioral services is to reduce the amount of services received by the client, and that if it were a client of DOE Provider 1 that still needed the same level of services after one and a half years, DOE Provider 1 would be concerned.<sup>235</sup>

While Private Center does not need to meet the State of Hawaii educational standards to be an appropriate placement, the record before this Hearings Officer is wrought with concerning and questionable practices of Private Center that do not appear to be helping Student to the "maximum extent appropriate, be educated with children who are not disabled."<sup>236</sup>

2. Parent 1 is not entitled to tuition reimbursement under the equitable considerations of the IDEA.

As discussed, *supra*, adjudicators have broad discretion in determining relief available to parents, taking all relevant equitable considerations into account.<sup>237</sup> "Regarding reimbursement, [adjudicators] may consider any relevant factor, including reasonableness of the private tuition and the conduct of the parents in the IEP formulation process."<sup>238</sup>

Petitioners have failed to demonstrate the reasonableness of the requested reimbursement for Private Center's tuition from August 2019 to October 2019. No invoices or itemized bills were provided for the periods of August 2019 and September 2019.<sup>239</sup> The only invoice

---

<sup>234</sup> FOF 104.

<sup>235</sup> FOF 114.

<sup>236</sup> 20 U.S.C. §1412(a)(5)(A).

<sup>237</sup> *Baquerzio*, 635 F.3d at 1159.

<sup>238</sup> *Department of Education v. L.S. by and through C.S.*, 2019 WL 1421752 at \*14 (D. Hawaii 2019).

<sup>239</sup> FOF 96.

provided was for October 2019 and appeared to have flat rate charges for the providers.<sup>240</sup>

Additionally, it appears from the testimony of Parent 1, Private Provider 1, and Private Provider 4, that the hours billed on days when Student was not in Private Center, that Private Provider 1 is billing the DOE hours for the periods when Student is living with Private Provider 1.<sup>241</sup> Based on the concerning billing practices of Private Center, particularly regarding Private Provider 1's hours for days where Student appears to be absent or not receiving services from Private Center, it is difficult for this Hearings Officer to determine that the requested tuition reimbursement for Private Center from August to October 2019 is reasonable.

This Hearings Officer also declines to award tuition reimbursement to Parent 1 under the considerations of equity. While Respondents denied Student a FAPE by not having an IEP in place at the start of the 2019-2020 school year, as discussed *supra*, Parent 1's actions placed Respondents in a position where they would have to choose between conflicting procedural violations of the IDEA. Even if Private Center was determined to be an appropriate placement for Student, this Hearings Officer also has discretion to "weigh 'equitable considerations' to determine whether, and how much, reimbursement is appropriate."<sup>242</sup>

It is clear from the record in this case that Parent 1 is experienced in the procedural requirements under IDEA, due process hearings, and the IEP process.<sup>243</sup> Further, Parent 1 was assisted at all relevant times by Private Center Administration 1, who \_\_\_self has lengthy experience with due process proceedings through Student and at least one other child's case against Respondents.<sup>244</sup> Private Center Administrator 1 and Private Center Administrator 2, and

---

<sup>240</sup> FOF 96-97.

<sup>241</sup> FOF 98-102.

<sup>242</sup> *Baquerzio*, 635 F.3d at 1159.

<sup>243</sup> FOF 3-4.

<sup>244</sup> FOF 5-8.

other representatives from Private Center oftentimes speak on behalf of Parent 1 for Student in IEP meetings.<sup>245</sup> It is with this experience in mind, that this Hearings Officer concludes that many of the delays and refusals to meet for Student's IEP meetings by Parent 1 placed Respondents in the difficult position of having to choose between procedural violations under the IDEA. Based on these delays, this Hearings Officer finds that the balance of equities does not entitle Parent 1 to tuition reimbursement for the period of August 2019 to October 2019, even if Private Center were deemed to be an appropriate placement for Student.

## **VI. DECISION**

Based on the foregoing Findings of Facts and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have proven that Respondents denied Student a FAPE for not having an IEP in place at the start of the 2019-2020 school year, however, this was largely due to the actions by Parent 1 and does not entitle Parent 1 to tuition reimbursement for Private Center from August 2019 to October 2019. Further, this Hearings Officer finds that Petitioners have not proven that Private Center was an appropriate placement for Student or that the requested reimbursement is reasonable.

The undersigned Hearings Officer finds that the IEP-10/30/2019 does sufficiently create a plan to provide Student with a FAPE in light of Student's unique needs and that the placement of Student at the Public Separate Facility by Respondents was appropriate and done in compliance with the procedures set forth under the IDEA. Public Separate Facility shall be deemed Student's current educational placement.

The IEP team shall meet to create a transition plan to transition Student from Private Center to the Public Separate Facility. This meeting shall take place within sixty (60) days of

---

<sup>245</sup> FOF 8, 27, 32, 51.

this order. Any delays in scheduling and completing the IEP transition plan by Petitioners and/or their agents, shall extend the deadline set herein by which the meeting must be conducted by the number of days attributable to the delay. Respondents shall document in writing any delays caused by Petitioners and/or their representatives and/or their associates.

### **RIGHT TO APPEAL**

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

DATED: Honolulu, Hawai‘i, April 27, 2020.

---

CHASTITY T. IMAMURA  
Hearings Officer  
Richards Building  
707 Richards Street, Suite 520  
Honolulu, Hawai‘i 96813  
Phone: (808) 587-7680  
Fax: (808) 587-7682  
atg.odr@hawaii.gov