



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

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

Petitioners,

vs.

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

Respondents.

DOE-SY1920-029

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: May 26 & 28, 2020
June 8, 2020

Hearings Officer : Chastity T. Imamura

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On November 26, 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 (hereinafter "Complaint") under the Hawaii Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities

¹ Personal identifiable information is provided in the Legend.

Education Act, from Student, by and through Parent 1 (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on December 6, 2019. With leave granted by the undersigned Hearings Officer, Petitioners submitted an amended request for due process hearing (hereinafter “Amended Complaint”) to Respondents on March 23, 2020. The Amended Complaint determined the final issues to be addressed at a Due Process Hearing. Respondents submitted a response to Petitioners’ Amended Complaint on April 2, 2020.

A pre-hearing conference on the Amended Complaint was held on April 23, 2020, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Ryan W. Roylo, Esq. (hereinafter “Mr. Roylo”), representing Respondents. At the pre-hearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for May 26, 2020 and May 28, 2020.

Due to the scheduling of the Hearing, Petitioners requested an extension of the original deadline by which a decision was to be made from June 6, 2020 to July 21, 2020. Petitioners’ request for an extension was granted and the new deadline was set at July 21, 2020.

Due to the coronavirus 2019 global pandemic, the Hearing was conducted via videoconferencing to ensure compliance with government mandated social distancing. An Order Regarding Video Conference Due Process Hearing was issued on May 11, 2020, which set forth the parameters for the videoconference hearing. These parameters included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

The Hearing commenced on May 26, 2020, using the Zoom videoconferencing platform. Each attendee to the Hearing was sent a link through email to access the Hearing by the Office of Dispute Resolution. Present in the videoconference Hearing were Hearings Officer Chastity T. Imamura; Parent 1 and Mr. Peck, on behalf of Petitioners; and DOE District Educational Specialist (hereinafter referred to as “DES”) and Mr. Roylo on behalf of Respondents, as well as the assigned court reporter. The Hearing continued to May 28, 2020, as scheduled, however testimony was not completed on that date. A further date of June 8, 2020 was scheduled for the conclusion of the testimony for this Hearing.

At the Hearing, Petitioners called Parent 1 as a witness during their case-in-chief and rested. Respondents called Principal as their sole witness during their case. Petitioners called a provider who was contacted by the DOE to be involved with Student’s case (hereinafter referred to as “DOE Provider 1”) to testify as their rebuttal witness.

Each party submitted a number of exhibits by the disclosure deadline for the Hearing. Due to the number of exhibits, this Hearings Officer limited the exhibits received as evidence to those that were determined to be relevant to the issues presented. On June 10, 2020, a final list of exhibits received at the Hearing to be considered by the Hearings Officer in this Decision was filed with agreement of the parties. The listed exhibits were received without objection by either party. Petitioners’ exhibits received and considered by this Hearings Officer at the Hearing are as follows: Exhibit 1, pages 1-21;² Exhibit 3, pages 78-86; Exhibit 4, pages 87-93, 97, 102, 107-

² Both Petitioners and Respondents submitted Student’s Individual Educational Plan dated February 5, 2020 (submitted as Petitioners’ Exhibit 1, pages 1-19; and Respondents’ Exhibit 2, pages 50-68), and Prior Written Notice dated February 13, 2020 (submitted as Petitioners’ Exhibit 1, pages 20-21; and Respondents’ Exhibit 2, pages 69-70). Both documents will be referenced herein using both Petitioners’ and Respondents’ page numbers.

108, and 129-146; Exhibit 5, pages 186-187, 196-204,³ and 208-209; and Exhibit 5 audio file of a portion of the IEP meeting on February 5, 2020.⁴ Respondents' exhibits received and considered by this Hearings Officer at the Hearing are as follows: Exhibit 2, pages 29-70;⁵ Exhibit 4, pages 166-172, 179, 197, 210-212, 218, 222-233, 261-284, 308-335, and 341-347; and Exhibit 6, pages 397-528, 554-647, 655-656.

Both parties wanted the opportunity to submit closing briefs regarding the legal issues and the relevant facts supporting those issues to this Hearings Officer for review. The deadline by which the briefs were to be submitted was July 1, 2020. Both parties timely submitted their closing briefs on July 1, 2020.

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

II. ISSUES PRESENTED

Petitioners assert nine (9) issues⁶ in the Amended Complaint to be determined at the Hearing:

³ By agreement of the parties, Petitioners' Exhibit 5 pages 196-204, which was a written transcript of the IEP meeting was admitted as demonstrative evidence to assist the parties and this Hearings Officer with timestamps of the relevant portions of the proceeding and is not being considered a verbatim transcript of the meeting. The audio file was reviewed by this Hearings Officer in its entirety as evidence in this case. Any relevant portions of the IEP meeting recording cited to in the record will be documented by timestamps taken from the recording and not from the aforementioned transcript.

⁴ The audio file was sent by the Petitioners via a Google drive link due to social distancing mandates but was downloaded by the Office of Dispute Resolution. Respondents also indicated receipt of and ability to play the Google link of the audio file.

⁵ Respondents' exhibits are paginated to include blank pages that separate the individual documents, for example, page 30, 32, 35, and 37 are blank pages, but for purposes of listing the exhibits received, the blank page numbers are included with any sequential listing of exhibits.

⁶ Petitioners' Amended Complaint listed ten (10) total issues, but Issue #5 was withdrawn by Petitioners at the pre-hearing conference.

1. Whether the Individual Educational Program (hereinafter “IEP”) was appropriate and/or needed to be reviewed or revised between the time of 5/25/2019 and 2/5/2020.

2. Whether the 02/05/20 IEP should be implemented in the home, community or clinical setting.

3. Whether the 02/05/20 IEP document accurately reflects the agreement of the IEP team for Student’s supports and services, specifically the clarification regarding student’s individual instructional support providers.

4. Whether the 02/05/20 IEP offer fails to include a description of the process and/or supports Student needs to enable Student to access Student’s program given the changes, which should have been anticipated and/or were known from Student’s then-existing program to the new program in Student’s new IEP.

5. Whether the discussion of the topic of needed frequency of services was sufficient during the IEP meetings.

6. Whether the 02/05/20 IEP document accurately reflects the agreement of the IEP team for Student’s placement.

7. Whether the 02/05/20 IEP fails to provide an appropriate extended school year (hereinafter “ESY”) program, and/or was based upon insufficient data and/or reasoning regarding the duration/length of ESY.

8. Whether the DOE did timely offer to implement and/or tender implementation of the 02/05/20 IEP.

9. Whether failing to provide Student to access to Student’s educational and related services and/or supports in Student’s current IEP during the school Spring 2020 intersession

and/or thereafter was a denial of a free and public education (hereinafter “FAPE”) under Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act of 1973.

III. FINDINGS OF FACT

Student’s background

1. Student is ___ years old and is eligible for special education and related services pursuant to Individuals with Disabilities Education Act (hereinafter “IDEA”) and Hawaii Administrative Rules (hereinafter “HAR”) Chapter 60 under Eligibility Category 1.⁷
2. Student has multiple diagnoses.⁸
3. Parent 1 had been working with a team from Health Care Facility 1 since Student’s diagnoses.⁹
4. Student attended Home School for part of the 2017-2018 school year but withdrew in September 2017. Student returned to Home School in June 2018 for the summer ESY session to transition back to Home School. Student has been enrolled at Home School since that time and has not been formally withdrawn from the school.¹⁰
5. Sometime in November 2019, Student stopped attending Home School.¹¹ Student began to attend Home School shortly before the February 5, 2020 IEP meeting, but stopped attending soon after that.¹²

⁷ Petitioners’ Exhibit 1, page 2 (hereinafter referenced as “P-Ex.1, p.2”); Respondents’ Exhibit 2, page 51 (hereinafter referenced as “R-Ex.2, p.51”).

⁸ P-Ex.1, p.2; R-Ex.2, p.51.

⁹ Parent 1’s Testimony, Transcript Volume 1, page 126, line 24 to page 127, line 8 (hereinafter referenced as “Tr.V1, 126:24-127:8”)

¹⁰ P-Ex.1, p.2; R-Ex.2, p.51.

¹¹ Principal’s Testimony, Tr.V2, 314:2-9, 333:9-13, 338:9-14. The last behavioral log submitted by Respondents is dated November 20, 2019, which appears to be the approximate date that Student attended school before January/February 2020.

¹² Principal’s Testimony, Tr.V2, 333:9-334:2; R-Ex.4, p.179, 312.

6. While Parent 1 did not formally withdraw Student from Home School, Home School has not been calling Parent 1 to verify Student's absences at Parent 1's request.¹³
7. Student's severe behavioral issues prevent Student from being able to be educated in a general education setting with other students.¹⁴
8. On the occasions that Student attended Home School during the 2019-2020 school year, Student spent the majority of Student's time at school in a self-contained classroom.¹⁵ This room started out as an ordinary classroom, but objects needed to be removed from the room because Student would damage or destroy items in the room or use them as weapons against Student's service providers or others.¹⁶
9. Some of Student's behaviors at Home School included running out of the classroom, throwing objects at Student's service providers, yelling profanities, biting or otherwise injuring ___self, using profanities at or making fun of other students, and other behaviors.¹⁷

Scheduling of Student's annual IEP meeting

10. Student's annual IEP review date was August 7, 2019.¹⁸
11. Starting as early as April 2019, DOE Student Services Coordinator (hereinafter referred to as "SSC") repeatedly contacted Parent 1 to schedule a time for the IEP team to meet for Student's IEP annual review.¹⁹

¹³ Principal's testimony, Tr.V2, 338:9-25.

¹⁴ See e.g., Student's daily behavioral logs, R-Ex.6, p.397-528, 554-647.

¹⁵ See e.g., P-Ex.5, IEP meeting audio recording, time-stamp 39:37-48:56.

¹⁶ See e.g., Principal's Testimony, Tr.V2, 314:20-315:12.

¹⁷ See Student's daily behavioral logs, R-Ex.4, p.179, 312, R-Ex.6, p.397-528, 554-647.

¹⁸ R-Ex.4, p.225.

¹⁹ See R-Ex.4, p.197; R-Ex.4, p.212; R-Ex.4, p.222-223; R-Ex.4, p.227; R-Ex.4, p.223; R-Ex.4, p.263; R-Ex.4, p.273; R-Ex.4, p.276.

12. Principal also attempted to contact Parent 1 to inform Parent 1 of the need for Student's annual IEP review and schedule a meeting.²⁰
13. Parent 1 repeatedly canceled the scheduled IEP annual review team meetings, often notifying the DOE of the need to cancel or reschedule the meetings a day or two prior to the scheduled time.²¹
14. In many of Parent 1's correspondence with the DOE, Parent 1 advised the DOE not to hold the annual IEP meeting without Parent 1, as Parent 1 wanted to be an active participant in the discussions of Student's IEP.²²
15. In August 2019, due to the delays in scheduling an annual IEP meeting, Parent 1 agreed to allow the previous IEP team to remain until a new IEP was developed by the team.²³
16. Prior to the IEP meetings, requests were also made to Parent 1 to sign consent forms allowing the IEP access to Student's records and other information from the Health Care Facility 1 team that were currently treating Student.²⁴
17. In response, Parent 1 informed the DOE that Parent 1 would only allow the DOE to send Parent 1's questions for Parent 1 to relay to the Health Care Facility 1 team, and that Parent 1 would provide the Health Care Facility 1 team's responses to the DOE. Parent 1

²⁰ See R-Ex.4, p.225; R-Ex.4, p.267.

²¹ See R-Ex.1, p.197 & 210, *Emails dated 4/29/2019 from Parent 1 saying that Parent 1 had a last-minute appointment and could not make the annual IEP meeting on 4/30/2019*; R-Ex.4, p.229, *Email dated 8/5/2019 from Parent 1 asking to reschedule the IEP meeting on 8/6/2019 due to Parent 1 being sick*; R-Ex.4, p.261, *Email dated 9/16/2019 from Parent 1 to reschedule the IEP meeting on 9/27/19*; R-Ex.4, p.267, *Email dated 10/16/2019 from Parent 1 indicating that Parent 1 does not want to attend the IEP meeting scheduled for 10/17/2019 without Parent 1's lawyer*; R-Ex.4, p.273-276, *Email dated 11/12/19 from Parent 1 to reschedule an IEP meeting scheduled for 11/13/2019*.

²² See R-Ex.4, p.210; R-Ex.4, p.229; R-Ex.4, p.261; R-Ex.4, p.280.

²³ R-Ex.4, p.231.

²⁴ Parent 1's Testimony, Tr.V2, 193:21-194:5; Principal's Testimony, Tr.V2, 297:10-16.

stated that Parent 1 did not trust the DOE enough to allow them access to Student's records without any paper trail.²⁵

18. IEP team meetings were held on January 8, 2020, January 31, 2020, and February 5, 2020. From those IEP meetings an IEP dated February 5, 2020 (hereinafter "IEP-2/5/2020") was developed.²⁶

IEP meeting on February 5, 2020.

19. The team members present at the IEP meeting on February 5, 2020, included DOE Provider 1, the DOE Provider 2, the Home School Special Education Teacher, Parent 1, Principal, SSC, the DOE School Psychologist, and DES. Mr. Peck also attended as Parent 1's attorney and Mr. Roylo attended as the DOE's attorney.²⁷
20. During the meeting Parent 1 indicated that Parent 1 wanted Mr. Peck to speak on Parent 1's behalf because he knew what Parent 1's positions were on the issues.²⁸
21. The DOE IEP team members did not have Student's information from the Health Care Facility 1 team due to Parent 1 not providing consent for Health Care Facility 1 team to release the information.²⁹
22. A brief discussion was had regarding the individualized instructional support staff that would be assigned to Student as part of Student's IEP services. The IEP team noted that

²⁵ Parent 1's Testimony, Tr.V2, 192:20-194:5.

²⁶ Principal's Testimony, Tr.V2, 275:3-19; P-Ex.1, p.1-19; R-Ex.2, p.50-68.

²⁷ P-Ex.1, p.19; R-Ex.2, p.68.

²⁸ P-Ex.5, IEP meeting audio recording, timestamps 14:58-15:05, 15:25-15:38, 17:59-18:25, 53:45-53:58 (hereinafter referenced as "P-Ex.5, IEP-14:58-15:05, 15:25-15:38, 17:59-18:25, 53:45-53:58").

²⁹ Parent 1's Testimony, Tr.V2, 192:20-194:5; Principal's Testimony, Tr.V2, 296:1-19; P-Ex.5, IEP-27:52-28:15.

Student already had one provider and one other provider that was trained in behavioral supports. The team agreed that Student's staff would remain the same.³⁰

23. While the IEP team attempted to discuss Student's special education and related services, it was recognized by all the team members that Student's maladaptive behaviors had progressed to the point where Student would not likely be successful at Student's current placement even if they modified the special education and related services.³¹

24. Both DOE Provider 1 and DOE Provider 2 believed that Student would benefit most from a clinical setting where environmental factors can be controlled by the staff to get Student's behaviors under control and then slowly integrate other children Student's age.³²

25. The primary concern of the IEP team was to get Student's behaviors under control so Student would be able to access Student's education as well as have appropriate social interactions with other students.³³

26. At the end of the discussion of Student's placement, the IEP team agreed that a program needed to be created to address Student's needs in a special placement and that once a

³⁰ P-Ex.5, IEP-29:56-31:52.

³¹ P-Ex.5, IEP-32:40-39:29.

³² P-Ex.5, IEP-37:52-38:14, DOE Provider 1 *opining that Student likely needs a higher level of care than Student can get on campus, 51:57-53:20, DOE Provider 2 opining that Student would benefit from a clinical setting where Student's environment can be controlled all day, 53:21-53:42, DOE Provider 1 agreeing that a small, controlled, clinical setting with a limited number of children would be appropriate, 58:53-59:44, DOE Provider 2 noting that starting in a clinical setting and then slow integration into the community setting to introduce Student to other children so Student can focus on Student's social/emotional aspect of Student's learning, 1:00:01-1:00:40, DOE Provider 1 agreeing that the approach for clinical and slowly working into community settings is very reasonable.*

³³ P-Ex.5, IEP-1:07:44-1:08:45.

suitable program was found, the IEP would be reviewed again to address any additional needs and services requested by the program.³⁴

27. Parent 1 and Mr. Peck discussed briefly the program that Parent 1 previously implemented in Parent 1's home and the community, but no details were provided about what Parent 1's previous program entailed.³⁵

28. The IEP team also discussed the ESY break and determined that since Student will be entering a new program, there would be no break for ESY services for Student for spring break 2020, but that any future ESY breaks would be determined based on data collected from Student's new program.³⁶

29. The IEP team also agreed that a new functional behavior assessment (hereinafter "FBA") was necessary to develop a new behavioral services or intervention plan to implement as part of Student's IEP and would be done when Student was in Student's new program.³⁷

30. At the conclusion of the February 5, 2020 IEP meeting, no specific program had been presented by any of the IEP team members. The IEP team agreed to meet again to include the providers of the potential program for Student to attend and discuss the details of the programs and how Student's IEP will be implemented.³⁸

31. The team discussed the potential date for the next IEP team meeting as February 18, 2020, subject to confirmation from the potential program providers attending.³⁹

³⁴ P-Ex.5, IEP-1:09:00-1:23:58, 1:28:30-1:29:48.

³⁵ P-Ex.5, IEP-54:00-56:38.

³⁶ P-Ex.5, IEP-1:47:27-1:50:08.

³⁷ P-Ex.5, IEP-1:50:10-1:51:28.

³⁸ P-Ex.5, IEP-1:51:45-1:52:55.

³⁹ P-Ex.5, IEP-1:53:47-1:55:25.

32. Home School informed Parent 1 that Student's present services are still available to Student at Home School during the interim period until began Student's new program.⁴⁰

Post IEP-2/5/2020 Events

33. In the IEP-2/5/2020, Student's educational placement was described as "[Student] will participate in a modified day schedule at a separate facility. Student will have access to non-disabled peers in a community setting within safe parameters (developed by providers working with Student)."⁴¹

34. A prior written notice dated February 13, 2020 (hereinafter "PWN-2/13/2020"), was sent out regarding Student's IEP-2/5/2020.⁴²

35. Both the IEP-2/5/2020 and the PWN-2/13/2020 were received by Parent 1 via email on February 13, 2020.⁴³

36. After the conclusion of the February 5, 2020 IEP meeting, DES met with DOE Provider 1 to inquire whether DOE Provider 1 could create a suitable program to implement Student's IEP.⁴⁴

37. DOE Provider 1 began to create a program for Student, including finding a physical location for the program and speaking with a special education teacher regarding Student's educational needs. DOE Provider 1 determined that part of the program would include DOE Provider 1 supervising Student's services, and using providers already working for the company to provide services to Student.⁴⁵

⁴⁰ P-Ex.5, IEP-1:55:28-1:58:23.

⁴¹ P-Ex.1, p.16

⁴² P-Ex.1, p.20-21; R-Ex.2, p.69-70.

⁴³ Parent 1's Testimony, Tr.V1, 229:7-18.

⁴⁴ DOE Provider 1's Testimony, Tr.V3, 360:18-23.

⁴⁵ DOE Provider 1's Testimony, Tr.V3, 360:23-361:11.

38. On February 7, 2020, SSC sent an email to Parent 1 requesting that Parent 1 sign consent forms to allow representatives from the Agency 1 to be present at the meeting.⁴⁶
39. Prior to the February 5, 2020 IEP team meeting, DOE Provider 1 contacted Parent 1 to obtain consent to gain access to Student's records and information. DOE Provider 1 required this release for records to complete the FBA that was required as part of Student's IEP.⁴⁷ Parent 1 refused to sign a consent releasing records, even though DOE Provider 1 agreed to allow Parent 1 to be present whenever Student had discussions with Student's team.⁴⁸
40. On February 18, 2020, an IEP team meeting was held for presenting DOE Provider 1's proposed program to Parent 1 and the rest of the IEP team.⁴⁹
41. At the time of the February 18, 2020, no contract(s) had been signed between DOE Provider 1 and the DOE, or any other entity, for Student's program.⁵⁰
42. At the meeting on February 18, 2020, Parent 1 informed the team that Parent 1 did not want DOE Provider 1 working with Student.⁵¹

⁴⁶ Principal's Testimony, Tr.V2, 278:17-279:9; R-Ex.4, p.314-317.

⁴⁷ R-Ex.6, p.655-656.

⁴⁸ DOE Provider 1 Testimony, Tr.V3, 384:20-385:8, 378:15-380:4.

⁴⁹ Principal's Testimony, Tr.V2, 281:18-24; DOE Provider 1's testimony, Tr.V3, 380:10-17.

⁵⁰ DOE Provider 1's Testimony, Tr.V3, 361:19-21, 370:5-17.

⁵¹ Principal's Testimony, Tr.V2, 282:14-19, 309:14-23; DOE Provider 1's Testimony, Tr.V3, 370:18-371:3. It should be noted that Parent 1 made allegations of misconduct on the part of DOE Provider 1 at the Hearing, however, no corroborating evidence was offered to support these allegations. Further, Parent 1's testimony in this regard was erratic, as Parent 1 repeatedly stated that Parent 1 did not want to disclose the details of the allegations, but then either disclosed details or said that Parent 1 disclosed details of the allegations. *See* Parent 1's Testimony, Tr.V2, 199:8-200:8. This Hearings Officer gives no weight to the allegations Parent 1 made against DOE Provider 1 during this Hearing.

43. Because of Parent 1's refusal to have DOE Provider 1 work with Student, DOE Provider 1's presentation on Student's proposed program was abandoned and the team discussed other options for Student.⁵²
44. After informing the team that Parent 1 refused to have DOE Provider 1 work with Student, Parent 1 suggested that the DOE look into Private Center as a possible placement for Student.⁵³
45. The DOE IEP team members suggested that they hold an additional meeting the next day, February 19, 2020, so they could invite Private Center Administrator to the meeting to provide information on whether Private Center would be able to implement Student's IEP.⁵⁴
46. Parent 1 arranged for Private Center Administrator to attend the IEP team meeting on February 19, 2020.⁵⁵
47. On February 19, 2020, the IEP team met with Private Center Administrator, who indicated that Private Center Administrator believed Private Center could implement

⁵² DOE Provider 1's Testimony, Tr.V3, 370:10-371:3.

⁵³ Principal's Testimony, Tr.V2, 282:20-283:1; DOE Provider 1's testimony, Tr.V3, 371:9-15. While Parent 1 testified that it was the DOE's suggestion to consider Private Center as an alternative placement for Student (*see* Tr.V1, 113:21-2), this Hearings Officer notes that throughout Parent 1's testimony, particularly on cross-examination, Parent 1's answers to questions were generally non-responsive and/or contradictory, with multiple explanations offered by Parent 1 that Parent 1 could not remember specifics. This Hearings Officer also notes that there were at least two occasions during Parent 1's cross-examination where Parent 1 asked to speak with Parent 1's attorney prior to answering the question posed. *See* Parent 1's Testimony, Tr.V1, 91:20-93:12, 186:9-187:19. Additionally, on this issue, Parent 1 offered contradictory and confusing testimony about Parent 1's concerns about Private Center and when Parent 1 expressed them to the IEP team. *See* Parent 1's Testimony, Tr.V1, 87:1-24, 90:10-23, 93:19-94:24, 109:17-113:15. This Hearings Officer finds Principal and DOE Provider 1's testimony to be more persuasive.

⁵⁴ Principal's Testimony, Tr.V2, 283:2-284:13.

⁵⁵ Parent 1's Testimony, Tr.V1, 64:3-65:7, R-Ex.4, p.319-321.

Student's IEP successfully. Four of the DOE IEP team members then set up appointments at Private Center to make observations to determine whether they believed that Private Center was an appropriate location to implement Student's IEP.⁵⁶

48. Another IEP team meeting was scheduled for February 27, 2020, to discuss the observations made at Private Center and to determine if any changes needed to be made to the IEP-2/5/2020. If Private Center were determined to be Student's placement, the IEP would also discuss a transition plan for Student at the February 27, 2020 meeting.⁵⁷

49. Private Center required written parental agreement and authorization before it would accept any student into the program.⁵⁸

50. On February 27, 2020, Parent 1 contacted SSC and asked to reschedule the meeting to March 12, 2020, saying that Parent 1 needed to pray on the matter and seek legal advice.⁵⁹

51. On February 27, 2020, SSC responded to Parent 1's request to reschedule the meeting by proposing three (3) earlier dates in March 2020 to schedule the meeting.⁶⁰

52. On February 28, 2020, Principal also sent a letter to Parent 1 indicating that Home School was responsible for implementing Student's IEP as soon as possible, and that the proposed March 12, 2020 date would unnecessarily delay the implementation of Student's IEP. Principal's letter also requested that Parent 1 agree to an earlier date in March for the meeting.⁶¹

⁵⁶ Principal's Testimony, Tr.V2, 284:20-287:7; R-Ex.4, p.169-170.

⁵⁷ Principal's Testimony, Tr.V2, 287:16-293:13; R-Ex.4, p.171.

⁵⁸ R-Ex.4, p.333.

⁵⁹ Principal's Testimony, Tr.V2, 290:7-18; R-Ex.4, p.327.

⁶⁰ Principal's Testimony, Tr.V2, 288:8-293:17; R-Ex.4, p.329.

⁶¹ Principal's Testimony, Tr.V2, 288:8-289:15, R-Ex.4, p.333-335.

53. In Principal's letter, dated February 28, 2020, Principal clarified to Parent 1 that Home School was ready to implement Student's IEP at Private Center, but that full parental agreement and authorization was required by Private Center before a student could start attending. Principal also reiterated to Parent 1 that services were still available for Student at Home School until Student began Student's new program.⁶²
54. When Parent 1 did not respond to the emails from SSC and Principal, Principal sent out another letter on March 6, 2020, to Parent 1 to schedule a meeting to follow up on the Private Center observations.⁶³
55. Parent 1 filed the instant Amended Complaint on March 23, 2020.
56. Parent 1 did not respond to the emails sent by SSC or the letters sent by Principal to reschedule the IEP team meeting to finalize the location of Student's placement. Instead, Parent 1 sent two emails to Principal on April 20, 2020 and April 23, 2020, stating that Student was enrolled in an alternative placement and that Parent 1 refused to discuss any transitions from Student's alternative placement.⁶⁴
57. As recently as March 30, 2020, DES emailed Private Center Administrator to see if Private Center still had an opening available for Student to attend the school even during the current COVID-19 pandemic situation.⁶⁵ Private Center Administrator confirmed that Private Center could still accept Student and that they had made accommodations to provide services to students on a case-by-case basis.⁶⁶

Parent 1's Proposed Program

⁶² R-Ex.4, p. 333-335.

⁶³ Principal's Testimony, Tr.V2, 292:11-293:17, R-Ex.4, p.343.

⁶⁴ Principal's Testimony, Tr.V2, 293:18-23; P-Ex.3, p.79-81.

⁶⁵ R-Ex.4, p.346.

⁶⁶ R-Ex.4, p.347.

58. After removing Student from Home School sometime in February 2020, Parent 1 began to provide services to Student in the home.⁶⁷

59. While Parent 1 testified that Parent 1 was receiving assistance and guidance from Student's Health Care Facility 1 Team,⁶⁸ the only evidence that has been produced to support Parent 1's testimony is an unsigned letter emailed to Parent 1 from a member of Student's Health Care Facility 1's team dated May 16, 2020.⁶⁹

60. Parent 1 has created Home Program at around the end of April 2020 or in May 2020, which is a proposed program to be used to implement Student's IEP. Home Program has not yet been incorporated, nor does it have any employees or equipment at this time.⁷⁰

61. Parent 1 testified that Parent 1 developed the program with the assistance of a provider that Parent 1 found through an internet advertisement, however no evidence was provided of any communications, correspondence or any other documents to support Parent 1's testimony.⁷¹

62. Parent 1 is waiting to obtain funding from the DOE after this Hearing to pay for the Home Program.⁷² Parent 1 anticipates the total monthly costs for the necessary reimbursement for Home Program will be no more than Sixteen Thousand Dollars (\$16,000).⁷³

63. Some of the items requested by Home Program for funding include cleaning of Parent 1's home, a MacBook for both Student and Student's service provider, a smart television,

⁶⁷ Parent 1's Testimony, Tr.V1, 46:7-50:1, 105:2-21, 266:12-15

⁶⁸ Parent 1's Testimony, Tr. V1, 105:5-21, 107:8-11, 111:9-13,

⁶⁹ P-Ex.3, p.82-84.

⁷⁰ Parent 1's Testimony, Tr.V1, 99:21-102:7, 103:17-104:24., P-Ex.4, p.129-130.

⁷¹ Parent 1's Testimony, Tr.V1, 46:16-21, 101:4-102:9.

⁷² Parent 1's Testimony, Tr.V1, 103:16-104:24.

⁷³ P-Ex.4, p.129-130.

transportation reimbursement for Student's service providers from their residence to Student's home, and medical insurance for Home Program employees.⁷⁴

64. Parent 1 envisions that these items will be reimbursed by the DOE and any physical purchases will become the permanent property of Home Program.⁷⁵

65. It is unclear from the evidence when or if the Home Program information presented by Petitioners was ever presented to the DOE.⁷⁶

66. Parent 1's program is based on allowing Student to lead the way in determine what educational materials Student would work on during that day.⁷⁷

67. Parent 1 testified during the Hearing that Student is currently making great progress in the program that Parent 1 has created for Student, however the only documents or records presented to demonstrate Student's success are undated photographs taken some time in May or June of Student interacting with other children.⁷⁸

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."⁷⁹ A Free and Appropriate Education ("FAPE") includes both special education and related services.⁸⁰

⁷⁴ Parent 1's Testimony, Tr.V1, 135:8-143:11; P-Ex.4, p.129-131.

⁷⁵ Parent 1's Testimony, Tr.V1, 135:1-136:23.

⁷⁶ See e.g., Principal's Testimony, Tr.V2, 297:17-298:12, 336:9-337:15.

⁷⁷ Parent 1's Testimony, Tr.V1, 106:2-107:4.

⁷⁸ Parent 1's Testimony, Tr.V1, 46:22-48:21, 105:4-21; P-Ex.4, p.132-146.

⁷⁹ *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 (D. D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)).

⁸⁰ H.A.R. §8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

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.⁸¹ 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.”⁸²

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”⁸³ It is “a written statement for each child with a disability that is developed, reviewed, and revised” according to specific detailed procedures contained in the statute.⁸⁴ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.⁸⁵

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.”⁸⁶ However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,⁸⁷ 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.”⁸⁸

⁸¹ *Id.*

⁸² *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

⁸³ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

⁸⁴ H.A.R. §8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R §300.22.

⁸⁵ H.A.R. §8-60-45; 20 U.S.C. § 1414; 34 C.F.R §300.321- 322.

⁸⁶ *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

⁸⁷ 137 S.Ct. 988, 197 L.Ed.2d 335 (2017).

⁸⁸ *Endrew F.*, 137 S.Ct., at 1001, 197 L.Ed.2d 335; *See also, Blake c. ex rel. Tina F. v. Hawai’i Dept of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Hawai’i 2009).

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 IEP is reasonably calculated to enable the student to receive educational benefit.⁸⁹ "A state must meet both requirements to comply with the obligations of the IDEA."⁹⁰

An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible.⁹¹ Among other things, the IEP must include,

"A statement of the special education and related services and supplementary aids and services, [...], to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child-

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To ... participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section; ..."⁹²

A. IDEA Procedural Requirements

In determining whether Student was denied a FAPE, the first inquiry is whether Respondents complied with the procedures set forth in the IDEA. However, harmless procedural violations do not constitute a denial of FAPE.⁹³ If procedural violations are found, a further inquiry must be made to determine whether the violations: 1) resulted in a loss of educational opportunity for Student; 2) significantly impeded Parent 1's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or 3) caused Student a

⁸⁹ *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

⁹⁰ *Doug C. v. Hawai'i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013). *See also, Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

⁹¹ *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2012).

⁹² 34 C.F.R. § 300.320 (a)(4); HAR §8-60-44(4).

⁹³ *Amanda J.*, 267 F.3d at 892.

deprivation of educational benefits.⁹⁴ Here, while they are not specifically categorized as procedural violations resulting in a denial of FAPE, Petitioners assert two arguments that fall under the category of procedural compliance with the IDEA.

First, Petitioners argue that Respondents failed to review or revise Student's IEP between May 25, 2019 and February 5, 2020.⁹⁵ Petitioners' next procedural argument is that the IEP team did not sufficiently discuss the topic of needed frequency of services during the IEP meetings.⁹⁶ Each of Petitioners' arguments will be addressed in turn.

1. Whether Student's IEP was appropriate and/or needed to be reviewed or revised between the time between May 25, 2019 and February 5, 2020.

The first issue presented in the Complaint is whether Student's IEP was appropriate and/or needed to be reviewed or revised between May 25, 2019 and February 5, 2020. Petitioners have failed to present any evidence or argument regarding this issue. No evidence of any prior IEP for Student was presented at the Hearing. Evidence was presented that supported the idea that Student's current program was not successful, as Student's behaviors had increased to the point where Student was in a room cleared of objects.⁹⁷ Testimony at the Hearing and discussion at the IEP meeting also noted that Student was not accessing Student's education due to Student's behaviors.⁹⁸ However, Petitioners did not present any arguments or evidence to strengthen their argument that Respondents committed any procedural violations by failing to make attempts to review or revise Student's IEP.

⁹⁴ *Id.*

⁹⁵ Petitioners' Issue #1

⁹⁶ Petitioners' Issue #6.

⁹⁷ FOF 7-9.

⁹⁸ FOF 7-9.

Additionally, Respondents have presented evidence that numerous attempts were made to contact Parent 1 and schedule an IEP meeting to, at a minimum, review Student's IEP before the annual review date of August 7, 2019. Home School contacted Parent 1 as early as April 2019, several months before the annual review date, to schedule an IEP meeting.⁹⁹ It was Parent 1 who would agree to meeting dates and times just to cancel them shortly before the meetings were scheduled.¹⁰⁰ Parent 1 further repeated to Home School that Parent 1 did not consent to having the IEP meeting without Parent 1 and Parent 1 wanted to be an active part of IEP process for Student.¹⁰¹ Finally, Parent 1 agreed to keep Student's previous IEP in place until the new one could be completed.¹⁰² Any failure to create, review, or revise Student's IEP prior to February 5, 2020 was due to delays attributed entirely to Parent 1.

Petitioners have failed to prove that Respondents committed a procedural violation by not reviewing or revising Student's IEP prior to February 5, 2020.

2. Whether the discussion on the topic of needed frequency of services was sufficient during the IEP meetings.

Petitioners present the question in Issue 6 of their Complaint of whether the discussion on the topic of needed frequency of services was sufficient during the IEP meetings. Petitioners have not presented any evidence or argument related to this issue. None of the witnesses that testified nor any of the evidence submitted addressed the topic of the needed frequency of services for Student in Student's IEP. Based on Petitioners' failure to address this issue, this Hearings Officer finds that the issue has been abandoned by Petitioners and finds no procedural violation on the part of Respondents.

⁹⁹ FOF 11-12.

¹⁰⁰ FOF 13.

¹⁰¹ FOF 14.

¹⁰² FOF 15.

C. Sufficiency of Student's IEP

The next prong of inquiry for determining whether a FAPE denial has occurred is whether Student's IEP is reasonably calculated to enable Student to receive an educational benefit. Petitioners present several issues addressing the contents of Student's IEP: a) whether Student's IEP-2/5/2020 should be implemented in the home, community and clinical setting;¹⁰³ b) whether the IEP document accurately reflects the agreement of the IEP team for Student's supports and services, specifically the clarification of supports and services regarding Student's individual instructional support providers;¹⁰⁴ c) whether the IEP-2/5/2020 fails to include a description of the process and/or supports Student needs to enable Student to access Student's program given the changes that should have been anticipated and/or were known from Student's then-existing program to the new program in Student's IEP;¹⁰⁵ d) whether the IEP-2/5/2020 accurately reflects the agreement of the IEP team for Student's placement;¹⁰⁶ and e) whether the IEP-2/5/2020 fails to provide an appropriate ESY program and/or was based upon insufficient data and/or reasoning regarding the duration/length of ESY.¹⁰⁷

In any review of whether an IEP is appropriate, the courts have applied a 'snapshot' rule, "which instructs [the reviewing body] to judge an IEP not in hindsight, but instead based on the information that was reasonably available to the parties at the time of the IEP."¹⁰⁸

¹⁰³ Petitioners' Issue #2.

¹⁰⁴ Petitioners' Issue #3.

¹⁰⁵ Petitioners' Issue #4.

¹⁰⁶ Petitioners' Issue #7.

¹⁰⁷ Petitioners' Issue #8.

¹⁰⁸ *Baquerizo v. Garden Grove Unified School District*, 826.F3d 1179, 1187 (9th Cir. 2016) (citing *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)), see also *J.W. ex rel. J.E.W. v. Fresno Unified School Dist.*, 626 F.3d 431 (9th Cir. 2010).

At the time of the February 5, 2020 IEP meeting, the IEP team members were aware that on the occasions when Student attended school, Student had been placed in an isolation room due to Student's behavior, as well as Student's tendency to elope.¹⁰⁹ The IEP team members were aware that Student was being treated by a team at Health Care Facility 1, however no one besides Parent 1 had any access to Student's information from that team, nor their recommendations.¹¹⁰ Student's attorney and Parent 1 had briefly spoken during the meeting about Student being previously successful at home and in the community, however no details were offered as to the program that Student followed in that setting.¹¹¹ The IEP team members were aware and agreed that Student needed a program that needed to be created to address all of Student's individual needs, while addressing Student's aggressive and violent behaviors toward other students as well as Student's service providers.¹¹²

Based on the information that the IEP team had and the discussions at the February 5, 2020 meeting, the team decided that the DOE would find a program that would be able to address Student's behaviors and implement the rest of Student's IEP.¹¹³ The IEP team left the majority of Student's IEP untouched as they determined that it would be best for the providers of Student's program to make changes to the IEP if necessary.¹¹⁴ Additionally, the IEP team determined that to better address Student's behaviors, a functional behavior assessment needed to be conducted on Student, from which a new behavioral services or behavioral intervention plan could be created.¹¹⁵

¹⁰⁹ FOF 7-9.

¹¹⁰ FOF 3, 16-17.

¹¹¹ FOF 27.

¹¹² FOF 26.

¹¹³ FOF 30.

¹¹⁴ FOF 30.

¹¹⁵ FOF 29.

It was clear from the IEP meeting held on February 5, 2020 that the IEP-2/5/2020 would be revised by the team with input from the providers of the new program that would be created for Student.¹¹⁶ Respondents further contacted qualified providers to discuss programs in which Student could be placed, however, it was Parent 1 that prevented Respondents from establishing a suitable placement for Student.¹¹⁷ Both programs needed consent from Parent 1 before Student would be accepted and Parent 1 refused.¹¹⁸ Additional attempts to schedule IEP meetings with Parent 1 to find an acceptable program went unanswered.¹¹⁹

While Petitioners argue that Respondents could have simply placed Student in any program that could implement Student's IEP without involving Parent 1 in the process, this argument fails.¹²⁰ While Respondents do have a duty to provide Student's education, with or without participation of Parent 1, their ability to do so was prevented by outside agencies who would not accept Student into their program without Parent 1's consent.¹²¹ Respondents continued to inform Parent 1 that Student would have access to Student's IEP supports and services at Home School, but Parent 1 refused that option.¹²² Finally, as of April 20, 2020, Parent 1 informed the DOE that Parent 1 had placed Student in an alternative program and refused to discuss transitioning Student from Student's alternative program.¹²³

Petitioners have failed to establish that Student's IEP-2/5/2020 was not reasonably calculated to allow Student to receive an educational benefit. While Petitioners assert several

¹¹⁶ FOF 30.

¹¹⁷ FOF 39, 40, 42-43.

¹¹⁸ FOF 39, 49.

¹¹⁹ FOF 50-54, 56.

¹²⁰ *See* Petitioners' Closing Brief.

¹²¹ FOF 39, 49.

¹²² FOF 32, 52.

¹²³ FOF 56.

defects in the specific language used in the IEP-2/5/2020 regarding the educational placement of Student, Student's individual instructional support providers, and extended school year, Petitioners have not presented evidence or argument as to how any of these are not calculated to suit Student's unique needs. Petitioners' sole argument in support for their specific complaints is that the IEP-2/5/2020 document does not reflect the agreement of the IEP team. The agreement of the IEP team at the end of the February 5, 2020 meeting was that Respondents would find a suitable program to address all of Student's unique needs, and that the IEP-2/5/2020 would be revised with extensive input from the program in which Student would be placed.¹²⁴ This included any behavioral services plan or behavioral intervention plan that would be implemented for Student following a functional behavior assessment, the individual instructional support providers and their qualifications, the inclusion opportunities for Student to be educated with non-disabled children, and the transition plan and extended school year services needed to successfully transition Student into the new program.¹²⁵

D. Implementation of Student's IEP

Petitioners also assert that Respondents have failed to timely offer to implement and/or tender implementation of the IEP-2/5/2020. Petitioners rely on the argument that Respondents unnecessarily decided to engage Parent 1 in discussions about what program would implement Student's IEP. It is clear based on the evidence submitted at the Hearing, Student's IEP-2/5/2020 has not yet been implemented at any program besides Parent 1's attempts to provide Student with supports and services while under a mandatory lock-down.¹²⁶ However, Respondents' failure to implement Student's IEP-2/5/2020 was caused primarily by Parent 1's

¹²⁴ FOF 26.

¹²⁵ FOF 28-30.

¹²⁶ FOF 59.

refusal to attend IEP team meetings and sign consents for Student to enter the programs proposed by the DOE.

In reviewing issues concerning implementation, the Ninth Circuit Court of Appeals has supported the holding that only material failures of implementation of IEPs would rise to the level of a denial of FAPE. In *Van Duyn ex rel. Van Duyn v. Baker School Dist.*, the Court reviewed the IDEA's definition of a free appropriate public education as 'special education and related services that ... are provided in conformity with the [child's] individualized education program,' and determined that "[t]here is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education."¹²⁷ The Ninth Circuit also explored the analysis done by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*,¹²⁸ and recognized the court's conclusion that implementation failures did not violate the IDEA because "the significant provisions of [the child's] IEP were followed, and, as a result, Student received an educational benefit."¹²⁹

Analyses done by the United States District Court, District of Hawaii, in reviewing whether failures of the DOE that were caused primarily by the parent result in denials of FAPE, are also instructive to this Hearings Officer. In *L.I. v. Hawaii*,¹³⁰ the District Court Judge affirmed a decision by a hearings officer that concluded that the failure for the DOE to have a transition plan where Parent 1 refused to provide the consent forms necessary for the DOE to take further steps of transferring the student to the new school was not a denial of FAPE. In that

¹²⁷ 502 F.3d 811, 821 (9th Cir. 2007).

¹²⁸ 200 F.3d 341 (5th Cir. 2000).

¹²⁹ *Van Duyn*, 502 F.3d at 821.

¹³⁰ 2011 WL 6002623 (D. Hawai'i 2011).

case, the District Court agreed with the hearings officer that “[i]t is ... somewhat paradoxical that [the parent] is complaining about the time for the implementation of the Transfer Plan ... when the parent caused the problem.”¹³¹

Similarly, in *A.R. v. Hawaii, Dept. of Educ.*,¹³² the District Court examined “whether an agency that was prevented by an uncooperative parent from implementing an [IEP] until two weeks after the school year had started is, as a result, required by the “stay put” provision of the [IDEA] to pay a child’s private school tuition” throughout the pendency of the proceedings. In that case, the District Court adopted the hearings officer’s findings that the parent of the student caused the student’s IEP to be delayed because the parent was obstructionist and/or uncooperative. Citing to other caselaw in other circuits, the District Court noted a holding from the Third Circuit that “[t]he stay-put provision ... was never intended to suspend or otherwise frustrate the ongoing cooperation of parents and the school district to reach an amenable resolution of a disagreement over educational services.”¹³³

Here, the IEP team, including Parent 1 and Parent 1’s attorney, decided at the February 5, 2020 meeting that Student’s IEP was so unique that the DOE would need to find a suitable program in which Student’s IEP could be implemented.¹³⁴ The team further decided that once a suitable program was found, the IEP team would discuss any needed revisions to Student’s IEP depending on input from Student’s new program.¹³⁵ At the conclusion of the February 5, 2020

¹³¹ *Id.* at *6.

¹³² 2011 WL 1230403 (D. Hawai`i 2011)

¹³³ *Id.* at *12 (quoting *C.H. v. Cape Henlopen School District*, 606 F.3d 59, 72 (3rd Cir. 2010). *Cf. Roland M. Concord Sch. Comm.*, 910 F.2d 983, 995 (“The law ought not to abet parties who block assembly of the required team and then, dissatisfied with the ensuing IEP, attempt to jettison it because of problems created by their own obstructionism.”)

¹³⁴ FOF 26.

¹³⁵ FOF 30.

IEP meeting, the DOE contacted DOE Provider 1, who began to create a program to implement Student's IEP.¹³⁶ Once Parent 1 informed the IEP team at the February 18, 2020 meeting that Parent 1 did not want DOE Provider 1 working with Student, the DOE held another meeting with Private Center, a program proposed by Parent 1.¹³⁷ The DOE completed observations and assessments with Private Center and scheduled another meeting to finalize whether Student would be placed at Private Center and, if accepted, plan Student's transition to Private Center.¹³⁸ It was Parent 1 that refused to work with DOE Provider 1, cancelled the scheduled meeting to discuss Private Center, did not respond to further requests from the DOE to meet to begin Student's program.¹³⁹ The DOE had made necessary arrangements and inquiries to Private Center to assure Student a spot in the program and continued services even during the COVID-19 pandemic.¹⁴⁰

This Hearings Officer finds that Petitioners' have failed to meet their burden of proof that Respondents materially failed to implement Student's IEP-2/5/2020, resulting in a denial of FAPE, where Respondents were impeded and obstructed from doing so by Parent 1's actions.

E. Violations Related to Student's Access under Section 504 of the Rehabilitation Act of 1973 and the IDEA

The final issue raised by Petitioners in their Complaint alleges that failing to provide Student access to Student's educational and related services and/or supports in Student's current IEP during the Spring 2020 school intersession and/or thereafter was a denial of FAPE under the IDEA or Section 504 of the Rehabilitation Act of 1973. Petitioners have failed to produce any

¹³⁶ FOF 36-37.

¹³⁷ FOF 42.

¹³⁸ FOF 44-46.

¹³⁹ FOF 47-48.

¹⁴⁰ FOF 42, 50-54, 56, 57.

evidence and/or argument regarding this issue, nor was it addressed during Petitioners' opening statement or in their closing brief. To the extent that the evidence and argument related to the delay in implementation of Student's IEP relates to this issue, this Hearings Officer finds that for the same reasons set forth in Section D of this Decision, Petitioners have failed to meet their burden of proving this issue.

F. Appropriateness of Home Program

In both their Complaint and their Closing Brief, Petitioners request that this Hearings Officer order Respondents to fund the program created by Parent 1. It is unclear whether Petitioners' request falls under the category of tuition reimbursement or a future compensatory education award.

The Courts have recognized the rights of parents to withdraw their child from a public school and unilaterally enroll them in a private school if they are unsatisfied with the services their child is receiving.¹⁴¹ Parents are then able to request reimbursement for such private programs, but are awarded such reimbursement only if a court or an administrative body determines that the public placement violated the IDEA and denied the student a FAPE and that the private placement was proper under the IDEA.¹⁴² In the Ninth Circuit, the standard of review requires that parents "demonstrate that the placement provides educational instruction specially

¹⁴¹ *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 364-365, 126 L. Ed.2d 284 (1993), citing *School Comm. Of Burlington v. Department of Ed. Of Mass.*, 471 U.S. 359, 369-370, 105 S.Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985), see also 20 U.S.C. §1415(b)(6), (f)(1)(A).

¹⁴² *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.”¹⁴³

Here, Petitioners have failed to prove that Respondents denied Student a FAPE. This Hearings Officer also finds that Petitioners have not met their burden of proof in demonstrating that Parent 1’s Home Program was an appropriate placement for Student. Despite Parent 1’s testimony that Student was doing very well in Parent 1’s current program, Petitioners have not submitted any documents, data, or signed letters of support for Home Program to establish that Student is receiving educational benefits in that program.¹⁴⁴ Petitioners have also failed to provide any documentation or verification of any amounts expended by Parent 1 for the current program on which this Hearings Officer could base an award.

Finally, Courts and reviewing bodies have awarded future funding and payment for private placements, additional services and/or educational needs generally as compensatory education awards.¹⁴⁵ These compensatory education awards are deemed appropriate when a court or hearing officer ascertains that the aspects of the IEP that were not followed were “substantial or significant” or, in other words, whether the deviations from the IEP’s stated requirements were “material.”¹⁴⁶ Compensatory education is an equitable remedy that attempts to account for the educational deficit caused by the deprivation of educational services that a student would have received in the first place.¹⁴⁷ In this case, Petitioners have failed to prove

¹⁴³ *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011) (citing *Frank G. v. Bd. of Educ.*, 459 F.3d at 365 (2nd Cir. 2006)).

¹⁴⁴ FOF 59, 61, 66.

¹⁴⁵ *R.P. ex rel. C.P. v. Prescott Unified School Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C.Cir. 2005)).

¹⁴⁶ *Catalan v. District of Columbia*, 478 F.Supp.2d 73 (D.D.C. 2007).

¹⁴⁷ *Department of Educ. Hawaii v. R.H., ex rel. K.R.*, 2013 WL 3338581 *7 (D.Hawai`i 2013) (citing *R.P.*, 631 F.3d 1125).

that Respondents denied Student a FAPE. Additionally, any loss of educational opportunities and related services were caused primarily by Parent 1's actions of refusing to cooperate with the DOE.

This Hearings Officer finds that Petitioners have not proven that Parent 1 is entitled to an award of reimbursement and/or compensatory education as they have not proven that Student was denied a FAPE, nor have they demonstrated appropriateness of Home Program or that the equities of this case that would warrant such an award.

VI. DECISION

Based on the foregoing Findings of Facts and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not proven that Respondents denied Student a FAPE. This Hearings Officer finds that Respondents have provided a program in Student's IEP-2/5/2020 that is reasonably calculated to allow Student to receive educational benefit in light of Student's unique circumstances. Further, this Hearings Officer finds that any failures of Respondents in finding a suitable location to implement Student's IEP were due to the actions of Parent 1. Finally, even if Respondents had failed to provide a FAPE for Student, Petitioners have failed to prove that Home Program is an appropriate program for reimbursement or for prospective funding by Respondents.

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

RIGHT TO APPEAL

The decision issued by this Hearings Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearings Officer shall have 30 days from the date of the decision of the hearings officer to file a civil action, with respect to the issues

presented at the due process hearing, in a district court of the United States or a State court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2) and §8-60-70(b).

DATED: Honolulu, Hawai‘i, July 17, 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

Unofficial Redacted Hearing Decision