



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

In the Matter of STUDENT, by and through
the Parent¹,

Petitioners,

vs.

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

Respondents.

DOE-SY2021-015

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: October 19 and 20, 2020

Hearings Officer: Charlene S.P.T. Murata

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION**

I. JURISDICTION

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

¹ [REDACTED]

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

II. INTRODUCTION

A Complaint and Resolution Proposal against the Department of Education, State of Hawaii and Christina Kishimoto, Superintendent of Hawaii Public Schools (“Respondents” or “DOE”), dated July 29, 2020, was filed on July 30, 2020 by Student, by and through Student’s Parent (collectively “Petitioners”).

A response to Petitioners’ Complaint and Resolution Proposal, dated August 7, 2020, was filed on August 10, 2020 by Respondents.

On August 27, 2020, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for September 4, 2020.

On September 4, 2020, a prehearing conference was held with Keith H.S. Peck, Esq. appearing on behalf of Petitioners, and Deputy Attorney General Anne T. Horiuchi appearing on behalf of Respondents. During the prehearing conference, the parties agreed to have the due process hearing on October 19, 20, 22, 2020, which were the earliest dates all participants were available. In order for the due process hearing to be held on those dates, Ms. Horiuchi stated that she would request an extension of the decision deadline, which was October 13, 2020.

On September 23, 2020, Ms. Horiuchi filed a Declaration of Anne T. Horiuchi to Extend the Decision Deadline from October 13, 2020 to November 27, 2020. An order granting Ms. Horiuchi’s request to extend the decision deadline was issued on the same date. November 27, 2020 became the decision deadline.

Due to the Coronavirus 2019 global pandemic, the parties agreed to conduct the due process hearing using a video conferencing platform to ensure compliance with government

mandated social distancing. See Governor of the State of Hawaii’s Third Supplementary Proclamation, effective March 23, 2020, and Twelfth Proclamation Related to the COVID-19 Emergency, effective August 20, 2020.

On October 12, 2020, an Order Regarding Due Process Hearing Via Video Conference was issued, setting forth the procedures that would be implemented during the due process hearing using the Zoom video conferencing platform.

The due process hearing took place on October 19 and 20, 2020, using the Zoom video conferencing platform. All participants in the due process hearing appeared remotely via video and audio. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Ms. Horiuchi. Parent was present for the due process hearing. The Department of Education District Educational Specialist-1 (“DES-1”) was present on behalf of Respondents.

Petitioners called DOE Special Education Teacher (“SPED Teacher”), Public School-1 Principal (“Principal-1”), Parent and Private School Teacher-1 as their witnesses during the due process hearing. Respondents called Public School-1 Student Services Coordinator (“SSC-1”) and Principal-1 as their witnesses during the due process hearing. Petitioners did not present any rebuttal witnesses.

The following exhibits were admitted into evidence: Petitioners’ Exhibits 3-14² (pages 21-119); Respondents’ Exhibit 1 (pages 1-13), Exhibit 3 (pages 45, 50, 58-75, 77-78, 82, 88, 90-110, 112-113, 134, 141, 143-163, 165-166), Exhibit 4 (pages 197-230), Exhibit 5 (pages 257-266), and Exhibit 6 (pages 268-396). After the close of evidence, Petitioners informed

² Petitioners’ Exhibits 1 and 2 are the same as Respondents’ Exhibit 3 at pages 143-163 and 165-166, and therefore, Petitioners agreed to use Respondents’ copy. Tr. Vol. II, 110:13-20.

Respondents that if Respondents wanted to supplement their exhibits with documents from DOE's "EHR system," Petitioners would not object. Tr. Vol. II, 181:22-182:25³. On November 20, 2020, Respondents filed Department of Education, State of Hawaii's Supplemental Exhibit List, and attached documents date-stamped DOE00397-DOE00406. Petitioners did not object to Respondents' supplemental exhibits. Thereafter, exhibits DOE00397-DOE00406 were admitted into evidence.

On October 28, 2020, Petitioners submitted a request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under H.A.R. §8-60-69. On October 30, 2020, Petitioners submitted a revised request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under H.A.R. §8-60-69, from November 27, 2020 to January 11, 2021⁴, so that transcripts could be prepared and post-hearing briefs filed. Respondents stipulated to the request for an extension. An order granting Petitioners' request to extend the decision deadline was issued on November 4, 2020.

On December 1, 2020, the parties timely submitted their closing briefs.

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

III. ISSUES PRESENTED

In their July 30, 2020 Complaint and Resolution Proposal, Petitioners allege procedural violations of the Individuals with Disabilities Education Act and Section 504 of the

³ "Tr. Vol. II, 181:22-182:25" refers to Volume II of transcript of due process hearing, page 181, line 22 through page 182, line 25.

⁴ Petitioners wrote "January 11, 2020" in error.

Rehabilitation Act of 1973. Specifically, Petitioners allege that Respondents denied Student a free appropriate public education (“FAPE”). Petitioners raise the following issues:

Issue 1 – Whether the DOE failed and/or refused to revise Student’s 08/28/2019 IEP when it should have.

Issue 2 – Whether the DOE refused to provide Student an Annual IEP unless Student enrolls in a public school first.

Issue 3⁵ – Whether the DOE informed Parent that there will be a material failure by the DOE to implement portions of Student’s 08/28/2019 IEP were Parent to enroll Student at Student’s home school (for a period of time).

Petitioners request the following remedies:

Remedy 1 – Find that the DOE denied Student a FAPE;

Remedy 2 – Order the DOE to reimburse Parents for educational and related expenses for the 2020-2021 school year, including summer intersession;

Remedy 3 – Order the DOE to directly fund Student’s private educational and related expenses for the 2020-2021 school year, including summer intersession;

Remedy 4 – If Student does not obtain private education, order the DOE to amend the 08/28/2019 IEP and/or develop a new annual IEP for Student and assess Student for needed compensatory education where the DOE materially failed to provide portions of Student’s IEP during the 2020-2021 school year; and

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

IV. FINDINGS OF FACT

1. Student is currently ___ years old. Pet. Ex. 1 at 001.

⁵ During the prehearing conference, counsel for Petitioners withdrew the following allegation: “It is anticipated that the DOE will continue to fail and/or refuse to develop an annual IEP for Student when the current IEP expires.”

2. Student is eligible for special education and related services pursuant to the IDEA and Hawaii Administrative Rules Chapter 60 under the category of _____. Student's disability causes Student to have delays in reading (listening comprehension, decoding), writing (spelling), math (numeracy, money, time), social-skills, communication and behavior that impacts Student's full participation in the general education curriculum. DOE Ex. 3 at 116, 119-120.
3. On November 6, 2017, Parent and Parent-2 executed an "Exceptions to Compulsory Education" form for the 2017-2018 school year, withdrawing Student from Public School-2 to receive an alternative education at Private School-1. DOE Ex. 5 at 257.
4. Student's address on November 6, 2017 was Address-1. DOE Ex. 5 at 257.
5. Public School-2 is located in _____ and is a part of the _____ District/Complex Area. DOE Ex. 6 at 290.
6. Student received Applied Behavior Analysis ("ABA") services through Private Agency from October 2017 through August 2019. Pet. Ex. 6 at 59-60; DOE Ex. 6 at 270.
7. On August 29, 2018 and September 19, 2018, IEP meetings were held at Public School-2, resulting in a September 19, 2018 IEP ("9/19/2018 IEP"). September 19, 2019 was listed as the IEP Annual Review Date. Parent was present at both IEP meetings. DOE Ex. 3 at 45, 50, 58-75.
8. The 9/19/2018 IEP states that Student would not participate with non-disabled students during all academic instruction and during speech language therapy. Student would participate with non-disabled students during homeroom activities, resource day (P.E., library, keyboarding, social skills, Hawaiian studies, music), field trips, lunch, recess and assemblies. DOE Ex. 3 at 73.

9. On September 24, 2018, a Prior Written Notice of Department Action was issued by the Principal of Public School-2 (“Principal-2”) (“9/24/2018 PWN”). According to the 9/24/2018 PWN, Student was to get special education services, speech/language therapy and transportation. Student also met the standard for Extended School Year (“ESY”) services. The IEP team considered placement in the least restrictive environment (“LRE”) and to allow Student increased opportunities to receive instruction with Student’s non-disabled peers in a general education setting but rejected this option because Student still needed adult supports and services throughout the school day to meet Student’s proposed goals and objectives for academics, communication, behavior and functional life skills. Student would participate in general education classroom activities when appropriate and attend all resource classes with Student’s non-disabled peers. DOE Ex. 3 at 77-78.
10. DES-2 is a District Educational Specialist for the ___ Complex Area, which is in the ___ District. DOE Ex. 6 at 270.
11. On August 5, 2019, Principal-2 asked Private Agency if someone from Private Agency could be available to attend an annual IEP for Student scheduled for August 21, 2019 at Public School-2. DOE Ex. 6 at 279.
12. On August 5, 2019, Private Agency informed Principal-2 that Private Agency did not have anyone available to attend an August 21, 2019 IEP meeting. DOE Ex. 6 at 279.
13. On August 9, 2019, Principal-2 asked Private Agency if there were any updated progress reports or notes since the March 2019 report sent by Private Agency to Public School-2. DOE Ex. 6 at 281.

14. On August 9, 2019, Private Agency confirmed that insurance required a new report every 6 months, and the March 2019 report was the most current report. A new report would be completed in September 2019. DOE Ex. 6 at 281-282.
15. On August 21, 2019 and August 28, 2019, IEP meetings were held at Public School-2, resulting in the “08/28/2019 IEP.” August 28, 2020 was listed as the IEP Annual Review Date. DOE Ex. 3 at 82, 88, 90-110.
16. Present at the August 21, 2019 IEP meeting were Parent, Parent-2, DES-2, Principal-2, and others. DOE Ex. 3 at 82.
17. On August 26, 2019, Principal-2 reminded Parent and Parent-2 of the follow-up IEP meeting on August 28, 2019, and expressed Principal-2’s hope that they will be able to complete a draft IEP and discuss Student’s upcoming 3-year re-evaluation. DOE Ex. 6 at 285.
18. Present at the August 28, 2019 IEP meeting were Parent, Parent-2, DES-2, Principal-2, and others. DOE Ex. 3 at 88.
19. Student’s 8/28/2019 IEP states that Student would not participate with non-disabled students during instructions in reading, writing, math and speech services. Student would be able to participate with non-disabled students during extracurricular, non-academic activities (such as field trips and assemblies). DOE Ex. 3 at 106.
20. A copy of the 8/28/2019 IEP was sent to Parent at Address-2 and received by “___”⁶ on September 3, 2019. DOE Ex. 3 at 109.
21. On August 28, 2019, Principal-2 issued a Prior Written Notice of Department Action (“8/28/2019 PWN”). The 8/28/2019 PWN proposed that Student receive special

⁶ There is no evidence in the record about who “___” is or how he/she is associated with Parent.

education, speech, Individualized Instructional Support, transportation, and ESY services. The proposed IEP was intended to address Student's delays in reading, writing, math and language/speech. Parents agreed to communicate with the school as to whether or not they would reenroll Student in a DOE school. DOE Ex. 3 at 112-113.

22. Private Agency drafted an "Exit Report September 2019." The Exit Report September 2019 included an assessment conducted on August 13 and 23, 2019. Pet. Ex. 5 at 25-58.
23. On September 2, 2019, Parent emailed DES-2 confirming that Parent received Student's 8/28/2019 PWN and 8/28/2019 IEP on August 30, 2019. Parent also requested confirmation from DES-2 that: (1) DES-2 had informed Parent that Parent had ten days upon receiving the IEP to let DES-2 know if Parent intended to reenroll Student in public school; (2) there was insufficient data to determine how many days Student can be on a break from school before Student needed ESY services; and (3) Public School-2 was given consent to observe and/or do assessments of Student at Private Agency, but no assessments and/or data was provided at the IEP meeting. DOE Ex. 6 at 287.
24. On September 6, 2019, DES-2 proposed to Parent that they reconvene the IEP team to clear up any confusion or miscommunication. DOE Ex. 6 at 288.
25. On September 9, 2019, Principal-2 sent separate letters to Parent and Parent-2 ("9/09/2019 letter"). "____." received the certified mail on behalf of Parent on September 10, 2019. The 9/09/2019 letter reads:

Our records indicate that your child has been identified by the Hawaii State Department of Education (DOE) as a student with a disability, under the Individuals with Disability Act (IDEA) and Chapter 60 of the Hawaii Administrative Rules and is not currently enrolled in a Hawaii public school. As a parent of a student with a disability, you continue to have protection under the procedural safeguards of Chapter 60 (see attached

⁷ There is no evidence in the record regarding who "____" is or his/her relationship to Parent.

“Procedural Safeguards Notice for Parents and Students”) and are eligible for the following:

Reevaluation

Our records indicate your child’s three-year reevaluation is due. The DOE proposes to conduct a reevaluation to determine continued eligibility for special education services. A review of existing evaluation data in our files indicates that the information we have is no longer current. Should your child continue to be eligible for special education, an appropriate program for your child will be developed and placement will be determined. If you wish to have a reevaluation conducted, or if you need assistance in understanding the provisions of Chapter 60, please contact the principal at the phone number listed above.

If we do not hear from you by 09/23/2019:

- A reevaluation will not be conducted,
- Your child will no longer be eligible for special education, and
- You will no longer receive this notice.

Should you wish to request an initial evaluation for special education in the future, please contact your DOE home school.

DOE Ex. 6 at 290-296.

26. An ABA Therapy Reassessment Report, dated September 18, 2019, was submitted on September 23, 2019 by a Provider of Agency. Pet. Ex. 6 at 59-86.
27. On September 24, 2019, a Student Services Coordinator at DOE School-2 noted that Parent had not responded to the 9/09/2019 letter. DOE Ex. 6 at 298.
28. On October 18, 2019, Keith Peck, Esq., on behalf of Petitioners, served Respondents with an Amended Complaint and Resolution Proposal; Exhibit “1” and “2” (“10/18/2019 Amended Complaint”). The 10/18/2019 Amended Complaint was designated case no. DOE-SY1920-017. Pet. Ex. 9 at 104-111. When the 10/18/2019 Amended Complaint was served upon Respondents, Student was attending Private School-2 and Student’s home school was Public School-2. Pet. Ex. 9 at 105.

29. On October 22, 2019, Parent signed a Tuition Payment Agreement for 2019-2020 School Year—Day School Program with Private School-2. The total tuition and fees was \$2,200.00. Pet. Ex. 13 at 118. The original tuition was \$37,300.00 but Student received a significant scholarship which reduced the amount Parent had to pay. Parent, Tr. Vol. I, 102:22-103:1.
30. On November 7, 2019 at 12:11 p.m., Principal-2 emailed Parent and Parent-2 (DES-2 was copied on the email), asking if they had received the 9/09/2019 letter. Principal-2 asked Parent and/or Parent-2 to respond to the 9/09/2019 letter by November 15, 2019 with at least three available dates to meet if one or both of them wanted PublicSchool-2 to conduct a triennial reevaluation. DOE Ex. 6 at 300.
31. On November 7, 2019 at 1:50 p.m., Parent emailed Principal-2 (with copy to DES-2) informing Principal-2 that Parent had checked the mail after 2 months at Address-1 and found a 2nd notice for certified mail from DOE. Parent asked Principal-2 to send all correspondence to Address-2. Parent also provided Principal-2 with three dates that Parent was available. DOE Ex. 6 at 300.
32. On November 27, 2019, an IEP meeting was held at Public School-2, resulting in a “11/27/2019 IEP.” The IEP Annual Review Date was not changed and remained on August 28, 2020. DOE Ex. 3 at 115-132. Pursuant to the 11/27/2019 IEP, Student would not participate with non-disabled students during instruction in reading, writing, math and speech services. Student would participate with non-disabled students during extracurricular, non-academic activities (such as field trips and assemblies). Present at the 11/27/2019 IEP meeting were Parent, Parent-2, DES-2, Principal-2, and others. DOE Ex. 3 at 131.

33. On November 27, 2019, a Prior Written Notice of Department Action was issued by Principal-2 (“11/27/2019 PWN”). According to the 11/27/2019 PWN, it was proposed that the IEP remain the same as the 8/28/2019 IEP because a re-evaluation was done and no changes to eligibility category was made that would change the IEP. The 11/27/2019 PWN noted that Student was currently attending Private School-2. DOE Ex. 3 at 134.
34. On November 27, 2019, Parent executed “Consent for Release of Information” forms, granting permission to Public School-2 to release and receive educational documents and information to and from Private School-2 for the purpose of programming and placement in educational setting. DOE Ex. 5 at 262-263.
35. On April 20, 2020, a settlement agreement was executed in case DOE-SY1920-017 regarding the 8/28/2019 IEP (“4/20/2020 Settlement Agreement”). Pet. Ex. 8 at 95-103; Pet. Ex. 9 at 108.
36. Pursuant to the 4/20/2020 Settlement Agreement, Petitioners agreed to waive any claims against Respondents, including claims that were “known or unknown, which may now exist or which may in any manner arise or grow out of any act, omission” by Respondents connected to Respondents’ obligation to offer and provide a FAPE to Student, up through and including the effective date of the settlement agreement. In exchange for this agreement, Respondents agreed to reimburse Petitioners \$2,560.00 for tuition, deposit, and uniform for Student’s attendance at Private School-2 for the 2019-2020 school year. Respondents also agreed to reimburse Petitioners for transportation costs from August 2019 to July 2020. Pet. Ex. 8 at 95-103.
37. On June 15, 2020, Parent emailed DES-2 informing DES-2 that DES-2 should be receiving in the mail documents verifying Parent’s official name change. Parent also

informed DES-2 that DES-2 will be receiving a letter from ___ to request that Parent's physical/ mailing address not be included in any correspondence that might be shared and/or seen by Parent-2. The following mailing address was provided to DES-2:

Address-3. Parent also requested a withdrawal form from DES-2. DOE Ex. 6 at 302-303.

38. DES-2 responded to Parent's June 15, 2020 email on the same day. DES-2 informed Parent that DOE would respect Parent's request and ensure confidentiality. DES-2 noted DES-2's concerns regarding some mileage reimbursement requests submitted by Parent and questioned the address being used. DOE Ex. 6 at 302.
39. On June 16, 2020, DES-2 emailed Parent informing Parent that Student was currently not enrolled in a public school so Student could not withdraw. DES-2 informed Parent: "If you will let me know what public school area you now reside in, we will alert that school and forward [Student's] records. Your child may be entitled to a private school participation plan. If you are interested in meeting to discuss that, we will inform the school serving the areas in which you now live." DOE Ex. 6 at 302.
40. On July 16, 2020, Parent emailed DES-2 informing DES-2 that "[Student] will attend [Private] School this year. [Student's] IEP has not been revised from the offer provided in [Student's] last Annual IEP. I alerted the school of the aspects of that IEP that I disagreed with. I will be seeking reimbursement for educational and related expenses from the DOE." Pet. Ex. 4 at 23; DOE Ex. 6 at 305.
41. When Parent wrote that Parent "alerted the school of the aspects of that IEP that I disagreed with," Parent meant that Parent alerted the school by filing the 10/18/2019 Amended Complaint. Parent, Tr. Vol. I, 51:9-52:10.

42. On July 17, 2020, DES-2 emailed Parent expressing DES-2's confusion. DES-2 wrote: "Your student has been parentally placed in a private school. We offered a private school participation plan which you did not accept. Also a settlement agreement was already reached on the IEP that you are referencing. You indicated above that you let the school know about your concerns. What school was that? Your student is not enrolled in a public school and to my knowledge your student would not be enrolled in the [] Complex Area if you elected to enroll [Student] in a public school since you reside in []." Pet. Ex. 4; DOE Ex. 6 at 305.
43. On July 20, 2020 at 10:41 p.m. and again on July 21, 2020 at 3:23 a.m., Parent emailed DES-2: "Does this mean that there will be no new IEP this year?" Pet. Ex. 4 at 23-24; DOE Ex. 6 at 307.
44. On July 21, 2020, DES-2 emailed Parent: "As a private school student attending a qualifying private school, your student is entitled to a private school participation plan. If you and your private school are interested in developing a plan, please contact your local public school. If you need help contacting them, I will be happy to assist. If you decide to enroll your child in a public school, the current IEP would be implemented. The new school would collect data and convene the IEP team as appropriate to determine if [Student's] needs were being met. Since we have a current IEP for which a settlement agreement was already reached, the DOE views this IEP as valid until the annual date. However, you have the right to enroll your student in a public school and then request the IEP team convene as you deem necessary." Pet. Ex. 4 at 24; DOE Ex. 6 at 307.

45. On July 30, 2020, Petitioners filed the instant Complaint and Resolution Proposal against the Respondents. DOE Ex. 1 at 1-7.
46. On July 31, 2020, the Superintendent of the Hawaii Public Schools, sent a memorandum to Complex Area Superintendents, Principals, District Educational Specialists, Public Charter School Executive Director, Public Charter School Directors, Teachers and Related Service Personnel entitled “Reopening of the School Year Requirements for Students with Disabilities” (“7/31/2020 memo”). The 7/31/2020 memo instructed the recipients of the memo that “all schools must fully implement students’ Individualized Education Programs (IEPs)/Section 504 Plans, regardless of their school’s instructional model.” The 7/31/2020 memo further ordered the recipients to conduct IEPs and Section 504 meetings within the first quarter for all students with disabilities and revise the IEPs accordingly. The Superintendent further ordered that the IEP revisions be based on students’ needs and not on the available instructional models (i.e., face-to-face, online or hybrid/blended learning), and that all students with disabilities must have a contingency plan in the event that there was another disruption in learning. “The School Closure Contingency Plan describes what service(s) will be provided, including accommodations/modifications/supports needed for the students to access and participate in distance learning (virtual, telepractice, or paper packet)....” The 7/31/2020 memo instructed the recipients that when a parent does not want to send their child to school and opts for distance learning, “and the school cannot implement the IEP in its entirety, the school team must work with the parent(s)/legal guardian(s) to develop a Total Distance Learning Plan to implement the IEP to the greatest extent possible.” The 7/31/2020 memo further reads: “Placement in the least restrictive environment

(LRE) continues to be a regulatory requirement that has not been waived. Changes to school instructional models will require schools to determine how they will maintain each individual student's LRE in the context of the school's core operations. The creation of ohana bubbles may not result in the segregation of students with IEPs." Pet. Ex. 10 at 112-113.

47. On August 6, 2020, a letter was sent to Parent by Public School Principal-1 of Public School-1 ("8/6/2020 FAPE letter"). The 8/6/2020 FAPE letter was sent through regular mail and certified mail. **DOE Ex. 6 at 330.** The 8/6/2020 FAPE letter states:

Our records indicate that your child has been identified by the Hawaii State Department of Education (DOE) as a student with a disability, under the Individuals with Disabilities Education Act (IDEA) and Chapter 60 of the Hawaii Administrative Rules, and is not currently enrolled in a Hawaii public school. As a parent of a student with a disability, you continue to have protection under the procedural safeguards of Chapter 60 (see attached "Procedural Safeguards Notice for Parents and Students") and are eligible for the following:

Free Appropriate Public Education (FAPE)

Although your child is not currently enrolled in a DOE public school, your child is still eligible to receive a FAPE which includes special education and related services through an individualized education program (IEP). If you intend to have your child receive a FAPE and to have an IEP developed, you must contact the principal at the number listed above.

If we do not hear from you by 8/14/20 expressing your intent to have your child receive a FAPE, this will serve as an acknowledgement that you do not want your child to receive a FAPE and:

- An IEP will not be developed for your child.
- The DOE will not be responsible for developing subsequent IEPs until you contact your child's current DOE home school to request one.

Parent received a copy of the 8/6/2020 FAPE letter. Parent, Tr. Vol. II, 132:14-133:1.

The copy sent by certified mail was sent to Parent at Address-4, and was returned to sender, unclaimed, unable to forward. DOE Ex. 6 at 317-319.

48. DES-1 is the District Educational Specialist for the ___ Complex. DOE Ex. 6 at 309.
49. On August 7, 2020, DES-1 emailed Parent (with copy to SSC-1 and Principal-1): “I am writing to you in light of the filed complaint and resolution proposal and to introduce myself and our ___ Complex....Our attorney general verified your address with your attorney, Mr. Peck. Given the verified address, your child’s homeschool is [Public] School in [___]. Looped into this email is [Principal-1] and [SSC-1]. . . .” DOE Ex. 6 at 309.
50. Public School-1 is located at ___. DOE Ex. 6 at 333.
51. On August 10, 2020, Parent emailed SSC-1 and DES-1 about setting up a resolution session for the instant due process complaint, and requested that Respondents send mail to the Address-3. DOE Ex. 6 at 311. Following this email on the same day, SSC-1 and Parent sent emails back and forth about setting up a resolution meeting. DES-1 and Principal-1 were a part of the email exchange. DOE Ex. 6 at 311-315.
52. On August 17, 2020, Parent emailed Principal-1: “Corresponding by email would be preferred at this time due to my work schedule and intensive training. I am reaching out to you at this time to address some questions that I have. As school year 2020-2021 rapidly approaches, how or what would [Public] School be doing in preparation for teaching SPED during this time with COVID-19? What is the plan for [Student’s] General Education and interaction with General Peers for the coming month be like?” DOE Ex. 6 at 325.
53. On the same day, Principal-1 responded to Parent: “As for your questions, right now, per DOE guidance, we are offering face to face or virtual preparation meetings this week to prepare for full distance learning that is going to start next week Monday [8/24/2020].

As for interaction, we are trying to find ways to provide opportunities for peer interaction via virtual classroom settings. What would be good is to set an IEP date so that we can come together to figure out all of this together. We are hoping we can schedule this meeting sometime during the week of 8/25-27. Would that work for you? If so, please let us know what time and day works best for you. We can do in person or virtual. Whatever works best for you. In the meantime, would we be able to get your consent to work with current school to get an idea of strength and growth areas. For this, we would prepare a consent form for your signature. Could we also email this to you? Please let us know if this can be done and when works best for you. Lastly, as shared with you on the phone, please come in to register when you have a chance. Our registrar. . .will be emailing you on the process and paperwork needed.” DOE Ex. 6 at 326.

54. On August 19, 2020, Public School-1’s registrar emailed Parent: “I got the files from [Public School-2] for [Student]. I am just waiting on the residence documents and completion of forms to enroll Student into [Public] School. I hope to hear from you shortly. Mahalo.” DOE Ex. 6 at 328.

55. On August 20, 2020, Parent signed a Tuition Agreement for 2020-2021 School Year with Private School-2. [REDACTED]

[REDACTED] Pet. Ex. 14 at 119. Private School-2 has a flat fee of \$38,500.00, which includes services such as occupational therapy and speech therapy. Parent, Tr. Vol. I, 65:17-67:18. Private School-2’s annual tuition of \$38,500.00 is reasonable.

56. Parent testified that Parent enrolled Student in Private School-2 because Parent wanted Student to continue Student's success and because Parent was not sure how long it would take for an IEP meeting with DOE to happen. Parent, Tr. Vol I, 63:2-63:14.
57. The start date for the 2020-2021 school year at Public School-1 was August 24, 2020. DOE Ex. 6 at 326.
58. On August 27, 2020, Principal-1 sent Parent a letter with two "Consent for Release of Information" forms to receive and release information from/to Private School-2. Principal-1 also asked Parent if Parent had received the 8/6/2020 FAPE letter. The August 27, 2020 letter was sent to the Address-3 and received by "____" ⁸ on August 31. DOE Ex. 6 at 330-334.
59. On August 27, 2020, Parent emailed Principal-1: "I understand you are interested in meeting and discussing [Student's] enrollment. At this time I'm not really sure where or what I want to do. I want to see what [Public] School has to offer and if social distancing is/will be in place for general education before I commit and/or consider enrolling [Student]." DOE Ex. 6 at 336.
60. On the same day, Principal-1 responded to Parent: "[A]t this time we are trying to meet all of our students' needs. At this time the majority of our students are distance learning. We do have some that come on campus, depending on their needs. When they do come on campus we are following the health guidelines. Let's meet as soon as possible so that we can figure out how to best help your [child]." DOE Ex. 6 at 337.

⁸ There is no evidence in the record regarding who "____" is or his/her relationship to Parent.

61. On September 1, 2020, the 8/6/2020 FAPE letter was re-sent by certified mail to Parent at the Address-3. Although the 8/6/2020 FAPE letter was received by “___”⁹ on September 3, 2020, Parent did not receive it. DOE Ex. 6 at 321-323; Parent, Tr. Vol. II, 132:14-133:1.
62. On September 4, 2020, Parent returned signed “Consent for Release of Information” forms. Parent emailed Principal-1: “I also am willing to schedule an IEP meeting, but do not want to enroll [Student] before seeing what the school would offer in the IEP. Since the DOE is not offering a way for [Student] to be among [Student’s] nondisabled peers. I think the IEP team should place [Student] at [Private School-2] for this school year.” Pet. Ex. 12 at 115-117; DOE Ex. 5 at 265-266, DOE Ex. 6 at 339-348.
63. On September 4, 2020, Principal-1 emailed Parent (with copy to SSC-1) asking Parent what dates would work best for Parent during the week of September 21-25, 2020 after 2:30 p.m. DOE Ex. 6 at 349.
64. On September 10, 2020, Parent emailed Principal-1 asking if September 23, 2020 at 3:00 p.m. would work. DOE Ex. 6 at 350.
65. On the same day, Principal-1 informed Parent Principal-1 would get back to Parent. DOE Ex. 6 at 351.
66. On September 11, 2020, Principal-1 informed Parent that September 23, 2020 at 3:00 p.m. would work. DOE Ex. 6 at 352.
67. On September 16, 2020, Principal-1 emailed Parent to confirm the September 23, 2020 IEP meeting at 3:00 p.m. Principal-1 asked Parent if Parent would be coming into the

⁹ There is no evidence in the record regarding who “___” is or his/her relationship to Parent.

school for face-to-face or appearing virtually via WebEx. DOE Ex. 6 at 353; Parent, Tr. Vol. II, 134:1-8.

68. On September 22, 2020, Parent emailed Principal-1: “I understand you were requesting to observe [Student] at [Private School-2]. Due to social distancing and the sporadic Lock Down, school extended out their start date and have yet to assign Student an RBT before Student can start. I look forward to meeting with you all tomorrow.” DOE Ex. 6 at 390.
69. Principal-1 responded to Parent’s September 22, 2020 email on the same day. Principal-1 again asked Parent if Parent will be coming into the school for the September 23, 2020 IEP meeting. DOE Ex. 6 at 390.
70. On September 23, 2020, an IEP meeting was held, resulting in a September 23, 2020 IEP (“9/23/2020 IEP”). Pet. Ex. 1; DOE Ex. 3 at 143-163. Parent participated by phone, while the Executive Director of Private School-2 and all other participants participated via WebEx. Parent, Tr. Vol. II, 134:15-21; DOE Ex. 3 at 141. The IEP Annual Review Date for the 9/23/2020 IEP is September 23, 2021. DOE Ex. 3 at 143.
71. On October 8, 2020, Parent emailed Principal-1: “In regards to your request that I register [Student] to [Public] School, I did not agree to [Student’s] IEP that we met for on September 23, 2020 nor have I received a hard copy. You can not implement [sic] [Student’s] IEP with having non disabled [sic] peers distant learning. However, I do agree that you gather current information on [Student]. I have told you that [Student] has grown a lot since this information on [Student] was taken November 2019....” Pet. Ex. 3 at 022; DOE Ex. 6 at 394.

Public School-1

72. Student is currently not enrolled at Public School-1. Parent, Tr. Vol. II, 133:5-7.
73. Public School-1 provides special education students, such as Student, with opportunities to interact with non-disabled students in advisory class, virtual assemblies, recess and classroom visitations. SSC-1, Tr. Vol. II, 154:15-157:20, 158:6-12; Principal-1, Tr. Vol. II, 172:3-19.
74. Non-disabled students go on campus for various reasons, such as activity planning by the student body (SSC-1, Tr. Vol. II, 154:15-19, 155:24-156:5) and receiving extra help from teachers on Wednesdays, which is available to disabled and non-disabled students. SPED Teacher, Tr. Vol. I, 37:5-38:5.
75. Parent's only concern with Student attending Public School-1 is that Student will not have an opportunity to interact with non-disabled peers on campus. Parent, Tr. Vol. II, 135:14-22, 136:10-14; Pet. Ex. 12 at 115; DOE Ex. 6 at 336, 339-348.

Private School-2

76. Parent moved Student from Private Agency to Private School-2 because Private Agency was primarily a clinic, whereas Private School-2 was more academic and the program was based on assessments and data taken of Student. Parent, Tr. Vol. II, 119:5-15.
77. Private School-2 is licensed [REDACTED]. Private School Teacher-1 ("PST-1"), Tr. Vol. I, 87:25-88:9.
78. Private School-2 is considered a "qualifying private school" by DOE standards for purposes of a private school participation plan. DOE Ex. 6 at 307.
79. Private School-2 is a school for children with disabilities [REDACTED]. PST-1, Tr. Vol. I, 97:21-98:2; SSC-1, Tr. Vol. II, 154:6-14.

80. Private School-2 has a day school and a high school. PST-1, Tr. Vol. I, 98:11-14.
81. The class consists of a variety of grade levels and ages. PST-1, Tr. Vol. I, 76:2-4.
82. In 2019-2020 school year, homeroom class ran from 8:00 a.m. to 8:45 a.m., where students would talk about classroom schedule for the day; talk about any upcoming events for the week; and then they would do a class activity before they started their day's rotations. PST-1, Tr. Vol. I, 75:18-76:7.
83. Private School-2 has scheduled parent-teacher conferences during the school year, but parents can request additional conferences if they want to speak with Private School-2. PST-1, Tr. Vol. I, 88:13-18.
84. Private School Teacher-1 has been employed at Private School-2 for almost 20 years. PST-1, Tr. Vol. I, 72:16-25.
85. Private School Teacher-1 is not a licensed special education teacher. PST-1, Tr. Vol. I, 73:19-21.
86. Student attended Private School-2 from August 21, 2019 to June 5, 2020 for the 2019-2020 school year. DOE Ex. 6 at 356-357.
87. Private School-2's program for Student in 2019-2020 school year was designed to fit and address Student's unique needs. PST-1, Tr. Vol. I, 77:18-78:2.
88. Private School Teacher-1 was Student's homeroom and language arts teacher for the 2019-2020 school year. PST-1, Tr. Vol. I, 72:18-19, 73:2-6.
89. As a language arts teacher, one of the primary programs Private School Teacher-1 used was Reading A to Z, which is aligned with common core. Reading A to Z program provides reading material, phonological awareness skills, comprehension, fluency. It can be printed out or it can be done on an iPad. It has benchmark assessments to help

- decide when to move a child up in reading. PST-1, Tr. Vol. I, 86:15-87:5, 95:11-96:1.
90. In the 2019-2020 school year, Private School Teacher-1 had ___ students in Private School Teacher-1's language arts class with Student and an assistant co-teacher, Private School Teacher-2. PST-1, Tr. Vol. I, 84:6-17.
91. Private School Teacher-1 and Private School Teacher-2 worked with all the students because they provide the students with one-on-one learning. PST-1, Tr. Vol. I, 84:16-21.
92. Private School Teacher-1 designed Student's language arts program for the 2019-2020 school year by giving Student comprehension, fluency, reading, phonological awareness skills assessments and observation at the beginning of the year. Private School Teacher-1 took into consideration Student's strengths and challenges in designing the language arts program. PST-1, Tr. Vol. I, 78:13-17, 80:16-81:2.
93. Private School Teacher-1 determined that Student was a multisensory learner, and learned best visually and hands-on, which helped Student to focus and pay attention. PST-1, Tr. Vol. I, 81:8-82:3.
94. Once Student understood the "routine of learning"—what's being implemented, how it's being implemented, knowing what to expect—Student was able to make progress at Private School-2. PST-1, Tr. Vol. I, 82:18-23.
95. During the 2019-2020 school year at Private School-2, Student had the following core subjects: reading, writing, math, science, social studies, art and adapted P.E. Student made steady gains through the first three quarters. Student was unable to participate in some of Student's classes during the fourth quarter due to the COVID-19 pandemic;

- however, for the classes Student was able to participate in during the fourth quarter, Student maintained Student's progress from third quarter. DOE Ex. 6 at 361-369.
96. When Student was not working on Student's core subjects, Student received "pull-outs" [REDACTED] services twice a day. Student also received occupational and speech/language therapy 2 times per week for 30 minutes each session. Student also had ___ lessons once a week. Parent, Tr. Vol. II, 118:13-24, 126:10-23; DOE Ex. 6 at 384; DOE Ex. 6 at 383.
97. Student had two Registered Behavior Technicians ("RBT") who rotated with Student throughout the week. PST-1, Tr. Vol. I, 82:4-12.
98. Even though Student rotated out of Private School Teacher-1's classroom for other courses, Private School Teacher-1 was aware of what the other teachers were doing because Private School-2 is a small school and there was collaboration among the teachers. The other teachers' programs for Student were also individualized for Student. PST-1, Tr. Vol. I, 85:25-86:17, 87:16-20.
99. After a week at Private School-2, Student made progress in speaking in complete sentences, and appropriately answering questions and expanding Student's vocabulary. Parent, Tr. Vol. II, 118:25-119:4.
100. Due to the COVID-19 pandemic, 2020-2021 school year at Private School-2 was pushed back and runs from September 15, 2020 to June 30, 2021. DOE Ex. 6 at 370; PST-1, Tr. Vol. I, 88:19-89:1.
101. Student did not start at Private School-2 until after September 22, 2020. DOE Ex. 6 at 390.

102. In 2020-2021 school year, Private School Teacher-2 is Student's classroom teacher. PST-1, Tr. Vol. I, 84:12-13.
103. In 2020-2021 school year, due to COVID-19 restrictions, students no longer rotate out of the classrooms; teachers would rotate into the classrooms instead. PST-1, Tr. Vol. I, 89:5-90:7.
104. In 2020-2021 school year, Student is taking math, science and social studies. PST-1, Tr. Vol. I, 90:8-10.
105. In 2020-2021 school year, Student's classroom has ___ students and some of the students have RBTs. PST-1, Tr. Vol. I, 90:11-16.
106. In 2020-2021 school year, the program for Student is still individualized to Student. PST-1, Tr. Vol. I, 89:14-17.
107. In 2020-2021 school year, all of Student's classmates have special needs. PST-1, Tr. Vol. I, 98:23-25.
108. In 2020-2021 school year, Private School-2 is implementing additional things for Student. Student now does more hands-on activities with projects. Parent, Tr. Vol. II, 123:9-22.
109. Student no longer uses the Picture Exchange Communication System ("PEC System") to communicate; Student now verbalizes. Parent, Tr. Vol. II, 124:3-10.
110. In 2020-2021 school year, Student continues to have an RBT with Student all day, providing one-on-one services. Parent, Tr. Vol. II, 124:19-125:6.
111. The RBT is overseen by a Board Certified Behavior Analyst ("BCBA"). Parent, Tr. Vol. II, 125:14-20.

112. Under the supervision of a BCBA, the RBT will implement the ABA treatment plan during the school day. Parent, Tr. Vol. II, 124:19-126:17; Pet. Ex. 6 at 81-82.
113. At the time of the due process hearing, Student was not enrolled at Public School-1. Parent, Tr. Vol. II, 133:5-7.
114. Parent does not recall if Parent enrolled Student in any DOE school in 2020. Parent, Tr. Vol. II, 133:2-4.
115. Student received financial assistance for 2019-2020 school year and paid \$2,200.00 in tuition and fees, instead of the full tuition of \$37,300.00. Pet. Ex. 13 at 118.
116. Student did not receive financial assistance for 2020-2021 school year and is contractually obligated to pay \$38,500.00 in tuition. Parent, Tr. Vol. II, 112:9-11.

V. CONCLUSIONS OF LAW

A. **BURDEN OF PROOF**

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

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

B. IDEA REQUIREMENTS

The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.” Bd. of Educ. v. Rowley, 458 U.S. 176,179-91, 102 S. Ct. 3034, 3037-3043 (1982); Hinson v. Merritt Educ. Ctr., 579 F.Supp.2d 89, 98 (2008)(citing 20 U.S.C. §1400(d)(1)(A)). A free and appropriate public education (“FAPE”) includes both special education and related services. H.A.R. §8-60-1; H.A.R. §8-60-3; 20 U.S.C. §1401(9); 34 C.F.R. §300.34; 34 C.F.R. §300.39; 34 C.F.R. §300.101.

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

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

Rowley). See also, Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001).

The school is not required to “maximize the potential” of each student; rather, the school is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” Rowley, 458 U.S. at 200. However, the United States Supreme Court in Andrew F. v. Douglas County School Dist. held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Andrew F. v. Douglas County School Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. ex rel. Tina F. v. Hawaii Dept. of Educ., 593 F.Supp.2d 1199, 1206 (D. Haw. 2009).

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each child. 20 U.S.C. §§1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child’s teacher, parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child’s present levels of academic achievement and functional performance, a statement of the child’s annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. §1414(d). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. §1414(d). The IEP is, in effect, a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Burlington v. Dep’t of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996,

2002 (1985). An IEP must be evaluated prospectively as of the time it was created.

Retrospective evidence that materially alters the IEP is not permissible. R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2012).

Procedural violations do not necessarily constitute a denial of FAPE. Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001). 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's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or (3) caused Student a deprivation of educational benefits. Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001).

C. ISSUES FOR DETERMINATION

1. The DOE Failed to Revise Student's 8/28/2019 IEP When It Should Have.

Petitioners are alleging that Respondents failed or refused to revise Student's 8/28/2019 IEP when it should have. There is no dispute that an annual IEP was done on 9/23/2020, roughly one month after the Annual Review Date. Pet. Closing Brief at 8. It is important to note that in this particular allegation, Petitioners are not alleging substantive violations of the 9/23/2020 IEP: "While the IEP was rushed and incomplete, that is not a current issue for this tribunal. In essence, the 9/23/2020 annual review IEP is not relevant to the central issue in this hearing, whether the failure to revise the 08/28/2019 IEP, under the circumstances, was a denial of FAPE." Pet. Closing Brief at 8. Therefore, this decision will not address the substance of the 9/23/2020 IEP and will focus on whether Respondents committed any procedural violations when they did not revise the 8/28/2019 IEP until 9/23/2020. Based on the evidence adduced at the due process hearing, the undersigned Hearings Officer finds that Respondents failed to revise

the 8/28/2019 IEP by the 8/28/2020 Annual Review Date and failed to have in effect an IEP for Student at the beginning of the 2020-2021 school year.

The development and revision of IEPs are governed by, *inter alia*, 34 C.F.R.

§300.324(a)(6), (b)(1)¹⁰,

(a) Development of IEP—

(6) Amendments. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

(b) Review and revision of IEPs—

(1) General. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

(i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child’s anticipated needs; or

(E) Other matters.

The federal regulations also require that “[a]t the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in §300.320.” 34 C.F.R. §300.323(a). Petitioners argue that Parent notified Respondents twice to the inadequacies in the 8/28/2019 IEP: (1) through the filing of the 10/18/2019 Amended Complaint, and (2) in an email dated July 16, 2020 from Parent to DES-2. Pet. Closing Brief at 5, 7. The notifications will be discussed in turn.

¹⁰ See also, H.A.R. §8-60-48(a)(6) and (b)(1).

(a) The 10/18/2019 Amended Complaint

Petitioners argue that “[u]nder 34 C.F.R. Sec. 300.324(a)(6)(b)(ii)(C)5 [sic], when Parent filed DOE-SY1920-017 hearing request on 10/18/2019, the DOE was obligated to hold a revision IEP meeting to address Parental concerns.” Pet. Closing Brief at 7. The undersigned is not aware of any legal authority, nor has Petitioners cited to any, that there is a concomitant obligation to have an IEP meeting whenever a due process complaint is filed. While a revision IEP meeting can certainly take place when there is a pending due process complaint, there must be a need for a revision IEP meeting, other than the existence of a due process complaint, because an IEP can be revised at any time as needed and appropriate. If the existence of a due process complaint, without more, is sufficient to show a need for a revision IEP meeting, then in all cases where a parent files for an impartial due process hearing, the parties would be required to have a revision IEP meeting and a resolution meeting¹¹.

¹¹ The resolution process is governed by 34 C.F.R. §300.510, and it states in relevant parts:

(a) Resolution meeting.

(1) Within 15 days of receiving notice of the parent’s due process complaint, and prior to the initiation of a due process hearing under §300.511, the LEA must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that—

- (i) Includes a representative of the public agency who has decision-making authority on behalf of that agency; and
- (ii) May not include an attorney of the LEA unless the parent is accompanied by an attorney.

(2) The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraph (a)(1) and (2) of this section need not be held if—

- (i) The parent and the LEA agree in writing to waive the meeting; or
- (ii) The parent and the LEA agree to use the mediation process described in §300.506.

Besides the 10/18/2019 Amended Complaint, there is no documentary or testimonial evidence that Parent raised any issues with Respondents before 7/16/2020 that would have triggered a need for a revision IEP meeting. There is no evidence to show that Respondents were aware of any changes in circumstances for Student that would necessitate a revision IEP meeting. Therefore, the existence of the 10/18/2019 Amended Complaint alone, without more, is not enough to trigger Respondents obligation to hold a revision IEP meeting.

Furthermore, the parties executed a settlement agreement on April 20, 2020 to resolve all the claims in the 10/18/2019 Amended Complaint stemming from the 8/28/2019 IEP (FOF 35, 36). In exchange for the withdrawal of the 10/18/2019 Amended Complaint and waiver of rights, Respondents agreed to reimburse Parent for tuition, deposit and uniform costs for the 2019-2020 school year at Private School-2. Student received a significant scholarship for school year 2019-2020, which reduced the tuition from \$37,300.00 to \$2,200.00 (FOF 115). Respondents reimbursed Parent \$2,560.00. In addition to the \$2,560.00 reimbursement, Respondents also agreed to reimburse Parent for transportation costs from August 2019 to July 2020 (FOF 36). As a part of the settlement agreement, Petitioners agreed to waive their rights on

(4) The parent and the LEA determine the relevant members of the IEP Team to attend the meeting.

(b) Resolution period.

(1) If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

any claims regarding Respondents' obligation to offer and provide a FAPE to Student up through and including the effective date of the settlement agreement, which was 4/20/2020 (FOF 36). In addition, Petitioners concede in their closing brief that they waived their rights to any claims that may have arose prior to April 20, 2020: "While the 4/20/2020 settlement waived Petitioners' right up to the full-execution of that agreement, thereafter the DOE's liability reattached in its inaction in the face of its knowledge of Parental discontent with the existing IEP." Pet. Closing Brief at 7. Therefore, if Respondents failed to revise Student's 8/28/2019 IEP as alleged by Petitioners, Petitioners waived any claims that may have arose prior to April 20, 2020. The question then remains, what did Respondents do after April 20, 2020, knowing that the 2020-2021 school year would be starting soon and Respondents were still obligated to offer a FAPE. Based on the evidence, Respondents did practically nothing in preparation for the impending annual review deadline for Student's IEP, until Parent emailed DES-2 on July 16, 2020 ("7/16/2020 Email").

(b) 7/16/2020 Email to DES-2

Petitioners allege that "an email notice to the DOE stating that reimbursement for private school would be sought unless a revision IEP meeting was held to address Parent's concerns regarding the 8/28/2019 IEP" placed Respondents on notice of the need for a revision IEP meeting. Pet. Closing Brief at 5. Petitioners are correct that the 7/16/2020 Email to DES-2 provided notice to the DOE that Parent wanted a revision IEP meeting. Parent's 7/16/2020 Email to DES-2 reads:

[Student] will attend [Private] School this year. [Student's] IEP has not been revised from the offer provided in [Student's] last Annual IEP. I alerted the school of the aspects of that IEP that I disagreed with. I will be seeking reimbursement for educational and related expenses from the DOE.

(FOF 40). A back and forth email exchange ensued between Parent and DES-2. On July 17,

2020, DES-2 responded to Parent:

Forgive me, but I am confused. Your student has been parentally placed in a private school. We offered a private school participation plan which you did not accept. Also, a settlement agreement was already reached on the IEP that you are referencing. You indicated above that you let the school know about your concerns. What school was that? Your student is not enrolled in a public school and to my knowledge your student would not be enrolled in the [] Complex Area if you elected to enroll [Student] in a public school since you reside in [].

(FOF 42). Instead of responding to DES-2's question about "What school was that?" Parent responded on July 20 and 21, 2020 with the following email:

Does this mean that there will be no new IEP this year?

(FOF 43). DES-2 responded on July 21, 2020:

As a private school student attending a qualifying private school, your student is entitled to a private school participation plan. If you and your private school are interested in developing a plan, please contact your local public school. If you need help contacting them, I will be happy to assist. If you decide to enroll your child in a public school, the current IEP would be implemented. The new school would collect data and convene the IEP team as appropriate to determine if [Student's] needs were being met. Since we have a current IEP for which a settlement agreement was already reached, the DOE views this IEP as valid until the annual date. However, you have the right to enroll your student in a public school and then request the IEP team convene as you deem necessary.

(FOF 44). The correspondence between Parent and DES-2 makes clear that DES-2 did not know where Parent, and ultimately Student, resided, and therefore did not know which school had the responsibility of offering a FAPE to Student. Prior to Parent's 7/16/2020 Email to DES-2, DES-2 had asked Parent to let DES-2 know what public school area Parent lived in so that DOE could alert that school and forward Student's records to that school (FOF 39). It is understandable that DES-2 may have been confused regarding Parent's address since Parent requested information be sent to Address-2 on November 7, 2019 (FOF 31) and then requested that mail be sent to Parent at Address-3 on June 15, 2020 (FOF 37). However, Respondents' argument that Parent contributed to the delay in revising the 8/28/2019 IEP because Parent did not respond to requests

for Parent's new address is unpersuasive. DOE Closing Brief at 13.

Respondents have the legal obligation to revise the IEP for Student by the Annual Review Date; Parent does not have this legal obligation¹². Because the legal obligation rests with Respondents, Respondents therefore must proactively ensure that they have sufficient time to revise the IEP. In this case, Respondents delayed in doing something until Parent reached out to DES-2 asking for a revised IEP on July 16, 2020 (FOF 40). Unfortunately, beginning the process of scheduling a meeting and revising the 8/28/2019 IEP on July 16, 2020 did not provide Respondents with sufficient time.

There were numerous things that Respondents could have done prior to July 16, 2020 to start the process in fulfilling their obligation toward Student: (1) Respondents could have conditioned the 4/20/2020 Settlement Agreement on a revision IEP meeting taking place since school was starting in four months, which would have obviated the need to chase Parent to give DOE Parent's updated address; if Petitioners disagreed with setting up a revision IEP meeting as part of the settlement, Respondents could have documented their efforts so that they have the option of having a revision IEP without Parent if Parent refused to participate¹³; (2) Respondents were aware since June 15, 2020 that Parent's address was in question (FOF 38) and could have made more effort to inquire from Parent or Petitioners' counsel about Parent's address at that

¹² The Ninth Circuit has held that “[a]n agency cannot blame a parent for its failure to ensure meaningful procedural compliance with the IDEA because the IDEA’s protections are designed to benefit the student, not the parent,” Doug C., 720 F.3d at 1045.

¹³ 34 C.F.R. §300.322(d): “Conducting an IEP Team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—(1) Detailed records of telephone calls made or attempted and the results of those calls; (2) Copies of correspondence sent to the parents and any responses received; and (3) Detailed records of visits made to the parent’s home or place of employment and the results of those visits.”

time; (4) Although DES-2 asked Parent on June 16, 2020 to let DES-2 know what public school area Parent resided in, DES-2 made no effort to follow up on this email when Parent did not respond; (5) Public School-2 could have begun the process until DOE could confirm Parent's address¹⁴; or (6) while not ideal, Public School-1 could have sent out a conference announcement setting the date, time and location for an IEP meeting and then discuss with Parent about rescheduling it. While it would have been helpful had Parent been more responsive, Respondents have not cited to any legal authority to show that the right to have revision IEP meetings is contingent on Parent providing a current address. Furthermore, if Respondents are conditioning the offer of FAPE on knowing Parent's address, the fact that Respondents put in so little effort¹⁵ to find out Parent's address knowing that there is a disabled child out there, raises concerns about Respondents' Child Find obligations¹⁶.

Next, Respondents argue that after they were able to verify through Petitioners' counsel Parent's address, Respondents diligently communicated with Parent and worked to obtain information so that the IEP could occur as soon as possible on September 23, 2020. DOE

¹⁴ An IEP can be implemented in a new school, subject to later revisions, as necessary. Public School-2 could have drafted the IEP and made an offer of FAPE, and Public School-1 could have later revised the IEP as needed. [REDACTED]

¹⁵ Respondents knew on June 15, 2020, perhaps sooner, that Parent wanted to keep Parent's address confidential, yet Respondents insisted on getting confirmation directly from Parent about Parent's address. Respondents knew the identity of Parent's attorney, but did not reach out to Parent's attorney until sometime around August 7, 2020 (FOF 37, 49).

¹⁶ H.A.R. §8-60-10(a): "The department shall annually identify, **locate**, and evaluate, all students with disabilities residing in the State, including students with disabilities who are homeless students or are wards of the State, and students with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services." (Emphasis added). It is the Department of Education's responsibility to locate Student.

Closing Brief at 4-5. Once Respondents found out where Parent lived and determined that Public School-1 was Student's home school, Principal-1 from Public School-1 sent a letter to Parent on August 6, 2020 informing Parent that Student was eligible for a FAPE and asked that Parent respond to the letter by August 14, 2020 (FOF 47). No one followed up with Parent regarding the 8/6/2020 FAPE letter. Even though Parent and SSC-1 began exchanging emails on August 10, 2020 regarding setting up a resolution meeting for the instant due process complaint, SSC-1 did not follow up with Parent about the 8/6/2020 FAPE letter (FOF 51). DES-1 and Principal-1, who were a part of these emails, also did not follow up with Parent about the 8/6/2020 FAPE letter or asked Parent about setting up an IEP meeting. A week later, on August 17, 2020, Parent emailed Principal-1 and asked Principal-1, "I am reaching out to you at this time to address some questions that I have. As school year 2020-2021 rapidly approaches, how or what would [Public] School be doing in preparation for teaching SPED during this time with COVID-19? What is the plan for [Student's] General Education and interaction with General Peers for the coming month be like?" (FOF 52). Principal-1 responded that same day, suggesting that an IEP meeting be held during the week of August 25 to 27—one day before the Annual Review Date and one day after school would have started on August 24, 2020 (FOF 53). By August 27, 2020, Parent still had not responded to the 8/6/2020 FAPE letter. Principal-1 sent a letter to Parent on August 27, 2020 asking if Parent received the 8/6/2020 FAPE letter (FOF 58).

Hawaii Administrative Rules §8-60-46 details the Respondents' responsibility regarding parent participation:

- (a) Department responsibility: general. The department shall take steps to ensure that one or both of the parents of a student with a disability are present at each IEP team meeting or are afforded the opportunity to participate, including:
 - (1) Notifying parents of the meeting early enough to ensure that they will

- have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place.

(b) Information provided to parents.

(1) The notice required under subsection (a)(1) shall:

- (A) Indicate the purpose, time, and location of the meeting and who will be in attendance; and
- (B) Inform the parents of the provisions in sections 8-60-45(a)(6) and (c) (relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the student), and section 8-60-45(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP team meeting for a student previously served under Part C of the Act).

(c) Other methods to ensure parent participation. If neither parent can attend an IEP team meeting, the department shall use other methods to ensure parent participation, including individual or conference telephone calls, consistent with section 8-60-51 (relating to alternative means of meeting participation).

(d) Conducting an IEP team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the department is unable to convince the parents that they should attend. In this case, the department shall keep a record of its attempts to arrange a mutually agreed on time and place, such as:

- (1) Detailed records of the telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and
- (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

The 8/6/2020 FAPE letter and Principal-1's email on August 17, 2020 do not satisfy the Department's responsibility under H.A.R. §8-60-46. The 8/6/2020 FAPE letter was returned to sender as unclaimed, unable to forward (FOF 47). Although Parent testified that Parent received the 8/6/2020 FAPE letter, there is no evidence of when Parent received the 8/6/2020 FAPE letter¹⁷. The 8/6/2020 FAPE letter was re-sent on September 1, 2020 and received by a "___" on

¹⁷ Although not in the record, it is possible that Parent received the 8/6/2020 FAPE letter via regular mail, even though the certified mail was returned to sender. There is also no record as to

September 3, 2020 (FOF 61).

With respect to the 8/17/2020 email from Principal-1 to Parent suggesting they meet during the week of August 25-27, Principal-1 not only gave Parent a one week notice to schedule an IEP meeting, but when Parent did not respond, Principal-1 did not follow up with Parent. Also, the 8/17/2020 email does not satisfy the notice requirement under H.A.R. §8-60-46(b)(1) because it does not indicate the purpose, time, and location of the meeting and who will be in attendance.

Even though Respondents believed that the 8/28/2019 IEP was valid until 8/28/2020 (FOF 44), they did not take reasonable steps to revise the 8/28/2019 IEP for school year 2020-2021 until Parent sought reimbursement for placing Student at Private School-2 on July 16, 2020. This left Respondents six weeks to convene the IEP team, obtain updated reports and conduct observations, if needed. Although there is no set time when Respondents have to begin the process of reviewing and revising an IEP, Respondents in this case, waited until the very last minute and placed themselves in a position where they could not review and revise the IEP before the Annual Review Date—essentially, Respondents ran out of time.

Under the IDEA, harmless procedural errors do not constitute a denial of FAPE; however, procedural inadequacies that result in the loss of educational opportunity or significantly impede the parent's opportunity to participate in the IEP formulation process will result in the denial of a FAPE. W.G. v. Bd. of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir.1992). A hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded

whether the copy of 8/6/2020 FAPE letter that was re-sent to Parent had the hand-written note "Resend Date: September 1, 2020" on it (FOF 61).

the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of education benefit. 34 C.F.R. §300.513(a)(2). "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been bettered considered.'" Doug C., 720 F.3d 1038, 1046 (9th Cir.2013), (quoting M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 657 (9th Cir.2005). "[A]n IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that his placement would have been different but for the procedural error." Doug C., 720 F.3d at 1046 (citing M.L., 394 F.3d at 657). Petitioners have not met their burden in showing that there was a loss of educational opportunity when Respondents did not revise Student's IEP by the Annual Review Date. As Parent testified during the due process hearing, regardless of whether DOE offered Parent a great program for Student, Parent "would never think of pulling [Student] out." See Section D-Tuition Reimbursement for Private School, *infra*.

Although Petitioners failed to show a loss of educational opportunity, the undersigned Hearings Officer finds Respondents significantly impeded Parent's opportunity to participate in the IEP formulation process. Pet. Closing Brief at 3. Although an IEP was done on September 23, 2020, this was after the Annual Review Date and after Parent had already committed to Private School-2 on August 20, 2020 (FOF 55). Therefore, there was no parental participation of a **timely revised IEP**, and significantly impeded Parent's right to parental participation. Parental participation in the IEP and educational placement process is critical and necessary. Doug C., 720 F.3d at 1043-1044. A school has an "affirmative duty" to include parents in the IEP process. Id. at 1044.

Based on the foregoing, Respondents failed to revise Student's 8/28/2019 IEP before the Annual Review Date and failed to have in effect an IEP at the beginning of the 2020-2021 school year, thereby denying Student a FAPE.

2. **The DOE Did Not Refuse to Provide Student an Annual IEP unless Student Enrolled in a Public School First.**

Petitioners are alleging that the DOE refused to provide Student an annual IEP unless Student enrolled in a public school first. Contrary to Petitioners' arguments, and Parent's testimony, DES-2 did not refuse to provide Student an annual IEP unless Student enrolled in a public school first, nor did DES-2 condition a revision of Student's 8/28/2019 IEP on Parent re-enrolling Student into a public school.

Pursuant to H.A.R. §8-60-48(b)(1), it is the responsibility of the DOE—not the individual schools--to ensure that an IEP team reviews and revises an IEP. Although it is reasonable to want to know where a child lives so that within an organization people will know who is responsible for performing the duty, not knowing where the child lives does not mean that the DOE does not have to ensure that an IEP is reviewed and revised as needed in a timely manner. Unlike our mainland counterparts that have state educational agencies and numerous local educational agencies, making residency a necessary determination in assessing who has the legal responsibility to provide FAPE¹⁸, "Hawaii DOE...functions as both a state agency entrusted with

¹⁸ "The LEA, in providing for the education of children with disabilities within its jurisdiction, must have in effect policies, procedures, and programs that are consistent with the State policies and procedures. . . ." 34 C.F.R. §300.201. "[I]t is apparent that 'jurisdiction' refers to geography—that is, it refers to a student's residence as the criteria for which local agency is responsible for IDEA compliance." *Department of Educ., State of Haw. v. M.F. ex rel. R.F.*, 840 F.Supp.2d 1214 at FN 14, Civil No. 11-00047 JMS-BMK (USDC Haw. Dec. 29, 2011). 71 Fed. Reg. 46540-01, 46593 (Aug. 14, 2006) reads: "Discussion: If a determination is made by the LEA where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private elementary school

IDEA compliance and as a direct provider of educational services...” Michael P. v. Department of Educ., 656 F.3d 1057, 1067 (9th Cir.2011). Student’s Hawaii residency was never in question. Therefore, not knowing if Public School-1 or another school was responsible for revising the IEP does not shield DOE from its legal responsibilities. It was DES-2’s desire to know where Parent lived so that DES-2 could figure out which school was responsible for preparing an IEP that contributed to the delay, not that DES-2 was conditioning an annual IEP on enrollment.

The evidence does not support a finding that DES-2 conditioned the revision of the IEP or the offer of an annual IEP on Parent enrolling Student in a DOE school. After having withdrawn Student from Public School-2 on November 6, 2017, Respondents continued to make IEPs for Student (FOF 3, 7, 15, 32, 70). Parent’s testimony that Parent felt like Parent had no choice but to enroll Student at Private School-2 because DOE would not address Student’s IEP until Parent enrolled Student at a public school I not credible. Parent, Tr. Vol. I, 63:3-14, 115:2-116:25. The evidence undermines Parent’s testimony because Parent participated in numerous IEP meetings while Student was not enrolled in a public school. Parent participated in the following IEP meetings while Student was not enrolled and not attending a public school: 8/29/2018, 9/19/2018, 8/21/2019, 8/28/2019 and 11/27/2019 (FOF 7, 16, 18, 32). DES-2 participated in the 8/21/2019, 8/28/2019 and 11/27/2019 IEP meetings (FOF 16, 18, 32). Furthermore, PublicSchool-1 held an IEP meeting and revised Student’s IEP on September 23,

or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child. We do not believe that a change to the regulations is necessary, as §300.201 already clarifies that the district of residence is responsible for making FAPE available to the child. Accordingly, the district in which the private elementary or secondary school is located is not responsible for making FAPE available to a child residing in another district.” Hawaii, unlike other states, do not have “districts.” Hawaii has one unified school district—Hawaii Department of Education.

2020 even though Student was not enrolled at Public School-1 (FOF 72). Therefore, Petitioners did not meet their burden in showing that DOE refused to provide Student an annual IEP unless Student enrolled in a public school first.

3. **The DOE Did Not Inform Parent that There Will be a Material Failure by the DOE to Implement Portions of Student’s 8/28/2019 IEP were Parent to Enroll Student at Student’s Home School (for a period of time).**

Petitioners are alleging that the DOE informed Parent that there will be a material failure by the DOE to implement portions of Student’s 8/28/2019 IEP if Parent were to enroll Student at Student’s home school for a period of time¹⁹. To be clear, Petitioners are not alleging that there was a material failure to implement Student’s 8/28/2019 IEP since Student did not attend a DOE school in the 2019-2020 and 2020-2021 school years. Petitioners are arguing that the “8/28/2019 IEP team did not develop that IEP with the idea that Student would be completely separated from Student’s non-disabled peers. This amounted to anticipatory repudiation of the implementation of Student’s IEP in a material way under the *Van Duyn* analysis.” Petitioners also argue that “Parent had a right to substitute for the anticipated material failure they [sic] DOE said would occur. . . .” Pet. Closing Brief at 8-9. The undersigned Hearings Officer finds both arguments unpersuasive.

First, Petitioners do not cite to any legal authority that an “anticipatory repudiation of the implementation” of an IEP is a denial of FAPE. Second, even if an “anticipatory repudiation of the implementation” of an IEP is a denial of FAPE, the undersigned finds that Petitioners have not met their burden in proving that Respondents anticipatorily repudiated the implementation of Student’s 8/28/2019 IEP. When the 8/28/2019 IEP was developed, the world was a very

¹⁹ Although Petitioners allege that DOE informed Parent that “portions” of the 8/28/2019 IEP will not be implement, the only portion argued by Petitioners involve Student’s opportunity to interact with non-disabled students.

different place and the COVID-19 worldwide pandemic had not begun. No one, including the 8/28/2019 IEP team, expected that there would be lockdowns, quarantines and social-distancing that would make “in-person” implementation of IEPs an issue. This is probably why Student’s 8/28/2019 IEP does not state whether Student would participate with Student’s non-disabled peers during non-academic activities in-person or virtually. With respect to Student’s ability to be with non-disabled students, Student’s 8/28/2019 IEP reads:

[Student] will not participate with nondisabled students during instructions in reading, writing, math and speech services. [Student] will be able to participate wit [sic] nondisabled students during extra-curricula [sic] activities (field trip, assemblies, etc.—non-academics).

(FOF 19).

Petitioners argue that “DOE...publicly communicated its intention to provide non-disabled Student’s a distance learning²⁰ program for some portion of the 2020-2021 school year since July 2020.” Petitioners cite to a 7/31/2020 memo from the Hawaii Superintendent to her staff as evidence of this communication. Pet. Closing Brief at 8. There is no evidence, documentary or testimonial, that the 7/31/2020 memo from the Hawaii Superintendent to her staff was publicly disseminated or communicated to the public in July of 2020, nor is there evidence of Parent receiving this memo. Therefore, the undersigned finds that Petitioners failed to prove that Parent was informed through the 7/31/2020 memo that there would be a material failure to implement portions of Student’s 8/28/2019 IEP.

The evidence shows that Parent found out from Principal-1 on August 17, 2020 that students at Public School-1 would start full distance learning on August 24, 2020 (FOF 53). On

²⁰ “Distance learning” has become a common term since the COVID-19 pandemic to describe a method of delivering educational instruction through virtual, paper packet or other means without having to be on school campus.

August 17, 2020, Parent emailed Principal-1 asking about Public School-1's plan for Student to interact with Student's non-disabled peers (FOF 52). Principal-1 responded the same day stating that Public School-1 was in the process of "trying to find ways to provide opportunities for peer interaction via virtual classroom settings," and suggested scheduling an IEP meeting for the week of August 25-27, 2020 to discuss this (FOF 53). Three days after Principal-1's email and before the Annual Review Date, Parent contracted with Private School-2 on August 20, 2020 (FOF 55). On August 27, 2020, Parent emailed Principal-1, "I want to see what [Public] School has to offer and if social distancing is/will be in place for general education before I commit and/or consider enrolling [Student]." (FOF 59). Principal-1 responded to Parent on the same day, informing Parent, "At this time the majority of our students are distance learning. We do have some that come on campus, depending on their needs." Principal-1 again asked to schedule an IEP meeting (FOF 60). An IEP meeting did not take place until September 23, 2020.

The Ninth Circuit Court in Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J held that "when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811, 815 (9th Cir.2007). "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." Van Duyn, 502 F.3d at 822.

The term FAPE means special education and related services that are provided in conformity with an IEP. 20 U.S.C. §1401(9)(D). Special education and related services "need

only be provided ‘in conformity with’ the IEP. There 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.” Van Duyn, 502 F.3d at 821.

Leaving aside the fact that Student’s 8/28/2019 IEP does not state that Student would have in-person interaction with non-disabled students, not being able to interact in-person with non-disabled students would be a minor discrepancy in the implementation of the services provided to Student and those required by Student’s 8/28/2019 IEP in light of the COVID-19 pandemic. Although not binding legal authority, the United States Department of Education (“USDOE”) provided some guidance to districts on how to address providing IDEA services during school closures. In the *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, the USDOE noted that “the IDEA, Section 504 and Title II of the American Disabilities Act do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time. . .because of exceptional circumstances, such as an outbreak of a particular disease.” However, the USDOE went on to say

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA. . . .

76 IDELR 77 (EDU, March 2020). The USDOE’s guidance comports with the Ninth Circuit Court’s decision in N.D. v. Hawaii Dept. of Educ., 600 F.3d 1104 (9th Cir.2010), which addressed disabled students’ access to education during “Furlough Fridays” in Hawaii in the 2009-2010 school year. The Ninth Circuit held that “the overarching goal of the IDEA is to

prevent the isolation and exclusion of disabled children, and provide them with a classroom setting as similar to non-disabled children as possible.” N.D., 600 F.3d at 1115. The Ninth Circuit affirmed the district court’s denial of a preliminary injunction because disabled and non-disabled students were equally affected. The Hawaii DOE did not implement policies and procedures that favored one group over the other, but rather made a financial decision to balance the budget that affected all students.

When Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions. Hawaii’s furloughs affect all public schools and all students, disabled and non-disabled alike. An across the board reduction of school days such as the one here does not conflict with Congress’s intent of protecting disabled children from being singled out. In comparison to cases in which a child is singled out in relation to her peers, the furlough days do not remove the plaintiffs from the regular classroom setting anymore than they do the other children. Disabled children are not singled out for furlough days. To the extent possible under the new school calendar, the disabled children are still “mainstreamed” with regular children at school. To allow the stay-put provisions to apply in this instance would be essentially to give the parents of disabled children veto power over a state’s decisions regarding the management of its schools. The IDEA did not intend to strip administrative powers away from local school boards and give them to parents of individual children, and we do not read it as doing so.

N.D., 600 F.3d at 1116-1117. While the Ninth Circuit did note that N.D.’s claim was more properly characterized as a “material failure to implement the IEP” under Van Duyn, 502 F.3d at 822, it still provides significant guidance on how at the administrative level we should be interpreting and applying the IDEA when faced with unprecedented challenges that require sacrifices from everyone

The United States Department of Education Office for Civil Rights (“OCR”) and Office of Special Education and Rehabilitative Services (“OSERS”) later clarified that during this unprecedented time,

School districts must provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with

disabilities and those individuals providing education, specialized instruction, and related services to these students. In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online or telephonically.

Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, 120 LRP 10623 (OSERS/OCR March 21, 2020).

The evidence adduced at the due process hearing indicates that Student would have been able to interact with Student's non-disabled peers during non-academic activities—virtually and in-person. Student could have interacted with non-disabled students in advisory class, virtual assemblies, recess and visiting classrooms (FOF 73). Non-disabled students also go on campus for various reasons, such as activity planning by the student body (FOF 74) and receiving extra help from teachers on Wednesdays, which is available to disabled and non-disabled students (FOF 74).

Therefore, although Principal-1 informed Parent that students at Public School-1 will be distance learning, this did not amount to a material failure of the DOE to implement a portion of Student's 8/28/2019 IEP. Parent's decision to not avail Student of the opportunities offered by Respondents or the unilateral placement of Student at Private School-2 for in-person instruction do not amount to Respondents' failure to materially implement Student's IEP.

For the reasons stated above, the undersigned Hearings Officer finds that Petitioners have not met their burden in showing that DOE informed Parent that there will be a material failure by the DOE to implement portions of Student's 8/28/2019 IEP. Because Respondents did not materially fail to implement portions of Student's 8/28/2019 IEP, Petitioners argument that

“Parent had a right to substitute for the anticipated material failure they [sic] DOE said would occur. . . .” must also fail. Parent took a risk when Parent contracted with Private School-2 before an annual review of Student’s IEP was completed because Parent “anticipated” that DOE would not be able to implement the least restrictive environment portion of the 8/28/2019 IEP. Petitioners’ anticipated material failure did not materialize because Respondents could provide Student with interaction with non-disabled peers, albeit most of the interaction would have been virtually. Virtual interaction with non-disabled peers is in conformity with the IEP, especially since the IEP does not explicitly state that Student will have in-person interaction with Student’s non-disabled peers²¹. Student’s interaction with non-disabled students virtually is a minor discrepancy in the implementation of the 8/28/2019 IEP and was not a denial of a FAPE.

D. TUITION REIMBURSEMENT FOR PRIVATE SCHOOL

Petitioners seek reimbursement for educational and related expenses for the 2020-2021 school year, including summer intersession. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in private school and request reimbursement for tuition at said private school from the local educational agency. Florence County School Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 364-365, 126 L.Ed.2d 284 (1993) (citing School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985)), see also 20 U.S.C. §1415(b)(6), (f)(1)(A). A parent who unilaterally places a child

²¹ The LRE requirements, in relevant part, reads: “To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled. . . .” 34 C.F.R. §300.114(a)((2)(i). The undersigned notes that the LRE requirements also do not specifically state that disabled children will be educated in-person with non-disabled children. In furtherance of safeguarding the health and welfare of students and teachers, it is reasonable to provide special education and related services virtually, where appropriate.

in private school pending review proceedings under the IDEA is entitled to reimbursement if the parent can establish that (1) the public placement violated the IDEA, and (2) the private school placement was proper under the IDEA. Doug C., 720 F.3d 1038, 1041, 1047-1048 (9th Cir.2013) (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993)). If both are met, “the district court must then exercise its ‘broad discretion’ and weigh ‘equitable considerations’ to determine whether, and how much, reimbursement is necessary.” C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Carter, 510 U.S. at 15-16, 114 S. Ct. 361).

The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in Frank G. v. Bd. Of Educ., 459 F.3d 356, 365 (2nd Cir.2006), where “to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.” C.B. v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Frank G. v. Bd. Of Educ., 459 F.3d at 365). Parental placement can be appropriate, even if it does not meet state standards. 34 C.F.R. §300.148(c). *See e.g.*, Florence County Sch. Dist. Four v. Carter, 20 IDELR 532 (U.S. 1993).

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

Private School-2 is a licensed school in the State of Hawaii and is a part of the Hawaii Association of Independent Schools (FOF 77). Private School-2 is also considered a “qualifying

private school” by DOE standards for purposes of a private school participation plan (FOF 78). In 2019-2020 school year, Private School-2 taught Student core subjects, such as math, English, social studies and science. When Student was not working on Student’s core subjects, Student received “pull-outs” for ABA services twice a day. Under the supervision of a BCBA, an RBT would implement the ABA treatment plan during the school day (FOF 95-97, 110-112). Student also received occupational and speech therapy, and ___ lessons once a week (FOF 96). Private School-2 has scheduled parent-teacher conferences during the school year, but Parent can request additional conferences if Parent wants to speak with Private School-2 (FOF 83). After a week at Private School-2, Student was talking in complete sentences and appropriately answering questions and expanding Student’s vocabulary (FOF 99). Parent moved Student from Private Agency to Private School-2 because Private Agency was primarily an ABA clinic, whereas Private School-2 provided more academics based on assessments and data taken of Student (FOF 76). Parent testified that for school 2019-2020 at Private School-2, Private School-2 “was good for [Student’s] unique needs. It’s well-rounded for [Student].” Parent, Tr. Vol. II, 118:17-18.

In 2020-2021 school year, Student’s program remains the same except that Student is doing more hands-on activities through projects (FOF 102-112). Student no longer uses the Picture Exchange Communication System (“PEC System”) to communicate; Student now verbalizes (FOF 109). Student continues to have an RBT with Student all day, providing one-on-one services during school year 2020-2021 (FOF 110).

Private School Teacher-1 was Student’s teacher for homeroom class and language arts class in 2019-2020 school year (FOF 88). Private School Teacher-1 conducted the assessments and observation of Student in 2019-2020 and determined that Student was a multisensory learner. Once Student learned the “routine of learning,” Student was able to make progress at

Private School-2. Although Private School Teacher-1 is no longer Student's teacher for the 2020-2021 school year, Private School-2 is a small school and Private School Teacher-1 collaborates with other teachers regarding what they teach their students. Student's 2020-2021 school year program continues to be individualized for Student (FOF 84-94, 98, 106, 108). Based on the foregoing reasons, Petitioners have proven that Private School-2 placement was proper under the IDEA.

Under IDEA, if Petitioners succeed in meeting their burden of proving that the DOE violated the IDEA and denied Student a FAPE, and that the private placement is proper, the reviewing body has the authority to consider equity in determining whether and in what amount tuition reimbursement is to be awarded to a parent that unilaterally places a child at a private program. C.B., 635 F.3d at 1159. The undersigned Hearings Officer finds that the equities in this case favor a reduction in reimbursement in Student's tuition and related expenses.

While the legal responsibility falls on Respondents to make sure that Student has an IEP in effect at the beginning of each school year, Parent contributed to the one-month delay by not responding to requests for information about where Parent lived and to set up an IEP meeting. On June 16, 2020, DES-2 specifically asked: "If you will let me know what public school area you now reside in, we will alert that school and forward [Student's] records." (FOF 39). Instead of responding to the request, Parent emailed one month later saying that "Student will attend [Private School] this year...I alerted the school of the aspects of that IEP that I disagreed with..." (FOF 40). DES-2 responded the next day on July 17, 2020, asking what school Parent alerted regarding aspects of the IEP Parent disagreed with, and again informed Parent of DES-2's confusion regarding where Parent lived (FOF 42). Again, instead of informing DES-2 what area Parent lived in, Parent simply responded: "Does this mean that there will be no new IEP this

year?” On July 21, 2020, DES-2 responded, “If you and your private school are interested in developing a plan, please contact your local public school. If you need help contacting them, I will be happy to assist.” (FOF 44). Parent did not tell DES-2 where Parent lived or ask DES-2 to contact a school. Instead, Petitioners filed the instant due process complaint.

In addition to not being responsive in letting DES-2 know the area in which Parent lived, Parent was also unresponsive to requests in setting up an IEP meeting. Although the record is unclear as to when Parent received the 8/6/2020 FAPE letter from Principal-1, Parent testified that Parent received it. However, Parent did not respond to the 8/6/2020 FAPE letter. On August 17, 2020, Principal-1 asked Parent to schedule an IEP meeting for the week of August 25-27. Instead of responding to Principal-1’s request to set up an IEP meeting, Parent signed a Tuition Agreement with Private School-2 on August 20, 2020. If Parent was not available on August 25-27 for an IEP meeting, Parent could have communicated that to Principal-1 and allow Respondents the opportunity to re-schedule to a mutually agreeable time. On August 27, 2020, Principal-1 emailed Parent and suggested that they meet as soon as possible so that they could figure out how to best help Student (FOF 60). It wasn’t until September 4, 2020 that Parent finally agreed to schedule an IEP meeting (FOF 62).

Furthermore, the undersigned Hearings Officer finds Parent’s communication with Principal-1 to be misleading. On August 27, 2020, Parent misleadingly told Principal-1: “At this time I’m not really sure where or what I want to do. I want to see what [Public] School has to offer and if social distancing is/will be in place for general education before I commit and/or consider enrolling [Student].” (FOF 59). Parent again misleadingly reiterates Parent’s willingness to enroll Student at Public School-1 once Parent sees what the school would offer in the IEP. Parent had no intention of enrolling Student at Public School-1 because Parent had

already signed a Tuition Agreement with Private School-2 and the thought of asking Private School-2 to let Parent out of the contract had never crossed Parent's mind. On October 20, 2020, during direct examination, Parent testified:

Q: So what I'm saying is, I mean, it's possible that you could have gone to [Private School] and said look, you know, this is a burden on me, can I just pay you what I've used, for this time I've used, can you let me out of the contract perhaps? Could you have tried that?

A. No. That thought has never crossed my mind because [Student] was substantially growing academically. The thought of pulling [Student] out in the midst of [Student] growing, I would never think of pulling [Student] out.

Q. Okay. So even **if the DOE had offered you a great program**, you know, you would just say I won't accept it?

A. I mean, where [Student]'s at right now growing substantially and academically, **the thought of taking [Student] out has never crossed my mind.**

Parent, Tr. Vol. II, 129:11-24. Parent's testimony clearly indicates that Parent wants Student to stay at Private School-2 for the 2020-2021 school year. However, Parent later reluctantly stated that Parent would think about it if the DOE offered Parent something great²². Parent, Tr. Vol. II, 129:25-130:4. Based on Parent's testimony, Parent may be willing to send Student to a DOE school in the future if an acceptable IEP is offered, but not for the 2020-2021 school year. Furthermore, the thought of taking Student out of Private School-2 never crossed Parent's mind since the 2019-2020 school year. The "growth substantially and academically" that Parent sees in Student dates back to November 2019 (Pet. Ex. 3 at 022; DOE Ex. 6 at 394) and likely does not refer exclusively to this academic school year because Student started school at Private

²² Parent also testified that when Student was initially diagnosed with ___ around the age of ___ years old, Parent researched private schools on ___, but ideally wanted to send Student to a DOE school. Parent, Tr. Vol. II, 136:23-138:19. Although Parent may have wanted to send Student to a DOE school back then, it does not mean that that is how Parent feels right now.

School-2 after September 22, 2020²³. The undersigned Hearings Officer finds Parent's continued statements about being willing to enroll Student at Public School-1 for the 2020-2021 school year after Parent had signed a Tuition Agreement with Private School-2 to be misleading.

Lastly, a reduction in reimbursement is warranted because the sole basis for why Parent enrolled Student at Private School-2 was because Parent believed that Public School-1 could not offer a way for Student to be among Student's non-disabled peers. Yet, Parent enrolled Student at a private school that only has special needs children. Even though parental placement can be appropriate even if it does not meet state standards (34 C.F.R. §300.148(c)), the undersigned will take this into consideration.

Respondents failed to review and revise Student's 8/28/2019 IEP by the Annual Review Date and to have an IEP in effect for Student at the beginning of the 2020-2021 school year; however, Parent's lack of cooperation and misleading conduct warrant a reduction in reimbursement.

E. PETITIONERS' SECTION 504 OF THE REHABILITATION ACT OF 1974 CLAIM.

Petitioners' Complaint "assert[s] Student's eligibility for rights and protections under Section 504 of the Rehabilitation Act of 1974." DOE Ex. 1 at 2. Petitioners, however, did not present any evidence or argument during the due process hearing and in their closing brief regarding their Section 504 claim. Based on the lack of evidence or argument to support this

²³ On September 22, 2020, Parent emailed Principal-1: "Due to social distancing and the sporadic Lock Down, [Private School-2] extended out their start date and have yet to assign [Student] an RBT before [Student] can start. I look forward to meeting with you all tomorrow." DOE Ex. 6 at 390. If Student started school on September 23, 2020, by the time Parent testified, the most Student would have gone to school was 18 days.

claim, the undersigned Hearings Officer concludes that Petitioners have effectively abandoned their Section 504 claim and have not met their burden of proof.

VI. DECISION

Based upon the above-stated Findings of Fact and Conclusions of Law, the undersigned Hearings Officer concludes that Petitioners have proven a denial of FAPE by failing to allow Parent significant and meaningful participation in the revision of the 8/28/2019 IEP before it expired and to have an IEP in effect at the beginning of the 2020-2021 school year. Petitioners further proved that Private School-2 is an appropriate placement for Student and that Parent is entitled to reimbursement for tuition and related expenses for Student's attendance at Private School-2 for school year 2020-2021. The undersigned Hearings Officer finds that the equitable considerations in this case warrants a reduction of \$7,700.00 in reimbursement for tuition and related expenses or direct tuition payment to Private School-2 for school year 2020-2021. Petitioners request for reimbursement or direct tuition payment to Private School-2 for summer programming is denied.

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

1. The IEP team shall, within ten (10) school days of this Order, decide if any additional data or information or assessments are needed to determine Student's current needs. Respondents shall make reasonable effort to obtain any additional data or information that is needed. Any assessments are to be scheduled and completed within forty (40) calendar days of this Order.
2. An IEP team meeting shall be held within ten (10) school days of obtaining any additional data or information and the completion of all aforementioned assessments. If, however, the IEP team determines that no additional data or information or

assessments are needed to determine Student's current needs, the IEP team meeting shall be held within ten (10) school days of that determination.

3. At the IEP team meeting, the IEP team shall determine whether Student meets the standard for an extended school year, and if eligible, the extent to which ESY is necessary.
4. Any delay in meeting any of the deadlines in this Order because of an act or acts of Petitioners and/or their representatives and/or their private providers, will extend the deadlines set herein by the number of days attributable to Petitioners and/or their representatives and/or their private providers. Respondents shall document in writing any delays caused by Petitioners and/or their representatives and/or their private providers.
5. Within 14 calendar days of receiving itemized invoice(s) from Private School-2 for Student's tuition, Respondents shall make payment, less any payment due to Parent pursuant to paragraph 6 herein, for Student's tuition for the 2020-2021 school year to Private School-2 for November 1, 2020 through June 30, 2021²⁴.
6. In the event that Parent paid for Student's tuition, Parent will be reimbursed for the amount paid. Respondents shall reimburse Parent within 14 calendar days of receiving proof of payment from Parent. Parent may only seek reimbursement for tuition from November 1, 2020 through June 30, 2021.
7. Payment(s) pursuant to paragraphs 5 and 6 shall not exceed a total amount of \$30,800.00.

²⁴ As of September 22, 2020, Student had not started school yet (FOF 68). The record is devoid of evidence regarding how or if Private School-2 will be adjusting its tuition to reflect the decrease in instructional days for Student.

8. Respondents will reimburse Petitioners for mileage for transportation from November 1, 2020 to June 30, 2021. Parent shall provide verification of Student's residential address ("home") to Respondents within ten (10) calendar days of this Order. Mileage reimbursement shall be for transporting Student from home to Private School-2 and from Private School-2 to home. Respondents are only responsible for one roundtrip transportation a day. In the event that Student is transported to Private School-2 from another location or from Private School-2 to another location, reimbursement shall not exceed the amount for transporting Student to Private School-2 from home or from Private School-2 to home. Petitioners must provide proof that Student attended Private School-2 for all school days that a mileage claim is made. The mileage rate shall not exceed the IRS published standard mileage rate for the applicable period for which reimbursement is sought. Any request for reimbursement of transportation mileage shall be made by July 30, 2021. Any request for reimbursement of transportation mileage not made by July 30, 2021 is waived.

RIGHT TO APPEAL

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

DATED: Honolulu, Hawai'i, January 8, 2021.

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

Redacted Hearing Decision