



OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of

STUDENT, by and through Parents,

Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII; KATHRYN
MATAYOSHI, in her official capacity as
Superintendent of the Hawaii Public Schools,

Respondents.

DOE-SY1617-017

DOE-SY1617-031

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION

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

I. INTRODUCTION

On October 3, 2016, the Department of Education, State of Hawai'i ("Respondents" or "DOE") received a request for a due process hearing ("Request") in DOE-SY1617-017 under Hawai'i Administrative Rules ("HAR") Title 8, Chapter 60 from Student, by and through Parents, (collectively referred to as "Petitioners").

A pre-hearing conference was held on November 3, 2016, before Hearings Officer Rowena A. Somerville, with Keith H.S. Peck, Esq. representing Petitioners; and Paul Mow, Esq. representing Respondents. The due process hearing ("Hearing") was scheduled for January 10, 2017.

On December 16, 2016, the Hearings Officer filed an Order Granting Petitioners' Request for an Extension of 45-Day Period to Complete the Due Process Hearing. The decisional deadline was extended from December 17, 2016 to January 31, 2017 so that the hearing could be held, the transcript prepared and post-hearing briefs filed so that there would be full consideration of the matter.

On July 7, 2016, the parties submitted a Stipulated Request to Continue the Exhibit Exchange and Administrative Hearing, because of witness unavailability. On July 14, 2016, the Hearings Officer rescheduled the hearing to August 9, 2016.

On July 13, 2016, Respondents filed a Declaration to extend the decisional deadline from July 15, 2016 to August 29, 2016 so that the hearing could be held, the transcript prepared and post-hearing briefs filed so that there would be full consideration of the matter. Petitioners had no objection. The extension was granted on July 15, 2016.

On December 12, 2016, the DOE received a request for a due process hearing in DOE-SY1617-031 under HAR Title 8, Chapter 60 from Student, by and through Parents. A pre-hearing conference was held on December 20, 2016, before the Hearings Officer, with Mr. Peck representing Petitioners; and Mr. Mow representing Respondents. The parties stipulated to consolidate DOE-SY1617-017 and DOE-SY1617-031 and waived any procedural defects. The Hearings Officer granted the Motion to Consolidate on December 22, 2016. The due process hearing was scheduled for March 9 through 10, 2017.

On January 30, 2017, Petitioners filed their Motion to for Partial Summary Judgment. Petitioners sought partial summary judgment in Petitioners' Consolidated Requests. On February 6, 2017, the Hearings Officer received Respondents' Memorandum in Opposition. On February 13, 2017, a hearing on the Motion was scheduled before the Hearings Officer. Respondents were represented by Mr. Mow; Petitioners were represented by Mr. Peck. DOE District Resource Teacher ("DRT") 1 was present on behalf of Respondents. Due to a scheduling error, a court reporter was not present at the hearing on the Motion. The parties agreed to waive the court reporter's presence and made no further arguments on the Motion. The matter was taken under advisement. The Hearings Officer filed an Order Denying Petitioners' Motion on February 17, 2017, finding that Petitioners had not met their burden in the Consolidated Request and summary judgement was not appropriate.

On February 22, 2017, Respondents filed a Declaration to extend the decisional deadline from February 26, 2016 to April 11, 2016. The extension was granted on February 23, 2017.

On March 9, 2017, the Due Process hearing was scheduled to commence. Respondents were represented by Mr. Mow, and DOE DRT 1 was present on behalf of Respondents. Mr. Peck had a medical emergency and made an appearance via telephone. Respondents were ready to proceed with the hearing and the witnesses were present. Mr.

Peck requested the matter be rescheduled. The hearing was rescheduled to March 29, 2017 through March 30, 2017.

The due process hearing was held on March 29, 2017 by the Hearings Officer. Petitioners were represented by Mr. Peck and Parents were present. Respondent was represented by Mr. Mow; DOE DRT 1 and DOE District Education Specialist (“DES”) were present on behalf of Respondents.

After the conclusion of the hearing, the Hearings Officer stated that Petitioners’ and Respondents’ Closing Briefs were due on May 23, 2017. On April 15, 2017, Respondents filed a Declaration to extend the decisional deadline from May 26, 2017 to July 9, 2017. The extension was granted on April 22, 2017.

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

II. ISSUES PRESENTED

In their October 3, 2016 and December 12, 2017 Requests, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act (“IDEA”). Specifically, Petitioners allege that the DOE denied Student a free appropriate public education (“FAPE”) based on Student’s November 24, 2015 and November 23, 2016 IEPs.

Petitioners allege the following:

1. November 24, 2015 IEP: Respondent unilaterally refused and/or failed to permit Parents from accessing information they needed to assist Student in accessing a FAPE by foreclosing their access to Student’s aid; and
2. November 23, 2016 IEP: Respondent failed to appropriately discuss the need for Parents to directly and sufficiently communicate with Student’s aide to coordinate and monitor Student’s program.

Petitioners request the following relief:

1. Order Respondents to fund and/or reimburse Student’s private educational and/or related services in relation to the needs resulting from the denial of FAPE, including financing charges and lost opportunity costs;
2. Find that Student’s private services are appropriate for purposes of reimbursement and as Student’s “current educational placement” for “stay put” purposes;

3. Order direct payment for any sum incurred, yet not paid by Parents, for educational and related expenses provided to Student that were beneficial and appropriate for Student including, but not limited to, mental health services, medications, transportation, uniforms, tutoring tuition, and mental health therapy; and
4. Compensatory education.

III. FINDINGS OF FACT

1. Student was born on _____. Pet. Motion, Exh. 2.
2. Parent 1 testified that Student has _____. Student requires a one-on-one (“1:1”) to assist Student with all skills. Student needs a Contracted Provider 1 to assist with walking for safety reasons. Student is able to walk very short distances. If Student climbs stairs without a 1:1 Student would fall. TR 14:9-12; 15:14 – 16:7.
3. Student is not able to communicate, but when starts to whine, Parents understand that something is bothering Student. TR 16:8-15.
4. Student needs to have the food pureed to the correct texture, because Student cannot chew solid food. Student also is unable to control _____ own body temperature. If Student overheats, Student needs to be placed in air conditioning or wiped down with a wet washcloth. TR 16:16 – 17:12.
5. Student has no academic skills. Parent 1 testified that Student can press a button with assistance if it attracts Student’s attention; however, Parent 1 did not know if Student was aware of the cause and effect. TR 14:13 – 15:12.
6. Student’s assigned Contracted Provider 1 at the Home School was a contracted service provider _____. The 1:1 worked one-on-one with Student. The Contracted Provider 1 is not a Special Education (“SPED”) teacher. The Contracted Provider 1 has worked with Student for over one year and nine months. The Contracted Provider 1 works with Student Monday through Friday from 7:30 a.m. to 4:30 p.m., and the Contracted Provider 1 conducts home visits every Thursday. TR 51:2-12; TR 53:6-8; TR 54:14-25.
7. The Contracted Provider 1 follows Student throughout the school day and during extended school day in the morning and after school. TR 89:13-17.
8. The SPED teacher only works directly with Student a small percentage of time. Typically, it is when the Contracted Provider 1 uses the restroom. TR 67:17-22; TR 129:20-24.

9. The Contracted Provider 2 testified that the Contracted Provider 1 “has more information on the day-to-day occurrences that involve [Student]” than the SPED teacher.¹ TR 165:7-14.

10. The SPED teacher directed the Contracted Provider 1 to collect data, make observations, practice skills, and take notes concerning Student’s daily progress. TR 115:10-19.

11. The Contracted Provider 1 is responsible for working with Student on “going to the toilet, assisting Student, prompting Student, turning on the lights, turning the sink on and off, helping Student with Student’s bottom going down and up...Assisting Student with the stairs, ascending and descending. Assisting Student walking around...Locating items and books in different areas.” Student also performs acute skills where Student pulls an item from one container and drops into another container. The Contracted Provider 1 compiles a data sheet on these skills, and SPED Teacher “tallies” what Student eats. The Contracted Provider 1 also works on these skills at the home visits. TR 53:9 – 54:13; TR 57:17 – 58:4.

12. The Contracted Provider 1 receives training from the SPED teacher and the Contracted Provider 2. TR 153:3 – 154:13.

13. The Contracted Provider 1 gives the completed data sheets to the Contracted Provider 2. The Contracted Provider 2 reviews the data sheets, makes a graph of Student’s progress, and provides monthly reports to the SPED teacher. They discuss the strategies that they are using, discuss any modifications to the strategies, ensure data is being collected with fidelity, and that they are targeting Student’s goals and objectives. TR 56:7 – 57:5; TR 93:2-13; TR 116:3-17; TR 145:18 – 146:22.

14. The Contracted Provider 1 enters information into Student’s communication book including, but not limited to, how the day went, the percentage of Student’s drinks, meals, and ____, toileting, the time Student went, bowel movements, urination, and any accidents. Contracted Provider 1 also includes the skills that Student completes. The Contracted Provider 1 has not made entries into the communication book since September 12, 2016. TR 59:10 – 60:12.

15. If the Contracted Provider 1 forgot to write something in the communication book, Contracted Provider 1 would inform the Parents verbally. For instance, if the

¹ _____. TR 141:18-24.

Contracted Provider 1 forgot to write in the communication book that Student was “whiney,” Contracted Provider 1 would tell the Parents directly. TR 79:9-23.

16. On November 24, 2015, the Home School conducted an IEP meeting. Parents, Vice Principal (“V.P.”), DOE DES, DOE DRT 2, District Provider 2, District Provider 3, District Provider 4, Contracted Provider 2, District Provider 1, , and general education and SPED teachers were present. Michelle Puu, Esq. represented Respondent and Mr. Peck represented Petitioners. The Contracted Provider 1 did not participate. Resp. Exh. 3 at 024.

17. The PWN dated November 27, 2015 IEP provided Student with a Contracted Provider 1 Contracted Provider 1 for 2040 minutes per week during the regular school day and 510 minutes per week after the regular school day. Of the 510 minutes, 60 minutes would be provided in the home for the purpose of supporting the generalization of skills learned in the classroom to the home environment. Resp. Exh. 3 at 040

18. There was no specific statement that the Contracted Provider 1 be required to directly communicate with Parents in either the November 24, 2015 IEP or November 27, 2016 IEP. Resp. Exh. 3.

19. On September 10, 2016, the Contracted Provider 1 attended an annual training with _____. At the training, _____ verbally informed all of their 1:1s that the DOE was prohibiting them from writing in the Students’ communication books. _____ stated it was the SPED teacher’s responsibility. The DOE was not at the training. TR 60:13 – 61:10; TR 63:15 – 64:1; TR 64:18 – 65:20.

20. On September 12, 2016, the Contracted Provider 1 informed the SPED teacher that , _____, prohibited Contracted Provider 1 from communicating directly with Parents or making entries into the communication book. TR 60:11-13; TR 118:9 – 119:6.

21. On September 12, 2016, Parent 1 called the SPED teacher and asked to speak to the Contracted Provider 1. The SPED teacher said Parent 1 could no longer have direct communication with Contracted Provider 1. The SPED teacher would convey Parent 1’s concerns to the Contracted Provider 1, and the SPED teacher would get back to Parent 1 with the response, if any. TR 119:7-16.

22. On September 12, 2016, the SPED teacher wrote into Student’s communication book, “[p]er _____’s contract with the DOE, 1:1s may no longer communicate directly with parents. I will be inputting [Student’s] daily comments from

this time onward.” The SPED teacher provided Parents with SPED Teacher’s personal cellular phone number. Pet Exh. 4 at 039; TR 119:17 – 120:16.

23. Prior to September 12, 2016, both the Contracted Provider 1 and the SPED teacher made entries into the communication book. TR 61:14-19.

24. On September 12, 2016, the Contracted Provider 1 had a Thursday home-visit with Student. Contracted Provider 1 explained to Parents why Contracted Provider 1 could no longer write in the communication book. TR 63:2-18.

25. On September 12, 2017 and thereafter, only the SPED teacher wrote the entries in the communication book, not the Contracted Provider 1. The Contracted Provider 1 would keep a daily log, and the SPED teacher would transfer the information into the communication book. The SPED teacher never asked the Contracted Provider 1 to respond to a question written by the Parents in the communication book. TR 61:14 - 62:3; TR 84:18-22.

26. On September 13, 2016 Parent 1 wrote in the communication book, “[a]s per your note that ‘1:1s may no longer communicate directly with parents’ – this is totally unacceptable.” Resp. Exh. 44 at 219; TR 120:20 – 121:3.

27. The Contracted Provider 1 provides the SPED teacher with a daily data sheet, and the SPED teacher pastes it into Student’s communication book. The SPED teacher includes a “brief synopsis of Student’s day, the skills that have been worked on, what Student had for breakfast, what time Student had breakfast, how much of it did Student eat, when Student had lunch, how much lunch Student ate, what Student had...Student has a schedule of _____. Student has a toileting schedule...what time the bus arrived at school, what time the bus picks [Student] up.” TR 72:17 – 73:25; TR 94:16 – 95:2; TR 95:9 – 96:17.

28. The SPED teacher determines what to include in the communication book. If Student is not feeling well or was injured, the SPED teacher would write it in the book. Parents did not express any dissatisfaction with the SPED teacher’s entries. TR 95:3-8; TR 128:2-4.

29. Sometimes the SPED teacher did not include all of Student’s information. Once, the SPED teacher did not inform Parents that Student needed more money for Student’s lunch fund. TR 70:2 – 71:8.

30. On September 19, 2016, Parents wrote the Principal a letter requesting an IEP meeting. They had “concerns about the implementation of the IEP.” They also

requested Student's data that the Home School had taken for the last six months. There was no specific mention of the communication book. Pet. Exh. 1.

31. On September 29, 2016, the SPED teacher had the Contracted Provider 1 give Parents the raw data binder that they had requested. The SPED teacher also provided Parents with the Student's corresponding monthly service reports for the IEP goals and objectives, Parent training, and ESY. Also included were copies of the communication book from the beginning of March 2016 through the end of August 2016. Resp. Exh. 14-19, 24-29, 33-38, 46; Resp. Exh. 44 at 231-232; TR 122:18 – 123:3.

32. On October 3, 2016, Petitioners filed their Request in DOE-SY1617-017 alleging that Student's November 24, 2016 IEP was inappropriate.² Specifically, Petitioners alleged, "[t]he school has unilaterally refused and/or failed to permit parents from accessing information they need to assist their child in accessing a FAPE by foreclosing their access to the child's aid." Resp. Exh. 1 at 003.

33. Parent 1 testified that if the Parents were, "able to communicate with the Contracted Provider 1, talk to the Contracted Provider 1 directly, we could have a better understanding of what was [Student's] day and could get direct answers. And it just felt a lot easier and better to have the freedom to be able to ask a question and get an answer back then." Now, there is no description of what actually happens during the school day. Parents receive a "sanitized version" of Student's day and do not always get answers to their questions. TR 21:6-25.

34. When the Contracted Provider 1 was writing in the communication book, the communication with Parents was more "personal." TR 68:24 – 69:19.

35. Parent 1 wanted the communication book to have a question and answer "box" for the Parents and Contracted Provider 1 to use. Parent 1 preferred to have direct communication with the Contracted Provider 1, rather than the SPED teacher, because the Contracted Provider 1 was the one actually working with Student. TR 22:1-18.

36. The Contracted Provider 1 testified that if there was a question and answer "box" in the communication book Contracted Provider 1 would not be able to write directly into the book. Instead, Contracted Provider 1 could write Contracted Provider 1 answer on

² The date of the Request was October 2, 2016; however, the DOE did not receive a facsimile of the Request until October 10, 2016. Resp. Exh. 1.

a separate piece of paper and have the SPED teacher paste it into the communication book. TR 74:5-18.

37. The Home School conducted an IEP meeting on November 23, 2016. Parents, V.P., DOE DES, District Provider 1, District Provider 3, District Provider 4, Contracted Provider 2, District Provider 1, and general education and SPED teachers were present. Mr. Mow and Mr. Peck also participated. Mr. Peck participated via telephone conference. The Contracted Provider 1 did not participate. Resp. Exh. 4 at 063.

38. The V.P. had not seen the contract between _____ and the DOE prior to the IEP meeting. The V.P.'s understanding of the contract at the IEP meeting was that the SPED teacher would be the main communicator; however, it did not prohibit the Contracted Provider 1 from communicating with the Parents. TR 179:7-16.

39. Student was provided with 1916 minutes per week of Contracted Provider 1 support. The Contracted Provider 1 service was described in the IEP as:

“one-to-one provided in accordance with Exhibit A, entitled Service Requirements and Activities, as defined and described in the RFP contract between the Department of Education and private service provider.³ The [Contracted Provider 1] “works with [Student] under the direction of [Student’s] teacher on strategies to build, enhance and maintain [Student’s] academic, vocational and daily living skills. The [Contracted Provider 1] observes and records data on [Student’s] progress toward the goals and objectives outlined in [Student’s] IEP. Other responsibilities include, collaborating with the teacher and the Contracted Provider 2 on strategies, fidelity of strategy implementation, and updates the teacher on [Student’s] daily progress for teacher’s daily communication to parents.”

Pet. Exh. 2 at 014-015.

40. The SPED teacher testified that the IEP team “had discussed the present level of education performance, [Student’s] strengths and needs. We had gone through the draft of the Goals and Objectives. We had gone through the services that we were offering. After discussion and everything seemed to be agreed to up to this point.” TR 137:15-21.

41. The following exchange occurred after the discussion:⁴

Mr. Peck: Now there’s one issue, I don’t know if you’re coming up, but I’m not sure if it’s going to be expressly addressed, and that is, I believe that the DOE is claiming that the Parents can indeed talk to the Contracted Provider 1, whatever it is called today - can directly communicate with that person. We

³ No “Exhibit A” was entered into evidence.

⁴ It is unclear from the recording which DOE representatives are speaking, and they have not been identified. The unknown DOE representatives will be identified as “DOE” for purposes of this finding of fact. Resp. Exh. 47.

would like that to be in the IEP, if it's something that the DOE recognizes as being permissible and productive, then we would like it actually mentioned. And that would, that would, be sufficient for us to not only not be concerned this time, but withdraw our concern from the previous encounters we've had, because there was, there was, a communication by the contract service provider that they would not be doing that direct communication. [*Marching band plays.*] Okay, I guess that band is giving their applause.

V.P.: Can we say that we will not prohibit the parents from trying to talk to the Contracted Provider 1, but it's up to the Contracted Provider 1 to respond based on their contract and if they want to or not or can or not.

Mr. Peck: Well you know what I think about that, that's like saying in an IEP, you know, we will have speech therapy as long as the therapist decides that it's okay with them. These are, these are, people who are, should be controlled by the IEP process, and their personal desires and the company's desires [*unintelligible*] are fine with me. But, you know, this is an IEP, we are trying to develop a program for this child based on the child's needs. If the contractor...

V.P.: Can we take a recess?

Mr. Peck: Sorry, yup, sure, let me just say one last thing, if the contract service provider is the problem, I will be more than happy to sue that company.

V.P.: Can we take a recess to...

Mr. Peck: Sure.

V.P.: We will take a recess.

DOE: How long?

V.P. How long do you need? Five minutes?

DOE: Ten minutes.

DOE: I have to leave again, I'm sorry, but I have to leave.

DOE: Is it okay if the service providers are not in for the end of the discussion if we need to leave?

Mr. Peck: Which service providers?

DOE: District Provider 1, District Provider 2, District Provider 3, and District Provider 4.

Mr. Peck: Sure. I find their presence at this point superfluous.

DOE: Oh good.

V.P.: Do you agree that they can leave? Okay.

DOE: And what about the regular ed teacher? Would you like?

Mr. Peck: Well I mean, well I mean you know, the regular ed teacher does not have a lot of contact, what I really, what I really think we should be discussing, instead of the legalities, is the needs and if we have the special ed teacher and the Contracted Provider 2 we can discuss the needs with regard to this point.

DOE: Okay.
DOE: Did you have any questions for [name] Teacher 2?
Parent 1: Not as of right now, so, but if we do, then we can always...
DOE: Teacher 2 can do four laps around the gym.
V.P.: Okay, ten minute recess, and you guys are excused.

[RECESS TAKEN]

Mr. Peck: Hello.
DOE: Hi, so okay, so we are resuming after the recess.
Mr. Peck: Okay.
DOE: To answer the question.
V.P.: So in answer to your request, we strongly believe and feel that we want to support good communication and we have been supporting that. We have a communication book protocol set up and [SPED teacher] even mentioned that I think you have access to her cell phone at any time. And we think that is the correct avenue for communication. So we don't see a need to write into the IEP to have communication with the Contracted Provider 1. We think it's in line with the contract. And, we will continue to support having open communication. If you ever have any concerns, questions, or anything that you need to communicate with, you can communicate with [SPED teacher].
Mr. Peck: Well, guess what guys, you just made me another 20,000 bucks, so thank you very much.

[End of recording].

Resp. Exh. 47.⁵

42. After the recess in the IEP meeting, there was no further discussion regarding the communication process. Parent 1 wanted to discuss the possibility of a question and answer "box" in the communication book for the Parents and Contracted Provider 1 to use, but was unable to, because the discussion had presumably ended. TR 20:22 – 21:2; 22:15-22; TR 46:4-17; TR 139:10-15.

43. The V.P. asked Parents at the end of the IEP meeting if there was anything further Parent 1 wanted to discuss, Parent 1 would not have brought up the communication

⁵ Respondent's Exhibit 47 is a recording of a select portion of the IEP meeting. The undersigned Hearings Officer received no recorded evidence of what occurred prior to or after the recording. This finding of fact reflects the recording in its entirety. The discussion prior to the recess is 4:27 minutes, and the discussion after the recess is 1:31 minutes.

issue again, because the DOE had already made their decision.⁶ TR 36:8-22; TR 181:20-24.

44. The Parental Concerns section of the IEP stated that Parents are concerned that recently their access to the Contracted Provider 1 has been limited. Pet. Exh. 2 at 007.

45. Parent 1 wanted to have “direct communication with the Contracted Provider 1” written into the IEP. TR 41:2-10.

46. The Contracted Provider 2 agreed that it is important to have a communication between Parents and the school, because it builds trust. TR 151:16-20.

47. At the time of the IEP meeting, the SPED teacher was communicating with Parents through the communication book. TR 127:23 – 128:1.

48. The Prior Written Notice (“PWN”) dated November 25, 2016 states that the Contracted Provider 1 support “will be provided in accordance with the RFP contract and is needed for [Student’s] safety and to practice skills addressed through goals and objectives in [Student’s] Individualized Education Program (IEP).” Pet. Exh. 2 at 020, ¶2.

49. The PWN states that the IEP team considered “[a]llowing direct communication between parents and [Contracted Provider 1].” Pet. Exh. 2 at 21, ¶3.

50. The PWN states that the direct communication was rejected because, “the school will continue to maintain and support open communication with parents via the classroom teacher who is also [Student’s] IEP Care Coordinator. Communication will continue to be provided between the home and school through, but not limited to, the Home-School Communication book, telephone (parents have both classroom phone number and teacher’s cell phone number), and in person.” *Id.* ¶4.

51. The PWN states that Parent’s concern regarding the Contracted Provider 1 service being undefined and insufficiently described in the current IEP, “has been addressed in the finalized IEP, and indicated in the PWN.” Pet. Exh. 2 at 21, ¶6.

52. The PWN stated that “Parents’ legal counsel rejected the school’s offer of FAPE and parents acquiesced.” Pet. Exh. 2 at 22, ¶6; TR 23:18-22.

53. On December 5, 2016, Parents sent the Principal a letter that PWN was incorrect regarding that statement that they “acquiesced.” The stated, “[w]e wanted the opportunity to speak with [Student’s] Aide. The DOE agree to this “if the agency would

⁶ Mr. Mow indicated that the V.P. asked Parents at the end of the IEP meeting if they any anything further they wanted to discuss; however, this portion of the IEP meeting was not included in Respondent’s Exhibit 47. TR 32:2 – 33:11.

agree,” but then refused to provide us this access saying that the contract with the agency did not permit this. We were not reluctant to call this IEP a denial of FAPE at all.” Resp. Exh. 5 at 068.

54. On December 13, 2016, the Principal responded to the Parents’ letter. Principal stated, “[t]he IEP held on November 23, 2016 concluded with an offer of FAPE by the school that was verbally rejected by your attorney, Mr. Keith Peck. At that time, you did not voice your agreement or disagreement with your attorney. In light of your letter, it isn’t clear to the school if you were accepting of rejecting the offer of FAPE. Please provide us with some clarifications on this matter...As far as the communication issue with the individual instructional support personnel, [the Home School] will be continuing to have communication available through the classroom teacher.” Resp. Exh. 5 at 069.

55. Parents had already filed the Request in DOE-SY1617-017 contesting the November 24, 2015 IEP and Respondents’ unilaterally refusal and/or failure to permit Parents from accessing information they needed to assist Student in accessing a FAPE by foreclosing their access to Student’s aid. TR 23:23 – 24:1.

56. Parent 1 was concerned about Student’s safety because she is non-verbal. Sometimes Student would come home with bruises with no explanation as to how they occurred. When Student would come home in a “whiney” mood, the communication book would not explain or describe if Student was having a “bad day.” TR 25:7 – 26:3.

57. Student needs to have the texture and consistency of Student’s food monitored to ensure Student has proper nutrition. Student is ___years old and ___ pounds. Parent 1 would speak to the Contracted Provider 1 about Student’s food consumption prior to September 12, 2016, but Contracted Provider 1 is unable to do so now. TR 26:4-21.

58. The SPED teacher declared that at no time has the quality or quantity of information available to the Parents through the communication book been reduced.

IV. CONCLUSIONS OF LAW

A. Burden of Proof

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 concluded that the burden of persuasion lies where it usually falls, upon the party seeking relief.” *Id.* at

535; see also *Stringer v. St. James R–I Sch. Dist.*, 446 F.3d 799, 803 (8th Cir.2006) (following *Schaffer* in context of claim that IEP was not being implemented). Neither *Schaffer* nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

B. IDEA Requirements

Part 300 of the C.F.R. and H.A.R., Title 8, Chapter 60, require that Respondents make available to students with a disability an offer of FAPE that emphasizes special education and related services designed to meet their unique needs.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court set out a two-part test for determining whether Respondent 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. *Rowley* 458 U.S. at 206-207. The Respondents are not required to “maximize the potential” of each student; rather, Respondents are 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 recently determined in *Endrew F. v. Douglas County School Dist.*, 137 S.Ct. 988 (2017) 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 the light of the child’s circumstances.” *Endrew* 137 S.Ct. at 1001. Similarly, the Hawaii District Court held that the IEP must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more than *de minimus*, and gauged in relation to the potential of the child at issue.” *Blake C. ex rel Tina F. v. Hawaii Dep’t of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw, 2009).

A state must comply both procedurally and substantively with the IDEA. Under the IDEA, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural inadequacies that result in the loss of educational opportunity or seriously infringe on the Parents’ opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992), see also *Amanda J. ex rel. Annette J. v. Clark County School Dist.*, 267 F.3d 877, 892 (9th Cir.2001).

The mechanism for ensuring a FAPE is through the development of a detailed,

individualized education program known as an 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, in part, a statement of the PLEPs, 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. § 1401(19). 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 adequately provides a FAPE if it is reasonably calculated to provide a child with a meaningful educational benefit at the time it was developed. *J.W. by J.E.W. and J.A.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 449 (9th Cir. 2010). 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).

The Hearings Officer has read the entire transcript of the Hearing. The Hearings Officer has also reviewed the exhibits admitted into evidence at the Hearing.

C. Whether the DOE unilaterally refused and/or failed to permit Parents from accessing information they needed to assist Student in accessing a FAPE by foreclosing their access to Student’s aid.

Petitioners’ original Request in DOE-SY1617-017 alleged that Student was denied a FAPE, because the DOE unilaterally refused to allow the Parents to directly communicate with the -Contracted Provider 1. At the time, Student’s IEP dated November 24, 2015 was in effect.

When developing Student’s IEP, the IEP team shall consider: (i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child. 20 U.S.C. § 1414(d), *see also* HAR §8-60-48(a). The IEP contains, in part, a statement of the PLEPs, 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. § 1401(19), *see also* HAR §8-60-44(a). The statement of measurable annual goals must include academic and functional goals, designed to “meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum” and “meet each of the child’s other educational needs that result from the child’s disability.” *Id.* The DOE shall have an IEP in effect at the beginning of each school year. HAR §8-60-47(a).

On November 24, 2015, the Home School conducted an IEP. Parents, VP, DOE DES, DOE DRT 2, District Provider 2, District Provider 3, District Provider 4, Contracted Provider 2, District Provider 1, Health Aide, and general education and SPED teachers were present. Michelle Puu, Esq. represented Respondent and Mr. Peck represented Petitioners. The Contracted Provider 1 did not participate. The PWN dated November 27, 2015 IEP provided Student with a Contracted Provider 1 Contracted Provider 1 for 2040 minutes per week during the regular school day and 510 minutes per week after the regular school day. Of the 510 minutes, 60 minutes would be provided in the home for the purpose of supporting the generalization of skills learned in the classroom to the home environment. There was no specific statement that the Contracted Provider 1 be required to directly communicate with Parents in the November 24, 2015 IEP. Resp. Exh. 3.

In accordance with the IDEA and the Court's decision in *Rowley*, the Ninth Circuit Court in *Van Duyn v. Baker School Dist.*, 502 F. 3d. 811, 822 (9th Cir. 2007) held that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. Respondents have an obligation to provide services “in conformity with” a Student’s IEPs. 20 U.S.C.A. §1401(9). IEPs are binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute—not to decide on its own no longer to implement part or all of the IEP. *See* 20 U.S.C.A. §§ 1414(d)(3)(F), 1415(b)(3).

Nothing in the November 24, 2015 IEP required the DOE to have the Contracted Provider 1 have direct communication with the Parents. The Hearings Officer notes that Student is non-verbal, and the Contracted Provider 1 has the most contact and information pertaining to Student. It is certainly reasonable for the Parents to expect that they be able to speak to the Contracted Provider 1 to voice their questions and concerns and receive

daily updates from Contracted Provider 1. Nevertheless, there was no specific statement in the IEP *requiring* the DOE to implement this.

The Hearings Officer finds that Petitioners have not met their burden to show that Student was denied a FAPE for failure to implement the November 24, 2015 by refusing Parents to have direct communication with the Contracted Provider 1. There was no procedural or substantive violation of the IDEA.

D. Whether Respondent failed to appropriately discuss the need for Parents to directly and sufficiently communicate with Student's aide to coordinate and monitor Student's program.

Petitioners alleged in their DOE-SY1617-031 Request that during the IEP meetings that led to the creation of the November 23, 2016 IEP, Respondents failed to appropriately discuss the need for Parents to directly communicate with the Contracted Provider 1.

20 U.S.C. § 1415 enumerates the procedural safeguards of the IDEA, the importance of which “cannot be gainsaid.” *Rowley*, 458 U.S. at 205. Procedural compliance is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important. As the Senate Committee on Labor and Public Welfare recognized,

[i]n many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning Conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.

S.Rep. No. 94-168, at 11-12, *reprinted in* 1975 U.S.C.C.A.N. 674, 1435.

To accomplish the IDEA's goal of ensuring that “all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs,” 20 U.S.C. § 1400(c), those individuals who have first-hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process. *Amanda J. v. Clark County School Dist.*, 267 F.3d 877, 891 (9th Cir. 2001). Parents observe their children in a

multitude of different situations, and they have a unique perspective of their child's special needs. *Id.* at 892. The procedural safeguard of parent participation is critical to the IEP process and ensuring that Student receives a FAPE.

Given the importance of the IDEA's procedural safeguards, when a school district or other state agency violates "the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide a FAPE." *W.G. v. Target Range*, 960 F.2d at 1485. The Supreme Court in *Rowley* stated,

[i]t seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, *see, e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley, 458 U.S. at 205–06.

Under IDEA, "[p]rocedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that... seriously infringe the parents' opportunity to participate in the IEP formulation process...clearly result in the denial of a FAPE." *W.G. v. Target Range*, 960 F.2d at 1483-1484. The court in *W.G.* further noted, "[i]n order to fulfill the goal of parental participation in the IEP process, the school district was required to conduct, not just an IEP meeting, but a *meaningful* IEP meeting." (emphasis added). *Id.* at 1479.

In this case, it is patently clear that Petitioners' main concern was, and continues to be the DOE disallowing Parents' direct communicating with the Contracted Provider 1. The Parental Concerns section of the November 23, 2016 IEP stated that Parents were concerned that their access to the Contracted Provider 1 has been prohibited. Parents wanted to have "direct communication with the Contracted Provider 1" specifically written into the IEP. The November 25, 2016 PWN states that the IEP team considered "[a]llowing direct communication between parents and [Contracted Provider 1]." The PWN also states that the direct communication was rejected because, "the school will continue to maintain

and support open communication with parents via the classroom teacher who is also [Student's] IEP Care Coordinator. Communication will continue to be provided between the home and school through, but not limited to, the Home-School Communication book, telephone (parents have both classroom phone number and teacher's cell phone number), and in person."

Respondents assert that "there was no evidence at the hearing that [the Home School] or any of its employees unilaterally refused and/or failed to permit communication with the Contracted Provider 1" and there was "no mention of a problem." Resp. Closing Brief at 13, 22, and 23. It is unfathomable how Respondents can make this assertion.

The evidence and testimony showed that on September 12, 2016, Parent 1 called the SPED teacher and asked to speak to the Contracted Provider 1. The SPED teacher said Parent 1 could no longer have direct communication with Contracted Provider 1. Thereafter, the SPED teacher stated that SPED teacher would convey Parent 1's concerns to the Contracted Provider 1, and the SPED teacher would get back to Parent 1 with the response, if any. That same day the SPED teacher wrote in the communication book, "[p]er _____'s contract with the DOE, 1:1s may no longer communicate directly with parents. I will be inputting [Student's] daily comments from this time onward." The following day, Parent 1 wrote in the communication book, "[a]s per your note that '1:1s may no longer communicate directly with parents' – this is totally unacceptable." Resp. Exh. 44 at 219. The next week, on September 19, 2016, Parents wrote the Principal a letter requesting an IEP meeting. They had "concerns about the implementation of the IEP." Although there was no specific mention of the communication book in the letter, two weeks later, on October 3, 2016, Petitioners filed their Request in DOE-SY1617-017 alleging that Student's November 24, 2015 IEP was inappropriate, because "[t]he school has unilaterally refused and/or failed to permit parents from accessing information they need to assist their child in accessing a FAPE by foreclosing their access to the child's aid." Resp. Exh. 1 at 003. Even though Parents' October 3, 2016 letter, did not specifically state their concern regarding the direct communication with the Contracted Provider 1, it should have been more than evident to the Respondents and provided them with adequate notice, what the issue was. The conversation with the SPED teacher and SPED teacher's entry in the communication log was the primary reason why Petitioners filed both Requests.

The Contracted Provider 1 assists Student with all of Student's skills. Student needs a Contracted Provider 1 to assist Student with walking for safety reasons. Student is able

to walk very short distances. If Student climbs stairs without a Contracted Provider 1 Student would fall. The Contracted Provider 1 entered information into Student's communication book including, but not limited to, how the day went, the percentage of Student's drinks, meals, and ____, toileting, the time Student went, bowel movements, urination, and any accidents. Contracted Provider 1 also included the skills that Student completed. When the Contracted Provider 1 wrote in the communication book, the communication with Parents was more "personal." Parent 1 testified that if the Parents were, "able to communicate with the Contracted Provider 1, talk to the Contracted Provider 1 directly, we could have a better understanding of what was [Student's] day and could get direct answers. And it just felt a lot easier and better to have the freedom to be able to ask a question and get an answer back then." Now, there is no description of what actually happened during the school day in the communication book. Parents receive a "sanitized version" of Student's day and do not always get answers to their questions.

Parents wanted to be able to speak directly with the Contracted Provider 1 to find out about Student's day, Student's moods, and any health concerns, because Student was non-verbal. For instance, prior to September 12, 2016, if the Contracted Provider 1 forgot to write in the communication book that Student was "whiney," Contracted Provider 1 would tell the Parents directly why Student was acting that way. If Student was "whiney," Parents knew that something was bothering Student. Knowing how Student's day went and Student's mood helped Parents better care for Student at home when Student returned from school. Parent 1 also testified that Parent 1 was concerned about Student's safety because Student is non-verbal. Sometimes Student would come home with bruises with no explanation as to how they occurred. When Student would come home in a "whiney" mood, the communication book would not explain or describe why Student was having a "bad day."

Respondents assert that the SPED teacher is in the best position to provide information to the Parents. There is no argument that the SPED teacher, based on SPED teacher training and experience, is highly qualified. SPED teacher works with the Contracted Provider 2 and other committed service providers to develop appropriate skills and strategies for Student's IEP goals and objectives. Respondents claim that the SPED teacher "has access to far more information than a Contracted Provider 1." While this may be true regarding Student's program and curriculum, it is not true with respect to Student's actual mood, demeanor, and actual activity throughout the school day. The Contracted

Provider 1 observes Student *all day*. The Contracted Provider 1 and SPED teacher both testified that the SPED teacher only works with directly with Student a small percentage of time. Typically, it is when the Contracted Provider 1 uses the restroom. The Contracted Provider 1 also testified that sometimes the SPED teacher does not include all of Student's information. Once, the SPED teacher did not inform Parents that Student needed more money for Student's lunch fund.

Respondents correctly state that Parents are able to communicate with the Contracted Provider 1 during the home-visits about the home-program; however, that is not the issue here. When Student is at home with the Contracted Provider 1, the Parents don't need to ask the Contracted Provider 1 about Student's mood, because they are able to see it first-hand. Parents want to be able to speak to the Contracted Provider 1 when they are unable to observe Student, during the school day.

At the November 23, 2016 IEP meeting, Petitioners wanted the Respondents to write into the IEP that Parents could directly communicate with the Contracted Provider 1. Specifically, Mr. Peck stated, "[w]e would like that to be in the IEP, if it's something that the DOE recognizes as being permissible and productive, then we would like it actually mentioned. And that would, that would, be sufficient for us to not only not be concerned this time, but withdraw our concern from the previous encounters we've had, because there was, there was, a communication by the contract service provider that they would not be doing that direct communication." The V.P. responded, "[c]an we say that we will not prohibit the parents from trying to talk to the Contracted Provider 1, but it's up to the Contracted Provider 1 to respond based on their contract and if they want to or not or can or not." Mr. Peck stated, "[w]ell you know what I think about that, that's like saying in an IEP, you know, we will have speech therapy as long as the therapist decides that it's okay with them. These are, these are, people who are, should be controlled by the IEP process, and their personal desires and the company's desires [*unintelligible*] are fine with me. But, you know, this is an IEP, we are trying to develop a program for this child based on the child's needs. If the contractor..." Thereupon, the V.P. requested a recess.

Respondents further assert that the V.P.'s position was "reasonable," because the DOE can't speak for _____ or for the Contracted Provider 1, who is not an employee of the DOE. Resp. Closing Brief at 11. This position is completely unacceptable and flies in the face of the IDEA requirements. An IEP must be based on the *individual* needs of each child. Respondents' position places _____'s contract provisions ahead of the needs of

Student. Essentially, the DOE has given _____ unfettered discretion to perform their contract however they choose, despite the specific needs or requirements of the DOE students. It should be noted that the contract was never submitted or entered into evidence and V.P. had not even seen the contract between _____ and the DOE prior to the meeting. Additionally, Respondent presented no evidence to show that the contract had been reviewed by their attorneys to determine if _____'s interpretation was, in fact, correct.

The facts of this case are similar to those in *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004). In *Deal*, the school district consistently rejected parent requests for ABA services and told parents that the “powers that be” were not implementing such programs. The School System did not have an “open mind” at the IEP meetings and were not willing to consider the ABA program because of the School System’s policy. No matter how strong the evidence, the School System refused to provide the 1:1 ABA services. *Id.* at 858- 59. The court stated,

[t]he evidence reveals that the School System, and its representatives, had pre-decided not to offer Zachary intensive ABA services regardless of any evidence concerning Zachary’s individual needs and the effectiveness of his private program. This predetermination amounted to a procedural violation of the IDEA. Because it effectively deprived Zachary’s parents of a meaningful participation in the IEP process, the predetermination caused substantive harm and therefor deprived Zachary of a FAPE.

Id. at 857. As in the instant case, the DOE placed their “compliance” with the _____ contract ahead of the individual needs of the Student. At this point in the IEP meeting (prior to the recess), the DOE had already predetermined that they would adhere to the _____ contract, thereby depriving Parents’ of a meaningful participation in the IEP process.

After the recess, the V.P. stated, “[s]o in answer to your request, we strongly believe and feel that we want to support good communication and we have been supporting that. We have a communication book protocol set up and [SPED teacher] even mentioned that I think you have access to her cell phone at any time. And we think that is the correct avenue for communication. So we don’t see a need to write into the IEP to have communication with the Contracted Provider 1. We think it’s in line with the contract. And, we will continue to support having open communication. If you ever have any concerns, questions, or anything that you need to communicate with, you can communicate with [SPED teacher].” Mr. Peck responded, “[w]ell, guess what guys, you just made me

another 20,000 bucks, so thank you very much.” Whereupon, there was no further discussion about whether the direct communication with the Contracted Provider 1 should be included the IEP.”

After the recess in the IEP meeting, there was no further discussion regarding the communication process, even though the V.P. asked them if Parents had anything further to discuss. Parent 1 wanted to discuss the possibility of a question and answer “box” in the communication book for the Parents and Contracted Provider 1 to use, but was unable to, because the Parent 1 assumed that the discussion on this topic was closed. The Contracted Provider 1 testified that if there was a question and answer “box” in the communication book Contracted Provider 1 would not be able to write directly into the book. Instead, Contracted Provider 1 could write Contracted Provider 1’s answer on a separate piece of paper and have the SPED teacher paste it into the communication book. As previously stated, this option was not discussed.

In *Deal*, the School System incorrectly assumed that because the parents were present and spoke at the meetings they were afforded an opportunity to participate. “Participation must be more than a mere form; it must be *meaningful*.” *Id.* at 858, *citing* *W.G.*, 960 F.2d at 1485; *see also Ms. C. v. Knox County Schools*, 315 F.3d 688, 694-95 (6th Cir. 2003) (stating that school officials must be willing to listen to the parents and must have open minds). The School System never treated the 1:1 ABA program as “a viable option.” Nothing the parents said could have changed the School System’s determination of appropriate services; therefore, their “participation was no more than after the fact involvement.” *Id.* The School System must consider the needs of each child and create an *individualized* program that address the child’s *unique needs*. “A ‘one size fits all’ approach to special education will not be countenanced by the IDEA.” *Id.* at 859. In this case, the DOE never considered direct communication to be a viable option and Parents were denied *meaningful* participation in the IEP process.

In an unpublished decision, the Ninth Circuit Court of Appeals stated, “predetermination occurs when an educational agency had made its determination prior to the IEP meeting...and is unwilling to consider other alternatives. In such a case, regardless of the discussion that may occur at the meeting, the School District’s actions would violate the IDEA’s procedural requirement...” *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. App’x 342 (U.S. Ct. of Appeals, 9th Cir. 2007). The court remanded the case to the District Court, because the it had failed to conduct an evidentiary hearing to determine whether the

School District maintained an “open mind,” and it failed to make specific factual findings regarding the School District’s intent or state of mind prior to an during the IEP meeting. The court cited *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 115, 1131 (9th Cir. 2003), that stated, “[a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.”

Respondents argue that there was no explicit violation of parent participation requirements because the Parents were not denied access to necessary information. As stated *supra*, the issue is the Parents were denied meaningful participation at the IEP meeting. The evidence has shown that the DOE did not keep an open mind in the IEP process. The DOE held-fast to their position that the _____ contract prohibited the Contracted Provider 1 from speaking to the Parents.

Student’s IEP provided Student with 1916 minutes per week of Contracted Provider 1 support. The Contracted Provider 1 service was described in the IEP as:

“one-to-one paraprofessional support services provided in accordance with Exhibit A, entitled Service Requirements and Activities, as defined and described in the RFP contract between the Department of Education and private service provider. The [Contracted Provider 1] “works with [Student] under the direction of [Student’s] teacher on strategies to build, enhance and maintain [Student’s] academic, vocational and daily living skills. The [Contracted Provider 1] observes and records data on [Student’s] progress toward the goals and objectives outlined in [Student’s] IEP. Other responsibilities include, collaborating with the teacher and the Contracted Provider 2 on strategies, fidelity of strategy implementation, and updates the teacher on [Student’s] daily progress for teacher’s daily communication to parents.”

There is no mention of direct communication between the Contracted Provider 1 and Parents. There’s not even an option for the Contracted Provider 1 to decide if Contracted Provider 1 wants to speak to the Parents (even though Mr. Peck rejected this). It is clear from the evidence and the statement of the DOE personnel determined that they were required to comply with _____’s contract, even though it was directly in contrast with Student’s needs and Parents’ concerns. The November 25, 2016 PWN states that the Contracted Provider 1 support “will be provided in accordance with the RFP contract and is needed for [Student’s] safety and to practice skills addressed through goals and objectives in [Student’s] Individualized Education Program (IEP).” The PWN also states that Parent’s concern regarding the Contracted Provider 1 service being undefined and

insufficiently described in the current IEP, “has been addressed in the finalized IEP, and indicated in the PWN.” This is simply not true.

Lastly, on December 13, 2016 the Principal stated in a letter to Parents, “[a]s far as the communication issue with the individual instructional support personnel, [the Home School] will be continuing to have communication available through the classroom teacher.” The DOE’s position is unwavering, and it not in compliance with the IDEA. Contracts and funding should never be a determining factor to override the intent, purpose and goals of the IDEA.

The Hearings Officer finds that Petitioners have met their burden and have shown that at the November 23, 2016 IEP meeting, the DOE had predetermined that they would adhere to the _____ contract, despite the needs of the Student and the Parents’ concerns. The DOE’s predetermination procedurally violated the IDEA, deprived Parents’ of a meaningful participation in the IEP process, caused substantive harm, and deprived Student of a FAPE.

E. Whether Student is entitled to relief.

The Hearings Officer has determined that Petitioners have shown that Parents were denied meaningful participation in the development of the IEP. Once a Hearings Officer holds that public placement of learning disabled child violated IDEA, they are authorized to grant appropriate relief. Equitable considerations are incorporated in fashioning relief, and Hearings Officer must consider all relevant factors, including appropriate and reasonable level of reimbursement that should be required.

Petitioners have requested the following relief:

1. Order Respondents to fund and/or reimburse Student’s private educational and/or related services in relation to the needs resulting from the denial of FAPE, including financing charges and lost opportunity costs;
2. Find that Student’s private services are appropriate for purposes of reimbursement and as Student’s “current educational placement” for “stay put” purposes;
3. Order direct payment for any sum incurred, yet not paid by Parents, for educational and related expenses provided to Student that were beneficial and appropriate for Student including, but not limited to, mental health

services, medications, transportation, uniforms, tutoring tuition, and mental health therapy; and

4. Compensatory education.

Petitioners have not presented evidence for any out-of-pocket expenses they have incurred. The Hearings Officer will grant any out-of-pocket expenses only to the extent that they are verifiable and are the direct result of the denial of FAPE.

Petitioners have also requested compensatory education. Compensatory education is an equitable remedy that attempts to account for the educational deficit caused by a deprivation of educational services that a student should have received in the first place. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). It seeks to "place disabled children in the same position they would have occupied but for the school district's violation of IDEA." *Id.*(quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)). Courts and Hearings Officers may award compensatory educational services at their discretion, often in the form of prospective injunctive relief. *Reid ex rel. Reid*, 401 F.3d at 523.

The inquiry as to an appropriate compensatory education remedy must be fact-specific and reasonably calculated to provide the educational benefits that would have accrued from special education services that should have been provided to the child in the first place. *Id.* at 524. An appropriate compensatory education award must be designed to ensure that a student is appropriately educated within the meaning of the IDEA. *Park ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006.) There is no need to provide a day-for-day compensation for time missed. *Id.*

Although Petitioners have requested compensatory education, they have not indicated what type or amount of compensatory education they are seeking. Their post-hearing brief and reply brief are silent on the subject. As a general proposition, it is not appropriate for a Petitioner represented by counsel to expect a Hearings Officer to develop a compensatory education program on their own. There was no particularly specified evidence that Student currently needs compensatory education services, and the Hearings Officer declines to make such an award.

V. DECISION

Based upon the above-stated findings of fact and conclusions of law, the Hearings Officer concludes that Petitioners have proven a denial of FAPE. Petitioners have met their burden to show that, procedurally and substantively, the November 23, 2016 violated the IDEA by denying Parents meaningful participation in the development of the IEP.

Petitioners shall be deemed the prevailing party in this matter.

RIGHT TO APPEAL

The parties have the right to appeal this decision to a court of competent jurisdiction within thirty (30) days after receipt of this decision.

DATED: Honolulu, Hawai'i, _____.

ROWENA A. SOMERVILLE
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs