



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-SY1617-021-A

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION

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CONCLUSIONS OF LAW AND DECISION**

I. INTRODUCTION

On October 19, 2016, the Department of Education, State of Hawai'i ("Respondents" or "DOE") received a request for a due process hearing ("Request") under Hawai'i Administrative Rules ("HAR") Title 8, Chapter 60 from Student, by and through Parents, (collectively referred to as "Petitioners") in DOE SY1617-021. On October 21, 2016, the DOE received an amended request for a due process hearing.

A pre-hearing conference was held on November 21, 2016, before Hearings Officer Rowena A. Somerville, with Carl M. Varady, Esq. representing Petitioners; and Kris S. Murakami, Esq. representing Respondents. Two Department of Education ("DOE") District Resource Teachers were present. The due process hearing ("Hearing") was scheduled for February 14 through 17, 2017.

On November 17, 2016, Petitioners filed a Motion for Stay Put. Respondent filed their Memorandum in Opposition to Petitioners' Motion for Stay Put on December 9, 2016.

On December 29, 2016, Petitioners filed a Declaration to extend the decisional deadline from January 5, 2017 to February 18, 2017, and from February 19, 2017 to April 4, 2017. The extension was granted on December 30, 2016.

The Hearing on Petitioners' Motion for Stay Put was held on December 19, 2016 and January 5, 2017 at the Department of Consumer Affairs, Office of Administrative Hearings, 335 Merchant Street, Hearings Room 1, Honolulu, Hawai'i by the undersigned Hearings Officer. Petitioners were represented by Mr. Peck. Parents were present on December 19, 2016, and Parent 1 was present on January 5, 2017. Respondent was represented by Ms. Murakami and the District Teacher 1 was present on behalf of the Respondent.

On February 3, 2017, the undersigned Hearings Officer filed an Order Clarifying the Stay Put Placement. The Order stated: 1) Student's placement for purposes of stay-put is in a regular education setting on a DOE campus; 2) the June 18, 2015 IEP and the terms expressed in the July 14, 2015 PWN is the last agreed upon, or ordered, placement, including transportation and other related services; and 3) Student needs a geographical exception pursuant to HAR chapter 8-13 or a programmatic placement to attend another school.

On February 7, 2017, the undersigned Hearings Officer conducted a telephone status conference with Mr. Varady and Ms. Murakami. Following the status conference, Mr. Varady sent a letter to the undersigned Hearings Officer stating the following:

Based on your February 3, 2017 ruling on Petitioners' stay put motion, the parties have agreed that no further matters are at issue and jointly request that you issue a decision adopting your findings, conclusion and decision as your final decision in this matter. The parties further jointly request that the matter be taken off calendar for any further proceedings based on your statement that you will grant the parties' request.

The Due Process Hearing was subsequently taken off of the calendar pursuant to the parties' request.

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

II. ISSUES PRESENTED

In their October 21, 2016 Request, Petitioners alleged procedural and substantive violations of the Individuals with Disabilities Education Act (“IDEA”). Specifically, Petitioners rejected the September 26, 2016 Individualized Education Program (“IEP”) and the terms contained in the September 30, 2016 Prior Written Notice (“PWN”) because it did not provide Student with a free appropriate public education (“FAPE”).

Petitioners alleged the following complaints:

1. Student’s placement at School 4 presents a direct threat to Student’s health and safety;
2. The IEP was not the product of collaboration with the Parents;
3. The IEP was predetermined; and
4. The IEP was contrary to Student’s medical care providers’ prescription.

Petitioners requested the following relief:

1. Maintain Student’s current program and placement at School 1 for the 2016-2017 school year and ESY;
2. Provide Student with transportation;
3. Provide Student with a 1:1 nurse;
4. Provide an American Sign Language (“ASL”) qualified interpreter throughout Student’s education and related services; and
5. Compensatory Education and all other appropriate relief.

III. FINDINGS OF FACT

Based upon the pleadings, exhibits, and arguments by the parties, the Hearings Officer finds the following:

1. Student was born on _____. Pet. Motion, Exh. 1.
2. Student spent over six months at Center 1 from 2012-2013 because Student is medically fragile. Parent 1 testified that Student goes from being ill to an emergency situation very quickly. TR 19:5 – 22:24.

3. Parent 2 became a ___ to assist with Student's medical care. Parent 2 also teaches other ___ how to respond to people with Diagnosis. TR 26:23 – 27:22; TR 100:101:8.

4. Parent 2 testified that even though ___ have more training some are “nervous” on pediatric calls. Parent 2 further testified that other personnel would not be able to assess Student's airway. TR 103:7-25.

5. Parent 1 testified that Student's cognitive ability is above average to average. Student's receptive language scores are in the above average range. Student has medical needs and delays in speech and mobility. TR 8:12 – 9:2.

6. Student is eligible for special education (“SPED”) and related services under the category of ___ due to medical concerns. Student has a diagnosis. Student requires a specially designed, individualized program to help Student with Student's educational progress. Pet. Motion, Exh. 1.

7. In the 2015-2016 school year, Student's Home School was School 2. *Ibid.*

8. Student has a private nurse that provides home care, because of Student's medically fragile state. Nurse started working with Student in January 2015. Nurse suctioned Student's airway approximately four to five times per hour, assessed whether Student needed breathing treatments with the nebulizers, cared for Student and administered medication. Pet. Motion, Exh. 9.

9. DOE held a conference at School 2. The purpose of the conference was to provide Parents with information on special education and transition options. TR 143:4 – 144:2.

10. The IEP team developed Student's IEP on June 18, 2015, by considering input from parents, early intervention specialists, DOE therapists, administration, District Teacher 1 and a SPED teacher. They also reviewed DOE cognitive, speech/language, fine motor, gross motor, adaptive, and observation assessments, and a private report from the Clinical Neuropsychologist. Resp. Memo in Opp., Exh. 1.

11. The IEP team extensively discussed the least restrictive environment (“LRE”) for Student. The IEP team decided that Student would benefit with participation with general education peers. They decided Student would be placed in a general education classroom. Parent 1 was informed that School 2 had a SPED program; however, there were no general education students there. The DOE told Parents that they

would find Student a program with general education students at a different school within the District. TR 145:7 – 147:3.

12. The Prior Written Notice (“PWN”) dated July 14, 2015 from School 2 stated that Student would receive 1800 minutes of SPED services per week, 210 minutes of occupational therapy (“OT”) services for the first quarter, and 270 minutes per quarter thereafter, 345 minutes of physical therapy (“PT”) services for the first quarter and 405 minutes per quarter thereafter, 540 minutes of speech/language therapy (“SLT”) per quarter, 1800 minutes of individualized instructional support per week, extended school year (“ESY”) services after 14 calendar days, OT, PT, and ASL consult, 60 minutes of ASL sign language training for staff per quarter, and daily transportation. Student would receive 1800 minutes per week of skilled nursing in school, and 300 minutes per week (60 minutes per day) for transportation on the school bus. Resp. Memo in Opp., Exh. 1.

13. Parent 1 testified that Student’s disability affects Student’s ability to communicate. Student initially could not make sounds. As Student grew older, Student was able to vocalize. Student’s primary mode of conversation is sign language. TR 17:19 – 18:17.

14. Student’s placement “will be in a regular education setting on a DOE campus.” Student’s specialized instruction could be provided in a “regular education setting where Student will have peers to provide modeling in a variety of skills and opportunities to socialize with them. In addition, the special education teacher on a DOE campus will be able to ensure that all services are provided, on-going communication with staff, and modifications are provided so [Student] can access Student’s education.” Resp. Memo in Opp., Exh. 1.

15. District Teacher 1 notified District Education Specialist (“DES”) of Student’s IEP team’s decision to place Student in a general education setting. District Teacher 1 notified DES 1 that there was enrollment availability for Student at School 1. It had one classroom with three teachers and an educational assistant. The program had six DOE SPED students and general education students in the classroom. Resp. Memo in Opp., Declaration of District Teacher 1; TR 147:4 – 149:6; TR 2445:18 – 247:3.

16. DES 1 notified District Teacher 1 that the School 1 Principal agreed to accept Student into their program. DES 1 instructed District Teacher 1 to coordinate the transition between School 2 and School 1 schools. Resp. Memo in Opp., Declaration of District Teacher 1; TR 247:4 – 15.

17. On August 3, 2015, School 2 held an IEP transfer meeting. District Teacher 1 participated in the IEP transfer meeting. Pet. Motion, Exh. 2.

18. District Teacher 1 testified that Parents complained about the cleanliness of School 1. The DOE purchased new floor mats for the indoor area and a steam mop to address their concerns. The DOE also purchased mats for the outdoor area to make it more accessible for Student. Further the District also provided ride-on equipment for Student. TR 151:1 – 153:18.

19. School 1 had a specialized toilet and toileting area for Student. TR 116:19-22.

20. On August 27, 2015, an IEP meeting was held with representatives from School 2 and School 1. Parents also participated.¹ Pet. Motion, Exh. 2.

21. In September 2015, Student's private nurse worked with the State of Hawaii, Department of Health, Public Health nurse to develop Student's emergency action plan. Pet. Motion, Exh. 9; TR 117:6 118:1.

22. Student's private nurse was assigned to work with Student at School 1. Nurse performed the same nursing services with Student that Nurse provided at home. Nurse is knowledgeable in Student's use of ASL, which is child-like and limited, and Nurse helps to interpret Student's communication to other staff and students at School 1. This encourages Student to use and develop ASL. Nurse trained Student's 1:1 to understand and help Student use ASL. *Ibid.*; TR 109:18-25.

23. The private nurse testified that one of Nurse's duties was to accompany Student on the bus to monitor Student's status. Another duty was to reinforce what was learned in Student's physical therapy, occupational therapy, and speech/language therapy sessions. TR 109:5-17.

24. The private nurse provided nursing care during all of Student's physical therapy and occupational therapy sessions. Nurse provided ASL translation for them to interact with Student. *Ibid.*

25. The DOE provided ongoing ASL training for all of the teachers who worked with Student. Student's private nurse declared that it would take at least a month for Nurse to train a new nurse to work with Student. Pet. Motion, Exh. 9.

¹ No PWN was submitted as an exhibit for this IEP.

26. When Student entered School 1, Student was bear crawling on Student's feet and hands and would scoot to move from place to place. During the school year, Student started using a walker, because Student was getting stronger. One of Student's goals in Student's IEP included, "mobility in order to maximize Student's participation in the school setting by mastering" independent ambulation on stairs, carrying objects, and using Student's walker. Pet. Motion, Exh. 9 and 10; TR 153:19 – 154:7; TR 16:2-8; TR 111:5-19.

27. The private nurse testified that climbing stairs was a "big part" of Student's physical therapy. TR 118:25 – 22.

28. Parent 1 testified that Student's hip muscles are too tight, and Student needs to walk and be vertical to stretch those muscles out so the development of the bone can be to the best of its ability. It is important that Student walks to determine if Student will need any future surgical procedures. TR 15:10-22.

29. Parent 1 testified that by the time Student left School 1 Student did not need a wagon. Student could get on and off the bus and walk to Student's classroom with the walker. Student would use the walker throughout the day. Student would bear crawl when Student was exhausted. Student did need private nurse and 1:1 to help, support, and encourage Student. TR 16:9 – 17:18.

30. The private nurse declared that the School 1 campus aided Student in making progress to ambulate. If Student became frustrated trying to move independently, Student would sometimes give up. Hills and long distances sometimes cause Student to give up, requiring the private nurse to encourage Student to move by ___self or by holding adults' hands. Pet. Motion, Exh. 9, 10.

31. The private nurse declared that by August 2016, Student started to participate in classroom group activities, responded to questions, communicated by verbalizing sounds, and joined in activities with other students more frequently. Student started to make friends with Student's typical peers at School 1. Student's peers encouraged Student and included Student in their daily activities. The socialization kept Student's motivation high and mobility skills developing. *Ibid.*; TR 110:1-9; TR 113:3 – 114:22; TR 121:4 122:25.

32. The School 1 Principal testified that in mid-August, 2016, Parent 1 told School 1 Principal that the family would be moving. The Principal informed Parent 1

that Parent 1 needed to register at the new Home School, School 3. The School 1 SSC informed District 2 about the move. TR: 198:11 – 199:10.

33. On August 18, 2016, District 2 Teacher 1 informed DES 2 that there was a possibility of Student coming to District 2 with a current IEP that called for inclusion placement. DES 2 was informed of Student's diagnosis and needs. District 1 would provide transportation until District 2 was able to do so. Resp. Memo in Opp., Declaration of DES 2.

34. Parent 1 testified that Parent 1 did not inform anyone at School 1 prior to August 26, 2017 that the family was moving. The family was considering buying a condominium in District 2. TR 28:7-10.

35. The private nurse declared that Nurse was informed that Student might be moving to District 2. Nurse stated that Nurse was told by Student's SPED teacher Student could stay at School 1 without a geographic exception ("GE"). Pet. Motion, Exh. 9; TR 203:13 – 205:7.

36. Student's SPED teacher at School 1 went on sick leave from mid-August to mid-October. TR 202:4 – 204:14.

37. On August 29, 2016, the DOE held a meeting with Parents to discuss their move. District Teacher 1 informed Parents that Student could continue at School 1, because Student was still residing in District 1 at the time. However, Student would be transitioned to District 2, because Parents informed District Teacher 1 that they would be residing in District 2 on September 6, 2016. Parents were informed to register Student at Student's new home school, School 3. Resp. Memo in Opp., Decl. of District Teacher 1; TR 154:8 – 156:11.

38. Parent 1 testified that at the August 29, 2016 meeting, School 1 Principal stated that Student was welcome to stay at School 1 even though District Teacher 1 stated that transportation would be a problem. District Teacher 1 stated that generally the only way a student could be transported from one district to another on a bus is if you have a court order. TR 48:13 – 49:5.

39. Parent 1 testified that Parent 1 asked whether Parents could transport Student to School 1. District Teacher 1 said that they could, but they would have to coordinate it with District 2. TR 50:14-19.

40. District Teacher 1 notified DES 1 about what occurred at the meeting, and the need to continue transportation services to and from School 1 during the transition process. Resp. Memo in Opp., Decl. of District Teacher 1.; TR 252:3-17.

41. District Teacher 1 testified that during this time period, District Teacher 1 had two other Students who transferred to another school district. The Parents notified the home school that they were moving, the home school contacted the new school, and the students registered and transferred there. Both students required nursing services. TR 156:12 – 159:11.

42. DES 1 testified that a period of transition is not typically done; however, because Student had severe needs, they wanted to make the transition as smooth as possible. TR 252:18 – 253:7.

43. School 1 SSC informed Parents of two transportation options to and from District 2 to School 1 during the transition period. The first option was to pick up Student and the private nurse first, and drop them off last. This would have entailed a two hour bus ride with Student's nurse, each way. The second option would be to pick up Student at 8:30 a.m. in District 2, but Student would arrive at school after it started, at approximately 9:00 a.m. In the afternoon, Student would be picked up from school one hour before school ended and taken straight home. The Parents chose the second option to reduce Student's time of the bus. District Teacher 1 and DES 1 testified that the transportation arrangement was temporary. DES 1 approved Student's transportation from Student's residence to School 1 until September 30, 2016 to allow for a successful transition to District 2. Resp. Memo in Opp., Declaration of DES 1; TR 159:18 – 160:19; TR 166:6 – 167:16; TR 207:5 – 208:6; TR 254:6 – 257:2.

44. School 1 Principal testified that Principal was concerned that due to Student's transportation schedule, Student was not able to meet all of the instructional time stated in the IEP. TR 208:14 – 209:3.

45. The private nurse testified that being on the bus for two hours could be a risk for Student's health, because it would become an emergency situation. TR 131:17-25.

46. Parent 1 testified that Parent 1 does not have any concerns about the additional time Student spent on the bus, because Student generally slept on the bus. Parent 1 also stated that Student started school at 9:00 a.m. and ended at 2:00 p.m. TR 56:2 – 57:17; 98:24 -99:7.

47. On September 2, 2016, the School 1 Principal informed DES 2 that the School 1 SSC spoke with Parent 1. Parent 1 wanted Student to be in a Montessori class, and “Parent 1 did not want Parent 1’s child to be around poor kids.” Parent 1 stated there was a “conflict of interest” because Parent 1 works with parents of students in . Resp. Memo in Opp., Declaration of DES 2.

48. On September 6, 2016, the Parents visited School 4 and asked District 2 Teacher 1 several questions about the school. Parents were concerned about the distance to the cafeteria and playground, and the size of the furniture. Parent 1 testified that Parent 1 was concerned that there were no stairs. When Student had Student’s PT services, they including going up and down stairs to get Student’s muscles moving for Student’s hips to walk. *Ibid*; TR 34:13

49. On September 6, 2016, the School 1 Principal informed DES 2 that Parent 1 told Principal Parent 1 did not want Student to be around “poor kids.” *Ibid*.

50. Parent 1 testified that Parent 1 did not say Parent 1 did not want Student to attend school with poor students. Parent 1 testified that Parent 1 was concerned about the program at School 4. In Parent 1’s experience, “a lot of the population of children that I’ve worked with in the program carry the violence and the health concerns into the classroom where they are.” Parent 1 was concerned about Student’s safety. Parent 1 testified that Student’s “neuropsych evaluator” had health and safety concerns about the program. Parent 1 further testified that some of the students in the program have English as a second language. Parent 1 also had concerns about the qualifications of the teachers. TR 41:4 – 44:22.

51. On September 7, 2016, DES 2 left a voice message for Parent 1 to call DES 2 about the questions Parent 1 had from the visit to School 4. *Ibid*.

52. On September 14, 2016, DES 1, DES 2, and the School 1 Principal had a telephone conference. They decided that Student’s services would begin in District 2 after fall break ended on October 17, 2016. Parent 1 was not a party to the conversation. *Ibid*.; TR 61:13-23; TR 229:18 - 230:23.

53. On September 15, 2016, DES 2 spoke to Parent 1 via telephone. DES 2 informed Parent 1 that Student’s services would begin on October 17, 2016 at School 4. Transportation would be arranged from Student’s home to the school, and Student would have a nurse, a 1:1 aide who signed, and oxygen ready for Student on that date. Parent 1 told DES 2 that School 4 was not appropriate for Student for medical, educational, and

safety reasons. Parent 1 stated that the school environment was too big, the classroom was too far from the playground, there was mosquito infestation, and the furniture was too tall. Parent 1 also stated that Parent 1 had a professional conflict of interest with the program. Parent 1 said students in the program have socio-economic stressors and language barriers, and the curriculum they use was designed for “poor socio-economic students.” Parent 1 thought Student would have to start over. Parent 1 wanted Student to remain at School 1, because the staff knew Student and they were more qualified. DES 2 informed Parent 1 that the IEP called for a placement in an inclusion setting and that School 4 met this. DES 2 told Parent 1 there were openings at other schools, but one had a large hill and the other was very far away. Resp. Memo in Opp., Declaration of DES 2.

54. On September 26, 2016, District 2 staff who would be attending the IEP meeting later that day toured School 1. Student had already gone home for the day. *Ibid.*

55. On September 26, 2016, an IEP meeting was held at School 1. Representatives from School 1, School 4 and District 2 were present. Resp. Memo in Opp., Declaration of District Teacher 1; TR 160:20 – 161:8.

56. Parent 1 testified that there was no nurse or 1:1 from School 4 in attendance at the IEP meeting. TR 45:20 – 25.²

57. Parents provided the IEP team a letter from Student’s Pediatric Orthopedic Doctor dated September 16, 2016. The doctor expressed the doctor’s concerns about Student being in a larger school campus. Doctor opined that Student would require mobility support such as a wheelchair or wagon, because Student would fatigue ambulating the required distances. Doctor encouraged the IEP team to allow Student to remain at School 1 to optimize Student’s progress, independence, mobility, and education. Pet. Motion, Exh. 11.

58. Parents also provided the IEP team with a letter from another Orthopedic Doctor dated September 26, 2016. Other doctor noted that Student has difficulty walking long distances and standing for long periods of time. The other doctor said it was imperative to keep Student as independent and mobile as possible. Student’s placement in a larger classroom and campus would put Student at a disadvantage, and Student’s gross motor skills would regress. The doctor recommended Student have desks and

² Neither party submitted an attendance list from this meeting.

chairs that were appropriately sized. The other doctor stated that it would be beneficial for Student to stay at School 1. Pet. Motion, Exh. 3.

59. Parent 1 testified that Student's Pulmonologist and Ear, Nose, and Throat Doctors recommended that Student be kept close to the hospital in case of an emergency. TR 24:6 - 25:5.

60. Student's IEP services remained the same. TR 161:25 – 162:9.

61. Parent 1 testified that Parent 1 asked the School 1 Principal if Student could remain at School 1, even if the transportation ended. The School 1 Principal said Principal would get back to Parent 1. Parent 1 testified that Principal never did. TR 70:3-14.

62. DES 2 informed Parents that there was another program opening at School 5. Parents scheduled an appointment to visit the school on September 30, 2016. On September 27, 2016, DES 2 was informed that there was not an opening at School 5. On September 29, 2016, DES 2 informed Parent 1 that there might be an opening at School 6; however, DES 2 was concerned about this school because there were no stairs to meet Student's IEP objective. Parent 1 also stated that Parent 1 was concerned that Student's 1:1 and private nurse would not be transitioning with Student. DES 2 informed Parent 1 that it was the DOE's intent to have them continue to work with Student for one to two weeks. Resp. Memo in Opp., Declaration of DES 2; TR 46:25 – 47:17.

63. Parent 1 testified that DES 2 never scheduled a meeting with Parent 1 to visit School 6. TR 47:14 – 21; TR 93:1-8.

64. The IEP team agreed to extend services at School 1 for transition purposes until October 7, 2016, the end of the first quarter. Resp. Memo in Opp., Declaration of District Teacher 1.

65. District Teacher 1 informed DES 1 that the IEP team agreed to extend services at School 1 for transition purposes until October 7, 2016, which was the end of the first quarter. DES 1 approved an extension of Student's transportation from Student's residence in District 2 to and from School 1 from September 30, 2016 through October 7, 2016. Resp. Memo in Opp., Declaration DES 1; Declaration of District Teacher 1.

66. District Teacher 1 contacted School 1 about Student's nurse and 1:1 skills trainer transferring to District 2 to continue working with Student. School 1 informed Parent 1 that the nurse would be willing to continue working with Student in District 2,

pending Nurse's availability with a possible new job. The 1:1 skills trainer was willing to assist in the transfer for one week. *Ibid.*

67. Parent 1 testified that on October 5, 2016, Student's bus driver reported that Student's last day at School 1 would be October 7, 2016 and Student would be starting School 4 on October 17, 2016. The private nurse said that there was talk about Student's last day at School 1. Parent 1 called DES 2, District 2 Teacher 1, and School 1 to get answers. TR 47:23 – 50:25.

68. On October 6, 2016, DES 2 contacted the School 1 Principal. The School 1 Principal informed DES 2 that Parent 2 was asking about Student's transition. Principal told Parent 2 that a transition plan was not required and the School 4 team was present at the IEP meeting. Student would continue to have Student's nurse, and the 1:1 would be with Student for one week as part of the transition. Parent 2 told Principal there was no offer of FAPE at the September 26, 2016 meeting. Resp. Memo in Opp., Declaration of DES 2; TR 260:11 - 24.

69. The private nurse declared that neither Nurse nor the 1:1 trainer were invited to transfer with Student to District 2. Pet. Motion, Exh. 9.

70. DES 2 sent Parents a letter dated October 6, 2016 regarding the September 26, 2016 IEP meeting. DES 2 stated that "the location of services that District 2 feels will meet [Student's] unique needs is at School 4." DES 2 informed Parents that if they were in disagreement with the ability of School 4 to provide a Free and Appropriate Education ("FAPE"), they could seek mediation. Resp. Memo in Opp., Exh. 2.

71. Parent 1 testified that the last program Parents agreed to was at School 1. TR 45:3-5.

72. On October 7, 2016, Parent 1 testified that Parent 1 contacted the private nurse to check on Student when Student was at School 1. The private nurse said they were celebrating Student's last day. Parent 1 contacted the SPED teacher said that no one informed Parent 1 it would be Student's last day at School 1. Parent 1 testified that the SPED teacher went directly to the school office and informed the School 1 Principal and SSC of Parent 1's concerns.³ Parent 1 also called District 2 Teacher1 and DES 2. TR 51:5-17; TR 71:12.

³ Student's SPED teacher at School 1 went on sick leave from mid-August to mid-October. TR 202:4 – 204:14.

73. On October 7, 2016, at approximately 10:00 a.m. District 2 Teacher 1 returned Parent 1's call and left a voicemail message. District 2 Teacher 1 stated that District 2 Teacher 1 would check on the transportation forms. The forms "had been submitted a long time ago with tentative dates" and that the bus company had to contact the "District" before any changes were made. District 2 Teacher 1 stated District 2 Teacher 1 sent the forms so that Student would not experience a two week delay "if and when Student is coming over to this side." District 2 Teacher 1 said that District 2 Teacher 1 would contact District Teacher 1 about the transportation. District 2 Teacher 1 also said that DES 2 would be sending Parents a letter about "possible locations." District 2 Teacher 1 stated that District 2 Teacher 1 would "try to find out some answers." Petitioner's Motion, Exh. 10; TR 70:16 – 72:16.

74. On October 7, 2016, DES 2 spoke with the School 1 Principal who had Parent 1 on the telephone. School 1 Principal informed DES 2 that Parent 1 was "very upset, because Parent 1 still doesn't know about 'placement.'" Parent 1 stated Parent 1 had not received the October 6, 2016 letter, and the private nurse and SPED teacher said it was Student's last day at School 1. DES 2 went through the information in the letter. Parent 1 reiterated Parent 1's concerns about School 4. DES 2 informed Parent 1 that the furniture had been lowered or was in the process of being lowered. DES 2 stated that they had discussed the transition at the IEP meeting. DES 2 informed Parent 1 about the October 6, 2016 letter. Resp. Memo in Opp., Exh. 2.

75. Parent 1 testified that as of October 7, 2016 Parent 1 did not know who Student's new nurse would be. TR 62:1-9.

76. On October 7, 2016, Parent 2 requested mediation. Resp. Memo in Opp., Exh. 3.

77. Parent 1 testified that Parent 1 received DES 2's letter dated October 6, 2016 on October 8, 2016. TR 52:3-6.

78. DES 2 sent Parents a letter dated October 10, 2016 confirming their request for mediation. DES 2 stated, "there is no stay-put when you seek mediation; therefore, things are being put in place for Student, to attend school at School 4 on Monday, October 17, 2016. Student needs to be enrolled there before Student can attend." Resp. Memo in Opp., Exh. 3.

79. Parent 1 testified that Parent 1 had a potential conflict of interest with School 4. Parent 1 stated, "It's basically a professional conflict of interest for me to be

involved with children at a program that I have clients working at the program.” TR 298:11-23.

80. On October 17, 2016, Parent 2 and Student showed up at School 1. Resp. Memo in Opp., Declaration of DES 2.

81. When Student did not transition to District 2 on October 17, 2017, the nurse and 1:1 skills trainer informed their agencies that they were no longer available to work with Student. Resp. Memo in Opp., Declaration of District Teacher 1.

82. District Teacher 1 declared that School 4 is substantively comparable to School 1, and it is an appropriate location to implement Student’s program. *Ibid.*

83. Parents wanted Student to be in a school in close proximity to Medical Facility with appropriate equipment. Parent 2 testified that even though a medical facility is closer to School 4, it might not have the specialists and would be less familiar with the equipment. Parent 2 stated that Medical Facility would provide better treatment for Student. TR 104:14-25.

84. District Teacher 1 and the School 1 Principal testified that in case of an emergency, DOE personnel would call 911 and the Parents. School 4 has a fire station and a police station directly across the street. TR 167:17 – 169:20; 210:23 – 211:6.

85. The School 1 Principal testified that Student did not have any medical emergencies that required hospitalization from the school during the 2015-2016 school year. TR 210:1-6.

86. On October 19, 2016, Petitioners filed the Request in DOE-SY1617-021. Parents did not agree to placement at School 4 and requested that Student “stay put at School 1 until the DOE and IEP team agree on an appropriate placement which meets [Student’s] educational, developmental and medical needs. The placement at School 4 is restrictive for [Student] and will cause regression in independence.” Pet. Motion, Exh. 4.

87. DES 2 sent Parents a letter dated October 19, 2016 regarding Student’s stay put. DES 2 stated that DES 2 at DES 1 were “in agreement that stay put does not apply to this case because the disagreement is not about placement; it is about location. Therefore, I recommend that you register [Student] at School 4 as soon as possible so that we can provide a Free and Appropriate Education (FAPE).” Resp. Memo in Opp., Exh. 5.

88. In a letter dated October 19, 2016, Student’s Ear, Nose, and Throat doctor requested a “geographical exception to stay at School 1 given its proximity to Medical

Center...School 1 is smaller compared to the new school, Student's classes are nearby and easier for [Student] to get around." The doctor stated Student should be closer to Medical Center in case of an emergency. Pet. Motion, Exh. 3.

89. On October 21, 2016, Petitioners filed an amended RIH in DOE-SY1617-021A. Petitioners rejected the September 26, 2016 IEP and the terms expressed in the September 30, 2016 PWN because it did not provide Student a FAPE. Parents sought to continue Student's current placement at School 1 through the 2016-2017 school year, including ESY. Pet. Motion, Exh. 5.

90. On November 7, 2016, Student's private nurse started working at Medical Center. TR: 107:2-10.

91. District Teacher 1 testified that if School 2 had opened a general education program while Student was living in the District, it would have been offered to Student. Once Student reached ___ grade, Student would go back to School 2, because there would be general education students there. If Parents wanted Student to attend a school outside of their district they would need to apply for GE. If their current district was unable to implement the IEP, a GE would not be required. TR 180:9 – 182:6.

92. DES 1 testified that if a student moves out of a district and wants to remain at their school, they would need to file a GE. A GE is not necessary when there is a programmatic placement based on location. A programmatic placement occurs when the home school is unable to provide all of the services in the IEP. The DOE would find a school typically close by the home school that has the ability to meet the services in the IEP. The DOE takes into consideration the transportation time and they do not want to interfere with the delivery of instructional minutes. TR 249:5 – 251:17.

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-1 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.

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. However, 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 Sch. 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). It 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). 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 undersigned Hearings Officer has read the entire transcript of the Motion for Stay Put. The undersigned Hearings Officer has also reviewed all of the exhibits admitted into evidence at the hearing on the Motion.

C. Whether Student was Denied a FAPE.

Petitioners' Request alleges that September 26, 2016 IEP and the terms contained in the September 30, 2016 PWN did not provide Student with a FAPE. Specifically Petitioners' allege: 1) Student's placement at District 2 program presents a direct threat to Student's health and safety; 2) the IEP was not the product of collaboration with the Parents; 3) the IEP was predetermined; and 4) the IEP was contrary to Student's medical providers' prescription. Respondents argue that Parents were active participants in the IEP process and District 2 is appropriate to meet Student's needs.

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).

1. Whether Student's placement at District 2 presents a direct threat to Student's health and safety.

Parents testified that Student's health and safety were at risk because of the distance to Medical Center and the "violent" students that attend the program.

Prior to the September 26, 2016 IEP meeting Parent 1 told DES 2 that School 4 was not appropriate for Student for medical, educational, and safety reasons. Parent 1 stated that the school environment was too big, the classroom was too far from the playground, there was mosquito infestation, and the furniture was too tall. Parent 1 testified that Parent 1 was concerned that there were no stairs. When Student had Student's PT services, they included going up and down the stairs to get Student's muscles moving for Student's hips to walk.

Parent 1 also stated that Parent 1 had a professional conflict of interest with program. Parent 1 said students in program have socio-economic stressors and language barriers, and the curriculum they use was designed for "poor socio-economic students." Parent 1 thought Student would have to start over. Parent 1 wanted Student to remain at School 1, because the staff knew Student and they were more qualified. DES 2 informed Parent 1 that the IEP called for a placement in an inclusion setting and that School 4 met this. DES 2 told Parent 1 there were openings at other schools, but one had a large hill and the other was very far away. DES 2 and the School 1 Principal also stated that Parent 1 told them Parent 1 did not want Student to be around "poor kids."

Parent 1 testified that Parent 1 did not say Parent 1 did not want Student to attend school with poor students. Parent 1 testified that Parent 1 was concerned about the program at School 4. In Parent 1's experience, "a lot of the population of children that I've worked with in the program carry the violence and the health concerns into the classroom where they are." Parent 1 was concerned about Student's safety. Parent 1 testified that Student's "neuropsych evaluator" had health and safety concerns about the program. Parent 1 further testified that some of the students in the program have English as a second language. Parent 1 also had concerns about the qualifications of the teachers.

At the September 26, 2016 IEP meeting, Parents provided the IEP team a letter from Student's Pediatric Orthopedic Doctor dated September 16, 2016. The doctor

expressed Doctor's concerns about Student being in a larger school campus. Doctor opined that Student would require mobility support such as a wheelchair or wagon, because Student would fatigue ambulating the required distances. Doctor encouraged the IEP team to allow Student to remain at School 1 to optimize Student's progress, independence, mobility, and education. Parents also provided the IEP team with a letter from another Orthopedic Doctor dated September 26, 2016. Other Doctor noted that Student has difficulty walking long distances and standing for long periods of time. Other Doctor said it was imperative to keep Student as independent and mobile as possible. Student's placement in a larger classroom and campus would put Student at a disadvantage, and Student's gross motor skills would regress. The doctor recommended Student have desks and chairs that were appropriately sized. Other Doctor stated that it would be beneficial for Student to stay at School 1.

In a letter dated October 19, 2016, Student's Ear, Nose, and Throat doctor requested a "geographical exception to stay at School 1 given its proximity to Medical Center...School 1 is smaller compared to the new school, Student's classes are nearby and easier for [Student] to get around." The doctor stated that Student should be closer to Medical Center in case of an emergency.

It is clear from all of the testimony Parents did not want Student to attend School 4, Parent 1 went so far as to say Parent 1 had a "conflict of interest" because Parent 1 works with parents of students in program. The undersigned Hearings Officer has concerns about Parents' credibility.

First, despite their arguments that Student needed to be in close proximity to Medical Center, they *chose* to move farther away. If there truly was an imminent need for Student to be close to the hospital, Parent's move to District 2 would be highly questionable. Second, Parent 1 testified that Parent 1 did not have any concerns about Student spending two hours on the bus going to School 1, each way, because Student generally slept on the bus. What would happen in the case of an emergency? Even the private nurse testified that being on the bus for two hours could be a risk for Student's health, because if Student got something lodged, it would become an emergency situation. It could be extremely problematic if Student had to be transported to Medical Center quickly while Student was being transported to and from school. Lastly, Parents did not provide any evidence to show that School 4 was, in fact, a direct threat to Student's health and safety. Student would have a private nurse, a 1:1, and the fire

department and police stations were directly across the street. The undersigned Hearings Officer finds that Petitioners have not met their burden to show Student's health and safety were at risk or that Student was denied a FAPE.

2. Whether the IEP was the product of collaboration with the Parents.

Petitioners allege the September 26, 2016 IEP meeting was not a collaborative effort. Petitioners presented no credible evidence to prove this claim. The undersigned Hearings Officer finds that Petitioners have not met their burden to show Student was denied a FAPE.

3. Whether the IEP was predetermined.

Petitioners allege the Student's placement was predetermined in the September 26, 2016 IEP meeting. Petitioners presented no credible evidence to prove this claim. The undersigned Hearings Officer finds that Petitioners have not met their burden to show Student was denied a FAPE.

4. Whether the IEP was contrary to Student's medical care providers.

See supra, section IV., C., 1. The undersigned Hearings Officer finds that Petitioners have not met their burden to show Student was denied a FAPE.

D. Whether Student is entitled to relief.

Once a Hearings Officer holds that public placement of learning a disabled child violated IDEA, they are authorized to grant appropriate relief. Petitioners' sought: 1) to maintain Student's current program and placement at School 1 for the 2016-2017 school year and ESY; 2) transportation; 3) 1:1 nurse; 4) an ASL qualified interpreter throughout Student's education and related services; and 5) compensatory education and all other appropriate relief.

The Hearings Officer has determined that Petitioners have not met their burden to show that the September 26, 2016 IEP or September 30, 2016 PWN procedurally or substantively violated the IDEA and denied Student a FAPE. The IEP already provides for transportation, a 1:1 nurse, and an ASL qualified interpreter.

On February 3, 2017, the undersigned Hearings Officer filed an Order Clarifying the Stay-Put Placement. She found that the IEP team determined Student's specialized instruction would be provided in a regular education setting where Student would have peers to provide modeling in a variety of skills and opportunities to socialize with them. Student's placement would be in a regular education setting on a DOE campus. The

precise location or school was not specified in the July 14, 2015 PWN, thus making the placement selection an administrative decision. The undersigned Hearings Officer found that Student's placement for purposes of stay-put is in a regular education setting on a DOE campus.

The undersigned Hearings Officer reached this finding based on the June 18, 2015 IEP meeting. That IEP was developed by considering input from Parents, early intervention specialists, DOE therapists, administration, District Teacher 1 and the SPED teacher. The team also reviewed DOE cognitive, speech/language, fine motor, gross motor, adaptive, and observation assessments, and a private report from the Clinical Neuropsychologist. The IEP team discussed the LRE for Student and decided that Student would benefit with participation with general education peers.

The PWN dated July 14, 2015 from School 2 stated that Student would receive 1800 minutes of SPED services per week, 210 minutes of OT services for the first quarter, and 270 minutes per quarter thereafter, 345 minutes of PT services for the first quarter and 405 minutes per quarter thereafter, 540 minutes of SLT per quarter, 1800 minutes of individualized instructional support per week, ESY services after 14 calendar days, OT, PT, and ASL consult, 60 minutes of ASL sign language training for staff per quarter, and daily transportation. Student would also receive 1800 minutes per week of skilled nursing in school, and 300 minutes per week for transportation on the school bus. Student's placement "will be in a regular education setting on a DOE campus." The IEP team determined that Student's specialized instruction could be provided in a "regular education setting where Student will have peers to provide modeling in a variety of skills and opportunities to socialize with them. In addition, the special education teacher on a DOE campus will be able to ensure that all services are provided, on-going communication with staff, and modifications are provided so [Student] can access Student education." Parent 1 was informed that School 2 had a SPED program; however, there were no general education students there. The DOE subsequently notified Parents that the School 1 Principal agreed to accept Student into their program that had a general education program. Student's IEP services in the September 26, 2016 IEP and September 30, 2016 PWN remained the same.

The Ninth Circuit, in *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dep't of Educ.*, defined "educational placement" based on Supreme Court case law, Congress's express intent in the statute, the agency's implementing regulations, and sister

circuits' decisions. Prior to *N.D.* the Ninth Circuit had only addressed changes in educational placement under the IDEA on one other occasion, *Johnson ex rel. Johnson*, 287 F.3d 1176. (9th Cir. 2002). In *Johnson*, plaintiff's parents filed suit on behalf of their autistic child when he turned three and was to be transferred between different educational agencies. Plaintiffs alleged that under "stay-put" their child was entitled to the "exact same program and vendors" that were provided previously. *Id.* at 1179. The Ninth Circuit held that the IDEA does not require the exact same vendors to provide the services and transfer of the child was appropriate because the new educational agency could "meet the requirements of the 'stay put' provision by providing comparable educational placement." *N.D.*, 600 F.3d 1104, 1114–16 (9th Cir. 2010).

The Court in *N.D.* also noted that the Fourth Circuit had previously performed an extensive analysis of the meaning of current "educational placement" under the IDEA in *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 675 (4th Cir. 2004). The *A.W.* case dealt with the transfer of an individual student between "materially identical settings." The court concluded that "the touchstone of the term 'educational placement' is not the precise location to which the student is assigned but rather the environment in which educational services are provided. To the extent that a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of 'mainstreaming' and affording access to a FAPE, the goal of protecting the student's 'educational placement' served by the 'stay-put' provision appears to be met. *Id.* at 683. Based on its definition of current "educational placement," the Fourth Circuit found that the disabled child's transfer did not violate the stay-put provisions. *Id.* at 683–84.

The Court in *N.D.* also cited the Fifth Circuit Court case *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003). The *White* case involved a child that attended a centralized school for hearing-impaired students. The centralized school was a general education campus, and the hearing-impaired students were mainstreamed. Parents wanted the child to attend their "neighborhood school" instead. The court stated that the term "placement" in the IDEA implementing regulation does not mean a particular school, but rather a setting, such as regular classes, special education classes, special schools, home instruction, or hospital or institution-based instruction. *Id.* at 380. The Court further noted that the Office of Special Education Programs (OSEP), the Department of Education branch charged with monitoring and enforcing the IDEA

and its implementing regulations, has explained:

[I]f a public agency ... has two or more equally appropriate locations that meet the child's special education and related service needs, the assignment of a particular school ... may be an administrative determination, provided that the determination is consistent with the placement team's decision.

Letter from Office of Special Education Programs to Paul Veazey (26 Nov. 2001). See also, e.g., *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (it is permissible for a student with a disability to be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individual needs of the student); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (citing policy letter indicating that assignment of a particular location is an administrative decision). *Id.* at 382.

Ultimately, the Ninth Circuit in *N.D.* held that “educational placement” means the general educational program of the student. More specifically they concluded, “under the IDEA a change in educational placement relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction. A change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting.” *N.D.*, 600 F.3d at 116.

Petitioners cited several cases and OSEP letters regarding a change in placement. The undersigned Hearings Officer did not find them to be applicable or persuasive. Petitioners' citations referred primarily to a change in placement that either involved students moving to a more restrictive environment or having substantive changes to their educational program. That was not the case here. Even though Petitioners argued that Student's placement at School 4 would fundamentally change Student's IEP, those arguments were purely speculative. Student would be moving to another general education setting, and Student would be receiving the same IEP program, services, and supports. For those reasons, the undersigned Hearings Officer found that Student's placement for purposes of stay-put is in a regular education setting on a DOE campus.

Lastly, the undersigned Hearings Officer has determined that Petitioners have not met their burden to show that the September 26, 2016 IEP and the terms contained in the September 30, 2016 PWN violated the IDEA and denied Student a FAPE. Petitioners' request for compensatory education is denied.

V. DECISION

Based upon the above-stated findings of fact and conclusions of law, the Hearings Officer concludes that Petitioners have not proven a denial of FAPE. Petitioners have not met their burden to show that, procedurally and substantively, the September 26, 2016 IEP and the terms contained in the September 30, 2016 PWN was inappropriate.

The Hearings Officer denies Petitioners' request for compensatory education. Respondents 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

STUDENT, by and through Parents vs. DOE; DOE-SY1617-021A
LEGEND: FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION