

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

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

Petitioners,

vs.

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

Respondents.

DOE-SY 1718-028

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

Due Process Hearing : Friday, April 20, 2018
Monday, April 23, 2018

Hearings Officer : Jennifer M. Young

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§ 1400, et seq.; the federal regulations implementing the IDEA, 34 C.F.R. §§ 300.1, et seq.; and the Hawai'i Administrative Rules §§ 8-60-1, et seq.

II. PROCEDURAL HISTORY ("BACKGROUND")

Petitioners are the parents of Student with a disability. On January 18, 2018, Petitioners filed a due process complaint ("Complaint") against Respondents DEPARTMENT OF EDUCATION, STATE OF HAWAI'I, and CHRISTINA KISHIMOTO, superintendent of the

¹ Personal identifiable information is provided in the Legend.

Hawai'i Public Schools (hereinafter "Respondents" or "DOE") alleging violations of the IDEA.² Respondents filed a Response to the Complaint on January 26, 2018. This Hearings Officer was appointed to preside over this case on or about February 20, 2018.

A Resolution Session was held on February 8, 2018. The parties did not reach a resolution of the matter during the Resolution Session.

A prehearing conference was conducted on February 27, 2018. Present at the prehearing conference were Jennifer M. Young, Hearings Officer; Keith H.S. Peck, counsel for Petitioners; and Ryan W. Roylo, Deputy Attorney General for Respondents.

Respondents' written response to the Complaint dated January 26, 2018 did not meet the requirements set forth in 34 C.F.R. § 300.508(e). Therefore, Respondents orally provided their response to each issue contained in the Complaint during the prehearing conference.

At the prehearing conference, the parties requested the opportunity to file dispositive motions. The deadline to file dispositive motions was set for March 9, 2018. A hearing on dispositive motions was scheduled for March 19, 2018. No dispositive motions were filed by the parties.

At the prehearing conference, a due process hearing was scheduled for April 20 and April 23, 2018.

On February 28, 2018, Respondents filed Respondents' Request and Declaration for an Extension asking to extend the 45-day deadline within which a decision in this matter must be issued ("Deadline") from April 3, 2018 to May 18, 2018. On March 5, 2018, this Hearings Officer granted Respondents' Request for an extension of the Deadline. The Deadline was extended to May 18, 2018.

² Respondents did not challenge the sufficiency of the complaint.

Petitioners filed their Witness Lists, Exhibit List and Exhibits on April 13, 2018, and Respondents filed their Witness Lists, Exhibit List and Exhibits on April 11, 2018.

The due process hearing was conducted on April 20 and April 23, 2018.

At the due process hearing, Petitioners called two witnesses: Private Psychologist and Parent 1. Respondents called two witnesses: SPED Teacher and Behavioral Health Specialist.

At the due process hearing, this Hearings Officer received into evidence Petitioners' Exhibits 1 –13 (inclusive) and 16-20 (inclusive). Petitioners withdrew Petitioners' Exhibits 14 and 15. This Hearings Officer also received into evidence Respondents' Exhibits 1 – 5 (inclusive) Exhibit 6, page 100 and pages 111-218, and Exhibits 7-8 inclusive. Respondents withdrew Respondents' Exhibit 6 pages 101-110.

III. BACKGROUND

Student is currently ____ old. Student is eligible for services under the IDEA by meeting the criteria for Eligibility Criteria 1. More specifically, Student is diagnosed with Disability. Disability is a disorder. Student has a full scale I.Q. of ____.³ The Complaint in this matter alleges procedural and substantive violations of the IDEA related to Student's functional performance, behavioral interventions, supports, transition plans and services. The current Individualized Private Program ("IEP") is dated September 19, 2017.

IV. ISSUES PRESENTED

The Complaint alleges that the IEP denies Student a Free Appropriate Public Education ("FAPE"). The following issues were certified for determination:

1. Whether the IEP development process (IEP meetings) should have included staff from the Private Program for a thorough discussion of Student's needs.

³ Private Psychologist Testimony.

2. Whether Student's Functional Performance is properly addressed in Student's IEP, and whether proper assessments regarding Student's Functional Performance was conducted.
3. Whether the IEP sufficiently describes Student's necessary behavioral supports when the IEP states, "Follow Behavioral Support Plan".
4. Whether the IEP specifies the amount of direct related services in Counseling and if those amounts comport with statements made during the IEP development process.
5. Whether Services up to 20 hours per month is sufficient, as there is no minimum duration listed and only a maximum amount of hours.
6. Transition

Whether the IEP describes the supports and or services necessary regarding Student's need and parent's concerns about changing Student's program / placement / location from Student's then existing location to a public-school location.

Whether the IEP is complete in that it could have been implemented as written without addressing Student's transition to public-school location.
7. Extended School Year Program ("ESY")

Whether the IEP team appropriately discussed and assessed the duration and frequency of Student's ESY.

Whether Student's Functional Performance need for socialization skills are addressed in Student's ESY.
8. Least Restrictive Environment ("LRE")

Whether the discussion regarding LRE fulfills the standard required by the 9th Circuit.

Whether the IEP provides Student with a Free and Appropriate Education in Student's LRE.
9. Whether the DOE designed Student's IEP specifically for implementation at School (Predetermination of Location).

V. FINDINGS OF FACT⁴

Student's Profile

1. Student has a full scale I.Q. of _____.⁵
2. Student is developmentally immature for Student's age.⁶
3. Student is diagnosed with Disability.
4. Student's disability is categorized as moderate and impacts Student's cognition.⁷ Student is strong-willed, obsessive, adverse to change, and transitions are difficult for Student.⁸
5. Student is sensory oriented and sensitive to her environment.⁹
6. Disability _____.¹⁰
7. Student requires the ___ at all times. Student keeps a monitor in a.¹¹
8. Student's water intake must be monitored and Student may only eat what is sent to school with Student by Parent 1, unless Parent 1 provides permission.¹²
9. Student is _____.¹³
10. Student presents symptoms of difficulties related to Student's medical conditions, sensory seeking behavior, difficulty with transitions, and defiant behavior and aggression.¹⁴
11. Due to difficulties with self-management, math computation, reading comprehension, and social emotional skills Student requires the supports of special education.¹⁵
12. Student requires ____.

⁴ The undersigned Hearings Officer considered the entire record, including all testimony and exhibits introduced prior to the DPH, in issuing this Decision and Order.

⁵ Private Psychologist Testimony.

⁶ Respondents' Ex. 3, p. 59. Private Psychologist Testimony.

⁷ Private Psychologist Testimony.

⁸ Private Psychologist Testimony; Parent 1's Testimony.

⁹ Private Psychologist Testimony; Parent 1's Testimony.

¹⁰ *Id.*

¹¹ Respondents' Ex. 3, p. 60.

¹² Respondents' Ex. 3, p. 60.

¹³ *Id.*

¹⁴ Respondents' Ex. 3, p. 59. Private Psychologist Testimony.

¹⁵ Respondents' Ex. 3, p. 60.

13. To determine Student's present levels of academic achievement and functional performance, goals, and services, supports and modifications, Student's IEP team considered:
 - a. parents input;
 - b. student's Evaluation dated April 30, 2017;
 - c. student's Progress Report from May - August;
 - d. Student's behaviors observed from August - December of 2016;
 - e. Student's 2016-2017 IEP;
 - f. Assessment.¹⁶

Functional Performance

14. Student's strengths are that Student:
 - a. is able to articulate events and Student's thoughts;
 - b. can be engaged and friendly;
 - c. has a good sense of humor;
 - d. works cooperatively with others and can be helpful in class;
 - e. is eager to attend and engaged in Student's current Private Program;
 - f. has excellent attendance at Private Program;
 - g. can be prompted to engage in activities when Student is in a good mood; and
 - h. has developed cooking skills, as Student enjoys cooking.¹⁷
15. Program is productive for Student.¹⁸
16. Student has poor boundaries with personal space.¹⁹
17. Student utilizes task avoidance behavior.²⁰
18. Student is easily distracted and requires frequent reminders to remain on track (watching peers walk in and out of the room, listening to others conversations, and noises in the room).²¹
19. Student requires intensive encouragement and chunking of assignments is necessary when Student is having a difficult day.²²
20. Student has off task behavior (not completing assignments, refusal to go to or return to class, not following adult directives, requiring repeated verbal redirections, verbal threats to staff and peers).²³

¹⁶ SPED Teacher Testimony, Respondents Ex. 3, pp. 58, 59, Private Psychologist used Assessment in the report.

¹⁷ Respondents' Ex. 3, p. 59. Private Psychologist Testimony.

¹⁸ Respondents' Ex. 3, p. 60.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Respondents' Ex. 3, p. 59.

21. Student has inappropriate behavior (swearing, teasing, yelling, ignoring, and name calling when communicating with staff and peers);²⁴
22. Student engages in tirades of swearing and inappropriate comments.²⁵
23. Student has previously told strangers that Student is being held hostage and not fed, Student has stolen items from the supermarket and bolted from the car.²⁶
24. Student will refuse to return to class, leave the bathroom, office or health room.²⁷
25. Student has behaviors to avoid the remaining day at Public School and be sent home.²⁸
26. Student did not know how to ___ until this summer when Student was taught and provided an assistance tool to perform the task while at Private Program.²⁹
27. Student lacks proper passenger safety skills while either in a car, bus or in other mode of transportation.³⁰
28. Student does not handle correction of behavior well, as Student feels cornered and becomes angry and aggressive.³¹
29. Student needs to develop active listening skills.³²
30. Student's IEP lists two "Health Goals". The first goal is focused on Interpersonal Communication and states "By the end of the IEP year, Student will demonstrate socially acceptable behaviors in school by meeting objectives".³³ The corresponding objectives state:
 - a. *Objective 1-*
Student will greet others, converse, and end conversations in a positive and respectful manner (no swearing or name calling) in 4 out of 5 opportunities.
 - b. *Objective 2-*
Student will use appropriate language to express Student's feelings, especially when upset (no swearing, verbal threats, demeaning or taunting others), in in 4 out of 5 opportunities.
 - c. *Objective 3-*

²⁴ *Id.*

²⁵ Private Psychologist Testimony; Parent 1's Testimony.

²⁶ *Id.*

²⁷ Respondents' Ex. 3, p. 74.

²⁸ Respondents' Ex. 3, p. 8.

²⁹ Private Psychologist Testimony; Parent 1's Testimony.

³⁰ *Id.*

³¹ *Id.*

³² Respondents' Ex. 3, p. 58.

³³ Respondents' Ex. 3, p. 66.

In counseling session, Student will practice and role play appropriate social skills (asking for help, listening and maintaining eye contact, taking turns when speaking, saying positive statements in 4 out of 5 opportunities.³⁴

31. Objective 1 listed under Student's Interpersonal Communication goal is both vague and overbroad.
32. Objective 2 listed under Student's Interpersonal Communication goal is vague.
33. Student's second health goal is focused on Self-Management and states: "By the end of Student's IEP year, Student will demonstrate appropriate self-management skills as measured by the following objectives".³⁵ The corresponding objectives state:
 - a. *Objective 1-*
When given a task or assignment, Student will begin the task with less than 3 prompts in 4 out of 5 opportunities.
 - b. *Objective 2-*
Student will follow teachers directives, do what is expected, and seek assistance from staff when needed in 4 out of 5 opportunities.
 - c. *Objective 3-*
Student will learn and utilize strategies to assist Student with self-control and limiting distractions in class in 4 out of 5 opportunities.³⁶
34. Objective's 1 and 2 listed under Student's Self-Management goal are overbroad.
35. Objective 3 listed in Student's Self-Management goal is vague and overbroad.
36. The IEP contains no goals focused on Student's Medical/Health need of Student "presents symptoms of difficulties related to disability, sensory seeking behavior" or Student's task avoidance.

Academic Needs

37. Students needs to work on the ability to navigate and comprehend informational text.³⁷
38. Student needs to write a complete paragraph.³⁸
39. Student needs to build Student's vocabulary.³⁹

³⁴ *Id.*

³⁵ Respondents' Ex. 3, p. 67.

³⁶ Respondents' Ex. 3, p. 67.

³⁷ Respondents' Ex. 3, p. 58.

³⁸ Respondents' Ex. 3, p. 58.

³⁹ Respondents' Ex. 3, p. 58.

40. Student needs to be able to identify relevant information in a word problem.⁴⁰
41. Student needs to be able to accurately measure ingredients when following a recipe.⁴¹
42. Students needs to be able to make purchases within a predetermined budget.⁴²

Educational Background and IEP Meeting Timeline

43. Student's 2016/2017 IEP is valid from August 11, 2016 and August 11, 2017.⁴³ Student last attended Public School in December of 2016.⁴⁴
44. On April 30, 2017, Private Psychologist performed an Evaluation on Student.⁴⁵ Private Psychologist then designed an educational program based upon Student's results.⁴⁶
45. Student began attending Private Program on May 9, 2017.⁴⁷
46. On July 27, 2017, Parent 1 signed a settlement agreement with the DOE requiring Parent 1 to participate in an IEP meeting with Public School to address any and all issues related to Student's education and develop an appropriate program and IEP before August of 2017.⁴⁸
47. The DOE agreed to pay for Student's Private Placement for two months, between May 1, 2017 and July 31, 2017.⁴⁹ Student's Public School began on August 11, 2017.⁵⁰
48. On July 7, 2017, the DOE e-mailed Parent 1 requesting to conduct an IEP meeting on July 26 or 27, 2017.⁵¹ Parent 1 responded to the e-mail on July 8, 2017 stating "I can't believe it will be delayed this long. We agreed that it would be held one month so it will allow Student time to transition. Now Student will have no services for a month. This is ridiculous and wrong."⁵² On July 10, 2017, the DOE followed up with a certified letter proposing the same dates (July 26 or 27, 2017)

⁴⁰ Respondents' Ex. 3, p. 58.

⁴¹ Respondents' Ex. 3, p. 58.

⁴² Respondents' Ex. 3, p. 58.

⁴³ Respondents' Ex. 3, p. 32.

⁴⁴ Parent 1's Testimony, Sped Teacher Testimony.

⁴⁵ Private Psychologist Testimony, Respondents Ex. 3, p. 58

⁴⁶ Private Psychologist Testimony.

⁴⁷ *Id.*

⁴⁸ Respondents' Ex. 1, p. 2.

⁴⁹ Respondents' Ex. 1, p. 1.

⁵⁰ *Id.*

⁵¹ Respondents' Ex. 6, p. 137.

⁵² *Id.*

for an IEP meeting.⁵³ The DOE also requested that Parent 1 provide consent for DOE observation of Student at Student's Private Placement to assist in determining the appropriate programming or placement for Student.⁵⁴ Contrary to Parent 1's testimony, Parent 1 received the certified letter dated July 10, 2017, as a family member signed for the certified letter.⁵⁵

49. On July 19, 2017, the DOE sent a certified letter, which Parent 1 also received, as another of Parent 1's family member signed for the letter.⁵⁶ Parent 1's testimony that Parent 1 did not receive the letter and Parent 1 is not familiar with family member's signature is not credible.⁵⁷ The letter proposed that the IEP team meet on July 26, 2017 or August 1, 2017, and requested Parent 1's consent for the DOE to invite Private Psychologist to the meeting.⁵⁸
50. Contrary to Parent 1's testimony, Parent 1 received another certified letter from the DOE on August 2, 2017 because Parent 1 had not confirmed an IEP meeting date.⁵⁹ The DOE proposed that the IEP team meet on August 2 or August 7, 2017, also requesting consent to invite Private Psychologist.⁶⁰
51. Parent 1 requested that the IEP meeting be held on August 14, 2017.⁶¹ The DOE agreed to conduct the IEP meeting on August 14, 2017 and again requested consent from Parent 1 to invite Private Psychologist with the DOE receiving the signed consent no later than August 11, 2017.⁶²
52. Student's 2016/2017 IEP expired on August 11, 2017.⁶³
53. The August 14, 2017 meeting did not occur and the IEP meeting was rescheduled for August 21, 2017.⁶⁴
54. On August 17, 2017, the DOE cancelled the August 21, 2017 IEP meeting, as Parent 1 did not provide the required consent for the DOE to observe Private Psychologist's Program or to receive information from Private Program.⁶⁵
55. On August 17, 2017 at 3:55 p.m., Parent 1 brought the signed consents to Public School.⁶⁶

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Respondents' Ex. 6, p. 137.

⁵⁶ Respondents' Ex. 6, p. 149.

⁵⁷ Parent 1's Testimony.

⁵⁸ Respondents' Ex. 6, p. 143.

⁵⁹ Respondents' Ex. 6, p. 157.

⁶⁰ Respondents' Ex. 6, p. 150.

⁶¹ Respondents' Ex. 6, p. 158.

⁶² Respondents' Ex. 6, p. 158.

⁶³ Respondents' Ex. 3, p. 32.

⁶⁴ Respondents' Ex. 6, p. 164.

⁶⁵ *Id.*

⁶⁶ Respondents' Ex. 6, p. 169.

56. After Parent 1 signed the consent forms, Private Psychologist denied DOE staff permission to observe Student at Private Program. Private Psychologist stated that the rationale for denying the DOE's observation request was because the DOE had not made payment for Student's June – July 31, 2017 programming.⁶⁷ The DOE was not permitted to gather relevant educational data regarding Student via observation.
57. Parent 1 received a certified letter on September 2, 2017 stating that the information from Student's summer program is essential for the DOE to review and consider when developing an appropriate program and placement for Student.⁶⁸ The DOE then scheduled an IEP meeting for September 6, 2017, and requested Parent 1 contact Public School if Parent 1 was unable to attend.⁶⁹
58. On September 6, 2017, Parent 1 did not appear at Public School for the IEP meeting and Parent 1 was not available by telephone for the scheduled IEP meeting.⁷⁰
59. On September 15, 2017, the IEP team informed Parent 1 they would reconvene the IEP meeting on September 19, 2017 and Parent 1 was provided a copy of Student's draft IEP.⁷¹
60. In attendance for Students' September 19, 2017 IEP were: Parent 1 and Attorney via telephone, SPED Teacher, Behavioral Health Specialist, General Education Teacher, Student Services Coordinator, Health Aide, Resource Teacher, District Education Specialist, Principal, DOE attorney and Department of Health Representative.⁷²
61. Neither, Parent 1 or the DOE did not invite Private Psychologist to the September 19, 2017 IEP meeting, as Private Psychologist would have attended if Private Psychologist were invited.⁷³
62. Parent 1's lack of cooperation with the school district led to an unreasonable delay in scheduling the IEP meeting from August 1-September 20, 2017.⁷⁴
63. Student attended Private Program during August and September.⁷⁵

⁶⁷ Respondents' Ex. 6, p. 173; Private Psychologist Testimony.

⁶⁸ *Id.*

⁶⁹ Respondents' Ex. 6, p. 169.

⁷⁰ Respondents' Ex. 6, p. 173

⁷¹ *Id.*

⁷² Respondents' Ex. 3, pp. 177-178.

⁷³ Private Psychologist Testimony.

⁷⁴ FOF 48-54.

⁷⁵ Petitioner's Ex. 19, p. 118.

64. Private Program costs are \$18,659.20 per month plus general excise tax.⁷⁶
65. Private Program consisted of 21 days for the month of September.⁷⁷ The cost per day of programming in September is \$888.53.⁷⁸ Student attended 14 days of programming as of September 20, 2017. The total cost of September's delay is \$12,439.42 plus general excise tax.
66. The cost of the remaining 7 days of Private Program days is \$6,219.71 plus general excise tax.⁷⁹

Student's Special Education, Supports and Modifications

67. Student receives 5,264 minutes of special education per month. This number is the amount of minutes between the first bell and the last bell at Public School.⁸⁰
68. Student receives repeated and simplified directions.⁸¹
69. Student receives ____.⁸²
70. Student requires frequent checks for understanding.⁸³
71. Student uses a calculator use of a graphic organizer.⁸⁴
72. Student will be provided extended time.⁸⁵
73. Positive reinforcement will also be provided.⁸⁶
74. Student will be provided with visual aids.⁸⁷
75. A multi-sensory presentation of information will be provided.⁸⁸
76. Services will be provided.⁸⁹

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 7 remaining educational days in September (\$6,219.71 plus general excise tax).

⁸⁰ Respondents' Ex. 3, p. 68.

⁸¹ Respondents' Ex. 3, p. 69.

⁸² Respondents' Ex. 3, p. 69.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

77. Student's IEP declares that "Student has a Behavioral Support Plan" and Student will "Follow Behavioral Support Plan"⁹⁰.
78. Student's Behavioral Support Plan ("BSP") states that Student avoids "social situations, and when Student does engage in social situations; Student may demonstrate inappropriate social interactions (laughing at inappropriate times, random and inappropriate comments, violating personal space boundaries, and verbal threats to peers and staff."⁹¹
79. The BSP also states that Student has non-compliance with tasks (going to class, leaving class, returning to class).⁹²
80. The BSP is listed under a supplementary aid and service, program modification and support for school personnel, but it was not created within the context of the IEP team, fully completed or provided to all IEP team members. Parent 1 had not seen the Behavior Support plan until this hearing.⁹³
81. A draft of the BSP was not provided to Parent 1 when the IEP team mailed Parent 1 the IEP and other related documents on September 26, 2017.⁹⁴
82. Student has not had Assessment.⁹⁵
83. Student's IEP states that transpiration is provided daily.⁹⁶

Counseling

84. Student receives 405 minutes of Counseling per month.⁹⁷
85. The IEP states that behavioral health/ counseling services "may include, but are not limited to any one or combination of the following:
 - a. individual and/or group to teach newly learned social/coping skills;
 - b. parent counseling/training to address effectiveness of strategies being used in school;
 - c. observation in a variety of settings to gauge progress and generalization of self-calming techniques;
 - d. collaboration with individuals (including teachers, parents, etc.) who will help develop and implement strategies or activities that help reinforce use of new skills in a variety of setting;
 - e. in class support; and,

⁹⁰ *Id.*

⁹¹ Respondents' Ex. 3, p. 74.

⁹² Respondents' Ex. 3, p. 74.

⁹³ Respondents' Ex. 3, p. 74; Parent 1's Testimony.

⁹⁴ *Id.*

⁹⁵ SPED Teacher's Testimony.

⁹⁶ Respondents' Ex. 3, p. 69.

⁹⁷ Respondents' Ex. 3, p. 68

- f. consultation with others to discuss Student's progress and to adjust Student's program as needed.⁹⁸
86. Student requires more than 405 minutes per month of one-on-one direct therapy to properly address Student's severe behavior needs.⁹⁹
87. Student requires Therapy to alter Student's automatic thoughts and actions, extinguish improper behavior and retrain Student.¹⁰⁰
88. Student's IEP contains 60 minutes per month of "Parent Education and Training".¹⁰¹
89. Student's IEP contained Services and provided "up to 20 hours per month" occurring in the Special Education location.¹⁰²
90. Services are services provided by ____.¹⁰³ The service can be, but is not limited to family based therapy.
91. Parent 1 wanted Services to be provided to student and did not voice any concerns regarding the provision of such service during the September 19, 2017, IEP meeting.¹⁰⁴
92. In December of 2016, Student was discharged from Services as the entire family was not able to meet on a weekly basis.¹⁰⁵
93. Parent 1 did not provide Public School or Agency with the necessary consents required for Student or Family to receive the Services.¹⁰⁶
94. Parent 1 testified that Parent 1 did not provide the consents because last year while receiving the Services for Student that the services would cease because the family must be present to receive services.

Extended School Year

95. "Due to Student's inability to retain learned information and skills Student requires, the supports of extended school year for 4 hours per school day for breaks from academic services for more than 14 calendar days. [Student] will

⁹⁸ Respondents' Ex. 3, pp. 68-69.

⁹⁹ Private Psychologist's Testimony.

¹⁰⁰ Private Psychologist's Testimony.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ SPED Teacher's Testimony; BHS Teacher's Testimony; Respondents' Ex. 6, p. 118.

¹⁰⁴ SPED Teacher's Testimony.

¹⁰⁵ Parent 1's Testimony; Respondents' Ex. 6, pp. 118-122.

¹⁰⁶ Parent 1's Testimony; Respondents' Ex. 6, p. 218.

receive counseling services for 30 minutes a week after 14 calendar days of non-instruction.”¹⁰⁷

96. Student’s ESY statement does not specify what Student will be working on during ESY (e.g. social skills, reading, writing, math, all goals).¹⁰⁸
97. The DOE did not have sufficient data to support why Student would receive ESY services after a break of 14 calendar days.¹⁰⁹
98. At Students’ current Private Program, Student has only experienced a break of nine days from programming.¹¹⁰ After the nine day break, Student experienced behavioral sliding was more moody when Student returned to the Private Program.¹¹¹ Student’s behavior could be addressed and corrected after a break of nine days.¹¹²
99. Student’s need for ESY services is between 9-14 days after a break in instruction.¹¹³

Transition

100. The IEP team did not discuss a transition plan at the September 19, 2017 IEP meeting, IEP team members stated that the transition plan would be completed during a separate “transition plan meeting”.¹¹⁴
101. A schedule outlining a half day at Public School is not an appropriate transition plan for Student.¹¹⁵
102. Student requires a comprehensive transition plan to change educational settings.¹¹⁶
103. If Student does not receive a comprehensive educational plan, the results will be “disastrous” as Student will incur an emotional set-back, become combative and possibly assaultive.¹¹⁷
104. Student had multiple behavioral incidents in 2016. The police were called for two incidents. Student was arrested for Student’s behavior because Student physically

¹⁰⁷ Respondents’ Ex. 3, p. 68.

¹⁰⁸ *Id.*

¹⁰⁹ SPED Teacher’s Testimony.

¹¹⁰ Private Psychologist’s Testimony.

¹¹¹ Private Psychologist’s Testimony.

¹¹² Private Psychologist’s Testimony.

¹¹³ Private Psychologist’s Testimony.

¹¹⁴ Parent 1’s Testimony; Respondents’ Ex. 3, p. 72.

¹¹⁵ *Id.*

¹¹⁶ Private Psychologist’s Testimony.

¹¹⁷ *Id.*

struck the staff in 2016. Student has trauma related to this experience and Student's transition plan must address Student's trauma and behavior.¹¹⁸

105. A comprehensive transition plan requires input from both Private staff and DOE staff.¹¹⁹
106. The first step of the transition plan requires DOE staff to attend, observe, and interact with Student at Private Program.¹²⁰ The second step of the transition plan requires Private Program staff and Student attending and interacting with staff and students at Public School to gradually transition Student back to Public School.¹²¹
107. The transition plan will take multiple months to complete.¹²²

Student's Current Placement

108. Student's program is 5 days per week for 6 hours a day, totaling 30 hours per week.¹²³
109. Student's program includes a total of six staff members and costs \$18,659.20 per month.¹²⁴
110. Student's current placement is not a true academic program but a therapeutic day program which utilizes academic subjects in an effort to assist Student to learn the activities of daily living.¹²⁵
111. Student is provided one-to-one counseling, anger management and continuous behavior modification techniques while at Private Program.¹²⁶
112. Parent 1 or family member take Student to Private Placement. Student does not ride a bus.¹²⁷
113. Student's safe passenger skills have improved with the use of a visual car chart token system.¹²⁸

¹¹⁸ Private Psychologist's Testimony; Parent 1's Testimony.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Private Psychologist's Testimony, Parent 1's Testimony, Respondents' Ex. 16, p. 93.

¹²⁴ Respondents' Ex. 16, p. 103.

¹²⁵ Private Psychologist's Testimony.

¹²⁶ *Id.*

¹²⁷ Private Psychologist's Testimony; Parent 1's Testimony.

¹²⁸ *Id.*

114. Basic hygiene is targeted (e.g. teaching how to wipe oneself, properly shower, brush teeth).¹²⁹
115. Private Psychologist created 43 goals and objectives for Student based on Student's specific cognitive ability and cognitive needs.¹³⁰
116. Student gains the most from reading instruction presented within the late ____ grade to early ____ grade range.¹³¹
117. Reading Goals/Objectives at the Private Program include but are not limited to:
- Interactive learning environments help promote reading and writing proficiency in the context of social interaction. In an interactive learning environment, Student would engage in reading and writing activities with a more mature reader and writers;
 - Student utilizes a small group reading method;
 - Repeated learning helps to increase Student's reading fluency;¹³² and
 - Incorporating self-monitoring techniques helps Student recognize and resolve Student's comprehension errors as they arise (e.g. Click or Clunk).¹³³
118. Student gains the most when math instruction is presented within the late ____ grade to middle ____ grade range.¹³⁴
119. Math Objectives at the Private Program include but are not limited to:
- All math instruction is systematic and explicit. Providing numerous clear models of easy and difficult problems accompanied by verbalization of the thought processes involved in solving the problem. Then providing guided practice with immediate corrective feedback to ensure Student's understanding. This is followed by independent practice to reinforce the learning objective;¹³⁵ and
 - Instruction should focus on building Student's understanding of rational numbers.¹³⁶
120. Writing instruction presented within the middle ____ grade to middle ____ grade is appropriate for Student.¹³⁷

¹²⁹ *Id.*

¹³⁰ Respondents' Ex. 16, p. 96.

¹³¹ *Id.*

¹³² Respondents' Ex. 16, p. 96.

¹³³ Respondents' Ex. 16, p. 97.

¹³⁴ Respondents' Ex. 16, p. 98.

¹³⁵ Respondents' Ex. 16, p. 98.

¹³⁶ Respondents' Ex. 16, p. 100.

¹³⁷ Respondents' Ex. 16, p. 103.

121. Writing Objectives at the Private Program include but are not limited to:
 - a. Computer technology makes the writing process easier and more motivating for Student. For example word processing eliminates the tedious task of recopying during revision; and
 - b. Student should be provided opportunities for frequent writing practice. Have student write regularly, using words from independent reading or daily activities (e.g. re-telling a story Student has read, etc.).¹³⁸
122. Reading, writing, and oral language skill development is mutually reinforcing. Student benefits from integrated instruction in reading, writing, listening, and speaking across all curriculum domains.¹³⁹
123. Student participates in real life activities such as shopping, food preparation, and lunch service for Private Program staff, healthy cooking classes, and physical activities to support a healthy and active lifestyle.¹⁴⁰
124. Student participates in social skill building at least every other day with Private Psychologist and another staff member.¹⁴¹
125. Student's program is fully integrated, as the program has a monthly focus on a specific area of exploration and study. Each monthly theme incorporates reading, math, writing skills, occupational opportunities in that area, health and nutrition, community based learning, and project based learning opportunities.¹⁴²
126. Each June, a complete evaluation will be completed to monitor Student's educational, cognitive, and social progress.¹⁴³
127. Student has made excellent progress from May 2017- present.¹⁴⁴
128. Student has excellent attendance and Student's violent outbursts have drastically reduced.¹⁴⁵

¹³⁸ Respondents' Ex. 16, p. 103.

¹³⁹ Respondents' Ex. 16, p. 104.

¹⁴⁰ Respondents' Ex. 16, p. 94.

¹⁴¹ Respondents' Ex. 16, p. 94

¹⁴² Private Psychologist's Testimony; Respondents' Ex. 16, p. 95.

¹⁴³ Respondents' Ex. 16, p. 95

¹⁴⁴ Private Psychologist's Testimony; Parent 1's testimony, Respondents' Ex. 17, p. 106.

¹⁴⁵ Respondents' Ex. 16, p. 106.

VI. CONCLUSIONS OF LAW

The IDEA is a comprehensive scheme set up by Congress to aid the states in complying with their Constitutional obligations to provide public education for children with disabilities.¹⁴⁶ The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.”¹⁴⁷ A free and appropriate public education (“FAPE”) includes both special education and related services.¹⁴⁸ Special education is “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education.¹⁴⁹ A FAPE requires that the special education and related services are:

1. provided at public expense, under public supervision and direction, and without charge;
2. meet the standards of the State Education Agency;
3. include an appropriate preschool, elementary school or secondary school education in the state involved; and
4. provided in conformity with the individualized education program (“IEP”) requirements.¹⁵⁰

To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP”.¹⁵¹

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (1) whether the Department of Education (“DOE”) complied with the procedures set forth in IDEA;

¹⁴⁶ *Smith v. Robinson*, 468 U.S. 992 (1984).

¹⁴⁷ *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. §1400(d)(1)(A)).

¹⁴⁸ H.A.R. § 8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R. §300.34; 34 C.F.R. §300.39.

¹⁴⁹ *Id.*

¹⁵⁰ H.A.R. § 8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R. § 300.22.

¹⁵¹ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F. Supp. 3d 1081, 1093 (D. Haw. 2016).

and (2) whether the student's IEP is reasonably calculated to enable the student to receive educational benefit.¹⁵² "A state must meet both requirements to comply with the obligations of the IDEA".¹⁵³

Harmless procedural errors do not constitute a denial of FAPE.¹⁵⁴ However, a Hearings Officer may find that a child not receive a FAPE only if the procedural inadequacies:

1. Impeded the child's right to a FAPE;
2. Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or
3. Caused the student a deprivation of educational benefit.¹⁵⁵

Where a court identifies a procedural violation that denied a student a FAPE, the court need not address the second prong requiring the IEP to be reasonably calculated to enable the student to receive educational benefit.¹⁵⁶

In determining the second prong whether the student's IEP is reasonably calculated to enable the student to receive educational benefit a school district need not maximize the potential of the child, however, the standard is more demanding than "*de minimis*" progress.¹⁵⁷ The standard "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁵⁸ The IEP must be "appropriately ambitious in light of [the child's] circumstances, just as advancement from grade to grade is appropriately

¹⁵² *Rowley*, 458 U.S. p. 206-7.

¹⁵³ *Doug C. v. Hawai'i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013) (quoting *Rowley*). See also *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

¹⁵⁴ *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008).

¹⁵⁵ 34 C.F.R. § 300.513.

¹⁵⁶ *Id.*

¹⁵⁷ *Andrew F. ex rel. Joseph F. vs. Douglas County School Dist.* 137 S. Ct. 988.

¹⁵⁸ *Id.* at 1001.

ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.”¹⁵⁹

The burden of persuasion is properly placed upon the party seeking relief.¹⁶⁰ Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹⁶¹ The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.¹⁶² In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.¹⁶³

VII. DISCUSSION

A. **Petitioners did not prove that Student’s September 19, 2017 IEP meeting should have included staff from Student’s Private Program.**

The IEP team is required to include the following individuals:

1. The parents of the student;
2. Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
3. Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
4. A representative of the Department of Education who:
 - a. Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - b. Is knowledgeable about the general education curriculum; and
 - c. Is knowledgeable about the availability of and has the authority to commit the resources of the department.

¹⁵⁹ *Id.* at 1000.

¹⁶⁰ 20 U.S.C. § 1415 (i)(2)(c).

¹⁶¹ *Id.*

¹⁶² *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622(1993) (internal quotation marks omitted).

¹⁶³ *Greenwich Collieries v. Director, Office of Workers’ Compensation Programs*, 990 F.2d 730. *Greenwich* 736 (3rd Cir. 1993), *aff’d*, 512 U.S. 246 (1994).

5. An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
6. At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
7. Whenever appropriate, the child with a disability.¹⁶⁴

In attendance for the September 19, 2017 IEP meeting were: Parent 1 and Attorney via telephone, SPED Teacher, Behavioral Health Specialist, General Education Teacher, Student Services Coordinator, Health Aide, Resource Teacher, District Education Specialist, Principal, and Department of Health Representative.¹⁶⁵ Petitioners do not allege that IDEA IEP team requirements were not met, but that the IEP team was not complete because the IEP team did not include staff from Student's Private Program.

This Hearings Officer finds the allegation to be without merit. The IEP team included all required individuals prescribed by the IDEA.¹⁶⁶

Parent 1 and the DOE have the *discretion* to invite "other individuals who have knowledge or special expertise regarding th[e] child".¹⁶⁷ Parent 1 could have invited staff from Student's Private Program.¹⁶⁸ The DOE also could have invited staff from Student's Private Program as the DOE had attempted for previously scheduled IEP meetings.¹⁶⁹ No evidence was presented that Private Psychologist was prevented from attending the IEP meeting. While it may have been ideal

¹⁶⁴ H.A.R §8-60-45. See 34 C.F.R. § 300.321(a).

¹⁶⁵ FOF 60.

¹⁶⁶ *Id.*

¹⁶⁷ H.A.R §8-60-45. See 34 C.F.R. § 300.321(a).

¹⁶⁸ *Id.*

¹⁶⁹ FOF 49-51.

to have Private Psychologist present at Student's September 19, 2017, IEP meeting, the IDEA does not mandate Private Psychologist's presence at this meeting.

Petitioners cite to *Doug C.* as support for their allegations.¹⁷⁰ However, *Doug C.* can be differentiated from the matter at hand. The procedural error in *Doug C.*, was that Parent wished to attend his child's IEP meeting, did not affirmatively waive attendance to the IEP meeting and was not presented with an opportunity to attend his child's IEP meeting. The substantive violation was lost educational opportunity, as Parent and staff from the student's then current private placement were not in attendance. A robust discussion about the child was prevented because the individuals most familiar with Student were absent.

Here, both Parent 1 and Attorney were present during the IEP meeting.¹⁷¹ Parent 1 was properly provided the opportunity to participate and advocate for Student and no evidence was provided to the contrary. In fact, Student's IEP meeting was rescheduled on numerous occasions to accommodate Parent 1's schedule and ensure Parent 1's participation.¹⁷² Additionally, Parent 1 had a private contractual obligation to participate in Student's IEP meeting before August of 2017.¹⁷³ The facts presented in *Doug C.* differ from the facts presented in this matter.

¹⁷⁰ *Doug C. v. Hawai'i Dept. of Educ.*, 720 F.3d 1038, 1047 (9th Cir. 2013). ("procedural error results in the denial of an educational opportunity where, absent the error, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered.").

¹⁷¹ FOF 60.

¹⁷² FOF 48-51, 53-59.

¹⁷³ FOF 46-47.

B. Petitioner did not prove that Respondents failed to conduct proper functional performance assessments, but did prove that Student’s functional performance was not properly addressed in Student’s IEP September 19, 2017, IEP because the annual goals do not meet IDEA requirements.

Assessments

Overall, an appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student’s needs,¹⁷⁴ contains a statement of the child’s present levels of academic achievement and functional performance,¹⁷⁵ establishes annual goals related to the needs identified and present levels,¹⁷⁶ and provides appropriate specialized instruction and related services.¹⁷⁷

The IEP is a layered document in which the subsequent layers build upon the preceding layer. After evaluation, each IEP must include a statement of the Student’s present levels of academic achievement and functional performance (“PLAAFP”).¹⁷⁸ The PLAAFP is the starting point for determining annual goals.¹⁷⁹ The PLAAFP must be all encompassing and reflect the entire range of strength’s deficits, interests, and learning style of the student, in both academic and non-academic domains.¹⁸⁰ Without a baseline of current performance, it is difficult to draft measurable and relevant annual goals,¹⁸¹ and to measure future progress.

Here, the IEP team had sufficient assessments to determine Student’s Functional Performance.¹⁸² Although Petitioner presented evidence that an Assessment could have been

¹⁷⁴ 34 C.F.R. § 300.320 (a)(1)

¹⁷⁵ *Id.*

¹⁷⁶ 34 C.F.R. § 300.320 (a)(2).

¹⁷⁷ 34 C.F.R. § 300.320 (a)(4).

¹⁷⁸ *See* 34 C.F.R. § 300.320 (a)(1)-(3).

¹⁷⁹ *Bend-Lapine Sch. Dist. v. K.H.*, 2005 WL 1587241 (D.Or.2005), *aff’d Bend-Lapine Sch. Dist. v. K.H.*, 234 F App’x 508 (9th Cir.2007) (unpublished). *See also* Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46662 (August 14, 2006).

¹⁸⁰ *See* 34 C.F.R. § 300.324 (a). *See also* Letter to New, 211 IDELR 464 (OSEP 1987) (noting that the PLAAFP should be individualized to each student’s unique needs and abilities).

¹⁸¹ *Id.*

¹⁸² FOF 13.

conducted on Student, Petitioner did not produce sufficient evidence to prove that the Assessment should have been conducted.¹⁸³

Annual Goals

Each IEP must include both academic and functional annual goals to meet the student's needs resulting from the student's disability to enable the student to be involved, and make progress, in the general education curriculum and to meet the student's other educational needs.¹⁸⁴ The annual goals are statements that describe what a student with a disability can reasonably be expected to accomplish within a 12-month period in the student's special education program.¹⁸⁵ The annual goals must be objectively measurable,¹⁸⁶ but the IDEA does not require goals to have outcomes and measures on a specific assessment tool.¹⁸⁷

Annual goals must be reasonably specific to allow the parent and the school district to monitor progress during the school year, and, as necessary, to revise the IEP consistent with the student's instructional needs.¹⁸⁸ When the goals are vague, inexact or otherwise immeasurable, the IEP cannot be said to include a statement of relevant or meaningful measurable annual goals, and results in the loss of educational opportunity for the student and seriously infringes on the parent's opportunity to participate in the IEP formulation process.¹⁸⁹

¹⁸³ FOF 82.

¹⁸⁴ 34 C.F.R. § 300.320(a)(2).

¹⁸⁵ *Letter to Butler*, 213 IDELR 118 (OSERS 1988).

¹⁸⁶ 34 C.F.R. § 300.320(a)(2)(i).

¹⁸⁷ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46662 (Aug. 14, 2006); see also *A.M. v. New York City Dept. of Educ.*, 964 F. Supp. 2d 270, 61 IDELR 214 (S.D.N.Y. 2013) (rejecting the argument that the failure of the annual, math goals to include a specific measurement standard denied FAPE).

¹⁸⁸ *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Page 12471 (Mar. 12, 1999).

¹⁸⁹ *Bend-Lapine Sch. Dist. v. K.H.*, 43 IDELR 191, 2005 WL 1587241 (D. Or. 2005) (affirming the ALJ's findings that statements included in the IEP were insufficient to determine an accurate baseline of the behaviors affected by the student's disability, failed to adequately state measurable goals, and lacked sufficient specificity to determine what supplementary aids might be required to implement the IEP), *aff'd*, *Bend-Lapine Sch. Dist. v. K.H.*, 234 F. App'x 508 (9th Cir. 2007) (unpublished); *Escambia County Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248 (S.D. Ala. 2005) (affirming the hearing officer's findings that annual goals defined by an inadequate statement of present levels of performance are meaningless, and that the IEP was flawed because it did not identify measurable goals). See also *Anchorage Sch. Dist.*, 51 IDELR 230 (SEA AK 2008), *aff'd*, 54 IDELR 29 (D. Alaska

In some instances, appropriately drafted short-term objectives may compensate for inadequate annual goals.¹⁹⁰ But equally inadequate benchmarks and short-term objectives are not an appropriate substitute.¹⁹¹ In *Mason City Community School District*¹⁹², the ALJ suggested that a properly written IEP goal will pass the “stranger test”. That is, a person unfamiliar with the student’s IEP would be able to implement the goal, assess the student’s progress on the goal, and determine whether the student’s progress was satisfactory.

Here, Student’s IEP lists two goals relating to “Health” and both goals require Student to progress in the listed objectives to measure the annual goal.¹⁹³ Objective 1 listed under Student’s Interpersonal Communication is both vague and overbroad, stating that Student “will greet others, converse, and end conversations in a positive and respectful manner (no swearing or name calling) in four out of five opportunities”.¹⁹⁴ The words “positive” or “respectful” are subjective and not defined. This Hearings Officer is unclear if swearing and name-calling are the only indicators to measure Student’s positive or respectful manner; and if name-calling and swearing are not the only indicators defining positive and respectful, then who defines what constitutes “positive” or “respectful” regarding Student’s conversation. This objective is measured by observation, therefore the person/people observing Student’s greeting, conversing, etc., should be measuring

2009) (holding that the omission of a baseline and the inclusion of vague and immeasurable annual goals in an IEP denies FAPE); *Independent Sch. Dist. No. 701 v. J.T.*, 45 IDELR 92 (D. Minn. 2006) (finding that the two annual goals and three short-term objectives that follow each goal could define a broad range of conduct and, therefore, inadequate).

¹⁹⁰ See *B.P. v. New York City Dept. of Educ.*, 64 IDELR 199 (S.D.N.Y. 2014), *aff’d*, 66 IDELR 272 (2d Cir. 2015) (unpublished); *D.A.B. v. New York City Dep’t of Educ.*, 973 F. Supp. 2d 344, 62 IDELR 21 (S.D.N.Y. 2013), *aff’d*, 630 F. App’x 73, 66 IDELR 211 (2d Cir. 2015).

¹⁹¹ See, e.g., *Edinburg Consol. Indep. Sch. Dist.*, 109 LRP 72776 (SEA TX 2009).

¹⁹² 46 IDELR 148 (SEA IA 2006).

¹⁹³ FOF 30, 33.

¹⁹⁴ FOF 30, 31.

the same indicators to determine Student's level of respect of positivity. Objective 1 is also overbroad.¹⁹⁵ Conversing can consist of minutes or hours and entails a broad range of interaction.

Objective 2 listed under Student's Interpersonal Communication annual goal is vague, as it uses wording such as "appropriate" and "upset".¹⁹⁶ A definition of appropriate language is needed to ensure that the various individual(s) are measuring Student according to the same matrix. The Objective lists swearing, verbal threats, demeaning or taunting others as examples of "appropriate" language, but it is unclear if this list is exhaustive and if the observer(s) can objectively determine the level of Student's appropriateness, as the meaning of demeaning or taunting may also vary from individual to individual.

Both benchmarks listed in the Interpersonal Communication use the wording "in 4 out of 5 opportunities".¹⁹⁷ Additional objective and defined language is necessary to enable a person to understand when an "opportunity" would exist for Student.

Objective 1 listed in Student's Self-Management annual goal is overbroad¹⁹⁸, as it states, "when Student is given a *task or assignment* Student will begin the task with less than 3 prompts in 4 out of 5 opportunities". The objective does not state who may give Student a task or assignment and the wording "*task or assignment*" could consist of virtually anything. A task could be a directive from the teacher,¹⁹⁹ which would be measured by objective 2.

Objective 3 listed in Student's Self-Management annual goal is also overbroad, as it states that Student will "learn and utilize strategies to assist Student with self-control and limiting distractions in 4 out of 4 opportunities".²⁰⁰ Learning and utilizing are separate concepts, combining

¹⁹⁵ FOF 32.

¹⁹⁶ FOF 30.

¹⁹⁷ FOF 12.

¹⁹⁸ FOF 33.

¹⁹⁹ FOF 33.

²⁰⁰ FOF 33.

both would make the goal very difficult to attain in one IEP year because Student's behavior is severe, including but not limited to, verbal outbursts, threats to staff, physical aggression, and other behaviors as an avoidance mechanism.²⁰¹ The strategies that Student is being called upon to learn and utilize are not defined. In the past, Student has used negative strategies such as _____ to leave the school. Although that is a strategy that required self-control, measurement of this indicator would not be a useful progress indicator. Specific strategies or general types of strategies should be defined.

While an annual goal listed in an IEP may be supported by an objective, the objectives, must be measurable and appropriate. Parent 1 and the DOE must be able to properly monitor Student's progress. Here, the objectives are overbroad and/or vague.²⁰² A person unfamiliar with the student's IEP would not be able to implement the goal, assess the student's progress on the goal, and determine whether the student's progress was satisfactory.

Therefore, the IEP cannot be said to include a statement of relevant or meaningful measurable annual goals, and results in the loss of educational opportunity for the student and seriously infringes on the parent's opportunity to participate in the IEP formulation process.

Additionally, the IEP contains no goals that focus on Student's medical related needs²⁰³ Student "presents symptoms of difficulties related to diagnosis, sensory seeking behavior" and Student _____ to avoid tasks."²⁰⁴ The IEP team identified Student's behavior resulting from of Student's diagnosis but did not address the need with a corresponding goal.

²⁰¹ FOF 16-29.

²⁰² FOF 30-35.

²⁰³ FOF 36.

²⁰⁴ FOF 10, 17.

Special Education / Related Services & Supplementary Aids / Services

An IEP must include a statement of the special education and related services, and supplementary aids and services to be provided to the Student.²⁰⁵ The IEP must further provide a statement of the program modifications or supports for the school personnel that will be provided to enable the student to advance appropriately toward attaining the actual goals and be involved in and make progress in the general education curriculum and to participate in extracurricular and nonacademic activities.²⁰⁶

In addition to the educational services, the school district is required to provide to the student, the IEP must also include the projected start date of the services and the anticipated frequency, location, and duration of the services.²⁰⁷ The description of the amount of services must be sufficiently comprehensively to make clear the school districts level of commitment to the student.²⁰⁸ *The violation impeded Student's right to a FAPE.*

C. Petitioners proved that Student's September 19, 2017 IEP failed to specify, Student's amount of direct related services in counseling.

Student's IEP states that "Student will receive 405 minutes of counseling per month", which equates out to about 45 minutes per week.²⁰⁹ The statement itself is sufficient, as it addresses the frequency (per month), location (special education), and duration (405 minutes).

However, it is the expansive definition of counseling listed in Student's IEP that fails to meet the requirements of the IDEA. The definition is overbroad.²¹⁰ It includes parent counseling and training, as minutes toward Student's 405 minutes per month of counseling, even though

²⁰⁵ 34 C.F.R. § 300.6(e) and 300(c)(8)(iii).

²⁰⁶ 34 C.F.R. § 300.320(a)(4).

²⁰⁷ 34 C.F.R. § 300.320(a)(7).

²⁰⁸ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46667 (August 14, 2006).

²⁰⁹ FOF 84.

²¹⁰ FOF 85.

“Parent Education and Training” are listed separately in the IEP providing 60 minutes per month to parent.²¹¹ The definition also includes: observation to gauge Student’s progress; “collaboration with individuals (including teacher, parents, etc.)” who will help develop and implement strategies that reinforce Student’s new skills; consultation with other to discuss Student’s progress; and the vague term “in class support”.²¹²

The frequency, location, and duration of Student’s counseling services are not clear because of the overbroad definition of counseling that the IEP team has created. The description of service is not sufficient to make clear the school districts level of commitment to the Student.

Additionally, there was testimony from Private Psychologist that even if the definition of counseling had specified one-on-one direct therapy, Student requires more than 45 minutes per week, or 405 minutes per month of counseling, to properly address Student’s inappropriate behavior.²¹³

The service of “405 minutes per month of counseling”, as defined by the IEP team, does not enable Student to appropriately advance toward Student’s goals. Student’s right to a FAPE was impeded and caused the student a deprivation of educational benefit.

²¹¹ Id.

²¹² Id.

²¹³ FOF 85.

D. Petitioner proved that Respondents' offer of Services for "up to 20 hours per month" does not meet IDEA's procedural requirements, as there is no minimum duration listed and only a maximum amount of hours.

Student's IEP lists the service of Service for "up to 20 hours per month" of Services²¹⁴ It is unclear from the statement when, how often and to what extent the service/therapy will be offered.²¹⁵ The location listed in the IEP specifies "Special Ed."; however, testimony reflected that this service takes place with the family in the home.²¹⁶ The frequency, location, or duration for this service is not provided as required by the IDEA. This is a procedural violation.

Student was previously discharged from Services in December of 2016, because the family was unable to participate on a weekly basis.²¹⁷ Parent 1 participated and attended Student's September 19, 2017 IEP meeting, and supported Student receiving the services.²¹⁸ However, Parent 1 did not provide the necessary consents required for Student or Student's Family to participate in Therapy.²¹⁹ Parent 1 testified that Parent 1 did not provide the consents because Parent 1 was told last year that the whole family must be present to receive services.²²⁰ Parent 1's testimony does not excuse Parent 1's lack of diligence in providing the necessary consents for the service, as Parent 1 was aware of what the service may require and did not voice any concerns regarding the Services during the IEP meeting and wanted the service to be provided for Student.²²¹ Parent 1 did not avail Student to receive the benefits of this service.

²¹⁴ FOF 89, 90.

²¹⁵ *Id.*

²¹⁶ FOF 89.

²¹⁷ FOF 92.

²¹⁸ FOF 91.

²¹⁹ FOF 93.

²²⁰ FOF 94.

²²¹ FOF 90-94.

E. Petitioners proved that Student’s IEP does not sufficiently describe Student’s necessary behavioral supports because the IEP only states, “Follow Behavioral Support Plan” and the plan is not incorporated into the IEP document.

If the student’s behavior impedes his or her learning or that of others, the IDEA requires the IEP team to consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior, and to include the same in the IEP.²²² It is within the discretion of the IEP team whether to include positive behavioral interventions and supports in the IEP, with one notable exception.²²³ The failure to include positive behavioral interventions and supports in the IEP when a student demonstrates the need for same can result in a denial of FAPE.²²⁴ The IDEA does not require the IEP team to develop a formal plan termed “Behavior Support Plan (“BSP”). What is required is that the IEP adequately address the student’s behavioral needs.²²⁵

Here, Student’s behavior impedes Student’s learning²²⁶, therefore, the IDEA requires the IEP team to consider the use of positive behavioral interventions, supports and other strategies to address Student’s behavior and include it in the IEP. Student’s IEP includes, repeated and simplified directions, support, counseling, services, positive reinforcement, and following a Behavioral Support Plan.²²⁷ The BHS listed under a supplementary aid and service, program modification and support for school personnel, yet it was not created and contents were discussed in the IEP team meeting. Parent 1 has not seen the contents of the draft Behavior Support plan

²²² 34 C.F.R. § 300.324(a)(2)(i). *See also Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).

²²³ In the disciplinary context, if it is determined that the conduct is not a manifestation of the student’s disability, the school district may apply the relevant disciplinary procedures to the student in the same manner and for the same duration as the procedures would be applied to students without disabilities. 34 C.F.R. § 300.530(c).

²²⁴ *See, e.g., R.K. v. New York City Dep’t of Educ.*, 56 IDELR 212 (E.D.N.Y. 2011), *aff’d*, 694 F.3d 167, 59 IDELR 241 (2d Cir. 2012).

²²⁵ *E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, 361 F. App.x 156, 53 IDELR 141 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2064, 110 LRP 18650 (U.S. 2010).

²²⁶ FOF 10, 16-29.

²²⁷ FOF 67, 68, 73, 76, 77.

until this hearing.²²⁸ Here, the IEP refers to the BSP, in an effort to manage Student's behavior.²²⁹ If Student's Behavior is going to be managed through the BSP, then the BSP must be incorporated into the IEP, so the protections that are provided to Parent 1 during the IEP process are extended to the BSP. Thus, Petitioners have proven that Student's IEP does not sufficiently describe Student's necessary behavioral and Student is denied a FAPE.

F. Petitioners have proven that Student requires a transition plan and that the IEP team did not develop a proper transition plan.

The IDEA does not specifically require that an IEP include services to assist a student's transition from school to school. However, the IDEA does require the DOE to provide the student with a FAPE that is "appropriately designed and implemented so as to convey [the][s]tudent with a meaningful benefit."²³⁰ The United States District Court for the District of Hawai'i, in *B.B. ex rel. J.B. v. Haw. Dep't of Educ.*²³¹, noted that, "in some cases, the knowledgeable education experts agree that a particular student would benefit from" a transition plan. An appropriate transition plan should be individualized and address the student's needs as they are outlined in the IEP.

Here, the DOE was aware that Student had a difficult time with transitions.²³² Student's difficulty with transitions is specifically listed in the September 19, 2017 IEP.²³³ Student's severe behavioral issues were also noted by the IEP team, and the IEP team was aware of the lengths Student would go to avoid situations or tasks Student did not prefer.²³⁴ During the 2016/2017 school year from the months of August- December while Student attended Public School, Student had behaviors to be sent home from Public School.²³⁵ Student required a transition plan to be

²²⁸ FOF 80.

²²⁹ FOF 77, 80.

²³⁰ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 203-204 (1982).

²³¹ 483 F. Supp.2d 1042, 1056-57 (D. Haw. 2006).

²³² FOF 4, 10, 17, 18, 24, 25, 100

²³³ FOF 4, 10.

²³⁴ FOF 4, 10, 17, 18, 24, 25

²³⁵ FOF 25.

discussed at the IEP meeting.²³⁶ This Hearings Officer heard no testimony from the DOE that Student did not require a transition plan, but that the transition plan was not to be part of the September 19, 2017, IEP meeting and required a separate “transition plan meeting”.²³⁷ In fact, the DOE proposed a half-day schedule they referred to as a transition plan for Student.²³⁸ In this case, this particular student would not only benefit from a transition plan; but requires a transition plan.²³⁹

A comprehensive transition plan requires input from both Private Program staff and DOE staff.²⁴⁰ Student’s transition plan should gradually reintroduced student to the public school staff and environment.²⁴¹ The first step of the transition plan requires DOE staff to attend, observe, and interact with Student at Student’s current Private Program.²⁴² The second step of the transition plan requires Private Program staff and Student attending and interacting with staff and students at Public School to gradually transition Student back to Public School.²⁴³ The transition plan will take multiple months to complete.²⁴⁴ Support such as counseling and/or a current behavioral support plan needs to be adjusted as the student transitions.²⁴⁵ Parent and Private Program staff must be involved in both the development and implementation of the transition plan.²⁴⁶

A comprehensive transition plan was not completed nor discussed during Student’s September 19, 2017 IEP meeting and resulted in the loss of educational opportunity and seriously infringed on the Parent’s opportunity to participate in the IEP formulation process.

²³⁶ FOF 100, 102, 103.

²³⁷ FOF 101.

²³⁸ FOF 105.

²³⁹ FOF 102.

²⁴⁰ FOF 105.

²⁴¹ FOF 106.

²⁴² FOF 106.

²⁴³ FOF 107.

²⁴⁴ FOF 103.

²⁴⁵ FOF 106.

²⁴⁶ FOF 105.

G. Petitioners have proven that Respondents did not have sufficient data to determine the amount of days before Student required Extended School Year (“ESY”) services.

ESY services are special education and related services that are provided to a student with a disability, beyond the normal school year; in accordance with the student's IEP and are at no cost to the parents of the student.²⁴⁷ The services must also meet the standards of the department of Education.²⁴⁸ The services shall be provided only if a student's IEP team determines, on an individual basis, that the services are necessary for the provision of a FAPE to the student.²⁴⁹

In determining the student’s needs for ESY services, the IEP team must consider the amount of regression and rate of recoupment the student experiences following a break in his/her educational program.²⁵⁰ “Will the student’s difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives?”²⁵¹

Student requires Extended School Year services “due to Student’s inability to retain learned information and skills Student requires the supports of extended school year for 4 hours per school day for breaks from academic services for more than 14 calendar days. [Student] will receive counseling services for 30 minutes a week after 14 calendar days of non-instruction.”²⁵²

²⁴⁷ Haw. Admin. Rules (HAR) § 8-60-7. *See also* 34 C.F.R. § 300.106.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See* Hawai’i Administrative Rules Guidelines, <https://www.hawaiipublicschools.org/DOE%20Forms/.../Ch60Guidelines.pdf> (last visited May, 2017). *See also Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1087 (D. Haw. 2016). (“the nature and severity of the disabling condition, Student’s ability to be self-sufficient, regression, and recoupment.”).

²⁵¹ *Id.*

²⁵² FOF 95.

The DOE did not have sufficient data to support why Student would receive ESY services after a break of 14 calendar days.²⁵³ Student's need for ESY is after 9 days but it is unknown if 14 days is too long.²⁵⁴ The amount of days must be based upon rationale that may be articulated.

H. Petitioner has not proven that Student's LRE is inappropriate.

Although Petitioners allege that Student's IEP is not provided in the least restrictive environment ("LRE"), Petitioners failed to provide sufficient evidence regarding this claim.

I. Petitioner has not proven that the DOE designed Student's IEP specifically for implementation at School (Predetermination of Location).

Student receives 5,264 minutes of special education per month.²⁵⁵ The amount is the duration between the first bell and the last bell at Public School. This is the only evidence that Petitioner presented that was pertinent to this claim. Petitioner has not proven this claim by a preponderance of evidence.

VIII. REMEDY

The IDEA empowers a hearings officer or court to grant relief that the hearings officer or court determines to be appropriate.²⁵⁶ One such remedy is reimbursement of tuition and related expenses.²⁵⁷ The DOE may be required to reimburse for tuition and the services obtained for the student if the services offered by the DOE were inadequate or inappropriate, the services selected by the parents were appropriate under the Act, and equitable considerations support the parents' claim for reimbursement.²⁵⁸

²⁵³ FOF 97.

²⁵⁴ FOF 97, 98.

²⁵⁵ FOF 67.

²⁵⁶ 34 C.F.R. 300.516(c)(3).

²⁵⁷ *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993); *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985).

²⁵⁸ *Id.*

The initial inquiry is whether the student's IEP and or placement is "proper" or "appropriate".²⁵⁹ To determine whether the school district made FAPE available to the student in a timely manner, Rowley's two-part test for appropriateness should be applied.²⁶⁰ More specifically, the hearings officer must determine whether the DOE complied with the procedural requirements of the IDEA and whether the IEP is reasonably calculated to enable the student to receive educational benefit.²⁶¹ It is unnecessary to address the second prong if the hearing officer identifies "procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parent's opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits[.]"²⁶²

The next inquiry is whether the parent's unilateral placement is "appropriate" or "proper".²⁶³ The unilateral placement does not need to meet the State standards that apply to education provided by the Department of Education.²⁶⁴ Parents need "only demonstrate that the placement provides educational instruction specifically designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction."²⁶⁵

Here, Student's September 19, 2017 IEP was not appropriate, as the DOE did not comply with the procedural requirements of the IDEA, and the procedural inadequacies resulted in the loss of educational opportunity, seriously infringed the parents' opportunity to participate in the IEP formulation process and/or caused a deprivation of educational benefits.

²⁵⁹ The Court uses the terms "proper" and "appropriate" interchangeably. *School Comm. Of Burlington*, 471 U.S. at 369 and 374.

²⁶⁰ *Bd. Of Educ. v. Rowley*, 458 U.S. (1982).

²⁶¹ *Id.*

²⁶² *Amanda J v. Clark Cnty Sch. Dist.*, 267 F. 3d. 877, 892 (9th Cir. 2001).

²⁶³ *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359 at 369 and 370. *See also Carter*, 510 U.S. at 15.

²⁶⁴ 34 C.F.R. 300.148(c). *See also Carter*, 510 U.S. at 14.

²⁶⁵ *C. B. v. Garden Grove Unified Sch. Dist.*, 635 F. 3d 1155, 1159 (9th Cir. 2011). Quoting *Frank G. v. Bd. Of Educ.*, 459 F. 3d 356, 365(2d Cir. 2006).

Here, parents' unilateral placement was appropriate. Parent demonstrated that the placement provides educational instruction specifically designed to meet the unique needs of Student, and the education is supported by services necessary to permit Student to benefit from Student's instruction.²⁶⁶ Immediately prior to Student beginning at Private Program, Private Psychologist performed an assessment.²⁶⁷ The results of the assessment provided the foundation for Private Psychologist to create goals and objectives for Student based on Student's specific cognitive ability and cognitive needs.²⁶⁸ Student has made excellent progress while at Private Program, has excellent attendance and Student's violent outburst have drastically reduced.²⁶⁹

Equities

The final consideration when determining tuition reimbursement is the balancing of the equities. In this step, the hearing officer must examine the actions of the parents and DOE. Consideration is given to the determination of whether the parents' actions were reasonable,²⁷⁰ whether the costs of the private placement is unreasonable,²⁷¹ whether there was a lack of parental cooperation with the school district.²⁷² Should the hearings officer determine that the equities do not favor the parents; the hearings officer may reduce or deny reimbursement?²⁷³

Here, Parent 1 did not come with clean hands. Parent 1 exhibited a lack of parental cooperation with the DOE when Parent 1 unreasonably delayed the scheduling of Student's IEP

²⁶⁶ FOF 108-128.

²⁶⁷ FOF 44, 126.

²⁶⁸ FOF 108-128.

²⁶⁹ FOF 127,128.

²⁷⁰ 20 U.S.C. § 1412 (a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).

²⁷¹ *Florence County Sch. Dist.*, 510 U.S. at 16.

²⁷² *Burlington, Carter*, nor the IDEA mandates this consideration, but other courts have weighed parental cooperation in deciding whether to award reimbursement. *See e.g., C.G. v. Five Town Community Sch. Dist.*, 513 F.3d 279 (1st Cir. 2008)(stating that reimbursement is contingent upon a showing that the parents diligently pursued the provision of appropriate services from the school district); *Glendale Unified Sch. Dist. v. Almasi*, 122 F. Supp. 2d 1093 (C.D. Cal 2000) (affirming the hearings officer finding that he parent's actions of withholding information from the school district impaired the district's ability to make decisions related to the student's education.)

²⁷³ 20 USC sec 1412 (a)(10)(C); 34 C.F.R. sec 300 148(d).

meeting. Parent 1 did not sign the required consent forms until August 17, 2017 and failed to attend the September 6, 2017 IEP meeting.²⁷⁴ Parent 1 signed a settlement agreement with the DOE requiring Parent 1 to meet with the Public School to address any and all issues related to Student's education and develop an appropriate IEP before August of 2017.²⁷⁵ The agreement also stated that Parent 1 would consent to the DOE's observation of Student at Student's Private Program and Parent 1 would authorize the release of Students records and data from Private Program.²⁷⁶ Parent 1 did not reasonably cooperate with the DOE. Parent 1 is responsible for the costs of Student's Private Placement from August 1 - September 20, 2017. The total costs that Parent 1 is liable for is \$31,098.69 plus general excise tax.²⁷⁷

The DOE is responsible for the cost of the remaining seven (7) days of Private Program days in September totaling \$6,219.71 plus general excise tax.²⁷⁸ The DOE is also responsible for October 2017 - May 2018.

Student requires a comprehensive transition plan to change educational settings. The DOE is obligated to create the transition plan. The transition plan requires input from both Private Program staff and DOE staff. The first step of the transition plan requires that DOE staff to attend, observe, and interact with Student at Private Program. The second step of the transition plan requires that Private Program staff and Student attend and interact with staff and students at Public School. Student will be gradually transitioned to Public School. Transition planning and services shall occur May - August 2018. The DOE is responsible for payment of Private Program staff's expenses and shall create a line item invoice regarding Private Program costs for transition.

²⁷⁴ FOF 53, 58.

²⁷⁵ FOF 46

²⁷⁶ *Id.*

²⁷⁷ FOF 64-66.

²⁷⁸ FOF 66.

ORDER

Based upon the findings of fact and conclusion of law herein, it is this 14th day of May 2018, hereby:

ORDERED THAT, Petitioners are responsible for Private Program costs from August (\$18,659.20) – September 20, 2017, for a total of \$31,098.69 plus general excise tax.

IT IS FURTHER ORDERED that Respondents shall reimburse the Private Program for the costs of Student's seven (7) days in September (\$6,219.71) and October – May Private Program programming (\$18,659.20 per month) for a total of 155,493.31, plus general excise tax.

IT IS FURTHER ORDERED THAT, within three (3) weeks of the date of this Decision and Order, Respondents shall conduct an IEP meeting whereby the participants review the findings of fact made regarding Student's Profile, Student's Special Education, Supports and Modifications, and Student's Current Placement, and any other relevant data to properly create a transition plan. The transition plan requires input from both Private Placement staff, DOE staff and Parent 1. Transition planning and services shall occur May - August 2018. The transition plan shall be created according to the parameters set out in this decision.²⁷⁹

IT IS FURTHER ORDERED THAT, Respondents are responsible for the cost of services/staff from the Private Program for transition services provided from June until August, 2018. The DOE shall create a line item invoice regarding services and costs of

²⁷⁹ The first step of the transition plan requires that DOE staff to attend, observe, and interact with Student at Educational Program. The second step of the transition plan requires that Educational Program staff and Student attend and interact with staff and students at Public School. Student will be gradually transitioned to Public School.

Private Program staff activities and tasks. Private Program staff hourly rates must not exceed the rates established for each staff member listed on page 104 and 105 of Petitioner's Exhibit 16.

By: _____
JENNIFER M. YOUNG
Hearings Officer

Nothing in this order shall be interpreted to preclude the IEP team from reviewing new or additional information.

Unofficial Hearing Decision

NOTICE OF APPEAL RIGHTS

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

Unofficial Hearing Decision