



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

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

Petitioners,

vs.

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

Respondents.

DOE-SY1819-007

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: August 20, 2018
August 21, 2018
October 15, 2018
October 16, 2018
October 17, 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 IDEA, 34 C.F.R §§ 300.1, et seq.; and the Hawai‘i Administrative Rules §§ 8-60-1, et seq.

¹ Personal identifiable information is provided in the Legend.

II. PROCEDURAL HISTORY (“BACKGROUND”)

Petitioners is the parent of a ____-year-old student (“Student”) with a disability. On July 10, 2018, Petitioners filed a due process complaint (“Complaint”) against Respondents DEPARTMENT OF EDUCATION, STATE OF HAWAI‘I, and CHRISTINA KISHIMOTO, superintendent of the Hawai‘i Public Schools (hereinafter “Respondents” or “DOE”) alleging violations of the IDEA.² Respondents filed a Response to the Complaint on July 24, 2018. This Hearings Officer was appointed to preside over this case on or about July 20, 2018.

A Resolution Session was held on July 20, 2018. The parties did not reach a resolution of the matter during the Resolution Session.

Respondents objected to Administrative Hearing Officer’s Request for Documents on August 1, 2018 and this Hearings Officer overruled Respondents objection on August 3, 2018.

A prehearing conference was conducted on August 6, 2018. Telephonically present for the prehearing conference were: Jennifer M. Young, Hearings Officer; Samuel P. Shnider, counsel for Petitioners; and Kunio Kuwabe, Deputy Attorney General for Respondents.

During the prehearing conference, a due process hearing was scheduled for August 20, 2018 through August 24, 2018. On August 8, 2018, Petitioners requested a responsive ruling regarding Petitioners entitlement to the student’s educational record. This same day a status conference was conducted telephonically and this Hearings Officer ruled that Petitioners were entitled to access to educational records and ordered the DOE to make Student’s educational records available no later than 12:00 p.m. on August 10, 2018, as Parties disclosures were due on August 13, 2018. The records were made available on August 9, 2018 and Respondent’s objected to the “expedited” access of educational records.

² Respondents did not challenge the sufficiency of the complaint.

Petitioners filed their Witness Lists, Exhibit List and Exhibits on August 13, 2018, and Respondents filed their Witness Lists, Exhibit List and Exhibits on this same day.

The due process hearing was conducted on August 20 and August 21, 2018. Adverse weather conditions were predicted to negatively impact the safety from August 22, 2018 through August 25, 2018. Therefore, on August 21, 2018 the hearing was continued, new hearing dates of October 15 – 17, 2018 were agreed upon and the parties made a joint oral request to extend the 45-day period to complete the Due Process Hearing. Petitioners submitted a written declaration to extend the 45-day period on September 3, 2018. This Hearings Officer granted the extension from September 23, 2018 to November 7, 2018 on September 11, 2018

At the due process hearing, Petitioners called nine witnesses: Private Facility Administrator, Parent 1, Private Facility Staff 1, Private Facility Staff 2, Public School Principal, DOE DES, Clinical Psychologist, Public School SSC, and Public School SPED Teacher 2. Respondents called five witnesses: Public School Principal, DOE Contracted Provider 1, Public School Care Coordinator, BHS, and DOE Provider 1.

At the due process hearing, this Hearings Officer received into evidence Petitioners' Exhibits: 3 –12 (inclusive); 13 (pg. 401-427); 14-15 (inclusive); 17-19 (inclusive); 22-23 (inclusive); 25-27 (inclusive); 29 (pg. 755); 30-31 (inclusive); 32 (pg. 774-780) 34-35 (inclusive); 38 (inclusive); 40 (pg. 890-897, pg. 900-904, pg. 906-909, pg. 913-916, pg. 921-927); and 41 (pg. 939-948, pg. 951-986, pg. 1002-1012).³ This Hearings Officer also received into evidence Respondents' Exhibits: 1 – 4 (inclusive); 6 (pg. 216-287, pg. 293, pg. 404, pg. 408-413, pg. 456-490, pg. 501, pg. 529-531, pg. 670-689, pg. 717-719, pg. 743-752, pg. 868-874); 7 (pg. 986-1026);

³ See Hearings Officer Ex. 1 (Exhibit Tracking).

and 9 (pg. 1045-1058, pg. 1063-1232).⁴ This Hearings Officer entered the Exhibit Tracking Form, Ex. 1 (inclusive).

III. BACKGROUND

Student is a ____ old child with a disability. Student exhibits severe behavioral challenges. After attending a private placement for almost ____ years, Student was enrolled in a public school for approximately six (6) months. Petitioners are alleging multiple procedural and substantive FAPE violations by the Hawai'i Department of Education ("DOE") occurring during Student's enrollment in Public School. Parent 1 unilaterally placed Student back into Private Facility. Petitioners contend that they are entitled to tuition reimbursement as a result of the DOE failing to provide Student with a FAPE.

IV. ISSUES PRESENTED

The Complaint alleges that the IEP denies Student a Free Appropriate Public Education ("FAPE") according to Student's 2018 IEP's. The following issues were certified for determination:

1. Whether or not current data and/or evaluations for Student were considered in preparing Student's IEP's.
2. Whether or not Student's IEP's contained valid Present Levels of Academic Achievement and Functional Performance ("PLAAFP").
3. Whether or not Student's IEP adequately addressed the impact of Student's behavior on Student's education.
4. Whether or not the services and goals listed in Student's IEP meet Student's needs.
5. Whether or not Student's LRE was properly determined.

⁴ *Id.*

6. Whether or not the IEP team predetermined Student's educational placement at Private Facility.
7. Whether or not the DOE failed to implement Student's IEP.
8. Whether or not Parent was able to appropriately participate in the decision-making process.
9. Whether or not the DOE properly issued Prior Written Notice ("PWN") as required by the IDEA.

Although Petitioner's did not seek to amend the issues to be determined until after the impartial due process hearing was closed, the following issue was tried by express and implied consent.⁵

10. Whether or not the DOE failed to implement Student's (DATE) IEP, in regards to Student's required transition plan.⁶

V. FINDINGS OF FACT

Background of Student

1. Student was born in ____ on (DATE)⁷ to Parents who separated shortly after Student's birth.⁸

⁵ The 9th Circuit has established via case law that Rule 15 of the Federal Rules of Civil Procedure may be applied in impartial due process hearings governed by IDEA. Rule 15 F.R.C. provides that an issue "tried by the parties' express or implied consent ... must be treated in all respects as if raised in the pleadings." *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1196 (9th Cir., 2017). *See also; Board of Ed. of the Mamaroneck Union Free School Dist. v. A.D. and N.D.*, 118 LRP 42685 (2nd U.S. Circuit Court of Appeals affirmed a District Court decision that held that a New York district "opened the door" to a claim for lack of counseling services in the IEP of a high schooler with ADHD. The 2d Circuit found that while the student's parents didn't include counseling services in their due process claim, the district raised the issue in the due process hearings and the parents were allowed to respond).

⁶ During the hearing, numerous documents regarding the required transition plan required by Student's January 26, 2017, IEP were entered into the record and multiple witnesses were questioned by both parties regarding the specifics of the required transition plan. At no point during the hearing did Respondent's object to witnesses questioned regarding the specifics of the transition plan. Respondent's on direct examination explored the 2017 transition plan with multiple DOE witnesses. On October 16, 2018, this Hearings Officer reminded the parties that the 2017 IEP was not an issue raised in the Complaint. At that point, Petitioner was given an opportunity to assert that the transition plan was at issue, yet Parent 1 did not assert the claim. Respondent's conceded that the transition plan had been explored with previous witnesses and Respondent's wished to build upon the issue because the transition plan was "directly relevant to the DOE's defense". Although Respondent's claim that information regarding the transition plan was contextual, the abundance of evidence entered into the record and manner in which the witnesses were questioned, lead me to find that that Respondents litigated the issue of whether Student's transition plan required by the January 26, 2017 IEP was properly implemented. However, even if this claim was not litigated the DOE still failed to offer Petitioner's a FAPE in 2018.

⁷ Parties Stipulation; Parent 1's Testimony.

⁸ Father's Testimony.

2. From birth, Parent 2 was Student's primary caregiver. From the age of ____ until ____, Student would move between ____ and ____ multiple times with Parent 2.⁹
3. When Student was about ____-years-old Parent 2 decided Parent 2 was unable to care for Student.¹⁰ Parent 1 suddenly had primary care taking responsibilities of Student and Parent 1 was unfamiliar with Student's needs, as Parent 1 had limited if any contact with Student.¹¹
4. Parent 2 has had no contact with Student and Student has been negatively impacted by the loss of a caregiver.¹²
5. Parent 1 enrolled Student in Private Facility for about 6 weeks when Student was ____-years-old.¹³
6. Student then transferred to Previous Public School in December of 2013.¹⁴
7. After about six months, (April of 2014) Student again transferred to Private Facility for Student's educational placement. Student is also provided with Services at Private Facility, and paid for by insurance.¹⁵
8. Although Parent 1 retains legal custody of Student, Student has resided with the same caretaker's since, March, 2016 when Student was ____-years-old.¹⁶
9. Parent 1 is unable to care for Student on a daily basis, as Parent 1 has Parent 1's own physical and mental health impairments, and Parent 1 resides in a condominium complex that does not allow children.¹⁷

⁹ *Id.*; Petitioners' Ex. 13, p. 402.

¹⁰ Parent 1's Testimony.

¹¹ Respondent's Ex. 13, p. 402; Father's Testimony.

¹² Father's Testimony; Petitioners' Ex., p. 121; Petitioners' Ex. 13, p. 402.

¹³ Private Facility Administrator's Testimony.

¹⁴ Respondent's Ex. 9, p. 1076; *Id.*

¹⁵ Father's Testimony.

¹⁶ *Id.*; Petitioners' Ex. 13, p. 402.

¹⁷ Father's Testimony.

10. Parent 1 does not have control over Student¹⁸ and elopement is a major safety concern while Student is with Parent 1. Student doesn't stay close to Parent 1 when out in public and has gotten lost at various public locations, resulting in the need for police assistance.¹⁹
11. Parent 1's physical health prevent Parent 1 from ensuring Student's safety, as Parent 1 is unable to restrain or catch Student if Student runs away.²⁰

Student's Current Profile

12. Student is a ____-year-old child with a disability, who qualifies for special education and related services.²¹ Student would also qualify for special education and related services under another eligibility category,²² as Student's functioning is extremely low.²³
13. Student exhibits deficits in social and functional functions.²⁴
14. Student has difficulties with sensory reactivity and sensory regulation.²⁵
15. Student is not able to make independent choices, exhibit self-control or take responsibility when appropriate.²⁶
16. Student is unable to protect Student's physical well-being, prevent or respond to injuries and follow rules.²⁷

¹⁸ Private Facility Administrator's Testimony.

¹⁹ Parent 1's Testimony; Petitioners' Ex. 6.

²⁰ Parent 1's Testimony; Private Facility Administrator's Testimony; Petitioners' Ex. 3, p. 120.

²¹ Parties Stipulation.

²² Respondent's Ex. 3, p. 145.

²³ Parent 1's Testimony; Private Facility Administrator's Testimony; Petitioners' Ex. 3 p. 120.

²⁴ Petitioners' Ex. 3, p. 120.

²⁵ Parent 1's Testimony; Private Facility Administrator's Testimony; Petitioners' Ex. 3, p. 120.

²⁶ Respondent's Ex. 3, p. 145.

²⁷ Petitioners' Ex. 3, p. 18.

17. Student has numbness.²⁸
18. Although Student enjoys being social and does not display social withdrawal, Student is significantly impaired by Student's inability to socially interact.²⁹ Student is unable to initiate friendships, express and/or recognize emotions.³⁰ Student enjoys Student's peers and is very interested in others.³¹
19. Student has emotional attachment issues and has preferred people and non-preferred people.³² Student will not react positively to directives from non-preferred people.³³
20. Student must have consistency with staff members and establish a trusted relationship based on mutual respect before staff can establish instructional control over student.³⁴ Staff for student must be predictable and establish firm boundaries.³⁵ Student thrives when staff is consistent with responses to Student's behavior.³⁶
21. Student is quick and can disappear within seconds.³⁷ It is critical for staff to keep Student within close proximity.

²⁸ Private Facility Administrator's Testimony; Parent 1's Testimony.

²⁹ Petitioners' Ex. 13, p. 408; Parent 1's Testimony; Public School SPED Teacher 2 Testimony.

³⁰ *Id.*

³¹ *Id.*

³² Private Facility Administrator's Testimony; Parent 1's Testimony.

³³ *Id.*

³⁴ Private Facility Administrator's Testimony.

³⁵ *Id.*

³⁶ *Id.*; Private Facility Staff 1's Testimony.

³⁷ Parent 1's Testimony; Private Facility Administrator's Testimony; Petitioners' Ex. 8, p. 195.

22. Student needs a small learning environment with a small number of students to maintain regulation and be available for learning.³⁸ A low distraction educational environment is essential for Student to make progress.³⁹
23. Student has a high need for movement and needs frequent movement breaks throughout Student's day.⁴⁰
24. Student is not able to be tested directly because of Student's behavior and minimal language skills.⁴¹
25. Student can exhibit maladaptive behaviors that severely inhibit Student's ability to access learning in the classroom.⁴²

Negative Behavior Triggers and Responses

26. Transitioning between tasks, activities, or environments is extremely challenging for Student.⁴³ This includes, but is not limited to, bus rides to and from school, lunch time in the cafeteria, changes in activities, and exposure to different adults.⁴⁴ Student needs "to transition between preferred and non-preferred activities without engaging in noncompliance, aggression, property destruction, or elopement".⁴⁵
27. Student will exhibit negative behavior when Student is told "No" or denied access to an item.⁴⁶

³⁸ Petitioners' Ex. 3, p. 121.

³⁹ *Id.*

⁴⁰ Petitioners' Ex. 3, p. 120.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Petitioners' Ex. 13, p. 405.

⁴⁴ *Id.*

⁴⁵ Petitioners' Ex. 11, p. 270.

⁴⁶ *Id.*

28. When Student becomes dysregulated Student will not focus on tasks and will not remember what Student has previously learned.⁴⁷ Student needs to be regulated to benefit from academic lessons.⁴⁸
29. ("Services") is the primary methodology utilized by staff to control Student's behavior.⁴⁹ Services is based on the foundation that a person's behavior is shaped by the consequences received for that behavior.⁵⁰
30. Private Facility Staff 2's create Behavior Plan's, which identify specific behaviors, discovers the function (task avoidance, escape, etc.) of the behavior, and identify a precise methods of staff reaction for that behavior.⁵¹
31. Private Facility Staff (receive certification, are supervised by Private Facility Staff , and trained in Services.⁵² Private Facility Staff's are trained to implement a Student's Behavior Support Plan ("BSP") with fidelity.⁵³ Private Facility Staff collect Student behavior data, which is reported to the Private Facility Staff so the Private Facility Staff can continually update and modify the according to Student's behavior.⁵⁴
32. A paraprofessional is not certified as a Private Facility Staff 1 and may not be trained in Services.

⁴⁷ Private Facility Staff 1's Testimony.

⁴⁸ *Id.*

⁴⁹ Private Facility Staff 1's Testimony.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*; Private Facility Staff 2 Testimony.

Private Facility from April 2014 until December 2017

33. Student is familiar with Private Facility as Student's educational placement because Student has been attending Private Facility since April, 2014.⁵⁵ Private Facility Administrator and Private Facility Staff 1 care deeply about the health and welfare of Student.⁵⁶
34. Private Facility Administrator was qualified as an expert in educating children. Private Facility Administrator has a Master's Degree in Education: Curriculum and Instruction.⁵⁷ Private Facility Administrator has taught children for twelve (12) years.⁵⁸ Private Facility Administrator has completed the certification and is qualified to take the exam.⁵⁹ Private Facility Administrator has created Functional Behavior Assessments ("FBA") and BSP's.
35. On November 20, 2015, the ⁶⁰, created a Treatment Plan for Student which consisted of 27 functional and academic goals.⁶¹ This treatment plan was continually updated and Student's goal progress were tracked.⁶²

Behavior

36. Upon enrollment at Private Facility, Student exhibited severe maladaptive and dangerous behaviors, such as elopement and noncompliance.⁶³

⁵⁵ Petitioners' Ex. 13, p. 402; Private Facility Administrator's Testimony; Parent 1's Testimony.

⁵⁶ *Id.*; Parent 1's Testimony; Clinical Psychologist's Testimony.

⁵⁷ Petitioners' Ex. 34, p. 798; Private Facility Administrator's Testimony.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The Center is a highly respected organization in the treatment of Children. Private Facility Administrator's Testimony; Clinical Psychologist Testimony.

⁶¹ Petitioners' Ex. 11, p. 250.

⁶² Petitioners' Ex. 11, p. 250.

⁶³ On November 15, 2015, , Private Provider designed a Behavior Support Plan and Academic and Functional Skills Acquisition Plan. The plan targeted **the above behaviors**.

37. Six (6) weeks after Student's enrollment into Private Facility, Private Facility established instructional control over Student.⁶⁴
38. Instructional control is the result of a caregiver demonstrating consistency.⁶⁵ Consistency helps Student bond and trust the caregiver.⁶⁶ When instructional control occurs Student's noncompliance is sporadic.⁶⁷ Private Facility's new staff members are gradually faded in to work with Student, as opposed to a new staff member beginning to provide services for an entire day.⁶⁸
39. Multiple staff members at Private Facility had instructional control over Student.⁶⁹
40. When Student became upset at Private Facility, Student did not become aggressive to staff members.⁷⁰

Elopement

41. Private Facility defined elopement as Student walking or running away from the immediate environment without receiving permission.⁷¹
42. In November, 2015, Student would elope when exposed to transitions.⁷² If Student anticipated a transition, Student would attempt to leave at that time, instead of when the group was ready to transition, and Student became visibly frustrated.⁷³

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Private Facility Administrator's Testimony.

⁷⁰ *Id.*

⁷¹ Petitioners' Ex. 10, p. 241.

⁷² Petitioners' Ex 10, p. 240.

⁷³ *Id.*

43. By May, 2016, the instances and extent of Student's elopement had decreased.⁷⁴ If Student was presented with an open space, or if Student was placed with a caregiver who had not established instructional control, elopement was more probable.⁷⁵ Student was able to walk with the group and stay behind staff on a regular basis while in the community. However, Student still needed to work on consistency regarding elopement.⁷⁶ When Student was denied access to an area in the community, Student became visibly upset and would run about 20 to 30 feet away from the caregiver but stayed within eyesight of staff.⁷⁷
44. By December, 2017, Student's elopement was primarily exhibited during unstructured times outside of the classroom.⁷⁸ However, at most, Private Facility staff only allowed about 10-12 feet of space between them and Student.⁷⁹

Noncompliance

45. When Student turned Student's body away, looked away, put Student's head down, made Student's body go limp and/or pushed objects away, after Student was given a directive Student's was exhibiting noncompliance.⁸⁰
46. Student was and is fixated with ____ and ____.⁸¹ Upon Student beginning Private Facility, Student would pick up ____ and ____ without asking for permission and throw ____ or ____ in the ____ parking lot or middle of the sidewalk.⁸² By May, 2016, Student would ask for permission to pick up ____ or

⁷⁴ Petitioners' Ex 10, p. 224.

⁷⁵ Petitioners' Ex. 10, p. 241; Private Facility Administrator's Testimony.

⁷⁶ Petitioners' Ex. 10, p. 224.

⁷⁷ Petitioners' Ex. 10, p. 224.

⁷⁸ Petitioners' Ex. 8, p. 195.

⁷⁹ *Id.*

⁸⁰ Petitioners' Ex. 10, p. 241.

⁸¹ Private Facility Administrator's Testimony; Parent 1's Testimony.

⁸² Petitioners' Ex. 10, p. 224; Private Facility Administrator's Testimony.

_____ and become less upset when Student was not allowed to pick the objects up.⁸³

47. In December, 2017, Student exhibited noncompliant behavior at a frequency of about 10 times per week when Student was regulated.⁸⁴ However, Student's instances of noncompliance increased significantly if Student was dysregulated.⁸⁵ In December, 2017, when Student was being noncompliant, Student would refuse to work, participate, stare at Student's t-shirt or repeat "_____".⁸⁶
48. While attending Private Facility, Student would have good days and bad days.⁸⁷ When experiencing a bad day, Student would exhibit sporadic episodes of noncompliance, as opposed to exhibiting maladaptive behavior for the entire day.⁸⁸

BEHAVIOR

49. In November, 2015, Student would _____.⁸⁹ By December, 2017, Student's _____ was limited to situations when Student was presented with non-preferred work, new staff, or new situations.⁹⁰
50. When Student was regulated Student would _____ about two (2) times per month.⁹¹ However, if Student became dysregulated Student would _____ more often.⁹²

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Petitioners' Ex. 8, p. 195.

⁸⁷ Private Facility Administrator's Testimony.

⁸⁸ *Id.*

⁸⁹ Petitioners' Ex. 10, p. 243.

⁹⁰ Petitioners' Ex. 8, p. 195.

⁹¹ *Id.*

⁹² *Id.*

51. Student would not ____ directly at people, but at the ____ or opposite area.⁹³
52. Private Facility Administrator testified that Student never ____ while Student attended Private Facility and Private Facility had not tracked Student's elopement or yelling since 2015. However, Private Facility Administrator conceded during Private Facility Administrator's testimony that Private Facility Administrator was not entirely familiar with Student's specifics of data tracking, as the role as Private Facility Administrator did not require such familiarity.
53. Student data entitled: 1) "Initial Workshop Report"; 2) "Private Facility End of School Year Report"; and, Student's January 26, 2018, IEP indicate that Student did ____ at Private Facility and Private Facility had been tracking Student's elopement and yelling after 2015.
54. Private Facility Administrator's testimony regarding Student's ____ and elopement and yelling data tracking is found less credible than the specific information found in the reports indicated above.

Academics

55. Upon enrollment at Private Facility Student was basically non-verbal, mostly uttering ' ____ '.⁹⁴
56. By May, 2016, Student had made significant improvements in Student's ability to communicate⁹⁵, as Student could use three word sentences on a regular basis when asking for desired objects or requesting help.⁹⁶ Student's vocabulary had improved from using approximations and very basic words to multiple syllable

⁹³ Private Facility Administrator's Testimony; Petitioners' Ex. 8, p. 195.

⁹⁴ Private Facility Administrator's Testimony. Parent 1's Testimony.

⁹⁵ Private Facility Administrator's Testimony.

⁹⁶ Petitioners' Ex. 10, p. 225.

words in a sentence.⁹⁷ Student would request or respond yes, instead of attempting to grab for an item.⁹⁸ Student was also learning ____ to assist Student with communicating with others.⁹⁹

57. By December, 2017, Student could read simple sentences consisting of 1–4 words for up to 20 pages.¹⁰⁰ Student could focus on reading for up to 40 minutes.¹⁰¹
58. By December of 2017, Student was capable of focusing on academics for up to one hour or more if necessary.¹⁰²

Public School (December 11, 2017 - June 14, 2018)

59. On Friday, December 8, 2017, Student’s Parent 1 enrolled Student in Public School and Student began attending classes at Public School on Monday, December 11, 2017.¹⁰³
60. Public School is large.¹⁰⁴

Transition Plan

61. Student’s January 26, 2017, IEP,¹⁰⁵ outlined Student’s problem behavior, required a BSP and stated that transition plan to be developed if Student were to return to Public School.¹⁰⁶ The IEP also required that Student receive services from two Private Facility Staff during Student’s transition¹⁰⁷, stating that “Both

⁹⁷ Petitioners’ Ex. 10, p. 224.

⁹⁸ Petitioners’ Ex. 10, p. 224.

⁹⁹ Parent 1’s Testimony; Private Facility Administrator’s Testimony; Petitioners’ Ex. 7, p. 196.

¹⁰⁰ Private Facility Administrator’s Testimony; Petitioners Ex. 7, p. 196.

¹⁰¹ Petitioners’ Ex. 7, p. 196.

¹⁰² Petitioners’ Ex. 8, p. 195; DOE DES Testimony.

¹⁰³ Public School Principal’s Testimony; Parent 1’s Testimony.

¹⁰⁴ Public School Principal’ Testimony.

¹⁰⁵ The January 26, 2017, IEP was valid from January 26, 2017 until January 23, 2018. A new IEP was implemented for Student on January 24, 2018.

¹⁰⁶ Respondent’s Ex. 8, p. 211.

¹⁰⁷ According to Private Facility Administrator, Student’s transition to Public School should have taken about six weeks. DOE Provider 1 testified that Student’s transition should have taken 4-6 months.

positions are necessary during the transition period in order to address safety (noncompliance and elopement) issues.”¹⁰⁸

62. DOE Provider 2 created a Transition Plan. More specifically, DOE Provider 2 created a “Transition Behavior Program”, “Transition Schedule: Teaching Routines”, and “Transition Behavior Program Data Tracking” forms dated December 8, 2017.¹⁰⁹
63. DOE Provider 2 has a degree in Special Education: Mild and Moderate Disabilities and ____.¹¹⁰
64. The “Transition Behavior Program” focused on Student’s noncompliance, aggression, elopement and dropping to the floor.¹¹¹ The BSP allowed staff to restrain Student if the staff member was qualified in the Quality Behavior Systems training program.¹¹²
65. Public School Principal testified that Public School did not create a transition plan for Student because the transition plan was not developed *prior* to Student’s return to Public School.¹¹³ Public School Principal further stated that if a transition plan was not developed, then the IEP did not require Student to have the services of two Private Facility Staff.¹¹⁴
66. Public School Principal’s Testimony is in direct conflict with DOE Provider 2 credible testimony supported by the documents entered into the record. Public

¹⁰⁸ Respondent’s Ex. 8, p. 211.

¹⁰⁹ Petitioners’ Ex. 9, pp. 1045-1049.

¹¹⁰ Respondent’s Ex. 9, p. 1231; DOE Provider 2 Testimony.

¹¹¹ *Id.*

¹¹² DOE Provider 2 Testimony.

¹¹³ Public School Principal’s Testimony.

¹¹⁴ *Id.*

School Principal’s Testimony regarding the absence of transition plan is given no weight.

- 67. When Student transitioned to Public School Student was provided with two (2) staff, but only **one** of which was licensed.¹¹⁵
- 68. From December 12, 2017 until January 24, 2018, the “Transition BSP Data Tracking” was utilized to track Student’s appropriate and inappropriate behavior by environment.¹¹⁶ Student exhibited instances of negative behavior.¹¹⁷

Student’s Behavior

- 69. Most of Student’s days at Public School consisted of severe behavior, allowing Student to focus on academics for short, limited time periods in maladaptive behavior episodes.¹¹⁸
- 70. From January 29, 2018, through February 20, 2018, (23 days) Student’s data shows the following total of instances and daily instances of each negative behavior listed.¹¹⁹

	Yelling		Kicking	Hitting	_____	Dropping	Eloperment	Noncompliance	Aggression
Total	214	76	79	144	108	31	27	84	397
Avg/Day	14	5	5	10	7	2	2	6	27

¹¹⁵ Public School Principal Testimony; Parent 1’s Testimony; Private Facility Administrator’s Testimony.

¹¹⁶ Petitioners’ Ex. 25, pp. 506-626.

¹¹⁷ *Id.* Such as, December 13, 2017, Student attempted to elope multiple times, then became upset and started ____, hitting, kicking, and ____ before needing to be restrained by Public School staff.¹¹⁷

¹¹⁸ Communication log.

¹¹⁹ Petitioners’ Ex. 13, p. 424.

Elopement

71. Student's "Transition Behavior Program Data Tracking" form used January – April 14, 2018, define elopement was defined as leaving Student's approved area.¹²⁰
72. While at Public School, Student would leave Student's immediate area and attempt to run from Student's assigned staff multiple times per week.¹²¹

Noncompliance

73. Student's "Transition Behavior Program Data Tracking" form used January – April 14, 2018, defined noncompliance as specifically defined as the refusal to participate in a demand or activity.¹²²
74. Student's Behavioral Support Plan dated May 2, 2018, Student exhibited noncompliance multiple times per school day.¹²³

[BEHAVIOR]

75. Student's "Transition Behavior Program Data Tracking" form used January – April 14, 2018, defines ____.¹²⁴
76. Student would ____ multiple times per week while Student was at Public School.¹²⁵

[BEHAVIOR]

77. Student's "Transition Behavior Program Data Tracking" form used January – April 14, 2018, define ____ as.¹²⁶

¹²⁰ Respondent's Ex. 4, p. 177; Petitioners Ex. 10, p. 241.

¹²¹ Petitioners' Ex. 15, p. 445.

¹²² Respondent's Ex. 4, p. 177; Petitioners Ex. 10, p. 241.

¹²³ Parent 1's Testimony; Private Facility Administrator's Testimony; Petitioners' Ex. 15, p. 445.

¹²⁴ Respondent's Ex. 4, p. 177; Petitioners' Ex. 10, p. 241.

¹²⁵ Petitioners' Ex. 15, p. 445.

¹²⁶ Respondent's Ex. 4, p. 177; Petitioners Ex. 10, p. 241

78. Student would ____ multiple times per week.¹²⁷

[BEHAVIOR]

79. Student's "Transition Behavior Program Data Tracking" form used January – April 14, 2018, define ____ as.¹²⁸

80. Student ____ multiple times per week while attending Student's Public School.¹²⁹

[BEHAVIOR]

81. Student's "Transition Behavior Program Data Tracking" form used January – April 14, 2018, define ____ as.¹³⁰

82. Student would ____ daily at varying rates during this time.¹³¹

[BEHAVIOR]

83. While at Public School, Student could be aggressive. Aggression is the sum of behaviors ____, ____, ____, and ____.¹³²

[BEHAVIOR]

84. Student's "Transition Behavior Program Data Tracking" form used January – April 14, 2018 defined yelling as loud vocal outburst.¹³³

85. Student would yell multiple times per day.¹³⁴ The outburst were intense and loud enough to hurt the listeners.¹³⁵

¹²⁷ Petitioners' Ex. 15, p. 445.

¹²⁸ Respondent's Ex. 4; Petitioners Ex. 10, p. 241.

¹²⁹ Respondent's Ex. 4; Petitioners Ex. 10, p. 241.

¹³⁰ Respondent's Ex. 4; Petitioners Ex. 10, p. 241.

¹³¹ Petitioners' Ex. 15, p. 445.

¹³² Respondent's Ex. 4; Petitioners' Ex. 10, p. 241.

¹³³ *Id.*

¹³⁴ Petitioners' Ex. 15, p. 445.

¹³⁵ *Id.*

Dropping

86. On or about February 1, 2018, the behavior labeled “Dropping” was added to Student’s “Transition Behavior Program Data Tracking” form.¹³⁶ Student would drop to the floor when Student was upset.¹³⁷

Data Issues

87. From December 12, 2017, until January 24, 2018, the “Transition Behavior Program Data Tracking” form was utilized to track Student’s appropriate and inappropriate behavior by venue.¹³⁸
88. On January 25, 2018, Student’s “Transition Behavior Program Data Tracking” was replaced with a new data form measuring yelling, dropping, _____, noncompliance, _____, _____, _____, and elopement.¹³⁹
89. From January 29, 2018, through February 20, 2018, (23 days) Student’s data is underreported as to actual rates of behavior because Student did not have one person dedicated to collecting data during this time frame.¹⁴⁰
90. Student’s January 25, 2018, data tracking form used a symbol of a box to signify six or more instances of a certain behavior.¹⁴¹ The behavior could occur 6 times or 20 times. One box would be drawn on the data tracking form and the box counted as 6 instances.¹⁴² This box occurred from February 1, 2018 until April 14, 2018.¹⁴³

¹³⁶ Petitioners’ Ex. 25, p. 512.

¹³⁷ *Id.*

¹³⁸ Petitioners’ Ex. 25, pp. 506-626.

¹³⁹ Petitioners’ Ex 25 p. 504.

¹⁴⁰ Petitioners’ Ex. 13, pp. 424-425.

¹⁴¹ Petitioners’ Ex. 25, pp. 510-626.

¹⁴² *Id.*

¹⁴³ *Id.*

91. From April 16, 2018 until June 15, 2018, the definitions of non-compliance, _____, _____ and _____ were altered.¹⁴⁴ _____, _____ and _____, were defined more specifically, requiring that Student _____¹⁴⁵ Student's **attempts** at _____, _____, or _____ were no longer tracked on a data form.¹⁴⁶
92. The definition of noncompliance was also defined in more specificity, requiring that Student voluntarily move from where Student was delivered, the refusal to participate in a demand or activity.¹⁴⁷
93. An accurate comparison of Student's behavioral data cannot be completed. Behavioral progress cannot be established as the definitions no longer included attempts and symbols were used to determine 6 or more instances of an event.

Academics

94. Student's goals were tied to common core standards, and broken down to meet Student's needs.¹⁴⁸
95. The more demanding a task, the less time Student is able to focus.¹⁴⁹
96. Overall, Student could attend to a task for 10–30 minutes.¹⁵⁰ If Student was dysregulated, then Student could not focus on an academic task for more than 10 minutes.¹⁵¹

¹⁴⁴ Petitioners' Ex. 26, p. 627

¹⁴⁵ *Id.* Private Facility Staff 2's Testimony.

¹⁴⁶ *Id.*

¹⁴⁷ Petitioners' Ex. 26, p. 627

¹⁴⁸ Public School Principal Testimony.

¹⁴⁹ Care Coordinator Testimony.

¹⁵⁰ Respondents Ex. 7, p. 1021.

¹⁵¹ *Id.*

97. Student could focus on Student’s reading program for up to 30 minutes if provided with multiple breaks.¹⁵² However, typically, Student would focus for about 20 minutes during Student’s reading program.¹⁵³

Timeline of Events at Elementary School

December

98. Student’s classroom does not have restroom in the classroom, a transition in location was required.¹⁵⁴

January

99. On January 24, 2018, Parent 1, Private Facility Administrator, Private Facility Staff 2, Public School Principal, and other members of Student’s IEP team met and a new IEP was implemented.¹⁵⁵ The IEP team discussed Student’s Present Level of Academic and Functional Performance (“PLAAFP”), Goals, and Services, among other things.¹⁵⁶
100. Student’s IEP required that Student receive services of: two staff per day (1 certified); 24 hours of services per month; and a BSP.¹⁵⁷
101. Student was also to have a daily communication log between Public School and Parent/Caregivers.¹⁵⁸ Student’s communication log was missing for four days (Jan 29–Feb 1).¹⁵⁹

¹⁵² Care Coordinator Testimony.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Petitioners’ Ex. 11, pp. 267-291.

¹⁵⁶ Petitioners’ Ex. 11 p. 267.

¹⁵⁷ Petitioners’ Ex. 11, p. 286.

¹⁵⁸ Petitioners’ Ex. 11, p. 286.

¹⁵⁹ Respondent’s Ex. 6, p. 231.

102. Student's LRE was determined as a special education setting for all academics. Student would be with non-disabled peers for recess, lunch, assemblies, _____, music, field trips, P.E., and all other school activities, as appropriate.¹⁶⁰
103. During Student's January 26, 2018, IEP meeting, the team decided that a "formal Functional Behavioral Assessment was necessary to establish behavioral, educational and counseling programs for [Student]". The FBA will better enable [Student's] IEP team in establishing appropriate goals for [Student].¹⁶¹

February

104. On February 12, 2018, Student's Public School Special Education Teacher requested that DOE Provider 2 create an Emergency BSP for Student as DOE Provider 2 was concerned because Student's current IEP/BSP failed to address how to handle Student's outbursts and elopement issues.¹⁶²
105. Student's DOE Provider 2 expressed that a FBA had to be created first, then a BSP would be created from the results of the FBA.¹⁶³
106. SPED Teacher 1 stated "this is a huge open campus and when [Student] gets mad, in order to keep Student and the other kids safe Student needs to be escorted out".¹⁶⁴ And SPED Teacher 1 did not possess certification from Quality Behavior Systems allowing SPED Teacher 1 to restrain Student if Student _____.¹⁶⁵
107. On February 20, 2018, Student's Public School Special Education Teacher notified Public School Principal that Public School Special Education Teacher

¹⁶⁰ Petitioners' Ex. 11, p. 286.

¹⁶¹ Petitioners Ex. 11, p. 292.

¹⁶² Respondent's Ex. 6, p. 402.

¹⁶³ Respondent's Ex. 6, p. 402

¹⁶⁴ Respondent's Ex. 6, p. 402.

¹⁶⁵ Public School Principal Testimony; Behavioral Health Specialist Testimony.

feared Student would elope and Public School Special Education Teacher could not take Student to the cafeteria or outside until Public School Special Education Teacher was provided with an Emergency BSP that allowed Public School Special Education Teacher to restrain Student.¹⁶⁶

108. On February 20, 2018, BHS created and implemented an Emergency BSP, which noted “This is an **Emergency Behavior Plan**, not based on an FBA, not meant to be permanent, and must be updated once the FBA is conducted”.¹⁶⁷ The Emergency BSP asserted that when Student became aggressive staff should distract Student, remove items which could be thrown, and “have a ____ available at all times so that you can block aggression...”¹⁶⁸ If Student were to become aggressive, elope or drop to the floor Staff could tell Student “all done” and show Student a picture of “____” in which Student would be placed, if Student could not calm down.¹⁶⁹ Once in ____, Staff was to remove all items and wait until Student stood in Student’s “____”.¹⁷⁰ The Emergency BSP also provided that adults could use district approved safety protocols to block Student from injuring ____self of others.¹⁷¹
109. BHS testified that BHS mislabeled the document, as BHS was using the template from an Emergency BSP, and the document should be called an Interim Behavior Support Plan.¹⁷²

¹⁶⁶ Respondent’s Ex. 6, p. 404.

¹⁶⁷ Respondent’s ex. 9, pp. 1053-1054.

¹⁶⁸ Respondent’s Ex. 9, p. 1054.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Public School BHS’s Testimony.

110. BHS sent an e-mail to Student’s Previous Care Coordinator on February 21, 2018, attaching the “**Emergency**” BSP for Student’s file.¹⁷³
111. Although Public School BHS testified that Public School BHS incorrectly mislabeled the Emergency BSP, Public School BHS’s testimony is given no weight as it is direct contradiction with the Emergency BSP label, the document description and BHS’s e-mail.
112. Although Public School Principal testified that the date on the Emergency BSP could have been mistaken date, Public School Principal’s testimony is not credible as it is contrary to the weight of the evidence.
113. The Emergency BSP was used to support staff for managing Student’s behavior from February 20, 2018, until May 1, 2018.¹⁷⁴
114. On February 20, 2018, Student’s was ____ and ____ at ____ and caused ____.¹⁷⁵ Student’s providers offered a ____ but Student refused.
115. On February 26, 2018, Student became dysregulated and _____. Student had a ____ and ____.¹⁷⁶
116. On February 28, 2018, at about 9:15 a.m. Student became upset after a transition.¹⁷⁷ Student yelled, knocked over books and a chair then attempted to elope.¹⁷⁸ SPED Teacher 1 repeatedly told Student “you need to leave” and “you’re out of here” while Student was escalated.¹⁷⁹ Provider reminded SPED Teacher 1 that the BSP required a specific strategy before provider could remove

¹⁷³ Respondent’s Ex. 6, p. 410-413.

¹⁷⁴ Respondent’s Ex. 6, pp. 410-413.

¹⁷⁵ Petitioners’ Ex. 23 p. 492.

¹⁷⁶ Petitioners’ Ex. 23 p. 411.

¹⁷⁷ Petitioners’ Ex. 12, p. 400.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

Student from the room.¹⁸⁰ Student was deescalated, choosing to stay in the room before becoming upset again.¹⁸¹ Student yelled and knocked over a chair.¹⁸² SPED Teacher 1 firmly stated that Student needed to leave the room.¹⁸³ Student was escorted out of the room and ____ .¹⁸⁴ SPED Teacher 1 approached Student and Student ____ .¹⁸⁵ SPED Teacher 1 then yelled “No”, grabbing Student’s ____ .¹⁸⁶ Student spent the remainder of the day in a separate room.¹⁸⁷

March

117. On March 2, 2018, Student came to school with ____ .¹⁸⁸ Student was asked if Student needed to see the school nurse and Student refused.¹⁸⁹
118. On March 5, 2018, Student had ____ and declined a ____ .¹⁹⁰
119. On March 12, 2018, while Student was at Private Facility for afterschool Services, Student injured a new Private Facility Staff when Student ____ .¹⁹¹ In the four (4) years Student had attended Private Facility, Student had never hurt another person.¹⁹²
120. Student became increasingly non-compliant during March and April, 2018 and was exhibiting new negative behaviors such as aggression and ____ .¹⁹³

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Petitioners’ Ex. 23, p. 490.

¹⁸⁹ *Id.*

¹⁹⁰ Petitioners’ Ex. 23, p. 489.

¹⁹¹ Respondent’s Ex. 6, p. 898.

¹⁹² *Id.*

¹⁹³ Private Facility Staff 1’s testimony.

121. Private Facility Staff 1 would take Student overnight at times during the months of March and April to drill compliance with Student, as Student's caretaker was stating Student's caretaker could no longer handle Student's behavior while Student was in caretaker's home.¹⁹⁴
122. Parent 1, Private Facility Administrator, DOE Provider 1, Public School Principal, and other members of Student's IEP team met on March 15, 2018 to discuss the results Student's FBA.¹⁹⁵
123. DOE Provider 1 ____.¹⁹⁶ DOE Provider 1 received Certification in 2007 then became licensed in Hawai'i in 2016.¹⁹⁷ DOE Provider 1 contracts with Public School, serves as DOE Provider 1 and created the FBA.
124. The 27-page FBA was thorough and comprehensive.¹⁹⁸ The report recommended that Student continue a 2:1 level of support for Student, with at one individual being certified, due to Private Facility Staff 1's specific training in Therapy and Student's high rates of challenging behavior.¹⁹⁹ The report further stated that the IEP team "should have the option of both individuals being certified".²⁰⁰
125. The report recommended that Public School, develop, train, and implement a BSP which addressed responses to specific problem behaviors, as well as, how to teach and shape appropriate replacement behavior.²⁰¹ Public School should, train all individuals working with Student how to interact according to the Plan.²⁰²

¹⁹⁴ *Id.*

¹⁹⁵ Petitioners' Ex. 11, p. 33

¹⁹⁶ DOE Provider 1 Testimony.

¹⁹⁷ DOE Provider 1 Testimony; Respondent's Ex. 9, pp. 1228-1229.

¹⁹⁸ Respondent's Ex. 4, pp. 174-200.

¹⁹⁹ *Id.*

²⁰⁰ Petitioners' Ex. 13, p. 425.

²⁰¹ *Id.*

²⁰² *Id.*

126. The report recommended that Public School consider an LRE which minimizes transitions and overstimulation.²⁰³
127. The report recommended that Public School continue to work with staff from Private Facility because of Private Facility’s familiarity and ongoing relationship with Student.²⁰⁴
128. During the March 15, 2018, IEP team meeting, Private Facility Administrator advocated that Private Facility should provide a Private Facility Staff 1 (who is familiar with and has instructional control over Student) to provide services at Public School, in an effort to assist with Student’s high rates of challenging behavior.²⁰⁵
129. Student’s LRE on March 15, 2018 was more restrictive than the LRE in January, stating that Student “will receive all academics in Special Ed. Student may participate with Student’s non-disabled peers for PE and _____ if Student chooses.²⁰⁶ At this time Student does not go out for _____, as it is too stimulating for Student”.²⁰⁷
130. The LRE was more restrictive because “[t]he team discussed the continuum of placement options and determined [Student’s] program can be provided in a special education setting on a **public school campus** which is less restrictive than a private special school. This will allow for greater access to typically developing

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Private Facility Administrator’s Testimony.

²⁰⁶ Respondent’s Ex. 3, p. 97.

²⁰⁷ *Id.*

peers while Student still receives all necessary individualized and specialized services and supports”.²⁰⁸

131. On March 16, 2018, Public School had determined that Private Facility Staff 1 would provide services for Student.²⁰⁹
132. On March 16, 2018, Parent 1 wrote a letter to Public School Principal requesting that Student be returned to Private Facility, as Public School did not have Student’s Behavior under control. Parent 1 cited opposition to Student’s access to other children, the _____ used as a _____, and amount of speech therapy time allotted to Student.²¹⁰

April

133. Student’s communication log was missing for eleven (11) school days (April 4–April 18).²¹¹ Public School created a new communication folder on April, 19, 2018.²¹²
134. In April, 2018, Student’s caretakers reported that Student was more challenging at home and Caretaker was experiencing additional stress in caring for Student.²¹³
135. From April to June of 2018, Student participated in _____ which consisted of two general education peers coming to Student’s room to interact with Student during lunch.²¹⁴ Student had not gone to _____ since February, 2018.²¹⁵

²⁰⁸ Respondent’s Ex. 3, p. 101.

²⁰⁹ Respondent’s Ex. 6, p. 512.

²¹⁰ Respondents Ex. 6, p. 516.

²¹¹ Respondent’s Ex. 6, p. 231.

²¹² Respondent’s Ex. 6, p. 258.

²¹³ Respondent’s Ex. 13, p. 402; Parent 1’s Testimony.

²¹⁴ Care Coordinator’s Testimony; DOE BHS’s Testimony; Public School Principal’s Testimony.

²¹⁵ FOF 125.

136. On April, 17, 2018, Student’s IEP team (including Parent and Private Facility Administrator) met to discuss Parent 1’s March 16, 2018 letter. The IEP team decided that Student would receive services from two (2) Private Facility Staff and that Public School continued to be Student’s LRE because the “Public School” could offer access to general education peers for social engagement and extra-curricular programs.²¹⁶
137. In mid-April, Student was observed by staff in the School ____ alone, attempting to ____ at _____. The ____ was large enough to _____.²¹⁷
138. Before Student was in _____, Student interrupted SPED Teacher 2’s classroom.²¹⁸ SPED Teacher 2 identified that Student had one instructional support person who was approximately 20 feet away from Student.²¹⁹ SPED Teacher 2 notified Public School’s Vice Principal about this event via e-mail.²²⁰
139. DOE Provider 1 testified that DOE Provider 1 was about 20 feet away from Student the day Student interrupted SPED Teacher 2’s classroom and that Student did not _____.
140. Although DOE Provider 1 testified that DOE Provider 1 was 20 feet away from Student, I find that DOE Provider 1 was not 20 feet away when Student attempted to _____. DOE Provider 1 is aware of Student’s fixation with _____ and it is not likely that DOE Provider 1 would allow Student to _____. DOE Provider 1 was not near Student when staff reported that Student _____.

²¹⁶ Petitioners’ Ex. 10, p. 363; Petitioners’ Ex. 11, p. 371.

²¹⁷ Petitioners’ Ex. 41, p. 951.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

May

141. Parent 1, Private Facility Administrator, Private Facility Staff 1, Private Facility CEO, and other IEP team members were in attendance for Student's May 3, 2018 IEP.²²¹ Student's BSP was based on his FBA and ultimately completed on May 3, 2018.²²² The BSP was a nine-page document; that included: behavioral basics, behavioral do's and don'ts, setting event's and detailed staff response instructions for noncompliance, yelling, _____, elopement, _____.²²³
142. Public School staff working with Student was continually changing. Special Education Teacher left in March/ April and replaced by a substitute SPED Teacher, Student's Care Coordinator served as Student's SPED Teacher for Extended School Year Services in March and June, and various staff were rotated in until DOE Provider 1's company began providing services.²²⁴

June

143. On June 14, 2018, Student was _____.²²⁵ A note was made of Student's _____ and documented Student's communication log.²²⁶
144. On June 14, 2018, at 7:09 p.m. Parent 1 took Student to the Emergency Room due to Parent 1's concern about Student's _____ and because Parent 1 previously had contact with Child Protective Services and was instructed to come to the Emergency Room when Student gets hurt.²²⁷

²²¹ Petitioners' Ex. 11, p. 373.

²²² Petitioners' Ex. 11, p. 395.

²²³ *Id.*

²²⁴ Public School Principal Testimony; Care Coordinator Testimony; Private Facility Staff 1 Testimony.

²²⁵ Private Facility Administrator's Testimony; Parent 1's Testimony; Petitioners' Ex. 38, pp. 853-856

²²⁶ Respondent's Ex. 6, pp. 868-874

²²⁷ Petitioners' Ex. 18, p. 457.

145. Student was provided with an antibiotic, released from the Emergency Room and no other medical treatment was necessary for Student's _____.²²⁸
146. During Students time at Public School, Student took off Student's ____ type shoes when Student entered the classroom and Student did not always put the shoes back on wear Student's while outside, resulting in Student's feet to be extremely _____.²²⁹
147. Care Coordinator and DOE Provider 1 testified that based on their personal knowledge Student always wore shoes outside.²³⁰
148. However, Care Coordinator and Public School were not always with Student when Student was on the Public School Campus.²³¹

Private Facility (June 14, 2018 until Present)

149. On June 15, 2018, Student returned to Private Facility.²³²
150. About five (5) students and one (1) neuro-typical peer attend Private Facility.²³³
151. The number of staff at Private Facility staff is significantly smaller than the number of staff at Public Facility.²³⁴ Student is familiar with staff at Private Facility and all staff working with staff may be trained regarding Student's Behavior Program.²³⁵
152. Private Facility is spatially small in size and does not demand many transitions throughout Student's day.²³⁶

²²⁸ Petitioners' Ex. 18, p. 458.

²²⁹ Petitioners' Ex. 38, pp. 858-860, Private Facility Staff 1 Testimony.

²³⁰ Care Coordinator Testimony; DOE Provider 1 Testimony.

²³¹ *Id.*

²³² Public School Principal; Parent 1's Testimony; Private Facility Administrator.

²³³ *Id.*

²³⁴ Private Facility Administrator Testimony

²³⁵ Private Facility Staff 1 Testimony.

²³⁶ Private Facility Staff 1 Testimony, Private Facility Administrator Testimony.

153. Private Facility plans activities in the community to expose students to non-disabled children.²³⁷

Student's Behavior

154. From June to August, Private Facility Staff 1 primarily focused on Student's behavior, drilling compliance.²³⁸

155. Student's Program includes a Staff and Private Facility Staff 1 at Private Facility. Private Facility Staff 2 is a licensed Staff in the State of Hawai'i as of July, 31, 2016.²³⁹

156. Student's behavior has gradually improved and Private Facility Staff 1 re-established instructional control by August of 2018.²⁴⁰

157. Private Facility Staff 1 regained instructional control by being consistent with Private Facility Staff 1 reactions to Student's behavior.²⁴¹ Student had to unlearn aggressive behavior such as _____.²⁴² As of August 2018, Student does not become aggressive, ____ on a weekly basis.²⁴³

158. Student may be non-compliant with new staff, therefore new staff are faded in to Student's program in order to generalize Student's compliance with unfamiliar staff.²⁴⁴

159. Parent 1 has noted improved compliance when Parent 1 is with Student.²⁴⁵

²³⁷ Private Facility Staff 1 Testimony.

²³⁸ *Id.*

²³⁹ Petitioners' Ex. 34, p. 785.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

160. Compliance with adults that Student is not familiar with is a continual goal.²⁴⁶

161. Private Facility Administrator has the ability to implement Student's behavior plan with fidelity.²⁴⁷

Academic's Behavior

162. Student has both Functional and Academic goals which Student works on at Private Facility.²⁴⁸

163. As of August of 2018, Student had met 34 of 39 benchmark goals listed in the May 3, 2018 IEP.²⁴⁹

164. Prior to Private Facility in June, Student was not able to independently write most letters of the alphabet and is now able to write most letters of the alphabet.²⁵⁰ Student can also spell Student's own name now.²⁵¹

165. Private Facility works on safety goals with Student such as: asking for help if ____ or what to do in a ____.²⁵²

166. Student is learning to articulate sentences with 5-6 words with intelligibility so others may understand Student.²⁵³

167. Student is learning to perform simple math.²⁵⁴

168. Although Clinical Psychologist recommended that it was in Student's "best interest" to be placed at Private Facility over Public School, Clinical Psychologist's report and testimony regarding Student's placement are given little

²⁴⁶ *Id.*

²⁴⁷ Private Facility Administrator Testimony.

²⁴⁸ *Id.*

²⁴⁹ Petitioners' Ex. 35, p. 814

²⁵⁰ Private Facility Staff 1 Testimony.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Private Facility Staff 1 Testimony.

²⁵⁴ *Id.*

to no weight. It is unclear what precisely Clinical Psychologist relied upon, as Clinical Psychologist broadly indicated that Clinical Psychologist had performed a “review of documents from the school” and a review of “previous reports”. Clinical Psychologist espoused concerns over Student’s lack of goals at Public School but conceded that Clinical Psychologist had not reviewed Student’s individualized education program from Public School. The IEP contains Student’s present levels of education, goals, services, LRE, and other significant material about the Student.

VI. CONCLUSIONS OF LAW

I. IDEA OVERVIEW

The Individuals with Disabilities Education Act (“IDEA”) is a comprehensive educational scheme that offers States federal funds to assist in educating children with disabilities.²⁵⁵ “In exchange for the funds, a State pledges to comply with a number of statutory conditions.” All eligible children must be provided a “free appropriate public education” or FAPE.²⁵⁶

A FAPE provides eligible students with both, special education and related services.²⁵⁷ 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.²⁵⁸ The IDEA requires, that the Hawai‘i Department of Education evaluate the student and determine whether the student is eligible for special education; and if

²⁵⁵ *Endrew F. ex rel. Joseph F. vs. Douglas County School Dist.* 137 S. Ct. 988. *Honig v. Doe*, 484 U.S. 305, 310 (1988)

²⁵⁶ *Endrew F.* at 993.

²⁵⁷ H.A.R. §8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

²⁵⁸ *Id.*

that student is eligible, the DOE must formulate and implement an Individualized Education Plan (“IEP”) for the student.²⁵⁹

The IEP is “the centerpiece of the statute’s education delivery system for disabled children”,²⁶⁰ it is the written document memorializing the collaborative effort between parents, teachers, and school staff to develop an educational plan for a student with a disability.²⁶¹ The IEP describes the child’s individual needs and documents the proper placement and services designed to meet those unique needs.²⁶² The IEP is the means by which special education and related services are “tailored to the unique needs” of a particular child.²⁶³

When Parents and the school disagree on whether or not a child is being provided with a FAPE, the IDEA provides procedural safeguards to resolve the dispute.²⁶⁴ Parents of a disabled child who claim violations of the IDEA can file a complaint with a Due Process Hearings Officer under 20 U.S.C. § 1415(b)(6)(A)”.²⁶⁵

²⁵⁹ *Dep’t of Educ. of Hawaii v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Haw. 2016).

²⁶⁰ *Honig v. Doe*, 484 U.S. 305, 311 (1988)

²⁶¹ §§ 1414.

²⁶² *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

²⁶³ *Andrew F. ex rel. Joseph F. vs. Douglas County School Dist.* 137 S. Ct. 988 (citing *Rowley*, 458, U.S., at 181,102 S.Ct. 3034.)

²⁶⁴ 20 U.S.C. §§ 1415(a), (b)–(h).

²⁶⁵ *J. G. by & through Greenberg v. Hawaii, Dep’t of Educ.*, No. CV 17-00503 DKW-KSC, 2018 WL 3744015, at *4 (D. Haw. Aug. 7, 2018) quoting *Hopewell Valley Reg’l Bd. of Educ. v. J.R.*, 2016 WL 1761991, *3 (D.N.J. May 3, 2016) (citing *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 257 (3d Cir. 2013)).

II. ROWLEY FAPE STANDARD²⁶⁶

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (1) whether the DOE complied with the procedures set forth in the IDEA; and (2) whether the student's IEP is reasonably calculated to enable the student to receive educational benefit.²⁶⁷ "A state must meet both requirements to comply with the obligations of the IDEA".²⁶⁸

Procedural errors alone do not constitute a denial of FAPE.²⁶⁹ A Hearings Officer may find a FAPE violation only if the procedural inadequacies:

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or
- (iii) Caused the student a deprivation of educational benefit.²⁷⁰

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.²⁷¹

²⁶⁶ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982).

²⁶⁷ *Rowley*, 458 U.S. at 206-7.

²⁶⁸ *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013) (quoting *Rowley*). See also *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

²⁶⁹ *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008).

²⁷⁰ 34 C.F.R §300.513.

²⁷¹ *Id.*

VII. DISCUSSION

1. Student's January 26, March 14, April 17, and May 3, 2018, IEP's were based upon proper evaluation.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,²⁷² establishes annual goals related to those needs,²⁷³ and provides appropriate specialized instruction and related services.²⁷⁴ An evaluation requires a variety of assessment tools to gather relevant functional, developmental, and academic information about the child, including information provided by the parent.²⁷⁵ A student must be assessed in all areas related to the suspected disability, including if appropriate, social and emotional status.²⁷⁶ After the data is reviewed, the DOE must, with the parent's input, identify what additional data is needed.²⁷⁷ Ultimately, the DOE must ensure that the evaluation is comprehensive, in order to identify all of the student's special education and related service needs.²⁷⁸

Petitioners allege that the Public School did not possess current data and or assessments upon which a valid IEP could be prepared for Student, claiming that Public School was not making a record of incidents, such as Student's injuries and behaviors and because of this lack of current data, the IEP did not contain appropriate goals for Student.

Student enrolled in Public School on December 8, 2017, and began attending classes on Monday, December 11, 2017.²⁷⁹ Public School was fully aware that Student's maladaptive

²⁷² 34 C.F.R § 300.320(a)(1).

²⁷³ 34 C.F.R § 300.320(a)(2).

²⁷⁴ 34 C.F.R § 300.320(a)(4).

²⁷⁵ See § 8-60-36; 34 CFR § 300.304.

²⁷⁶ See H.A.R. § 8-60-36; 34 CFR § 300.304.

²⁷⁷ *Id.*

²⁷⁸ See H.A.R. § 8-60-36; 34 CFR § 300.304.

²⁷⁹ FOF 59.

behavior's created a safety risk for Student and others.²⁸⁰ Student required a BSP to alleviate challenging behavior.²⁸¹ During Student's January 26, 2018, IEP meeting, the team decided that a "formal Functional Behavioral Assessment was necessary to establish behavioral, educational and counseling programs".²⁸² The IEP team believed the FBA will enable them to establish more appropriate goals for Student.²⁸³ The FBA was completed on March 14, 2018, and discussed during Student's March 15, 2018, IEP meeting.²⁸⁴ A BSP was created from the results of the thorough FBA on May 3, 2018.²⁸⁵

Student's IEP's accurately identify Student's needs and behavioral challenges. Petitioner's failed to identify any assessment that Student required and conceded they were not looking for an assessment, but the award of a specific placement. The nature of Petitioners claim, is not one of evaluation, but of a failure to implement proper data collection measures.²⁸⁶ Petitioners have failed to prove by a preponderance of the evidence that Student's 2018 IEP's were based upon an improper evaluation of Student.

2. Student's January 26, 2018, March 14, 2018, April 17, 2018, and May 3, 2018 IEP's contained valid Present Levels of Academic Achievement and Functional Performance.

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").²⁸⁷ The PLAAFP is the starting

²⁸⁰ FOF 61.

²⁸¹ *Id.*

²⁸² FOF 99, 103.

²⁸³ *Id.*

²⁸⁴ FOF 122-132.

²⁸⁵ FOF 141.

²⁸⁶ See Failure to Implement, Section VIII p. 53.

²⁸⁷ See 34 C.F.R. § 300.320 (a)(1)-(3).

point for determining annual goals.²⁸⁸ 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.²⁸⁹ Without a baseline of current performance, it is difficult to draft measurable and relevant annual goals,²⁹⁰ and to measure future progress.

Parent 1 and Private Facility Administrator attended and participated in Student's January 26, 2018, March 14, 2018, April 17, 2018, and May 3, 2018 IEP meetings.²⁹¹ Private Facility Administrator is and was familiar with Student's current level of functioning as Student had attended Private Facility for over three years prior to Student's enrollment in Public School.²⁹² There was no documentation or testimony that Parent 1 or Private Facility Administrator objected to Student's PLAAFP's, in fact the IEP's document Parent 1's concerns.²⁹³ Additionally, Parent 1 wrote a letter to Public School Principal and DOE DES, where Parent 1 specifically identified issues Parent 1 had with the IEP, at no point did Parent 1 indicate that the PLAAFP's were an inadequate reflection of Student's abilities.²⁹⁴ If Parent 1 was concerned that Student's PLAAFP's were inaccurate, it is likely that those concerns would be espoused in the letter.²⁹⁵ Petitioners have failed to prove that Student's 2018 IEP's contained invalid PLAAFP's.

²⁸⁸ *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).

²⁸⁹ *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).

²⁹⁰ *Id.*

²⁹¹ FOF 99,122-132,136,141.

²⁹² FOF 33-58.

²⁹³ FOF 99,122-132,136,141.

²⁹⁴ FOF 132.

²⁹⁵ *Id.*

3. Student's goals listed in Student's January 26, 2018, March 14, 2018, April 17, 2018, and May 3, 2018 are appropriate.

Every 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.²⁹⁶ 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.²⁹⁷ The annual goals must be objectively measurable.²⁹⁸ 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.²⁹⁹

Student's goals were tied to common core standards, and broken down to meet Student's needs.³⁰⁰ Parent 1 and Private Facility Administrator attended and participated in every IEP meeting for Student in 2018 and there was no documentation or testimony that Parent 1 or Private Facility Administrator objected to Student's proposed goals.³⁰¹ Parent 1's March 15, 2018 letter made no mention that Student's goals were inadequate.³⁰² If Parent 1 was concerned regarding Student's proposed goals, it is likely that those concerns would be espoused in the letter.

Although, Private Facility Staff 1 and Private Facility Administrator testified that some of Student's goals listed in Student's IEP's were too easy and that Student had previously accomplished some of the proposed goals at Private Facility, their testimony did not focus on specific goals which were inappropriate. Most of Student's days at Public School consisted of

²⁹⁶ 34 C.F.R. § 300.320(a)(2).

²⁹⁷ *Letter to Butler*, 213 IDELR 118 (OSERS 1988).

²⁹⁸ 34 C.F.R. § 300.320(a)(2)(i).

²⁹⁹ *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Page 12471 (Mar. 12, 1999).

³⁰⁰ FOF 132.

³⁰¹ FOF 99,122-132,136,141.

³⁰² *Id.*

severe behavior, allowing Student to focus for short, limited time periods (about 10 minutes) in between severe maladaptive behavior episodes.³⁰³ Overall, Student could attend to a task for only 10-30 minutes.³⁰⁴ Private Facility Staff 1's and Private Facility Administrator's testimony do not take into account, that when Student becomes dysregulated Student will not focus on tasks and Student cannot remember academic or functional tasks Student had previously learned.³⁰⁵

Petitioner's argued that one of Student's benchmark goals was for Student to safely navigate the school 80% of the time and Student was repeatedly getting hurt on school campus. The record does not support this allegation.³⁰⁶ Although, Student did not always ____ at Public School and has ____ .³⁰⁷ The record does not support that Student was repeatedly getting hurt on the Public School campus.³⁰⁸

Petitioners have failed to prove by a preponderance of the evidence that Student's 2018 IEP contained inappropriate goals.

4. Student IEP's required a Behavioral Support Plan and the Plan's did not properly address Student's Maladaptive Behavior.

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 same in the IEP.³⁰⁹ Although, it is within the discretion of the IEP team whether to include positive behavioral interventions and supports in

³⁰³ FOF 186.

³⁰⁴ FOF 69-97.

³⁰⁵ FOF 28.

³⁰⁶ FOF 13, 115,117,118,143-145.

³⁰⁷ FOF 17, 148.

³⁰⁸ FOF 13, 115,117,118,143-145.

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

the IEP, the failure to include positive behavioral interventions and supports in the IEP when a student demonstrates the *need* can result in a denial of FAPE.³¹⁰

The IDEA does not require the IEP team to develop a formal plan termed “Behavior Support Plan” (BSP), nor conduct a Functional Behavior Assessment (“FBA”) however, the IEP must adequately address the student’s behavioral needs.³¹¹ There are no specific substantive requirements for the behavioral interventions and supports contemplated by the IDEA,³¹² though courts require sufficient specificity in the IEP/BSP to address the behavior.³¹³ A district may deny a child FAPE by developing an inappropriate BSP.³¹⁴

Transition Behavior Support Plan

Student’s behavior impedes Student’s learning.³¹⁵ Student’s IEP team determined a BSP would be utilized to address Student’s challenging behavior.³¹⁶ DOE Contracted Provider 1 created a Transition BSP, and Transition BSP data tracking form.³¹⁷ The Transition BSP was created to assist Student’s during Student’s transition from Private Facility to Public School; DOE Contracted Provider 1 created the plan with limited data, as Student had not attended

³¹⁰ See, e.g., *R.K. v. New York City Dep’t of Educ.*, 56 IDER 212 (E.D.N.Y. 2011), *aff’d*, 694 F.3d 167, 59 IDELR 241 (2d Cir. 2012).

³¹¹ *E.H. v. Bd. of Educ. of Shenandoah 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).

³¹² *Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221*, 375 F.3d 603, 41 IDELR 146 (7th Cir. 2004), *cert. denied*, 543 U.S. 1009, 110 LRP 39024 (2004).

³¹³ See, e.g., *M.M. v. District 0001 Lancaster County Sch.*, 702 F.3d 479, 60 IDELR 92 (8th Cir. 2012) (finding that the school district considered the evaluator’s recommendation for the use of a calming room); *Kingsport City Sch. Sys. v. J.R.*, 51 IDELR 77 (E.D. Tenn. 2008) (upholding the administrative law judge’s finding that the school district denied the student FAPE when the BSP relied heavily on adult intervention to help the student develop appropriate social skills).

³¹⁴ See *C.F. v. New York City Dep’t of Educ.*, 62 IDELR 281 (2d Cir. 2014) (The lack of an FBA led to the development of an inappropriate BIP and caused the district to offer an inappropriate placement); and *Pencader Charter Sch.*, 113 LRP 21474 (SEA DE 05/10/13).

³¹⁵ FOF 13-31, 36-54, 69-93.

³¹⁶ FOF 61-64,100, 104-113, 116, 122-31,141.

³¹⁷ FOF 61-63.

Public School for over 3 years prior to Student’s attendance.³¹⁸ The Transition BSP focused on Student’s noncompliance, aggression, elopement and dropping to the floor.³¹⁹

On January 25, 2018, the Transition BSP data tracking form was replaced with a new form that documented the specific instances in which, Student yelled, dropped to the floor, _____, exhibited noncompliance, , .³²⁰ Although, Student’s data tracking form was updated, Student’s Transition BSP was not updated.³²¹

From January 29, 2018, through February 20, 2018, (23 days) Student’s data shows the following total of instances and daily instances of each negative behavior listed.³²²

	Yelling					Dropping	Elopement	Noncompliance	Aggression
Total	214	76	79	144	108	31	27	84	397
Avg/Day	14	5	5	10	7	2	2	6	27

The table shows that Student was aggressive³²³ on an average of 27 times per day.³²⁴ Student yelled about 14 times per day, _____ about 5 times per day, _____ about 5 times per day, _____ about 7 times a day, tried to elope two times per day and did not comply to directives about 6 times per day.³²⁵

On February 12, 2018, SPED Teacher 1 requested that DOE Provider 1 create an Emergency BSP for Student because Student’s IEP and BSP failed to address how to handle Student’s outburst and elopement issues.³²⁶ While, the Transition BSP allowed staff to restrain

³¹⁸ *Id.*, FOF 33.

³¹⁹ FOF 63.

³²⁰ FOF 88.

³²¹ FOF 108.

³²² FOF 70.

³²³ Which is the accumulation of , _____ as defined by the FBA.

³²⁴ FOF 70.

³²⁵ *Id.*

³²⁶ FOF 104-108.

Student if they were certified, SPED Teacher 1 was not certified.³²⁷ Student's Private Facility Staff 2 informed SPED Teacher 1 that expressed a Functional Behavioral Analysis ("FBA")³²⁸ had to be completed first and then a Behavior Support Plan could be created based off of the results of Student's FBA.³²⁹ There was no new BSP created and Student's Transition BSP continued to be the document utilized to address Student's challenging behavior on February 12, 2018.³³⁰

Student's IEP must adequately address Student's behavioral needs.³³¹ While the Transition BSP was appropriate upon Student's first day of attendance at Public School and continued to be appropriate while Public School collected data and gained further knowledge regarding Student; the Transition BSP became inappropriate by February 12, 2018.³³² Student's data reveals a severely dysregulated child experiencing 27 episodes of aggression per day.³³³ In addition, Student also had high rates of yelling, _____, noncompliance, and elopement on a daily basis.³³⁴ SPED Teacher 1 notified Student's Private Facility Staff 2 that Student's IEP did not address Student's outburst or elopement.³³⁵ While there are no specific substantive requirements for a BSP, the BSP was the document determined in Student's IEP to address behavioral challenges, therefore the BSP must properly address Student's behavior.³³⁶ The Transition BSP

³²⁷ FOF 105.

³²⁸ The FBA was completed on March 14, 2018 and the BSP completed on May 2, 2018. FOF 122, 124 – 127, 141.

³²⁹ Respondent's Ex. 6, p. 402

³³⁰ FOF 108.

³³¹ E.H. v. Bd. of Educ. of Shenandoah 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).

³³² FOF 70.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ FOF 104.

³³⁶ FOF 61-64,100, 104-113, 116, 122-31,141.

was not addressing Student’s maladaptive behaviors and Public School had notice of this by February 12, 2018.³³⁷

Emergency Behavior Support Plan

On February 20, 2018, SPED Teacher 1 notified Public School Principal that SPED Teacher 1 feared Student would elope and that SPED Teacher 1 could not take Student to the ____ until SPED Teacher 1 was provided with an Emergency Behavior Plan that allowed SPED Teacher 1 to restrain Student.³³⁸ SPED Teacher 1 stated that Public School “is a ____ campus and when [Student] gets mad, in order to keep Student and the other kids safe Student needs to be escorted out”.³³⁹

This very same day, Public School BHS created and implemented an “Emergency Behavior Support Plan”.³⁴⁰ The Emergency BSP, was not meant to be permanent.³⁴¹ The Emergency BSP was a 1.5 page document which addressed four behaviors: noncompliance, aggression, elopement, and dropping to the floor.³⁴² The Emergency BSP asserted that when Student became aggressive, staff should distract Student, remove ____ which could be ____, and “have a ____ item available at all times so that you can ____ ...”³⁴³ The Emergency BSP stated that if Student were to become aggressive, elope or drop to the floor, Staff could tell Student “all done” and show Student a picture of ____ in which Student would be placed in, if Student could not calm down.³⁴⁴ Once in the ____, Staff was to remove all items and wait until Student ____.³⁴⁵

³³⁷ FOF 70, 104.

³³⁸ FOF 107.

³³⁹ FOF 106.

³⁴⁰ FOF 108-113.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Respondent’s Ex. 9, p. 1054.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

The Emergency BSP also provided that adults could use district approved safety protocols to block Student from injuring ___self or others.³⁴⁶ This provided SPED teacher 1 the ability to restrain Student if necessary.³⁴⁷

While utilizing the Emergency BSP, Student continued to exhibit extremely challenging behavior.³⁴⁸ On February 26, 2018, Student became dysregulated and _____.³⁴⁹ Student had a _____ Student's s.³⁵⁰ It is unclear if Student hurt ___self during Student' dysregulation or if Student had _____ previously.³⁵¹ On February 28, 2018, at about 9:15 a.m. Student became upset after a transition.³⁵² Student yelled, knocked over books and a chair, and _____.³⁵³

In March and April Student's maladaptive and aggressive behavior began to seep into other environments.³⁵⁴ Student's Caretaker stated Student's Caretaker was unable to care for Student and Student had an aggressive incident at Private Facility while there for Services.³⁵⁵ Private Facility Staff 1 began seeing Student exhibit new negative behaviors such as aggression and _____. Private Facility Staff 1 would take Student overnight to drill compliance when Student's caretaker was not able to handle Student in Caretaker's home in March.

On March 12, 2018, while Student was at Private Facility for afterschool Services, Student injured a new Private Facility Staff when Student _____.³⁵⁶

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ FOF 70-86.

³⁴⁹ FOF 115.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² FOF 116.

³⁵³ *Id.*

³⁵⁴ FOF 119-120.

³⁵⁵ FOF 119,134.

³⁵⁶ Petitioners' Ex. 898

On March 15, 2018 an IEP meeting convened where the team examined the results of Student's FBA.³⁵⁷ Parent 1 and Private Facility Administrator attended.³⁵⁸ During this meeting, Parent 1 and Private Facility were provided with the data and graphs illustrating the extent of Student's maladaptive behavior.³⁵⁹ The FBA recommended that Public School, develop, train, and implement a behavior support plan that addresses responses to specific problem behaviors as well as how to teach and shape appropriate replacement behavior.³⁶⁰ Student's Emergency BSP plan did not adequately addresses responses to specific problem behaviors and shape appropriate replacement behavior.

The Emergency BSP remained in place until May 2, 2018.³⁶¹ On May 3, 2018, Student's new Behavioral Support Plan was complete.³⁶² Student's new Behavioral Support Plan was a nine-page document; that included: behavioral basics, behavioral do's and don'ts, setting event's and detailed staff response instructions for noncompliance, yelling, _____, elopement, _____ and _____.³⁶³ While this BSP plan is specific and addresses Student's _____ needs, it was not implemented until May, 2018.³⁶⁴

Student's BSP must address Student's specific behavior. The Emergency BSP was not meant to be permanent, yet it was implemented from February 20, 2018 until May 2, 2018.³⁶⁵ Student's FBA was completed on March 15, 2018 and the BSP plan took 49 days to develop.³⁶⁶ This is not reasonable considering that Public School was on notice regarding the extent of

³⁵⁷ FOF 122.

³⁵⁸ *Id.*

³⁵⁹ FOF 70, 124-128.

³⁶⁰ FOF 125.

³⁶¹ FOF 113.

³⁶² FOF 141.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ FOF 113.

³⁶⁶ FOF 141.

Student's maladaptive behaviors.³⁶⁷ By utilizing the Emergency BSP to address Student's behavior by until May 2, 2018 was a procedural inadequacy that caused the Student a deprivation of educational benefit, and therefore, a denial of FAPE.

5. Petitioners failed to prove by a preponderance of evidence that Student's IEP's contained inappropriate related services and supplementary aids and services for Student.

An IEP must include a statement of the special education and related services, and supplementary aids and services to be provided to the Student.³⁶⁸ 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.³⁶⁹

By March 15, 2018, Public School was on notice regarding the exact extent of Student's behavior as DOE Provider 1 had completed Student's FBA. DOE Provider 1's FBA was a thorough and comprehensive 27 page document.³⁷⁰

The report recommended:

- 1) Student continue support with at least one of those supports certified due to Student's high rate of challenging behavior an Private Facility Staff 1's specific training in services.³⁷¹ The report also recommended that the IEP team *consider* support individuals be certified;³⁷²

³⁶⁷ FOF 70-93.

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

³⁶⁹ 34 C.F.R. § 300.320(a)(4).

³⁷⁰ FOF 124.

³⁷¹ FOF 124.

³⁷² *Id.*

2) Public School, develop, train, and implement a behavior support plan that addresses responses to specific problem behaviors as well as how to teach and shape appropriate replacement behavior.³⁷³ Public School should, train all individuals working with Student on how to interact according to the Plan³⁷⁴; and lastly,

3) Public School work cooperatively with Private Facility as Student attended Private Facility three years and continues to attend Private Facility for Services.³⁷⁵

Although, Private Facility Administrator advocated for Private Facility to provide a Private Facility Staff who was familiar with and had instructional over Student, during Student's Public School, Public School did not take Private Facility Administrator's offer.³⁷⁶ Public School sought to hire staff from a private business instead.³⁷⁷ Public School could have hired Private Facility's staff but they chose not to. Additionally, Public School staff working with Student was continually changing.³⁷⁸

While it may have been best practice for Public School to contract with Private Facility to provide a staff for Student during Student's school day, the legal standard does not require such. If Petitioner's had established that only Private Facility Staff could establish instructional control over Student, then they may have met their burden. Petitioners have established that Student needs familiar staff, as Student may be non-compliant with new staff.³⁷⁹ However, Public School could have faded new staff into Student's program, to create familiarity.³⁸⁰ Student's

³⁷³ FOF 125.

³⁷⁴ FOF 127.

³⁷⁵ *Id.*

³⁷⁶ FOF 128.

³⁷⁷ FOF 131.

³⁷⁸ FOF 142.

³⁷⁹ FOF 158.

³⁸⁰ *Id.*

program needs could have been met without hiring Private Facility Staff. Student's related services, and, supplementary aids and services were appropriate.

Petitioners have failed to prove by a preponderance of the evidence that Student's IEP contained Student's related services, and, supplementary aids and services were inappropriate for Student.

6. Student's LRE was improperly determined on March 14, 2018, April 17, 2018, and May 3, 2018.

The IDEA requires that "to the maximum extent appropriate" children with disabilities be educated with children without disabilities.³⁸¹ Segregation should occur only when the "nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." The LRE for each student must be determined based upon the child's individualized situation.³⁸² The LRE requirement is subordinate to the IDEA's requirement that educational placements be based on individual needs.³⁸³ A student's need for intensive special education services can outweigh the need to interact with typically developing peers.³⁸⁴

One of the recommendations listed in Student's FBA was that Public School consider a LRE which minimizes transitions and overstimulation.³⁸⁵ Student's LRE on March 15, 2018 was more restrictive than Student's LRE in January, as the March 15, 2018, IEP stated that Student "will receive all academics in Special Ed. Student may participate with Student's non-

³⁸¹ 34 C.F.R. § 300.114.

³⁸² See *Letter to Lott*, 16 IDELR 84 (OSEP 1989); *Letter to Vergason*, 17 IDELR 471 (OSERS 1991); and *Letter to Goodling*, 18 IDELR 213 (OSERS 1991).

³⁸³ *Id.*

³⁸⁴ *Cincinnati Public School District*, 6 ECLPR 62 (SEA OH 2008), *aff'd*, *Board of Education of the City School District of the City of Cincinnati v. Wilhelmy*, 54 IDELR 58 (S.D. Ohio 2009).

³⁸⁵ FOF 126.

disabled peers for ____ if Student chooses.³⁸⁶ At this time Student does not go out for ____, as it is too stimulating for Student.³⁸⁷ Although, Parent 1 opposed limiting Student's exposure to other children, Student's behavior created a ____ as Student ____.³⁸⁸ The LRE was not too restrictive, as Student's individualized situation required ____.³⁸⁹

In March, April, and May the Public School argued that the Public School was Student's LRE because Student had access to neuro-typical peers at Public School.³⁹⁰ However, in February and March, 2018, Public School had already limited Student's access to non-disabled Student's because of Student's behavior.³⁹¹ Student no longer ____ and was able to interact with other children during ____.³⁹²

Student's behavioral needs outweighed Student's need to interact with typically developing peers.³⁹³ Student required a more restrictive placement in Student's March 14, 2018, April 17, 2018, and May 3, 2018. Student's was denied FAPE as Student's LRE was improperly determined on March 14, 2018, April 17, 2018, and May 3, 2018.

VII. Student's IEP did not predetermine placement

Although Petitioners allege that Student's IEP team predetermined Student's placement, Petitioners have failed to prove by a preponderance of the evidence that Student's IEP team predetermined Student's placement during any of the 2018 IEP meetings.

³⁸⁶ FOF 129.

³⁸⁷ *Id.*

³⁸⁸ FOF 70-74,132,

³⁸⁹ FOF 14, 15.

³⁹⁰ FOF 129, 136, 141.

³⁹¹ FOF 22,104-107, 129,135.

³⁹² *Id.*

³⁹³ *Cincinnati Public School District*, 6 ECLPR 62 (SEA OH 2008), *aff'd*, *Board of Education of the City School District of the City of Cincinnati v. Wilhelmy*, 54 IDELR 58 (S.D. Ohio 2009).

Public Placement failed to properly implement Student’s 2017 and 2018 IEP.

FAPE requires that “special education and related services ... are provided in conformity with an IEP”.³⁹⁴ The Ninth Circuit Court of Appeals, in *Van Duyn*,³⁹⁵ stated that the language of the IDEA, “counsels against making minor implementation failures actionable given that “special education and related services” need only be provided “in conformity with” the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.”

The Court in *Van Duyn* held that only “a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.”³⁹⁶

Student’s behavior is at the crux of Student’s ability to access Student’s education.³⁹⁷ Student must master functional goals, such as compliance and non-aggression.³⁹⁸ Student’s IEP contain multiple means to alleviate behavioral challenges, in order for Student to access Student’s education. As of April 17, 2018, Student receives counseling, Private Facility Staff 1 and DOE Provider 2: certified³⁹⁹, a communication log between Public School and Parent/Caretaker, a BSP, Consultant, and 24 service hours per month.⁴⁰⁰ Although, Public School attributed many services to assist Student to access Student’s education, these services have not been implemented with fidelity.

³⁹⁴ 34 C.F.R. § 300.17 (d).

³⁹⁵ *ex. Rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 821 (2007)

³⁹⁶ *Id.* at 822.

³⁹⁷ FOF 25.

³⁹⁸ *Id.*

³⁹⁹ Two Private Facility Staff were added to Student’s services as of April 17, 2018.

⁴⁰⁰ FOF 136.

Student's January 24, 2017 IEP Transition Requirements

Student was enrolled in Public School on Friday, December 8, 2017.⁴⁰¹ Student's January 26, 2017, IEP, valid through January 24, 2018,⁴⁰² required a transition plan to be developed if Student were to return to Public School.⁴⁰³ The IEP also required that Student receive services from two staff during Student's transition.⁴⁰⁴ The IEP stated that "Both positions are necessary during the transition period in order to address safety (noncompliance and elopement) issues."⁴⁰⁵

Public School Principal informed the Public School of Student's enrollment and expected attendance at Public School on Monday, December 11, 2017.⁴⁰⁶ Public School then created the following three documents: 1) "Transition BSP", 2) "Transition Schedule: Teaching Routines", and 3) "Transition BSP Data Tracking".⁴⁰⁷ The forms were implemented on Student's first day of attendance.⁴⁰⁸

On December 11, 2017, Student was provided with staff but only one of those people were certified. The IEP required *two* certified staff. Student did not receive two certified staff in December 2017 or January 2018.

In this instance, the DOE was on notice that transitioning between tasks, activities or environments was extremely challenging for Student and the two certified staff were necessary for Student's ____.⁴⁰⁹ Student then exhibited severe, challenging, maladaptive behavior. The

⁴⁰¹ FOF 59.

⁴⁰² The January 26, 2017, IEP was valid from January 26, 2017 until January 23, 2018. A new IEP was implemented for Student on January 24, 2018.

⁴⁰³ FOF 61-68

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

absence of an individual trained to address Student's needs is a material failure, depriving Student of educational benefit and therefore, denying FAPE.

Data Collection

Data is collected to determine the extent and sometimes duration of Student's behavior. The data determines what is and what is not working for Student, what behaviors need to be supported and what behaviors to be extinguished. In this case there are issues with the underlying data. From January 29, 2018, through February 20, 2018, (23 days) Student's data is underreported as to actual rates of behavior because Student did not have one person dedicated to collecting data during this time frame.⁴¹⁰ Then on January 25, 2018, individuals began using a symbol of a box to signify six or more instances of a certain behavior.⁴¹¹ The behavior could occur 6 times or 20 times and only one box would be drawn on the data tracking form.⁴¹² This box occurred from February 1, 2018 until April 14, 2018.⁴¹³ The extent of Student's behavior was not properly captured.

Then, from April 16, 2018 until June 15, 2018, the definitions of non-compliance, hitting, and ____ were altered.⁴¹⁴ ____, and ____, were defined more specifically.⁴¹⁵ Student's **attempts** at ____ or ____ were no longer tracked on a data form.⁴¹⁶ The definition of ____ was also defined in more specificity, requiring that Student voluntarily move from where Student was delivered, the refusal to participate in a demand or activity.⁴¹⁷ Although Private Facility Staff 2 explained that Student's most serious behavior was to be tracked in order to focus on its extinction, this

⁴¹⁰ FOF 89.

⁴¹¹ FOF 90.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ FOF 91.

⁴¹⁵ *Id.* DOE Provider 1's Testimony.

⁴¹⁶ FOF 92.

⁴¹⁷ Petitioners' Ex. 26, p. 627

altering of the definitions do not capture the extent of Student's behavior. Student may only have two instances of ____ indicated because a _____. However, Student may have ____ 15 times. Although, I do not find the data changes to be done out of a nefarious purpose, the multiple changes in data collection do not allow an accurate comparison of Student's behavioral data.

Behavior Support Plan

Student's Emergency Support Plan governed on February 20, 2018.⁴¹⁸ This plan provided that Student go to ____ if Student was aggressive, eloped, or dropped to the floor.⁴¹⁹ During this time, Student's Behavior had been particularly challenging with 27 aggressive incidents a day.⁴²⁰ On February 26, 2018, Student became dysregulated and ____.⁴²¹ Then on February 28, 2018, SPED Teacher 1 inappropriately disciplined Student at about 9:15 a.m. Student became upset after a transition.⁴²² Student yelled, knocked over books and a chair, and then attempted to elope.⁴²³ SPED Teacher 1 repeatedly told Student "you need to leave" and "you're out of here" while Student was escalated.⁴²⁴ SPED Teacher 1 was telling Student that Student needed to go. Student's Instructional Support Person reminded SPED Teacher 1 that the BSP required a specific strategy before SPED Teacher 1 could remove Student from the room.⁴²⁵ Student was deescalated, chose to stay in the room. Student became upset again, Student yelled and knocked over a chair.⁴²⁶ SPED Teacher 1 firmly stated that Student needed to leave the room.⁴²⁷ Student was being escorted out of the room by staff when Student ____.⁴²⁸ SPED

⁴¹⁸ FOF 108.

⁴¹⁹ *Id.*

⁴²⁰ FOF 69-70.

⁴²¹ FOF 115.

⁴²² FOF 116.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*

Teacher 1 then approached Student and Student ____.⁴²⁹ SPED Teacher 1 then yelled “No”, as SPED Teacher 1 grabbed Student’s ____.⁴³⁰ Student spent the remainder of the day in a separate room.⁴³¹ SPED Teacher 1 did not comply with the Emergency BSP to address Student’s behavior. SPED Teacher 1 inappropriately ____.

Communication Log

Student’s 2018 IEP’s required the use of a Communication Log between Public School and Student’s Parent 1/Caretaker.⁴³² Student’s Communication Log was missing for four (4) January 4, 2018–February 1, 2018.⁴³³ Student’s Communication Log was also missing for eleven (11) school days from April 4–April 19, 2018.⁴³⁴ Student has limited verbal skills and ____.⁴³⁵ The communication log is the avenue for which communication is occurring between Public School and Student’s other caretakers.

Student’s behavior is at the core of Student’s education. While there is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education, the data collection measure as outlined above combined with the failure to implement the Emergency BSP and Communication Log absence are material failures. Student was deprived of educational benefit and denied FAPE.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² FOF 101.

⁴³³ *Id.*

⁴³⁴ FOF 133.

⁴³⁵ FOF 1-11, 56.

7. Parent was able to appropriately participate in the decision making process and received the required PWN.

While Petitioners assert that Parent 1s' input was ignored by the IEP team, there is no evidence that supports Petitioner's claim. Petitioners have failed to prove by a preponderance of the evidence that Parent was unable to appropriately participate in the decision making process.

VIII. REMEDY

The IDEA empowers a hearings officer or court to grant relief that the hearings officer or court determines to be appropriate.⁴³⁶ One such remedy is reimbursement of tuition and related expenses.⁴³⁷ 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.⁴³⁸

The initial inquiry is whether the student's IEP and or placement is "proper" or "appropriate".⁴³⁹ 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.⁴⁴⁰ 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.⁴⁴¹ 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

⁴³⁶ 34 C.F.R. 300.516(c)(3).

⁴³⁷ *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).

⁴³⁸ *Id.*

⁴³⁹ The Court uses the terms "proper" and "appropriate" interchangeably. *School Comm. Of Burlington*, 471 U.S. at 369 and 374.

⁴⁴⁰ *Bd. Of Educ. v. Rowley*, 458 U.S. (1982).

⁴⁴¹ *Id.*

infringe the parent’s opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits[.]”⁴⁴²

The next inquiry is whether the parent’s unilateral placement is “appropriate” or “proper”.⁴⁴³ The unilateral placement does not need to meet the State standards that apply to education provided by the Department of Education.⁴⁴⁴ 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.”⁴⁴⁵

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,⁴⁴⁶ whether the costs of the private placement is unreasonable⁴⁴⁷ whether there was a lack of parental cooperation with the school district.⁴⁴⁸ Should the hearings officer determine that the equities do not favor the parents; the hearings officer may reduce or deny reimbursement?⁴⁴⁹

In this matter, there were multiple FAPE violations as outlined above. Parent 1’s unilateral placement was appropriate as Petitioners demonstrated that the placement provides educational

⁴⁴² *Amanda J v. Clark Cnty Sch. Dist.*, 267 F. 3d 877, 892 (9th Cir. 2001).

⁴⁴³ *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.

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

⁴⁴⁵ *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).

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

⁴⁴⁷ *Florence County Sch. Dist.*, 510 U.S. at 16.

⁴⁴⁸ *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.)

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

instruction specifically designed to meet the unique needs of Student, and the education is supported by services necessary to permit Student to benefit from the instruction.⁴⁵⁰

⁴⁵⁰ FOF 1-58, 149-168.

ORDER

Based upon the findings of fact and conclusion of law herein, it is this 7th day of November 2018, hereby:

IT IS HEREBY ORDERED THAT Respondents shall reimburse Private Facility for the cost of Student's educational programming for the following periods:

- a. Student's educational program during the extended school year services for School Year 2017-2018, beginning on June 15, 2018; and
- b. Student's educational program for the duration of school year 2018-2019, including but not limited to, all extended school year services provided in school year 2018-2019.

IT IS FURTHER ORDERED THAT Parent 1 and/or Private Facility shall provide Respondents with copies of documentation, including but not limited to invoices and Student's attendance records, of any and all outstanding costs of Student's program within thirty (30) days of the date of this Order. Parent 1 and/or Private Facility shall thereafter provide Respondents with any subsequent documentation of the costs of Student's program within thirty (30) days of the date of the invoice.

IT IS FURTHER ORDERED THAT Respondents shall make the aforementioned payments to Private Facility within 60 days of receiving the required documentation of the aforementioned costs.

DATED: Honolulu, Hawai'i, November 7, 2018.

JENNIFER M. YOUNG
Hearings Officer
Richards Building
707 Richards St., Suite 403
Honolulu, Hawai'i 96813
Phone: (808) 587-7680
Fax: (808) 587-7682
atg.odr@hawaii.gov

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).