



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

In the Matter of STUDENT, by and through  
the Parent<sup>1</sup>,

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE  
OF HAWAI'I; CHRISTINA KISHIMOTO,  
Superintendent of Hawaii Public Schools; and  
KEITH HAYASHI, Interim Superintendent of  
Hawaii Public Schools,

Respondents.

DOE-SY2122-008

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing:  
September 23-24, 2021

Hearings Officer: Charlene S.P.T. Murata

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

**I. JURISDICTION**

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

<sup>1</sup> [REDACTED]

## **II. INTRODUCTION**

A Due Process Complaint against the Department of Education, State of Hawaii; Christina Kishimoto, Superintendent of Hawaii Public Schools; and Keith Hayashi, Interim Superintendent of Hawaii Public Schools (“Respondents” or “DOE”) was filed on August 6, 2021 by Student, by and through Student’s Parent (collectively “Petitioners”).

A response to Petitioners’ Due Process Complaint was filed on August 16, 2021 by Respondents.

On August 30, 2021, a Notice of Prehearing Conference; Subjects to be Considered; Hearing Process Guidelines was issued to the parties, setting a prehearing conference for September 8, 2021.

On September 8, 2021, a prehearing conference was held with Parent appearing on behalf of Petitioners, and temporarily assigned District Educational Specialist (“DES 1”) appearing on behalf of Respondents. During the prehearing conference, the parties agreed to have the due process hearing on September 23-24, 2021. Parent requested that the due process hearing be opened to the public. A Prehearing Order was issued on September 9, 2021.

Due to the Coronavirus 2019 global pandemic, the parties agreed to conduct the due process hearing using a video conferencing platform to ensure the safety of participants. On September 13, 2021, an Order Regarding Due Process Hearing Via Video Conference was issued, setting forth the procedures that would be implemented during the due process hearing using the Zoom video conferencing platform.

On September 10, 2021, Respondents filed Respondents’ Motion for Summary Judgment; Memorandum in Support of Motion; Declaration of DES 1; Exhibits “1”-“2”. On September 15, 2021, Petitioners filed Petitioners’ Response in Opposition to Respondents’

Motion for Summary Judgment. Respondents did not file a reply. On September 21, 2021, an Order Denying Respondents' Motion for Summary Judgment was issued.

Disclosures were due September 16, 2021. Respondents' disclosures were timely filed. Petitioners filed their disclosures on September 20, 2021. Respondents had no objections to Petitioners filing their disclosures late. Tr. Vol. I, 7:6-13<sup>2</sup>.

The due process hearing took place on September 23 and 24, 2021, using the Zoom video conferencing platform. All participants in the due process hearing appeared remotely using both the video and audio functions on Zoom. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Parent, and Respondents were represented by temporarily assigned District Educational Specialist ("DES 2"). Due to DOE inadvertently forgetting to secure a court reporter, the parties agreed to video record the due process hearing so that a court reporter could later transcribe the due process hearing. The undersigned Hearings Officer recorded the due process hearing using the video recording feature on the Zoom video conferencing platform, which was later transcribed by a court reporter. Tr. Vol. I, 4:21-5:20.

Petitioners called the following individuals as witnesses during the due process hearing: DES 1; Student Services Coordinator ("SSC"); Care Coordinator/Special Education Teacher ("CC/SPED"); Principal ("Principal"); and District Educational Specialist ("DES 3"). Respondents called Speech Language Pathologist ("SLP 1") as their witness during the due process hearing. Petitioners did not present any rebuttal witnesses.

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<sup>2</sup> "Tr. Vol. I, 7:6-13" means Transcript Volume I of the due process hearing, page 7, lines 6 through 13.

The following exhibits were admitted into evidence without objections: Petitioners' Exhibits 1-2 (pages 1-35); and Respondents' Exhibits 1-10 (pages 1-50)<sup>3</sup>. Tr. Vol. I, 8:2-22.

On October 13, 2021, the parties timely submitted their closing briefs.

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

### **III. ISSUES PRESENTED**

In their August 6, 2021 Due Process Complaint, Petitioners allege a violation of the Individuals with Disabilities Education Act. Specifically, Petitioners allege that Respondents denied Student a free appropriate public education ("FAPE"). Petitioners raise the following issue:

Whether DOE materially failed to implement Student's 8/09/2021-IEP<sup>4</sup> by not complying with the following 8/09/2021-IEP language: "Service providers will remain consistent to the greatest extent possible. The DOE does not guarantee any given provider at any given time, per settlement agreement for this annual IEP."

Petitioners request the following remedy:

Order DOE to comply with the following 8/09/2021-IEP language: "Service providers will remain consistent to the greatest extent possible. The DOE does not guarantee any given provider at any given time, per settlement agreement for this annual IEP."

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<sup>3</sup> Both parties did not bate-stamp their exhibits. The Office of Dispute Resolution inputted bate-stamps on Petitioners and Respondents' exhibits and emailed the bate-stamped versions to the parties prior to the due process hearing. The parties did not object to using the bate-stamped version in the due process hearing. Tr. Vol. I, 7:14-8:1. The bate-stamped version will be referenced in this decision.

<sup>4</sup> Respondents were aware that the Due Process Complaint was filed on August 6, 2021 and the IEP is dated August 9, 2021. At the prehearing conference, Respondents waived any and all objections to the Due Process Complaint pre-dating the 8/09/2021-IEP. This waiver was reaffirmed by Respondents before the due process hearing began. Tr. Vol. I, 5:21-6:10.

#### IV. FINDINGS OF FACT

##### Witnesses and Individuals involved in Student's Program

1. District educational specialists ("DES") have two supervisory roles. Each DES oversees an assigned complex area and a specific group of service providers. DES 1, Tr. Vol. I, 14:18-15:3.
2. District Educational Specialist ("DES 4") was the DES for the [REDACTED] Complex and oversaw the occupational therapists, physical therapists, and speech-language pathologists ("SLP"). DES 1, Tr. Vol. I, 15:5-8. [REDACTED] "School 1" is part of the [REDACTED] Complex. DES 1, Tr. Vol. I, 14:18-15:3, 19:20-20:15.
3. DES 1 became the DES of the [REDACTED] Complex in October of 2020 when DES 1 replaced DES 4 [REDACTED]. DES 1, Tr. Vol. I, 14:6-17, 15:5-8, 23:10-15. As DES, DES 1 also oversaw all the school-based behavior health specialists. DES 1, Tr. Vol. I, 14:18-15:3, 19:20-20:15.
4. DES 3 replaced DES 4 as the DES for SLP on [REDACTED] SLP 1, Tr. Vol. I, 99:21-100:11; DES 3, Tr. Vol. II, 164:23-165:3.
5. DES 3 was [REDACTED] of [REDACTED] from July 2020 to July 2021. DES 3, Tr. Vol. II, 187:24-188:2.
6. DES 3 is currently the DES for the [REDACTED] Complex and [REDACTED] Complex on [REDACTED] which covers [REDACTED] schools, and oversees the SLPs for [REDACTED] schools. DES 3, Tr. Vol. II, 186:7-12.
7. DES 2 replaced DES 1 as the DES for the [REDACTED] Complex on September 15, 2021 when DES 1 became [REDACTED] of [REDACTED]. DES 1, Tr. Vol. I, 14:6-17, 15:22-23, 23:16-23; SLP 1, Tr. Vol. I, 99:21-100:11.

8. Currently, with respect to School 1, DES 3 supervises the SLP, and DES 2 supervises the [REDACTED] Complex. SLP 1, Tr. Vol. I, 99:21-100:11.
9. As the DES for SLP, DES 3 is responsible for procuring SLP services and placement of SLP service providers. DES 1, Tr. Vol. I, 15:25-16:8.
10. SLP 1 is a licensed speech-language pathologist employed with the DOE. SLP 1 is a level 5 SLP for [REDACTED] and [REDACTED], and supervises SLP service providers who are lower than level 3. SLP 1, Tr. Vol. I, 96:22- 97:7; DES 1, Tr. Vol. I, 28:22-29:5; DES 3, Tr. Vol. II, 157:16-23.
11. SLP 1's current position with DOE is speech-language coordinator. SLP 1, Tr. Vol. I, 96:22- 97:7. As a speech-language coordinator, SLP 1 provides technical support to other speech-language pathologists in areas related to clinical speech-language pathology; and provides support to district educational specialists in analyzing workload and caseload for their speech-language pathologists. SLP 1, Tr. Vol. I, 97:6-16. When a new provider is assigned to a school by a DES, SLP 1 helps with online log training; provides clinical support to the new service provider, as needed; works with the teachers, school administration, and a student's school team to make sure that the speech-language pathologist is able to review previous records; and connects the new SLP service provider with the previous SLP service provider, to ensure there is a smooth transition between the two providers. SLP 1, Tr. Vol. I, 97:17-24, 97:25-96:14. As a speech-language coordinator, SLP 1 also provides training to related service providers, teachers and other staff members to implement communication goals and objectives. SLP 1, Tr. Vol. I, 120:23-121:5; DES 1, Tr. Vol. I, 26:17-27:6, 27:11-28:21.

12. SSC is a student services coordinator at School 1. SSC has been the student services coordinator for Student's program since 2015. As a student services coordinator, SSC coordinates services for students, and conducts student support team meetings and meetings to determine eligibility. SSC, Tr. Vol. I, 46:18-47:16.
13. CC/SPED has been a care coordinator and special education teacher in Student's classroom since January of 2021. SPED, Tr. Vol. I, 52:17-24. As a care coordinator, CC/SPED coordinates service providers; works with parents and service providers to set meeting dates; collects data; "drives" students' programs; writes goals and objectives; and runs IEP meetings. CC/SPED, Tr. Vol. I, 53:20-54:3.
14. SLP 2 is employed with DOE as a speech-language pathologist ("SLP 2"). SLP 1, Tr. Vol. I, 110:16-18.
15. SLP 2 provided SLP services to Student from March 9, 2021 to May 26, 2021. DOE Ex. 8 at 046.
16. SLP 3 is a licensed speech-language pathologist ("SLP 3") in the State of Hawaii. SLP 3 is employed with Contracted Agency ("Contracted Agency") and is contracted to provide speech-language pathology services to DOE. SLP 1, Tr. Vol. I, 97:25-98:14, 98:15-18, 114:4-14.
17. SLP 3 has been permanently assigned to Student for the 2021-2022 school year and began at School 1 in August of 2021. SLP 1, Tr. Vol. I, 114:15-20; DES 3, Tr. Vol. II, 183:8-12.
18. Principal became principal of School 1 in [REDACTED]. Principal, Tr. Vol. I, 145:16-22.

**Student Background**

19. Student is currently [REDACTED] years old and in the [REDACTED] grade at School 1. Pet. Ex. 1 at 001.
20. Student has a medical diagnosis of [REDACTED]. Student is eligible for special education and related services pursuant to the IDEA and Hawaii Administrative Rules Chapter 60 under the category of [REDACTED]. Pet. Ex. 1 at 002, 006.
21. Student is “currently performing below [REDACTED] same age peers in the areas of social interaction, communication, academics, and fine motor skills[,] which will affect [REDACTED] ability to fully participate in the general education curriculum at this time. Therefore, specially designed instruction and supplemental aids and services are needed for continued success with [REDACTED] educational program.” Pet. Ex. 1 at 006.
22. Student is non-verbal and uses augmentative alternative communication (“AAC”) devices as Student’s main mode of communication. DES 3, Tr. Vol. II, 165:4-10; SLP 1, Tr. Vol. I, 102:6-16. Student’s AAC devices include an iPad and modified signs and gestures. The iPad has an application that allows Student to put together pictures and words, and it speaks the words that Student would like to communicate. SLP 1, Tr. Vol. I, 113:4-19.
23. Student’s current language program being used through Student’s AAC device is Snap+Core. SLP 2 suggested using a new program called the LAMP program, which SLP 2 has experience in using and is trained to use. SLP 1 is training SLP 3 to use the LAMP program. SLP 1, Tr. Vol. I, 116:8-117:16.
24. Parent filed a request for due process hearing in June of 2021 that resulted in a settlement agreement. CC/SPED, Tr. Vol. I, 72:22-74:5.



25. Student was eligible for extended school year (“ESY”) services from June 6, 2021 to July 27, 2021. During ESY, Student was scheduled to receive 30 minutes of direct SLP services per week. Pet. Ex. 1 at 029. SLP services during ESY was provided by “SLP 4.” DOE Ex. 6 at 042.
26. On August 3, 2021 at 10:12 a.m., Parent emailed DOE asking questions regarding Student’s program, including questions about Student’s registered behavior technician (“RBT”), board certified behavior analyst (“BCBA”), and occupational therapy (“OT”) and SLP service providers. Among the questions asked was whether SLP 2 was still Student’s SLP service provider. DOE Ex. 6 at 042.
27. On August 3, 2021 at 1:02 p.m., DES 1 responded to Parent’s inquiry about the RBT and BCBA assigned to Student and informed Parent that the “SLP and the SLP V will provide...training” to the RBT to become familiar with Student’s AAC device. DES 1 did not respond to Parent’s question about whether SLP 2 was still Student’s SLP service provider. DOE Ex. 6 at 042.
28. On August 4, 2021 at 9:17 a.m., DES 1 emailed Parent: “Exiting RBT SLP 4 gave [REDACTED] an overview on 7/26 before the [sic] left. [REDACTED] is quite familiar with using the lamp app already because [REDACTED] student at [REDACTED] last year used one. Also SLP 1 and SLP 3 will continue to provide device support/training to meet [REDACTED] communication program. I hope this helps to clarify.” DOE Ex. 6 at 042.
29. On August 4, 2021 at 9:28 a.m., Parent responded to DES 1 via email: “[REDACTED] is RBT who left. SLP 4 was the SLP over ESY. What happened to SLP 2?” DOE Ex. 6 at 042.
30. On August 4, 2021 at 9:34 a.m., DES 1 emailed Parent and confirmed that “SLP 2 is not the SLP assigned, SLP 3 is the SLP.” DOE Ex. 6 at 041-042.

31. On August 4, 2021 at 9:41 a.m., Parent emailed DES 1: “What happened to SLP 2?”  
DOE Ex. 6 at 041.
32. On August 4, 2021 at 10:17 a.m., DES 1 emailed Parent: “In an effort to ensure consistent service and provider, we have contracted this SLP to provide service throughout the year. The provider’s caseload has been carefully managed to ensure this consistency or [sic] service. SLP 2 will assist in transition.” DOE Ex. 6 at 041.
33. On August 4, 2021 at 10:21 a.m., Parent sent DOE the following email: “I would like you to provide rationale for SLP 2 no longer being able to provide services going forward as we had previously discussed. If SLP 2 still works for the district and is still at School 2, then SLP 2 is available to continue as a consistent provider for [Student]. Based on our extensive conversations and the language that we agreed-upon for consistency of staff, I will file due process again by the end of the week if you cannot provide adequate details as to why SLP 2 is not available.” DOE Ex. 6 at 041.
34. On August 5, 2021 at 5:10 p.m., Principal sent Parent the following email: “As I understand it, the SLP assigned to [Student] has been specifically contracted with a small case load. This was intentional so that we do not run into issues of overburdening our providers and to increase the ability for this SLP to remain with [Student] on a consistent basis this year. SLP 2 is slotted to help this SLP with the transition.” DOE Ex. 6 at 041.
35. On August 6, 2021, Petitioners filed the instant Due Process Complaint.
36. Student’s current individual educational program is dated August 9, 2021 (“8/09/2021-IEP”). Pet. Ex. 1 at 001.

37. According to the 8/09/2021-IEP, the IEP Annual Review Date is May 11, 2022. Pet. Ex. 1 at 001.
38. Present at the 8/09/2021-IEP meeting were the following people: CC/SPED, a general education teacher, both of Student's parents, a behavior analyst, and Principal. Pet. Ex. 1 at 034.
39. Student's 8/09/2021-IEP contains twenty (20) goals<sup>5</sup>: one (1) in the area of Language Arts: Grade █; fifteen (15) in the area of Non-Core: Health; and four (4) in the area of Non-Core: Physical Education. Pet. Ex. 1 at 008-028; CC/SPED, Tr. Vol. I, 75:3-76:19.
40. An SLP service provider is needed to work with Student in the area of Language Arts: Grade █, which contains seven (7) short-term objectives or "mini-goals." Pet. Ex. 1 at 008-009; CC/SPED, Tr. Vol. I, 75:20-77:2, 90:22-25.
41. An SLP service provider is not needed to work with Student in the areas of Non-Core: Health and Non-Core: Physical Education. CC/SPED, Tr. Vol. I, 77:3-79:15.
42. At the time of the due process hearing, Student was making progress towards Student's annual goals, but had not yet achieved the annual goals because the IEP period has not ended. CC/SPED, Tr. Vol. I, 74:9-75:2, 82:19-85:15.
43. According to the 8/09/2021-IEP, Student will be provided speech/language therapy services twice a month, 40 minutes per session, from May 21, 2021 to May 11, 2022. Pet. Ex. 1 at 029; CC/SPED, Tr. Vol. I, 79:16-80:7.

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<sup>5</sup> CC/SPED stated that Student's 8/09/2021-IEP contains nineteen (19) goals. This minor error does not detract from CC/SPED's credibility as CC/SPED was counting the goals while the undersigned Hearings Officer was scrolling through the exhibits on a shared screen on Zoom.

44. According to the 8/09/2021-IEP, Student will be provided occupational therapy services twice a month, 30 minutes per session, from May 21, 2021 to May 11, 2022. Pet. Ex. 1 at 029; CC/SPED, Tr. Vol. I, 79:16-80:7.
45. The frequency of services in Student's IEP was changed from weekly to monthly to address a shortage of service providers and their request for more flexibility. By changing the frequency from weekly to monthly, DOE would be able to comply with Student's IEP and provide accommodations to the service providers to deal with personal events, such as sick leave or a death in their family. CC/SPED, Tr. Vol. I, 62:16-63:13.
46. According to the 8/09/2021-IEP, Student will be provided 1750 minutes per week of special education from May 21, 2021 to May 11, 2022. Pet. Ex. 1 at 029.
47. According to the 8/09/2021-IEP, Student will be provided daily transportation in the afternoon from May 21, 2021 to May 11, 2022. Pet. Ex. 1 at 029, 031.
48. All services in the 8/09/2021-IEP will be provided to Student via "in-person" delivery. If an in-person provider is not available, service will be suspended until an in-person provider is available to resume services for up to ten (10) days. If an in-person provider is not available, the district will find an appropriate substitute provider, in-house or through a contracted agency. Any service minutes missed for any other reason will be provided as compensatory minutes, or otherwise agreed upon. Pet. Ex. 1 at 032.
49. In the "Clarification of Services and Supports" section of the 8/09/2021-IEP, the following language was written: "Service providers will remain consistent to the greatest extent possible. The DOE does not guarantee any given provider at any given time, per

settlement agreement for this annual IEP.” Hereinafter referred to as “clarification language.” Pet. Ex. 1 at 032.

50. Student has been receiving the required occupational therapy service minutes indicated in the 8/09/2021-IEP. CC/SPED, Tr. Vol. I, 80:15-18.
51. Student has been receiving the required special education minutes indicated in the 8/09/2021-IEP. CC/SPED, Tr. Vol. I, 80:19-21.
52. Student has been receiving the required transportation services as indicated in the 8/09/2021-IEP. CC/SPED, Tr. Vol. I, 80:24-81:1; Pet. Ex. 1 at 031.
53. Student is currently working on Quarter one objectives in the 8/09/2021-IEP and is making progress. CC/SPED, Tr. Vol. I, 74:9-75:2, 82:19-85:15.
54. On August 9, 2021, Parent informed DOE that Parent was declining SLP services because Parent did not want a new SLP service provider to work with Student until the district provided introduction or professional background information to ensure that the new SLP service provider was appropriate for Student. DOE Ex. 4 at 038-040.
55. On August 9, 2021, Principal acknowledged receiving Parent’s notification of declining SLP services. DOE Ex. 5 at 039.
56. Due to Parent declining SLP services, Student has not been receiving SLP services; however, an in-person SLP service provider is available during Student’s scheduled speech time. CC/SPED, Tr. Vol. I, 80:8-14.
57. On August 13, 2021, a Prior Written Notice of Department Action was issued (“8/13/2021-PWN”). DOE Ex. 2 at 035.
58. According to the 8/13/2021-PWN, the “HIDOE...proposed...adding language into the clarifications per the settlement agreement: Service providers will remain consistent to

the greatest extent possible. The DOE does not guarantee any given provider at any given time, per settlement agreement for this annual IEP.” The action was proposed because a “[s]ettlement was negotiated with DES and parents and was offered.” DOE Ex. 2 at 035.

59. The 8/13/2021-PWN also noted that the IEP team “discussed SLP make-up minutes (730 total minutes) and different placement options for the make up [sic] minutes. 1. Stay after school for make-up SLP services. 2. Coming to ESY for a special service camp. 3. Provide contract service minutes at the [REDACTED] center.” The IEP team rejected this option because the “team agreed staying after school might be more agitating for [Student]. More information was required on the ESY service program as well as the service minutes being provided at the [REDACTED] center before a decision could be made.” DOE Ex. 2 at 035.
60. On September 14, 2021, Principal emailed Parent a letter confirming that although Parent is declining SLP services, an SLP service provider will be available to provide Student with SLP services whenever Parent decides to allow Student to engage this service. Principal also confirmed that SLP make-up minutes owed to Student from previous years can be arranged when in-person services resume. DOE Ex. 3 at 037-038.
61. Student previously had a speech-language service provider who did not provide services for almost an entire year, and DOE is currently working on providing Student with make-up minutes. DES 1, Tr. Vol. I, 30:3-31:4. Student still has outstanding speech minutes from the 2018-2019 school year. DES 1, Tr. Vol. I, 32:9-15; DES 3, Tr. Vol. II, 166:18-22.

62. SLP services has been available to Student since the beginning of the 2021-2022 school year and the beginning of the 8/09/2021-IEP; however, Parent has been declining SLP services. DES 3, Tr. Vol. II, 183:13-184:7; SLP 1, Tr. Vol. I, 98:19-99:4; DES 1, Tr. Vol. I, 31:11-32:3.
63. From 2019 to present, Student has had approximately six (6) SLP service providers--three (3) providers during ESY and three (3) during the regular school year. SSC, 38:23-39:12, 45:3-46:17; SLP 1, Tr. Vol. I, 119:12-18; DOE Ex. 8 at 46-50.
64. Service providers for the regular school year do not work during ESY. There is usually one SLP service provider who provides services to all the students during ESY. SSC, Tr. Vol. I, 5-12; SLP 1, Tr. Vol. I, 106:23-107:8.
65. From August 20, 2020 to December 18, 2020, Speech-Language Pathologist 5 (“SLP 5”) was Student’s assigned speech-language pathologist. SLP 5 consistently provided SLP services to Student every week for approximately 30 minutes each session. Student was not available for two (2) SLP sessions<sup>6</sup>. DOE Ex. 10 at 049-050.
66. On March 1, 2021 and March 3, 2021, Speech-Language Pathologist 6 (“SLP 6”) was Student’s assigned speech-language pathologist. Student received 20 service minutes of SLP services each day from SLP 6. DOE Ex. 9 at 048.
67. From March 9, 2021 to May 25, 2021, SLP 2 was Student’s assigned SLP service provider. Student had twenty-one (21) scheduled sessions with SLP 2 for 20 service

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<sup>6</sup> SLP 5 provided 44 sessions of SLP services, wherein Student was “not available” for two sessions. It is possible that Student received less than 42 SLP sessions because SLP 5 provided two sessions on 8/25/2020, 8/28/2020, 11/20/2020, and three sessions on 9/17/2020, but there is no evidence as to who received the service minutes and Student was not marked “not available.” It is possible that some of the SLP sessions were consult minutes and not direct service minutes with Student. DOE Ex. 10 at 049-050; DES 3, Tr. Vol. II, 197:3-199:18. SLP 5 was not called as a witness during the due process hearing.

- minutes each session. Student attended all twenty-one (21) scheduled sessions with SLP 2. DOE Ex. 8 at 047; SLP 1, Tr. Vol. I, 112:11-23.
68. SLP services for the 8/09/2021-IEP was projected to begin on May 21, 2021 and end on May 11, 2022. Pet. Ex. 1 at 029.
69. On May 26, 2021, SLP 2 was Student's assigned SLP service provider. Student was marked "not available" for the May 26, 2021 scheduled session with SLP 2. Although SLP 2 provided 15 service minutes of SLP services, it is unclear who received those service minutes or what those service minutes were for (direct services to Student or consultation)<sup>7</sup>. DOE Ex. 8 at 046; DES 3, Tr. Vol. II, 197:3-199:18.
70. From June 6, 2021 to July 27, 2021, Student received SLP services from SLP 4. DOE Ex. 6 at 042.
71. From August 4, 2021 to September 15, 2021, SLP 3 was Student's assigned SLP service provider. During the first week of school on August 4, 2021 and August 6, 2021, Student received 20 service minutes each day from SLP 3. Beginning on August 9, 2021, Student was marked "not available" to receive any SLP services from SLP 3 because Parent declined SLP services. DOE Ex. 4 at 038; DOE Ex. 6 at 042; DOE Ex. 7 at 045; CC/SPED, Tr. Vol. I, 70:18-23; SLP 1, Tr. Vol. I, 112:24-113:3.
72. CC/SPED testified that the 8/09/2021-IEP has been implemented. CC/SPED, Tr. Vol. I, 70:15-17.
73. Principal testified that there has been consistent implementation of the 8/09/2021-IEP. SLP services have been offered and provided with consistency pursuant to the

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<sup>7</sup> SLP 2 was not called as a witness during the due process hearing.



8/09/2021-IEP but services have been rejected by Parent. Principal, Tr. Vol. I, 144:25-145:7.

### **Speech-Language Pathology Services at School 1**

74. A part of a district educational specialist's responsibility is to retain employees. DES 1, Tr. Vol. I, 19:23-20:15. DOE has been short-staffed and making sure that they prioritize student needs and keeping service providers have been major factors in making decisions in the last two years. DES 1, Tr. Vol. I, 21:1-7.
75. It is a systemic problem that DOE does not have enough service providers and persistently has vacancies, even though DOE advertises and interviews. DES 1, Tr. Vol. I, 29:10-19; Principal, Tr. Vol. I, 140:1-11.
76. In the district where School 1 is a part of, there should be [REDACTED] full-time SLP service providers employed by the DOE. DES 3, Tr. Vol. II, 169:1-6, 187:13-16. Currently, there are [REDACTED] SLP service providers employed by the DOE and five (5) vacant positions. SLP 1, Tr. Vol. I, 109:10-21; DES 3, Tr. Vol. II, 158:3-12, 187:13-23.
77. DES 3 is actively trying to fill the five (5) vacant SLP positions. DES 3, Tr. Vol. II, 187:13-23.
78. Currently, there are [REDACTED] or [REDACTED] SLP service providers who are contracted with the DOE. SLP 1, Tr. Vol. I, 109:10-21; DES 3, Tr. Vol. II, 158:3-12.
79. All SLP service providers, whether employed by DOE or contracted with DOE, are level 3 or above. SLP 1, Tr. Vol. I, 109:10-21; DES 3, Tr. Vol. II, 158:3-18.
80. All SLP service providers, whether employed by DOE or contracted with DOE, are licensed in the State of Hawaii. DES 3, Tr. Vol. II, 156:5-13, 158:13-18.

81. SLP assignments for the 2021-2022 school year were made by DES 3 and SLP 1. SLP 1 worked with DES 3 to identify needs and appropriate service providers. DES 1, Tr. Vol. I, 19:23-20:15, 21:23-22:4, 26:17-28:21.
82. Alternative and augmentative communication (“AAC”) encompasses ways of communicating other than through the use of vocal speech. SLP 1, Tr. Vol. I, 113:4-19.
83. All licensed SLP service providers with the DOE have experience in assessing, utilizing and implementing AAC devices as it is a part of their SLP master’s program education. SLP 1, Tr. Vol. I, 102:6-23, 113:20-114:3, 115:16-116:2.
84. SLP 2 was temporarily assigned by Complex Area Superintendent (“CAS”) and DES 4 to School 1 from School 2 for the last quarter of the 2020-2021 school year. Once SLP 2 completed SLP 2’s temporary assignment, SLP 2 returned to School 2 where SLP 2 currently works full-time. SLP 1, Tr. Vol. I, 106:23-107:11, 110:16-111:19; DES 3, Tr. Vol. II, 164:5-165:3.
85. SLP 2 is a trained BCBA. SLP 1, Tr. Vol. I, 111:20-112:1.
86. SLP 2’s preference was to go back to School 2. SLP 1, Tr. Vol. I, 110:16-111:5; DES 3, Tr. Vol. II, 175:17-178:13. Due to DOE’s shortage of SLP service providers, changes were made to meet SLP 2’s needs in an effort to retain SLP 2 as an employee. DES 1, Tr. Vol. I, 18:4-20, 21:14-22.
87. It was DES 1’s understanding that SLP 2 was going to quit. DES 1, Tr. Vol. I, 18:4-20, 21:14-22.
88. SLP 3 is able to provide in-person SLP services. CC/SPED, Tr. Vol. I, 71:4-9.

89. SLP 3 is a level 4 SLP service provider and SLP 3 is capable and available to provide the entirety of Student's speech and language therapy services as indicated in the 8/09/2021-IEP. DES 3, Tr. Vol. II, 188:11-18; SLP 1, Tr. Vol. I, 98:19-99:4.
90. When a student transitions from one service provider to another, a transition meeting takes place between the old service provider and new service provider. SLP 2, SLP 3, and SLP 1 participated in a transition meeting for Student. CC/SPED, Tr. Vol. I, 87:21-88:2.
91. CC/SPED did not request that SLP 2 be Student's SLP service provider for the 2021-2022 school year. CC/SPED, Tr. Vol. I, 64:3-8.
92. CC/SPED advocated for an in-person SLP service provider to be in the school providing direct services to all CC/SPED's students, not just Student. CC/SPED did not advocate for a specific person to provide SLP services. CC/SPED, Tr. Vol. I, 63:23-66:23, 81:2-10.
93. CC/SPED did not have any discussions regarding Student's program with DES 4 or DES 3. CC/SPED, Tr. Vol. I, 55:8-12, 66:24-67:66.
94. CC/SPED does not have control over service providers and to which students they are assigned. CC/SPED, Tr. Vol. I, 66:18-23.
95. In the first week of August 2021, DES 1 received a master assignment from DES 3, informing DES 1 and other administrators of all the SLP assignments. As soon as DES 1 knew that the SLP service provider had been changed, DES 1 informed the school, and within 24-48 hours, the school reported that information out. DES 1, Tr. Vol. I, 16:20-17:14.

96. DES 3 could not have been aware of the clarification language in Student's 8/09/2021-IEP when DES 3 made the SLP assignment for the 2021-2022 school year because the 8/09/2021-IEP did not exist. DES 1, Tr. Vol. I, 16:20-17:14.
97. In an effort to keep the provider consistent and in accordance with Student's IEP, DES 1 consistently shared with the other district educational specialists the language that had been put into Student's 8/09/2021-IEP. DES 1, Tr. Vol. I, 17:15-18:3.
98. DES 3 had a discussion with DES 1 about keeping SLP 2 as Student's SLP service provider, the discussion was not pursuant to the 8/09/2021-IEP clarification language. DES 3, Tr. Vol. II, 160:11-164:22. DES 3 informed DES 1 that SLP 2 went back to School 2 because SLP 2 was on temporary assignment at School 1. The decision to return SLP 2 to School 2 was an administrative decision. Due to the aggregate make-up minutes or extra minutes of the students at School 1, SLP 2 would not be able to work in two schools. DES 3, Tr. Vol. II, 166:18-168:21.
99. When Principal found out in late summer that SLP 2 would not be Student's SLP service provider for the 2021-2022 school year, Principal did not take any measures to keep SLP 2 as Student's SLP service provider. Principal, Tr. Vol. I, 128:14-21.
100. Principal did not make a request to the district to have SLP 2 serve at School 1. Principal, Tr. Vol. I, 137:5-7.
101. Principal was aware of the revised language in the 8/09/2021-IEP to keep service providers consistent to the greatest extent possible. Principal, Tr. Vol. I, 130:2-5.
102. With regard to the 8/09/2021-IEP, Principal discussed with DES 3 that School 1 would have an SLP, that this particular SLP had a small caseload, and that it would help keep

- the SLP service consistent and not to have the SLP burn out or quit, which had happened in the past. Principal, Tr. Vol. I, 141:13-23.
103. DES 3 did not speak with SLP 2 about remaining as Student's SLP service provider. DES 3, Tr. Vol. II, 175:17-178:13.
104. In the past, Parent had requested that DOE contract service providers for Student and had discussed with DES 3 this request. When DES 3 contracted with SLP 3 through Contracted Agency to provide SLP services to School 1, DES 3 did so with the knowledge that Parent had in the past requested contract service providers. In contracting with SLP 3, it was intended that SLP 3's caseload would be very small to ensure that SLP 3 did not get overwhelmed and DOE would not be in a situation where it would have to shift providers again. DES 1, Tr. Vol. I, 18:4-19:15; DES 3, 158:19-159:14.
105. In determining SLP assignments, DES 3 and SLP 1 took into consideration all the cases that require SLP services, the acuity of the cases, locations and transportation for the providers, and providers' personal needs. DES 1, Tr. Vol. I, 19:23-20:15. DES 3 considered these factors, assigned the SLPs, notified the schools, and the schools notified the parents. DES 1, Tr. Vol. I, 26:2-16; SSC, Tr. Vol. I, 39:13-40:7.
106. DES 1 believes that DES 3 had all the information DES 3 needed in making the SLP assignments and followed standard procedures in determining SLP assignments. DES 1, Tr. Vol. I, 20:17-22, 21:8-10, 26:2-16.
107. The determination of SLP service provider made in this case was within normal standards. Principal, Tr. Vol. I, 144:6-8.

108. In matching an SLP service provider to a student/caseload, the following factors are considered: licensure in the state of Hawaii; travel between sites; input from teachers, families and parents; input from speech-language pathologist about preferences; input from district level needs and requirements; DES provider input about analyzing the caseloads, approving new hires and contracted providers, looking at consistency for teachers, providers and students, and looking at maximizing consistency across a provider's caseload; and students' needs. If there are specific clinical needs that need to be addressed by an SLP service provider, DOE will take into consideration an SLP service provider's ability to meet those clinical needs or an SLP service provider's willingness to be trained. SLP 1, Tr. Vol. I, 100:16-102:5, 108:11-109:9. These factors were considered when determining Student's SLP match. SLP 1, Tr. Vol. I, 104:8-106:15.
109. In placing an SLP service provider with Student for the 2021-2022 school year, DES 3 considered caseload minutes, including make-up minutes, for [REDACTED] schools; and consistency of service provider in delivering appropriate services for students. DES 1, Tr. Vol. II 155:21-156:4, 158:19-161:2.
110. The number of years of experience in SLP is not taken into consideration as much when placing a student with an SLP service provider. SLP service providers in levels 1 and 2 are assigned direct supervision. SLP service providers in level 3 and above do not require supervision and can take care of any student. DES 1, Tr. Vol. II, 156:14-157:3.
111. DES 3 signed an authorization for SLP 3 to attend a LAMP training on September 24, 2021. DES 3, Tr. Vol. II, 165:13-20.

112. LAMP is a speech program for students who use an AAC device to communicate. DES 3, Tr. Vol. II, 188:3-10; DOE Ex. 6 at 042.
113. SLP 3 was chosen to be Student’s SLP service provider because SLP 3 could provide in-person SLP services; SLP 3 was placed in two (2) schools; SLP 3 has considerably less students than other SLP service providers, which allows DOE to manage SLP 3’s caseload so that SLP 3 can be a consistent provider for Student. Principal Tr. Vol. I, 134:14-135:18; DES 3, Tr. Vol. II, 158:19-161:2.
114. School 1 and School 2 are less than five (5) miles apart. DES 3, Tr. Vol. II, 188:19-25.

**V. CONCLUSIONS OF LAW**

**A. BURDEN OF PROOF**

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

The Supreme Court held in Schaffer that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005). The Court “conclude[d] that the burden of persuasion lies where it usually falls, upon the party seeking relief.” Id. at 535. Neither Schaffer nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases. The “party objecting to the IEP’s implementation,...[has] the burden of proof at the administrative hearing.” Van Duyn, 502 F.3d 811, 820 (9th Cir.2007).

**B. IDEA REQUIREMENTS**

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

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

In Bd. of Educ. v. Rowley, the Court set out a two-part test for determining whether the school offered a FAPE: (1) whether there has been compliance with the procedural requirements of the IDEA; and (2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-207, 102 S. Ct. at 3050-3051 (1982). “A state must meet both requirements to comply with the obligations of the IDEA.” Doug C. v. Hawaii Dept. of Educ., 720 F.3d 1038, 1043 (9th Cir.2013) (quoting Rowley). See also, Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001).

The school is not required to “maximize the potential” of each student; rather, the school is required to provide a “basic floor of opportunity” consisting of access to specialized



instruction and related services which are individually designed to provide “some educational benefit.” Rowley, 458 U.S. at 200. However, the United States Supreme Court in Endrew F. v. Douglas County Sch. Dist. held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F. v. Douglas County Sch. Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. ex rel. Tina F. v. Hawaii Dept. of Educ., 593 F.Supp.2d 1199, 1206 (D.Haw. 2009).

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each child. 20 U.S.C. §§1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child’s teacher, parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child’s present levels of academic achievement and functional performance, a statement of the child’s annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. §1414(d). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. §1414(d). The IEP is, in effect, a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Burlington v. Dep’t of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002 (1985). An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. R.E. v. New York City Dep’t of Educ., 694 F.3d 167 (2012).

Procedural violations do not necessarily constitute a denial of FAPE. Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001). If procedural violations are found, a further inquiry must be made to determine whether the violations: (1) resulted in a loss of educational opportunity for Student; (2) significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or (3) caused Student a deprivation of educational benefits. Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001).

### C. ISSUE FOR DETERMINATION

This case presents one issue for determination:

Whether DOE materially failed to implement Student’s 8/09/2021-IEP<sup>8</sup> by not complying with the following 8/09/2021-IEP language: “Service providers will remain consistent to the greatest extent possible. The DOE does not guarantee any given provider at any given time, per settlement agreement for this annual IEP.”

Hereinafter referred to as “clarification language.” As the evidence during the due process hearing indicates and Petitioners’ Closing Brief clarifies, the only service provider that is the subject of this due process hearing is the speech-language pathologist. Therefore, to be more precise, Petitioners are alleging that DOE materially failed to implement Student’s 8/09/2021-IEP by making yet “another provider change”<sup>9</sup> for Student’s SLP services in violation of the 8/09/2021-IEP language that the “service providers will remain consistent to the greatest extent possible.”

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<sup>8</sup> Respondents were aware that the Due Process Complaint was filed on August 6, 2021 and the IEP is dated August 9, 2021. At the prehearing conference, Respondents waived any and all objections to the Due Process Complaint pre-dating the 8/09/2021-IEP. This waiver was reaffirmed by Respondents before the due process hearing began. Tr. Vol. I, 5:21-6:10.

<sup>9</sup> Tr. Vol. I, 16:20-22.

To begin, there appears to be a disconnect between Petitioners and DOE's interpretation of the clarification language in the 8/09/2021-IEP. Petitioners interpret the clarification language to mean that compliance can be achieved by keeping, or attempting to keep, a previous service provider<sup>10</sup>; while DOE interprets the clarification language to mean that compliance can be achieved by DOE getting a service provider who can be consistent. (FOF 108-109, 113). However, regardless of which interpretation is applied, Petitioners ultimately fail to meet their burden in showing that DOE materially failed to implement Student's 8/09/2021-IEP.

In applying Petitioners' interpretation that compliance with the clarification language means keeping the same SLP service provider or making attempts to keep the same SLP service provider, DOE has complied. Petitioners' interpretation would require DOE to assign either SLP 2, SLP 4, or SLP 3 as Student's SLP service provider as these three individuals had recently provided SLP services to Student. (FOF 67, 69, 70, 71). SLP 2 provided SLP services from March 9, 2021 to May 25, 2021. (FOF 67, 69). SLP 4 provided SLP services from June 6, 2021 to July 27, 2021. (FOF 70). SLP 3 provided SLP services on August 4 and 6, 2021. (FOF 71). The due process complaint was filed on August 6, 2021 and the 8/09/2021-IEP was written thereafter<sup>11</sup>. Based on Petitioners' interpretation that compliance requires the assignment of a

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<sup>10</sup> Although Petitioners' Closing Brief avoids stating that compliance with the clarification language means assigning SLP 2 to Student, it is clear that this is Petitioners' position. Petitioners' Closing Brief argues that "[i]n this case, the service provider is still employed and able to fulfill the role as [Student's] Speech Language Pathologist (SLP). There is no viable issue of travel/distance from the provider's other cases, as during testimony given by DES 3, the SLP's only other cases are within 2 miles from [Student's] school." Petitioners' Closing Brief, pp. 1-2. These facts are clearly describing SLP 2. (FOF 67, 84, 86, 98, 114).

<sup>11</sup> While there is some evidence of a settlement agreement containing similar language about consistency of service providers being executed before the 8/09/2021-IEP, the undersigned Hearings Officer does not have authority to enforce a settlement agreement. (FOF 24, 49, 58). "[A] due process hearing before an IHO was not the proper vehicle to enforce the settlement agreement." "Congress has expressly provided for enforcement of IDEA settlement agreements in federal district courts when the agreement at issue was entered into 'through the [IDEA]

previous SLP service provider, DOE can accomplish this compliance by assigning one of the aforementioned individuals. DOE elected to assign SLP 3.

In applying DOE's interpretation that compliance with the clarification language means making attempts to secure an SLP service provider who can be consistent for the 2021-2022 school year, DOE has complied. DES 3 assigned SLP 3 to School 1 sometime during the first week of August 2021. (FOF 95). SLP 3 was assigned School 1 because SLP 3 had fewer students than other SLP service providers, which would allow DOE to manage [REDACTED] caseload so that SLP 3 could be a consistent provider for Student. (FOF 32, 34, 89, 102, 104). Petitioners' arguments that DES 3 made an "administrative decision" and "DES 3 confirms, that no INDIVIDUAL attention was administered in the decision to change providers for [Student], which is in violation on [sic] the current IEP," are not persuasive. Petitioners' Closing Brief, p. 3. It would be inherently unfair to find that DES 3 failed to comply with the clarification language in the 8/09/2021-IEP when the 8/09/2021-IEP did not exist at the time that DES 3 made the decision to assign SLP 3 to School 1. (FOF 71, 95-96). Although heightened consideration into maintaining the same SLP service provider for Student was not done pursuant to the 8/09/2019-IEP, DES 3 did consider consistency of staff as it is a part of the factors considered in determining placement of SLP service providers. (FOF 108-109). Therefore, Principal and DES 3 not putting in effort to keep SLP 2 as Student's service provider was not a violation of the clarification language. (FOF 100, 103). Utilizing DOE's interpretation of the clarification language, the effort DOE put into providing Student with a consistent SLP service provider for the 2021-2022 school year was sufficient to comply with the clarification language.

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mediation process,'...or at a 'resolution meeting.'" H.C. ex rel. L.C. v. Colton-Pierrepont Cent. Sch. Dist., 341 Fed.Appx. 687, 690 (2nd Cir.2009). Therefore, DOE's obligation regarding the assignment of service providers will be determined solely according to the 8/09/2021-IEP.

Furthermore, the 8/09/2021-IEP states that the service providers will remain consistent “to the greatest extent possible.” Contrary to Petitioners’ argument that SLP 2 is “able to fulfill the role as [Student’s] Speech Language Pathologist,”<sup>12</sup> it was not possible to assign SLP 2 to School 1 without adversely affecting SLP 2 and the administration of SLP services for the entire [REDACTED] district. Although School 1 and School 2 are less than 5 miles apart (FOF 114), the issue is not simply about physical distance. Due to the aggregate make-up minutes of the students at School 1, SLP 2 could not work in both schools. (FOF 98). SLP 2 was on temporary assignment when SLP 2 worked at School 1 and SLP 2 wanted to go back to School 2. (FOF 84, 86, 87). It would be unfair to SLP 2 to assign SLP 2 to School 1 or to make SLP 2 commute on a regular basis between School 1 and School 2—however short the distance may be. Taking into consideration the shortage of SLP service providers, the understanding that SLP 2 would return to School 2 once SLP 2 was done with SLP 2’s temporary assignment, and SLP 2 wanting to return to School 2, it would behoove DOE to assign SLP 2 to School 2 or risk exacerbating the SLP service provider shortage should SLP 2 decide to leave. (FOF 74-78). Therefore, it was not possible to keep SLP 2 at School 2 without adversely affecting SLP 2 and the administration of SLP services in the [REDACTED] district.

Based on the foregoing, DOE did not fail to comply with the 8/09/2021-IEP clarification language; however, even assuming that DOE did fail to comply with the clarification language, the failure would not be material. The Ninth Circuit Court in Van Duyn v. Baker Sch. Dist. 5J held that “when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. A material failure occurs when there is more than a minor discrepancy between the services

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<sup>12</sup> Petitioners’ Closing Brief, p. 1.

provided to a disabled child and those required by the IEP.” Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 815 (9th Cir.2007). “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” Van Duyn, 502 F.3d at 822.

In Van Duyn, the Ninth Circuit Court found, *inter alia*, that the student did not work towards all of the short-term objectives in ■■■ IEP and ■■■ personal aid did not have the state training in ■■■ as called for in ■■■ IEP. However, with respect to these findings, the Ninth Circuit Court held that “He did not work toward all of the short-term objectives laid out in ■■■ IEP, but this failure was not material given the extremely large number of such objectives....And even though ■■■ was never trained at the state level, Ms. Baxter did attend classes and meet with people knowledgeable about Van Duyn’s experience with the condition. Accordingly, the District did not materially fail to implement Van Duyn’s IEP in any of these areas.” Van Duyn, 502 F.3d at 816, FN 5.

Contrary to Petitioners’ argument that “[f]ailure to implement the IEP, in its entirety [sic] is a failure to maintain legal compliance; it is a denial of FAPE,”<sup>13</sup> the term FAPE means special education and related services that are provided in conformity with an IEP. 20 U.S.C. §1401(9)(D). Special education and related services “need only be provided ‘in conformity with’ the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.” Id. at 821.

To properly apply the *Van Duyn* standard, the Hearings Officer must analyze whether the DOE failed to implement specific provisions of ■■■ IEP. *See Van*

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<sup>13</sup> Petitioners’ Closing Brief, p. 2.

*Duyn*, 502 F.3d at 822. If the DOE has failed to implement specific provisions of [REDACTED] IEP, the Hearings Officer must decide whether the failure was material. *Id.* In doing so, the Hearings Officer is required to determine whether “there is more than a minor discrepancy between the services a school provides to a disable child and the services required by the child’s IEP.” *Id.* In this case, the Hearings Officer must determine whether the DOE materially failed to implement specific provisions of [REDACTED] IEP despite its efforts after furloughs began.

Dept. of Educ., Hawaii v. C.J., 2011 WL 6002621, CV. No. 10-00257 AWT-BMK, at \*4 (D.Haw. Nov. 29, 2011). To be clear, Petitioners are not alleging that DOE failed to provide SLP services. The issue is focused on what effort DOE put into keeping the same SLP service provider. As an initial matter, “school districts have the sole discretion to assign staff” and “school districts have the prerogative to assign staff to provide educational services without parental consent.” Slama by Slama v. Independent Sch. Dist. No. 258, 259 F. Supp.2d 880, 884 (Minn. USDC, March 24, 2003).

Even if the DOE failed to implement the provision of Student’s 8/09/2021-IEP requiring that the “service providers will remain consistent,” the failure was not material. There is no discrepancy between the services the school provides to Student and the services required by Student’s 8/09/2021-IEP. Student was receiving Student’s OT services and Student’s special education, and Student was making progress towards Student’s annual goals. (FOF 39, 42-47, 50-53). SLP services were available to Student, but Petitioners declined the SLP services. (FOF 54-56). So even if assigning SLP 3 is a discrepancy in services, the discrepancy is minor and there is still conformity with the 8/09/2021-IEP<sup>14</sup>. SLP 3 is qualified to provide SLP services and SLP 3 is able to provide services for the entire 2021-2022 school year. (FOF 16-17, 32, 34, 79-80, 83, 88-90, 102, 104, 111, 113). Accordingly, even assuming that DOE failed to comply

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<sup>14</sup> The undersigned also notes that Student’s 8/09/2012-IEP contains twenty goals and an SLP service provider will be working with Student on one of the twenty goals. (FOF 39-41).

with the clarification language, the failure did not rise to a material fail to implement Student's 8/09/2021-IEP.

For the reasons stated above, the undersigned Hearings Officer finds that Petitioners have not met their burden in showing that DOE materially failed to comply with the clarification language in Student' 8/09/2021-IEP. Assigning SLP 3, who is qualified and available to provide services for the entirety of the 2021-2022 school year, to Student is in conformity with the 8/09/2021-IEP.

## **VI. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the issue raised in the August 6, 2021 Due Process Complaint by a preponderance of the evidence. As Petitioners have failed to prove that Respondents denied Student a FAPE, Petitioners' requested remedy is denied.

### **RIGHT TO APPEAL**

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

DATED: Honolulu, Hawai'i, October 20, 2021.

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Redacted Hearing Decision