OFFICE OF DISPUTE RESOLUTION
DEPARTMENT OF THE ATTORNEY GENERAL
STATE OF HAWAIʻI

In the Matter of STUDENT, by and through the Parent 1[1], Petitioners, vs. DEPARTMENT OF EDUCATION, STATE OF HAWAIʻI and CHRISTINA KISHIMOTO, Superintendent of Hawaiʻi Public Schools, Respondents.	DOE-SY1920-055 FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION Due Process Hearing: September 28-30, 2020 and November 20, 2020 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-

[1] Personal identifiable information is provided in the Legend.

60-1, et seq. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973 ("Section 504"), as amended in 1974, codified at 29 U.S.C. §§794, et seq.; and the Hawaii Administrative Rules §§8-61-1, et seq. in their claims and requests for relief.

II. INTRODUCTION

On June 15, 2020, the Department of Education, State of Hawaii, and Christina Kishimoto, Superintendent of Hawaii Public Schools ("Respondents" or "DOE"), received a Complaint and Resolution Proposal from Student, by and through Parent 1 (collectively "Petitioners").

On June 24, 2020, DOE filed a response to Petitioners' Complaint and Resolution Proposal.

On July 10, 2020, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for July 16, 2020.

On July 14, 2020, with the consent of the undersigned Hearings Officer and with no objections by DOE, Petitioners filed a First Amended Complaint and Resolution Proposal ("FAC").

On July 24, 2020, DOE filed Department of Education's Response to Petitioners' First Ammended [sic] Complaint and Resolution Proposal.

On August 10, 2020, another Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for August 20, 2020.

On August 20, 2020, a prehearing conference was held with Keith H.S. Peck, Esq. ("Mr. Peck") appearing on behalf of Petitioners, and Deputy Attorney General Kevin M. Richardson ("Mr. Richardson") appearing on behalf of DOE. During the prehearing conference, the parties agreed to have the due process hearing on September 28-30, 2020 and requested that the 45-day

decision deadline be extended. On September 15, 2020, Petitioners filed Petitioners' Request for an Extension from September 28, 2020 to November 11, 2020. An order granting Petitioners' request to extend the 45-day decision deadline was issued on September 16, 2020.

Due to the Coronavirus 2019 global pandemic, the parties agreed to conduct the due process hearing using a video conferencing platform to ensure compliance with government mandated social distancing. See Governor of the State of Hawaii's Third Supplementary Proclamation, effective March 23, 2020, and Twelfth Proclamation Related to the COVID-19 Emergency, effective August 20, 2020.

On September 4, 2020, Petitioners' filed Petitioners' Motion for Partial Summary Judgment; Memorandum in Support of Motion; Declaration of Counsel Keith H.S. Peck; Declaration of [Parent][2]; Exhibits [sic] "1". On September 11, 2020, DOE filed Respondents' Memorandum in Opposition to Petitioners' Motion for Partial Summary Judgment filed on September 4, 2020; Declaration of [Student Services Coordinator]; Exhibits "A"-"B". A hearing on the motion was held on September 21, 2020. On September 24, 2020, an Order Denying Petitioners' Motion for Partial Summary Judgment was issued.

On September 21, 2020, 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.

The due process hearing took place on September 28-30 but was unable to be completed within three days. A further due process hearing date was scheduled, by agreement, for November 20, 2020. On October 30, 2020, Respondents submitted a request to extend the 45-

[2] Petitioners' Motion for Partial Summary Judgment did not include a declaration by Parent 1. Transcript of September 21, 2020 hearing on Motion for Partial Summary Judgment, 4:9-11.

day timeline from November 11, 2020 to December 26, 2020, and an order granting the request was issued on the same date. See Order Granting Respondents' Request to Extend the 45-Day Timeline, dated October 30, 2020.

The four-day due process hearing was conducted using the Zoom video conferencing platform. All participants in the due process hearing appeared remotely via video and audio. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and DOE was represented by Mr. Richardson**.** Parent 1 was present on the first day for the morning portion, and elected not to participate in the remainder of the due process hearing. The Department of Education District Educational Specialist ("DES") was present on behalf of DOE.

Petitioners called Parent 1 and Private Facility 1 Administrator as their witnesses during the due process hearing. Respondents called the following witnesses during the due process hearing: DOE Special Education Teacher 1 ("Special Education Teacher 1"), DOE Speech-Language Pathologist ("SLP"), and DOE Student Services Coordinator ("SSC").

The following exhibits were admitted into evidence without objection: Petitioners' Exhibits 1 through 3, pages 001 through 185; Respondents' Exhibits 1 through 7, pages 001-155.

On December 11, 2020, Respondents submitted a request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under HAR §8-60-69, from December 26, 2020 to February 9, 2021, so that transcripts could be prepared and post-hearing briefs filed. Petitioners stipulated to the request for an extension. An order granting Respondents' request to extend the 45-day timeline was issued on December 14, 2020.

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 July 14, 2020 FAC, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Specifically, Petitioners allege that the DOE denied Student a free appropriate public education ("FAPE"). Petitioners raise the following issues:

Issue 1 – The 9/28/2018-IEP team and the 11/9/2018-IEP team utilized improper factors to determine Student's placement. Additionally, Student could succeed in a less restrictive placement.

Issue 2 – The DOE failed to collect sufficient data/information, prior to the 9/28/2018-IEP meeting and the 11/9/2018-IEP meeting, necessary to determine whether Student qualified for Extended School Year services. The discussion held regarding Student's eligibility for Extended School Year services at both meetings was insufficient. Student should have qualified for Extended School Year services.

Issue 3 – The DOE failed to collect sufficient data/information and/or include participation of knowledgeable persons about Student's needs at the 9/28/2018-IEP meeting and the 11/9/2018-IEP meeting. This includes a discussion about assistive technology and/or communication skills. This allegation relates to the concept of "lost educational opportunity."

Issue 4 – The 9/28/2018-IEP and the 11/9/2018-IEP fail to provide sufficient Supplementary Aids and Services for Student to be successful in the Least Restrictive Environment and/or make adequate gains on Student's academic, behavioral, and/or social needs.

a. The phrase "Provider" is inadequate to ensure Student will be provided appropriate behavioral intervention. Also, the frequency "Daily" is vague and cannot be enforced as an all-day statement by Parent 1; it could mean anything from one per day for 10 minutes to all day.

Issue 5 – The 11/9/2018-IEP expired on 11/9/2019 and has not been replaced.

Petitioners request the following remedies:

Remedy 1 – Find that the allegations in this First Amended Complaint have been proven;

Remedy 2 – Order the DOE to reimburse Parents for all educational and related

expenses since, in, or about June 2018 or sometime thereafter determined to be appropriate;

Remedy 3 – Order the DOE to assume the costs of Student's privately delivered educational and related services moving forward;

Remedy 4 – Order the DOE to fund an additional 100 hours of applied behavioral analysis to Student over the next 12 months as compensation for services lost in order to address Student's needs to develop social skills; and

Remedy 5 – Order such other relief that is appropriate and justified in equity and/or in law under the circumstances.

IV. FINDINGS OF FACT

Student Background

1. Student is currently ____ years old. Pet. Ex. 1 at 014.

2. Student is eligible for special education and related services pursuant to the IDEA and Hawaii Administrative Rules Chapter 60.. Pet. Ex. 1 at 015.

3. Student's "delay in the areas of self help, social-emotional, approaches to learning, cognitive, English-Language Arts, and receptive/expressive communication development may directly affect Student's ability to participate in the general education setting and to meet the standards and benchmarks at Student's age level. [Student] needs specially designed instruction to meet Student's developmental milestones." Pet. Ex. 1 at 015.

4. When Student first started school at Home School, Student had destructive/aggressive behaviors, such as, slapping Parents in the face, pinching other children, pulling sibling's hair and sitting on sibling. Student did not initiate playing with sibling or other children. Student threw items, screamed, yelled, clinched, had anxiety attacks, and made a fist. Student ran towards fire, jumped off play structures, and ran away from Parents. Student had difficulty transitioning from activities and places. Pet. Ex. 1 at 002.

5. During the 2018-2019 school year, Student was in school at Home School. DOE Ex. 2 at 037.

6. During the 2019-2020 school year, Student was in school at Private Facility-1. Pet. Ex. 3 at 150-159.

7. During the 2020-2021 school year, Student is in school at Private Facility-2. Pet. Ex. 3 at 147-148.

Before September 28, 2018 IEP Meeting

8. On August 15, 2017, Doctor-1, Student's private doctor, referred Student to Public Agency 1 for an abnormal developmental screening. Pet. Ex. 2 at 106.

9. Public Agency 1 is part of the Public Agency 2. Pet. Ex. 2 at 039.

10. On September 14, 2017, Student was evaluated by Public Agency 1 and determined to meet the eligibility criteria. Pet. Ex. 2 at 039-043.

11. In September through November of 2017, Student was in a program at Public Agency 1. Student had a Plan. Pet. Ex. 1 at 002; Pet. Ex. 2 at 028, 037; Pet. Ex. 2 at 028-074.

12. Student received services from Public Agency 1 on 9/14/2017, 10/6/2017, 11/9/2017, 11/16/2017 and 11/30/2017. Public Agency 1 records indicate that Student was referred to Public Agency 1 for concerns, and delay in speech (Pet. Ex. 2 at 060). Other concerns included: not being able to distinguish between food substances and non-food substances (Pet. Ex. 2 at 047, 061); having immediate meltdowns if Student did not get what Student wanted (Pet. Ex. 2 at 059); not imitating the play activity of other children (Pet. Ex. 2 at 061); and vocalizing and babbling but not using words (Pet. Ex. 2 at 066). Public Agency 1 discussed adding a speech-language pathologist to Student's plan (Pet. Ex. 2 at 028-031). There is no mention of regression in the Public Agency 1 records.

13. On November 3, 2017, Doctor-2 conducted an Evaluation of Student. Based on Doctor-2's observation and Student's history, Student was diagnosed with Disability 1. Pet. Ex. 2 at 053.

14. On February 20, 2018, Public Agency 1 issued a "Child Outcomes Summary," giving a Final Rating for Student. The summary noted that the occupational therapist had not been able to complete a session since November of 2017 due to family cancellations and losing contact with the family. Pet. Ex. 2 at 076-079.

15. No one from Home School requested a copy of the Public Agency 1 records for Student. SSC, Tr. Vol. IV, 29:21-30:6[3].

16. Public Agency 1 records are routinely forwarded to DOE by Public Agency 1; however, this did not happen for Student. SSC, Tr. Vol. IV, 29:21-25.

17. During the 2018-2019 school year, Student was at Home School. Pet. Ex. 3 at 138; SSC, Tr. Vol. IV, 10:23-11:2.

18. In June of 2018, during a Student Focus Team ("SFT") meeting with Parent 1 regarding sibling, Parent 1 told the SFT that Parent 1 was taking Student to see Doctor 3. The SFT asked Parent 1 to contact them after the appointment to discuss the Doctor 3's findings. DOE Ex. 5 at 097; Special Education Teacher 1, Tr. Vol. III, 77:23-78:8; SSC, Tr. Vol. IV, 11:7-12:25.

19. An SFT meeting occurs when a parent or teacher or someone has a concern about a child. The team usually consists of a parent, student services coordinator, general education teacher, a special education teacher, and perhaps a school psychologist or

[3] "SSC, Tr. Vol. IV, 29:21-30:6" means Testimony of SSC, Transcript of due process hearing, volume IV, page 29, line 21 through page 30, line 6.

speech pathologist, if appropriate, and anyone else who may be necessary. An SFT meeting is an initial meeting to discuss what the team will do, whether the child needs more interventions or assessments. SSC, Tr. Vol. IV, 11:9-12:10.

20. Student was diagnosed with Disability 1 by Doctor 3 in a report with an encounter date of July 19, 2018 ("7/19/2018-Report")[4]. Pet. Ex. 1 at 002; DOE Ex. 3 at 058-060.

21. Doctor 3 recommended, among other things, speech therapy through thee Program called Private Program 1[5] and therapy through DOE. DOE Ex. 3 at 059.

22. Doctor 3 referred Student to therapy, but Parent 1 declined the services. Pet. Ex. 1 at 002.

23. On August 21, 2018, an SFT meeting was scheduled for September 4, 2018 with Parent 1 to discuss Student. DOE Ex. 5 at 080, 081.

24. On August 28, 2018, Parent 1 asked to reschedule the SFT meeting to September 14, 2018. DOE Ex. 5 at 082, 102.

25. During the SFT meeting on September 14, 2018, the SFT determined that based on Doctor 3's 7/19/2018-Report, Student met the eligibility criteria for special education and related services. The SFT on that same day recommended that additional testing be completed to help with programming and determining needs. DOE Ex. 3 at 071; DOE Ex. 5 at 098.

26. On September 14, 2018, Parent 1 was provided a copy of an Evaluation Summary Report ("9/14/2018-ESR"). The 9/14/2018-ESR was a summary of an initial evaluation

[4] It is noted that the office visit with Doctor 3 was on July 19, 2018; however, Doctor 3 did not sign the report until July 23, 2018. For the purposes of this administrative decision, the date July 19, 2018 will be used when referring to Doctor 3's report so to maintain consistency because other documentary evidence states that Doctor 3's report is dated July 19, 2018.
[5] It is unclear if Private Program 1 is the same agency as Public Agency 1.

that found Student eligible for special education services. The 9/14/2018-ESR noted that Student had some school experience through "Progam"[6]. DOE Ex. 3 at 061-062; Special Education Teacher 1, Tr. Vol. III, 100:21-101:24.

27. On September 14, 2018, a Conference Announcement was issued, setting a conference meeting for September 28, 2018 at Home School. The purpose of the September 28, 2018 conference meeting was to develop an Individualized Education Program ("IEP") for Student. DOE Ex. 2 at 021.

28. On September 15, 2018, SSC conducted an academic evaluation of Student and issued an Academic Evaluation Report ("9/15/2018-AE Report"). The 9/15/2018-AE Report also included an observation of Student in class at Home School on October 17, 2018. The academic evaluation noted that Student had limited school experience, Student's speech was largely unintelligible, but Student is able to communicate through a mixture of pointing, gestures, body language, and "babble." Student's performance in the academic/cognitive domains and social/emotional development were low average compared to Student's same aged peers. Student's performance in the adaptive domain was low compared to Student's same aged peers. DOE Ex. 3 at 063-066; Special Education Teacher 1, Tr. Vol. II, 158:24-159:8.

29. SLP is a speech-language pathologist for DOE. As a speech-language pathologist, SLP conducts assessments and determines if a child has a speech and language delay or deficiency. SLP participates in determining if a child is eligible for special education, and if the child is eligible, SLP will help to develop an IEP for the child. SLP will

[6] The record is unclear as to whether "Program" is the same as Public Agency 1.

provide the speech-language therapy in accordance with the child's IEP. SLP, Tr. Vol. III, 153:12-19.

30. On September 24, 2018, SLP conducted a speech/language assessment of Student. Parent 1 informed SLP that Student briefly received services with Public Agency 1. At the time of the speech/language assessment, Student did not have experience attending a structured school with typically developing children. According to SLP, Student's overall receptive and expressive language skills were significantly delayed. During the assessment, Student "primarily spoke in jibberish with intonation/inflection and intent." Due to limited verbal skills, a true speech sound inventory or measure of intelligibility could not be obtained. SLP's findings during the September 24, 2018 speech-language assessment were documented in a Speech/Language Assessment Report ("9/24/2018-SLP Report"). DOE Ex. 3 at 067-069.

September 28, 2018 IEP Meeting

31. On September 28, 2018, an IEP meeting was held, resulting in a September 28, 2018 IEP (9/28/2018-IEP"). Pet. Ex. 1 at 001-013.

32. Present at the 9/28/2018-IEP meeting were Parent 1, Private Facility 1 Administrator, Special Education Teacher 1, another special education teacher, SLP, a general education teacher, and an administrator of Home School. Pet. Ex. 1 at 013; DOE Ex. 2 at 023.

33. During the 9/28/2018-IEP meeting, Private Facility 1 Administrator was there in Private Facility 1 Administrator capacity as a consultant and Private Facility 1 Administrator's role was to guide the IEP team on the Assessment. Private Facility 1 Administrator was invited to participate because Private Facility 1 Administrator was running the Program

at Home School and the IEP team was considering putting Student in the Program. Special Education Teacher 1, Tr. Vol. III, 89:5-90:8, 90:10-20; Private Facility 1 Administrator, Tr. Vol. I, 106:21-107:13.

34. The 9/28/2018-IEP team determined that the severity of Student's behavioral problems warranted placing Student in the Program. Special Education Teacher 1, Tr. Vol. III, 89:1-12.

35. The Program can be implemented in a general education setting. Private Facility 1 Administrator, Tr. Vol. II, 26:10-12.

36. The Program at Home School was implemented in the special education classroom. Private Facility 1 Administrator, Tr. Vol. II, 26:5-9; Special Education Teacher 1, Tr. Vol. III, 91:21-23, 126:12-127:6.

37. Since it was determined that Student would be in the Program, Student was placed in a special education classroom. Special Education Teacher 1, Tr. Vol. III, 126:12-127:6.

38. The 9/28/2018-IEP team determined that Student's placement was in a fully self-contained classroom. DOE Ex. 2 at 035, 037; Special Education Teacher 1, Tr. Vol. III, 131:10-23.

39. According to Special Education Teacher 1, a general education setting would not have been appropriate for Student. Special Education Teacher 1, Tr. Vol. III, 36:1-8.

40. According to Private Facility 1 Administrator, at the time of the 9/28/2018-IEP meeting, implementing the Program in a special education setting was appropriate for Student. Private Facility 1 Administrator, Tr. Vol. II, 26:21-27:17.

41. During the 9/28/2018-IEP team meeting, the IEP team decided that it was in Student's best interest to start school on October 15, 2018 instead of the regular start date of

October 5, 2018. The bases for this decision were that this would be Student's first experience in a school setting, separation anxiety, and October 5, 2018 was a short week before a five-day fall break. DOE. Ex. 2 at 034, 038; Special Education Teacher 1, Tr. Vol. III, 26:14-27:3.

42. According to the 9/28/2018-IEP, Student would receive 1830 minutes per week of special education and speech/language therapy for 350 minutes per quarter. DOE Ex. 2 at 034.

43. Under the "Supplementary Aids and Services, Program Modifications and Supports for School Personnel" ("Supplementary Aids and Services") section of the 9/28/2018-IEP, Student would receive the following: consultation; provider services; breaks; visual aid schedule; and communication log. DOE Ex. 2 at 034.

44. The 9/28/2018-IEP states that "DOE Provider 2" would be provided "Daily." DOE Ex. 2 at 034.

45. The statement "DOE Provider 2" was read to Parent 1. Parent 1 did not ask the other IEP team members what the phrase meant. Parent 1, Tr. Vol. I, 15:1-2, 17:15-22, 18:19-22.

46. DOE Provider 2 was with Student for the entire duration of the school day, or more than 90 percent of the time, except for when there was an emergency and DOE Provider 2 was pulled away. Private Facility 1 Administrator, Tr. Vol. I, 166:23-167:1, 174:9-176:9; Private Facility 1 Administrator, Tr. Vol. II, 88:2-20, 107:24-109:12.

47. Private Facility 1 Administrator had a contract with DOE to provide Home School with DOE Provider 2. The contract ended at the end of the 2018-2019 school year. The DOE Provider 2 who assisted Student at Home School during the 2018-2019 school year

were from Private Facility 1 Administrator's private agency. Private Facility 1 Administrator, Tr. Vol. II, 39:11-22, 108:3-8, 127:15-19, 130:6-17.

48. The 9/28/2018-IEP team also proposed that Student would not participate with Student's non-disabled peers during mealtime, instructional times, and naptime. Student would participate with Student's non-disabled peers during recess and other school functions with modifications and accommodations. DOE Ex. 2 at 035.

49. The 9/28/2018-IEP team relied on SLP's expertise that there was no data regarding regression and recoupment at the time to support extended school year ("ESY") services for speech-language therapy because it was an initial IEP and there had not been any breaks in school. SLP, Tr. Vol. III, 160:14-161:4, 166:13-20.

50. During the 9/28/2018-IEP meeting, it was explained to Parent 1 that the IEP team did not have data to determine ESY eligibility because there had been no breaks in school, and it was explained to Parent 1 that ESY will be re-evaluated after breaks. SLP, Tr. Vol. III, 172:21-173:6.

51. SLP took data on Student's regression/recoupment after the 9/28/2018-IEP meeting when there was a lengthy break and found that Student did not have a big recoupment time period to regain the skills. SLP, Tr. Vol. III, 166:21-167:1.

52. During the 9/28/2018-IEP meeting, the DOE members of the IEP team asked Parent 1 questions, Parent 1 had no questions of Parent 1's own, and Parent 1 was not confused about anything as the IEP team went through the various sections of the IEP. Parent 1, Tr. Vol. I, 49:21-51:4.

53. On the same day, after the 9/28/2018-IEP meeting, a Prior Written Notice of Department Action was issued ("9/28/2018-PWN"). DOE Ex. 2 at 037.

54. The 9/28/2018-PWN stated that the "[d]etermining factors for the need for supplementary aids and services: services, provider services, room break, visual aide schedule, and communication log are part of the program, to offer more appropriate instruction and behavior management determined by information gathered from the Doctor 3 report, past information reported from Parent 1, and the IEP team input." DOE Ex. 2 at 037.

55. On October 24, 2018, a DOE school psychologist conducted an evaluation of Student and made a written report ("10/24/2018-PE Report"). The 10/24/2018 Report was intended to be used during the re-evaluation of Student's special education eligibility, placement, and services. The 10/24/2018 Report states that Student's cognitive skills were rated in the delayed range and Student displayed many characteristics associated with Disability 1. The 10/24/2018 Report also provided recommendations for the IEP team. DOE Ex. 3 at 070-075.

56. The 10/24/2018 Report also noted: "[Student] was evaluated through Public Agency 1 by a specialist who diagnosed Student. DOE Ex. 3 at 071.

57. On October 31, 2018, Parent 1 called Home School to schedule an eligibility meeting. The meeting was scheduled for November 9, 2018. DOE Ex. 5 at 084.

November 9, 2018 IEP Meeting

58. On November 9, 2018, a Conference Announcement was issued, setting an IEP meeting for November 9, 2018 at Home School. The purpose of the November 9, 2018 IEP meeting was to review the effectiveness/appropriateness of Student's 9/28/2018-IEP and to determine educational placement because assessments had been completed. DOE Ex. 2 at 039; SLP, Tr. Vol. III, 163:10-21.

59. On November 9, 2018, an IEP meeting was held, resulting in a November 9, 2018 IEP ("11/9/2018-IEP"). Pet. Ex. 1 at 014-027; DOE Ex. at 042-055.

60. The annual review date listed in the 11/9/2018-IEP is November 9, 2019. Pet. Ex. 1 at 014.

61. Present at the 11/9/2018-IEP meeting were Parent 1, Private Facility 1 Administrator, Special Education Teacher 1, a general education teacher, SSC, SLP, and another special education teacher. Pet. Ex. 1 at 027; DOE Ex. 2 at 041.

62. Much of the 9/28/2018-IEP carried over to the 11/9/2018-IEP with minimal changes to the Present Levels of Educational Performance ("PLEP"): the Background statement was changed to note that Student had been attending a SPED classroom at Home School for four weeks; and the Impact Statement changed Student's eligibility category. (DOE Ex. 2 at 025, 043). The most significant changes were made to the area of English Language Arts and Literacy (compare DOE Ex. 2 at 033 with 047 and 052). Another significant change was the number of minutes of consultation, which decreased from 120 minutes per month to 60 minutes per month (compare DOE Ex. 2 at 034 and 053). The change in consultation minutes was made pursuant to Private Facility 1 Administrator's recommendation because Student showed a decrease in behaviors within four weeks in the SPED classroom. DOE Ex. 2 at 053; Private Facility 1 Administrator, Tr. Vol. I, 121:21-122:21.

63. Student's placement continued to be in the special education classroom. Parent 1 agreed with this placement for Student. DOE Ex. 2 at 053; Parent 1, Tr. Vol. I, 63:4-21.

64. On the same day, after the 11/9/2018-IEP meeting, a Prior Written Notice of Department Action was issued ("11/9/2018-PWN"). The 11/9/2018-PWN noted that Student

continued to not meet the eligibility for ESY services because no data on regression could be taken as there were no long breaks during the four weeks that Student was in school.

65. The 11/9/2018-PWN also noted: "Determining factors for the need for supplementary aids and services: consultation, program services, room break, visual aide support, and communication log are part of the program, to offer more appropriate instruction and behavior management determined by information gathered from the Doctor 3 report, past information from Parent 1, school assessments, and the IEP team input." DOE Ex. 2 at 056. The 11/9/2018-PWN further noted that the bases for the proposed or refused actions were "information gained from the Doctor 3 report, past information reported from Parent 1, academic evaluation, psycho-educational evaluation, speech/language assessment, and input from IEP team. DOE Ex. 2 at 056-057.

66. On November 9, 2018, Parent 1 was provided a copy of an Evaluation Summary Report, which summarized the re-evaluation of Student ("11/9/2018 Report"). The 11/9/2018 Report noted that Student "has some school, Public Agency 1, experience, as well as pre-educational experience in the home setting prior to enrollment at [Home School]. Student has attended school at [Home School] in the last month and has shown progress." The 11/9/2018-ES Report also noted that Student "was evaluated through Public Agency 1 by a specialist who diagnosed Student." DOE Ex. 3 at 076-077.

After the November 9, 2018 IEP Meeting

67. When Student first started at Home School, Student was speaking mostly "gibberish" and was just beginning to repeat words and Student did not have a lot of independent words that Student was saying; however, throughout the school year, Student was still

using "gibberish," but Student was beginning to use more words and Student was putting words together. SLP, Tr. Vol. III, 165:19-166:1.

68. An Individualized Education Program—Progress Report ("IEP Progress Report") was completed every quarter to determine if progress was being made on the goals and objectives, which was done through taking data and observations. DOE Ex. 6 at 136-145; SLP, Tr. Vol. III, 167:2-10.

69. Student's IEP Progress Report was done during three periods: 01/11/2019, 04/03/2019 and 05/31/2019. Spring break occurred between 01/11/2019 and 04/03/2019. DOE Ex. 6 at 136; Special Education Teacher 1, Tr. Vol. III, 58:12-19.

70. Spring break did not impact Student's ability to make progress in the area of English Language Arts and Literary. On 01/11/2019, Student's progress on the objective of making two-word utterances 80% of opportunities was "emerging." Although there is no evidence of regression or rate of recoupment between 01/11/2019 and 04/03/2019, whatever regression Student experienced was recouped and additional progress was made because during reporting period 04/03/2019, Student's progress on the objective of making two-word utterances went from "emerging" to "progressing." DOE Ex. 6 at 136.

71. Student "mastered" the objective of following multiple-step routines (washing hands, bathroom, putting on/off shoes, etc.) in the area of Physical Well-being, Health, and Motor Development. If Student had regressed in this objective during spring break, it was recouped because Student maintained mastery of this objective during reporting periods 04/03/2019 and 05/31/2019. DOE Ex. 6 at 137.

72. Three objectives were set to help Student in the area of Skill Development. Student made progress in all three objectives, and ultimately "mastered" all three objectives during reporting period 05/31/2019. Initially, Student did not initiate play interactions or join in parallel play with sibling or other children and threw tantrums if Student was not given what Student wanted or when transitioning from preferred activities. By reporting period 05/31/2019, Student was interacting with a variety of children, especially on the playground and with peers from another class; Student would often take the hand of a peer to lead them to an activity; Student was able to parallel play; and Student was able to be redirected and showed appropriate and positive responses when told no. DOE Ex. 6 at 138-139. If Student experienced regression in this area during spring break, Student was able to recoup the skills and made additional progress during reporting period 04/03/2019. DOE Ex. 6 at 138-139.

73. Student made progress in the areas of Programs (DOE Ex. 6 at 140-141), Programs (DOE Ex. 6 at 142-143), and Programs (DOE Ex. 6 at 144-145). If Student experienced any regression during the spring break, Student recouped those lost skills and either maintained the same level of progress or made further progress. By reporting period 05/31/2019, Student "mastered" all the objectives for these areas. DOE Ex. 6 at 140-145.

74. When Student returned from spring break, Special Education Teacher 1 observed that behaviorally Student had regressed, which was normal, but within an appropriate period of time, Student was able to go back to where Student had been in behavioral responses and in attending and focus. Special Education Teacher 1, Tr. Vol. III, 10:19-11:4.

75. Overall, Student demonstrated progress during the 2018-2019 school year at Home School. Private Facility 1 Administrator, Tr. Vol. II, 110:1-111:9.

76. In May of 2019, Private Facility 1 Administrator founded Private Facility-1. Pet. Ex. 3 at 160.

77. On August 15, 2019, Parent 1 executed a Request for Release form ("8/15/2019-Release form"). The withdrawal date is noted as July 3, 2019. The 8/15/2019-Release form indicated that Student was transferring to an unspecified private facility and granted Home School permission to transfer Student's records to the new facility upon receiving a written request for records. DOE Ex. 7 at 146.

78. Signing the 8/15/2019-Release form is not a withdrawal from special education services.

79. On October 28, 2019, SSC sent Parent 1 a letter informing Parent 1 that Student was eligible for a free appropriate public education ("10/28/2019-FAPE letter"). The 10/28/2019-FAPE letter states in relevant part:

> **Free Appropriate Public Education (FAPE)**
> Although your child is not currently enrolled in a DOE public school, your child is still eligible to receive a FAPE which includes special education and related services through an individual education program (IEP). If you intend to have your child receive a FAPE and to have an IEP developed, you must contact the principal at the number listed above.
>
> If we **do not** hear from you by 11/7/19 (date) expressing your intent to have your child receive a FAPE, this will serve as an acknowledgement that you **do not** want your child to receive a FAPE and:
>
> - An IEP **will not** be developed for your child.
> - The DOE **will not** be responsible for developing subsequent IEPs until you contact your child's current DOE home school to request one.

DOE Ex. 5 at 103-106.

80. On November 4, 2019, Parent 1 received the 10/28/2019-FAPE letter. DOE Ex. 5 at 106; Parent 1, Tr. Vol. I, 45:16-46:4.

81. At no point did Parent 1 respond to the 10/28/2019-FAPE letter. Parent 1, Tr. Vol. I, 46:5-11.

82. Although Parent 1 did not respond to the 10/28/2019-FAPE letter, a non-response is not a withdrawal from special education services.

83. On November 9, 2019, Student's 11/9/2018-IEP expired and an updated IEP was not made. DOE Ex. 1 at 042; SSC, Tr. Vol. IV, 46:22-24.

84. On May 8, 2020, Parent 1 requested a copy of Student's IEP and a copy was emailed to Parent, 1 along with a copy of a prior written notice. DOE Ex. 5 at 085, 107.

85. On June 15, 2020, Petitioners filed a Complaint and Resolution Proposal against the DOE.

86. On July 14, 2020, Petitioners filed a First Amended Complaint and Resolution Proposal against the DOE.

87. In August of 2020, Private Facility 1 Administrator founded Private Facility-2. Pet. Ex. 3 at 160.

88. On August 17, 2020, Parent 1 signed a tuition agreement with Private Facility-2. Pet. Ex. 3 at 147.

89. On August 24, 2020, SSC called Parent 1 to arrange an IEP meeting for Student, however, Parent 1 was unsure if Parent 1 wanted to have a meeting and wanted to consult with someone before deciding. DOE Ex. 5 086, 108.

90. On August 26, 2020, SSC emailed Parent 1 to follow up on SSC's August 24, 2020 telephone call. DOE Ex. 5 at 108.

91. On August 26, 2020, Parent 1 and SSC had a telephone conversation where they agreed to schedule an IEP meeting for September 10, 2020 using WebEx. SSC followed up on

the telephone conversation with an email and attached a consent form for Parent 1 to execute to obtain records from Student's private facility. DOE Ex. 5 at 087, 110.

92. On August 26, 2020, Parent 1 executed a Consent for Release of Information form ("8/26/2020-Consent form"), granting DOE permission to release and receive educational information to or from Private Facility-1. Pet. Ex. 3 at 132; DOE Ex. 4 at 078; DOE Ex. 5 at 111-112.

93. On August 27, 2020, SSC returned the 8/26/2020-Consent form to Parent 1 asking Parent 1 to fill in the portions asking for Name of Parent, Phone Number and Address. The 8/26/2020-Consent form was otherwise signed by Parent 1. Parent 1 filled in the missing portions and returned it to SSC within minutes. DOE Ex. 5 at 113-115.

94. On August 27, 2020, upon receiving the signed 8/26/2020-Consent form, SSC emailed the form to Private Facility 1 Administrator and called Private Facility-1 and left a message requesting information on Student's current performance to assist with program development. DOE Ex. 5 at 088, 117.

95. On August 28, 2020, SSC went to Private Facility-1 to hand deliver the 8/26/2020-Consent form. No one answered the door. SSC called Private Facility 1 Administrator on Private Facility 1 Administrator's cell phone to tell Private Facility 1 Administrator SSC had emailed Private Facility 1 Administrator 1 the 8/26/2020-Consent form. Private Facility 1 Administrator said Private Facility 1 Administrator didn't see the email but would check and would provide the information. DOE Ex. 5 at 089.

96. On September 4, 2020, SSC sent an email to Private Facility 1 Administrator to follow up on the 8/26/2020-Consent form since no information had been received. DOE Ex. 5 at 090, 117.

97. On September 9, 2020, SSC emailed Parent 1 and informed Parent 1 that SSC had been trying to get current information and data from Private Facility-1 to prepare for their September 10, 2020 IEP meeting. SSC suggested to Parent 1 that should Private Facility-1 not be able to provide information ahead of time, one option would be to allow them to participate in the IEP meeting. Pet. Ex. 3 at 133-134; DOE Ex. 5 at 091.

98. On September 9, 2020, SSC emailed Private Facility 1 Administrator trying to get current data in advance of the scheduled IEP meeting. DOE Ex. 5 at 092; DOE Ex. 5 at 118.

99. On September 9, 2020, Private Facility 1 Administrator responded to SSC's email stating that Private Facility 1 Administrator was dealing with a family emergency, Private Facility 1 Administrator's office had been short staffed since the quarantine, and Private Facility 1 Administrator will get SSC documents as soon as Private Facility 1 Administrator could. DOE Ex. 5 at 092; DOE Ex. 5 at 119.

100. On September 9, 2020, Parent 1 emailed SSC stating: "Hi sorry to get back to you so late but it doesn't look like you'll be able to get the records in time and they can't participate in the meeting tomorrow could we possibly reschedule for another time?" DOE Ex. 5 at 120.

101. On September 10, 2020, SSC responded to Parent 1 stating that SSC will notify the IEP team that the September 10, 2020 IEP meeting was cancelled and will need to be rescheduled. Pet. Ex. 3 at 133; DOE Ex. 5 at 121.

102. On September 10, 2020, Parent 1 responded to SSC's email and stated: "Thank you I just don't see a successful IEP put in place today without accurate data." Pet. Ex. 3 at 133; DOE Ex. 5 at 122.

103. On September 10, 2020, SSC emailed Parent 1 stating that SSC will continue to seek information from Private Facility-1 and that SSC was willing to spend a day or part of a day at Private Facility-1 to do observations. DOE Ex. 5 at 124.

104. On September 10, 2020, Parent 1 emailed SSC: "Yeah there has been some unforeseen circumstances that the school Private Facility 1 Administrator needed to take care of and was unable to get the information out and attend the meeting." DOE Ex. 5 at 126.

105. On September 10, 2020, SSC emailed Private Facility 1 Administrator: "I'm sorry to hear that and hope everything is ok. As for the data, I am willing to visit [Private Facility-1] and spend a day or part of a day to observe [Student] in Student's educational setting, as that would at least provide some information. Let me know if that is an option or there is some other way I can assist." DOE Ex. 5 at 128.

106. On September 10, 2020, SSC emailed Parent 1 and Private Facility-1 offering to do whatever was needed to get current data including observing Student in Student's educational setting. DOE Ex. 5 at 093.

107. On September 10, 2020, Private Facility 1 Administrator responded to SSC's email: "On 9/3 I informed you that for information to be released for this 2020-2021 school year releases need to reflect the name [Private Facility-2]. I did this on behalf of the DOE's request for release of information last week but I'm not in the position to do this at this point. As I mentioned my father passed yesterday. This will need to be initiated by the DOE. We are a private facility and there are various and different needs for the confidentiality of students. Unfortunately we do not have authorization from parents for observations to take place from personnel from other organizations and agencies." DOE Ex. 5 at 129.

108. On September 11, 2020, SSC received the Private Facility 1 Administrator's email requesting a new Consent for Release of Information reflecting Private Facility-2's name. DOE Ex. 5 at 094.

109. On September 11, 2020, SSC emailed Parent 1 informing Parent 1 that Private Facility-1 was requiring the DOE to get a revised Consent for Release of Information form reflecting their new name as Private Facility-2 prior to the release of any information. SSC also requested that Parent 1 allow DOE to observe Student in Student's current educational setting for program development and educational planning. The email included two attachments: (1) a revised Consent for Release of Information form with the name Private Facility-2; and (2) a Request for Observation form. Pet. Ex. 3 at 135-137; DOE Ex. 5 at 095; DOE Ex. 5 at 131-132.

110. On September 11, 2020, SSC emailed Private Facility 1 Administrator: "Thank you for the clarification. I thought that since you were doing business as [Private Facility-1] (see Website) and that we had received information related to other clients using the name [Private Facility-1] that you did not need any additional paperwork from us. I will follow up to get a revised Consent for Release of Information." SSC did not refute Private Facility 1 Administrator's statement that Private Facility 1 Administrator informed SSC on September 3, 2020 that the release form needed to reflect the name Private Facility-2. DOE Ex. 5 at 133.

111. Private Facility 1 Administrator had released information to DOE regarding Student for the 2019-2020 school year but required a new consent form that reflected Private Facility-2's name since Student was attending Private Facility-2 in 2020-2021 school year. Private Facility 1 Administrator, Tr. Vol. I, 134:5-135:6.

112. On September 14, 2020, Parent 1 signed a Consent for Release of Information form ("9/14/2020-Consent form"), granting DOE permission to release and receive educational information to or from Private Facility-2 for the purpose of program development and educational planning. DOE Ex. 4 at 079.

113. On September 14, 2020, SSC received the signed 9/14/2020-Consent form and Request for Observation form from Parent 1, and forwarded both forms to Private Facility 1 Administrator on the same day. SSC asked Private Facility 1 Administrator to forward any educationally relevant information that may assist with program development and educational planning and asked to observe Student in Student's educational setting. DOE Ex. 5 at 096, 135.

Private Facility-1

114. In May of 2019, Private Facility-1 was founded by Private Facility 1 Administrator. Pet. Ex. 3 at 160.

115. Private Facility-1 was a one-year, non-profit pilot program that was funded by donors for the 2019-2020 school year. Private Facility 1 Administrator, Tr. Vol. I, 137:2-10; Private Facility 1 Administrator, Tr. Vol. II, 45:8-14, 46:23-49:13.

116. The 2019-2020 school year at Private Facility-1 ran from August 14, 2019 to May 28, 2020. Private Facility-1 had no school for 11-days during winter break, 4-days during spring break, and 4-days during fall break. DOE Ex. 7 at 147-148.

117. There were eight (8) students in Private Facility-1. Private Facility 1 Administrator, Tr. Vol. II, 47:7-10.

118. Student was in the program in Private Facility-1. Private Facility 1 Administrator, Vol. II, 138:21-139:1.

119. Private Facility-1 did not have a special education program. Private Facility 1 Administrator, Tr. Vol. II, 70:23-71:10.

120. Private Facility-1 had a "reverse inclusion" program where non-disabled children from the community came into Private Facility-1 and joined the students in their classroom schedules and activities. The reverse inclusion program allowed Private Facility-1 students to be exposed to non-disabled children. Private Facility 1 Administrator, Tr. Vol. I, 137:22-138:23.

121. Private Facility-1 did not have licensed teachers. Private Facility 1 Administrator, Tr. Vol. II, 50:13-16.

122. The annual tuition for Private Facility-1 for the 2019-2020 school year was $18,500.00. Pet. Ex. 3 at 150-159.

123. The $18,500.00 tuition was made possible through donations. Families received an additional tuition reduction based on their financial needs. Private Facility 1 Administrator, Tr. Vol. II, 46:23-49:13.

124. For August 2019 through March 2020, Parent 1 paid a total of $700.00 in cash to Private Facility-1. During April and May 2020, the monthly tuition for Private Facility-1 was waived because Private Facility-1 was closed due to the COVID-19 pandemic. Pet. Ex. 3 at 150-159; Private Facility 1 Administrator, Tr. Vol. II, 53:19-54:2.

125. On June 18, 2019, Private Facility 1 Administrator conducted an initial assessment of Student for Private Facility-1. Private Facility 1 Administrator wrote an "Individualized Education Plan" for the 2019-2020 school year ("6/18/2019- Plan"). Pet. Ex. 3 at 138-144.

126. The 6/18/2019- Plan was an assessment of Student's language, learning, and social skills, and behavioral barriers that were interfering with Student's ability to learn more advanced skills. Private Facility 1 Administrator used the Assessment. Pet. Ex. 3 at 138.

127. The 6/18/2019 Plan presented (1) the results of the Assessment, (2) the results of the Assessment, and (3) the goals to teach Student more effective language, learning and social skills such as: fine motor, gross motor, independence, self-help, toileting, and to reduce any language and learning barriers. Pet. Ex. 3 at 138.

128. Student received an overall score of 63.5 out of 170 on the Assessment. A higher score on the assessment indicates higher skill levels. Pet. Ex. 3 at 139.

129. Student received an overall score of 28 out of 96 on the Assessment. A lower score on the assessment indicates fewer barriers. The assessment identifies the barriers that are impeding language and skills acquisition. Student had 21 identified barriers out of 24. Pet. Ex. 3 at 140.

130. The 6/18/2019- Plan noted that "No problem behavior was observed over a 3 day observation period for 60 minutes each observation. Observation dates: 6/19, 6/20, and 6/21/19." Pet. Ex. 3 at 141.

131. The 6/18/2019- Plan includes targets and objectives and will be taught through services with an emphasis on verbal skills. Pet. Ex. 3 at 141.

132. The 6/18/2019- Plan noted that a re-assessment would be conducted in approximately six months following the onset of Student's school program to determine the acquisition level of skills. Pet. Ex. 3 at 141.

133. The 6/18/2019- Plan listed the following Educational Accommodations that would be utilized for Student: collaboration with parent regarding behavior at home vs. school;

prepare Student for upcoming transitions; Student specific antecedent strategies; discrimination teaching; Parent 1's communication books; staff rotation for generalization; visual aids; extra time; preferential seating; counters for data collection; mobile data collection supplies; preferential services location; access to preferred items and activities; reversed inclusion; peer modeling facilitation; speech pathology consult; consultation; programs; and providers. Pet. Ex. 3 at 144.

134. The 6/18/2019- Plan does not mention Student needing ESY services.

135. On November 1, 2019, a re-assessment of Student's language, learning, and skills was done by Private Facility 1 Administrator of Private Facility-1, resulting in an Assessment for the 2019-2020 school year ("11/1/2019-Assessment"). Student's overall score was 78.0 out of 170. Student improved in all skill areas since the 6/18/2019- Plan. Pet. Ex. 3 at 145-146.

136. Student did not receive speech-language therapy at Private Facility-1 because Student's speech production was appropriate for Student's age. Private Facility 1 Administrator, Tr. Vol. II, 63:2-6, 64:24-65:16, 68:3-6.

137. Student did not have special education consultation at Private Facility-1. Private Facility 1 Administrator, Tr. Vol. II, 63:13-17.

Private Facility-2

138. In August of 2020, Private Facility-2 was founded by Private Facility 1 Administrator. Pet. Ex. 3 at 160.

139. Private Facility-2 is a for-profit business. Private Facility 1 Administrator, Tr. Vol. I, 132:17-133:1, 138:24-139:1.

140. Private Facility 1 Administrator used the information gathered from operating Private Facility-1 to develop Private Facility-2's program, and to identify additional services, technology, and assistive technology that could be implemented in Private Facility-2. Private Facility 1 Administrator, Tr. Vol. I, 137:11-21; Private Facility 1 Administrator, Tr. Vol. II, 54:18-55:15.

141. Private Facility-2 is a private school for children with disabilities. Private Facility 1 Administrator, Tr. Vol. II, 55:19-22.

142. Private Facility-2 is an educational program where the skills, objectives, and goals are facilitated. Data collection is taken on a child's specific objectives and goals and then it is tailored to that child's educational program. Private Facility 1 Administrator, Tr. Vol. II, 91:18-19.

143. Private Facility-2 is a year-round program. The 2020-2021 program runs from August 17, 2020 through July 28, 2021. Pet Ex. 3 at 147-148; Private Facility 1 Administrator, Tr. Vol. II, 59:20-24, 69:3-5.

144. The hours of Private Facility-2 are 8:00 a.m. to 2:00 p.m. Student attends Private Facility-2 from 8:00 a.m. to 2:00 p.m. Private Facility 1 Administrator, Tr. Vol. II, 57:4-6, 69:3-5.

145. Private Facility-2 has three classrooms. There are seven students in Private Facility-2. Private Facility 1 Administrator, Tr. Vol. II, 143:23-144:13.

146. Student is in the classroom with two other students. Private Facility 1 Administrator, Tr. Vol. II, 86:3-17.

147. There are three (3) non-disabled children who participate in the reverse inclusion program at Private Facility-2. The non-disabled children are not enrolled at Private

Facility-2. The non-disabled children participate in the reverse inclusion program on a voluntary basis. The non-disabled children are either being home schooled or participate in distance learning. Once these non-disabled children start to attend school in-person, they will not be able to participate in the reverse inclusion program. Private Facility 1 Administrator, Tr. Vol. I, 138:24-141:6; Private Facility 1 Administrator, Tr. Vol. II, 56:2-15, 79:21-83:6.

148. Student will have the opportunity to participate with the non-disabled children in the reverse inclusion program. At the time of the due process hearing, Student was still going through the assessment process so the exact number of minutes Student will have with non-disabled children had not yet been determined. Private Facility 1 Administrator, Tr. Vol. II, 80:23-82:5.

149. Providers are with the students the whole day. Private Facility 1 Administrator, Tr. Vol. II, 57:7-8.

150. Student has a provider with Student for the six hours that Student is in school. Private Facility 1 Administrator, Tr. Vol. II, 143:7-9.

151. The goals and objectives being implemented at Private Facility-2 are continuations of the goals and objectives from Student's 6/18/2019- Plan and 11/1/2019-Assessment. The goals and objective are being implemented according to Student's current skill level. Private Facility 1 Administrator, Tr. Vol. II, 111:10-114:4.

152. On August 17, 2020, Parent 1 signed a tuition agreement with Private Facility-2 for the 2020-2021 school year. The tuition is $219,226.80. Pet. Ex. 3 at 147-148.

153. Private Facility-2 is significantly more expensive than Private Facility-1 because Private Facility-2 does not receive donations. Private Facility 1 Administrator, Tr. Vol. I, 137:8-15; Private Facility 1 Administrator, Tr. Vol. II, 62:11-19.

154. The annual tuition is $48,000.00 ($4,000.00/month) and it covers special education programming, all the materials, the overhead costs, staffing engaged in the administrative side, outside services and technologies for Student's program. Pet. Ex. 3 at 147; Private Facility 1 Administrator, Tr. Vol. II, 136:5-16.

155. At the time of the due process hearing, Student was a candidate to receive speech-language therapy at Private Facility-2 because Student had issues with Student's sentence structure, grammar, and other aspects of Student's language. The cost for speech-language therapy is $6,090.00 per school year. Pet. Ex. 3 at 148. Private Facility 1 Administrator, Tr. Vol. II, 63:7-12, 65:17-66:2, 66:12-67:10.

156. If Student qualifies, Private Facility 1 Administrator will provide the speech-language therapy. Private Facility 1 Administrator, Tr. Vol. II, 135:15-18.

157. Private Facility 1 Administrator is certified. Private Facility 1 Administrator, Tr. Vol. II, 50:10.

158. At the time of the due process hearing, Private Facility 1 Administrator was the only provider. Private Facility 1 Administrator, Tr. Vol. II, 115:7-10.

159. There are no special education teachers who will provide direct services to Student at Private Facility-2. A provider will implement Student's educational program with the assistance of a special education consultant. Private Facility 1 Administrator, Tr. Vol. II, 78:24-79:20, 94:14-18, 95:9-10.

160. "Special Education Consultation" will be provided by a special education consultant located who will remotely consult with Private Facility-2's personnel on academic programs and curriculums for the students. Student will not receive direct services from the special education consultant. The annual cost of the special education consultant is $10,000.00. Pet. Ex. 3 at 148; Private Facility 1 Administrator, Tr. Vol. II, 69:8-20, 72:6-73:22.

161. At the time of the due process hearing, Student was a candidate for special education consultation because it was anticipated that Student will receive more academic services. Student will begin learning reading, writing and math in Private Facility-2. Private Facility 1 Administrator, Tr. Vol. II, 69:17-20, 71:15-25.

162. Student's academic curriculum will be based on standards and will be taught through services. Private Facility 1 Administrator, Tr. Vol. II, 73:7-11, 74:4-11.

163. Assessment is to assess Student for a remote program. The assessment would find out what program Student would benefit from, how much time per week or per day Student will need, and assess Student using a device. The Assessment would also include interviewing Student's parents. The cost of Assessment is $1,000.00. Pet. Ex. 3 at 148; Private Facility 1 Administrator, Tr. Vol. II, 74:12-75:4.

164. At the time of the due process hearing, Student was a candidate for remote/distance learning. Private Facility 1 Administrator, Tr. Vol. II, 74:18-23.

165. Program & Supplies may include a computer, iPad or mini-iPad to take home to use during distance learning. Student has not yet been provided supplies for the program. The cost for the program & supplies for Student is $2,000.00. Pet. Ex. 3 at 148; Private Facility 1 Administrator, Tr. Vol. II, 63:16-24, 75:17-76:3, 76:13-19.

166. "Assistive Technologies" is part of Student's on-campus school program and includes visual aids and supports, laminating materials, use of a mini-iPad (which is used for "services"). Student is a candidate for services. The cost of assistive technologies is $500. Pet. Ex. 3 at 147; Private Facility 1 Administrator, Tr. Vol. II, 63:25-64:5, 76:4-19.

167. "Consultation" is to develop Student's program, modify the program as needed, review the data collection and assessments, and make decisions about Student's program. The annual cost of consultation is $12,180.00. Pet. Ex. 3 at 148; Private Facility 1 Administrator, Tr. Vol. II, 137:9-138:4.

168. Consultation will be provided by Private Facility 1 Administrator. Private Facility 1 Administrator, Tr. Vol. II, 135:5-8.

169. "Supervision" is the supervision, guiding and training of providers. The annual cost to Student is $12,180.00. Pet. Ex. 3 at 148; Private Facility 1 Administrator, Tr. Vol. II, 64:12-23, 137:6-16.

170. Private Facility 1 Administrator will provide the supervision. Private Facility 1 Administrator, Tr. Vol. II, 137:1-5.

171. "Administrative Fee 15%" covers processing, filing, printing out materials, providing information to parents, handling of paperwork, and all the administrative aspects of providing the services that are itemized in the student cost analysis. The Administrative Fee is $27,495.00. Pet. Ex. 3 at 148; Private Facility 1 Administrator, Tr. Vol. II, 138:5-17, 141:23-143:3.

172. Private Facility 3 provides accreditation to organizations providing services. On September 14, 2020, Private Facility 1 Administrator signed an engagement letter with

Private Facility 3 to begin the preliminary accreditation process. Pet. Ex. 3 at 162-179; Private Facility 1 Administrator, Tr. Vol. I, 142:1-144:9; Private Facility 1 Administrator, Tr. Vol. II, 57:9-58:25.

173. Private Facility-2 is in the process of becoming licensed. Private Facility 1 Administrator, Tr. Vol. II, 58:9-17.

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.

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 Board of Education 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. Board of Education 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 School 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 School Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. 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., 267 F.3d at 892.

C. ISSUES FOR DETERMINATION

1. Whether the 9/28/2018-IEP team and the 11/9/2018-IEP team utilized improper factors to determine Student's placement. Additionally, Student could succeed in a less restrictive placement.

Petitioners are alleging that the 9/28/2018-IEP team and 11/9/2018-IEP team utilized improper factors to determine Student's placement[7], and Student could succeed in a less restrictive environment. In Petitioners' closing brief, Petitioners argue that Respondents predetermined Student's placement by deciding Student would participate in the Program intended to be implemented in a special education setting. Pet. Closing at 3-4.

Petitioners' allegation of predetermination is outside the scope of Issue No. 1. A school violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. K.D. v. Dept. of Educ., Hawaii, 665 F.3d 1110, 1123 (9th Cir.2011). As alleged in the FAC, the IEP team utilized improper factors to determine Student's placement, which means that a determination about placement had not yet been made at the time the IEP was being developed. Predetermination means that the IEP team made a placement determination before the IEP was developed. An impartial due process hearing is limited to issues that are raised in a due process hearing complaint:

> The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

[7] Pursuant to H.A.R. §8-60-2, "placement" means an appropriate educational setting for the implementation of the program for a student with a disability based upon the individualized program. It does not mean the specific location or school but the type of placement on the continuum of placement options (e.g., regular classroom with support, special class, special school, etc.).

20 U.S.C. §1415(f)(3)(B). See Dep't. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, *8 (D.Haw. May 1, 2012). There was no agreement to hear the issue of predetermination.

However, even assuming that predetermination falls within the scope of the FAC, Petitioners fail to meet their burden in showing that Student was denied a FAPE. "Predetermination is a species of procedural violation because the IDEA 'requires that the placement be based on the IEP, and not vice versa.'" Cupertino Union Sch. Dist. v. K.A., 75 F.Supp.3d 1088, 1099 (N.D.Cal. Dec. 2, 2014). A "court must still consider whether the procedural error led to a substantive violation of the IDEA, or whether the procedural error caused the loss of educational opportunity, seriously infringed the parents' opportunity to participate in the IEP formulation process, or caused a deprivation of educational benefits." K.A., 75 F.Supp.3d at 1099.

During the 9/28/2018-IEP meeting, Private Facility 1 Administrator was invited to participate because Private Facility 1 Administrator was running the Program at Home School and the IEP team was considering putting Student in the Program (FOF 32-33). The 9/28/2018-IEP team determined that the severity of Student's behavioral problems warranted placing Student in the Program (FOF 34). While the Program can be implemented in a general education setting, the Program at Home School was implemented in the special education classroom (FOF 35-36). Since it was determined that Student would be in the Program, Student was placed in a special education classroom[8] (FOF 37). The determination to place Student in a special

[8] Whether the IEP team satisfied the four-factor balancing test articulated in Rachel H. to determine the appropriate placement for Student, although alleged in the FAC, was not argued by Petitioners. Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. ex rel. Holland, 14 F.3d 1398, 1404 (9th Cir.1994). Whether the 9/28/2018-IEP team appropriately determined Student's placement is different from predetermining Student's placement. Having not argued

education classroom was made during the 9/28/2018-IEP meeting after a discussion about the severity of Student's behaviors and placing Student in the Program. According to Special Education Teacher 1, a general education setting would not have been appropriate for Student (FOF 39). According to Private Facility 1 Administrator, at the time of the 9/28/2018-IEP meeting, implementing the Program in a special education setting was appropriate for Student (FOF 40). Because the decision to place Student in a special education classroom was made during the 9/28/2018-IEP meeting after a discussion, it was not predetermination.

Even if DOE predetermined Student's placement, Petitioners fail to meet their burden in showing that this "prevent[ed] Parent 1 from a wider discussion on placement." Pet. Closing Brief at p. 4. There is no evidence that Parent 1 wanted to discuss other placements. During the 9/28/2018-IEP meeting, the DOE members of the IEP team asked Parent 1 questions, Parent 1 had no questions of Parent 1's own, and Parent 1 was not confused about anything as the IEP team went through the various sections of the IEP (FOF 52). Based on the foregoing, Petitioners fail to meet their burden in showing that Parent 1's opportunity to participate was significantly impeded even if Student's placement was predetermined.

With respect to the 11/9/2018-IEP, Petitioners also fail to meet their burden in showing that Student was denied a FAPE if the placement was predetermined. The IEP team met again on November 9, 2018 to review the effectiveness/appropriateness of Student's plan and to determine educational placement (FOF 58). Student's supplementary aids and services remained the same except for the decrease in consultation minutes because Student had shown a decrease in behavioral problems (FOF 62). Student's placement continued to be in the special education

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that the IEP team used improper factors to determine Student's placement, Petitioners have abandoned Issue No. 1 as stated in the FAC.

setting. Parent 1 agreed with this placement for Student (FOF 63).

Furthermore, Petitioners do not allege, and the record does not support, that Student was denied an educational benefit or missed an educational opportunity. Based on the record, Student was appropriately placed in a special education setting that implemented the Program as Student's behavioral problems decreased within four weeks of being in a special education classroom (FOF 62) and Student made steady progress while at Home School (FOF 69, 70-75).

Petitioners also fail to show that Student could have succeeded in a less restrictive environment. Parent 1 and Private Facility 1 Administrator did not inform the DOE members of the 9/28/2018-IEP team and 11/9/2018-IEP team that they believed Student should be in a less restrictive environment. Private Facility 1 Administrator was in agreement that implementing the Program in a special education classroom was appropriate for Student during the 9/28/2018-IEP meeting (FOF 40); and Parent 1 agreed with placing Student in a special education classroom during the 11/9/2018-IEP meeting (FOF 63).

Based on the foregoing, Petitioners abandoned Issue No. 1 as it is alleged in the FAC. However, assuming that predetermination is within the scope of the FAC, Petitioners fail to show that Student's placement was predetermined and that Parent 1's opportunity to participate in the decision-making process was significantly impeded.

2. Whether the DOE failed to collect sufficient data/information, prior to the 9/28/2018-IEP meeting and the 11/9/2018-IEP meeting, necessary to determine whether Student qualified for Extended School Year services. The discussion held regarding Student's eligibility for Extended School Year services at both meetings was insufficient. Student should have qualified for Extended School Year services.

In Issue No. 2, Petitioners allege that (1) the DOE failed to collect sufficient information before the IEP meetings to determine ESY eligibility; (2) the discussion about Student's eligibility for ESY services during the IEP meetings was insufficient; and (3) Student should

have been deemed eligible for ESY services. The undersigned finds that DOE failed to collect information prior to the IEP meetings to determine whether Student qualified for ESY services; however, Petitioners fail to meet their burden in showing that the discussion about Student's eligibility for ESY services during the IEP meetings was insufficient, and Petitioners fail to show that Student needs ESY services.

DOE failed to collect information before the 9/28/2018-IEP meeting and 11/9/2018-IEP meeting to determine whether Student was eligible for ESY services. DOE was aware on or before September 14, 2018 that Student had some school experience through "Private Program 1" (FOF 26). On September 24, 2018, SLP was informed by Parent 1 that Student received services from Public Agency 1 (FOF 30). Public Agency 1 records are routinely forwarded to DOE by Public Agency 1; however, this did not happen for Student (FOF 16). Having not received the Public Agency 1 records for Student, DOE did not request a copy (FOF 15). DOE decided that they did not need the Public Agency 1 records since they had Doctor 3's 7/19/2018-Report and could make an eligibility determination based on the Doctor 3's report. SSC, Tr. Vol. IV 29:21-31:16. The Public Agency 1 records were further deemed unnecessary because DOE determined that they would be ordering their own assessments. SSC, Tr. Vol. IV, 29:21-31:11. In this case, where Student is entering a DOE school, and DOE has extremely limited information about Student because Student is new, whatever information that "Private Program 1" and Public Agency 1 may provide becomes even more important[9]. Whether or not the information would have been useful in determining ESY eligibility cannot be determined until DOE looks at it. For example, observations from an occupational therapist regarding Student's

[9] The record is unclear as to whether the school experience at "Private Program 1" is the same as the services Student received from Public Agency 1. If they are separate agencies, DOE should have reached out to both and tried to get information from both agencies.

ability to use some sounds/expressions and Student's vocalization ability may help in establishing the baseline for determining regression. Pet. Ex. 2 at 029. Without seeing the Public Agency 1 records, there is no way of knowing if there is any useful information regarding regression or recoupment that could be used in determining ESY eligibility. The fact that DOE will be doing assessments does not mean that the Public Agency 1 records are less important. The information that DOE gains from the assessments will be helpful when they are done, but the information that the Public Agency 1 records contain pre-dates the assessments. Therefore, the undersigned finds that DOE failed to collect information to determine Student's eligibility for ESY services.

Petitioners fail to argue why the discussion regarding ESY eligibility was insufficient and the undersigned declines to guess why Petitioners believe that the discussion was insufficient. The IEP team not having the Public Agency 1 records at the time of the 9/28/2018-IEP meeting and 11/9/2018-IEP meeting does not automatically make the discussion insufficient, especially when the Public Agency 1 records do not speak to the need for ESY services (FOF 12). However, even assuming that the ESY eligibility discussion was insufficient, Petitioners fail to meet their burden in showing a substantive error.

While DOE committed a procedural error by not obtaining the Public Agency 1 records, there was no substantive error because Petitioners have not shown that ESY services are necessary for the provision of FAPE to Student. "[T]he mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process, nor that the DOE's determination was incorrect." Laddie C. ex rel. Joshua C. v. Dep't of Educ., 2009 WL 855966 at *4 (D.Haw. Mar. 27, 2009).

The C.F.R. §300.106—Extended school year services—states in pertinent part:

(a) General.

(1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school years services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not—

(i) Limit extended school year services to particular categories of disability; or

(ii) Unilaterally limit the type, amount, or duration of those services.

(b) Definition. As used in this section, the term extended school year services means special education and related services that—

(1) Are provided to a child with a disability—

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA.

Haw. Admin. Rule §8-60-7 is substantively identical to C.F.R. §300.106.

DOE must provide ESY services only if the Student's IEP team determines that ESY services are necessary for the provision of FAPE to Student. Dep't of Educ., State of Haw. v. Leo W., 226 F.Supp.3d 1081, 1112, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016). "The burden is on the parents to establish that ESY services are necessary." Virginia S. ex rel. Rachael M. v. Dep't of Educ., Hawaii, Civil No. 06-00128 JMS/LEK, 2007 WL 80814, at *13 (D.Haw. Jan. 8, 2007). "'[A] claimant seeking an ESY must satisfy an even stricter test, because "providing an ESY is the exception and not the rule under the regulatory scheme."'" N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1211 (9th Cir.2008) (citations omitted). Therefore, the burden is on Petitioners to establish by a preponderance of the evidence that ESY services are necessary for Student. Petitioners have failed to meet this burden.

While Petitioners are not required to present empirical proof of actual prior regression, there was no evidence that ESY was necessary. There were no expert opinion testimony or opinions from professionals or any reliable documentation showing that ESY is necessary. N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1212 (9th Cir.2008) (A claimant can rely on expert opinion testimony to make the showing that ESY is necessary to permit a child to benefit from his instructions, and are not required to present empirical proof of actual prior regression). See also, Virginia S. ex rel. Rachael M. v. Dep't of Educ., Hawaii, Civil No. 06-00128 JMS/LEK, 2007 WL 80814, at *12 (D.Haw. Jan. 8, 2007) ("'the state should consider the likelihood of regression, slow recoupment, and predictive data based upon the opinion of professionals.'" Todd v. Duneland Sch. Corp., 299 F.3d 899 (7th Cir. 2002)); Kenton County Sch. Dist. v. Hunt, 384 F.3d 269, 279 (6th Cir.2004) (confirming that "it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.")

"'ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.'" N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1211 (9th Cir.2008) (quoting MM ex rel. DM v. Sch. Dist. of Greenville County, 303 F.3d 523, 537-38 (4th Cir.2002)). Based on the lack of evidence that the benefits Student will gain during a regular school year will be significantly jeopardized if Student is not provided ESY services, Petitioners have failed to meet their burden. As such, DOE did not deny Student a FAPE because the 9/28/2018-IEP and 11/09/2018-IEP did not provide ESY services to Student.

3. **Whether the DOE failed to collect sufficient data/information and/or include participation of knowledgeable persons about Student's needs at the 9/28/2018-IEP meeting and the 11/9/2018-IEP meeting. This includes a discussion about assistive technology and/or communication skills. This allegation relates to the concept of "lost educational opportunity."**

Petitioners withdrew Issue No. 3. Pet. Closing Brief at 5.

4. **Whether the 9/28/2018-IEP and the 11/9/2018-IEP fail to provide sufficient Supplementary Aids and Services for Student to be successful in the Least Restrictive Environment and/or make adequate gains on Student's academic, behavioral, and/or social needs.**

    a. **The phrase "Provider" is inadequate to ensure Student will be provided appropriate behavioral intervention. Also, the frequency "Daily" is vague and cannot be enforced as an all-day statement by Parent 1; it could mean anything minutes to all day.**

In Issue No. 4, Petitioners allege that the 9/28/2018-IEP and the 11/9/2018-IEP fail to provide sufficient Supplementary Aids and Services for Student to be successful in the least restrictive environment and/or make adequate gains on the academic, behavioral, and/or social needs. Petitioners allege that the phrase "Provider" is inadequate to ensure that Student will be provided appropriate behavioral intervention, and the term "Daily" is vague and cannot be enforced as an all-day statement by Parent 1[10]. Petitioners fail to show that the phrase "Provider" and the term "Daily" resulted in a denial of FAPE.

In determining whether an inadequate or vague description in an IEP results in a denial of FAPE, the Ninth Circuit has provided guidance that a reviewing authority examine the

[10] Petitioners argue in their closing brief (p. 6) that "Simply describing this service as 'Provide appropriate modeling for asking and answering questions' does not identify the Program...." However, "provide appropriate modeling for asking and answering questions" do not appear in either the 9/28/2018-IEP or the 11/9/2018-IEP's Supplementary Aids and Services.

deficiency as a procedural violation. See Union School Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir.1994) (holding that a failure to formally provide a written offer for an appropriate educational placement to parents was a procedural violation under the IDEA); M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1195 (9th Cir.2017) (holding that the school district's failure to properly document the offer of visually impaired services was a procedural violation that precluded parents from meaningful participation in the IEP process); William Hart Union Sch. Dist. California State Educational Agency, 119 LRP 32329, 14 (2019) (holding that failure to make a clear written offer of FAPE is a procedural violation). While the IDEA does envision that the written IEP offer would constitute a "formal, specific offer from a school district [that] will greatly assist parents in presenting complaints with respect to any matter relating to the educational placement of the child," M.C. v. Antelope, 858 F.3d at 1197, omissions or imprecise language do not always amount to a denial of FAPE. Assuming that a procedural violation occurred, the review must then continue onto whether the procedural violation amounted to a loss of educational opportunity, significantly impeded parent's opportunity to participate or a deprivation of educational benefits to Student. Amanda J., 267 F.3d at 892.

Petitioners allege that the phrase "Provider" does not identify the Program the IEP team anticipated that Student would receive. First, with respect to this allegation, Petitioners are not alleging that the Supplementary Aids and Services are not appropriate, but rather the words used to describe the services are inadequate. Petitioners fail to meet their burden in showing that this phrase is inadequate. Petitioners have not cited to any legal authority that a program must be identified in an IEP. While the IEPs do not identify the Program, the 9/28/208-PWN and 11/9/2018-PWN both state that "consultation, Provider, room break, visual aide schedule, and

communication log are part of the program. . . ." (FOF 54, 65).

Petitioners allege that because the phrase "Provider" is vague, it is "a violation of Parents' right to participation." Pet. Closing Brief at 5. However, Petitioners fail to establish how the phrase significantly impeded Parent 1's opportunity to participate. Parent 1 was present at the 9/28/2018-IEP meeting. Parent 1 testified during the due process hearing that the statement "Provider" was read to Parent 1 and Parent 1 did not understand what it meant at the time. Parent 1, Tr. Vol. I, 15:1-2, 17:15-22. Parent 1, however, did not ask the other IEP team members what the phrase meant (FOF 45). "The court [in C.B.] decline[d] to place upon a school the burden of recognizing a parent's concern about the inadequacy of a school's response to the parent's inquiry when the parent has given no indication of concern." Dep't of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, at *11 (D.Haw. May 1, 2012). Likewise, in this instant case, the undersigned declines to place upon a school the burden of recognizing that Parent 1 did not understand what the phrase meant when Parent 1 did not raise Parent 1's concerns or lack of understanding. Furthermore, the same phrase was used again in the 11/9/2018-IEP and there is no evidence that Parent 1 raised any concerns or informed the DOE members of the IEP team that Parent 1 did not understand the phrase. And while not alleged by Petitioners, the record does not support that Student missed an educational opportunity or was denied an educational benefit. Based on the foregoing, Petitioners failed to meet their burden of showing that the use of the phrase "Provider" denied Student a FAPE.

Next, Petitioners allege that the term "Daily" is vague and cannot be enforced as an all-day statement by Parent. An IEP must include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child. . . ." 20 U.S.C. §1414(d)(1)(A)(i)(IV). The IEP must

state the "anticipated frequency, location, and duration of those services." 20 U.S.C. §1414(d)(1)(A)(i)(VII). The allegation in this case is similar to that of Dep't. of Educ., Hawaii, v. C.B., where the Hawaii District Court was faced with the issue of whether the term "daily" was sufficient. The undersigned analyzes this case in the same manner as the C.B. Court, and finds that Petitioners fail to show that the use of the term "daily" resulted in the denial of a FAPE.

"[T]he Ninth Circuit suggested that a failure to sufficiently specify the frequency of services was a procedural, not substantive violation." C.B., 2012 WL 1537454, at *10 (citing J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 953 (9th Cir.2009)). Therefore, Petitioners must show that the use of the term "daily" resulted in a loss of educational opportunity, significantly impeded Parent 1's opportunity to participate in the IEP formulation process or resulted in a deprivation of educational benefits to Student. Petitioners do not allege that the use of the term "daily" resulted in a loss of educational opportunity, or significantly impeded Parent 1's opportunity to participate in the IEP formation process or resulted in a deprivation of educational benefits to Student.

Even though Petitioners are alleging that the term "daily" is vague, the record indicates that Parent 1 understood that providers would be present for the duration of the school day. Parent 1, Tr. Vol. I, 54:10-55:9. Private Facility 1 Administrator, who had a contract with DOE to provide services to Home School, testified that Student was provided services for the entire duration of the school day except for when there was an emergency and provider is pulled away (FOF 46-47). Special Education Teacher 1 testified that the term "daily" meant that a provider would be with Student for the entirety of the school day. Special Education Teacher 1, Tr. Vol. III, 22:13-23:1. Furthermore, the record does not support that Student suffered a loss of

educational opportunity or was deprived of an educational benefit. Therefore, Petitioners fail to meet their burden in showing that the use of the term "daily" was a denial of FAPE.

5. Whether the 11/9/2018-IEP expired on 11/9/2019 and has not been replaced.

In Issue No. 5, Petitioners are alleging that Respondents denied Student a FAPE when Student's 11/9/2018-IEP expired on November 9, 2019 and Respondents did not replace the 11/9/2018-IEP. There is no dispute that the last IEP for Student is dated November 9, 2018 (FOF 83; DOE Closing Brief at 23). Student has been without a valid IEP since November 9, 2019. Based on the evidence adduced at the due process hearing, the undersigned Hearings Officer finds that Respondents failed to perform an annual review of Student's 11/9/2018-IEP and to have an IEP in effect for Student at the beginning of the 2020-2021 school year.

The development and revision of IEPs are governed by, *inter alia*, 34 C.F.R. §300.324(a)(6), (b)(1)[11],

> (a) Development of IEP—
>
> *****
>
> (6) Amendments. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.
>
> (b) Review and revision of IEPs—
> (1) General. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—
> (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
> (ii) Revises the IEP, as appropriate, to address—
> (A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;
> (B) The results of any reevaluation conducted under §300.303;

[11] See also, H.A.R. §8-60-48(a)(6) and (b)(1).

> (C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);
> (D) The child's anticipated needs; or
> (E) Other matters.

Furthermore, federal regulations also require that "[a]t the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in §300.320." 34 C.F.R. §300.323(a).

In the present case, on November 9, 2018, the IEP team formulated the 11/9/2018-IEP. The IEP team at that time decided that an annual review of the 11/9/2018-IEP would be conducted by November 9, 2019 (FOF 60). However, no IEP meeting was held to review Student's 11/9/2018-IEP, and Respondents have not articulated a valid reason why Student's 11/9/2018-IEP was not reviewed.

Respondents' arguments that Parent 1 withdrew Student from Home School on July 3, 2019 and did not respond to the 10/28/2019-FAPE letter are unpersuasive. DOE Closing Brief at pp. 23-24. Respondents have the legal obligation to revise the 11/9/2018-IEP for Student by the annual review date; Parent 1 does not have this legal obligation[12]. Because the legal obligation rests with Respondents, Respondents must revise the IEP for Student by the annual review date. In this case, Parent 1 did not withdraw Student from special education services (FOF 78, 82). Student continues to be eligible for special education services as acknowledged by the 10/28/2019-FAPE letter. Parent 1 not calling Home School as requested by the 10/28/2019-FAPE letter does not eliminate Respondents' legal obligation to make a FAPE offer to Student.

At most, Parent 1's failure to respond to the 10/28/2019-FAPE letter is the equivalent of a

[12] The Ninth Circuit has held that "[a]n agency cannot blame a parent for its failure to ensure meaningful procedural compliance with the IDEA because the IDEA's protections are designed to benefit the student, not the parent," Doug C., 720 F.3d at 1045.

refusal to participate in an IEP meeting. Parent 1 not responding to the 10/28/2019-FAPE letter is not the equivalent of waiving Student's right to a FAPE. If a public school sends multiple communications to a parent, and if the parent refuses to respond to these communications, the parent, arguably, waives his/her right to participate in an IEP meeting, and the public school can proceed with an IEP meeting without the parent. H.A.R. §8-60-46(d)[13]. Assuming that Parent 1's failure to respond to the 10/28/2019-FAPE letter rises to the level of refusing to participate, which the undersigned is not finding, DOE could have held the annual IEP meeting without Parent 1. Therefore, the failure to have an annual IEP meeting by November 9, 2019 is a procedural violation.

Under the IDEA, harmless procedural errors do not constitute a denial of FAPE; however, procedural inadequacies that result in the loss of educational opportunity or significantly impede the parent's opportunity to participate in the IEP formulation process will result in the denial of a FAPE. W.G. v. Bd. of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir.1992). A hearing officer may find that a child did not receive a FAPE 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

[13] Hawaii Administrative Rules §8-60-46(d) states:

> Conducting an IEP team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the department is unable to convince the parents that they should attend. In this case, the department shall keep a record of its attempts to arrange a mutually agreed on time and place, such as:
> (1) Detailed records of the telephone calls made or attempted and the results of those calls;
> (2) Copies of correspondence sent to the parents and any responses received; and
> (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

a FAPE to the parent's child; or (iii) caused a deprivation of education benefit. 34 C.F.R. §300.513(a)(2). "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been bettered considered.'" Doug C., 720 F.3d 1038, 1046 (9th Cir.2013) (quoting M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 657 (9th Cir.2005)). "[A]n IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that his placement would have been different but for the procedural error." Doug C., 720 F.3d at 1046 (citing M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 657 (9th Cir.2005)). Petitioners have met their burden in showing that there was a loss of educational opportunity when Respondents did not revise Student's IEP by the annual review date. Parent 1 testified during the due process hearing that during an upcoming IEP meeting Parent 1 would like to convince Home School to place Student at Private Facility-2, and if that is not possible, to provide services that are similar to what Student is receiving at Private Facility-2. Parent 1, Tr. Vol. I, 39:8-21.

In addition to meeting their burden of showing a loss of educational opportunity, the undersigned Hearings Officer finds Respondents significantly impeded parent's opportunity to participate in the IEP formulation process. Parental participation in the IEP and educational placement process is critical and necessary. Doug C., 720 F.3d at 1043-1044. A school has an "affirmative duty" to include parents in the IEP process. Id. at 1044. "Because disabled children and their parents are generally not represented by counsel during the IEP process, procedural errors at that stage are particularly likely to be prejudicial and cause the loss of educational benefits." M.C. v. Antelope Valley Union High School District, 858 F.3d 1189, 1195 (9th Cir.2017). The 10/28/2019-FAPE letter acknowledged that Student "is still eligible to receive a

FAPE" (FOF 79). Knowing that Student is still entitled to a FAPE, Respondents failed to hold an IEP meeting and update Student's IEP. Respondents' efforts to include Parent 1 in an IEP meeting was not sufficient. Respondents must proactively try to "convince" Parent 1 to participate in an IEP meeting, and only when Respondents are "unable to convince" Parent 1 to attend can Respondents then proceed without Parent 1. Doug C. at 1044. A solution to not being able to convince a parent to participate in an IEP meeting is not to deny a student a FAPE, but to proceed without that parent[14]. While it may seem like Parent 1 did not want to attend an IEP meeting because Parent 1 did not respond to the 10/28/2019-FAPE letter, not responding to the 10/28/2019-FAPE letter is not a refusal to participate. Parent 1 had a right to participate in an IEP meeting that should have occurred, but did not, which resulted in Parent 1's opportunity to participate being significantly impeded.

Respondents also failed to have in effect an IEP at the beginning of the 2020-2021 school year. DOE schools historically begin sometime in August. The 11/9/2018-IEP having expired on 11/9/2019, Respondents did not have in effect an IEP for Student in August of 2020 when the 2020-2021 school year began. For the same reasons why not having an annual review of Student's IEP resulted in a loss of educational opportunity and significantly impeded Parent 1's opportunity to participate in the IEP decision-making process, not having an IEP in effect at the beginning of the 2020-2021 school year resulted in a loss of educational opportunity and significantly impeded Parent 1's participation rights. Based on the foregoing, Petitioners have met their burden in proving that Student was denied a FAPE.

D. TUITION REIMBURSEMENT FOR PRIVATE FACILITY

[14] The undersigned is not suggesting that based on these facts that Respondents should have proceeded with an IEP meeting without Parent 1.

Petitioners seek reimbursement for all educational and related expenses for Private Facility-1 for the 2019-2020 school year and payment for all educational and related expenses for Private Facility-2 for the 2020-2021 school year. Pet. Closing Brief at p.32; FAC. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in a private school and request reimbursement for tuition at said private school from the local educational agency. Florence County School Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 364-365, 126 L.Ed.2d 284 (1993) (citing School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985)), see also 20 U.S.C. §1415(b)(6), (f)(1)(A). A parent who unilaterally places a child in private school pending review proceedings under the IDEA is entitled to reimbursement if the parent can establish that (1) the public placement violated the IDEA, and (2) the private school placement was proper under the IDEA. Doug C., 720 F.3d 1038, 1041, 1047-1048 (9th Cir.2013) (citing Carter, 510 U.S. at 15, 114 S. Ct. 361). If both are met, "the district court must then exercise its 'broad discretion' and weigh 'equitable considerations' to determine whether, and how much, reimbursement is necessary." C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir. 2011) (citing Carter, 510 U.S. at 15-16, 114 S. Ct. 361).

The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in Frank G. v. Bd. Of Educ., 459 F.3d 356, 365 (2nd Cir.2006), where "to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit

from instruction." C.B., 635 F.3d at 1159 (citing Frank G., 459 F.3d at 365). Parental placement can be appropriate, even if it does not meet state standards. 34 C.F.R. §300.148(c).

In this case, the public placement of Student violated the IDEA in such a manner that Student was denied a FAPE. This Hearings Officer now examines whether the unilateral placement of Student at Private Facility-1 in the 2019-2020 school year and Private Facility-2 in the 2020-2021 school year were proper under the IDEA.

Private Facility-1 in 2019-2020 School Year

An impartial due process hearing may be requested "within one hundred and eighty calendar days of a unilateral special education placement, where the request is for reimbursement of the costs of the placement." H.R.S. §302A-443(a)(2). "The unilateral special education placement timeframe begins on the student's first day of attendance." H.A.R. §8-60-61(a)(2). On June 18, 2019, Student participated in an assessment at Private Facility-1, resulting in the 6/18/2019 Plan (FOF 125). Parent 1 signed a Request for Release form on August 15, 2019, requesting the release of Student from Home School to transfer to a private facility (FOF 77). Student attended Private Facility-1 at the beginning of fall 2019, and the school year began sometime on August 14, 2019 (FOF 116). The instant Complaint and Resolution Proposal was filed on June 15, 2020 and the FAC was filed on July 14, 2020 (FOF 85-86). August 2019 to June 15, 2020 is more than one hundred eighty calendar days. Therefore, Petitioners are barred from seeking reimbursement for the 2019-2020 school year at Private Facility-1.

In addition to being barred because of an untimely request for impartial due process hearing, Petitioners failed to comply with the notice provision of 20 U.S.C. §1412(a)(10)(C)(iii). According to 20 U.S.C. §1412(a)(10)(C)(iii), reimbursement may be reduced or denied and states in pertinent part:

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

Student was removed from Home School on August 15, 2019 when Parent 1 signed the 8/15/2019-Release form and began school sometime in August of 2019. Prior to the removal of Student from Home School in the 2019-2020 school year, the most recent IEP meeting that Parent 1 attended was the 11/9/2018-IEP meeting. There is no evidence that during the 11/9/2018-IEP meeting Parent 1 informed the IEP Team that Parent 1 was rejecting the placement proposed by DOE to provide a free appropriate public education to Student, including stating Parent 1's concerns and Parent 1's intent to enroll Student in a private facility at public expense. There is also no evidence that 10 business days prior to the removal of Student from Home School Parent 1 had given written notice to DOE that Parent 1 was rejecting the placement proposed by DOE to provide a free appropriate public education to Student, including stating Parent 1's concerns and Parent 1's intent to enroll Student in a private facility at public expense. For these reasons, Petitioners' request for reimbursement for the 2019-2020 school year is denied.

Private Facility-2 in 2020-2020 School Year

Private Facility-2 is not yet a licensed school in the State of Hawaii, but it is in the process of becoming licensed (FOF 173). Private Facility-2 is also in the process of seeking preliminary accreditation from the Private Facility 3 (FOF 172). Private Facility-2's pending licensure and accreditation status does not preclude it from being deemed an appropriate placement[15].

Private Facility-1 was a non-profit program established in May of 2019 by Private Facility 1 Administrator (FOF 114-115). Private Facility 1 Administrator used the information gathered from operating Private Facility-1 to develop Private Facility-2's program, and to

[15] H.R.S. §302A-443.5 reads in pertinent parts: Education of students with disabilities; private residential facilities; special education schools or programs; accreditation.

(a) As used in this section:

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"Nonpublic special education school or program" means any privately owned or operated preschool, school, educational organization or corporation, treatment facility, day program, residential program, or any other placement that maintains, conducts, or provides classes or programming, including related services as defined by federal or state laws, rules, or regulations, for the purpose of offering instruction or treatment to students with disabilities for consideration, profit, tuition, or fees.

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(c) Any nonpublic special education school or program that:

(1) Is not accredited by the Western Association of Schools and Colleges, any Hawaii affiliate of the Western Association of Schools and Colleges, the Hawaii Association of Independent Schools, the National Association for the Education of Young Children, or the National Early Childhood Program for Accreditation; and

(2) Receives funding from the State, either directly or through parental reimbursement,

Shall apply for accreditation within ninety days from the date of accepting a student with disabilities who was placed there as the result of a hearing officer's decision pursuant to section 302A-443, court order, settlement agreement, or placement by the department. Within the ninety-day application period, the nonpublic special education school or program shall provide proof of its application for accreditation to the department.

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identify additional services, technology, and assistive technology that could be implemented in Private Facility-2 (FOF 140). Private Facility-2 is a for-profit business (FOF 139). All the students at Private Facility-2 have disabilities (FOF 141). Student is in the class with two other students (FOF 146). Although Private Facility-2 does not have licensed special education teachers, DOE Provider 2 and Private Facility 1 Administrator will serve as teachers and will receive guidance from a special education consultant (FOF 159-160).

Parent 1 testified that while Student was attending Private Facility-1, Student became more verbal and Student was able to identify and express what Student wanted and needed. Student also threw less tantrums when Student had to transition from one activity to another. Parent 1, Tr. Vol. I, 41:12-42:1. Parent 1 testified that while Student is attending Private Facility-2, Student continues to show improvement in Student communication skills, social skills, and in tolerating transitions between activities. Parent 1, Tr. Vol. I, 42:4-14.

Student is in class from 8:00 a.m. to 2:00 p.m. (FOF 144). At the time of the due process hearing, Student was a candidate for speech-language therapy and special education services (FOF 155, 161). Student will be able to interact with non-disabled children through the reverse inclusion program (FOF 148). Student will have a provider at all times while in Private Facility-2 (FOF 150). The provider implements Student's program and is overseen by Private Facility 1 Administrator (FOF 159, 170). Student's academic curriculum is modeled after standards (FOF 162), and Student will begin learning reading, writing and math in Private Facility-2 (FOF 161).

The "Ninth Circuit [has] held that a private program does not need to meet all of a student's educational needs, and merely needs to provide specially designed educational instruction for the unique needs of the student." L.S., 2019 WL 1421752, at *14 (citing C.B.,

635 F.3d at 1159). The "Supreme Court has held that the IDEA's requirements of public schools are not applicable to private school placement." Id. at *15 (citing Carter, 510 U.S. at 13-14, 114 S.Ct. 361). Parental placement can be appropriate even if it does not meet state standards. 34 C.F.R. §300.148(c). Based on the foregoing reasons, Petitioners have proven that Private Facility-2 placement was proper under the IDEA.

Under IDEA, if Petitioners succeed in meeting their burden of proving that the DOE violated the IDEA and denied Student a FAPE, and that the private placement is proper, the reviewing body has the authority to consider equity in determining whether and in what amount tuition reimbursement is to be awarded to a parent that unilaterally places a child at a private program. C.B., 635 F.3d at 1159. "Regarding reimbursement, courts may consider any relevant factor, including the reasonableness of the private tuition, [citation omitted], and the conduct of parents in the IEP formulation process." LS, 2019 WL 1421752, at *14. The undersigned Hearings Officer finds that Private Facility-2's tuition costs to be unreasonable because it includes redundant and excessive. Id., at *15.

The total tuition and fees for the 2020-2021 school year for school is $219,226.80 (FOF 152). Private Facility-2 relied on a 2020-2021 school year rate sheet from Private Facility 4 to formulate its rates. Private Facility 1 Administrator, Tr. Vol. II, 101:7-102:11; Pet. Ex. 3 at 149. Private Facility-2's $48,000.00 annual tuition covers special education programming, all the materials, the overhead costs, staffing engaged in the administrative side, outside services and technologies for Student's program (FOF 154). However, Private Facility-2 charges a 15% Administrative Fee ($27,495.00) to cover processing, filing, printing out materials, providing information to parents, handling of paperwork, and all the administrative aspects of providing the services that are itemized in the student cost analysis (FOF 171). The 15% Administrative Fee is

redundant of the overhead/administrative cost charged under tuition. Therefore, the 15% Administrative Fee will be taken out of the reimbursement[16].

The Program and Supplies is redundant. Program and Supplies may cover a computer, iPad or mini-iPad to take home to use during distance learning (FOF 165). According to the cost analysis, Student will be charged Program and Supplies (Pet. Ex. 3 at 148); however, the tuition rate sheets indicate that Program and Supplies is $1500 (Pet. Ex. 3 at 147). There is no reasonable explanation in the record of why Student is being charged an additional $500 for Program and Supplies. Regardless, the $2000 is redundant. First, the $48,000.00 annual tuition covers all the materials for Student's program (FOF 154). Second, Student is being charged $500 for "Assistive Technologies" for supplies and use of a mini-iPad while on-campus (FOF 166). Whatever materials and supplies that Private Facility-2 would have used for Student during in-person instruction can be given to Student to use at home when Student is not receiving in-person instruction. Therefore, the Program and Supplies of $2000 will be taken out of the reimbursement.

Private Facility-2 also charges $10,000/year for a special education consultant. The consultant does not have direct contact with Student. Because Private Facility-2 does not have any special education teachers, the consultant will advise the providers or anyone who is involved in implementing Student's program (FOF 159-160). Special education programming is already included in the $4,000 monthly tuition (FOF 154). See School Year 2020-2021 Tuition Rates at Pet. Ex. 3 at 147 ("includes special education program curriculum"). While Private

[16] Although Private Facility 4's rate sheet shows a 15% administration fee, there is no evidence in the record explaining what type of school Private Facility 4 is, the grade level it services, and what the administration fee covers. Just because Private Facility 4 charges an administration fee does not mean that it is appropriate for Private Facility-2 to charge an administration fee.

Facility-2 is not required to have special education teachers, if Parent 1 is being charged for special education, then Private Facility-2 should provide Student with special education. Private Facility-2 can either employ a special education teacher who can provide special education for which Parent 1 is already being charged, or Private Facility-2 can employ a non-teacher and pay on its own to educate this non-teacher to provide special education for which Parent 1 is already being charged. It is not reasonable for Private Facility-2 to pass on the expense of educating their staff to provide a service that the Parent 1 is already paying for. Based on the above, the $10,000/year special education consultant charge is taken out of the reimbursement.

Respondents denied Student a FAPE when Student's 11/9/2018-IEP expired on or about November 9, 2019 and Respondents did not conduct an annual review of the IEP or had an IEP in effect for Student at the beginning of the 2020-2021 school year. Student is entitled to have Student's private placement funded by DOE; however, a reduction in funding is warranted because the tuition and fees charged by Private Facility-2 is unreasonable. Furthermore, because assessments were ongoing at the time of the due process hearing and Student was considered a "candidate" for certain services, Petitioners or Private Facility-2 must provide proof of service rendered before receiving reimbursement or payment (FOF 155, 161).

E. PETITIONERS' SECTION 504 OF THE REHABILITATION ACT OF 1974 CLAIM

Petitioners' FAC "assert[s] Student's eligibility for rights and protections under Section 504 of the Rehabilitation Act of 1974." FAC, p. 2. Petitioners, however, did not present any evidence or argument during the due process hearing and their closing brief regarding their Section 504 claim. Based on the lack of evidence or argument to support this claim, the

undersigned Hearings Officer concludes that Petitioners have effectively abandoned their Section 504 claim and have not met their burden of proof.

VI. DECISION

Based upon the above-stated Findings of Fact and Conclusions of Law, the undersigned Hearings Officer concludes that Petitioners have proven a denial of FAPE when DOE failed to revise Student's 11/9/2018-IEP by the annual review deadline and to have in effect an IEP for Student at the beginning of the 2020-2021 school year, which resulted in a loss of educational opportunity and significantly impeded Parent 1's participation rights. Petitioners further proved that Private Facility-2 is an appropriate placement for Student and that Parent 1 is entitled to reimbursement for tuition and related expenses for Student's attendance at Private Facility-2 for the 2020-2021 school year. The undersigned Hearings Officer finds that the equitable considerations in this case warrants a reduction of $39,495.00 in reimbursement for tuition and related expenses or direct tuition payment to Private Facility-2 for the 2020-2021 school year.

For the reasons stated above, IT IS HEREBY ORDERED --

1. The IEP team shall, within ten (10) school days of this Order, decide if any additional data or information or assessments are needed to determine Student's current needs. Respondents shall make reasonable effort to obtain any additional data or information that is needed. Any assessments are to be scheduled and completed within forty (40) calendar days of this Order.
2. An IEP team meeting shall be held within ten (10) school days of obtaining any additional data or information and the completion of all aforementioned assessments. If, however, the IEP team determines that no additional data or information or

assessments are needed to determine Student's current needs, the IEP team meeting shall be held within ten (10) school days of that determination.

3. Any delay in meeting any of the deadlines in this Order because of an act or acts of Petitioners and/or their representatives and/or their private providers, will extend the deadlines set herein by the number of days attributable to Petitioners and/or their representatives and/or their private providers. Respondents shall document in writing any delays caused by Petitioners and/or their representatives and/or their private providers.
4. Within 30 calendar days of receiving monthly itemized invoices from Private Facility-2 for services rendered, Respondents shall make payment, less any payment due to Parent 1 pursuant to paragraph 5 herein, for Student's tuition for the 2020-2021 school year. Private Facility-2's itemized invoices shall include, at a minimum, a description of the services rendered, the date and duration of the services, and the name and title of the person(s) performing the services.
5. In the event that Parent 1 paid for Student's tuition, Parent 1 will be reimbursed for the amount paid. Respondents shall reimburse Parent 1 within 30 calendar days of receiving proof of payment from Parent 1.
6. Payment(s) pursuant to paragraphs 4 and 5 shall not exceed a total amount of $179,731.80.
7. Respondents will reimburse Petitioners for mileage for transportation from August 17, 2020 to July 28, 2021. Parent 1 shall provide verification of Student's residential address ("home") to Respondents within ten (10) calendar days of this Order. Mileage reimbursement shall be for transporting Student from home to Private

Facility-2 and from Private Facility-2 to home. Respondents are only responsible for one roundtrip transportation a day. In the event that Student is transported to Private Facility-2 from another location or from Private Facility-2 to another location, reimbursement shall not exceed the amount for transporting Student to Private Facility-2 from home or from Private Facility-2 to home. Petitioners must provide proof that Student attended Private Facility-2 for all school days that a mileage claim is made. The mileage rate shall not exceed the IRS published standard mileage rate for the applicable period for which reimbursement is sought. Any request for reimbursement of transportation mileage shall be made by August 28, 2021. Any request for reimbursement of transportation mileage not made by August 28, 2021 is waived.

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 H.A.R. §8-60-70(b).

DATED: Honolulu, Hawai‘i, February 8, 2021.

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