IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

F.K., by and through her mother A.K., **Plaintiffs,** **v.** **DEPARTMENT OF EDUCATION, State Of Hawaii, and KATHRYN MATAYOSHI, in her official capacity as Superintendent of the Hawaii Public Schools,** **Defendants.**	**Civil No. 12-00136 ACK-RLP**
DEPARTMENT OF EDUCATION, State of Hawaii, **Third-Party Plaintiff,** **v.** **LOVELAND ACADEMY, LLC, and DOE DEFENDANTS 1-10,** **Third-Party Defendants.**	

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND GRANTING THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUGMENT

For the reasons set forth below, the Court DENIES Plaintiffs' Motion for Summary Judgment (ECF No. 172), GRANTS Defendants' Motion for Summary Judgment (ECF No. 168), DENIES

Third-Party Plaintiff's Motion for Summary Judgment (ECF No. 170), and GRANTS Third-Party Defendant's Motion for Summary Judgment (ECF No. 174).

Count I of Plaintiffs' Complaint is DISMISSED with prejudice, and Counts II-VI of Plaintiffs' Complaint are DISMISSED without prejudice. Counts III and V of Third-Party Plaintiff Department of Education, State of Hawaii's Amended Third-Party Complaint are also dismissed without prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

This case comes before the Court on the four cross-motions for summary judgment ("MSJs") filed by the parties in the instant case. As the parties are already familiar with the extensive history of this action, the Court recites below only the relevant factual and procedural background.

Plaintiff F.K. ("F.K." or "Student") is a minor diagnosed with Autism, a handicapping condition under the IDEA. Compl. ¶ 16, ECF No. 1. She has been receiving special education services under the Individuals with Disabilities Education Act ("IDEA") for several years. On March 30, 2009, an Administrative Hearings Officer ("AHO") determined that Defendant Department of Education, State of Hawaii ("DOE") denied F.K. a Free Appropriate Public Education ("FAPE"), as required under the IDEA, and ordered that DOE fund her private

placement at Third-Party Defendant Loveland Academy, L.L.C. ("Loveland"). Id. ¶ 31; Plfs.' MSJ Ex. B, ECF No. 172-9.

DOE later offered Student a placement at King Intermediate School in a March 10, 2011 prior written notice ("PWN"), which Plaintiff A.K. ("A.K." or "Mother") rejected. Compl. ¶ 35, ECF No. 1. Plaintiffs filed a Request for Due Process Hearing related to that PWN (Administrative Case No. DOE-SY1011-126) on June 2, 2011, subsequent to which Loveland became Student's "stay-put" placement under 20 U.S.C. § 1415(j). Id. ¶ 36. Administrative Hearings Officer ("AHO") Richard Young issued an October 12, 2011 "Order Clarifying the Time that Stay Put Is In Effect" in that proceeding, which confirmed that Plaintiffs were "entitled to the protections under stay put during the pendency of this proceeding, which began when the Request was filed on June 2, 2011." Id. ¶ 49; Plf.'s MSJ Ex. C at 3, ECF No. 172-10.

Because F.K. was receiving special education services at Loveland due to stay-put, DOE sought to monitor Student's education pursuant to the IDEA, 20 U.S.C. § 1412(a)(10)(B)(ii)[1]

[1]When disabled children are placed in private schools at state expense, the IDEA provides that state educational agencies "shall determine whether such schools and facilities meet standards that apply to State educational agencies" and "that children so served have all the rights the children would have if served by such agencies." 20 U.S.C. § 1412(a)(10)(B)(ii).

and H.R.S. § 302A-443(f) ("Act 129").[2] See Am. TPC ¶¶ 10-12, ECF No. 68. The relevant history of these monitoring efforts is set forth below.

On September 1, 2011, Sheena Alaiasa, Principal at King Intermediate School ("Principal Alaiasa"), sent a letter to Patricia Dukes ("Dukes"), owner and Chief Executive Officer of Loveland, indicating that DOE is obligated by Act 129 to "conduct and monitor student progress." The letter requested copies of F.K.'s educational records, including medical records, and requested "permission to conduct observations" for 1-2 hours on a quarterly basis. Plfs.' MSJ Ex. O at 1-2, ECF No. 172-22; Concise Statement of Facts in Support of Defendants' Motion for Summary Judgment ("Defs.' CSF")[3] Ex. 18 at 1-2, ECF No. 169-25.

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[2]Act 129 authorizes DOE to "monitor" children receiving special education services when they are placed in private schools at the Department's expense. This monitoring authority includes, without limitation, direct observation of disabled students within private schools (with or without notice), as well as the review of such students' records and the right to talk with their teachers at reasonable times. When student records are requested, private schools are to provide them within three business days. H.R.S. § 302A-443(f)(3)-(5), (h).

[3]The Court notes that Defs.' CSF (ECF No. 169) is substantially identical to the Concise Statement of Facts in Support of Third Party Plaintiff's Motion for Summary Judgment ("TPP's CSF") (ECF No. 171). Both documents were submitted by DOE. For the sake of brevity, the Court does not include redundant citations to identical exhibits attached to these papers.

On September 12, 2011, John Loveland, Clinical Director of Loveland, responded to Principal Alaiasa. His letter requested that DOE provide "the necessary and appropriate consent forms . . . showing that [Student's] parent/s are aware of your requests and consent to them." Plfs.' MSJ Ex. N at 1-2, ECF No. 172-21.

On November 17, 2011, Principal Alaiasa wrote back to Dukes to inform her that four DOE officials would arrive to conduct monitoring on December 5, 2011. The listed monitors included Barbara Ward ("Ward"), a District Speech Pathologist, Bill Beaman ("Beaman"), a Special Education Teacher, and Aletha Sutton ("Sutton"), a District Educational Specialist in the Autism Program. The letter also clarified that their monitoring activities on campus would include "Observing Student," "Interviewing providers," "Reviewing records," "Conducting Department-administered assessments,"[4] and picking up copies of educational records, including medical records. Plfs.' MSJ Ex. M at 1-2, ECF No. 172-20; Defs.' CSF Ex. 21, ECF No. 169-28.

On December 5, 2011, Ward, Beaman, and Sutton arrived at Loveland in an attempt to observe F.K. They were denied entry to the building and access to Student's records by John

[4]The letter does not indicate what these assessments would involve, or how their results would be used.

Loveland, because they did not have a signed consent from Mother.[5] See Declaration of Aletha Sutton ("Sutton Decl.") ¶¶ 11-13, ECF No. 169-6; Deposition of Barbara Ward ("Ward Dep.") Tr. 34:8-35:23, Defs.' CSF Ex. 22, ECF No. 169-29; Deposition of Aletha Sutton ("Sutton Dep.") Tr. 15:16-16:24, 21:17-22:20, 37:1-24, Defs.' CSF Ex. 23, ECF No. 169-30 and Third-Party Defendant's Separate Concise Statement of Facts in Support of Its MSJ ("TPD's CSF") Ex. A, ECF No. 175-2; Declaration of Barbara Ward ("Ward Decl.") ¶¶ 6-7, ECF No. 169-3.

On a letter of the same date, John Loveland memorialized Loveland's position regarding DOE's visit. He noted that he was "sorry that the trip was unsuccessful," but that his "understanding under FERPA is that an observation *is* an assessment, and all assessments must have the consent of the parent."[6] The letter requested that DOE send Loveland "a clear,

[5]According to DOE, not all school personnel receive this treatment. Waianae Student Services Coordinator Lanny Busher ("Busher") apparently was allowed to monitor a student at Loveland on July 25, 2012 without a parental consent form. According to Busher's uncontested declaration testimony, Dukes informed him that she would "not have let [Busher] in to observe" if "District or State personnel" had been with him. Declaration of Lanny Busher ("Busher Decl.") ¶¶ 3-7, ECF No. 169-7; Defs.' CSF Ex. 42, ECF No. 169-49.

[6]The Court notes that the parties offer evidence regarding Loveland's historical position regarding parental consent for student observations, even before the passage of Act 129.

written, FERPA compliant, signed, parental consent to evaluate and assess and to release information." Plfs.' MSJ Ex. L at 1-2, ECF No. 172-19; Defs.' CSF Ex. 24 at 1-2, ECF No. 169-31.

On December 19, 2011, John Loveland received an undated letter from Principal Alaiasa, announcing that "[w]e have made attempts to fulfill our monitoring duties and you and Loveland have obstructed our efforts. As such, we will be withholding payment to Loveland until we are able to monitor [Student]." Plfs.' MSJ Ex. K, 172-18; Loveland Decl. ¶ 12, ECF No. 172-4. Where student monitoring access is denied by private schools, DOE's tuition withholding is mandatory under Act 129. The statute provides that DOE "*shall* withhold payment to any

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Defendants contend that Ward was allowed to observe F.K. at Loveland on January 8, 2010, based on oral consent provided by Dukes. See Defs.' MSJ Ex. 4, ECF No. 169-11; Ward Decl. ¶¶ 8-9, ECF No. 169-3.

DOE officials including Deborah Nekomoto, Principal of Kapunahala Elementary School ("Principal Nekomoto") and Janis Watanabe, Student Services Coordinator ("Watanabe") also attempted to arrange an observation of F.K. in January-March 2010, pursuant to the IDEA. They were unsuccessful, despite substantial correspondence with Loveland, until they obtained a parental consent for F.K.'s annual reevaluation on May 13, 2010. See Defs.' CSF at 3, Exs. 4-17, ECF Nos. 169, 169-11 to 169-24; Declaration of Deborah Nekomoto ("Nekomoto Decl.") ¶¶ 15-16, ECF No. 169-2.

Dukes' deposition testimony, meanwhile, is that Loveland has never allowed "observations for purposes of assessment without [parental] consents," and that she never recalls letting anyone observe F.K. without such a consent. Dukes Dep. Tr. 29:19-24, TPD's CSF Ex. E, ECF No. 175-6.

private school or placement that restricts or denies monitoring by the department." H.R.S. § 302A-443(i) (emphasis added).

Loveland contends that DOE's choice to withhold tuition for F.K. and other students forced the school to reduce student services and placed it "at risk of closing, thereby discharging the students to inappropriate placements." Loveland Decl. ¶¶ 2, 18, ECF No. 172-4; Dukes Decl. ¶ 19, ECF No. 172-3. Loveland alleges that it reduced skills trainer services, play therapy, adaptive physical education activities, art and music therapy, and occupational therapy to F.K. Dukes Decl. ¶¶ 23, 31, ECF No. 172-3. Loveland also attempted to bill Mother for F.K.'s unreimbursed services, but Mother was unable to afford Student's tuition payments. Id. ¶ 24.

On December 21, 2011, Loveland arranged for Mother to sign a consent form that it prepared, which authorized DOE to complete an "Assessment/Observation of [Student], daughter."[7] Plfs.' MSJ Ex. J, ECF No. 172-17; Loveland Decl. ¶ 11, ECF No. 172-4. This form was sent to DOE by fax and mail. Loveland Decl. ¶ 11, ECF No. 172-4.

[7]The consent form listed an expiration date one year from the date of signing or upon completion of the authorized "Assessment/Observation." It also explicitly noted that "[t]his confidential information may be used by the DOE for the following purpose: Team Preparation for IEP: Goals and Objectives, Present Level of Performance." Plfs.' MSJ Ex. J, ECF No. 172-17.

On December 28, 2011, John Loveland also wrote back to Principal Alaiasa, confirming that DOE's monitoring "appears to me to violate FERPA and IDEA Federal laws." However, he proposed dates of December 28-29, 2011 or January 4-5, 2012 to attempt another monitoring visit. The letter attached the December 21, 2011 consent from Mother. Plfs.' MSJ Ex. I at 3-4, ECF No. 172-16; Defs.' CSF Ex. 26 at 3-4, ECF No. 169-33. He wrote to Principal Alaiasa again the next day, asking whether DOE would attempt to monitor the following week and adding that he believed, upon further research, that parental consent was required not by the Family Educational Rights and Privacy Act ("FERPA"), but by the IDEA. Plfs.' MSJ Ex. H at 1-2, ECF No. 172-15; Defs.' CSF Ex. 27 at 2-3, ECF No. 169-34

The following day, on December 30, 2011, Plaintiffs filed a second administrative challenge (Administrative Case No. DOE-SY1112-067). See Compl. Ex. B at 1, ECF No. 1-2 (Civ No. 12-00240 ACK-RLP). They argued that DOE's withholding of tuition payments to Loveland constituted a unilateral change in placement and denial of FAPE to F.K. Compl. ¶ 37, ECF No. 1.

On January 5, 2012, Principal Alaiasa wrote to Mother regarding Student's upcoming annual individualized education program ("IEP") reevaluation, which was the subject of a December 15, 2012 PWN. The PWN had proposed a number of

"assessments as part of [the] reevaluation" and had attached a consent form for Mother to sign. Principal Alaiasa requested that Mother return the signed consent as soon as possible. Defs.' CSF Ex. 28 at 1, ECF No. 169-35.

On January 30, 2012, Sutton wrote to John Loveland to confirm receipt of his letters of December 28-29, 2011 and to inform him that DOE personnel would be available to monitor F.K. at Loveland on February 15, 2012, February 22, 2012, or February 23, 2012. If DOE did not hear back, the monitors would arrive on February 15, 2012. The letter also confirmed DOE's continuing position that Loveland had "obstructed" the Department's monitoring, and that DOE would withhold tuition payments under Act 129 until it was able to monitor F.K. Plfs.' MSJ Ex. G at 1, ECF No. 172-14; Defs.' CSF Ex. 29 at 1, ECF No. 169-36.

On February 3, 2012, Mother wrote to Principal Alaiasa, referencing the DOE-Loveland correspondence of December 28-29, 2011. She requested that DOE "provide me with a HIPAA complian[t] release form for confidential medical information." Plfs.' MSJ Ex. F at 1-2, ECF No. 172-13; Defs.' CSF Ex. 31 at 1-2, ECF No. 169-38.

On February 9, 2012, John Loveland also wrote to Sutton, noting that Mother's February 3, 2012 letter was

"requesting a HIPPA [sic] compliant Consent Form to be sent to her by you" and that Loveland would "expect a consent that is specific in purpose and time limited, as per HIPPA [sic] and FERPA protocols." Plfs.' MSJ Ex. E at 1, ECF No. 172-12; Defs.' CSF Ex. 32 at 1, ECF No. 169-39.

On February 15, 2012, Ward and Sutton arrived at Loveland for a second attempt to monitor F.K. Sutton Decl. ¶ 21, ECF No. 169-6. The trip was unsuccessful. John Loveland again demanded a written parental consent form from the DOE officials before he would allow them to observe F.K. or review her records, apparently notwithstanding the December 21, 2010 consent he had obtained from Mother.[8] Sutton Decl. ¶ 22, ECF No. 169-6; see also Ward Decl. ¶¶ 6-7, ECF No. 169-3.

On March 9, 2012, while DOE-SY1011-126 and DOE-SY1112-067 were still pending, Plaintiffs initiated the instant case. ECF No. 1. Their Complaint seeks declaratory and injunctive relief regarding Defendants' alleged violations of F.K.'s rights under the IDEA. Specifically, the Complaint challenges

[8]A purported transcript of an audio recording of John Loveland's conversation with the DOE monitors on February 15, 2012 appears at Defs.' CSF Ex. 36, ECF No. 169-43. It is inaccurately authenticated as "Exhibit '33'" in the Declaration of Aletha Sutton. See Sutton Decl. ¶ 24, ECF No. 169-6.

The transcript reflects that Sutton said DOE didn't "feel [it] need[ed]" a parental consent, and that John Loveland told the monitors "I can't let you do anything without a consent." Defs.' CSF Ex. 36 at 1, ECF No. 169-41.

Defendants' compliance with certain procedural safeguards under the IDEA and seeks to enjoin Defendants' withholding of tuition pursuant to Act 129. See id. ¶¶ 1-10, 53-75. On the same day, Plaintiffs also moved the Court for a preliminary injunction that would require DOE to reimburse F.K.'s tuition during stay-put. Mot. for Prelim. Injunction at 2, ECF No. 4.

On March 14, 2012, DOE officials were finally allowed to monitor F.K. at Loveland and obtain "most if not all" of her educational records. Sutton Decl. ¶¶ 25-26, ECF No. 169-6. This monitoring was apparently accomplished as a result of Mother's "consenting to our request to observe," as memorialized in a March 22, 2012 letter from Principal Alaiasa to Mother. Defs.' CSF Ex. 37, ECF No. 169-44.

As relevant to the discussion below, the parties disagree regarding the potential scope of DOE's "monitoring" attempts, particularly as to whether they could be considered "evaluations" or "assessments" of Student under the IDEA.[9] DOE emphasizes that Sutton's deposition testimony is that she went to Loveland "to monitor," and she denies that she has ever been there "to assess F.K." Sutton Dep. Tr. 15:16-23, Defs.' CSF Ex. 23, ECF No. 169-30. Ward's deposition testimony is that she

[9]Distinct IDEA implementing regulations apply to "monitoring" and "evaluations." Compare 34 C.F.R. § 300.300 (parental consent for evaluations) with 34 C.F.R. § 300.147 (monitoring students in private placements).

went to Loveland "with the intention of observing F.K. and . . . to review communication records." Ward Dep. Tr. 35:4-18, Defs.' CSF Ex. 22, ECF No. 169-29.

Ward has also testified that she understands there to be a difference between "monitoring" and "assessment." In her experience, assessment involves collecting data on student performance, such as through standardized testing. Ward will "often also include observational information as part of my assessment." Ward Dep. Tr. 14:18-21, TPD's CSF Ex. C, ECF No. 175-4. In general, "assessment is a formalized way of gathering information" about a student, which is "formalized in a written report." Id. Tr. 15:25-16:6. In contrast, Ward states that "when I'm monitoring, I'm only observing. I'm not assessing, I'm only observing and collecting information through observation." Id. Tr. 14:21-23.

Sutton's deposition testimony is that DOE protocol would normally call for her to write a report on her observation of a student and put it in that student's "Confidential Folder," and that she did take handwritten notes at her observation of F.K. Sutton Dep. Tr. 59:3-60:3, TPD's CSF Ex. A, ECF No. 175-2. Sutton also testified that the IEP meetings for F.K. in 2011 and 2012 relied on information in F.K.'s Confidential File, id. Tr. 64:6-23, although Sutton is unsure whether her set of notes from

her monitoring observation "actually made it to paper in the file" for F.K.: "[i]t may be in there, it may not be in there,"[10] id. Tr. 60:3-5. Sutton also does not recall whether she worked with Ward to compile any observational report on F.K. Id. Tr. 59:7-10.

The record shows that Sutton and Ward were both involved in DOE's attempts to monitor F.K. under Act 129 and among the individuals that participated in F.K.'s IEP reevaluations between 2011-2013. See Ward Dep. Tr. 20:25-21:1, 42:23-43:14, TPD's CSF Ex. C, ECF No. 175-4; Sutton Dep. Tr. 60:11-61:19, TPD's CSF Ex. A, ECF No. 175-2.

On April 5, 2012, Defendants filed an Answer to Plaintiffs' Complaint, as well as a Third-Party Complaint against Loveland, Dukes,[11] and Doe Defendants 1-10. ECF No. 12. Defendants filed an Amended Third-Party Complaint ("Am. TPC") on

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[10]The Court observes that a reference to a set of notes regarding an observation of F.K. appears at page 66 of the excerpt of the Deposition of Aletha Sutton filed by Loveland.

The excerpt suggests, contrary to Loveland's arguments, that Sutton's notes may *not* have been in F.K.'s Confidential File. Sutton testifies that the notes would "probably" be located now "in one of my folders, one of my composition books where I take personal notes," and that she did not give a copy of those notes to Ward. Sutton Dep. Tr. 66:8-15, TPD's CSF Ex. A, ECF No. 175-2. However, because the preceding page of testimony was not filed, the Court is unable to ascertain to which set of notes this discussion refers.

[11]The parties stipulated to the dismissal of Dukes from the action on March 14, 2013. ECF No. 161.

September 17, 2012. ECF No. 68. The Am. TPC alleges that Loveland "breached its duty to comply" with Act 129 by impeding DOE's ability to monitor F.K.'s education. Because this alleged negligence compelled DOE to withhold reimbursement to Loveland under Act 129, leading to Plaintiffs' lawsuit, the Am. TPC seeks attorneys' fees. Am. TPC ¶¶ 40-47, 55-60, ECF No. 68.[12]

On April 9, 2012 and April 25, 2012, respectively, Plaintiffs received adverse administrative decisions in DOE-SY1011-126 and DOE-SY1112-067. Despite having already opened the instant case, Plaintiffs filed an appeal of both administrative decisions by initiating a separate case, F.K. ex rel. A.K. v. Dep't of Educ., State of Hawaii, Civ. No. 12-00240 ACK-RLP (the "Related Case") on May 8, 2012. Compl. ¶ 1, ECF No. 1 (Civ No. 12-00240 ACK-RLP). The Complaint in the Related Case requested an order finding that Loveland was a proper placement for F.K. and that DOE's refusal to reimburse F.K.'s tuition was a denial of FAPE.[13] Id. at 8-9.

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[12]The parties agree that the only claims in the Am. TPC that remain before the Court are DOE's negligence claim and request for attorneys' fees (Counts III and V). ECF No. 202 at 2; ECF No. 203 at 3. Counts I, II, and IV of the Am. TPC were dismissed on November 7, 2012. See Order Granting in Part Third-Party Defendants' Motion to Dismiss Third-Party Complaint at 2, ECF No. 93.

[13]Plaintiffs have recognized that they raised the same denial of FAPE challenge in the instant case and the Related

On June 22, 2012, the Court granted Plaintiffs' request for a preliminary injunction in the instant case, requiring DOE to reimburse the costs of "Student's placement at Loveland Academy from June 2, 2011, throughout the pendency of the instant litigation."[14] Order Granting Prelim. Injunction ("Prelim. Injunction Order") at 2, 49-50, ECF No. 33.

On December 11, 2012, the Court issued in the Related Case an Order Affirming the Administrative Hearings Officers' Findings of Fact, Conclusions of Law, and Decisions in DOE-SY1011-126 and DOE-SY1112-067 ("Order Affirming AHO"). ECF No. 41 (Civil No. 12-00240 ACK-RLP). Plaintiffs appealed that decision to the Ninth Circuit Court of Appeals on January 8, 2013. Notice of Appeal, ECF No. 43 (Civ. No. 12-00240 ACK-RLP).

On March 28, 2013, all parties to this case filed motions for summary judgment ("MSJs") on Plaintiffs' Complaint and DOE's Am. TPC. ECF Nos. 168, 170, 172, 174. Each MSJ was accompanied by a Concise Statement of Facts. ECF Nos. 169, 171, 173, 175. Recognizing that the resolution of the appeal in the

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Case. See Compl. ¶ 37, ECF No. 1; Plfs. Supp. Br. at 3-4, ECF No. 204.

[14]For the reasons explained in the Court's June 29, 2015 Order Granting Defendant/Third Party Plaintiff and Counterclaim Defendants' Motion to Terminate Stay-Put ("Order to Terminate"), the injunction was modified to clarify that DOE was not required to pay for F.K.'s education at Loveland following the resolution of her placement challenge in DOE-SY1011-126. ECF No. 234.

Related Case would "moot several, if not all" of Plaintiffs' claims in this case, ECF No. 179, the Court stayed the instant action on April 24, 2013, ECF No. 188.

On November 26, 2014, the Ninth Circuit issued its decision upholding this Court's Order Affirming AHO. See F.K. ex rel. A.K. v. Hawaii Dep't of Educ., 585 Fed. App'x 710 (9th Cir. 2014). Like this Court, the Ninth Circuit rejected Plaintiffs' contention that DOE's proposed placement at King Intermediate School, described in F.K.'s March 10, 2011 PWN, was not an appropriate educational placement. Id. at 711. The Ninth Circuit also agreed with this Court that DOE's failure to make payments to Loveland did not constitute either "a unilateral change in F.K.'s placement or a denial of a FAPE for F.K. under the IDEA." Id. at 712. This was because DOE had resumed payments to Loveland pursuant to the Court's preliminary injunction, and F.K.'s educational program had not experienced "any significant changes" as a consequence of DOE's temporary nonpayment. Id. On January 9, 2015, Plaintiffs' petition for rehearing *en banc* was denied. See ECF No. 54 (Civ No. 12-00240 ACK-RLP).

The Court lifted the stay in the instant case and reinstated the instant MSJs on December 18, 2014. ECF No. 198. On February 11, 2015, the parties were directed to file

supplemental briefs addressing which issues presented in the MSJs remain before this Court. ECF No. 200. Each party filed a brief outlining its position regarding the remaining issues presented in its own MSJ on February 20, 2015. ECF Nos. 201, 202, 203, 204. On February 26, 2015, response briefs were also filed regarding each supplemental brief except Loveland's, to which DOE filed no opposition. ECF Nos. 209, 210, 211.

Loveland filed its Opposition to Third-Party Plaintiff DOE's MSJ on February 23, 2015, ECF No. 205 ("TPD's Opp."), [15] which was accompanied by a separate CSF ("TPD's Opp. CSF"), ECF No. 206. Defendant's Opposition to Plaintiff's MSJ, ECF No. 235 (Defs.' Opp."), and Third-Party Plaintiff DOE's Opposition to Loveland's MSJ, ECF No. 236 ("TPP's Opp."), were filed on August 3, 2015. Plaintiffs' Opposition to Defendant's MSJ, ECF No. 237-1 ("Plfs.' Opp."), was untimely filed on August 7, 2015.[16]

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[15]It appears that Loveland's decision to file TPD's Opp. on February 23, 2015 related to its decision to include in that document a challenge to DOE's standing to bring its third-party claim. Loveland moved the Court for leave to file a motion to dismiss DOE's complaint for lack of standing on the same date. ECF No. 207. The Court permitted Loveland to file its requested motion to dismiss, ECF No. 216, but ultimately denied the motion to dismiss on the merits, ECF No. 225.

[16]The deadline for the parties' Oppositions was August 3, 2015, pursuant to Local Rule 7.4. The Court granted Plaintiff's request for extension of time to file Plfs.' Opp. on August 10,

On August 10, 2015, Loveland filed its Reply Memorandum in Support of Its MSJ, ECF No. 238 ("TPD's Reply"), DOE filed its Reply Memorandum in Support of Its MSJ, ECF No. 239 ("TPP's Reply")[17], and Plaintiffs filed their Reply Memorandum, ECF No. 242. Defendants' Reply Memorandum in Support of Its MSJ ("Defs.' Reply"), ECF No. 243, was filed on August 17, 2015.

The parties' MSJs were heard on August 28, 2015. The Court notes that F.K. is, meanwhile, in transition from Loveland to a placement at Castle High School, pursuant to her latest IEP. That IEP was issued on December 16, 2014 and has not been challenged by Plaintiffs. See Order to Terminate at 20, ECF No. 234. The instant MSJs relate to remaining "ancillary issues not tied to Student's placement," an issue which was fully resolved by the Ninth Circuit's decision in the Related Case. See id.

STANDARD

A party is entitled to summary judgment on any claim or defense if it can be shown "that there is no genuine dispute as to any material fact and the movant is entitled to judgment

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2015 and extended Defendants' time to file a Reply to August 17, 2015. See Minute Order, ECF No. 240.

[17]The document is erroneously entitled "*Defendants'* Reply Memorandum in Support of Its Motion for Summary Judgment" but briefs DOE's position as Third-Party Plaintiff.

as a matter of law.'" Maxwell v. Cnty. of San Diego, 697 F.3d 941, 947 (9th Cir. 2012) (quoting Fed. R. Civ. P. 56(a)). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by either "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

A genuine issue of material fact exists if "a reasonable jury could return a verdict for the nonmoving party." United States v. Arango, 670 F.3d 988, 992 (9th Cir. 2012) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986)). Conversely, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Scott v. Harris, 550 U.S. 372, 380 (2007). Summary judgment will be granted against a party that fails to demonstrate facts sufficient to establish "an element essential to that party's case and on which that party will bear the burden of proof at trial." Parth v. Pomona Valley Hosp. Med. Ctr., 630 F.3d 794, 798-99 (9th Cir. 2010) (citation omitted).

The movant has the burden of persuading the court as to the absence of a genuine issue of material fact. Avalos v.

Baca, 596 F.3d 583, 587 (9th Cir. 2010). If the movant satisfies its burden, the nonmovant must present evidence of a "genuine issue for trial," Fed. R. Civ. P. 56(e), that is "significantly probative or more than merely colorable,"[18] LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1137 (9th Cir. 2009) (citation omitted).

When evaluating a motion for summary judgment, the court must "view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." Scott, 550 U.S. at 378. The court may not, however, weigh conflicting evidence or assess credibility. In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008). If "reasonable minds could differ as to the import of the evidence," summary judgment will be denied. Anderson, 477 U.S. at 250–51.

DISCUSSION

As noted in the Court's December 18, 2014 Minute Order, the claims remaining in this case collectively involve

[18]The Ninth Circuit has explained that "[l]egal memoranda and oral argument, in the summary-judgment context, are not evidence, and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment." Flaherty v. Warehousemen, Garage and Service Station Emp. Local Union No. 334, 574 F.2d 484, 486 n.2 (9th Cir. 1978). Allegations in a complaint also "do not create an issue against a motion for summary judgment supported by affidavit," id. at 486 n.2, and a "conclusory, self-serving affidavit" that lacks detailed facts and supporting evidence may not create a genuine issue of material fact, F.T.C. v. Neovi, Inc., 604 F.3d 1150, 1159 (9th Cir. 2010).

the legality of certain portions of Act 129 and Loveland's denial of DOE's "monitoring" access to Student and her records, absent parental consent. See ECF No. 198. This case was filed almost three and a half years ago and stayed during appeal proceedings in the Related Case. As a result, many of the parties' claims are no longer viable.

For the reasons set forth below, the Court concludes that none of the claims in Plaintiffs' Complaint remains to be adjudicated by this Court. The Court therefore DENIES Plaintiff's MSJ, ECF No. 172, and GRANTS Defendants' MSJ, ECF No. 168. Counts III and V of Third-Party Plaintiff DOE's Am. TPC remain to be adjudicated. For the reasons explained below, the Court DENIES Third-Party Plaintiff DOE's MSJ, ECF No. 170, and GRANTS Third-Party Defendant Loveland's MSJ, ECF No. 174.

I. The Claims in Plaintiffs' Complaint Are Not Properly Before the Court

The Court concludes that none of the six claims presented in Plaintiffs' Complaint is viable for adjudication. Some of these claims became moot or claim precluded over the course of this case; others were never properly presented.

On March 28, 2013, Plaintiffs and Defendants each moved for summary judgment on Plaintiffs' Complaint, which

sought declaratory and injunctive relief on the following six claims:

1. Defendants' withholding of F.K.'s tuition under Act 129 constituted an unlawful unilateral placement and denial of FAPE (Count I);

2. Defendants' tuition withholding violated the IDEA's stay-put provision, 20 U.S.C. § 1415(j) (Count II);

3. Defendants' tuition withholding violated AHO Young's order finding that Student's stay-put placement commenced at Loveland beginning June 2, 2011 (Count III);

4. Act 129's tuition-withholding provision related to student monitoring is preempted by the IDEA's requirement that DOE provide reimbursement for students in private placements (Count IV);

5. Defendants violated the IDEA by "evaluating" F.K. more than once a year (Count V); and

6. Defendants implemented Act 129 in violation of federal law by (a) attempting to conduct "assessments and evaluations" of F.K. without notice and consent, (b) attempting to obtain F.K.'s mental health records without consent, and (c) "terminat[ing] Plaintiff F.K.'s educational placement" without notice (Count VI).

See Compl. ¶¶ 53-75, ECF No. 1. The Court addresses in turn the reasons for which each of the foregoing claims is not viable.

First, the doctrine of *res judicata*, or claim preclusion, bars the re-litigation of Count I. Claim preclusion applies where there is an identity of claims between cases, a final judgment on the merits, and privity between the parties.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003). Here, Plaintiff's Count I is claim precluded by the Ninth Circuit's decision in the Related Case.

Plaintiffs have recognized that their Complaints in this case and the Related Case raised the same challenge regarding DOE's tuition withholding as a unilateral placement and denial of FAPE. See Compl. ¶ 37, ECF No. 1 (recognizing that the denial of FAPE challenge presented in DOE-SY1112-067 (and appealed in the Related Case) was the same as that "indicated in this complaint"); Plfs. Supp. Br. at 3-4, ECF No. 204 ("The Plaintiff concedes that [the] cause of action regarding the cut off of funds was split between the two cases.").

The Ninth Circuit ruled on this issue in the Related Case and affirmed this Court's holding: DOE's tuition withholding did not create a unilateral change in F.K.'s placement or deny her a FAPE. This was because DOE resumed payments under this Court's preliminary injunction, and F.K.'s education did not actually experience "any significant changes." F.K., 585 Fed. App'x at 712. The Ninth Circuit's decision has not been appealed, constituting a "final judgment on the merits," and the parties in the two cases are the same.

Plaintiff concedes that the issue of unilateral placement "due to a significant loss of educational/IEP services" is now eliminated on the basis of *res judicata.* See Plfs.' Reply to Defs.' Supp. Mem. re: Defs.' MSJ at 4, ECF No. 211. Plaintiffs argue, however, that the Court should nonetheless rule on a supposedly live issue of unilateral placement "based on the complete cut off of funding." See Plfs.' Supp. Br. at 3, ECF No. 204.

The Court rejects this argument. Plaintiffs admit that the Court already determined that "a complete cut-off of funding is not taking place." Id. at 4 (citing Order Affirming AHO at 40, ECF No. 41, Civ. No. 12-00240 ACK-RLP). Plaintiffs also recognize that the Court's preliminary injunction "mooted out the remedy for the alleged unilateral placement due to the complete cut off of funding." Plfs.' Reply to Defs.' Supp. Mem. re: Defs. MSJ at 6, ECF No. 211. There are, therefore, no facts presented that would necessitate a ruling on the legality of a "complete cut off of funding." The Court declines to issue an advisory opinion on "what the law would be upon a hypothetical state of facts." Chafin v. Chafin, 133 S. Ct. 1017, 1023 (2013) (quoting Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990) (further citation omitted)). On the basis of *res*

judicata, the Court DISMISSES Plaintiffs' Count I with prejudice.

Second, the Court concludes that Plaintiffs' Count II, related to DOE's alleged violation of stay-put generally, and Count III, related to DOE's alleged violation of AHO Young's stay-put order for F.K. specifically, are now moot.

The "case or controversy" requirement of Article III of the United States Constitution denies federal courts the power to decide moot cases, in which they would be asked to "decide questions that cannot affect the rights of litigants in the case before them." Cammermeyer v. Perry, 97 F.3d 1235, 1237 (9th Cir. 1996) (citing Lewis, 494 U.S. at 477). Instead, federal courts may resolve only "real and substantial controversies admitting of specific relief." Id. (citation and alteration omitted); see also, e.g., Pub. Utils. Comm'n of Cal. v. FERC, 100 F.3d 1451, 1458 (9th Cir. 1996) ("The Court must be able to grant effective relief, or it lacks jurisdiction.").

Put differently, "the crucial question is whether granting a present determination of the issues offered will have some effect in the real world. When it becomes impossible for a court to grant effective relief, a live controversy ceases to exist, and the case becomes moot." Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Public Schs., 565 F.3d 1232, 1250 (10th

Cir. 2009) (citation and alterations omitted). Cases can be mooted by developments subsequent to the filing of a complaint. Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992). It is "not enough that a dispute was very much alive when suit was filed." Lewis, 494 U.S. at 477. Rather, the parties must "continue to have a 'personal stake in the outcome'" of the claims at their time of disposition. Id. (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (further quotation omitted)).

In this case, DOE resumed stay-put payments to Loveland pursuant to the Court's preliminary injunction. Plaintiffs acknowledge that "DOE is now current in its Stay Put payments to Loveland." Plfs.' Reply to Defs.' Supp. Mem. re: Defs.' MSJ at 5, ECF No. 211. Stay-put has also been terminated henceforward. See Order to Terminate, ECF No. 234. F.K. is in transition from Loveland to a placement at Castle High School pursuant to her December 16, 2014 IEP, which Plaintiffs have not challenged. See id. at 20. Accordingly, the Court could no longer issue any order regarding Plaintiffs' second and third claims that would have any "effect in the real world." Miller, 565 F.3d at 1250. Plaintiffs' Counts II and III are moot, and they are DISMISSED without prejudice.

Third, the parties strongly dispute whether Count IV of Plaintiffs' Complaint is moot. For the reasons explained below, the Court concludes that it is.

Plaintiffs' Count IV challenges Act 129's tuition withholding provision, H.R.S. § 302A-443(i) (hereinafter "Section (i)"), pursuant to which DOE "shall withhold payment to any private school or placement that restricts or denies monitoring by the department" under the Act. Plaintiffs argue that Section (i) is preempted by the IDEA pursuant to the Supremacy Clause, U.S. CONST. Art. VI, cl. 2, under which federal law preempts conflicting state law. See Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 371-72 (2000).

According to Plaintiffs, "[p]rompt reimbursement payment is mandated by the IDEA to ensure that there is no delay in the implementation of Plaintiff F.K.'s IEP." They argue that Section (i) is thus invalid, to the extent that it allowed DOE to "circumvent its FAPE obligations to Plaintiff" by withholding her tuition following Loveland's monitoring obstruction. See Compl. ¶¶ 63-70, ECF No. 1.

The Court agreed with Plaintiffs' argument when it issued its preliminary injunction in this case. See Prelim. Injunction Order at 18-37, ECF No. 33. Specifically, the Court held that Plaintiffs were "likely to succeed on the merits on

the limited grounds that Act 129's withholding provision (subsection (i)) is in conflict with, and accordingly preempted by, the Stay Put provision of the IDEA." Id. at 37. The Court noted that "'state law is naturally preempted to the extent of any conflict with a federal statute'" and determined that such conflict existed to preempt DOE's withholding of F.K.'s stay-put reimbursement under Section (i). Id. at 19 (citing Crosby, 530 U.S. at 371). This was because "[t]he purpose of the IDEA is to ensure that the rights of children with disabilities, as well as their parents, are protected," but Section (i) was "negatively impacting Student, whose educational services have already been reduced." Id. at 36-37 (emphasis in original) (citing 20 U.S.C. § 1400(d)(1)(A)-(B)). As discussed above, DOE made full reimbursement for F.K.'s tuition pursuant to the Court's preliminary injunction.

Plaintiffs argue that the Court should nonetheless reach this issue again at the current stage of litigation. They note that Section (i)'s preemption "was not decided by the Ninth Circuit" in the Related Case and suggest that the Ninth Circuit "deferred its ruling to this matter." Plfs.' Supp. Br. at 3, ECF No. 204. Defendants, in contrast, argue that the issue of Section (i)'s federal preemption is moot. They urge that "[b]ecause the Department is no longer required to pay for

Plaintiff to attend Loveland Academy, her claims challenging Act 129 are not justiciable and are therefore moot." Defs.' Opp. to Plfs.' MSJ at 6, ECF No. 235.

The Court begins by clarifying what the Ninth Circuit actually stated: "The related but distinct issue of whether Act 129 is preempted by federal law, raised more directly in the other action, does not have to be addressed to resolve this case. We express no opinion regarding that issue." F.K., 585 Fed. App'x at 712. Plaintiffs had not actually raised their Section (i) preemption challenge in the Related Case; rather, their Complaint included only claims that (a) F.K.'s placement offer at King Intermediate School was inappropriate, and (b) DOE's tuition-withholding constituted a unilateral placement and denial of FAPE. See generally Compl., ECF No. 1 (Civ. No. 12-00240 ACK-RLP). It is therefore inaccurate to suggest that Plaintiffs' challenge to Section (i)'s preemption was affirmatively "deferred" to this Court by the Ninth Circuit.

Regardless, the Court agrees with Defendants that Plaintiffs' Section (i) preemption claim is moot. As noted above, federal courts only have jurisdiction over live "cases" and "controversies." U.S. CONST. Art. III, § 2, cl. 1. "If an action or claim loses its character as a live controversy, then the action or claim becomes 'moot,' and [courts] lack

jurisdiction to resolve the underlying dispute." Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 797-98 (9th Cir. 1999) (en banc); see also, e.g., Mendoza v. I.N.S., 17 F.3d 395 * 1 (9th Cir. 1994) ("If the reviewing court can no longer grant effective relief, then a case is moot." (citation omitted)).

Here, the Court is unable to grant any further *effective* relief on Plaintiffs' Count IV. Plaintiffs received full reimbursement for F.K.'s tuition at Loveland pursuant to the Court's preliminary injunction, and there is no suggestion that DOE has failed to make tuition payments since that time. Stay-put also ended with the Ninth Circuit's resolution of F.K.'s appropriate placement, and she is in transition to her new public placement at Castle High School. See Order to Terminate, ECF No. 234. Plaintiffs' request for declaratory and injunctive relief with respect to Section (i) thus could not provide Plaintiffs with meaningful relief at this time.

Plaintiffs argue that their Section (i) preemption claim evades mootness because DOE's action is "capable of repetition, yet evading review." Plfs.' Reply at 3, ECF No. 242 (citing Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., 14 F.3d 1398, 1403 (9th Cir. 1994)). The Court disagrees, even crediting Plaintiffs' observation that F.K. has five years of remaining IDEA eligibility. Id.

The "capable of repetition, yet evading review" exception to mootness applies in "exceptional situations." Spencer v. Kemna, 523 U.S. 1, 17 (1998). To determine whether an issue is capable of repetition while evading review, courts examine "(1) whether 'the challenged action is of limited duration,' and (2) whether there is 'a reasonable expectation that the same complaining party will be subjected to the same action again.'" M.M. v. Lafayette Sch. Dist., 767 F.3d 842, 858 (9th Cir. 2014) (quoting Wiggins v. Rushen, 760 F.2d 1009, 1011 (9th Cir. 1985)). A "reasonable expectation" of repetition must be more than "a mere physical or theoretical possibility." Murphy v. Hunt, 455 U.S. 478, 482 (1982). It is also Plaintiffs' burden to show that it is reasonable to expect that Defendants will repeat the challenged action. Lee v. Schmidt-Wenzel, 766 F.2d 1387, 1390 (9th Cir. 1985) (citing Lyons, 461 U.S. at 109).

Here, regardless of whether potential instances of DOE's tuition-withholding may be of limited duration, Plaintiffs have not met their burden to demonstrate a "reasonable expectation" that they will again be subjected to such action under Section (i). Act 129 plainly applies to allow DOE monitoring only where students are placed in *private* schools. The Act contains no provision that would permit DOE to undertake

monitoring of public school students or withhold their tuition. In this case, F.K.'s current placement is in the public schools, and there is no present evidence that she will be returned to a private school.

As discussed in the Court's Order to Terminate, the Ninth Circuit's decision in the Related Case "created a bilateral placement for F.K. at her DOE home school," a point conceded by Plaintiffs' counsel. ECF No. 234 at 20. Plaintiffs have not challenged F.K.'s latest December 16, 2014 IEP, which also proposes placement at her DOE home school. Thus, "[e]ven a timely due process appeal regarding her latest IEP would not invoke stay-put at Loveland." Rather, stay-put would preserve F.K.'s current offer of placement at her DOE home school. Id. at 20, 22.

Under these circumstances, Plaintiffs would need to show a "reasonable expectation" that all of the following events will occur within the next five years (F.K.'s remaining IDEA eligibility): (1) Student will receive a new placement at Loveland or another private school, either through the annual reevaluation process or following a due process appeal of her public placement, (2) once F.K. is in a private placement, DOE will request to monitor her education under Act 129, (3) F.K.'s private school will deny DOE access to monitor her, and (4) DOE

will withhold tuition reimbursement under Section (i). See Defs.' Opp. at 10, ECF No. 235.

It is "theoretically possible" that all of these events will occur, but this does not establish reasonable likelihood of repetition. Murphy, 455 U.S. at 482; see also, e.g., Lee, 766 F.2d at 1390 ("Speculative contingencies afford no basis for finding the existence of a continuing controversy between the litigants.").[19] Plaintiffs have not established a reasonable expectation that DOE will again withhold F.K.'s tuition under Section (i).[20] The Court therefore finds Plaintiffs' Count IV moot and DISMISSES that claim without prejudice.

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[19]The Court adds that the single case cited by Plaintiffs on this issue is not controlling. There, a student's *placement* challenge under the IDEA was not considered moot where evidence showed that the conflict was a "continuing one [that] will arise frequently." The plaintiffs established a "consistent" history of diverging educational philosophies between themselves and the defendant, which the court found would cause similar placement challenges to recur with each new IEP. See Rachel H., 14 F.3d at 1403.

[20]The Court observes that DOE's sole basis for withholding F.K.'s tuition under Section (i) was Loveland's refusal to allow monitoring without parental consent. Because the Court reaches the merits of this consent argument in the context of DOE's Third Party Complaint and finds below that Act 129 is preempted with respect to withholding tuition (and that DOE should instead file for due process, injunctive relief, or a declaratory judgment if monitoring is not allowed), it seems particularly *unlikely* going forward that private schools will have cause to deny DOE monitoring access on that basis or be deprived of reimbursement upon such denial.

Fourth, Plaintiff concedes that "issues regarding evaluations and multiple evaluations per a one year period is also finally decided because that issue . . . never ripened into a case or controversy." Plaintiffs recognize that "DOE is not electing to conduct multiple evaluation[s] in a one year period." Plfs.' Supp. Br. at 2, ECF No. 204. The Court may not issue an advisory ruling on a hypothetical state of facts. Chafin, 133 S. Ct. at 1023. A claim also is not "ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. U.S., 523 U.S. 296, 300 (1998) (quoting Thomas v. Union Carbide Ag. Prods. Co., 473 U.S. 568, 580-81 (1985) (further citation omitted)). Accordingly, Plaintiffs' Count V is DISMISSED without prejudice.

Fifth, the Court concludes that Plaintiffs' Count VI is moot for reasons similar to those discussed above. Count VI primarily relates to the legality of DOE's attempts to "conduct assessments and observations" and "obtain confidential mental health records" without parental consent.[21] Plaintiffs argue

[21]As discussed above with respect to Plaintiffs' Count I, the Ninth Circuit's decision in the Related Case determined that F.K. did not experience a change in placement or even a significant change in services.

This resolves the portion of Count VI claiming that Defendants "terminate[d] Plaintiff F.K.'s educational placement without a prior written notice and notice of procedural

that DOE's attempt to conduct unconsented monitoring under Act 129 is preempted by alleged IDEA requirements for "written notice and consent" and "signed release[s]." Compl. ¶ 74, ECF No. 1.

As explained above, a plaintiff must continue to have a "personal stake in the outcome" of his claims at all stages of a case. Lyons, 461 U.S. at 101. "When it becomes impossible for a court to grant effective relief, a live controversy ceases to exist, and the case becomes moot." Miller, 565 F.3d at 1250. Here, Plaintiffs seek declaratory relief, requesting that the Court declare "that Act 129 of the 2010 Legislature is invalid as implemented by the DOE when it is used to violate the parental notice, parental consent, the procedural safeguard notice requirements, and other procedural safeguards of the IDEA." See Compl. at 19, ECF No. 1.

In this case, Plaintiffs no longer have a "personal stake" in the resolution of this issue. Their request for relief also would not be "effective." Even by June 22, 2012, the Court noted in its Prelim. Injunction Order that it need not (and did not) address Plaintiffs' argument that DOE's attempts to monitor students without parental consent violated federal

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safeguards required by the IDEA," Compl. ¶ 74, ECF No. 1, as it has been judicially determined that no termination of her placement occurred.

law.[22] This was because the evidence showed that Loveland had procured parental consents on behalf of DOE and had thereafter allowed DOE to observe F.K. and review her records. Prelim. Injunction Order at 41-42, ECF No. 33.

This is consistent with evidence presented in the instant briefing, which shows that Mother consented to DOE's monitoring on December 21, 2011 and in March 2012, and that DOE was able to monitor F.K. and review her records on March 14, 2012. See Plfs.' MSJ Ex. J, ECF No. 172-17; Loveland Decl. ¶ 11, ECF No. 172-4; Sutton Decl. ¶¶ 25-26, ECF No. 169-6; Defs.' CSF Ex. 37, ECF No. 169-44.

There is no suggestion that DOE subsequently attempted to monitor F.K. without consent. F.K.'s current placement is at Castle High School, and Plaintiffs have offered no evidence of any reasonable likelihood that she will again be monitored in a private school setting. Accordingly, the Court concludes that Plaintiffs' Count VI is moot and DISMISSES it without prejudice.

[22]The Court's preliminary injunction order addressed only Plaintiffs' allegations of preemption by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g). See Prelim. Injunction Order at 41-42, ECF No. 33. However, the issue of whether Plaintiffs' claim is properly before the Court applies with the same relevance to Plaintiffs' Count VI, involving alleged preemption by the IDEA.

Lastly, the Court briefly addresses two additional issues that were never properly before it but are briefed in the parties' MSJs. The Court declines to rule on those issues.

First, at the hearing of May 21, 2012 on Plaintiffs' motion for preliminary injunction, Plaintiffs' counsel raised a challenge to Purpose Clauses 4 and 5 of Act 129. See Prelim. Injunction Order at 29, ECF No. 33. These clauses are codified at Section (g) of Act 129 and purport to require private placements to charge DOE "the same rates, fees, and tuition charged to parents who unilaterally place a student at the school" and to require DOE to "pay only for private school or placement services that are specified in a student's IEP." H.R.S. § 302A-443(g) (hereinafter "Section (g)").

Nothing in Plaintiffs' Complaint suggests that DOE actually attempted to enforce Section (g) in this case. Rather, the evidence shows that DOE withheld reimbursement to Loveland specifically because Loveland impeded its ability to "monitor" F.K. under Section (i) of Act 129. See Plfs.' MSJ Ex. K, 172-18; Loveland Decl. ¶ 12, ECF No. 172-4. Nonetheless, apparently in response to Plaintiffs' counsel's oral argument at the

Court's preliminary injunction hearing, both sides address Section (g) in their MSJs.[23]

The parties may not introduce a new claim for adjudication in their MSJs, where Plaintiffs' Complaint did not include it.[24] Moreover, a plaintiff must demonstrate standing under Article III of the U.S. Constitution to pursue a claim in federal court. This requires a showing that a plaintiff was injured "in fact," that the injury is "fairly traceable" to the defendant's actions, and that the injury likely will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Here, there is no evidence that DOE sought to enforce Section (g) or that Plaintiffs were thereby injured. Plaintiffs lack standing to challenge this portion of Act 129.

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[23]Specifically, Plaintiffs' MSJ includes one paragraph of relevant text regarding Section (g)'s limitations on tuition rates and non-IEP services billing, citing to hypothetical concerns about private schools' abilities to contract and provide adequate services. See Mem. in Support of Plfs.' MSJ at 24, ECF No. 172-1. Defs.' MSJ similarly points to no evidence that these issues actually arose in F.K.'s case. Rather, DOE's arguments, like Plaintiffs', are in the hypothetical: for example, "If the published rate is $5,000 a month, then the DOE should be charged that same rate." Mem. in Support of Defs.' MSJ at 34, ECF No. 168-1.

[24]The Court observes that its Prelim. Injunction Order also found that the parties had not sufficiently addressed Section (g), notwithstanding Plaintiffs' counsel's argument at the Court's hearing. The Court had therefore declined to rule on the issue at that time. ECF No. 33 at 30 n. 16, 17.

Second, Plaintiffs' MSJ also challenges, for the first time, Section (h) of Act 129, H.R.S. § 302A-443(h) (hereinafter "Section (h)"). Under Section (h), private schools receiving IDEA funds must provide copies of student records to DOE within three days of a records request. See Mem. in Support of Plfs.' MSJ at 24, ECF No. 172-1.

Again, Plaintiffs may not raise a new claim in their MSJ that was not pleaded in their Complaint. Moreover, there is no evidence that DOE actually sought to enforce Section (h) as to F.K. No facts suggest that there was ever a dispute among the parties as to the *time period* for producing F.K.'s records. Plaintiffs simply complain in their MSJ that Section (h) appears "arbitrary and capricious" in general. Mem. in Support of Plfs.' MSJ at 24, ECF No. 172-1. Absent any showing that Plaintiffs were actually harmed by DOE's enforcement of Section (h), they lack standing to challenge that provision.

For the foregoing reasons, the Court DENIES Plaintiff's MSJ, ECF No. 172, and GRANTS Defendants' MSJ, ECF No. 168. Plaintiffs' Count I is DISMISSED with prejudice, and Plaintiffs' Counts II-VI are DISMISSED without prejudice.

II. The Court Denies Third-Party Plaintiff DOE's MSJ and Grants Third-Party Defendant Loveland's MSJ as to DOE's Amended Third-Party Complaint

Third-Party Plaintiff DOE and Third-Party Defendant Loveland moved for summary judgment on March 28, 2013 as to the two remaining claims in DOE's Am. TPC:[25]

1. Loveland was negligent in breaching its duty to comply with Act 129 when it refused DOE access to monitor Student, compelling DOE to withhold reimbursement for F.K.'s tuition and leading to Plaintiffs' lawsuit (Count III); and

2. Loveland's aforesaid negligence obligates it to compensate DOE's attorneys' fees for litigating against Plaintiffs (Count V).[26]

See Am. TPC ¶¶ 40-47, 55-60, ECF No. 68. DOE and Loveland submit, and the Court agrees, that all issues raised in their MSJs as to the foregoing counts remain to be litigated.[27] See

[25]As noted above, all other counts in the Am. TPC have been dismissed. See Order Granting in Part Third-Party Defendants' Motion to Dismiss Third-Party Complaint ("MTD Order"), ECF No. 93.

[26]The Court notes that "[a]ttorneys' fees as sought here are an 'element of damages,' not a claim." MTD Order at 21, ECF No. 93. The Court therefore does not analyze DOE's Count V separately from Count III.

[27]The Court recognizes that it *may* dismiss state law claims over which it has supplemental jurisdiction where, *inter alia*, it has dismissed all claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3). In making such a decision, however, courts are to consider whether dismissal would serve interests of fairness, judicial economy, convenience, and comity. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988). The Court will retain supplemental jurisdiction to adjudicate DOE's third-party claim here, given

Third Party Plf.'s Supplemental Mem. Regarding Third Party Plf.'s MSJ at 2, 8, ECF No. 202; Loveland's Supplemental Br. in Support of Its MSJ at 3, ECF No. 203.

Under Hawaii law, DOE's negligence claim requires proof of (1) duty, (2) breach of duty, (3) causation, and (4) damages. Kaho'ohanohano v. Dep't of Human Servs., 178 P.3d 538, 563 (Haw. 2008). Under Hawaii law, attorneys' fees are recoverable as damages for negligence "where the wrongful act of the defendant has involved the plaintiff in litigation with others." Lee v. Aiu, 936 P.2d 655, 668-69 (Haw. 1997) (quoting Uyemura v. Wick, 551 P.2d 171, 176 (Haw. 1976)). In addition, even where a law contains no express provision that its violation will result in tort liability, a court may adopt the law as the duty of care necessary to avoid negligence liability. RESTATEMENT (SECOND) OF TORTS § 285 cmt. c; see also Ono v. Applegate, 612 P.2d 533, 539 (Haw. 1980)).

For the reasons explained below, the Court concludes that DOE has proven the duty and breach of duty elements of its negligence claim but cannot establish causation of damages as a

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the late stage of litigation and interests of judicial economy. See, e.g., Bak v. Metro-North RR Co., No. 12-cv-3220 (TPG), 2015 WL 1757035 * 4 (S.D.N.Y. Apr. 16, 2015) (retaining jurisdiction given late stage of litigation and judicial efficiency); Anserphone, Inc. v. Bell Atl. Corp., 955 F. Supp. 418, 433 (W.D. Pa. 1996) (retaining jurisdiction given duration of lawsuit and imminent trial).

matter of law.[28] Accordingly, Loveland's MSJ is GRANTED, and DOE's is DENIED.

a. DOE Establishes Duty and Breach of Duty on Its Negligence Claim

The Court concludes that DOE has established the duty and breach of duty elements of its negligence claim against Loveland. First, Loveland has an explicit duty to allow DOE to conduct monitoring under Act 129. It is delineated at Section (f) of the statute:

> "Any private school or placement that receives funding from the department for the placement of a student with a disability, whether the funding is by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, *shall allow* the department access to exercise its authority under this subsection to monitor any student placed at the private school or placement.

H.R.S. § 302A-443(f) (emphasis added). Consistent with its MTD Order, the Court finds that Loveland's duty for purposes of DOE's negligence claim is appropriately "determined by reference to [the] statute," Ono, 612 P.2d at 539, which affirmatively obligates Loveland to "allow" DOE to conduct monitoring.

[28]The Court does not consider Loveland's additional argument that DOE lacks standing to bring its third-party claims. See TPD's Opp. at 23-26, ECF No. 17. As noted above, the same challenge was already the subject of a separate motion to dismiss filed by Loveland on April 2, 2015, ECF No. 218, and denied on the merits by the Court on May 14, 2015, ECF No. 225.

Second, it is factually undisputed that Loveland breached its duty under Act 129 to "allow" DOE's monitoring of F.K. Act 129 clarifies that DOE's monitoring authority under the statute includes, *inter alia*, direct observation of disabled students within private schools (with or without notice), review of those students' records, and discussions with their teachers. H.R.S. § 302A-443(f)(3)-(5).

Loveland, however, turned DOE monitors away from the school and refused them access to F.K.'s records on December 5, 2011 and February 15, 2012. See Sutton Decl. ¶¶ 11-13, 22, ECF No. 169-6; Ward Dep. Tr. 34:8-35:23, Defs.' CSF Ex. 22, ECF No. 169-29; Sutton Dep. Tr. 15:16-16:24, 21:17-22:20, 37:1-24, Defs.' CSF Ex. 23, ECF No. 169-30; TPD's CSF Ex. A, ECF No. 175-2; Ward Decl. ¶¶ 6-7, ECF No. 169-3. These actions violated Loveland's duty to allow monitoring, as defined at H.R.S. § 302A-443(f)(3)-(5).

Loveland raises two arguments that it has not, in fact, breached a viable duty to DOE under Act 129. The Court, however, finds neither persuasive. First, Loveland argues that its duty to allow DOE monitoring under H.R.S. § 302A-443(f) is not an appropriate standard of conduct to apply to DOE's negligence claim under RESTATEMENT (SECOND) OF TORTS § 288(a). TPD's Opp. at 16-19, ECF No. 205.

This argument is baseless. The Restatement provides that courts will not adopt a statutory standard of conduct in a negligence *per se* action where the purpose of the statute is "found to be *exclusively* [] to protect the interests of the state or any subdivision of it as such." RESTATEMENT (SECOND) OF TORTS § 288(a) (cited in TPD's Opp. at 17, ECF No. 205). Loveland complains that Act 129's "express stated purpose is to protect the interests of the state (i.e., the DOE), not the interests of the students." TPD's Opp. at 19, ECF no. 205 (emphasis in original).

This assertion flies in the face of the legislative purpose statements and history cited *by Loveland*. The statute explicitly aims "to ensure that each student is afforded the same opportunity to receive rigorous, standards-based instruction and curriculum that are provided to their peers in public schools." Id. at 19 (quoting 2011 Haw. Sess. Laws 129 § 1). Legislative history further confirms that Act 129 was intended to allow "DOE to be more accountable for the public funds paid for these placements and to determine whether the students are receiving quality education and services that result in true progress." Id. (quoting S. Stand. Comm. Rep. No. 624, 2011 Senate Journal, at 2) (emphasis omitted).

On this record, the Court finds that the Hawaii legislature did not act "exclusively to protect the interests of the state" when it passed Act 129, including the provision requiring private schools to allow DOE monitoring. RESTATEMENT (SECOND) OF TORTS § 288(a) therefore does not apply.[29]

Second, Loveland argues that its duty to allow DOE monitoring under Act 129 is preempted by parental consent requirements under the IDEA.[30] See TPD's MSJ at 11-20, ECF No. 174; TPD's Opp. at 13-16, ECF No. 205. According to Loveland, it "owes" Plaintiffs a duty under the IDEA "to obtain parental consent before any evaluation of a student." Allegedly, this duty preempts "any statutory duty Loveland supposedly 'owes' to the DOE pursuant to Act 129." TPD's Opp. at 13, ECF No. 205.

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[29]The Court observes further that, even to the extent that the legislative history evinces a partial legislative purpose to improve accountability for public funds, this does not exclusively reflect governmental "self-interest." The substantial tuition charged by Loveland, for example, plainly impacts the remaining quantity of public funding available to educate other students in the State of Hawaii. It is in those students' interests for DOE to ensure that public funding is not used inappropriately by the private schools.

[30]Loveland has raised the same argument at prior points in this case by citing to FERPA and HIPAA, and DOE addresses those arguments in its MSJ. However, Loveland concedes that "Loveland's Motion does not raise any issues" concerning those statutes and that "Loveland has not requested any relief regarding those Acts." TPD's Reply at 3 n.1, ECF No. 238. The Court therefore declines to address whether those statutes have any impact on DOE's negligence claim.

As discussed above, federal law preempts state law to the extent that the two conflict. U.S. CONST. Art. VI, cl. 2; see also, e.g., Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 371-72 (2000). Federal preemption of state law may be expressed in statute, implied by the creation of comprehensive federal legislation in a field that leaves "no room" for state supplementation, or created where state law "actually conflicts with federal law." Pac. Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (citations omitted).

The latter form of preemption is referred to as "conflict preemption." It occurs when "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The Court concludes that it is not "impossible" for Loveland to comply with both its federal obligations and its duty to allow monitoring under Act 129, nor does Loveland's duty to allow monitoring under Act 129 serve as an "obstacle" to Congressional objectives.

"Impossibility" for purposes of conflict preemption occurs only where there is an "inevitable collision" between state and federal law that makes it a "physical impossibility" for a party to comply with both obligations. As an example, this could occur if a federal law forbade marketing any avocado of more than 7% oil content, while state law prevented marketing of any avocado of less than 8% oil content. Florida Lime & Avocado Growers, 373 U.S. at 143. The Court's inquiry related to impossibility preemption focuses on the ability of a private challenger to comply with both its federal and state obligations. See, e.g., Crosby, 530 U.S. at 373 (the focus of impossibility preemption is whether "it is impossible for a private party to comply with both state and federal law"); PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2579 (2011) ("The question for 'impossibility' is whether the private party could independently do under federal law what state law requires of it.").

No such impossibility is presented here. The IDEA provisions and implementing regulations cited by Loveland apply to consent obligations applicable *to DOE* with respect to students' annual "reevaluations." Under the IDEA, *"[a]gencies in the State"* must "take appropriate action . . . to ensure the protection of the confidentiality of any personally identifiable

data, information, and records collected or maintained by the Secretary and by State educational agencies and local educational agencies." 20 U.S.C. §§ 1412(a)(8), 1417(c) (emphasis added). In addition, "*each public agency*" is obligated to "obtain informed parental consent . . . prior to conducting any reevaluation of a child with a disability." 34 C.F.R. 300.300(c)(1)(i) (emphasis added). As Loveland can point to no federal regulation that required it, rather than DOE, to obtain parental consent prior to allowing DOE to monitor F.K., the Court cannot find that it was "impossible" for Loveland to comply with both Act 129 and federal law. As noted above, the Court's inquiry related to impossibility preemption, as it has been raised in this case, focuses on Loveland's obligations (not DOE's). See, e.g., Crosby, 530 U.S. at 373; PLIVA, 131 S. Ct. at 2579.[31]

[31]The Court notes, however, that even if it were to consider DOE's obligations, it would not find that it was "impossible" for DOE to adhere to both federal and state laws regarding parental consent. The record here shows that parental consent was, in fact, obtained before DOE monitored F.K. Moreover, to the extent that DOE previously attempted to monitor F.K. without consent, it does not appear that it would have been "impossible" for DOE simultaneously to comply with federal law. The reasons for this conclusion are explained at greater length below. In particular, the IDEA's implementing regulations allow for "monitoring" of students in private schools without parental consent. 34 C.F.R. § 300.146. Monitoring under the IDEA can include, *inter alia*, on-site visits and the use of written reports. Id. § 300.147. In addition, although parental consent is required for DOE to "reevaluate" a student, DOE need not

Loveland also argues, however, that even if it was *possible* for it to comply with both Act 129 and federal law, its duty to allow unconsented monitoring would present "a clear obstacle to the accomplishment and execution of the purposes of the IDEA." TPD's Mem. in Support of Its MSJ at 12, ECF No. 174-1. Loveland urges that this is so because DOE must obtain parental consent to evaluate or reevaluate students under 20 U.S.C. § 1414(c)(3) and 34 C.F.R. §§ 300.303(a)(1), 300.300(c). According to Loveland, the record contains "undisputed" evidence that Ward and Sutton generated notes from their Act 129 monitoring observations that were later used, along with their memories, during reevaluations of F.K. See id. at 14-15.

The Court notes that the factual record is not as clear as Loveland describes, despite the parties' substantial submissions. For example, there is some uncertainty as to whether the DOE monitors' notes actually made it into F.K.'s Confidential File, which is used in her reevaluations. See Sutton Dep. Tr. 60:3-5, TPD's CSF Ex. A, ECF No. 175-2. Regardless, even assuming that DOE personnel created notes and memories during their Act 129 monitoring that they used in later

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obtain parental consent to "review existing data." 34 C.F.R. § 300.300(d)(1)(i). The statute does not indicate that "existing data" cannot include information or reports obtained in the course of unconsented student monitoring, or that different DOE officials must "monitor" versus "reevaluate" students.

reevaluations of F.K., the Court does not find that this would "stand[] as an obstacle" to Congressional objectives. Hines, 312 U.S. at 67.

The IDEA itself imposes upon DOE an obligation to "monitor" IDEA-covered students placed in private schools, in order to ensure that they have "all the rights of a child with a disability who is served by a public agency" and are receiving education consistent with the standards in DOE schools. 34 C.F.R. § 300.146. DOE may conduct such monitoring "through procedures *such as* written reports, on-site visits, and parent questionnaires." Id. § 300.147 (emphasis added). The statute does not mandate that parental consent be obtained before monitoring, that different DOE employees conduct monitoring versus annual reevaluations,[32] or that annual reevaluations exclude written reports generated during monitoring. Thus, even if the DOE monitors in this case later participated in F.K.'s reevaluations and relied on their notes and memories, this would not appear to conflict with the IDEA.

[32]The Court observes that it may not be feasible (or even desirable) to expect that different sets of DOE employees would be available to conduct "monitoring" versus "evaluations" of students. This is especially so in smaller states and in areas of unique student need.

Moreover, Loveland consistently ignores the IDEA's parental consent exception for "reviewing existing data as part of an evaluation or a reevaluation." 34 C.F.R. § 300.300(d)(1)(i). Loveland does not explain why DOE monitors' written notes and reports should not be considered "existing data" that reevaluation teams may consider without consent. This would appear to be consistent with, rather than an "obstacle" to, Congressional intent.

For the foregoing reasons, the Court concludes that DOE has established the duty and breach of duty elements of its negligence claim against Loveland.

b. DOE Cannot Establish Causation of Damages on its Negligence Claim

Notwithstanding its establishment of the duty and breach of duty elements of its negligence claim against Loveland, DOE cannot prove the third element, causation of damages, as a matter of law.[33]

When the Court issued its MTD Order in this case, it recognized that DOE pleaded a viable claim that Loveland "caused DOE to terminate payments to Loveland Academy, which then caused DOE to become embroiled in this litigation with F.K." ECF No.

[33]Based on this conclusion, the Court does not reach separately whether DOE has sufficiently proven its damages (the fourth element of its negligence claim).

93 at 18.[34] In other words, causation for purposes of DOE's negligence claim comprises a four-step chain of events: Loveland impeded DOE's monitoring, which caused DOE to withhold tuition for F.K., which caused Plaintiffs to sue DOE for payment, which caused DOE to incur attorneys' fees.

What was not before the Court at that time is the argument raised by Loveland now: that "Loveland cannot be the legal cause of any damages claimed by the DOE because the IDEA preempts Act 129's provision [Section (i)] requiring the DOE to withhold tuition payments to education placements."[35] TPD's Opp. at 20, ECF No. 205. The Court agrees and finds that Section (i) is preempted by the IDEA, and that this conclusion negates the causation element of DOE's negligence claim as a matter of law.

First, the Court concludes that Act 129's Section (i) is preempted by the IDEA, as applied to this case. Section (i) required DOE to withhold tuition that it was obligated to provide under the IDEA; pursuant to the Supremacy Clause, this conflict must be resolved in favor of DOE's federal obligation.

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[34]As discussed above, Act 129's Section (i) in fact *mandates* that DOE withhold student tuition when its monitoring access is denied. See H.R.S. § 302A-443(i).

[35]As discussed above, Plaintiffs raised the same argument in the course of this litigation. However, the issue is moot as to their case, given that the Court can no longer order effective relief on their behalf.

The Court analyzed this issue at length in its Prelim. Injunction Order, which discussion is incorporated by reference herein. See ECF No. 33 at 18-37. As a concise explanation of the relevant legal analysis, federal law preempts state law where the two conflict. U.S. CONST. Art. VI, cl. 2; see also, e.g., Crosby, 530 U.S. at 371-72. Federal preemption occurs where state law "actually conflicts with federal law." Pac. Gas & Elec. Co., 461 U.S. at 204. This type of "conflict preemption" occurs when "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (citations omitted).

The IDEA provides federal money to state and local education agencies to help them educate disabled children, on the condition that they implement the substantive and procedural requirements of the Act. See R.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1121 (9th Cir. 2011). One such requirement is the IDEA's stay-put provision, under which a child is entitled to remain at her "then-current educational placement" during any due process proceedings initiated under the statute. 20 U.S.C. § 1415(j). In this case, as discussed above, F.K. was receiving educational services at Loveland

pursuant to stay-put at the time of DOE's attempts to monitor her under Act 129. Stay-put was invoked following her first due process challenge to DOE's March 10, 2011 offer of placement at King Intermediate School. AHO Young's October 12, 2011 order in DOE-SY1011-126 clarified that F.K. was entitled to stay-put placement at Loveland as of June 2, 2011, the date on which she initiated that challenge. See Compl. ¶ 49; Plf.'s MSJ Ex. C at 3, ECF No. 172-10.

Although the IDEA does not expressly refer to payment or reimbursement, the Ninth Circuit has clarified that stay-put requires a school district to fund a child's "current educational placement" at a private school, when applicable, during due process proceedings under the IDEA. See Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635, 641 (9th Cir. 1990). The parties have not presented, nor is the Court aware of, any authority that would allow states to withhold reimbursement to students' private stay-put placements, in contravention of their federal funding obligation.

To the contrary, courts have recognized that "[a]llowing the District to terminate the child's placement during the appeals process, while the District continues to receive federal education funding, runs counter to the purpose

of § 1415(j)." Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 1040 (9th Cir. 2009). This result would "force parents to choose between leaving their children in an education setting which potentially fails to meet minimum legal standards, and placing the child in private school at their own cost . . . [which] amounts to no choice at all." Id. (citing Susquenita Sch. Dist. v. Raelee S. ex rel. Heidi S., 96 F.3d 78, 87 (3d Cir. 1996)).

That concern is well-illustrated in the instant case, where F.K. was placed at Loveland pursuant to an administrative decision that DOE's prior offer of placement denied her a FAPE. When DOE withheld F.K.'s tuition payments, notwithstanding stay-put being in effect, Loveland attempted to bill Mother for tuition she could not afford. Absent the Court's preliminary injunction, Mother would have been faced with the untenable choice of attempting to pay for Student's education herself or returning F.K. to a potentially inadequate placement.

The overarching purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education," and to ensure that "children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(A)-(B). To that end, the IDEA places the responsibility for providing FAPE directly on the school

district, even when students are placed in private schools: "If the State or public agency has placed children with disabilities in private schools for purposes of providing FAPE to those children, the State and the public agency must ensure that these children receive the required special education and related services at public expense, at no cost to the parents, and in accordance with each child's IEP." 71 Fed. Reg. 46598-99 (Aug. 14, 2006).

Given the IDEA's purpose and funding requirements related to the provision of FAPE during stay-put, DOE's enforcement of Section (i) in this case stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines, 312 U.S. at 67 (1941). Consistent with its Prelim. Injunction Order, the Court finds that implementing Act 129's Section (i) is in conflict with, and accordingly preempted by, the IDEA's stay-put provision as applied in this case. U.S. CONST. Art. VI, cl. 2.

The Court adds that, given the conflict between DOE's federal and state law obligations, the appropriate course for the Department would have been to seek a declaratory judgment, injunction, or due process hearing against Loveland, instead of withholding Student's tuition. As the foregoing analysis explains, DOE's obligation was to make F.K.'s stay-put payments

pursuant to federal law, notwithstanding contrary obligations under Section (i). DOE could, however, have sought a declaratory judgment, injunctive relief, or due process hearing in response to Loveland's attempts to block its monitoring activities. This would have accomplished DOE's objectives – securing monitoring access to F.K. and her records – without contravening the IDEA.[36]

Second, as to the impact of the foregoing finding on DOE's negligence claim, Hawaii law provides that "an actor's negligent conduct is a legal cause of harm to another" only if "(a) his or her conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his or her negligence has resulted in the harm." Mitchell v. Branch, 363 P.2d 969, 973 (Haw. 1961) (citing RESTATEMENT (FIRST) OF TORTS § 431; Prosser on Torts § 47); see also, e.g., Taylor-Rice v.

[36]The Court notes that this issue, related to DOE's proper course of conduct *prior* to withholding F.K.'s tuition, is distinct from the instruction in its Prelim. Injunction Order that "[s]hould Defendants believe that Loveland is obstructing Defendants' monitoring efforts going forward, it appears that Defendants' proper recourse is the initiation of a due process hearing" pursuant to 20 U.S.C. § 1415(f). ECF No. 33 at 49. The latter instruction was directed to DOE's appropriate course of action after the Court's preliminary injunction issued, contrasted to its appropriate course of action prior to withholding F.K.'s tuition in the first place.

State, 979 P.2d 1086, 1100-01 (Haw. 1999) (citing Mitchell with approval).

The second factor under Mitchell considers "whether there are policy concerns or rules of law that would prevent imposition of liability on the negligent party although his negligence was clearly a cause of the resultant injury." Taylor-Rice, 979 P.2d at 1101 (citation omitted). It calls on courts to "consider[] whether the intervening actions of [another actor] in the chain of causation relieved [the defendant] from liability." McKenna v. Volkswagenwerk Aktiengesellschaft, 558 P.2d 1018, 1022 (Haw. 1977).

The Court concludes that the federal preemption of DOE's tuition withholding insulates Loveland against negligence liability here. DOE's enforcement of Section (i), an intervening act in the chain of events between Loveland's conduct and DOE's harm, was unlawful. Whether or not Loveland's obstruction of DOE's monitoring violated its own duty under state law, DOE was not subsequently permitted to withhold F.K.'s tuition. It would be unfair to say that Loveland's conduct proximately caused Plaintiffs' lawsuit and DOE's damages where the Supremacy Clause forbade DOE's intervening action *ex ante*. At the very least, DOE should have sought a declaratory judgment, injunction, or due process hearing as to its rights

before acting contrary to federal law. DOE acted at its own risk in withholding F.K.'s tuition instead.

Accordingly, the Court concludes that DOE cannot prove causation on its negligence claim as a matter of law. The Court DENIES Third-Party Plaintiff DOE's MSJ, ECF No. 170, and GRANTS Third-Party Defendant Loveland's MSJ, ECF No. 174. The remaining claims in DOE's Am. TPC, Counts III and V, are dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' Motion for Summary Judgment (ECF No. 172), GRANTS Defendants' Motion for Summary Judgment (ECF No. 168), DENIES Third-Party Plaintiff's Motion for Summary Judgment (ECF No. 170), and GRANTS Third-Party Defendant's Motion for Summary Judgment (ECF No. 174).

Count I of Plaintiffs' Complaint is DISMISSED with prejudice, and Counts II-VI of Plaintiffs' Complaint are DISMISSED without prejudice. Counts III and V of DOE's Am. TPC are also dismissed without prejudice.

IT IS SO ORDERED.
DATED: Honolulu, Hawai'i, September 4, 2015.

F.K. ex rel. A.K. v. Dep't of Educ., State of Hawaii, et al., Civ. No. 12-00136 ACK-RLP, Order Denying Plaintiffs' Motion for Summary Judgment, Granting Defendants' Motion for Summary Judgment, Denying Third-Party Plaintiff's Motion for Summary Judgment, and Granting Third-Party Defendant's Motion for Summary Judgment.