

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

MICHELLE SHORES AND DANE SHORES,  
INDIVIDUALLY AND ON BEHALF OF  
THEIR MINOR SON B.S.;

CIV. NO. 21-00455 LEK-WRP

Plaintiffs,

vs.

NIKITA HAY, PSY.D.; KURT  
HUMPHREY, M.D.; JANE AND/OR  
JOHN DOES 1-25, DOE ENTITIES 1-  
10,

Defendants.

**ORDER: DENYING DEFENDANTS' MOTION TO STRIKE; DENYING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT; AND GRANTING IN PART AND  
DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

On April 24, 2023, Plaintiffs Michelle Shores ("Mrs. Shores") and Dane Shores ("Mr. Shores"), individually and on behalf of their minor son B.S., (collectively "Plaintiffs") filed their Motion for Partial Summary Judgment as to Liability ("Plaintiffs' Motion"). [Dkt. no. 31.] Also on April 24, 2023, Defendants Nikita Hay, Psy. D., ("Dr. Hay") and Kurt Humphrey, M.D., ("Dr. Humphrey" and collectively "Defendants") filed their Motion for Summary Judgment on All Claims ("Defendants' Motion for Summary Judgment"). [Dkt. no. 34.] On July 7, 2023, Defendants filed their memorandum in opposition to Plaintiffs' Motion ("Opposition to Plaintiffs' Motion"). [Dkt. no. 48.] On July 8, 2023, Plaintiffs filed their memorandum in opposition to

Defendants' Motion for Summary Judgment ("Opposition to Defendants' Motion for Summary Judgment"). [Dkt. no. 50.] On July 14, 2023, Defendants and Plaintiffs filed their respective replies ("Defendants' Reply" and "Plaintiffs' Reply"). [Dkt. nos. 55, 56.]

The Court found these matters suitable for disposition without a hearing pursuant to Rule LR7.1(c) of the Local Rules of Practice for the United States District Court for the District of Hawaii ("Local Rules"). See EO, filed 7/25/23 (dkt. no. 60). On July 27, 2023, the Court issued an entering order informing the parties of its summary ruling denying Plaintiffs' Motion and granting Defendants' Motion for Summary Judgment. [Dkt. no. 61.] This Order supersedes that entering order. Plaintiffs' Motion is hereby denied, and Defendants' Motion for Summary Judgment is hereby granted in part and denied in part for the reasons set forth below.

#### **BACKGROUND**

##### **I. Relevant Allegations**

Mrs. Shores and Mr. Shores ("Parents") are B.S.'s adoptive parents. [Complaint for Declaratory Relief and Damages ("Complaint"), filed 11/22/21 (dkt. no. 1), at ¶ 8.] B.S. suffers from numerous mental and emotional health conditions and is eligible for services and programs under the Individuals with Disabilities Education Act ("IDEA"). See id. at ¶ 9.

Plaintiffs allege the following claims against Defendants: (1) a claim alleging violations of the IDEA and Section 504 of the Rehabilitation Act ("the Rehab Act"), together with a 42 U.S.C. § 1983 claim alleging violations of B.S.'s due process rights under the Fifth and Fourteenth Amendments of the United States Constitution, and Article I of the Hawai`i Constitution ("Count I"); and (2) a medical malpractice claim ("Count II"). Plaintiffs seek declaratory judgment, general and special damages, punitive and/or exemplary damages, reimbursement of costs and expenses, and any other appropriate relief. Dr. Hay is sued in her individual and official capacity while Dr. Humphrey is sued only in his official capacity. See id. at ¶¶ 3-4.

## **II. Relevant Facts**

During the 2019-2020 academic school year ("SY 2019-20"), B.S. was a student within the Hawai`i State Department of Education ("DOE"), and the DOE was responsible for providing B.S. with a public education. See Defs.' Concise Statement of Material Facts ("Defs. CSOF"), filed 4/24/23 (dkt. no. 35), at ¶¶ 1-3; Pltfs.' Concise Statement of Facts in Opposition to Defendants' Motion for Summary Judgment ("Pltfs.' Responsive CSOF"), filed 7/8/23 (dkt. no. 51), at pg. 2 (admitting Defs.'

¶¶ 1-3).<sup>1</sup> The DOE developed an Individualized Education Program ("IEP") for B.S., which was effective from December 10, 2019 to September 10, 2020. B.S.'s IEP stated that he would receive services at a private residential facility, but it did not state that he required specialized treatment in a secure residential treatment program on the mainland. See Defs.' CSOF at ¶¶ 4-6; Pltfs.' Responsive CSOF at pg. 2.

During SY 2019-20, Dr. Hay and Dr. Humphrey were employed by the Hawai'i State Department of Health ("DOH") Child and Adolescent Mental Health Division ("CAMHD"). During some of SY 2019-20, B.S. received his education and related IEP services at Detroit Behavioral Institute Capstone Academy ("Capstone") in Michigan. See Defs.' CSOF at ¶¶ 11-13; Pltfs.' Responsive CSOF at pg. 2. "By at least December of 2019, B.S.'[s] parents . . . were aware that B.S.'[s] placement at Capstone required termination." [Defs.' CSOF at ¶ 14; Pltfs.' Responsive CSOF at pg. 2.]

Around November 2019, B.S.'s IEP team began efforts to place B.S. in another treatment program. Dr. Hay evaluated B.S. and submitted a report to Parents and the IEP team. See Pltfs.' Concise Statement of Facts in Support of Motion for Partial Summary Judgment as to Liability ("Pltfs.' CSOF"), filed 4/24/23

---

<sup>1</sup> Plaintiffs admitted paragraphs one through fourteen of Defendants' CSOF. See Pltfs.' Responsive CSOF at pg. 2.

(dkt. no. 32), at ¶¶ 3-4; Defs.' Separate Concise Statement of Material Facts in Opposition to Plaintiffs' Motion for Summary Judgment as to Liability ("Defs.' Responsive CSOF"), filed 7/7/23 (dkt. no. 48-1), at ¶¶ 3-4 (partially disputing Pltfs.' ¶¶ 3-4 on other grounds). From December 2019 through February 2020, Parents executed consent and authorization forms to allow Dr. Hay and Dr. Humphrey to initiate inquiries and applications to alternative residential treatment programs. Between November 2019 and January 2020, B.S.'s IEP team met several times to discuss potential placements in alternative residential treatment programs. See Pltfs.' CSOF at ¶¶ 7-8; Defs.' Responsive CSOF at ¶¶ 7-8 (partially disputing Pltfs.' ¶¶ 7-8 on other grounds).

In a January 30, 2020 letter, signed by Dr. Humphrey for Dr. Hay, Parents were informed that B.S. was going to be discharged from Capstone, and Capstone requested that B.S. be discharged as soon as possible. The letter stated that the DOH would place B.S. in the CAMHD's Residential Crisis Stabilization Program ("RCSP") if Parents consented. If they did not consent, then B.S. would be returned to Parents' care. The change was to take effect on February 9, 2020. See Defs.' CSOF, Decl. of Kurt Humphrey ("Humphrey Decl."), Exh. E (Notice of Action, dated 1/30/20 ("Notice of Action")).

In an email dated January 31, 2020, Ms. Shores emailed Dr. Hay stating that, among other things, "we want to talk to **DOE** since the time is so short on [B.S.'s] placement [at Capstone] and the directive from [Capstone] that he should be moved [as soon as possible]." [Defs.' CSOF, Decl. of Nikita Hay ("Hay Decl."), Exh. D (emails between Dr. Hay and Mrs. Shores all dated January 31, 2020) at 1 (emphasis added).]

An Interstate Compact on the Placement of Children ("ICPC") Request form for B.S. was signed by the receiving state - *i.e.*, Michigan - on June 29, 2018. See Defs.' CSOF, Decl. of Janet Ledoux ("Ledoux Decl."),<sup>2</sup> Exh. F ("B.S.'s ICPC Request") at 1. According to B.S.'s ICPC Report on Child's Placement Status ("B.S.'s ICPC Report"), signed on October 29, 2020, B.S.'s placement at Capstone was terminated on February 13, 2020, and the report indicated he was transferred to Hawai`i. See id. at 2; see also Humphrey Decl., Sealed Exh. C (Detroit Behavioral Institute Capstone Academy - Residential Discharge Summary, stating B.S. was released from Capstone on February 12, 2020).<sup>3</sup>

When B.S. arrived in Hawai`i, Plaintiffs did not take B.S. back into their custody, and Dr. Hay notified Child Welfare

---

<sup>2</sup> Janet Ledoux is an Administrative Officer for CAMHD. See Ledoux Decl. at ¶ 1. She is CAHHD's custodian of records for purposes of this case. See id. at ¶ 3.

<sup>3</sup> Exhibit C was filed under seal on April 25, 2023. [Dkt. no. 39.]

Services ("CWS"). CWS arranged for B.S. to be admitted into the Kapiolani Medical Center for Women and Children ("KMC"). See Pltfs.' CSOF at ¶¶ 14-15; Defs.' Responsive CSOF at ¶¶ 14-15 (partially disputing Pltfs.' ¶¶ 14-15 on other grounds). On March 5, 2020, Michelle E. Nakata ("Nakata") - a State of Hawai`i ("State") Deputy Attorney General - replied to an email from Plaintiffs' counsel informing Nakata that B.S. "eloped" from a CAMHD facility. See Pltfs.' CSOF, Decl. of Eric A. Seitz ("Seitz Decl."), Exh. 3 (emails from February and March 2020 concerning B.S.'s transportation and placement in Hawai`i) at PageID.173. B.S. was subsequently admitted to the Family Treatment Center at the Queens Medical Center. See Pltfs.' CSOF at ¶ 19; Defs.' Responsive CSOF at ¶ 19 (partially disputing Pltfs.' CSOF ¶ 19 on other grounds).

On February 7, 2020, Plaintiffs filed a due process request. See Seitz Decl., Exh. 4 (Order Granting Petitioner's Motion for Entry of 'Stay Put' Order) at 2. On March 11, 2020, a hearings officer for the State Department of the Attorney General's Office of Dispute Resolution issued an Order Granting Petitioners' Motion for Entry of 'Stay Put' Order, ordering that B.S. remain placed at a private residential facility while the due process request was pending. See generally id. In May 2020, B.S. was transported to a residential treatment program in Kansas. See Pltfs.' CSOF at ¶ 21; Defs.' Responsive CSOF at

¶ 21 (partially disputing Pltfs.' CSOF at ¶ 21 on other grounds).

In Plaintiffs' Motion, Plaintiffs seek summary judgment against Defendants as to the issue of liability because, according to Plaintiffs, Defendants violated 20 U.S.C. § 1415(j) when they changed B.S.'s then-current educational placement even though B.S.'s IEP team had not changed his placement. See Pltfs.' Motion, Mem. of Law at 2.

In Defendants' Motion for Summary Judgment, Defendants argue summary judgment is appropriate because: (1) Dr. Hay is an improper defendant for any Fourteenth Amendment claim; (2) there is no private right of action under Article I of the Hawai'i Constitution; (3) Dr. Hay and Dr. Humphrey are improper defendants under the IDEA and Rehab Act; (4) any claim under the IDEA fails because Plaintiffs did not exhaust the administrative remedy process; (5) Dr. Hay is entitled to qualified immunity; and (6) Plaintiffs' medical malpractice claim fails because Plaintiffs have not provided any expert opinion. See Defs.' Motion for Summary Judgment at PageID.197-98.

## DISCUSSION

### **I. Defendants' Motion to Strike**

On June 21, 2023, Defendants filed their Motion to Strike Plaintiffs' Motion for Partial Summary Judgment as to Liability [DKTS 31-32] ("Motion to Strike"). [Dkt. no. 44.] On

July 10, 2023, Plaintiffs filed their response in opposition to the Motion to Strike ("Opposition to Motion to Strike"). [Dkt. no. 53.] Defendants filed their reply on July 19, 2023. [Dkt. no. 58.] The Court found this matter suitable for disposition without a hearing pursuant to Local Rule 7.1(c). See Minute Order - EO, filed 6/27/23 (dkt. no. 46).

In the Motion to Strike, Defendants request that the Court strike Plaintiffs' Motion because Plaintiffs purportedly failed to comply with Local Rule 7.8 when they did not meet and confer with Defendants regarding Plaintiffs' Motion. See Motion to Strike at 3-6. Plaintiffs argue they complied with Local Rule 7.8. See generally Pltfs.' Opp. to Motion to Strike. After reviewing the parties' submissions, the Motion to Strike ultimately amounts to he-said-she-said. Moreover, in light of the importance of the issues raised in Plaintiffs' Motion, the Court declines to make any finding regarding the contentions raised in connection with the Motion to Strike. The Motion to Strike is therefore denied.

## **II. Plaintiffs' Motion**

Plaintiffs' Motion consists of only two and a half pages of argument as to why they are entitled to summary judgment as to the issue of liability. See Pltfs.' Motion, Mem. of Law at 1-3. Plaintiffs make arguments that Defendants are not entitled to summary judgment as to their claims against

Defendants under the Fifth and Fourteenth Amendment, Rehab Act, Hawai`i Constitution, or their medical malpractice claim, but Plaintiffs do not explain why summary judgment should be granted in their favor as to those claims. Plaintiffs vaguely argue Defendants violated § 1415(j) because Defendants unilaterally removed B.S. from Capstone and transferred him to Hawai`i, even though his IEP team had not changed his placement. See id. at 2. This argument seemingly relates to Plaintiffs' IDEA claim, but it is too vague for the Court to make a ruling that they have carried their burden on summary judgment. To the extent that Plaintiffs' IDEA claim is that B.S.'s transfer from Capstone violated B.S.'s IEP and, therefore, the IDEA, Plaintiffs do not provide evidence or legal argument as to how Defendants violated the IEP. For instance, Plaintiffs have not established that B.S.'s IEP required him to be placed at Capstone or any other secure residential treatment program on the mainland.

Moreover, it appears Plaintiffs contend that Defendants violated B.S.'s right to a free appropriate public education ("FAPE") under the IDEA, and they therefore seek to vindicate such a violation. Plaintiffs' IDEA claim against Defendants is confusing because Plaintiffs initially requested a due process hearing under the IDEA **against the DOE**. See Defs.' CSOF, Decl. of Custodian of Records - Michelle M.L. Puu ("Puu

Decl."),<sup>4</sup> Sealed Exh. B at 2-3 (Request for IDEA Impartial Due Process Hearing, signed by Mrs. Shores on 2/5/20).<sup>5</sup> On April 17, 2020, Plaintiffs withdrew their complaint with the Office of Dispute Resolution. See id. at 50-52 (Withdrawal of Amended Complaint). On the same day, the hearings officer granted Plaintiffs' withdrawal and the case was dismissed with prejudice "due to a settlement agreement reached between the parties." [Id. at 54 (second page of the Order of Dismissal).] Plaintiffs now pursue an IDEA claim against the DOH for the purported denial of B.S.'s FAPE. Because Plaintiffs IDEA claim seeks relief for the denial of FAPE, they must exhaust the IDEA's procedures. See 20 U.S.C. § 1415(l); see also Fry v. Napoleon Cnty. Schs., 580 U.S. 154, 165 (2017) ("Section 1415(l) requires that a plaintiff exhaust the IDEA's procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws when (but only when) her suit "seek[s] relief that is also available" under the IDEA." (alteration in Fry)).

Plaintiffs have not proffered any evidence that they have exhausted their administrative remedies under the IDEA. Moreover, Plaintiffs seek monetary damages and, thus, insofar as

---

<sup>4</sup> Michelle M.L. Puu is a Supervisor of the Office of Dispute Resolution, Department of the Attorney General, State of Hawai`i. [Puu Decl. at ¶ 1.]

<sup>5</sup> Exhibit B was filed under seal on April 25, 2023. [Dkt. no. 38.]

they bring a claim under the IDEA, that claim is improper because the IDEA does not allow for an award of ordinary monetary damages. See McIntyre v. Eugene Sch. Dist. 4J, 976 F.3d 902, 910-11 (9th Cir. 2020). It is therefore absolutely clear that Plaintiffs fail to "identify[] each claim . . . or part of each claim . . . on which summary judgment is sought," and they have neither "show[n] that there is no genuine dispute as to any material fact . . . [nor that they are] entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(a). Plaintiffs' Motion must be denied.

### **III. Defendants' Motion for Summary Judgment**

#### **A. Plaintiffs' Count I**

##### **1. Section 1983 Claims**

Plaintiffs allege their Fifth and Fourteenth Amendment claims against Dr. Hay in her individual and official capacity and against Dr. Humphrey in his official capacity. It is undisputed that, at the time of the alleged events, both Dr. Hay and Dr. Humphrey were DOH employees. See Defs.' CSOF at ¶¶ 11-13; Pltfs.' Responsive CSOF at pg. 2. Plaintiffs' claims against Dr. Hay and Dr. Humphrey in their official capacities are claims against the State. See Hafer v. Melo, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State." (citation omitted)). "[N]either a State nor its

officials acting in their official capacities are 'persons' under § 1983." Will v. Michi. Dep't of State Police, 491 U.S. 58, 71 (1989).

Insofar as Plaintiffs bring Fifth Amendment due process claims against Dr. Hay in either her individual capacity or her official capacity, and Dr. Humphrey in his official capacity, those claims necessarily fail as a matter of law because "the Fifth Amendment's due process clause only applies to the federal government." See Bingue v. Prunchak, 512 F.3d 1169, 1174 (9th Cir. 2008) (some citations omitted) (citing Betts v. Brady, 316 U.S. 455, 462, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942)). Because Plaintiffs are not raising claims against the federal government, summary judgment must be granted in favor of Defendants as to Plaintiffs' Fifth Amendment claims against them.

Further, because Plaintiffs bring their Fourteenth Amendment due process claims against Defendants in their official capacities, the State is entitled to Eleventh Amendment immunity. See Will, 491 U.S. at 66 ("That Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect was made clear . . . ."). The Fourteenth Amendment claims against Defendants in their official capacities are therefore improper insofar as Plaintiffs seek damages. Summary

judgment in favor of Defendants is warranted as to those claims. To the extent that Plaintiffs seek declaratory relief, it appears they seek declaratory relief for a **past** violation that is not ongoing. Because they do not seek prospective relief, Plaintiffs' Fourteenth Amendment claims against Defendants in their official capacities fail. See Jamul Action Comm. v. Simermeyer, 974 F.3d 984, 994 (9th Cir. 2020) (stating that, for the exception to Eleventh Amendment Immunity to apply to a claim seeking injunctive and/or declaratory relief, "a plaintiff must point to **threatened or ongoing** unlawful conduct by a particular governmental officer" (emphasis added)). Accordingly, summary judgment in favor of Defendants is appropriate as to Plaintiffs' Fourteenth Amendment claims against Defendants in their official capacities.

As to Plaintiffs' Fourteenth Amendment due process claim against Dr. Hay in her individual capacity, Plaintiffs do not allege whether the claim is regarding substantive or procedural due process. Regardless,

"[i]n a § 1983 action, the plaintiff must . . . demonstrate that the defendant's conduct was the actionable cause of the claimed injury." Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008). Such causation "can be established" either "by some kind of direct personal participation in the deprivation" or "by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." Gini v. Las Vegas Metro. Police Dep't, 40 F.3d

1041, 1044 (9th Cir. 1994) (quoting Merritt v. Mackey, 827 F.2d 1368, 1371 (9th Cir. 1987)). “To meet [§ 1983’s] causation requirement, the plaintiff must establish both causation-in-fact and proximate causation.” Harper, 533 F.3d at 1026 . . . . “Without [such] caus[ation], there is no section 1983 liability.” Van Ort v. Est. of Stanewich, 92 F.3d 831, 837 (9th Cir. 1996).

Chaudhry v. Aragón, 68 F.4th 1161, 1169 (9th Cir. 2023) (some alterations in Chaudhry) (footnotes omitted).

Plaintiffs allege the due process violation occurred when Defendants “unilaterally, arbitrarily, and deliberately den[ied] B.S. adequate, reasonable, and essential programs and services including, but not limited to the ‘special education and related aids and services’ provided to students with disabilities to ‘meet [the] individual education needs of [those students] as adequately as the needs of non[disabled] persons are met.’” [Complaint at ¶ 23 (quoting 34 C.F.R. Section 104.33(b) (1)(i)).] The Court need not make any finding as to whether a constitutional violation occurred because, even if Plaintiffs could show a constitutional violation, there is no genuine issue of material fact as to whether Dr. Hay caused such a violation.

Under Hawai`i Administrative Rule § 8-60-29,<sup>6</sup> the DOE

---

<sup>6</sup> For the purposes of Title 8 Chapter 60 of the Hawai`i Administrative Rules, the term “‘[d]epartment’ means the state department of education . . . .” Haw. Admin. R. § 8-60-2.

shall ensure that a student with a disability who is placed in or referred to a private school or facility by the [DOE]:

(1) Is provided special education and related services:

(A) In conformance with an IEP that meets the requirements of sections 8-60-44 through 8-60-49; and

(B) At no cost to the parents;

(2) Is provided an education that meets the standards that apply to education provided by the [DOE] including the [DOE]'s responsibility to ensure the provision of a FAPE and the requirements of the [IDEA]; and

(3) Has all of the rights of a student with a disability who is served by the [DOE].

"In implementing section 8-60-29, the [DOE] shall monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires." Haw. Admin. R. § 8-60-30.

Although, in Hawai'i, the DOE and the DOH are required "to work together to provide the services necessary to enhance the likelihood of positive learning outcomes for students with disabilities, . . . . [u]ltimately, . . . [the] DOE is responsible for ensuring that its students receive appropriate special education services." Mark H. v. Hamamoto, 620 F.3d 1090, 1093 (9th Cir. 2010).

Here, Dr. Hay would sometimes participate in B.S.'s IEP meetings. See Hay Decl. at ¶ 11. In November 2019, Dr. Hay completed a clinical psychological evaluation of B.S. "to make

recommendations for treatment and educational services." [Seitz Decl., Exh. 1 (Clinical Psychological Evaluation, report dated 11/18/19) at 1.] "By at least December of 2019, B.S.' [s] parents . . . were aware that B.S.' [s] placement at Capstone required termination." [Defs.' CSOF at ¶ 14; Pltfs.' Responsive CSOF at pg. 2.] Between November 2019 and January 2020, B.S.'s IEP team discussed potential new placements. See Pltfs.' CSOF at ¶ 8; Defs.' Responsive CSOF at ¶ 8 (partially disputing Pltfs.' ¶ 8 on other grounds). Capstone eventually requested to discharge B.S. from its facility as soon as possible. See Humphrey Decl., Exh. E (Notice of Action). Parents were aware that it was Capstone's "directive." See Hay Decl., Exh. D (January 31, 2020 emails between Dr. Hay and Mrs. Shores) at 1.

Once Capstone decided to discharge B.S., Dr. Hay attempted to acquire Parents' consent to authorize a new placement. See e.g., id. at 2 ("To pursue either of these options, we would first need your consent."). In finding out that Capstone was discharging B.S., Parents requested an emergency IEP team meeting. See id. ("This meeting was called as an emergency meeting yesterday . . . . However, I understand that there was not a lot of notice as this meeting is in reaction to the information we discussed on Wednesday. Thanks for the information, we will take it to the IEP meeting today."). Even though Dr. Hay could not attend the emergency

IEP team meeting, Dr. Hay offered to reschedule the meeting, and Mrs. Shores declined because Parents "want[ed] to talk to **DOE** since the time is so short on B[.S.]'s placement and the directive from [Capstone] that he should be moved [as soon as possible]." [Id. at 1 (emphasis added).]

Viewing the "evidence in the light most favorable to Plaintiffs as the nonmoving parties," see Harris v. Cnty. of Orange, 17 F.4th 849, 855 (9th Cir. 2021) (brackets, quotation marks, and citation omitted), there is not a genuine dispute of material fact as to whether Dr. Hay's "conduct was the actionable cause of the claimed injury," see Chaudhry, 68 F.4th at 1169 (quotation marks and citation omitted). There is no evidence that Dr. Hay caused Capstone's request that B.S. be transferred as soon as possible. Dr. Hay worked for the DOH – not Capstone or the DOE. Once Capstone decided to discharge B.S., Dr. Hay attempted to work with Parents to have B.S. transferred to RCSP.

Plaintiffs also appear to take issue with B.S. being sent back to Hawai`i after being discharged from Capstone. See e.g., Complaint at ¶ 17. Insofar as Plaintiffs' Fourteenth Amendment due process claim stems from those events, summary judgment in favor of Dr. Hay is also appropriate. Under Hawai`i Revised Statute § 350E-1, which is the terms and provision of

section in Hawaii's enactment of the Interstate Compact on Placement of Children:

The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law. . . . .

Haw. Rev. Stat. § 350E-1, Art. V(a)

Here, an ICPC request was completed for B.S. At the time of B.S.'s transfer to Capstone, the ICPC stated that B.S.'s "Current Legal Status" was "Parent Relative Custody/Guardianship." [Ledoux Decl., Exh. F at 1 (B.S.'s ICPC Request).] B.S.'s ICPC Report stated B.S. was being transferred from Capstone to the sending state, *i.e.*, Hawai'i, because his treatment was completed. See id. at 2 (B.S.'s ICPC Report). Dr. Hay attempted to receive Parents' consent to have B.S. transferred to RCSP. See, e.g., Hay Decl., Exh. H (email from Dr. Hay to Parents, dated 2/10/20). In a text message to Dr. Hay, Mr. Shores stated: "I'm in a meeting with my boss. What is the emergency? Our lawyer is on a flight to the mainland right now so we cannot get legal counsel to sign any additional consent forms until sometime tomorrow." [Id., Exh. I

(text messages between Dr. Hay and Parents from 2/12/20) at 2.]

Dr. Hay replied, stating: "Okay, if you cannot sign any additional consents, we will have to have you come pick [B.S.] up or I will have to call CWS." [Id. at 1.] Dr. Hay did not receive a response from the Parents. Dr. Hay then contacted CWS. See Hay Decl. at ¶ 43-44.

Under § 350E-1 Art. V(a) and B.S.'s ICPC Request, because Capstone discharged B.S. and another placement was not secured, B.S. was required to be transferred to Hawai`i. Moreover, although Hawai`i retained jurisdiction under the ICPC, B.S.'s parents retained their legal custody of B.S. Although the timing was not ideal for the parties, because Parents neither consented to a placement nor sought physical custody of B.S. when he arrived in Hawai`i, Dr. Hay had no other option than to contact CWS. See Hay Decl. at ¶ 44.

There is insufficient evidence to create a genuine issue of fact for trial as to whether Dr. Hay was the cause-in-fact of B.S. getting discharged from Capstone or being sent back to Hawai`i. Conversely, the evidence shows Dr. Hay requested the Parents to either complete consent forms so that B.S. could be placed at another facility or take custody of B.S. after he arrived in Hawai`i. Parents refused both requests because, in part, they wanted to consult their attorney first. But, Dr. Hay's attempts and contacts with Parents do not, without

more, suggest Dr. Hay was the moving force behind B.S.'s transfer from Capstone to Hawai`i. Accordingly, summary judgment is granted in favor of Dr. Hay to the extent that Plaintiffs raise a due process claim under the Fourteenth Amendment against her in her individual capacity based upon those events.

## **2. Claim Under the Hawai`i Constitution**

Plaintiffs also bring a due process claim under Article I Section 5 of the Hawai`i Constitution. See Complaint at ¶ 24. Insofar as Plaintiffs raise a due process claim for damages under the Hawai`i Constitution, that claim fails as a matter of law and, therefore, summary judgment in favor of Defendants is warranted. See Davis v. Abercrombie, Civ No. 11-00144 LEK-BMK, 2014 WL 3809499, at \*16 (D. Hawai`i July 31, 2014) (predicting that the Hawai`i Supreme Court "would not recognize a claim for damages arising directly under the Hawai`i State Constitution"). Moreover, it is unlikely Plaintiffs seek declaratory relief based on their due process claim under the Hawai`i Constitution. Plaintiffs prayed for the following relief:

- 1) The entry of a judgment declaring that the Defendants' unilateral removal of B.S. from his I.E.P. placement and transportation of B.S. back to Hawaii without any suitable placement were unlawful and violated rights guaranteed to the Plaintiffs and B.S. by the **Rehabilitation Act**,

**I.D.E.A, and 42 U.S.C. Section 1983, et seq,  
inter alia.**

[Complaint at pg. 9 (some emphases in original).] Because Plaintiffs fail to include their due process claim under the Hawai`i Constitution in their prayer for declaratory relief, it does not appear that they seek declaratory relief for that claim. But, even if Plaintiffs intended to seek declaratory relief for their Hawai`i Constitution claim, their claim is foreclosed because Plaintiffs are not seeking prospective relief although they are seeking general damages, special damages, and attorney's fees, see id., and, therefore, sovereign immunity applies, see Bush v. Watson, 81 Hawai`i 474, 481, 918 P.2d 1130, 1137 (1996) (stating Hawai`i Supreme Court has adopted exception to sovereign immunity as stated in Ex parte Young, 209 U.S. 123 (1908)); see also Off. of Hawaiian Affs. v. Kondo, 153 Hawai`i 170, 178, 528 P.3d 243, 251 (2023) ("The State's sovereign immunity does not bar actions seeking prospective declaratory or injunctive relief."). Accordingly, summary judgment is granted in favor of Defendants for Plaintiffs' due process claim under the Hawai`i Constitution.

**3. Section 504 of the Rehab Act Claim**

At the onset, Plaintiffs' Rehab Act claim is unclear. They allege in the introduction to their Complaint that Defendants "violat[ed] [the] rights guaranteed to Plaintiffs and

B.S. by the Rehabilitation Act of 1973, the Individuals with Disabilities Act, and 42 U.S.C. Section 1983 . . . ."

[Complaint at pg. 2.] They further allege "[t]his Court has jurisdiction to hear this matter pursuant to the Rehabilitation Act of 1973, Section 504, for deprivation of civil rights pursuant to 42 U.S.C. Sections 1983, et seq., and under 28 U.S.C. Section 1331 and 1343, *inter alia*, . . . ." [Id. at ¶ 6. (emphases in original)] To the extent that Plaintiffs are attempting to enforce rights under the Rehab Act through a § 1983 action, such a claim is precluded. See Vinson v. Thomas, 288 F.3d 1145, 1156 (9th Cir. 2002) ("a plaintiff cannot bring an action under 42 U.S.C. § 1983 against a State official in her individual capacity to vindicate rights created by . . . section 504 of the Rehabilitation Act."); see also Jefferies v. Albert, Civ. No. 09-00156 JMS/KSC, 2009 WL 4064799, at \*7 (D. Hawai'i Nov. 24, 2009) ("As to the . . . Rehabilitation Act, Plaintiffs cannot recover under § 1983"). Insofar as Plaintiffs attempt to enforce a right directly under the Rehab Act, the Court addresses that claim, based on the limited allegations in the Complaint.

Section 504 of the Rehab Act states, in pertinent part:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by

reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a). Plaintiffs' Rehab Act claim against Dr. Hay in her individual capacity fails as a matter of law because "Section 504 of [the Rehab Act] do[es] not authorize claims against State officials in their individual capacities." See Hayes v. Voong, 709 F. App'x 494, 495 (9th Cir. 2018) (citing Vinson v. Thomas, 288, F.3d 1145, 1156 (9th Cir. 2002)).

Because Plaintiffs bring their § 504 claim against Dr. Hay and Dr. Humphrey in their official capacities, that claim is treated as a claim against the DOH. See Gomez v. Vernon, 255 F.3d 1118, 1126 (9th Cir. 2001) ("A suit, like this one, against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself." (citation omitted)). Section 504 applies to the DOH if it is a state department that receives federal funding. See 29 U.S.C. § 794(b)(1)(A).

To prevail on a Section 504 claim, a plaintiff must show:

- (1) he is a qualified individual with a disability;
- (2) the school receives federal financial assistance; and,
- (3) he was excluded from participating in, denied the benefits or services of, or

subject to discrimination at the school solely by reason of his disability.

A.G. v. Paradise Valley Unified School Dist.  
No. 69, 815 F. 3d 1195, 1204 (9th Cir. 2016); Doe v. State of Hawaii Dep't of Education, 351 F. Supp. 2d 998, 1012 (D. Haw. 2004).

To receive damages pursuant to Section 504, a plaintiff must show the public entity acted with intent to deny him the benefits of a public education. T.B. ex rel. Brenneise v. San Diego Unified School Dist., 806 F.3d 451, 467 (9th Cir. 2015). Intent is demonstrated by showing either intentional discrimination or deliberate indifference. Mark H. v. Hamamoto, 620 F.3d 1090, 1097-98 (9th Cir. 2010).

Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood. A.G., 815 F.3d at 1204 (citing Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001)).

Ricks v. Matayoshi, CIV. NO. 16-00044 HG-KSC, 2017 WL 1025170, at \*6 (D. Hawai`i Mar. 16, 2017).

Here, there is no evidence that the DOH initiated or caused B.S.'s transfer from Capstone. The DOH, therefore, could not have "acted with intent to deny him the benefits of a public education" because it was not the "entity" that caused B.S.'s discharge from Capstone. See id. Plaintiffs' Rehab Act claim fails, then, insofar as the claim is based on the DOH purportedly discharging B.S. from Capstone.

Plaintiffs' Rehab Act claim also fails because they have not proffered sufficient evidence to raise a genuine issue

of fact for trial as to whether B.S. was transferred from Capstone to Hawai`i "solely by reason of his disability." See id. (citation omitted). Capstone discharged B.S. and, pursuant to his ICPC, he was transferred to Hawai`i as the sending state. There is no evidence that the DOH subjected B.S. to any discrimination, let alone discrimination that was based solely upon B.S.'s disabilities. To the extent that Plaintiffs allege disability discrimination occurred because the aids and services provided for B.S.'s special education and individual education needs were inadequate, see Complaint at ¶ 23, there is no genuine issue of material fact that the DOE - not the DOH - was "responsible for ensuring that [B.S.] receive[d] appropriate special education services." See Mark H., 620 F.3d at 1093. Even if the DOH shares that responsibility, there is not a genuine issue of material fact as to whether the DOH acted intentionally or with deliberate indifference. Accordingly, summary judgment is granted in favor of Defendants in their official capacities as to Plaintiffs' Rehab Act claim.

**4. IDEA Claim**

There is not a genuine issue of material fact as to Plaintiffs' IDEA claim because they did not exhaust their administrative remedies. See supra Discussion Section II. In any event, insofar as Plaintiffs seek a remedy for a purported violation of B.S.'s right to a FAPE, their claim

against DOH necessarily fails because the DOE is responsible for a FAPE. As such, summary judgment is granted in favor of Defendants as to Plaintiffs' IDEA claim.

**B. Plaintiffs' Count II - Medical Malpractice**

Under 28 U.S.C. § 1337(c) (3): "The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction . . . ." Because summary judgment has been granted in favor of Defendants as to all of the federal claims, and the Court's jurisdiction is based on federal question jurisdiction, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law medical malpractice claim.

But, the Court points out that, if it had chosen to rule on the medical malpractice claim, Plaintiffs fail to present any expert testimony on the requisite standard of care required for a medical negligence claim. See Craft v. Pebble, 78 Hawai'i 287, 298, 893 P.2d 138, 149 (1995). Giving Plaintiffs the benefit of the doubt, it appears they invoke the "common knowledge" exception. See, e.g., Opp. to Defs.' Motion for Summary Judgment at 3 ("Unlike typical medical cases where the diagnoses or performance of medical procedures are at issue, in this case the finders of fact do not need and will not benefit from the opinions of an expert who will testify that by

acting unlawfully the Defendants also committed malpractice.”). To the extent that Plaintiffs invoke this exception, their claim against Dr. Hay is essentially a negligence claim. See Craft, 78 Hawai`i at 298, 893 P.2d at 149 (“When the ‘common knowledge’ exception is applied, the medical malpractice case transforms into an ordinary negligence case, thus obviating the necessity of expert testimony to establish the applicable standard of care. This exception, however, is rare in application.” (citations omitted)). Even so, there is no evidence offered by Plaintiffs suggesting that Dr. Hay was negligent. If the Court had exercised supplemental jurisdiction and ruled on Plaintiffs’ medical malpractice claim, it would likely have granted summary judgment in favor of Dr. Hay.

#### CONCLUSION

On the basis of the foregoing, Defendants’ Motion to Strike Plaintiffs’ Motion for Partial Summary Judgment as to Liability [DKTS 31-32], filed June 21, 2023, is HEREBY DENIED; Plaintiffs’ Motion for Partial Summary Judgment as to Liability, filed April 24, 2023, is HEREBY DENIED; and Defendants’ Motion for Summary Judgment on All Claims, filed April 24, 2023, is HEREBY GRANTED IN PART AND DENIED IN PART. Defendants’ Motion for Summary Judgment is GRANTED to the extent that summary judgment is GRANTED in favor of Defendants as to Count I. Defendants’ Motion for Summary Judgment is DENIED to the extent

that the Court declines to exercise supplemental jurisdiction over Plaintiffs' medical malpractice claim in Count II. The Clerk's Office is directed to enter judgment and close the case on **September 5, 2023**, unless a timely motion for reconsideration is filed.

In light of the Court's rulings, the September 18, 2023 nonjury trial date and all trial-related dates and deadlines are VACATED. If reconsideration of the instant Order is granted, a trial re-setting conference will be held.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, August 21, 2023.



/s/ Leslie E. Kobayashi  
Leslie E. Kobayashi  
United States District Judge

**MICHELLE SHORES, ET AL. VS. NIKITA HAY, PSY.D., ET AL; CV 21-00455 LEK-RT; ORDER: DENYING DEFENDANTS' MOTION TO STRIKE; DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**