

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

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

Petitioners,

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAI‘I and KATHRYN
MATAYOSHI, Superintendent of
Hawaii Public Schools,

Respondents.

DOE-SY 1718-030

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION

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I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act (“IDEA”), as amended in 2004, codified at 20 U.S.C. §§ 1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R §§ 300.1, et seq.; and the Hawaii Administrative Rules §§ 8-60-1, et seq.

II. PROCEDURAL HISTORY (“BACKGROUND”)

Petitioners are the parents of a ___-year-old student (“Student”) with a disability. On February 9, 2018, Petitioners filed a due process complaint (“Complaint”) against Respondents

¹ Personal identifiable information is provided in the Legend.

alleging violations of the IDEA.² Keith H.S. Peck, Esq. represents the Petitioners and Kevin M. Richardson, Esq. represents the Respondents.

On February 13, 2018, the Department of Education responded to the Complaint.

On February 15, 2018, the parties participated in a four-minute resolution meeting³ and were not able to resolve the Complaint.

On February 16, 2018, the prehearing conference notice was provided to the parties, which scheduled an in-person conference for March 9, 2018, at 11:00 a.m. The prehearing conference notice directed the Petitioner to provide the Hearings Officer with a copy of all relevant individualized education program(s) at least three business days prior to the prehearing conference.

On or about February 22, 2018, this Hearings Officer was assigned to preside over this case.

On March 9, 2018, the Hearings Officer held the prehearing conference where Respondents appeared in person but Petitioner's attorney, failed to appear in person. The undersigned telephoned Petitioners attorney who agreed to appear by telephone. Respondents did not object to Petitioner's appearance by telephone. Petitioner failed to provide the student's individualized education program(s) to this Hearings Officer.

The prehearing conference began at 11:00 a.m. and ended at 12:07 p.m. Petitioners objected to the Respondents' form of response, as the response dated February 13, 2018 did not meet the requirements set forth in 34 C.F.R §300.508 (e). Therefore, Respondents orally provided their response to the Complaint during the conference. Petitioner had the opportunity to ask clarifying questions regarding the answer to the Complaint. Petitioner and Respondents were asked if either had any other questions or concerns regarding the matter immediately prior

² Respondents did not challenge the sufficiency of the complaint.

³ Resolution occurred from 10:05 until 10:09 a.m.

to the end of the prehearing conference. Petitioner did not voice any additional questions during that time.

The 30-day resolution period ended on March 11, 2018. The parties agreed that the 45-day due process hearing timeline began on March 12, 2018.

On March 14, 2018, the prehearing conference summary and order (“Prehearing Order”) was issued.⁴

On March 20, 2018, Petitioners withdrew the issue of “Whether there should have been a more complete discussion regarding modifications to the content and delivery of instruction” from the Complaint.

The due process hearing commenced on March 28 and 29, 2018. Petitioners presented one witness on their behalf Parent 1. Respondents presented two witnesses on their behalf: Special Education Teacher (“SPED Teacher 1”) and General Coordinator (“SPED Teacher 2”).

On March 29, 2018, Petitioner made an oral motion regarding Respondents’ answer to the Complaint, the undersigned provided Petitioner with an opportunity to submit an oral motion in writing by April 3, 2018 for consideration and requested that Petitioner address the timeliness of the motion. Petitioner failed to file a written motion regarding this issue.

At the close of the hearing, this Hearing Officer entered into evidence all of Petitioner’s proposed exhibits,⁵ and all of Respondents’ proposed exhibits.⁶

⁴ Neither party objected to this Order.

⁵ This Hearings Officer admitted into evidence Petitioner’s exhibits 1-7, inclusive. Neither party objected to the admission of the other party’s exhibits as outlined in the prehearing conference order and summary. However, both parties objected at Hearing to an Exhibit of the opposing party.

⁶ This Hearings Officer admitted into evidence Respondents exhibits 1-4, inclusive. Ex. 5 pages 0063-0071 were admitted. Ex. 5 pages 0072-80 were not admitted, as they contain information regarding Student’s report card, which was not created until at least February 24, 2017. The IEP in question was created on February 9, 2017. Ex. 6 was admitted in its entirety. Neither party objected to the admission of the other party’s exhibits as outlined in the prehearing conference order and summary. However, both parties objected at Hearing to an exhibit of the opposing party.

III. BACKGROUND

Student is __ years old and eligible for services under the IDEA by meeting criteria for Eligibility Criteria 1. Student is diagnosed with Disability. Student currently attends Private School, which specializes in Disability. Parents believe that Private School is the proper place for Student to be educated, as the school is composed of gifted children, children with disabilities and general education children. The Complaint in this matter alleges procedural and substantive violations of the IDEA related to Student's educational needs. The Individualized Educational Program ("IEP") at issue is dated February 9, 2017.

IV. ISSUES PRESENTED

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

1. Whether Student receives Student's IEP in the Least Restrictive Environment ("LRE").
2. Whether the discussion regarding Student's LRE fulfills the four-factor balancing test⁷ as required by Rachel H.
3. Whether Student's LRE during Student's Extended School Year ("ESY") program was described in Student's IEP.⁸
4. Whether Student's LRE during Student's ESY program was properly discussed during Student's February 9, 2017, IEP meeting.
5. Whether the "discussion" regarding Student's individualized need for socialization during Student's ESY program was sufficient.
6. Whether the "discussion" regarding how the DOE would address Student's socialization needs during Student's ESY was sufficient.

⁷ *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 20 IDELR 812 (9th Cir. 1994). (Considering the educational benefits of placement full-time in a regular class; the non-academic benefits of such placement; the effect the student has on the teacher and children in the regular class; and the costs of mainstreaming the student).

⁸ Petitioner is referring to the IEP document.

7. Whether the DOE had sufficient information and assessments from Student's then-current education program (Private School) to make informed decisions regarding Student's LRE, ESY, and Placement.

V. FINDINGS OF FACT⁹

Student's Educational Profile

1. Student is currently in the ___ grade.
2. Student demonstrates academic skills below grade and age expectations in the areas of reading, writing and math.¹⁰
3. In comparison to same age peers, Student has limited academic fluency.¹¹
4. Student's reading fluency and reading rate are significant areas of weakness.¹²
5. Student's rate of learning and comprehension of what is taught is compromised.¹³
6. Student has significant difficulty in engaging in age and grade level tasks.¹⁴
7. Student needs support in mastering basic skills.¹⁵
8. Student needs extra time when completing work.¹⁶
9. Student's ability to keep up with the pace of instruction is slower than other children the same age.¹⁷
10. Student's rate of skill acquisition and ability to keep up with the pacing of instruction will be impacted by Student's overall low average memory abilities.¹⁸
11. Student's difficulties with reading decoding, reading comprehension, written expression, math calculation and math problem solving impede Student's progress in general education curriculum.¹⁹

⁹ The undersigned Hearings Officer considered the entire record, including all testimony and exhibits introduced at the DPH, in issuing this Decision and Order.

¹⁰ Student took Assessment on January 20, 25 and 26 of 2016. Petitioners Ex. 1, p. 004; SPED Teacher 2 Testimony; Parent 1's Testimony.

¹¹ Petitioners Ex. 1, p. 004; SPED Teacher 2 Testimony.

¹² Parent 1's Testimony; SPED Teacher 2 Testimony; SPED Teacher 1 Testimony; and Petitioner's Ex. 1, p. 004-005.

¹³ Assessment: Petitioners Ex. 1, p. 004; SPED Teacher 2 Testimony.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; Parent 1's Testimony.

¹⁷ *Id.*

¹⁸ Student's performance on the Assessment. Petitioner's Ex. 1, p. 005.

¹⁹ *Id.*; SPED Teacher 2 Testimony.

12. Parents are concerned that Student is significantly behind in academics compared to peers of Student's same age.²⁰
13. Parents were specifically asked at the IEP team meeting of February 9, 2017 whether there was anything that Student's private school was providing that the IEP team had not considered while designing Student's goals and objectives.²¹ Parent 1 confirmed that private school was working on goals similar to the goals the IEP team proposed. Parents did not propose any additional goals or objectives.²²
14. Parents confirmed that the IEP team's discussion of Student's academic strengths, needs, and goals was "pretty much covered" through the IEP teams' discussion of Student's academic strengths, needs and goals.²³
15. Student's present levels of academic and functional performance are based on Student's previous IEP, the DOE's team's two separate observations of Student in Private School classrooms on January 20, 2017, and January 31, 2017, Private School teachers' feedback, progress report from Private School, Assessment from Private School, Student work samples from Private School, assessment and other assessments conducted by the DOE.²⁴

Reading

16. Student has Disability.²⁵
17. Student reads at a ___-grade reading level.²⁶
18. Student's reading strengths are:
 - a. that Student is working on decoding multi-syllabic words;
 - b. able to answer "wh" questions;
 - c. able to identify problem/solution in a story;
 - d. able to recall the sequence of events in a story; and
 - e. She is able to make inferences after re-reading and discussion.²⁷
19. Parents were specifically asked at the IEP team meeting whether they had any questions or comments regarding Students strengths in reading, math, and social-functioning. Parents did not ask any questions or provide any feedback.²⁸

²⁰ Parent 1's Testimony; Respondents Ex. 6, p.008 at 20:16.

²¹ Respondents Ex. 6, p.008 at 32:40 -33:25.

²² *Id.*

²³ Respondents Ex. 6, p.008 at 34:15 -34:45.

²⁴ *Id.* SPED Teacher 2 Testimony.

²⁵ Parent 1's Testimony.

²⁶ Parent 1's Testimony; Petitioners Ex. 1, p. 004.

²⁷ Petitioner's Ex. 1, p. 002.

²⁸ Respondents' Ex. 6, p. 0003 at 6:18-7:02.

20. Student's reading needs are:
- to apply phonemic awareness and contextual cues when decoding multi-syllabic words;
 - to increase oral reading fluency and accuracy;
 - to use explicit evidence from a text to accurately answer comprehension questions; and
 - Properly summarize text.²⁹
21. At the IEP team meeting, parents were invited to participate in a discussion regarding Student's reading needs.³⁰ Other than confirming that Student's reading needs were a topic for discussion, Parent 2 did not offer any additional information to the IEP team.³¹
22. Student's reading goals are:
- To improve Student's reading, literature and informational Skills by answering comprehension questions accurately in 4 out of 5 opportunities within a year.
 - To improve Student's reading foundational skills to support comprehension by both decoding multi-syllabic words accurately and re-reading a text 10 words per minute faster than Student's initial reading (improving from a baseline of 78 words per minute in 4th grade passage to 110 words per minute) with no more than 2 errors in 4 out of 5 opportunities, within a year.³²
23. Parents were active in designing Student's reading goals. Parent 2 requested that Student's reading goal to be revised to include that Student be able to differentiate nouns, verbs and other parts of speech.³³ The IEP was updated to reflect Parent 2's request.³⁴
24. The IEP team added a reading goal to Student's IEP after Parents provided the IEP team with Student's Progress Report from Private School.³⁵ Parents provided this report at the IEP team meeting. Parents supported the addition of the goal to Student's IEP³⁶
25. After the IEP team read Students reading goals,³⁷ Parents agreed with the reading goals, with Parent 1 adding, "Sure, we would love to have those goals reached."³⁸

²⁹ Petitioner's Ex. 1, p. 003.

³⁰ Respondents' Ex. 6, p. 00083 at 7:38-7:45.

³¹ *Id.*

³² Petitioner's Ex. 1 p. 009.

³³ Respondents' Ex. 6, p. 00083 at 28:00-29:00.

³⁴ Petitioner's Ex. 1 p. 009.

³⁵ Respondent's Ex. 6, p. 00083 at 52:00-52:08.

³⁶ *Id.*

³⁷ Respondents' Ex. 6, p. 00083 at 26:00-26:15.

³⁸ *Id.*

26. SPED Teacher 1 and SPED Teacher 2 observed Student at Private School on January 20, 2017, in the computer lab with nine other Students.³⁹ Student was working on a reading program.⁴⁰ The Program is a program developed for struggling readers.⁴¹
27. The Program and reading with a partner are currently used to assist Student with reading.⁴²
28. Student's ___ class at Private school is conducted in a small group setting with 12 students and two teachers.⁴³
29. Private school reported to DOE that on August 22, 2016, Student scored a median score of 69 on Assessment and 13 on Assessment.⁴⁴

Writing

30. Students writing strengths are:
 - a. after assistance in gathering information and putting ideas in a graphic organizer Student can write in paragraph form using a topic sentence, supportive details and a conclusion;
 - b. enjoys using a work list for reference to improve Student's word choice for descriptions and transitions;
 - c. ability to use dialogue and quotation marks in Student's writing;
 - d. likes to do research and with assistance used multiple sources to write information; and
 - e. attempts to write compound sentences.⁴⁵
31. Student's writing needs are:
 - a. continue to use a graphic organizer to organize ideas prior to writing;
 - b. to edit Student's writing with assistance and include proper capitalization, spelling and punctuation;
 - c. writing a cohesive paragraph; and
 - d. writing an organized multi-paragraph essay.
32. At the IEP team meeting, Parents were invited to participate in a discussion regarding Student's writing needs.⁴⁶

³⁹ SPED Teacher 1 Testimony; SPED Teacher 2 Testimony; Petitioner's Ex. 1, p. 002.

⁴⁰ *Id.*

⁴¹ SPED Teacher 2 Testimony.

⁴² Parent's Testimony; SPED Teacher 1 Testimony; Petitioner's Ex. 1, p.002.

⁴³ Petitioner's Ex. 1, p.004.

⁴⁴ Petitioner's Ex. 1, p. 002; SPED Teacher 1 Testimony; SPED Teacher 2 Testimony.

⁴⁵ Petitioner's Ex. 1, p. 002

⁴⁶ Respondent's Ex. 6, p. 00083 at 8:04-8:08.

33. Student's Writing Goal is that within a year, Student will "improve Student's text types and purposes skills by writing complete pieces in different genres (including opinion, informative/explanatory and narrative) in 4 out of 5 opportunities".⁴⁷
34. Students writing goals were read during the IEP team meeting of February 9, 2017. Parent 2 verbalized agreement with Student's prospective writing goal to the team and Parent 1 provided no additional input regarding Student's writing goal.⁴⁸
35. Student's ___ class at Private school is conducted in a small group setting.
36. Student does not understand the difference between a noun and a verb.⁴⁹
37. A typical ___-grade writing class would focus on writing multi-paragraph informational essays, narrative and persuasive essays.⁵⁰

Math

38. Student's math strengths are:
 - a. ability to solve multi-digit addition and subtraction problems with regrouping;
 - b. knowledge of some addition and multiplication facts;
 - c. knowledge on how to use "touch dots" for addition, subtraction and multiplication;
 - d. ability to calculate the value of assorted coins;
 - e. ability to give a monetary amount involving coins and dollar bills;
 - f. ability to tell time to the minute;
 - g. working towards solving two step work problems involving the four operations including whole numbers and fractions; and
 - h. ability to identify fractions and find equivalent fractions with manipulatives.
39. Student's math needs are:
 - a. continue to work on solving two-step word problems using the four operations with whole numbers and fractions;
 - b. to solve multi-digit multiplication problems; and
 - c. improve math facts fluency.⁵¹
40. Parents were invited to discuss student's math needs with the IEP team. Parents were read student's math needs and asked if they agreed.⁵² Parents provided no verbal response to the IEP team.⁵³

⁴⁷ Petitioner's Ex. 1, p. 009.

⁴⁸ Respondent's Ex. 6, p. 00083 at 29:47.

⁴⁹ SPED Teacher 1 Testimony.

⁵⁰ SPED Teacher 2 Testimony.

⁵¹ Petitioner's Ex. 1, p.003.

⁵² Respondent's Ex. 6, p. 00083 at 8:11-8.40.

⁵³ *Id.*

41. Student's math goal is that within a year, Student will "improve Student's number and operation skills by performing whole number operations and operations with fractions accurately in 4 out of 5 opportunities".⁵⁴
42. Parents did not voice disagreement or add any questions or comments when specifically asked about Student's math goals after the IEP team read Students math goals on February 9, 2017.⁵⁵
43. Working with manipulatives in math has helped Student understand subtraction with regrouping and that student is currently working towards applying those concepts to word problems.⁵⁶
44. SPED Teacher 1 and SPED Teacher 2 observed Student at Private School on January 20, 2017, in Student's classroom where Student was adding up points for Student's school reward system. Student can add three or more multi-digit numbers.⁵⁷
45. Principal and Student Services Coordinator observed Student at Private School on January 31, 2017, in Student's math class which consisted of 12 students and two teachers.⁵⁸ Student was able to skip count by threes and perform three-digit subtraction.⁵⁹ Student was able to perform multiplication drills with the use of numbers on a board.⁶⁰

Social/Functional

46. Student's Strengths are:
 - a. a positive attitude toward learning;
 - b. well-liked by Student's peers and teachers;
 - c. positive peer relations;
 - d. eagerness to share thoughts and ideas in class discussions and give feedback to others about their work;
 - e. answers questions orally in front of a large group;
 - f. Student initiates and maintains peer conversations appropriately.⁶¹
47. Students needs are:
 - a. to improve organization in large group settings;
 - b. additional time process and complete assignments;
 - c. to use a calculator or math fact as an aid when appropriate;
 - d. ___ approach in addition to a structured, repetitious evidence-based learning program; and

⁵⁴ Petitioner's Ex. 1, p.011.

⁵⁵ Respondent's Ex. 6, p. 00083 at 29:47.

⁵⁶ Student's progress report August 16, 2016-November 9, 2017. DOE's Ex. 5, p. 00063;

⁵⁷ Petitioner's Ex. 1, p.004; SPED Teacher 1 Testimony.

⁵⁸ Petitioner's Ex. 1, p.004.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Petitioner's Ex. 1, p. 003; SPED Teacher 1 Testimony.

- e. audio material.⁶²
48. During the IEP meeting on February 9, 2017 after the IEP team read Student's social/functional needs and Parents were asked if they had questions or comments regarding Student's social/functional needs.⁶³ Parents voiced concern over student transitions from classroom to classroom, and commented that student would benefit from a ___ program that is integrated within Student's entire educational program with continuity from subject to subject.⁶⁴ Parents did not identify any additional functional needs or goals.
49. In private school, Student does not transition after every period of instruction but transfers to separate classrooms at the end of each day for "enrichments" or labs.⁶⁵
50. In proposed DOE program, shadowing, maps and teacher monitoring are available to assist Student when transitioning from classroom to classroom.⁶⁶
51. Student did not like attending Public School 2. Student experienced anxiety because of a perceived stigma from receiving special education services.⁶⁷ Student did not transition from room to room in Public School 2.
52. Parents are concerned that Student will experience anxiety if Student is "singled out" and peers know that Student is receiving special education.⁶⁸
53. Student's anxiety and peer knowledge will be mitigated because special education resource classrooms are located in different locations throughout the school and a classroom could be a resource room one period and a general education room another period, as SPED teachers also teach electives.⁶⁹
54. SPED Teacher 1 and SPED Teacher 2 observed Student volunteering to answer a Guest Speaker's question while observing Student at Private School.⁷⁰
55. Student is a motivated student who participates readily and enjoys teaching other students what Student has learned.⁷¹
56. Student is active in ___, performing in front of live audiences.⁷²

⁶² Petitioner's Ex. 1, p. 003-004.

⁶³ Respondent's Ex. 6, p. 00083 at 9:24.

⁶⁴ Respondent's Ex. 6, p. 00083 at 9:25-9:50; Parent 1's Testimony.

⁶⁵ Parent 1's Testimony.

⁶⁶ Respondent's Ex. 6, p. 00083 at 9:25-9:50; SPED Teacher 1 Testimony.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ SPED Teacher 1 Testimony; SPED Teacher 2 Testimony.

⁷⁰ SPED Teacher 1 Testimony; Petitioner's Ex. 1, p. 004.

⁷¹ Petitioner's Ex. 1, p. 002.

⁷² Parent 1's Testimony.

Special Education and Related Services

Extended School Year

57. Parents were active in discussion regarding Student's special education and related services.⁷³ Parents asked to understand, and the DOE explained, ESY services.⁷⁴
58. Student requires Extended School Year services to assist in Students rate of retention of skills.⁷⁵
59. Student's ESY program addresses reading, writing and math goals and objectives.
60. The DOE determined that "after **14** consecutive calendar days, Student will receive **four** hours per day of ESY."⁷⁶
61. The DOE used Student's 2016-2017 IEP as a basis for Student's Extended School Year Services.⁷⁷
62. The IEP Team did not have enough data to determine when precisely Student needed ESY services.⁷⁸ The IEP states that Student would need ESY services after a break of 14 calendar days.⁷⁹
63. Additional data would need to be collected after Student's ESY program to determine Student's rate of retention.⁸⁰
64. Parent 2 confirmed with the IEP team that Student's ESY program at Public School 1 would begin during the end of July.⁸¹
65. Parents were informed in writing on May 8, 2017, that Extended School Years services were to be held at public school from June 9, 2017 until July 24, 2017 from 8:00 a.m. until 12:00 p.m.⁸²
66. The DOE sent a letter to Parents on May 31, 2017, requesting Parents to inform the DOE if Student intended on attended ESY Program.

⁷³ Respondent's Ex. 6, p. 00083 at 49:30-50:10. SPED Teacher 1 Testimony.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Petitioners Ex. 1, p. 012.

⁷⁷ Respondents' Ex. 6, p. 00083 at 35:53.

⁷⁸ DOE conceded this fact during the hearing.

⁷⁹ Respondents' Ex. 6, p. 00083 at 50-50:31.

⁸⁰ Respondents' Ex. 6, p. 00083 at 50:31-50:54.

⁸¹ Respondents' Ex. 6, p. 00083 at 50:20-50:36.

⁸² Respondents' Ex. 4, p. 00054.

67. Parents e-mailed the DOE on June 1, 2018 that Parents had other arrangements for Student⁸³ during the timeframe of Extended School Year.
68. Parents did not raise concerns during the February 9, 2017, IEP meeting that Student would not attend extended school year program if Student was placed into a resource room for Extended School Year.⁸⁴
69. Student informed parents that Student would refuse to attend ESY if it was only Special Education Students.⁸⁵
70. Student did not attend any ESY program during the summer of 2017. However, Parents provided tutoring “off and on” during this time through ____.⁸⁶

Other

71. Student will participate with general education students for Student’s electives, which total 360 minutes per week.⁸⁷ Student will also participate with non-disabled peers for homeroom, recess, lunch, and all school related activities.⁸⁸ Student will be provided 900 minutes of special education.⁸⁹
72. Student will be allowed extra time on all academic tasks and wait time to process information.⁹⁰
73. Student will learn in a small group setting.⁹¹
74. Student will be provided with access to technology.⁹²
75. Student will be allowed self-initiated breaks.⁹³
76. Large assignments will be broken up into smaller tasks.⁹⁴
77. Periodic checks for understanding of instructions will occur when Student is working.⁹⁵

⁸³ Respondents’ Ex. 4, p. 00056.

⁸⁴ Parent 1’s Testimony.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*; Respondents Ex. 6, p. 00083 at 40-41:00; Petitioners Ex. 1, p. 014.

⁸⁸ Petitioners Ex. 1, p. 014.

⁸⁹ Parent 1’s Testimony; Respondents Ex. 6, p. 00083 at 40-41:00; Petitioners Ex. 1, p. 014.

⁹⁰ Respondents’ Ex. 6, p. 00083 at 28:00-29:00.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* This service was added as a result of Assessment dated June 26, 2016 by Private Provider 1. Petitioners Ex. 1, p. 013.

⁹⁴ *Id.*

⁹⁵ *Id.*

78. Student will be checked for organization (how is homework written down, material to do homework).⁹⁶
79. Student will be provided organizers (structured note sheets, outlines, check sheets, graphic organizers).⁹⁷
80. Student will have preferential seating close to visual aids, teacher and away from distractions.⁹⁸
81. Student will be provided with audio materials or read materials aloud.⁹⁹
82. Student will be provided with a ___ approach using evidence-based programs for reading and math.¹⁰⁰
83. Student will be provided a structured sequential program with repetition in reading and math¹⁰¹
84. Student will be allowed to provide verbal extension to Student's written work in academic areas.¹⁰²
85. Student will be pre-taught new vocabulary.¹⁰³
86. Student will be provided checklists for procedures, e.g., math algorithms.¹⁰⁴
87. Student will be provided calculators or multiplication chart aids.¹⁰⁵
88. Student will use manipulatives.¹⁰⁶
89. Parents meetings regarding students will occur.¹⁰⁷
90. Parents were invited to add or comment on the services Student would receive.¹⁰⁸

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* This service was also added as a result of Assessment dated June 26, 2016 by Private Provider 1. Petitioners Ex. 1, p. 013.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* This service was added as a result of Assessment dated June 26, 2016 by Private Provider 1. Petitioners Ex. 1, p. 013.

¹⁰⁷ *Id.*

¹⁰⁸ Respondents' Ex. 6, p. 00083 at 41-41:20.

91. Parents failed to identify any additional services or modifications that Student required.
92. Student uses technology at Student's private school. Parent 1 stated at the IEP team meeting that a tablet has assisted Student with academics. The IEP team added "access to technology" as a support for Student.¹⁰⁹
93. Student will not participate with non-disabled peers for _____. Student will participate with non-disabled peers for _____."

Placement

94. The IEP team discussed the continuum of placement with parents explaining inclusion, resource and general education settings.¹¹⁰
95. The IEP team explicitly addressed the academic and non-academic benefits of Student being placed in a resource room, and general education inclusion setting.¹¹¹
96. Student requires a resource room, as Student needs to master the foundational skills.¹¹²
97. Resource room classes are smaller and the focus would be on mastering foundational skills.¹¹³ Student's ability to work on comprehension is impeded by Student's current reading level.¹¹⁴
98. Student's placement goal is inclusion.
99. Inclusion classrooms contain general education peers and special education peers in the same classroom.¹¹⁵
100. Special education students in inclusion classroom are typically on grade level or slightly below grade level.¹¹⁶
101. Students who are two or three grade levels behind their peers academically but placed in inclusion lessons would not receive proper educational benefit.¹¹⁷ Their lesson plans would be altered to such a degree that the student would not be able to

¹⁰⁹ Parent 1's Testimony; Respondents' Ex. 6, p. 00083 at 42:00-42:46.

¹¹⁰ Respondents' Ex. 6, p. 00083 at 100:16-107:18; Parent 1's Testimony. SPED Teacher 1 Testimony; SPED Teacher 2 Testimony.

¹¹¹ *Id.*

¹¹² SPED Teacher 2 Testimony.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

effectively participate in class discussions, group discussion, or literature circles.¹¹⁸ Additionally, the work pace would be overwhelming for a Student who was significantly behind.¹¹⁹ Supports would not alleviate the negative effects.¹²⁰

102. It was explained to the Parents by the IEP team that in a general education setting, teachers are unable to accommodate student's needs, all general education teachers are not trained in _____ teaching methods, and the class sizes are too large.¹²¹

103. Inclusion is inappropriate for Student, as Student's basic skills need to improve.

104. Student currently attends private school during this 2017-2018 school year.¹²² Student also attended private school for the 2016-2017 school year.¹²³

105. Parents believe that Private School is the best placement for Student and consider Private school to be general education.¹²⁴

106. Private school has about _____ students and _____ teachers in Student's classroom.¹²⁵ Each student in the classroom has their own educational goals and education plan similar to an IEP.¹²⁶ Therefore, when comparing private school to DOE school, private school functions more similar to a resource room than general education.

107. Private school serves "students, specializing in Disability".¹²⁷

108. Public School has SPED teachers trained in ____ approaches to learning.¹²⁸

109. Parents did not inform the IEP team that Student refused to attend Public School if Student was placed into a Special Education setting during the IEP team meeting of February 9, 2017.

110. Student informed Parents that Student would not attend public school if Student were placed into a resource room, as it is a special education setting.¹²⁹

111. Parents informed the DOE on June 2017, that they were rejecting Student's IEP, as the IEP did not provide the appropriate placements or services.¹³⁰

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Parent 1's Testimony.

¹²² Parent 1's Testimony; SPED Teacher Testimony; Petitioner's Ex. 1.

¹²³ Parent 1's Testimony; DOE Ex. 1, p. 0005

¹²⁴ Parent 1's Testimony, Respondent's Ex. 6, p. 00083 at 110:55.

¹²⁵ Parent 1's Testimony, SPED Teacher 1 Testimony; Petitioner's Exhibit 1, p. 004.

¹²⁶ Parent 1's Testimony.

¹²⁷ Petitioner's Ex. 5, p. 42.

¹²⁸ SPED Teacher 2's Testimony; SPED Teacher 1 Testimony.

¹²⁹ Parent 1's Testimony.

¹³⁰ Parent's Testimony. Respondents Ex. 4, p. 00057

112. Although Parents testified that Parent 1 advocated for general education for Student, Parent 1 more clearly advocated for Student to remain at Private School.

113. Parents believe that there is a stigma attached to special education, sharing that while Parent 1 was in school, Parent 1 always knew what classes had special education children in them.¹³¹

114. Student never attended Public School.¹³²

VI. CONCLUSIONS OF LAW

The IDEA is a comprehensive scheme set up by Congress to aid states in complying with their Constitutional obligations to provide public education for children with disabilities.¹³³ The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.”¹³⁴ The IDEA provides state’s with federal funding to educate children with disabilities if a state can demonstrate that it has policies and procedures in effect to assure that all handicapped children have the right to a free appropriate public education.¹³⁵

A FAPE includes both special education and related services.¹³⁶ Special education is “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education.¹³⁷ A FAPE requires that special education and related services are:

1. provided at public expense, under public supervision and direction, and without charge;

¹³¹ Parent 1’s Testimony.

¹³² Parent 1’s Testimony.

¹³³ *Smith v. Robinson*, 468 U.S. 992 (1984).

¹³⁴ *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. §1400(d)(1)(A)).

¹³⁵ *Rowley*, 458 U.S. 181, 179-91 (1982) (citing 20 U.S.C. § 1412(a)).

¹³⁶ H.A.R. § 8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

¹³⁷ *Id.*

2. meet the standards of the State Education Agency;
3. include an appropriate preschool, elementary school or secondary school education in the state involved; and,
4. Provided in conformity with the individualized education program (“IEP”) requirements.¹³⁸

To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.”¹³⁹

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (1) whether the Department of Education (“DOE”) complied with the procedures set forth in IDEA; and (2) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit.¹⁴⁰ “A state must meet both requirements to comply with the obligations of the IDEA”.¹⁴¹

Harmless procedural errors do not constitute a denial of FAPE.¹⁴² The Hearings Officer must find that the procedural error has also:

- (i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or
- (iii) Caused the student a deprivation of educational benefit.¹⁴³

¹³⁸ H.A.R. § 8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R § 300.22.

¹³⁹ *Dep’t of Educ. of Hawaii v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Haw. 2016).

¹⁴⁰ *Rowley*, 458 U.S. at 206-7.

¹⁴¹ *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013) (quoting *Rowley*). See also *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

¹⁴² *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008).

¹⁴³ 34 C.F.R §300.513.

In determining the second prong of whether the student's IEP is reasonably calculated to enable the student to receive educational benefit a school district need not maximize the potential of the child, however, the standard is more demanding than "*de minimis*" progress.¹⁴⁴ The standard "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁴⁵ The IEP must be "appropriately ambitious in light of [the child's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives."¹⁴⁶

VII. DISCUSSION

Petitioners allege that Student's IEP is not provided in the least restrictive environment ("LRE"). The IDEA requires that "to the maximum extent appropriate" children with disabilities be educated with children without disabilities.¹⁴⁷ Segregation should occur only when the "nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

Placing a child in the LRE is not an option, it is a mandate. But, the student does not have an absolute right to be in a general education classroom. The student only has the right to have such considered first and rejected for good reason.¹⁴⁸

¹⁴⁴ *Andrew F. ex rel. Joseph F. vs. Douglas County School Dist.* 137 S. Ct. 988.

¹⁴⁵ *Id.* at 1001.

¹⁴⁶ *Id.* at 1000.

¹⁴⁷ 34 C.F.R. § 300.114.

¹⁴⁸ See *Letter to Cohen*, 25 IDELR 516 (OSEP 1996) "Mainstreaming which results in total failure, where separate teaching would produce superior results, is not appropriate and satisfactory"; *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 22 IDELR 804 (9th Cir. 1995).

The DOE must ensure that “a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.”¹⁴⁹ The continuum must include regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.¹⁵⁰ “The continuum must also make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.”¹⁵¹

The LRE mandate creates tension between the two IDEA requirements of educating the student to the maximum extent appropriate in a general education setting with supports, while also, meeting all of the student’s unique needs, academically, socially and behaviorally.¹⁵² “While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child’s IEP goals.”¹⁵³ The LRE for each student must be determined based upon the child’s individualized situation and the LRE requirement is subordinate to the IDEA’s requirement that educational placements be based on individual needs.¹⁵⁴ A student’s need the student's need for intensive special education services can outweigh the need to interact with typically developing peers.¹⁵⁵

¹⁴⁹ 34 C.F.R. 300.115(a).

¹⁵⁰ 34 C.F.R. 300.115(b)(1).

¹⁵¹ 34 C.F.R. 300.115(b)(2).

¹⁵² See *Wilson v. Marana Unified Sch. Dist. No. 6*, 735 F.2d 1178, 556 IDELR 101 (9th Cir. 1984); *Bend-Lapine Sch. Dist. v. D.W.*, 152 F.3d 923, 28 IDELR 734 (9th Cir. 1998). See also *B.S. v. Placentia- Yorba Linda Unified Sch. Dist.*, 306 F. App’x 397, 51 IDELR 237 (9th Cir. 2009) (unpublished) (holding that the benefits of mainstreaming were minimal compared to the student’s need for more intensive instruction).

¹⁵³ *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1468 (9th Cir. 1996) (emphasis added).

¹⁵⁴ See *Letter to Lott*, 16 IDELR 84 (OSEP 1989); *Letter to Vergason*, 17 IDELR 471 (OSERS 1991); and *Letter to Goodling*, 18 IDELR 213 (OSERS 1991).

¹⁵⁵ *Cincinnati Public School District*, 6 ECLPR 62 (SEA OH 2008), *aff’d*, *Board of Education of the City School District of the City of Cincinnati v. Wilhelmy*, 54 IDELR 58 (S.D. Ohio 2009).

The Ninth Circuit has devised a standard for determining whether an eligible student has been mainstreamed to the maximum extent appropriate.¹⁵⁶ The four-factor balancing test requires the Hearings Officer to consider:

1. the educational benefits of placement full-time in a regular class
2. the non-academic benefits of such placement;
3. the effect the student has on the teacher and children in the regular class; and
4. the costs of mainstreaming the student.

The standard is to be used by a court or hearings officer to review the LEA's decision.¹⁵⁷

The IDEA requires the DOE to provide the parents of a student with an opportunity for meaningful participation during the development of an IEP.¹⁵⁸ Although a consensus is ideal, "The mere existence of a difference in opinion between the parents and the rest of the IEP team is not sufficient to show that the parents were denied full participation in the process, nor that the DOE's determination was incorrect."¹⁵⁹

Issue 1: Student's February 2, 2017, IEP is provided in the least restrictive environment.

Educational Benefits of Placement Full-Time in a Regular Class

In comparison to same age peers, Student has limited academic fluency.¹⁶⁰ Student demonstrates academic skills below grade and age expectations in the areas of reading, writing, and math.¹⁶¹ Student needs extra time when completing work.¹⁶² Parents are concerned that

¹⁵⁶ *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 20 IDELR 812 (9th Cir. 1994).

¹⁵⁷ "Guardian has not cited to any law that suggests the school district, in the IEP document itself, must justify its placement offer by explicitly applying the Rachel H. Framework. Instead Rachel H. articulates a test that courts employ when reviewing the school district's decision" *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 68 IDELR 2 (9th Cir. 2016).

¹⁵⁸ *See Burlington School Committee*, 105 S.Ct. at 2002; 20 U.S.C. §1401(19) (1982).

¹⁵⁹ *Laddie C. ex rel. Joshua C. v. Dep't of Educ.*, 2009 WL 855966, at *4 (D. Haw. Mar. 27, 2009).

¹⁶⁰ FOF #3.

¹⁶¹ FOF #2, 4, 6, 7, 17.

¹⁶² FOF #5, 8, 9, 10, 47, 82.

Student is significantly behind in academics compared to peers of Students same age.¹⁶³ Student also requires a small group setting and ___ learning.¹⁶⁴ As discussed in the IEP meeting, general education teachers may not be trained in ___ teaching but all special education teachers are trained in ___ methodologies. As also discussed in the IEP meeting, Student requires education to be provided in small groups. Parent 1 testified that Parent 1 understood that the IEP team believed that a general education setting was inappropriate for Student, Student currently participates in small group learning at Private School, Student requires small group learning, and general education class sizes may be too large. The educational benefits to placing Student in a regular classroom are minimal as Student's difficulties with reading decoding, reading comprehension, written expression, math calculation and math problem solving impede Student's progress in general education curriculum.¹⁶⁵

The IEP team discussed and considered the continuum of placements. While Student's placement goal is inclusion and parents are in favor of an inclusion classroom, this setting was not selected as a proper placement for Student because special education students in an inclusion classroom are typically on grade level or slightly below grade level. Here, Student is three grade levels behind Student's same aged peers. Placing Student into inclusion would require altering lesson plans to such a degree, that Student would not be able to effectively participate in class discussions, group discussion or literature circles. Additionally, the work pace would be overwhelming, as Student requires additional time for tasks. Additional Supports would not alleviate the negative effects of Student being placed into a general education inclusion classroom¹⁶⁶.

¹⁶³ FOF #12.

¹⁶⁴ *Id.*

¹⁶⁵ FOF #11.

¹⁶⁶ FOF #102.

Resource room classes are smaller and focus on mastering foundational skills. Student requires a resource room, as Student needs to master the foundational skills. Student's ability to work on comprehension is impeded by Student's current reading level. Student's participation in a Resource Room for special education services for ___ are appropriate in order for Student to master foundational skills.

Non- Educational Benefits of Placement Full-Time in a Regular Class

Parents testified that Student is an active and social child. Student has friends outside of the school setting and enjoys participating in _____.¹⁶⁷ Currently, Student has a positive attitude toward learning.¹⁶⁸ During the IEP meeting no member of the IEP team voiced concerns that Student had unmet socialization or communication needs. Communication and or socialization goals were not addressed because the need to establish such goals were not communicated by any member of the team. Petitioner did not present evidence of an assessment or evaluation indicating that Student required communication or socialization goals. Student's IEP goals are based on improving academic achievement.

Parents expressed concern that Student may feel a stigma and experience anxiety because Student's peers would know that Student was receiving special education.¹⁶⁹ Student did not like attending Public School 2, as Student perceived a stigma resulting from receiving special education services at Public School 2.¹⁷⁰ Student's anxiety and peer knowledge will be mitigated because special education resource classrooms are located in different locations throughout the

¹⁶⁷ FOF #56.

¹⁶⁸ FOF #46.

¹⁶⁹ FOF #51, 52, 111, 112.

¹⁷⁰ FOF #51.

school and a classroom could be a resource room one period and a general education room another period, as SPED Teacher 1 also teach electives.¹⁷¹

Parents voiced minimal concern about Student transitioning by posing a general question to IEP team regarding whether students who are similar to Student feel anxiety when they transitioning from classroom to classroom.¹⁷² The IEP team answered that typically students did not feel anxiety and explained that shadowing, maps and teacher monitoring were available to assists student with transitions if required.¹⁷³

The Resource Room is only required for Student's core classes consisting of 900 minutes per week and the remaining 360 minutes per week, Student will participate with general education peers.¹⁷⁴

Parents did not inform the IEP team that Student refused to attend the DOE school if Student was placed into a Resource Room.¹⁷⁵ The IEP team cannot properly address a parent's concern if the concern is not communicated to the IEP team. The IEP team was unable to offer any supports, modifications or a transition plan to possibly alleviate this issue because the issue was unknown to the IEP team at the time of the IEP meeting.

The Effect the Student has on the Teacher and Children in the Regular class

Evidence was not presented that Student had negative behavioral issues, which impede Student's learning. Student's placement in a special education resource room are a result of academic concerns.¹⁷⁶

¹⁷¹ FOF #51, 52, 112.

¹⁷² FOF #49-53.

¹⁷³ FOF #51.

¹⁷⁴ FOF #88.

¹⁷⁵ FOF #109.

¹⁷⁶ *See Supra.*

The Costs of Mainstreaming the Student.

Evidence regarding the costs of mainstreaming Student was not provided. Student's placement in a Resource Classroom is based on Student's academic needs and a lack of functional goals necessitating socialization. While inclusion is a placement goal, it is not an appropriate option at this point in time.¹⁷⁷

In balancing, the educational benefits of placement full-time in a regular class; the non-academic benefits of such placement; the effect the student has on the teacher and children in the regular class; and the costs of mainstreaming the student, Student's need for intensive special education services outweigh Student's need to interact with typically developing peers for the specified 900 specified minutes per week.¹⁷⁸ Student will participate with general education students for Student's electives, which total 360 minutes per week.¹⁷⁹ Student will also participate with non-disabled peers for homeroom, recess, lunch, and all school related activities.¹⁸⁰

Petitioner asserts that in *Rachel H*, the student had an IQ of 40 and was fully mainstreamed, therefore, the Student in this matter should be mainstreamed. However, *Rachel H*. and this matter can be differentiated. Rachel H was in Kindergarten and a general education Kindergarten classroom was able to meet Rachel H.'s academic needs and communication goals. Rachel H's IEP consisted of communication goals and Rachel H. benefitted from other student's modeling proper behavior. Here, Student is in the ___ grade, performs at a ___-grade reading level and parents are concerned about student's academic achievement. Student's IEP team, which included Student's parents, did not establish goals regarding socialization or

¹⁷⁷ *Id.*

¹⁷⁸ FOF #71.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

communication for Student. Student's unique needs established during the February 9, 2017 were based on improving organization and enhancing reading, writing, and math skills. Rachel H. is distinguishable from this matter, as Rachel H did not have the same unique needs as Student presented in this matter. Therefore, Student's unique needs determine Student's LRE and Student's unique needs require placement in a Resource Classroom.

Issue 2: During Student's February 9, 2017, IEP meeting the IEP Team's Discussion of Student's LRE was properly discussed.

Parents actively participated in the IEP team meeting on February 9, 2017. Parents asked questions, clarified statements and provided additional insight regarding Student.¹⁸¹ Parents were invited to actively participate and specifically asked if they had any questions or concerns while the IEP team established Student's present levels of academic achievement and functional performance ("PLAAFP").¹⁸² Parents were also actively involved in establishing goals.¹⁸³ In fact, the IEP added a writing goal after Parent 2 commented that the team had earlier identified that Student could not differentiate between a noun and a verb. Parents were active participants in designing Student's modifications and supports.¹⁸⁴ As a result of Parent 1's comments, assistive technology was added as a support to Student's modifications and supports.¹⁸⁵ Parents were present at the IEP meeting and actively involved in the decision-making process. Parents were not prevented from communicating in any manner regarding the topic of LRE.¹⁸⁶ In determining Student's LRE, the IEP team explicitly addressed the academic and non-academic benefit to Student being placed in a resource room, and general education inclusion setting.¹⁸⁷

¹⁸¹ FOF #12-14, 19, 21, 23, 32-34, 40, 42.

¹⁸² *Id.*

¹⁸³ FOF #13, 14, 19, 23-25, 34, 48.

¹⁸⁴ FOF #57, 64, 90, 91.

¹⁸⁵ FOF #91.

¹⁸⁶ FOF #96.

¹⁸⁷ FOF #94, 95.

The weight of the evidence contradicts Petitioner’s claim. Parents were actively involved in the decision-making process. The IDEA does not require a fixed amount of “discussion” to occur. Petitioner referred to *Doug C*¹⁸⁸, however, in *Doug C.*, the procedural error in that matter was that Parents did not attend the IEP meeting and the substantive error was lost educational opportunity. Additionally, Petitioner has not cited to any law that suggests the DOE, in the IEP document itself, must justify its placement offer by explicitly applying the Rachel H. Framework.

Issue 3: Student’s Extended School Year Least Restrictive Environment was properly described Student’s February 3, 2017 IEP.

Extended school year services are special education and related services that are provided to a student with a disability, beyond the normal school year; in accordance with the student’s IEP and are at no cost to the parents of the student.¹⁸⁹ The services must also meet the standards of the Department of Education and be provided only if a student’s IEP team determines, on an individual basis, that the services are necessary for the provision of a FAPE to the student.¹⁹⁰

The Second Circuit Court of Appeals has held that the LRE requirement applies to ESY programs in the same manner it applies to school year placements.¹⁹¹ The school district “must consider an appropriate continuum of alternative placements to offer the disabled student the least restrictive placement from that continuum that is appropriate for his or Student’s needs.”¹⁹²

¹⁸⁸ *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038, 1047 (9th Cir. 2013). (“procedural error results in the denial of an educational opportunity where, absent the error, there is a “strong likelihood” that alternative educational possibilities for the student “would have been better considered.”)

¹⁸⁹ Haw. Admin. Rules (HAR) § 8-60-7. (Hawaii has fully implemented the purposes, guarantees, and protections of the IDEA into its own regulatory structure. See Haw. Code R. §§ 8–60–1 to 8–60–84; see also § 8–60–1(b) (“This chapter shall be construed as supplemental to, and in the context of, the Individuals with Disabilities Education Act ... and other federal laws and regulations relating to the provision of a free appropriate public education to a student with a disability.”). Hawaii’s regulations mirror the language in the IDEA regarding the IDEA’s purposes, the guarantee of a FAPE, and the requirement of parent participation. See also 34 C.F.R. § 300.106.

¹⁹⁰ *Id.*

¹⁹¹ *T.M. v. Cornwall Cent. Sch. Dist.*, 63 IDELR 31 (2d Cir. 2014). H.A.R. § 8-60-7(2). See also *See, Letter to Myers*, 213 EHLR 255 (OSEP letter dated August 30, 1989).

¹⁹² *T.M. v. Cornwall Cent. Sch. Dist. at 752.*

There is no requirement that the IEP include information found in one segment of the IEP in another segment of the IEP.¹⁹³

Students do not learn new skills in Extended School Year Programming, as the goal is to maintain Student's skills relevant to Student's IEP goals and objectives.¹⁹⁴ Here, it was determined that Student's ESY program would address goals and objectives for Student in the area of reading, writing, and math,

Student's LRE statement established that Student would not participate with Student's non-disabled peers for _____. Student will participate with non-disabled peers for _____.

In the regular school year, Student does not participate with non-disabled peers for _____. The LRE requirement applies to ESY programs in the same manner it applies to school year placements. Therefore, it is evident from the IEP that Student would not participate with non-disabled peers for reading, writing, or math during the Extended School Year program.

Petitioner has not cited to any law that suggests the DOE, in the IEP document itself, must explicitly describe, or restate a separate LRE statement for ESY programming. In *T.M. vs. Cornwell Central School District*, the Court held that the LRE requirement applies to ESY programs in the same manner it applies to school year placements, meaning the ESY program must occur in Student's LRE. As described above Student's LRE is sufficient, therefore, Student's LRE during ESY is properly described in the IEP.

¹⁹³ 34 C.F.R § 300.320(d)(2).

¹⁹⁴ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, p. 46582.

Issue 4: Student's Least Restrictive Environment during Extended School Year Program was properly discussed in the February 3, 2017 IEP.

Parents were active in the discussion regarding Student's Least Restrictive Environment.¹⁹⁵ Parents were active during discussions regarding Student's Extended School Year program and Student's Least Restrictive Environment. Parents inquired and the IEP team explained ESY services. In fact, at one point, Parent 1, from what Parent 1 understood the IEP team to say, explained to Parent 2 ESY services. Parent 2 confirmed that ESY for the 2017 School year would begin during the End of July.¹⁹⁶

The IEP team discussed that Student would be in a resource room for the Extended School Year Program. Parents did not raise concerns during the February 9, 2017, IEP meeting that Student would not attend extended school year program if Student were placed into a Resource Room for Extended School Year Programming.¹⁹⁷ Parents conceded that Student was informed of ESY Program after the IEP meeting and that is when Student stated informed Parents that Student refused to attend ESY if the ESY program was only with Special Education Students.¹⁹⁸ Parents failed to notify the DOE of this concern, even after the IEP meeting.

Issue 5: The discussion regarding Student's need for socialization during Extended School Year was sufficient.

Issue 6: The "discussion" regarding how the DOE would address Student's socialization needs during ESY was sufficient.

During the IEP meeting, IEP team established Student's functional and social strengths and needs.¹⁹⁹ Parents were active in this discussion advising the IEP team that student would

¹⁹⁵ See infra.

¹⁹⁶ Respondent's Ex. 6, p. 00083 at 50:20-50:36.

¹⁹⁷ FOF #68.

¹⁹⁸ FOF #69.

¹⁹⁹ FOF #46, 47.

benefit from a ___ program that is integrated within Student's entire educational program with continuity from subject to subject.²⁰⁰

Although Parents did express concern that Student may feel a stigma and experience anxiety because Student's peers would know that Student was receiving special education.²⁰¹ The IEP team mitigated this concern by sharing that special education resource classrooms are located in different locations throughout the school and a classroom could be a resource room one period and a general education room another period, as SPED teachers also teach electives.²⁰² Parents did not identify any socialization or communication needs of the student. Evidence was not presented that Student had an anxiety disorder or experiences a large amount of anxiety on an everyday basis.

This Hearings Officer did not hear testimony that student had inappropriate peer interaction, needed to work on Student's communication goals or functioned with a high level of anxiety. This Hearings Officer heard testimony about a social, active Student who could be considered outgoing.

Parents did not to identify any additional functional needs of Student during the IEP meeting, not just during Extended School Year. No members of the IEP team expressed a need, therefore, it was unnecessary that the IEP discuss how the IEP team would address an unestablished socialization needs.

²⁰⁰ FOF #48.

²⁰¹ FOF #51, 52, 111, 112.

²⁰² FOF #51, 52, 112.

Issue 7: The DOE had sufficient information and assessments from Private School to determine Students Least Restrictive Environment and Placement. The DOE did not have sufficient data to determine the number of days before Student required Extended School Year Services.

Student's LRE and Placement

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,²⁰³ establishes annual goals related to those needs,²⁰⁴ and provides appropriate specialized instruction and related services.²⁰⁵ The IEP must have sufficient information to establish Student's present levels of academic achievement and functional performance ("PLAAFP"). The PLAAFP is the starting point for determining annual goals.²⁰⁶ Each IEP must include measurable annual goals, both academic and functional goals, to meet the student's need resulting from the disability to enable the student to be involved, and make progress, in the general education curriculum and to meet the student's other educational needs.²⁰⁷

The IEP must also include a statement of the special education and related services and supplementary aids and services to be provided to the Student.²⁰⁸ The IEP must further provide a statement of the program modifications or supports for the school personnel that will be provided to enable the student to advance appropriately toward attaining the actual goals and be involved in and make progress in the general education curriculum and to participate in extracurricular and nonacademic activities. The IEP must then establish Student's Least Restrictive

²⁰³ 34 C.F.R § 300.320(a)(1).

²⁰⁴ 34 C.F.R § 300.320(a)(2).

²⁰⁵ 34 C.F.R § 300.320(a)(4).

²⁰⁶ *Bend-Lapine Sch. Dist. V. K.H.*, 43 IDELR 191, 2005 WL 1587241 (D. Or. 2005), aff'd *Bend-Lapine Sch. Dist. V. K.H.* 234 F. App'x 508 (9th Cir. 2007) (unpublished). See also Analysis and Comments to the Regulations, Federal Register, Vol. 71 No. 156, Page 46662 (August 14, 2006).

²⁰⁷ 34 C.F.R § 300.320(a)(2).

²⁰⁸ 34 C.F.R § 300.6(e) and 300©(8)(iii).

environment based on the culmination of the above, as the IEP is a layered document in which the subsequent layers build upon the preceding layer. Once an IEP, or its contents, is determined, the team is tasked with identifying an appropriate educational placement where the IEP can be implemented.²⁰⁹

Here, Student's present levels of academic and functional performance are based on Student's previous IEP, the IEP team's two separate observations from private school classrooms on January 20, 2017, and January 31, 2017, Private school teachers' feedback and Private School Progress report, Assessment from Private School, work samples from Student, previous academic assessment, 2016 neurological psychological assessment and parents input.

Reading

Student's reading needs were properly established.²¹⁰ Student's reading goals were properly established.²¹¹ After the IEP team read Student's reading goals, Parents were asked if the goals sounded appropriate. Parent 1 stated, "Sure, we would love to have those goals reached."²¹²

Writing

Student's writing needs were properly established.²¹³ Student's writing goals were properly established.²¹⁴ During the IEP meeting on February 9, 2017 after the IEP team read Student's writing goals, Parent 2 verbalized agreement regarding Student's prospective writing goal.²¹⁵

²⁰⁹ 34 C.F.R § 300.116.

²¹⁰ FOF #20, 21.

²¹¹ FOF #23-29.

²¹² *Id.*

²¹³ FOF #31-32.

²¹⁴ FOF #33-37.

²¹⁵ FOF #34.

Math

Student's math needs were properly established.²¹⁶ Student's math goals were properly established.²¹⁷ Parents did not voice disagreement or add any questions or comments when specifically asked about Student's math goals after the IEP team read Student's math goals on February 9, 2017.²¹⁸

Functional/Social

Students Functional/Social needs are: to improve organization in large group settings; additional time process and complete assignments; to use a calculator or math fact as an aid when appropriate; ___ approach in addition to a structured, repetitious evidence based learning program; and audio material.²¹⁹ Parent's comments and concerns regarding Student's Functional/Social needs focused on providing Student a ___ program, Student transitioning between classrooms and a perceived stigma from peer knowing Student is special education.²²⁰

After the IEP team discussed Student's academic strengths, needs and goals, parents were specifically asked if there was anything that Student's private school was providing that the IEP team had not covered in Student's goals and objectives.²²¹ Parent's did not provide any additional goals or objectives and confirmed that private school was working on the same goals as the IEP team proposed for Student. Parents confirmed that the IEP team's discussion of Student's academic strengths, needs, and goals was "pretty much covered" through the IEP

²¹⁶ FOF #39, 40.

²¹⁷ FOF #41-45.

²¹⁸ FOF #47.

²¹⁹ Petitioner's Ex. 1, p. 003-004.

²²⁰ FOF #47-53.

²²¹ FOF #13.

teams' discussion of Student's academic strengths, needs and goals.²²² Student's modifications and supplementary services were discussed at length and properly established.²²³

Student's IEP identify Student's needs,²²⁴ establishes individualized annual goals related to those needs,²²⁵ and provides appropriate specialized instruction and related services.²²⁶

Student's LRE was also properly established.²²⁷ Student's placement results from the contents of the IEP. Therefore, the DOE had sufficient information to make informed decisions regarding Student's LRE and Placement.

Extended School Year Programming

Student requires Extended School Year services to assist with Students rate of retention of reading, writing, and math skills. Student's ESY program addresses only reading, writing and math goals, and objectives. The IEP team determined that "after **14** consecutive calendar days, Student will receive four hours per day of ESY. The IEP team used Student's 2016-2017 IEP as a basis for determining the amount of days before Student would require Extended School Year Services. The DOE conceded that they did not have enough data to determine when precisely Student needed ESY services, therefore they would continue with to use the amount listed in the Student's previous IEP, which determined that "after **14** consecutive calendar days, Student will receive **four** hours per day of ESY".²²⁸

The DOE stated that they would collect additional data regarding Student's rate of retention after Student's ESY program. While this data is useful for determining Student's ESY

²²² FOF #51-53.

²²² FOF #14.

²²³ FOF #71-93.

²²⁴ 34 C.F.R § 300.320(a)(1).

²²⁵ 34 C.F.R § 300.320(a)(2).

²²⁶ 34 C.F.R § 300.320(a)(4).

²²⁷ See supra.

²²⁸ FOF #57-65.

for Student's ESY for next year, it does not establish a proper amount of data to support providing ESY services for the ESY period at issue. The DOE could have inquired with Private School by asking for teacher observation or teacher comments regarding Student's retention rate after student returned from winter break while Student was attending Private School. The DOE did not have sufficient information to establish the proper Extended School Year Program for Student. **As a result of this failure, the DOE did not offer Student a FAPE.**

Extended School Year FAPE Denial Liability

If a school district fails to place a disabled student in their LRE during the student's ESY, the student will not be entitled to reimbursement unless the student attends an appropriate private alternative placement and proves that equitable consideration favor reimbursement.²²⁹ The remedy in this matter was limited to the duration of Extended School Year Services.²³⁰

Although, Student in this matter was provided ESY in Student's LRE, the above provides a framework for reimbursement, which requires a student to attend an appropriate private alternative placement and prove equitable considerations that favor reimbursement. Here, Student did not attend any private placement during the timeframe of Extended School Year programming, and Parent's failed to avail Student for Extended School Year Programming.²³¹

Parents were informed in February that ESY programming would be offered during the end of July 2017 for Student.²³² Parents did not raise concerns during the February 9, 2017, IEP meeting that Student would not attend extended school year program if Student were placed into a Resource Room for Extended School Year programming. Additionally, Parents conceded that Student was informed of ESY program after the IEP meeting and this is when Student informed

²²⁹ *T.M. v. Cornwall Cent. Sch. Dist.*, 63 IDELR 31 (2d Cir. 2014).

²³⁰ *Id.*

²³¹ Citing to "other arrangements" for Student

²³² FOF #57-65.

Parents that Student refused to attend an ESY program if it was only available to Special Education Students. Parents did not inform the DOE of Student's concern at any time regarding Student's Extended School Year Program.

On May 8, 2017, the DOE mailed a letter to Parents providing notice that Extended School Year services were going to be held at Public School 1 from June 9, 2017 until July 24, 2017 during the hours of 8:00 a.m. until 12:00 p.m. The DOE mailed another letter to Parents on May 31, 2017, requesting that Parents confirm Student's intent to attend ESY programming.

Parents replied to the DOE in a timely manner, informing the DOE that Student would not be attending ESY programming as, Parents had other arrangements for Student. On June 20, 2017, Parents informed the DOE that they rejected the DOE's offer of FAPE resulting from alleged inappropriate placement or services. Parents were not concerned with the amount of days before Student received ESY services but the placement. Student did not want to attend ESY programming if the program only contained disabled children.

Student did not attend a private ESY program during the summer of 2017 and equitable considerations do not warrant reimbursement as Parents did not avail Student for ESY programming. **Therefore, tuition reimbursement is not required in this matter and Petitioner did not produce sufficient evidence regarding compensatory education.**

DATED: Honolulu, Hawai'i, April 25, 2018.

JENNIFER M. YOUNG
Hearings Officer

NOTICE OF APPEAL RIGHTS

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