



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

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

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE  
OF HAWAI'I and CHRISTINA  
KISHIMOTO, Superintendent of Hawai'i  
Public Schools,

Respondents.

DOE-SY1920-048

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing:  
August 11-12, 2020 and  
December 16-18, 2020

Hearings Officer: Charlene S.P.T. Murata

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

**I. JURISDICTION**

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R. Part 300; and the Hawaii Administrative Rules §§8-60-1, et seq. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973

---

<sup>1</sup> Personal identifiable information is provided in the Legend.

(“Section 504”), as amended in 1974, codified at 29 U.S.C. §§794, et seq.; and the Hawaii Administrative Rules §§8-61-1, et seq. in their claims and requests for relief.

## **II. INTRODUCTION**

On June 3, 2020, the Department of Education, State of Hawaii, and Christina Kishimoto, Superintendent of Hawaii Public Schools (collectively “Respondents” or “DOE”), received a Complaint and Resolution Proposal from Student, by and through Parent 1 (collectively “Petitioners”).

On June 10, 2020, DOE filed a response to Petitioners’ Complaint and Resolution Proposal.

On June 26, 2020, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for July 8, 2020.

On July 8, 2020, a prehearing conference was held with Keith H.S. Peck, Esq. (“Mr. Peck”) and Paul Herran, Esq. appearing on behalf of Petitioners, and Deputy Attorney General Kunio Kuwabe (“Mr. Kuwabe”) appearing on behalf of DOE. During the prehearing conference, the parties agreed to have the due process hearing on August 11-12, 2020.

On July 15, 2020, a Prehearing Order was issued to the parties, setting forth the issues and procedures for the due process hearing, and deadlines for submission of substantive motions, witness and exhibit lists, exhibits, and witness email addresses. No substantive motions were filed, and the parties timely submitted their witness and exhibit lists; exhibits; and witness email addresses.

Due to the Coronavirus 2019 global pandemic, the parties agreed to conduct the due process hearing using a video conferencing platform to ensure compliance with government mandated social distancing. See Governor of the State of Hawaii’s Third Supplementary

Proclamation, effective March 23, 2020, and Twelfth Proclamation Related to the COVID-19 Emergency, effective August 20, 2020.

On July 28, 2020, an Order Regarding Due Process Hearing Via Video Conference was issued to the parties, setting forth the procedures that would be implemented during the due process hearing using a video conferencing platform.

On August 6, 2020, Petitioners filed Petitioners' First Amended Witness List, Exhibit List: Exhibits. On August 11, 2020, Petitioners filed Petitioners' Second Amended Witness List, Exhibit List: Exhibits.

The due process hearing took place on August 11-12, 2020 using the WebEx video conferencing platform. All participants in the due process hearing appeared remotely via video and audio. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Mr. Kuwabe. Parent-1 was present for the due process hearing. The Department of Education District Educational Specialist ("DES") was present on behalf of Respondents. The due process hearing was not completed on August 12, 2020.

On August 14, 2020, Petitioners' filed Petitioners' Request for an Extension to extend the 45-day decision deadline under Hawaii Administrative Rules ("H.A.R.") §8-60-69 from August 17, 2020 to October 1, 2020 so that there could be more time to complete the due process hearing. An Order Granting Petitioners' Request for an Extension, dated August 14, 2020, was issued on the same date.

On August 20, 2020, a status conference was held. Due to scheduling conflicts, the parties requested that the further due process hearing be scheduled for October 13-15, 2020. On September 22, 2020, Petitioners filed Petitioners' Request for an Extension to extend the 45-day

decision deadline under H.A.R. §8-60-69 from October 1, 2020 to November 16, 2020 so that the further due process hearing can be scheduled for October 13-15, 2020. On September 22, 2020, an Order Granting Petitioners' Request for an Extension, dated September 22, 2020, was issued. The 45-day decision deadline was extended to November 15, 2020.

On October 13, 2020, the further due process hearing was cancelled because Petitioners' counsel was ill. On October 28, 2020, Petitioners filed Petitioners' Request for an Extension to extend the 45-day decision deadline. On November 9, 2020, Petitioners filed another Petitioners' Request for an Extension, amending their October 28, 2020 extension request. On November 9, 2020, an Order Granting Petitioners' Request for an Extension, dated November 9, 2020, was issued. The 45-day decision deadline was extended to December 30, 2020. The further due process hearing was rescheduled to December 16-18, 2020 by agreement.

The further due process hearing took place on December 16-18, 2020 using the Zoom video conferencing platform. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Mr. Kuwabe. Parent-1 and DES were present. Parent-2 was present on December 18, 2020. All participants in the due process hearing appeared remotely via video and audio.

Petitioners called Parent-1, Private Facility 1 Provider 2 and Private Facility 2 Provider 1 as their witnesses during the due process hearing. Respondents called the following witnesses during the due process hearing: DES, District Teacher 1, Vice Principal, DOE Provider 11, DOE Provider 2, and Principal-2. Petitioners called Parent-1 as a rebuttal witness.

The following Petitioners' exhibits were admitted into evidence: Exhibit 1 (pages 001-137, 139-144) Exhibit 2 (pages 145-149, 213-241, 246-330), Exhibit 3 (pages 331-344), and

Exhibit 4 (pages 348-380, 390-397<sup>2</sup>, July 2020 Video of Student, Audio 05/08/2020 IEP meeting, Audio 06/01/2020 IEP meeting)<sup>3</sup>.

Respondents' Exhibit 2 (pages 32-33), Exhibit 3 (pages 37-77, 83-135, 139-188), Exhibit 4 (pages 201-212), Exhibit 6 (pages 592-594, 596-601, 629, 635-636, 776-777, 783-784, 818-821, 823-824, 833-838, 846, 965-969, 1180-1228)<sup>4</sup>, Exhibit 7 (pages 1232-1261), and Exhibit 9 (pages 1271,1273-1276, 1278-1301, 1303 (Video file)<sup>5</sup>, 1305-1323,1338-1394, 1396-1404, 1406-1407)<sup>6</sup>.

On December 18, 2020, Respondents submitted a request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under H.A.R. §8-60-69 so that transcripts can be prepared and post-hearing briefs filed. An Order Granting Department of Education, State of Hawaii's Motion to Extend 45 Days Deadline, filed December 18, 2020, was issued on December 18, 2020. The deadline by which a decision in this matter must be issued is February 13, 2021.

On January 22, 2021, the parties timely submitted their closing briefs.

---

<sup>2</sup> Petitioners' Exhibit 4 bate-stamped 390 and 391-397 are not audio files. They are timestamps/transcripts prepared by Parent-1 of the 05/08/2020 IEP meeting and 06/01/2020 IEP meeting. Tr. Vol. II, 96:16-97:10, 138:21-139:6.

<sup>3</sup> Tr. Vol. II, 93:19-97:13; Tr. Vol. III, 213:14-214:18; Tr. Vol. IV, 381:23-382:21; Tr. Vol. V, 556:15-559:25, 652:9-12.

<sup>4</sup> Respondents cite to DOE Ex. 6, bate-stamped 1133-1136 in their closing brief; however, these pages were not admitted into evidence. Therefore, the undersigned did not consider these pages. DOE Closing Brief at 26.

<sup>5</sup> DOE's Exhibit 9, bate-stamped 1303, entitled "Video File," dated June 1, 2020, was admitted into evidence. DOE Exhibit 9, bate-stamped 1333 was not admitted in evidence and was not considered. Tr. Vol. IV, 382:20-383:13; Tr. Vol. V, 558:24-559:10.

<sup>6</sup> Tr. Vol. III, 213:20-215:16; Tr. Vol. IV, 382:22-383:13; Tr. Vol. V, 558:24-560:5, 652:9-653:18.

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

### **III. ISSUES PRESENTED**

In their June 3, 2020 Complaint, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Specifically, Petitioners allege that the DOE denied Student a free appropriate public education (“FAPE”). Petitioners raise the following issues regarding the 6/1/2020, 5/29/2020, 5/8/2020, 5/6/2020 IEP written offers, their development and implementation:

Issue 1 – Changes made to Student’s 1/29/2020-IEP regarding Services (namely the removal of information used in substitution for a description of the needed consistency, experience and knowledge required to address Student’s needs in this domain, i.e., services), denied Student a FAPE. The inclusion of information describing Student’s need for consistency in provider and the experience and knowledge that provider requires is a necessary aspect of Student’s IEP. Petitioners assert their rights under the stay-put clause of the IDEA<sup>7</sup>.

Issue 2 – Removing 120 minutes of direct therapy from Student’s 1/29/2020-IEP is a denial of FAPE. Petitioners assert their rights under the stay-put clause of the IDEA.

Issue 3 – Removing the Provider from Student’s 1/29/2020-IEP significantly affects Student’s ability to access Student’s comprehensive IEP program, as it is physically impossible for one provider to teach Student, maintain safety, ensure proper use of equipment, and operate a device simultaneously. Petitioners assert their rights under the stay-put clause of the IDEA.

Issue 4 – A. Due to Student’s medical and emotional condition, and to the isolating nature of the offered location for the implementation of Student’s Extended School Year (and extended school day) program, the ESY/ESD program offered by the DOE is improper and denies Student a FAPE

---

<sup>7</sup> Respondents concede that Stay Put applies and the 1/29/2020-IEP is the Stay Put IEP. Therefore, a determination by the undersigned Hearings Officer regarding Stay Put is no longer necessary. Tr. Vol. IV, 383:14-384:12.

under Section 504 and the IDEA. The ESY program offered in the 6/1/2020-IEP would not have been in the least restrictive environment.

B. The discussions surrounding the determination of the location for the implementation of Student's ESY/ESD program denied Parent 1/Student a FAPE by focusing on what was available instead of what was needed. The DOE guided the inquiry by eliminating the possibility of including non-disabled children, by refusing to consider a private location because it did not fit into its perspective of the continuum of placement, and by failing to adhere to the Holland Test in addition to determining the location for implementation based on availability and not needs. This deprived the IEP team of the opportunity to discuss the Student's need more thoroughly and denied parent participation by steering the conversation from its required focus: Student's needs.

Issue 5 – The DOE has denied Student a FAPE under Section 504 and the IDEA by materially failing to implement Student's IEP from, on, or about 3/17/2020 until the end of the 2019-2020 regular school year.

Petitioners request the following remedies:

Remedy 1 – Order the DOE to provide the Services Student requires to attend the Private Facility 1 during the ESY period in Student's IEP, or in the event that Student's parents have paid for this service, order reimbursement.

Remedy 2 – Order the DOE to revise the IEP to include the statements removed from Student's IEP regarding Occupational Therapy and therapy.

Remedy 3 – Order the DOE to revise the IEP to include the provider.

Remedy 4 – Order the DOE to provide an additional amount of services that will be capable of compensating Student for lost educational achievements and to provide Student the benefits Student would have attained had Student's program continued during the period that Student's services had not been delivered in conformity with Student's IEP, and during the extended school year, if these services were not provided in a manner where Student received the benefits Student could have received were they delivered appropriately.

Remedy 5 – Order the DOE to Reimburse Parents for any fees, costs and transportation costs incurred in the substitution of services the DOE failed to appropriately tender and/or deliver.

Remedy 6 – Order such other relief that is appropriate and justified in equity and/or in law, under the circumstances.

#### **IV. FINDINGS OF FACT**

##### **Witnesses and Individuals Providing Services to Student**

1. Private Facility 1 Provider 2 began working with Student in May of 2020, implementing a plan. On August 17, 2020, Private Facility 1 Provider 2 started providing services to Student at Home School through an IEP. Private Facility 1 Provider 1 was Private Facility 1 Provider 2's supervisor while Private Facility 1 Provider 2 was implementing the plan, and continues to be Private Facility 1 Provider 2's supervisor while Private Facility 1 Provider 2 implements the IEP. Private Facility 1 Provider 2 did not participate in the May-IEP and June-IEP meetings. Tr. Vol. III, 306:10-308:5, 315:20-318:10.
2. Private Facility 2 Provider 1 is employed with Private Facility 2. Private Facility 2 Provider 1 met Student and provided services to Student. Private Facility 2 Provider 1 ran Student's in-home program until Student transitioned into DOE. When Student transitioned into DOE, there was an approximate one-year gap when Private Facility 2 Provider 1 did not provide any services to Student. In May of 2014, DOE contacted Private Facility 2 Provider 1 and asked Private Facility 2 Provider 1 to do an evaluation of Student. Private Facility 2 Provider 1 has been working with Student since then through a contract with DOE. Private Facility 2 Provider 1 has worked with Student for approximately six years and continues to work with Student. Private Facility 2 Provider 1 provides services to Student twice a week at school, and each session is an hour long. Tr. Vol. III, 331:16-19, 353:17-19, 368:21-370:3. Private Facility 2 Provider 1 testified as an expert. Tr. Vol. III, 351:8-11.

3. DES is a district educational specialist with the DOE. DES has been working in the education sector since 1998. DES joined Hawaii DOE at the beginning of 2019. Tr. Vol. IV, 387:12-16.
4. District Teacher 1 graduated with a degree in special education in 2010 District Teacher 1 received a master's in curriculum and instruction with advanced specialized endorsements in English as a second language and early childhood special education. District Teacher 1 also completed courses and is licensed. Tr. Vol. IV, 479:13-480:5. In the 2019-2020 school year, District Teacher 1 provided services to teachers and other staff members, including Special Education Teacher, pursuant to Student's IEP. Tr. Vol. IV, 492:9-16, 497:13-16. In May of 2020, District Teacher 1 provided services to Special Education Teacher regarding Student's IEP, potential IEP goals and objectives, looking at the data collection and making programming changes based off of the data collection, and provided support in other areas. Tr. Vol. IV, 492:17-493:1. In the June-IEP, District Teacher 1 is "teacher services #2". Pet. Ex. 1 at 134; Tr. Vol. IV, 517:4-9. District Teacher 1 testified as an expert. Tr. Vol. IV, 490:3-11.
5. DOE Provider 1 is licensed with DOE since July of 2008. Tr. Vol. V, 563:13-15, 564:8-14. In DOE Provider 1's role, DOE Provider 1 conducts evaluations of a child's ability to communicate effectively in the classroom involving articulation, fluency, and receptive and expressive language skills. If a child is non-verbal, DOE Provider 1 would use augmentative or alternative forms of communication for that child and conduct appropriate assessments in that area. DOE Provider 1 also develops treatment goals and objectives; collects data and corresponds with teachers and staff regarding a child's progress based on that data; and provides direct services to children. Tr. Vol. V, 563:16-

- 564:7. DOE Provider 1 was Student's provider from January of 2020 until the end of the school year in May of 2020. Tr. Vol. V, 567:18-25. DOE Provider 1 testified as an expert. Tr. Vol. V, 567:9-11.
6. Vice Principal is the vice principal at Home School. During the 2019-2020 school year, Vice Principal was a temporary assigned principal from June 15, 2020 through June 30, 2020 until a new principal could be hired to replace Principal-1. Tr. Vol. IV, 529:2-16; Tr. Vol. IV, 388:20-22.
  7. Physical Therapist is a licensed physical therapist with the DOE since 2018. Physical Therapist provided physical therapy services to Student during the 2019-2020 school year. Tr. Vol. V, 621:17-24, 622:8-12.
  8. Special Education Teacher was Student's special education teacher during the 2019-2020 school year.
  9. Principal-1 was principal of Home School until the end of the 2019-2020 school year. Tr. Vol. IV, 388:20-22.
  10. Principal-2 became the principal of Home School on July 1, 2020. During the 2019-2020 school year, Principal-2 was a principal at another DOE School. Tr. Vol. V, 636:2-7, 636:11-16.
  11. Private Facility 3 Provider 1 is employed with Private Facility 3. Private Facility 3 Provider 1 has been providing Student with direct services for the past 7 years. Tr. Vol. II, 174:12-23; Pet. Ex. 2 at 256.
  12. DOE Provider 4 is employed with a private company. DOE Provider 4 provided services to Student. Tr. Vol. IV, 436:25-437:4; Pet. Ex. at 247.
  13. Private Facility 1 Provider 1 is employed with Private Facility 1. Tr. Vol. IV, 406:5-7.

## Student Background

14. At the time of the due process hearing, Student was \_\_\_\_ years old. Pet. Ex. 1 at 001.
15. Student qualifies for IDEA services under an Eligibility Category. Pet. Ex. 1 at 012; DOE Ex. 6 at 0836.
16. Student has been in and out of hospitals. Tr. Vol. I, 35:18-21.
17. Student was born with various medical conditions. Pet. Ex. 2 at 246; DOE Ex. 2 at 0032.
18. Student is non-verbal, and is capable of making noises, a few sounds, and syllables. Student does not use sign language. Student uses a device which has an application. The device is an iPad Pro. Student has two DOE issued iPad Pros, one for the home and one for school. Pet. Ex. 1 at 002, 010; Tr. Vol. II, 84:19-85:10.
19. A device is extremely important for Student because it is Student's "voice." Tr. Vol. III, 226:3-5; Tr. Vol. V, 583:11-584:5.
20. Student has mild to moderate disability that requires augmentation.
21. Student wears prescription eyeglasses. Pet. Ex. 1 at 002. Student often tries to pull off the eyeglasses. Pet. Ex. 1 at 006.
22. Student is highly susceptible to infection. Pet. Ex. 1 at 002.
23. Parent-1 feeds and gives water to Student about eight times a day. Tr. Vol. I, 50:13-22.
24. Student receives services at Home School. Pet. Ex. 2 at 246.
25. Services for Student is to teach Student how to coordinate the movements. Pet. Ex. 2 at 247.

26. Student has a team who provide care to Student throughout the school day. Tr. Vol. III, 354:6-14. Student has a special education teacher and general education teacher. Tr. Vol. IV, 500:5-12; Pet. Ex. 1 at 002, 004, 038; Pet. Ex. 2 at 246.
27. Student receives services from Private Facility 2 Provider 1 twice a week at school. Each session is an hour long. Tr. Vol. III, 368:21-369:4.
28. Student can independently walk but needs an adult within a few feet from Student for safety purposes. Pet. Ex. 1 at 008.
29. In special education, Student has a special chair to perform fine motor activities. In regular education, Student sits at a regular table and is able to climb in and out of Student's seat with close supervision and sometimes, physical assistance. Pet. Ex. 1 at 004.
30. Student has non-aggressive behavior issues that interfere with Student's learning, such as disengaging, not attending, refusing to participate, turning away, throwing things, not sitting down, getting up and walking away. Tr. Vol. II, 78:10-18.
31. Student has an Emergency Action Plan and a Regulation Plan. Pet. Ex. 1 at 002, 007.

**1/29/2020-IEP**

32. The January 29, 2020 IEP ("1/29/2020-IEP") is the "Stay Put" IEP. Tr. Vol. IV, 383:14-384:12.
33. Present at the development of the 1/29/2020-IEP were Special Education Teacher, Principal-1, General Education Teacher, Private Facility 1 Provider 1, Doe Provider 1, Parent-1, and a speech-language pathologist. Pet. Ex. 1 at 040.
34. Student's 1/29/2020-IEP is extensive, consisting of 40 pages and 21 goals and objectives (13 of which are in the area of OT). Pet. Ex. 1 at 001-040.

35. At the time of the 1/29/2020-IEP, Student was performing below Student's same age peers in the general education curriculum at the time. Pet. Ex. 1 at 012.
36. According to the 1/29/2020-IEP, Student qualifies for extended school year ("ESY") services due to the nature and severity of Student's disabling conditions. Student receives ESY services for five consecutive days (Monday through Friday) year-round except for Thanksgiving Day, Christmas Day, and New Year's Day. Pet. Ex. 1 at 036; Tr. Vol. I, 45:7-13.
37. In addition to ESY, Student is also eligible for extended school day ("ESD"). During the regular school year, Student receives ESD from 2:00 p.m. to 4:30 p.m. Extended school day remains in effect during ESY; however, ESD will be from 12:00 p.m. to 4:30 p.m. rather than 2:00 p.m. to 4:30 p.m. Pet. Ex. 1 at 038.
38. Due to the extent of Student's needs, Student has many days of ESY services on campus at Home School without any peers. Tr. Vol. I, 44:22-45:9.
39. Student's ESY services include: special education; device and data collection; speech/language therapy; occupational therapy; and physical therapy. Pet. Ex. 1 at 036.
40. Pursuant to the 1/29/2020-IEP, Student will receive the following services: 1850 minutes per week of special education; 240 minutes per week of speech-language therapy; 120 minutes per week of occupational therapy; 30 minutes per week of physical therapy. Pet. Ex. 1 at 036.
41. Pursuant to the 1/29/2020-IEP, Student has 46 Supplementary Aids and Services, Program Modifications and Supports for School Personnel. Pet. Ex. 1 at 036-038.
42. The educational assistant to target use of the device and data collection will be 2700 minutes per week. Pet. Ex. 1 at 036.

43. The provider is responsible for collecting data on how often Student uses the device. The provider collects data by clicking on an “app” on an iPad or phone, or taking down the information on a piece of paper. Tr. Vol. II, 101:7-12; Tr. Vol. IV, 456:17-457:16; Pet. Ex. 1 at 036, 038.
44. The 240 minutes per week of speech-language therapy was provided.. Pet. Ex. 1 at 038.
45. In the Clarification of Services and Supports section of the 1/29/2020-IEP, the following:
- Services = must be provided by one, consistent provider who is licensed and has certification and experience.
- (“Clarification Statement”). Pet. Ex. 1 at 038.
46. The extent to which Student will participate with non-disabled students is as follow:
- [Student] will participate with Student’s non-disabled peers in the general education classroom for social and language purposes during morning & dismissal routines, group activities, extracurricular activities (garden, dance, PE, music, etc.) as appropriate and lunch/recesses. Student also participates with non-disabled peers during reverse inclusion time inside the room or special education classroom. [Student] will not participate with non-disabled peers for individualized instruction inside the special education classroom, or therapy. Student will have access to typically developing peers during summer ESY program to maintain Student’s social skills.
- Pet. Ex. 1 at 039.

**During COVID-19 Lockdown**

47. Spring break for the 2019-2020 school year began on March 16, 2020. Tr. Vol. IV, 419:9-15. Due to the COVID-19 pandemic, DOE schools were shut down around March 18 or 19, 2020 to the end of the school year on May 28, 2020. Tr. Vol. IV, 419:17-25, 425:15-22; DOE Ex. 9 at 1402.

48. On March 19, 2020, Private Facility 3 Provider 1 informed Parent-1 that due to the COVID-19 pandemic and DOE closure, Private Facility 3 Provider 1 was instructed to not complete any services for DOE students during the closure. Pet. Ex. 3 at 331.
49. On March 23, 2020, Governor David Y. Ige issued a Third Supplementary Proclamation to the March 3, 2020 Emergency Proclamation, ordering all persons in the State of Hawaii to stay at home or in their place of residence from March 25, 2020 to April 30, 2020. The March 23, 2020 Third Supplementary Proclamation also stated that persons may travel to and from essential businesses and operations to the extent that such businesses or operations cannot be conducted through remote technology from homes or places of residence. Educational institutions were among those considered essential businesses and operations.
50. During the COVID-19 shutdown, Special Education Teacher and related service providers delivered instruction virtually to Student.
51. On March 30, 2020, Special Education Teacher emailed Parent-1 with enrichment activities, which were suggestions on different activities that parents could do with Student. Special Education Teacher also emailed Parent-1 personalized daily activities parents could do with Student. Some of the suggested activities involved the use of a device. DOE Ex. 9 at 1305-1322; Tr. Vol. II, 200:15-204:16; Tr. Vol. IV, 421:15-424:19.
52. On April 6, 2020, Special Education Teacher sent an email to Parent-1 with suggestions on different ways parents could engage Student in reading. DOE Ex. 9 at 1338, 1344; Tr. Vol. II, 205:17-9.

53. On April 9, 2020, Special Education Teacher asked Parent-1 if Parent 1 was interested in PT teletherapy once a week with Physical Therapist. DOE Ex. 9 at 1339-1342.
54. Physical Therapist emailed Parent-1 on April 24, April 30, May 11 and May 22 to offer PT teletherapy services. Parent-1 neither accepted nor declined the offers. Physical Therapist also sent Parent-1 “5/22/2020-PT Resources for [Student],” which is a list of exercises and activities tailored to Student’s needs and abilities. DOE Ex. 9 at 1396-1404; Tr. Vol. V, 622:18-627:4. Parent-1 accepted the recommendations made by Physical Therapist and worked on the exercise recommendations with Student. Tr. Vol. II, 199:19-200:14.
55. DOE Provider 1 provided four speech-language teletherapy sessions: April 17, April 30, May 5 and May 12. DOE Ex. 9 at 1406-1407; Tr. Vol. V, 568:25-570:5; Tr. Vol. II, 199:5-18; DOE Ex. 6 at 0823; DOE Ex. 6 at 0629; DOE Ex. 6 at 0596.
56. On April 10, 2020, DOE Provider 1 and Parent-1 had a telephone conference regarding Student’s current home program and needs. DOE Provider 1 followed up with an extensive email summarizing what they had discussed and provided enrichment activities for parents to do with Student. DOE Ex. 6 at 0592-0594; Tr. Vol. V, 570:14-572:12, 593:11-19.
57. DOE Provider 1’s goal was to virtually meet with Student and DOE Provider 1’s other students once a week. Tr. Vol. V, 569:20-570:5, DOE Ex. 6 at 0601.
58. On May 1, 2020, a teacher sent Parent-1 a link to an internet site that had resources for Student. DOE Ex. 6 at 0846; Tr. Vol. II, 205:10-22.
59. DOE was not able to provide services “per the state no telehealth due to safety issues.” Special Education Teacher noted in Student’s Individual Education Program-Progress

Report that “[s]pecific enrichment activities, that were aligned to IEP objectives were emailed to parent. Special education teacher offered services through the DOE to parent and was in communications with all team members. Special education teacher communicated with parent via email and text between 3.30.20 – 5.28.20.” DOE Ex. 7 at 1232-1233.

60. According to Parent-1, the COVID-19 lockdown was March through May. During that time, no one came to the home until mid-April when a private provider started coming to the home. By the end of April, when the provider had increased services to four hours per day, Student also went to Private Facility 1 from 1:30 p.m. to 4:00 p.m. Tr. Vol. 290:21-292:4.
61. According to Parent-1, when Student was offered teletherapy, Student could not do it because Student would not sit for more than 15 seconds, wouldn’t look at the device, would not respond to the person talking to Student through the device (computer or iPad). Tr. Vol. II, 105:13-106:1, 151:2-10.
62. A triennial re-evaluation was conducted for continued eligibility and programming. April 30, 2020, Parent-1 was provided a copy of an Evaluation Summary Report (“4/30/2020 Report”). DOE Ex. 2 at 0032.
63. According to the 4/30/2020 Report, Student’s program was recommended to be changed from 120 minutes of direct service per week to 45 minutes of direct service per week. A new consultation service of 180 minutes per quarter was recommended to be added. The 4/30/2020 Report stated that the “recommendations are based on Student’s progress with goals and current roadblocks of personal preference for participation and internal motivation to consume food and drink consistently.” The report further noted, “To

ensure Student continued growth, direct service minutes will focus on specific skills in a 1-1 setting.” DOE Ex. 2 at 0032.

64. According to 4/30/2020 Report, Student “needs specifically designed instruction, accommodations and/or modifications in the following areas to be involved in and progress in the general education curriculum: daily living skills, intellectual functioning, communication, socialization, and motor skills.” DOE Ex. 2 at 0033.

### **May-IEP**

65. The 1/29/2020-IEP indicates that Student’s IEP Annual Review Date is May 3, 2020. Pet. Ex. 1 at 001.
66. On May 6, 2020 and May 8, 2020, IEP Annual Review meetings were held, resulting in a May 6, 2020 and May 8, 2020 IEP (“May-IEP”). Pet. Ex. 1 at 041-089.
67. Present at the May 6, 2020 IEP meeting were 15 people: Physical Therapist, Private Facility 3 Provider 1, DOE Provider 4, Special Education Teacher, District Teacher 1, Private-OT, Principal-1, General Education Teacher, DOE, DOE Provider 1, Parent-1, Parent-2, and DES. Pet. Ex. 1 at 088.
68. Everyone who attended the May 6, 2020 IEP meeting were at the May 8, 2020 IEP meeting except for Private Facility 3 Provider 1, DOE Provider 4, and a teacher. Pet. Ex. 1 at 089.
69. Parent-1 testified that before the May 6, 2020 IEP meeting, Parent-1 informed DOE that it was not appropriate to have an IEP meeting because no one had seen Student since Home School had shut down; however, Parent-1 agreed to meet for the annual IEP because Special Education Teacher and other personnel were leaving the school and Parent-1 wanted their input about Student. Tr. Vol. II, 63:7-64:14.

70. During the May 6, 2020 IEP meeting, the IEP team discussed Private Facility 3 Provider 1's Reassessment Report, dated March 13, 2020 ("3/13/2020 Report"). The 3/13/2020 Report was drafted with contributions from DOE Provider 4. Pet. Ex. 2 at 247. The 3/13/2020 Report reassessed Student's skills to determine Student's current skills and to aid in making recommendations for academic programming for the 2020-2021 school year. Pet. Ex. 2 at 246; Tr. Vol. II, 175:4-177:10; Pet. Ex. at 246-257.
71. Student's last assessment was almost three years ago in May of 2017. Pet. Ex. 2 at 247.
72. During the May 6, 2020 IEP, Private Facility 3 Provider 1 went over Private Facility 3 Provider 1's 3/13/2020 Report and made Private Facility 3 Provider 1's recommendations. Parent-1 objected to the recommendations citing to the lack of current data and that the evaluation was based on matters before the COVID-19 pandemic. Tr. Vol. II, 175:4-177:10; Pet. Ex. at 246-257.
73. The 3/13/2020 Report recommended that Student's program change from 120 minutes of direct service per week to 45 minutes of direct service per week. The 3/13/2020 Report also recommended that a new consultation of 180 minutes per quarter be added. The consultation service minutes would be used to develop small group peer opportunities<sup>8</sup> for Student and would support and train staff in developing enriching activities to foster a positive development of skills. Pet. Ex. 2 at 256.
74. DOE Provider's recommendation to reduce the number of minutes of services and to implement a peer program was based on Student's progress and personal preference for participation and internal motivation to complete skills consistently, which had become

---

<sup>8</sup> These small group peer times are also known as "\_\_\_." Tr. Vol. IV, 400:13-25.

roadblocks to Student's continued progress. Pet. Ex. 2 at 256; Tr. Vol. IV, 401:1-402:16.

75. During the May 8, 2020 IEP meeting, Parent-1 objected to the new goals and objectives because Parent 1 felt that they were no longer appropriate due to regression. Parent-1 asked to keep the old goals and objectives, and if DOE wanted to, add the new goals and objectives without taking out the old goals and objectives. Tr. Vol. 63:23-64:17.
76. During the May 8, 2020 IEP meeting, DES explained to Parent-1 and Parent-2 that DOE was trying to get children back to school, especially for ESY. DES explained that DES wanted to be careful in how they "word" the May-IEP to make sure that if there is a "large discrepancy" in Student's skills then Student would get more compensatory minutes and would get the services until Student is caught up. If the IEP team left Student's IEP the way it was, it would be difficult to show that Student had any regression. Pet. Ex. 4 at Audio 05/08/2020 IEP meeting, 02:53:30-02:55:13.
77. During the May 8, 2020 IEP meeting, the IEP team discussed the removal of the provider. Private Facility 1 Provider 1, who supervises the providers who work with Student, recommended that the provider be removed because a provider could handle a device and run Student's program. Private Facility 1 Provider 1 stated that it was Private Facility 1 Provider 1's responsibility to make sure that any provider who works with Student is able to run Student's program and handle a device. The IEP team discussed the history of why a provider was included in previous IEPs--Student had two providers. In the 1/29/2020-IEP, Student had two providers. One provider handled the device while the other provider handled Student's program. Prior to the May-IEP meeting, the IEP team took data on how Student would react when the provider did not

help with the device and the responsibility was shifted to the provider. The IEP team discussed that on average Student had 93 points per day (each time Student pressed the device, it was recorded) when the provider helped Student. When the provider did not help Student with the device, Student averaged 103 points per day. The IEP team also discussed the goal of moving Student towards more independence. After listening to Parent-1's concerns and arguments, Private Facility 1 Provider 1 maintained Private Facility 1 Provider 1's recommendation that the provider be removed from the May-IEP. Pet. Ex. 4 at Audio 05/08/2020 IEP meeting, 02:35:00-02:42:05; Tr. Vol. IV, 402:20-406:18; Tr. Vol. III, 311:6-13.

78. The May-IEP offered Student similar ESY services as the 1/29/2020-IEP except for the following changes: (1) the provider to assist with device and data collection was not in the May-IEP; (2) speech-language therapy was changed from 120 minutes per week to 45 minutes per week and consultation for staff was added; and (3) a provider consult was added to the May-IEP. Pet. Ex. 1 at 036, 083.
79. The May-IEP offered the same services as the 1/29/2020-IEP except that the speech-language therapy minutes were reduced from 240 minutes per week to 165 minutes per week. Pet. Ex. 1 at 036, 083.
80. The 165 minutes per week of speech-language therapy consists of two types of therapy. Pet. Ex. 1 at 083, 085-086.
81. The May-IEP did not offer a second provider to target use of a device and data collection. Pet. Ex. 1 at 036, 083.
82. The May-IEP did not have an OT clarification statement, and did not have "device" in the Supplementary Aids and Services section.

83. During the May 8, 2020 IEP meeting, the IEP team declined to put the qualifications for an OT in the IEP because having the qualifications would make it difficult to fill a vacant position. Pet. Ex. 4 at Audio 05/08/2020 IEP meeting, 3:06:00-3:13:04.

84. Under the “Supplementary Aids and Services, Program Modifications and Supports for School Personnel” section of the May-IEP, a Peer Program for 1 time per week is listed. This is not in the 1/29/2020-IEP. The Clarification of Services and Supports describes the Peer Program in the following manner:

Peer Program will begin first quarter of the 2020/21 SY as once/week with frequency being revised by the team as appropriate. Location will be the special education classroom or alternate room that is generally quiet with minimal/low distractions. Participants will include at least one peer who is interested in socializing and modeling experiences. Specific number of peer(s) will vary pending type of experience. Please see Peer Experience Protocol for additional details on positioning and structure.

Pet. Ex. 1 at 085.

85. The Clarification of Services and Supports section also explained:

[Student] will receive 45 minutes of direct services per week of speech-language therapy. The speech-language pathologist must have certification and experience. Speech-language consultation regarding services of 180 minutes/quarter will be provided to address the following: program development, data collection, progress monitoring, staff training, fidelity checks on treatment strategies and other components related to the implementation of the daily program.

Pet. Ex 1 at 086.

86. The description of the extent Student would participate with non-disabled students remained largely unchanged expect that instead of participating with non-disabled peers during reverse inclusion time inside the sensory room or special education classroom, the May-IEP states that Student will “participate[] with non-disabled peers during the social skills program.” Pet. Ex. 1 at 039, 087.

87. The May-IEP contains sections entitled “5.6.20 Parental Report” and “5.8.20 Parental Report” throughout the IEP, documenting Parent-1’s concerns and observations about Student’s progress at home.
88. Following the May-IEP meetings, a Prior Written Notice of Department Action was issued on May 13, 2020 (“3/13/2020-PWN”). The 3/13/2020-PWN gave the following explanations of why the OT’s credentials and second educational assistant/communication aide were eliminated, and direct minutes were reduced.
1. The team’s data that was reviewed on 5/4/20, during [Student’s] 3 year re-evaluation, does not support the need for 120 minutes of direct services at this time.
  2. The Occupational Therapist’s credentials had been included prior to the provider coming onto the IEP team. [Student] now has another provider on the team who can assist all service providers.
  3. The second provider is no longer warranted now that [Student] has a provider who can run the program to fidelity as determined by the provider and SLP. Additionally, the team agreed that [Student’s] program is focusing on independence, we want [Student] to be operating the device themselves as much as possible now.
  4. The team decided to use the data collected from August 2019-March 2020 to guide the new IEP with the understanding that [Student] will need to be re-evaluated upon returning to school in order to determine Student’s current baseline/appropriate goals at that time. Parent 1 observations were added into the Present Level of Educational Performance under each section titled “parental report”.

The 3/13/2020-PWN also states that Student “has access to typically developing peers during summer ESY program to maintain social skills.” DOE Ex. 3 at 0132-0135.

#### **June-IEP**

89. The IEP team met on May 29, 2020 and June 1, 2020 to discuss where Student would receive ESY services for the summer of 2020. The meetings resulted in a June 1, 2020

IEP (“June-IEP”). Pet. Ex. 1 at 090-137; Tr. Vol. IV, 413:16-20, 415:15-416:4; Tr. Vol. II, 177:16-18; Pet. Ex. 4 at Audio 06/01/2020 IEP meeting, 00:09:00-00:09:21.

90. Present at the June 1, 2020 IEP meeting were DES, Special Education Teacher, Private-OT, Principal-1, a student services coordinator, General Education Teacher, DOE Provider 2, Private Facility 1 Provider 1, and Parent-1<sup>9</sup>. Pet. Ex. 1 at 137.
91. Prior to meeting on June 1, 2020 IEP, Parent-1 provided DOE with two May 28, 2020 letters from Student’s doctors. Tr. Vol. I, 39:21-40:19, 42:8-12; Tr. Vol. IV, 413:24-3; Pet. Ex. 2 at 145.
92. During the June 1, 2020 IEP meeting, the IEP team discussed seven educational setting options where Student could be placed during summer of 2020 to implement the ESY program: general education setting; combination of general education and special education setting; special education setting; public separate facility setting; private separate facility; private residential facility; and home bound/hospital setting. The IEP team focused their discussion on a special education setting at Home School, Private Facility 1 and home. Pet. Ex. 4 at Audio 06/01/2020 IEP meeting.
93. DES offered to provide services in the home because the doctors’ notes provided by parents, which suggested consistency, and parents’ request to keep Student away from others, could justify placing Student at home. Pet. Ex. 4 at Audio 06/01/2020 IEP meeting, 00:23:45-00:25:10.
94. The June-IEP states that the following placement options were discussed for ESY:
1. General Education Setting – the general education setting was rejected due to nature and severity of [Student’s] disabilities.

---

<sup>9</sup> Petitioners and Respondents did not include a copy of the May 29, 2020 IEP meeting “Meeting Participants” page as part of their exhibits.

2. Special and General Education Setting was rejected due to nature and severity of [Student's] disability.
3. Special Education setting was accepted by the team as the Least Restrictive Environment for [Student].
4. Private Separate Facility – parent proposed [Private] Facility. The team rejected this option as [Private] Facility is neither an educational nor medical facility. No other private separate facilities were considered.
5. Homebound/Hospital placement was rejected because Parent-1 did not want it.

Pet. Ex. 1 at 132.

95. The June-IEP offered the same services and Supplementary Aids and Services as the May-IEP. No changes were made to the Clarification of Services and Supports section or the description of the extent Student would participate with non-disabled students.

Pet. Ex. 1 at 083-087, 132-136.

96. Following the June-IEP meeting, a Prior Written Notice of Department Action was issued on June 10, 2020 (“6/10/2020-PWN”). The 6/10/2020-PWN states that parents requested that Student receive ESY services for summer of 2020 at Private Facility 1. The 6/10/2020-PWN gave the following explanation of why the action was proposed and refused:

Due to safety concerns with COVID 19 [sic] parents feel that [Student] would be safer at [Private] Facility. Parent 1 stated that [Private Center] has opened with appropriate social distancing and safety guidelines for several weeks. Team decided that students [sic] LRE is [Home] School. [Private Facility] is more restrictive setting and is not an educational placement.

DOE Ex. 3 at 0187.

97. The 6/10/2020-PWN also described the other options considered and why they were rejected:

1. General Education setting was rejected due to nature and severity of Student's disability.

2. Special and General Education setting was rejected due to nature and severity of Student's disability.
3. Special Education setting – self containing. This was accepted by the team as the LRE for Student.
4. Public separate facility – team discussed public separate facility and team decided there were no great options for the students.
5. Private Separate facility – Parent 1 proposed Private Facility. Team decided that Private Facility would have to be a school setting with Special Education teacher. Due to doctors' notes (2) provided by family the team could place Student there if it was a medical facility. Private Facility confirmed they are not a medical facility. The team rejected this option as Private Facility is neither an educational nor medical facility. No other private separate facilities were considered.
6. Home Hospital placement - Team discussed placing Student in the home with all IEP ESY services due to medical notes. Parent 1 did not want this placement.

DOE Ex. 3 at 0187-0188.

98. The least restrictive environment to implement Student's ESY services in the summer of 2020 was in a special education setting at Home School.
99. Private Facility is a more restrictive setting than the special education setting at Home School.
100. Parent-1 testified that DOE wanted Student to go back on Home School campus for ESY services in June. Parent-1 stated that Parent 1 and Parent-2 declined because they did

not feel safe and didn't feel that Home School was ready to keep Student safe. Parent-1 further testified that they asked for ESY services to be delivered at Private Facility. Tr. Vol. III, 292:15-21.

101. Parent-1 testified that for summer of 2020 between June and August, Student stayed at home in the morning with a provider (who was not funded by DOE) and went to Private Facility from 1:30 p.m. to 4:00 p.m. Tr. Vol. III, 292:22-293:21.
102. On June 15, 2020, Private Facility 1 Provider 1 produced a Reassessment and Treatment Plan Update Report ("6/15/2020 Report"). Many of the new objectives in the 6/15/2020 Report involve the usage of a device. The intervention plan outlined in the 6/15/2020 Report will be implemented by one provider. The focus of the plan is to increase Student's skills, Student's independence with daily living skills, and health and safety skills. Pet. Ex. 2 at 258-277.

#### **Summer of 2020 ESY**

103. In the past, Student had ESY in a fully self-contained setting at Home School. Tr. Vol. IV, 414:14-415:14.
104. During the summer of 2020, Home School campus was available to special education students attending ESY. Tr. Vol. IV, 416:18-20, 418:21-23, 532:22-533:5; Tr. Vol. V, 637:22-638:3.
105. Home School had a four-week summer school program beginning June 15, 2020 for general education students and section 504 students who were struggling after the school closure in March of 2020. Tr. Vol. IV, 418:24-419:5, 529:17-530:15, 542:14-543:10; Tr. Vol. V, 637:24-638:3.

106. The students in the summer school program ranged in different grades. Tr. Vol. IV, 543:18-20.
107. The summer of 2020 ESY program for Student would have been the same as Student regular school year program—full day, fully self-contained program. Tr. Vol. IV, 416:21-417:2.
108. There was one special education classroom that had several students. Student would have been in this special education classroom. Tr. Vol. IV, 417:13-418:2, 534:13-17, 538:16-539:1.
109. Home School had a second room made available for Student in the event that Student was not comfortable in the special education classroom or parents didn't want Student in the special education classroom. Tr. Vol. IV, 534:16-24.
110. The length of time in school per day for the ESY students varied depending on their individual needs and IEPs; Student would be the only one to be at school until 4:30 p.m. Tr. Vol. IV, 539:12-542:9.
111. The ESY students had access to their non-disabled peers during recess time; during a peer program where the general education students went into the special education classroom to be peer buddies to the students; and during "special time," such as P.E. Tr. Vol. IV, 539:2-11. Student would have been integrated with the general education students in the summer school program. Tr. Vol. IV, 543:11-24.
112. All the related service providers that were providing services to ESY students at Home School were on campus. Tr. Vol. IV, 534:25-535:6. Student would have received services in the areas of occupational therapy, speech-language therapy and physical therapy while on campus during the summer of 2020. Tr. Vol. IV, 418:15-23.

113. A provider was also available on campus during the summer of 2020. Tr. Vol. IV, 418:15-20.
114. Home School implemented safety protocols which included social distancing, wearing face masks, temperature checks, reducing the number of people who were allowed on campus, and following Department of Health guidelines. Tr. Vol. IV, 417:3-12, 533:8-534:8. General education students were required to wear face masks at all times, while ESY students were encouraged to wear face masks. If the ESY students were not able to wear face masks at all times, Home School would practice social distancing of six feet. School staff, for general education and ESY, were required to wear face masks at all times. Service providers had the option of wearing face shields in addition to face masks. Tr. Vol. IV, 535:14-536:9.
115. Between June 9, 2020 to July 1, 2020, Private-OT provided nine OT sessions through distance learning and direct sessions at the home. Six of the nine sessions were make-up sessions. On July 2, 2020, Private-OT was informed that Private OT could not provide ESY OT services at the home because ESY OT services were direct sessions that had to be done on Home School campus. Pet. Ex. 2 at 227-241; Tr. Vol. III, 219:17-223:16.
116. On June 19, 2020, offered speech and language telehealth services for communication as part of Student's summer of 2020 ESY program. Parent-1 declined the offer of telehealth as not a viable modality for Student due to Student's impairments, constant mobility and inability to attend to a device. Pet. Ex. 3 at 332-334.
117. Student spent the summer of 2020 at home and at Private Facility 1. A provider came to the home for four hours and then Student went to Private Facility from 1:00 p.m. to 4:30 p.m. Student went to Private Facility from 1:00 p.m. to 4:30 p.m. because that was

longest period of time Student could go without water. Tr. Vol. I, 48:12-49:23; Tr. Vol. III, 292:22-293:21.

118. Student received services during the summer of 2020 from Private Facility 1 Provider 1 through Private Facility 1. Tr. Vol. II, 181:18-21.

### **2020-2021 School Year**

119. The beginning of the school year at Home School was delayed 3-4 weeks with no students on campus. The delay was to provide the school time to prepare for re-opening. Tr. Vol. V, 638:19-23.
120. Once Home School opened, during the first quarter, ESY students and general education students who needed internet access or had parents who worked at Home School were allowed on campus. ESY students were on campus every day. Tr. Vol. V, 638:23-639:9.
121. During the second quarter, general education students in several grades were brought back onto campus in phases. These students were in a hybrid rotation<sup>10</sup>. Vulnerable students<sup>11</sup> who were in various grades were also brought back onto campus. Tr. Vol. V, 639:9-640:10.
122. Student was part of the ESY group that started at the beginning of the school year. Tr. Vol. V, 640:11-15.
123. Student's classroom has other ESY students. Tr. Vol. V, 640:20-641:3.
124. Student receives in-person instruction five days a week. Tr. Vol. V, 642:19-25.

---

<sup>10</sup> Students who were part of the hybrid rotation had a combination of distance learning and in-person instruction. These students would be on campus two days for in-person instruction and then be at home for three days for distance learning. Tr. Vol. V, 639:14-20.

<sup>11</sup> "Vulnerable students" are students who are English language learners, students with IEPs, or students with Section 504 plans. Tr. Vol. V, 640:2-10.

## Private Center

125. On June 4, 2020, Student started receiving in-person services at Private Facility 1. Tr. Vol. II, 174:7-11.
126. Private Facility 1 is a large company that provides services and has several offices on the island. Pet. Ex. 4 at Audio 06/01/2020 IEP meeting, 00:25:32-00:26:00; Tr. Vol. II, 181:14-17.
127. Private Facility 1 is not a medical facility, does not have nurses on site, and does not employ nurses. Pet. Ex. 4 at Audio 06/01/2020 IEP meeting, 00:26:00-00:26:47.
128. Private Facility 1 is not a hospital. Pet. Ex. 4 at Audio 06/01/2020 IEP meeting 00:38:17-00:39:19, 00:41:19-00:42:00.
129. If Student attended Private Facility 1, either DOE or parents would have to pay for a provider to accompany Student. Tr. Vol. I, 46:20-47:5.
130. Private Facility 1 is not a private school. It does not have an educational program or teachers, and it does not follow common cord standards. Pet. Ex. 4 at Audio 06/01/2020 IEP meeting, 00:12:29-00:13:12; Tr. Vol. II, 131:5-11; Tr. Vol. IV, 416:5-11.
131. Private Facility 1 does not have group activities or community activities. Pet. Ex. 4 at Audio 06/01/2020 IEP meeting, 00:35:47-00:36:24.
132. Parent-1 has seen children who are from Home School and other schools at Private School 1. Tr. Vol. I, 46:20-47:3; Pet. Ex. 4 at Audio 06/01/2020 IEP meeting, 00:35:48-00:36:24.
133. Private Facility 1 would not allow providers to handle Student's \_\_\_\_\_. Tr. Vol. I, 49:8-50:12.

## **Reimbursement**

134. Petitioners provided invoices in the amount of \$580.00 for doctor's visits and charges to attend Private Facility 1 from May 1, 2020 to July 30, 2020. The amount represents Petitioners' co-pay after insurance. Pet. Ex. 4 at 369-380; Tr. Vol. II, 150:16-155:15.

## **V. CONCLUSIONS OF LAW**

### **A. BURDEN OF PROOF**

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

The Supreme Court held in Schaffer that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005). The Court "conclude[d] that the burden of persuasion lies where it usually falls, upon the party seeking relief." Id. at 535. Neither Schaffer nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

### **B. IDEA REQUIREMENTS**

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

both special education and related services. H.A.R. §8-60-1; H.A.R. §8-60-3; 20 U.S.C. §1401(9); 34 C.F.R. §300.34; 34 C.F.R. §300.39; 34 C.F.R. §300.101.

Special education means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a child with a disability to benefit from special education. 34 C.F.R. §300.34; 34 C.F.R. §300.39; 20 USC §1401(26) and (29). To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.” Dept. of Educ. of Hawaii v. Leo W., 226 F.Supp.3d 1081, 1093 (D.Haw. 2016).

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

The school is not required to “maximize the potential” of each student; rather, the school is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” Rowley, 458 U.S. at 200. However, the United States Supreme Court in Andrew F. v. Douglas County School Dist. held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Andrew F. v. Douglas

County School Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. ex rel. Tina F. v. Hawaii Dept. of Educ., 593 F.Supp.2d 1199, 1206 (D.Haw. 2009).

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

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

### C. ISSUES FOR DETERMINATION

- 1. Whether changes made to Student's 1/29/2020-IEP regarding Occupational Therapy Services (namely the removal of information used in substitution for a description of the needed consistency, experience and knowledge required to address Student's needs in this domain, i.e., Private-OT), denied Student a FAPE. The inclusion of information describing Student's need for consistency in provider and the experience and knowledge that provider requires is a necessary aspect of Student's IEP.**
- 

Petitioners allege that Student was denied a FAPE because the clarification statement about an occupational therapist that existed in the 1/29/2020-IEP was removed from subsequent IEPs. Pet. Closing Brief at 6. Petitioners request that "[t]he Clarification statement regarding OT services should be reinstated into Student's IEP until the IEP team deems it unnecessary to address Student's unique circumstances." Pet. Closing Brief at 7. Petitioners argue that DES lied to the IEP team during the May 2020 IEP meeting that a clarification statement was not allowed in an IEP, and that the lie significantly interfered in Parent-1's ability to participate in the IEP meeting and stifled the discussion about the removal of the clarification statement. Closing Brief at 2-4, 7. After careful consideration of the entire record and review of the May 8, 2020 IEP meeting audio, it is determined that Petitioners fail to meet their burden.

In the "Clarification of Services and Supports" section of Student's 1/29/2020-IEP, the following clarification statement is provided for the OT:

Occupational Therapy Services = Occupational therapy must be provided by one, consistent provider who is licensed and has certification and experience.

(FOF 50). The clarification statement is essentially a statement of a desired OT's qualification and a requirement for "one, consistent provider". This clarification statement is not in the "Clarification of Services and Supports" section of the May-IEP and June-IEP. (FOF 87, 100).

Hawaii Administrative Rules §8-60-44(a) outline what must be contained in an IEP. Pursuant to H.A.R. §8-60-44(a), the following must be in an IEP: (1) a statement of the student's present levels of academic achievement and functional performance; (2) a statement of measurable annual goals, including academic and functional goals and a description of short-term objectives or benchmarks; (3) a description of how the student's progress toward meeting the annual goals will be measured and when periodic reports on the progress the student is making toward meeting the annual goals will be provided; (4) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student, and a statement of the program modifications or supports for school personnel that will be provided; (5) an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in activities; (6) a statement regarding statewide assessments; and (7) the projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications. Haw. Admin. Rules §8-60-44(a) almost mirrors 20 U.S.C. §1414(d)(1)(A)(i). A student's IEP "must address such matters as the child's present level of academic achievement, annual goals for the child, how progress toward those goals is to be measured and the services to be provided to the child. §1414(d)(1)(A)(i)." Van Duyn v. Baker School Dist. 5J, 502 F.3d 811, 818 (9th Cir.2007). Nothing in the Hawaii Administrative Rules or 20 U.S.C. §1414(d) requires an IEP to provide a clarification statement for service providers. See e.g., S.M. v. Hawaii Dep't of Educ., 808

F.Supp.2d 1269, 1274 (D.Haw. 2011) (“Nothing in that section indicates that an IEP must specify the qualifications or training of service providers.”); B.V. v. Dept. of Educ., State of Hawaii, 451 F.Supp.2d 1113, 1125 (D.Haw. 2005), *aff’d*, 514 F.3d 1384 (9th Cir.2008) (“J-C’s IEP was not deficient simply because it failed to prescribe specific qualifications for J-C’s Skills Trainer.”); R.E.B. v. State of Hawaii, Dept. of Educ., 770 Fed.Appx. 796, 800 (9th Cir.2019) (“R.E.B. contends that the IDEA required DOE to specify in J.B.’s IEP that his one-on-one aide would have the same qualifications as a contracted skills worker. But ‘nothing in [20 U.S.C. § 1414(d)] indicates that an IEP must specify the qualifications or training of service providers.’”) (quoting S.M. v. Haw. Dept. of Educ., 808 F.Supp.2d 1269, 1274 (D. Haw. 2011)).

Haw. Admin. Rules §8-60-44(d) further states:

Construction. Nothing in this section shall be construed to require:

- (1) That additional information be included in a student’s IEP beyond what is explicitly required in section 614 of the Act<sup>12</sup>; or
- (2) The IEP team to include information under one component of a student’s IEP that is already contained under another component of the student’s IEP.

The inclusion of the qualification would be additional information that DOE is not required to include in an IEP. Similarly, the inclusion of a statement that “one, consistent provider” be the OT is also additional information that DOE is not required to include in an IEP. “We held that the IDEA does not require the exact same vendors to provide the services and transfer of the child was appropriate because the new educational agency could ‘meet the requirements of the “stay put” provision by providing comparable educational placement.’ *Id.* at 1181.” N.D. v. State of Hawaii, Dept. of Educ., 600 F.3d 1104, 1114 (9th Cir.2010) (citing Johnson v. Special Educ. Hearing Office, State of Cal., 287 F.3d 1176, 1181 (9th Cir.2002)). The IEP team can

---

<sup>12</sup> “[S]ection 614 of the Act” refers to 20 U.S.C. §1414. S.M. v. Hawaii Dept. of Educ., 808 F.Supp.2d 1269, FN8 (D.Haw. April 20, 2011).

(though not required to) include additional information, if they think it is necessary. The fact that the May-IEP contains a statement of the qualifications for a speech-language pathologist. (FOF 90) does not mean that the qualifications of an OT must be included, too. Pet. Closing Brief at 6.

Petitioners' argument that DES's lie to the IEP team during the May 2020 IEP meeting significantly interfered in Parent-1's ability to participate in the IEP meeting and stifled the discussion about the removal of the clarification statement is unpersuasive. The discussion regarding the OT's qualification occurred during the May 8, 2020 IEP meeting. DES stated during the meeting:

I don't think that it's appropriate for us to put credentials in the services and support section cause it is hard to fill it... Yeah, but it – it makes it difficult for us to fill the position and it pigeon-holes who we're using... It's not a part of IDEA. It's not part of the rights of parents to get to pick and choose who they have. We just provide services and we can say you will have that service provided. Um, yeah, so we are not going to include that in the support and services section.

An unidentified woman then stated her opinion, "I do not believe that specific information about the training needs to be included in the IEP." There is no evidence that DES intentionally tried to mislead the IEP team. DES stated that having the credentials of the OT in the IEP will make it difficult to fill a vacant position. (FOF 88). This is a legitimate staffing concern since, as stated by Parent-1, they had already gone through 10 or 15 occupational therapists. Pet. Ex. 4 at Audio 05/08/2020 IEP meeting, 3:06:00-3:13:04.

The undersigned respectfully disagrees with Petitioners' interpretation of H.A.R. §8-60-44(a)(4) and 20 U.S.C. §1414(d)(1)(A)(i)(IV) as requiring a description of the qualifications of service providers. Pet. Closing Brief at 5. Student's May-IEP and June-IEP both state the beginning and end dates of the OT services, and the frequency and location. 20 U.S.C.

§1414(d)(1)(A)(i)(VII). If there is more that is required, Petitioners have not cited to any legal authority as requiring such. There is no evidence that Parent-1's participation rights were significantly impeded during the discussion regarding the removal of the clarification statement. Pet. Closing Brief at 7. The audio recording of the May 8, 2020 IEP meeting amply shows that Parent-1 participated in the discussion about the clarification statement and throughout the IEP meeting. There is also no evidence of lost educational opportunity. Pet. Closing Brief at 7, FN 3. Student will continue to receive OT services, the issue is the qualifications of who will be providing the OT services. Therefore, Petitioners fail to meet their burden in showing that Student was denied a FAPE because the May-IEP and June-IEP do not contain a clarification statement for the OT.

**2. Whether removing 120 minutes of direct services from Student's 1/29/2020-IEP is a denial of FAPE.**

Petitioners allege that Student was denied a FAPE because Student's 1/29/2020-IEP provides 120 minutes per week<sup>13</sup> of speech-language therapy, while the May-IEP and June-IEP offer 45 minutes per week of speech-language therapy in a peer program<sup>14</sup>. (FOF 49, 84, 100). Petitioners argue that DES misinformed the IEP team during the May 2020 IEP meeting<sup>15</sup> that they were not allowed to take into account Student's regression and the proposed "IEP was not

---

<sup>13</sup> In the 1/29/2020-IEP, the services grid indicates that Student will receive 240 minutes per week of speech-language therapy. The 240 minutes figure is the sum of two different types of speech-language therapies. In the 1/29/2020-IEP, Student would receive 120 minutes per week of speech-language therapy and 120 minutes per week of speech-language therapy. (FOF 49). Likewise, in the May-IEP and June-IEP, the sum of the two different speech-language therapies is indicated in the services grid. Student will receive 120 minutes per week of speech-language therapy and 45 minutes per week of speech-language therapy, which totals 165 minutes per week. (FOF 84-85).

<sup>14</sup> Student receives all nutrition and hydration through a G-tube. The speech-language therapy that Student receives is to teach Student how to coordinate the movements. (FOF 24, 27).

<sup>15</sup> The IEP team met on May 6 and May 8. Petitioners' closing brief does not state which day DES allegedly misinformed the IEP team.

designed to provide sufficient progress for Student.” Pet. Closing Brief at 10-11. Petitioners’ arguments with respect to this issue are unpersuasive and therefore have not met their burden in showing that DOE denied Student a FAPE by reducing the number of minutes Student would receive therapy.

The change from 120 minutes per week to 45 minutes per week was based on the recommendation of Private Facility 3 Provider 1 during the May 6, 2020 IEP meeting. There were 15 participants in the May 6, 2020 IEP meeting, including Private Facility 3 Provider 1, DOE Provider 4, Parent-1, Parent-2, and DES. (FOF 72). There is no audio or video recording of the May 6, 2020 IEP meeting so what exactly transpired during that meeting is unknown; however, the IEP meeting continued onto May 8, 2020. During the May 8, 2020 IEP meeting, Private Facility 3 Provider 1 and DOE Provider 4 were not present. (FOF 73).

Petitioners’ argument that DES misinformed the IEP team during the May 2020 IEP meeting that they were not allowed to take into account Student’s regression does not rise to the level of a denial of FAPE. At the beginning of the May 8, 2020 audio recording<sup>16</sup>, Parent-1 states:

So um, I just wanted to make sure that everybody understood that, um, in contrast to the position from Wednesday, where we were informed that there was a directive that we had to use data from February and March, um, that that was not actually the case, that there was actually no directive.

Pet. Ex. 4 at 390; Pet. Ex. 4 at Audio 05/08/2020 IEP meeting, 00:00:10-00:00:44; Tr. Vol. I, 36:11-37:22. Parent-1 does not indicate who made the statement and a long silence followed Parent-1’s comment and no one refuted Parent-1’s comment. The statement made during the May 6, 2020 IEP meeting does not rise to the level of a denial of FAPE with respect to the

---

<sup>16</sup> It is unclear at what point Parent-1 began recording the May 8, 2020 IEP meeting. It appears that the meeting had already begun when the recorder was turned on. Tr. Vol. I, 36:11-16.

proposed 45 minutes per week of therapy using a peer program. A directive that the IEP team had to consider information obtained before the COVID-19 pandemic is not the same as not considering regression. After the above statement was made by Parent-1, the DOE members of the IEP team reassured Parent-1 and Parent-2 that the IEP was a draft, that the IEP team is still working on the IEP, and that the discussion was still in progress. Pet. Ex. 4 at Audio of 05/08/2020 IEP meeting, 00:04:50-00:05:30, 00:08:30-00:08:39, 00:10:00, 00:11:25-00:11:50. DES<sup>17</sup> stated: “We understand that there has been regression. We understand that you are seeing things that we haven’t seen before.” Pet. Ex. 4 at Audio of 05/08/2020 IEP meeting, 00:14:17-00:14:27. The IEP team continued to discuss the proposed 45 minutes per week of therapy, and after listening to Parent-1’s reasoning about leaving the therapy at 120 minutes per week, DES stated that DES was comfortable leaving it and then reassessing Student when they “came back.” However, another DOE member of the IEP team informed DES and the other members that they could not leave it at 120 minutes without Private Facility 3 Provider 1 and DOE Provider 4 present as their goals were based on 45 minutes. Pet. Ex. 4 at Audio 05/08/2020 IEP meeting, 02:14:35-02:20:00. Even though DES may have said that there was a directive that the IEP team had to use data from February and March, DES’s willingness to propose 120 minutes of therapy shows that the directive did not preclude the consideration of 120 minutes of therapy. The IEP team considered which services would be best for Student and considered Parent-1’s concerns. Even if Petitioners disagree with the 45 minutes per week of therapy in a peer program proposed by the IEP team, “the mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process,

---

<sup>17</sup> The audio recording does not indicate who is speaking, but based on the undersigned’s familiarity with the witnesses, the speaker sounds like DES.

nor that the DOE's determination was incorrect." Laddie C. ex rel. Joshua C. v. Dept. of Educ., 2009 WL 855966 at \*4 (D.Haw. Mar. 27, 2009). Based on the foregoing, the IEP team being informed that a directive required them to consider data from February and March did not deny Student a FAPE.

Petitioners also argue that the proposed "IEP was not designed to provide sufficient progress for Student." This argument is also unpersuasive. Private Facility 3 Provider 1 has been Student's provider for the last 7 years. (FOF 12). Student's last assessment was almost three years ago in May of 2017. (FOF 76). Private Facility 3 Provider 1's 3/13/2020 Report recommended that Student's program be changed from 120 minutes of direct service per week to 45 minutes of direct service per week with a new consultation of 180 minutes per quarter to develop small group peer opportunities for Student. (FOF 78). Private Facility 3 Provider 1 explained that Private Facility 3 Provider 1's "recommendations are based on [Student's] progress with goals and current roadblocks of personal preference for participation and internal motivation to complete skills consistently. [Student's] strong, emphatic opinions are vital to Student's long-term success and must be considered when designing [Student's] treatment plan." (FOF 79).

While it is understandable that Parent-1 is concerned that a reduction in the minutes may result in regression (Pet. Closing Brief at 9), Petitioners did not offer an alternative expert opinion or any expert opinion to refute the appropriateness of Private Facility 3 Provider 1's recommendation. During the IEP meeting, the IEP team was presented with Private Facility 3 Provider 1's expert recommendation and Parent-1's concerns and opinions. The IEP team decided to adopt the recommendations of the expert. The undersigned Hearings Officer will not second-guess Private Facility 3 Provider 1's expert opinion (when no contradictory expert

opinion exists), nor will the undersigned second-guess the IEP team's provision of special education services.

Petitioners' argument that "the reduction of the minutes provided to Student was done in May 2020, after Student regressed precipitously during the early months of the pandemic" does not invalidate Private Facility 3 Provider 1's recommendation. Pet. Closing Brief at 10. Private Facility 3 Provider 1's report was done on March 13, 2020. The COVID-19 pandemic shutdown began around March 18, 2020. The IEP meeting with Private Facility 3 Provider 1 occurred on May 6, 2020. There is no doubt that Student probably regressed during these past two months; however, there is no more evidence that 120 minutes is more effective than 45 minutes than there is evidence that 45 minutes is more effective than 120 minutes when the setting in which Student would receive the therapy would also be changed. The change in Student's direct therapy isn't just to the number of minutes; the reduction in direct therapy will be accompanied by a peer program. The change in therapy is to address Student's personal preference and internal motivation which were found to be roadblocks to Student's continued growth. (FOF 79). While Petitioners believe that Private Facility 3 Provider 1's focus on Student's "human dignity" is misplaced (Pet. Closing Brief at 9-10), the undersigned will not attempt to guess at how much "human dignity" should be considered in creating a program when no other expert opinion has been presented. N.S. v. Hawaii, Dept. of Educ., Civil No. 09-00343 SOM/KSC, 2010 WL 2348664, \*5 (D.Haw. June 9, 2010) ("The mother's conclusion, without more, does not counter the testimony of the experts who reviewed the reports and determined that services were not necessary.") Private Facility 3 Provider 1's 3/13/2020 Report notes:

This data reveals [Student] is gaining independence to communicate wants and needs. Student is extremely clear when Student is not interested in an activity. Student will turn Student's head, push the item away or throw the item on the ground. Many strategies including token reinforcement systems, rewards for

participation in smaller increments and breaking down steps to the meal have all been utilized to aid [Student] in maintaining a positive relationship. Student continues to build Student's opinions and Student's ideas and feelings are respected at all times.

Pet. Ex. 2 at 255-256.

Plaintiffs presented no data, expert opinion, or other evidence that the IEP's provision...[of special education] was insufficient. The Court will not second-guess the IEP team's provision of special education services, absent contrary evidence. The IDEA relies heavily upon the expertise of school districts to meet its goals and this Court will not substitute its own judgment of sound educational policy for that of the educational authorities. [Citation omitted]. Although Plaintiffs are not satisfied with the DOE's offer of FAPE, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C.2002) (stating that the IDEA does not provide for an "education...designed according to the parent's desires") (citation omitted).

G.A. v. Hawaii, Dept. of Educ., Civil No. 10-00730 LEK-BMK, 2011 WL 3861431, \*14

(D.Haw. Aug. 31, 2011). Based on the foregoing, Petitioners have failed to meet their burden of proof that the IEP is not reasonably calculated to enable Student to receive educational benefits because it offered 45 minutes per week of therapy in a peer program.

**3. Whether removing the provider from Student's 1/29/2020-IEP significantly affects Student's ability to access Student's comprehensive IEP program, as it is physically impossible for one provider to teach Student, maintain safety, ensure proper use of equipment, and operate a device.**

Petitioners allege that Student was denied a FAPE when the provider in Student's 1/29/2020-IEP was not in the May-IEP and June-IEP offers. Petitioners are alleging that the May-IEP and June-IEP are substantively flawed because it does not contain a "provider." Petitioners fail to meet their burden with respect to this issue.

Access to a device is extremely important for Student. (FOF 19-20). A provider helps Student with the device and is responsible for collecting data on how often Student uses a device. The data is collected by clicking on an "app" on an iPad or phone or taking down the information

on a piece of paper. (FOF 48). By taking away the provider, a provider would assume the responsibility of helping Student use the device and collecting data while running Student's program. (FOF 82).

During the May 8, 2020 IEP meeting, Private Facility 1 Provider 1 recommended that the provider be removed from the May-IEP because a provider can assume the responsibilities of another provider and it will help in moving Student towards more independence. Private Facility 1 Provider 1, who is responsible for any provider who will be working with Student, ensured Parent-1 that the provider will be capable of running Student's program and handling a device. After listening to Parent-1's concerns and arguments, Private Facility 1 Provider 1 maintained Parent 1's recommendation of removing the provider. The IEP team listened to Private Facility 1 Provider 1's explanation and Parent-1's concerns and arguments and decided to follow the recommendation of Private Facility 1 Provider 1. (FOF 82).

Petitioners called Private Facility 1 Provider 2 as a witness to show that the removal of a provider would negatively impact a provider's ability to perform their duties; however, Private Facility 1 Provider 2's opinions were not available to the May-IEP team. Private Facility 1 Provider 2 had just started working with Student in May of 2020 and Private Facility 1 Provider 2 was not a part of the May-IEP or June-IEP meetings. (FOF 2, 72-73, 95). "[A]n IEP must be evaluated in light of the 'snapshot' rule, 'which instructs us to judge an IEP not in hindsight, but instead based on the information that was reasonably available to the parties at the time of the IEP.'" Dept. of Educ., State of Haw. v. Leo W., 226 F.Supp.3d 1081, 1099, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016) (citing Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1187 (9th Cir.2016)). Private Facility 1 Provider 2's opinions were not available to the May-IEP team and the team could not consider what was not available to them.

Besides Private Facility 1 Provider 1's testimony, Petitioners presented no other expert testimony, data or documentation to contradict Private Facility 1 Provider 1's recommendation of removing the provider. The undersigned will not second-guess Private Facility 1 Provider 1's recommendation when there is no contradictory expert information.

While Parent-1 testified about the importance of the device, and no one is disputing the importance of the device, Parent-1 gave misleading testimony about the removal of the device from the May-IEP. The 1/29/2020-IEP lists "device with transition photos" as a Supplementary Aids and Services. (FOF 44). The May-IEP does not list "device with transition photos" in the Supplementary Aids and Services section. (FOF 87). Parent-1 testified that the IEP team did not discuss removing the device when drafting the May-IEP and that Parent 1 only found out a few days before testifying on August 12, 2020. Tr. Vol. II, 101:13-102:6, 106:13-24. However, this is not true. The IEP team did discuss why the "device with transition photos" was not in the May-IEP during the May 8, 2020 IEP meeting. Pet. Ex. 4 at Audio 05/08/2020 IEP meeting, 02:43:33-02:46:00. Parent-1 wanted to give the impression that "they have removed \_\_\_\_." Parent-1's misleading statements coupled with Parent 1's reluctance to be forthright during cross-examination draws into question Parent-1's credibility and results in Parent 1's testimony being afforded less weight<sup>18</sup>.

Petitioners' disagreement with the IEP team's decision to remove the provider, without more, is not sufficient to show that parental participation was significantly impeded or that the IEP team's decision was incorrect. Laddie C., 2009 WL 855966 at \*4.

---

<sup>18</sup> For example, Parent-1 was reluctant to answer a simple question about Private Facility 1 not being a private school. Tr. Vol. II, 181:14-182:14.

There is also no evidence in the record that removing a provider would result in a loss of an educational opportunity or cause a deprivation of an educational benefit for Student when Student would still have someone helping with the device and taking data on the usage. Petitioners failed to meet their burden of showing that Student is denied a FAPE by the removal of a provider.

**4A. Whether due to Student’s medical and emotional condition, and to the isolating nature of the offered location for the implementation of Student’s Extended School Year (and extended school day) program, the ESY/ESD program offered by the DOE is improper and denies Student a FAPE under Section 504 and the IDEA. The ESY program offered in the 6/1/2020-IEP would not have been in the least restrictive environment.**

---

Petitioners make two allegations: (1) due to Student’s medical and emotional conditions and the isolating nature of the “offered location,” the extended school year/extended school day (“ESY”) program offered is improper; and (2) the ESY program offered in the June-IEP would not have been in the LRE. Petitioners fail to meet their burden of proof with respect to this issue.

With respect to Petitioners’ first allegation, Petitioners fail to show that the ESY program was made improper due to Student’s health and “isolating nature” of the location. During the summer of 2020, which is the ESY period that is at issue, DOE reopened Home School to provide a summer program for a select number of students. Home School had a four-week summer school program beginning June 15, 2020 for general education students and section 504 students who were struggling after the school closure in March. (FOF 110). The students in the summer school program ranged in grade. (FOF 111).

Home School also had an ESY program for the special education students. (FOF 109). There was one special education classroom that had several students. (FOF 113). Home School had a second room made available for Student in the event that Student was not comfortable in the special education classroom or parents didn’t want Student in the special education

classroom. (FOF 114). The length of time in school per day for the ESY students varied depending on their individual needs and IEPs; Student would be the only one to be at school until 4:30 p.m. (FOF 115).

The ESY students had access to their non-disabled peers during recess time; during a peer program; and during “special time.” (FOF 116). Student would have been integrated with the general education students in the summer school program. (FOF 116).

All the related service providers that were providing services to ESY students at Home School were on campus. (FOF 117). Student would have received services from providers during the ESY program. (FOF 117-118).

Home School implemented safety protocols which included social distancing, wearing face masks, temperature checks, and reducing the number of people who were allowed on campus. The safety protocols took into consideration children who were not capable of wearing face masks by practicing social distancing of six feet. (FOF 119).

Furthermore, “location” is within the DOE’s authority to decide. Parent-1 testified as follow:

Mr. Peck: Okay. Another issue here, issue 4, there was some statement by opposing counsel that the issue of Issue 4 is about placement and placement is one thing if it applies to ESY or it applies to school year services, but that’s not your issue, is it? What you raise in Issue 4 is due to student’s medical and emotional condition and the isolating nature of the offered location for the implementation of student’s extended year – extended school day program, the ESY program offered is improper. So your issue wasn’t an issue of placement it was an issue of location, where should the IEP be implemented during COVID-19, correct?

Parent-1: That is correct.

Tr. Vol. II, 143:12-23. Then, Parent-1 gave the following testimony:

Mr. Peck: ....What was your real concern? Was it to change the child's placement, like not with special ed kids/with special ed kids, or was it because of this pandemic?

Parent-1: It was because of the pandemic.

Mr. Peck: And so you were just looking for a safe location?

Parent-1: That is correct. And we did not feel that the [Home School] campus was ready to be safe for Student.

Mr. Peck: Did anybody discuss the regular school year placement, like changing the placement for your child with regard to the regular school year?

Parent-1: The principal mentioned that and I made it clear that we were only talking about a location to hold ESY.

Tr. Vol. II, 144:11-22. In Petitioners' closing brief, Petitioners argue that "Parent...sought the implementation of the ESY program to be done at Student's private provider's facilities." Pet. Closing Brief at 15. Essentially, Parent-1 did not want ESY at Home School; Parent-1 wanted ESY at Private Facility 1. The District Court of Hawaii has held that "the physical location where a placement will be implemented is an administrative decision made by the DOE...." N.S. v. State of Hawaii, Dept. of Educ., Civil No. 09-00343 SOM/KSC, 2010 WL 2348664, \*8 (D.Haw. June 9, 2010). See also, Oliver C. v. State of Hawaii, Dept. of Educ., 762 Fed.Appx. 413, 415 (9th Cir.2019) ("A change in location alone does not qualify as a change in 'educational placement.'" Upon student moving, it was within DOE's authority to determine what school would implement student's IEP, against Parents' wishes.) It was within DOE's authority to decide the location of where Student's ESY services would be implemented, which was the same place as where Student's IEP would have been implemented during the regular school year. (FOF 129). Based on the foregoing, DOE took reasonable steps to protect Student's health,

Student would not have been isolated, and it was within DOE's discretion to decide the location of where Student's ESY program would be implemented.

With respect to Petitioners' argument that the ESY program offered in the June-IEP would not be in the least restrictive environment, Petitioners fail to meet their burden in showing that the ESY program will not be implemented in the LRE.

Pursuant to H.A.R. §8-60-15, the least restrictive environment requirements are:

The department shall ensure that:

- (1) To the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, are educated with students who are nondisabled; and
- (2) Special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only if 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." See 20 U.S.C. §1412(a)(5).

Petitioners make two arguments regarding least restrictive environment: (1) Vice Principal said during the May/June IEP meetings that Student will be in "a separate room" from the rest of the students—proposing isolation on campus; and (2) "[Vice Principal] said 'Student's the only student who goes to 4:30' with no one else on campus; no peers.'" Pet. Closing Brief at 14-15. First, contrary to Petitioners' arguments, Vice Principal could not have made those statements at the IEP meetings because Vice Principal did not attend the May 6, 2020, May 8, 2020, and June 1, 2020 IEP meetings. (FOF 72-73, 95). Second, Vice Principal testified that there was one special education classroom for the ESY students, and that Student would have been in that classroom with the other ESY students had Student attended ESY for the summer of 2020 at Home School. (FOF 113). A separate classroom was made available in the event that Student was not able to be in the special education classroom or parents did not want Student in the special education classroom. Having a contingency plan in place in the event that Student could

not be in the special education classroom was a sound administrative decision. Considering Student's health issues and the risks posed by the COVID-19 virus, the availability of the second classroom did not make the "offered location" isolating.

With respect to Petitioners' argument that Student is the only student at school till 4:30 p.m., Vice Principal testified that the length of time in school per day for the ESY students varied depending on their individual needs and IEPs, with Student being the only one there until 4:30 p.m. (FOF 115). Student being the last student to leave school does not make the ESY program non-compliant with the LRE. Student's June-IEP states that "Student will have access to typically developing peers during summer ESY program to maintain social skills." (FOF 100). Had Student gone to Home School during the summer of 2020 for ESY, Student would have had access to the non-disabled peers during recess time, peer program time, and "special time," such as P.E. (FOF 116). Student's access to non-disabled peers would have been throughout the day, not at 4:30 p.m.

Furthermore, Student being the last student to leave campus does not make Student's ESY program improper or isolating because someone has to be the last person to leave school. For example, in the summer of 2020, there were several students in the ESY program. If the students left school at different times, the student who is the last to leave will not have any peers. If the ESY program for this student is deemed improper because it is isolating, and DOE places this student in a private facility, as Petitioners are seeking here, the ESY program will not be able to exist at Home School because all students will eventually be the last student to leave as each student is placed in a private facility. To have no one in the special education classroom be "isolated," all the ESY students would have to leave at the same time.

Petitioners further fail to prove by a preponderance of the evidence that the ESY program offered in the June-IEP would not have been in the least restrictive environment. Petitioners did not offer any evidence, testimonial or documentary, that Student could succeed in a less restrictive environment. Student would have been placed in a special education classroom with other students. Student would have had access to the general education students during recess time, peer time, and special time. Private Facility 1 is more restrictive than Home School because Private Facility 1 has no non-disabled children.

Lastly, although Petitioners allege that it was a denial of “FAPE under Section 504,” Petitioners did not present any evidence or argument during the due process hearing and their closing brief regarding their Section 504 claim. Therefore, Petitioners fail to meet their burden in proving their Section 504 claim.

**4B. Whether the discussions surrounding the determination of the location for the implementation of Student’s ESY/ESD program denied Parent/Student a FAPE by focusing on what was available instead of what was needed. The DOE guided the inquiry by eliminating the possibility of including non-disabled children, by refusing to consider a private location because it did not fit into its perspective of the continuum of placement, and by failing to adhere to the Holland Test in addition to determining the location for implementation based on availability and not needs. This deprived the IEP team of the opportunity to discuss the Student’s need more thoroughly and denied parent participation by steering the conversation from its required focus: Student’s needs.**

---

In this allegation, Petitioners allege that the discussion surrounding the determination of the location for the implementation of Student’s ESY program denied Student a FAPE because it focused on what was available instead of what was needed. Parent-1 made clear during the June-IEP meeting that Parent 1 did not want to talk about changing Student’s placement, and that Parent 1 only wanted to talk about where Student’s ESY program would be implemented during the summer of 2020 because of safety concerns brought on by the COVID-19 pandemic. Parent-1 stated during the June-IEP:

Well, I think after we learned more about the lack of training and lack of previous experience in implementation of the safety measures which were outline by the CDC, which we were provided with, Principal 1, thank you very much. This is day one, and we don't feel comfortable that people have been familiar enough, and trained enough, and screened enough, to ensure a safe environment for our child at this time. Now, we are open to the fact that maybe by the fall, when school is open, that that will have changed, and this will become a routine thing. But we are not at this time willing to have our child be the first person exposed to this new scenario. Pet. Ex. 4 at Audio 06/01/2020 IEP meeting, 00:20:29-00:21:15.

In response to Private Facility 1 Provider 1's statement that Private Facility 1 has no teachers, Parent-1 stated:

I think this is a unique situation and I think if [Student] is placed at [Private Facility] then it's perfectly within the capability of the DOE to send Student, or have Student educated, even if has to be in a separate room, with speech therapy, occupational therapy, PT and the educational instruction. Pet. Ex. 4 at Audio 06/01/2020 IEP meeting, 00:21:27-00:23:31.

Through the course of the June-IEP meeting, the IEP team went through the continuum of alternative placements in discussing where Student would go for that summer.

The "continuum of alternative placements" is governed by H.A.R. §8-60-16, which reads:

- (a) The department shall ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services.
- (b) The continuum required in subsection (a) shall:
  - (1) Include the alternative placements listed in the definition of special education under section 8-60-2 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
  - (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

The definition of "special education" under §8-60-2 reads in relevant part:

- (1) Special education means specifically designed instruction, at no cost to the parents, to meet the unique needs of a student with a disability, including:
  - (A) Instruction conducted in the classroom, in the home, in hospitals and institutions, in the community, and in other settings; and
  - (B) Instruction in physical education.

Petitioners allege that the “DOE ruled out providing Student ESY services at the private facility because it wasn’t a licensed facility. But that is not a requirement for considering whether it would be appropriate as a location to implement the IEP.” Pet. Closing Brief at 15-16.

Petitioners cite to 20 U.S.C. §300.115 (Continuum of alternative placements) and §300.39 (Special Education) in their argument. Whether Petitioners are making a location argument or a placement argument, both arguments fail.

If Petitioners are making a location argument, the location of where a student’s IEP will be implemented is an administrative decision made by the DOE. N.S., 2010 WL 2348664, \*8. The IEP team was not required to go through the continuum of alternative placements or the Holland Test<sup>19</sup> in deciding the location of where to implement Student’s IEP.

If Petitioners are making a placement argument, Petitioners’ argument fails because the Home School setting is a less restrictive environment than Private Facility 1. Although Parent-1 has seen children at Private Facility 1, Private Facility 1 does not have an educational program, has no teachers, and will not have group or community activities. (FOF 135-136). The children that Parent-1 has seen at Private Facility 1 are all special needs children. (FOF 137). While

---

<sup>19</sup> In considering whether DOE proposed an appropriate placement for a student, the following facts must be examined: (1) the educational benefits available to Student in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of Student’s presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming Student in a regular classroom. Sacramento City Unified School Dist., Bd. Of Educ. v. Rachel H., by and through her guardian ad litem, Robert Holland; et. al., 14 F.3d 1398,1400-1401 (9th Cir.1994).

private placement need not adhere to the least restrictive environment requirement of the IDEA, LRE is a factor which can be considered in the determination of the appropriateness of the private placement. C.L. v. Scarsdale Union Free School Dist. 744 F.3d 826, 836 (2nd Cir.2014). However, at Home School, Student will have access to non-disabled peers.

Besides concerns about Home School's ability to keep Student safe from the COVID-19 virus, Petitioners are not alleging that DOE cannot implement Student's IEP. As explained to Parent-1 during the June-IEP meeting and testified to during the due process hearing, Home School had safety protocols in place to protect Student during the summer of 2020. (FOF 119). While it is Parent-1's personal belief that Private Facility 1 can better implement safety protocols, that alone is not enough to make Home School not an appropriate placement.

However, even assuming that DOE committed a procedural violation during the discussion, Petitioners fail to show that the procedural error significantly impeded Parent-1's participation rights. The IEP team considered various alternative placements, from a general education setting to a private facility setting (Private Facility 1) to a home setting, and rejected the option of placing Student at Private Facility 1. (FOF 97). Parent-1 not getting what Parent 1 wants does not mean that the IEP team did not consider it, nor does it mean that Parent-1 was denied Parent 1's participation rights. Based on the audio recording of the June 1, 2020 IEP meeting, Parent-1 fully and assertively participated in the discussion. Therefore, even if there was a procedural violation by not thoroughly discussing placing Student at Private Facility 1, Petitioners fail to show that the procedural violation resulted in a loss of educational opportunity,

significantly impeded parent's opportunity to participate or caused a deprivation of educational benefits<sup>20</sup>. Amanda J., 267 F.3d 877, 892 (9th Cir.2001).

Lastly, although Petitioners allege that the June-IEP meeting should have focused on "Student's needs," Petitioners do not specify exactly what needs are not being met. If the "Student's needs" that Petitioners are referring to are the need for peer interaction and safety, those have been addressed above. For the reasons stated above, Petitioners fail to meet their burden with respect to issue this issue.

**5. Whether the DOE denied Student a FAPE under Section 504 and the IDEA by materially failing to implement Student's IEP<sup>21</sup> from, on, or about 3/17/2020 until the end of the 2019-2020 regular school year.**

Petitioners allege that the DOE materially failed to implement Student's IEP from 03/17/2020 until the end of the 2019-2020 regular school year, which was May 28, 2020. (FOF 52). Pet. Closing Brief at 17. Petitioners argue that "Student has experienced profound losses. Although, Petitioners do not have the ability to provide exacting evidence of Student's regression, the DOE does and should be required to evaluate and mitigate these losses." Pet. Closing Brief at 18. Based on the evidence adduced at the due process hearing, the undersigned Hearings Officer finds that Petitioners did not meet their burden with respect to this issue. It is important to note that this issue is only alleging a material failure to implement between March 17, 2020 to May 28, 2020—approximately two and a half months.

---

<sup>20</sup> Although not argued by Petitioners, there could not have been a loss of educational opportunity or deprivation of educational benefit because Private Facility is not an educational setting and did not have teachers. Had Student been placed at Private Facility, DOE would have had to provide the educational instruction along with all of Student's service providers.

<sup>21</sup> During the due process hearing, Petitioners clarified that the IEP alleged in Issue No. 5 was the January and May 2020 IEPs. Tr. Vol. III, 302:13-303:7.

The Ninth Circuit Court in Van Duyn v. Baker School Dist. 5J held that “when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.” Van Duyn v. Baker School Dist. 5J, 502 F.3d 811, 815 (9th Cir.2007). “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” Van Duyn, 502 F.3d at 822.

The term FAPE means special education and related services that are provided in conformity with an IEP. 20 U.S.C. §1401(9)(D). Special education and related services “need only be provided ‘in conformity with’ the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.” Van Duyn, 502 F.3d at 821.

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

Dept. of Educ., Hawaii v. C.J., 2011 WL 6002621, CV. No. 10-00257 AWT-BMK, at \*4

(D.Haw. Nov. 29, 2011). Petitioners do not specify how or what portions of Student’s IEP DOE failed to implement. Although not binding legal authority, the United States Department of Education (“USDOE”) provided some guidance to districts on how to address providing IDEA

services during school closures. In the *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, the USDOE noted that “the IDEA, Section 504 and Title II of the American Disabilities Act do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time. . .because of exceptional circumstances, such as an outbreak of a particular disease.”

However, the USDOE went on to say

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA. . . .

76 IDELR 77 (EDU, March 2020). The USDOE’s guidance comports with the Ninth Circuit Court’s decision in N.D. v. Hawaii Dept. of Educ., 600 F.3d 1104 (9th Cir.2010), which addressed disabled students’ access to education during “Furlough Fridays” in Hawaii in the 2009-2010 school year. The Ninth Circuit Court held that “the overarching goal of the IDEA is to prevent the isolation and exclusion of disabled children, and provide them with a classroom setting as similar to non-disabled children as possible.” N.D., 600 F.3d at 1115. The Ninth Circuit Court affirmed the district court’s denial of a preliminary injunction because disabled and non-disabled students were equally affected. The Hawaii DOE did not implement policies and procedures that favored one group over the other, but rather made a financial decision to balance the budget that affected all students.

When Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions. Hawaii’s furloughs affect all public schools and all students, disabled and non-disabled alike. An across the board reduction of school days such as the one here does not conflict with Congress’s intent of protecting disabled children from being singled out. In comparison to cases in which a child is singled out in relation to peers, the furlough days do not

remove the plaintiffs from the regular classroom setting anymore than they do the other children. Disabled children are not singled out for furlough days. To the extent possible under the new school calendar, the disabled children are still “mainstreamed” with regular children at school. To allow the stay-put provisions to apply in this instance would be essentially to give the parents of disabled children veto power over a state’s decisions regarding the management of its schools. The IDEA did not intend to strip administrative powers away from local school boards and give them to parents of individual children, and we do not read it as doing so.

N.D., 600 F.3d at 1116-1117. While the Ninth Circuit Court did note that N.D.’s claim was more properly characterized as a “material failure to implement the IEP” under Van Duyn, 502 F.3d at 822, it still provides significant guidance on how at the administrative level we should be interpreting and applying the IDEA when faced with unprecedented challenges that require sacrifices from everyone

The United States Department of Education Office for Civil Rights (“OCR”) and Office of Special Education and Rehabilitative Services (“OSERS”) later clarified that during this unprecedented time,

School districts must provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students. In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online or telephonically.

*Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, 120 LRP 10623 (OSERS/OCR March 21, 2020). During the beginning months of the COVID-19 pandemic lockdown, DOE made reasonable efforts to provide special education, occupational therapy, speech-language therapy, and physical therapy services to Student. DOE’s efforts came in the form of

teletherapy, emailed resource materials (both generic and tailored to Student), phone conference, and constant communication through various modes to keep in contact with Parent-1 during the lockdown. (FOF 55-64). For the reasons stated above, the undersigned Hearings Officer finds that Petitioners have not met their burden in showing that DOE failed to materially implement Student's IEP from March 17, 2020 to May 28, 2020.

Lastly, although Petitioners allege that it was a denial of "FAPE under Section 504," Petitioners did not present any evidence or argument during the due process hearing and their closing brief regarding their Section 504 claim. Therefore, Petitioners fail to meet their burden in proving their Section 504 claim.

**F. PETITIONERS FAIL TO MEET THEIR BURDEN IN SHOWING THAT PRIVATE FACILITY 1 IS AN APPROPRIATE PLACEMENT**

To the extent that Petitioners are seeking reimbursement for Private Facility 1. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in a private school and request reimbursement for tuition at said private school from the local educational agency. Florence County School Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 364-365, 126 L.Ed.2d 284 (1993) (citing School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985)), see also 20 U.S.C. §1415(b)(6), (f)(1)(A). A parent who unilaterally places a child in private school pending review proceedings under the IDEA is entitled to reimbursement if the parent can establish that (1) the public placement violated the IDEA, and (2) the private school placement was proper under the IDEA. Doug C., 720 F.3d 1038, 1041, 1047-1048 (9th Cir.2013) (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993)). If both are met, "the district court must then exercise its 'broad discretion' and weigh 'equitable considerations'

to determine whether, and how much, reimbursement is necessary.” C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Carter, 510 U.S. at 15-16, 114 S. Ct. 361).

The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in Frank G. v. Bd. Of Educ., 459 F.3d 356, 365 (2nd Cir.2006), where “to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. They need only demonstrate that the placement provides **educational instruction** specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.” C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Frank G. v. Bd. Of Educ., 459 F.3d at 365) (bold added). Parental placement can be appropriate, even if it does not meet state standards. 34 C.F.R. 300.148(c). See e.g., Florence County Sch. Dist. Four v. Carter, 20 IDELR 532 (U.S. 1993).

In this case, Petitioners have failed to prove that DOE denied Student a FAPE. However, even assuming that Petitioners did meet their burden, Petitioners have failed to show that Private Facility 1 is an appropriate placement for Student. There is no evidence that Private Facility 1 provided educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction. Private Facility 1 is not a private school and has no teachers or an educational program. (FOF 135). Based on the foregoing reasons, Petitioners have not proven that Private Facility 1 placement was proper under the IDEA.

**V. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the issues in the Complaint by a preponderance of the evidence. As Petitioners have failed to prove that DOE denied Student a FAPE, Petitioners' request for the relief sought in the Complaint, including reimbursement of expenses, fees and costs, is denied.

**RIGHT TO APPEAL**

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

DATED: Honolulu, Hawai'i, February 13, 2021.

---

CHARLENE S.P.T. MURATA  
Hearings Officer  
707 Richards Street, Suite 520  
Honolulu, Hawai'i 96813  
Phone: (808) 587-7680  
Fax: (808) 587-7682  
atg.odr@hawaii.gov