



OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

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

Petitioner(s),

vs.

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

Respondents.

DOE-SY1920-053

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: September 24, 2020
October 12, 2020
October 21, 2020

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On June 15, 2020, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE") received a request for a due process hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities

¹ Personal identifiable information is contained in the Legend.

Education Act, from Student, by and through Parent 1 (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on June 26, 2020. A status conference was held on July 24, 2020, at which time this Hearings Officer granted Petitioners leave to file an Amended Complaint. Petitioners’ Amended Complaint was filed on July 24, 2020. Respondents filed DOE’s Response to Petitioners’ Amended Complaint on August 3, 2020. Respondents also filed DOE’s Amended Response to Petitioners’ Amended Complaint on August 3, 2020.

A prehearing conference was held on August 20, 2020, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Kris S. Murakami, Esq. (hereinafter “Ms. Murakami”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for September 23-25, 2020.

On September 15, 2020, Mr. Peck requested a telephone status conference with this Hearings Officer and Ms. Murakami. Mr. Peck stated that one of their main witnesses had a family emergency, requiring that witness to travel to the mainland. At that time, due to the witness’s emergency, the Hearing was rescheduled to September 24, 2020, October 12, 2020 and October 21, 2020. Due to the rescheduling of the Hearing, Petitioners requested an extension of the original deadline by which a decision was to be made from October 7, 2020 to November 21, 2020. Respondents did not object to the request for extension, and Petitioners’ request for an extension was granted and the new deadline was set at November 21, 2020.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure compliance with government mandated social distancing.² An Order Regarding Video Conference Due Process Hearing was issued on

² See Governor of the State of Hawai‘i’s Twelfth Proclamation Related to the COVID-19

September 8, 2020, which set forth the parameters for the video conference hearing. These parameters included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

The Hearing commenced on September 24, 2020, using the Zoom video conferencing platform. Each attendee to the Hearing was sent a link through email to access the Hearing by the Office of Dispute Resolution. Present in the video conference Hearing were Hearings Officer Chastity T. Imamura; Parent 1, District Educational Assistant (hereinafter “EA”), Speech-Language Pathologist 1 (hereinafter “SLP 1”), Vice Principal (hereinafter “VP”) and Principal during their case and rested. SLP 1 was qualified to testify as an expert in the field of speech-language pathology and augmentative communication. Petitioners did not present any rebuttal evidence.

Each party submitted their exhibits for the Hearing by the disclosure deadline of September 16, 2020. On October 22, 2020, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on October 30, 2020. Any objections to the proposed exhibits were due on November 4, 2020. Neither Petitioners nor Respondents submitted any corrections or additional proposed exhibits to be received as evidence for

Emergency, effective August 20, 2020, and Governor of the State of Hawai‘i’s Thirteenth Proclamation Related to the COVID-19 Emergency, effective September 22, 2020.

consideration in the Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-050; and Exhibit 2, pages 051-081, 089-093, 098-104.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 2, pages 051-053, 060, 068; Exhibit 3, pages 091-107, 112-133; Exhibit 6, pages 311-312, 329, 331, 332-337; Exhibit 7, pages 369-370; Exhibit 8, pages 374-401; and Exhibit 9, pages 446-451, 486-488.

Both parties wanted the opportunity to submit closing briefs regarding the legal issues and the relevant facts supporting those issues to this Hearings Officer for review. The deadline by which the briefs were to be submitted was Thursday, November 12, 2020. Both parties timely submitted their closing briefs on that date.

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.

II. JURISDICTION

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

III. ISSUES PRESENTED

Petitioners assert six (6) issues in the Amended Complaint to be addressed at the Hearing:

1. Whether Respondents denied Student a free and appropriate public education (hereinafter "FAPE") when the 10/2/2018 & 5/16/2019 Individualized Educational Program (hereinafter "IEP") teams utilized improper factors to determine Student's placement. Petitioners argue that Student could succeed in a less restrictive

placement then that which is identified in the IEP document for the period from 10/2/2018 to 7/30/2019.

2. Whether Respondents denied Student a FAPE when the DOE failed to collect sufficient data/information, prior to the 10/2/2018 and 5/16/2019 IEP meetings, necessary to determine whether Student qualified for Extended School Year (hereinafter “ESY”) services. Petitioners argue that the discussion held regarding Student’s eligibility for ESY services was insufficient and that Student should have been made eligible for ESY services.
3. Whether Respondents denied Student a FAPE when the DOE failed to collect sufficient data/information and/or include participation of knowledgeable persons about Student’s needs at the 10/2/2018 IEP meeting. This includes a discussion about assistive technology and/or communication skills. This allegation relates to the concept of “lost educational opportunity and parental participation.” The allegation now being made includes: (a) the 10/2/2018 IEP was not appropriately updated to reflect the Student’s need for a device, (b) merely stating device is insufficient/vague and would interfere with parental participation in the monitoring of Student’s program, and/or (c) the DOE has manipulated the Prior Written Notice (hereinafter “PWN”) for purposes of litigation.
4. Whether Respondents denied Student a FAPE when the 10/2/2018 IEP and the 5/16/2019 revisions, if any, to the 10/2/2018 IEP fails to provide sufficient Supplementary Aids and Services for Student to be successful in the Least Restrictive Environment (hereinafter “LRE”) and/or make adequate gains on Student’s academic, behavioral and/or social needs. This includes Petitioners’ argument that the terms “Use appropriate materials to deliver instruction” and “Provide visuals to help with a variety of tasks during school day” are vague and will not allow Parent 1 a means to enforce this modification. Petitioners further allege that the phrase “Provide appropriate modeling for asking and answering questions” isn’t a sufficient means to support Student’s acquisition of communication skills.
5. Whether Respondents denied Student a FAPE when the 10/2/2018 IEP expired on 10/2/2019 and has not been replaced. While the 5/17/2019 PWN claims to have extended Student’s program until May 14, 2020, Petitioners believe that the 5/17/2019 PWN they were provided after their original filing this instant action has been manipulated for purposes of litigation. The allegation now being made includes: (a) the 10/2/2018 IEP was not appropriately updated to reflect the offer to extend Student’s annual IEP until May 14, 2020, (b) it would be improper to have extended Student’s IEP until May 14, 2020, (c) the DOE has manipulated the PWN for purposes of litigation and/or the IEP would have expired on May 14, 2020 and the DOE failed to provide a current offer of FAPE because of its expiration.
6. The 5/16/2019 IEP team determined that Student required transition supports to allow Student to successfully enter the placement but failed to describe these supports in Student’s IEP.

Petitioners filed a Motion for Partial Summary Judgment on August 31, 2020. At the hearing on the Motion, Ms. Murakami made specific factual representations regarding the allegations in Petitioners' Motion and conceded that no genuine issues of material fact existed regarding those representations. This Hearings Officer granted Petitioners' Motion for Partial Summary Judgment and concluded that no genuine issue of material fact exists in determining whether the DOE denied Student a FAPE by failing to conduct an annual review of Student's IEP annually and/or failed to have an IEP in place for Student at the start of the 2020-2021 school year.³ Therefore, this Hearings Officer finds that as to Issue #5, Petitioners have proven the allegation that Respondents denied Student a FAPE by failing to have an annual review of Student's IEP prior to its expiration.

In Petitioners' Closing Brief, filed on November 12, 2020, Petitioners withdrew Issue #6, therefore Issue #6 will not be further addressed in this Decision.⁴

IV. FINDINGS OF FACT

Student's background

1. Student has diagnoses.⁵
2. In February 2017, Student was referred to Home School for possible evaluation for special education and related services through the early intervention system of the State of Hawai'i Department of Health.⁶ An IEP was prepared for Student in May

³ See Order Granting Petitioners' Motion for Partial Summary Judgment, filed on September 22, 2020.

⁴ See Petitioners' Closing Brief, filed November 12, 2020, page 10-11.

⁵ Petitioners Exhibit 1, page 002, page 025, 027 (hereinafter referenced as P-Ex.1, p.002, 025, 027").

⁶ Testimony of SSC, Transcript Volume 3, page 182, line 25 to page 184, line 4 (hereinafter referenced as "Tr.V3, 182:25-184:4"); Respondents' Exhibit 2, page 051 (hereinafter referenced as "R-Ex.2, p.051").

2017.⁷

3. On August 1, 2017, Parent 1 revoked consent for continued provision of special education and related services for Student.⁸
4. During the time between August 2017 to October 2, 2018, Student did not go to any other school but received some services and some speech therapy sessions.⁹

Home School's preschool program

5. Prior to the 2018-2019 school year, Private School Director was contacted by a district educational specialist at the DOE to be a consultant for a program that the DOE was going to initiate in the classrooms at some of the DOE public schools.¹⁰
6. Private School Director's program was based on practices that use a set of principles to achieve change. One of the key assessments used for programs is an Assessment, which determines the skills for students relative to their non-disabled counterparts.¹¹
7. Private School Director's role as a consultant was to create a program, train the DOE teachers and staff to implement the program, assist with identifying objectives for students in the program, and guide the DOE's program through training and feedback.¹²
8. Private School Director's company also provided staff for the program to work with students and collect data for the program.¹³
9. Private School Director worked as the consultant for the program at the Home School

⁷ Testimony of SSC, Tr.V3, 185:24-186:2; R-Ex.2, p.060, 091-107.

⁸ Testimony of Parent 1, Tr.V1, 39:19-40:19, 44:25-45:25, R-Ex.2, p.068.

⁹ Testimony of Parent 1, Tr.V1, 46:24-48:5.

¹⁰ Testimony of Private School Director, Tr.V2, 84:21-85:2.

¹¹ Testimony of Private School Director, Tr.V2, 83:7-11, 85:13-86:2.

¹² Testimony of Private School Director, Tr.V2, 85:3-86:8.

¹³ Testimony of Private School Director, Tr.V2, 86:11-20.

- for the 2018-2019 school year.¹⁴
10. For the 2018-2019 school year, Home School had a classroom that was an all-inclusive setting for students with special needs to attend all day.¹⁵
11. Special Education Teacher (hereinafter “SPED Teacher”) was the teacher for the classroom with the program, who was trained by Private School Director and attempted to incorporate aspects of the program with all the other standards needed to implement the individual students’ IEPs.¹⁶

Student’s IEP-10/02/2018

12. At the beginning of the 2018-2019 school year, Parent 1 contacted Home School to inquire about enrolling Student in school.¹⁷
13. An evaluation meeting was held, and it was determined that Student would be evaluated in the areas of academic performance, cognition, behaviors, fine-motor, behavior, and speech-language.¹⁸
14. On October 2, 2018, following the completion of the evaluation, an eligibility meeting was held and Student was determined to be eligible for special education and related services.¹⁹
15. Private School Director was present at the eligibility meeting to answer questions that Parent 1 may have had about the program at Home School. Private School Director was not present for the IEP development meeting that took place on the same date.²⁰

¹⁴ Testimony of Private School Director, Tr.V2, 134:6-16.

¹⁵ Testimony of Vice Principal; Tr.V3, 311:7-9.

¹⁶ Testimony of Private School Director, Tr.V2, 132:11-21.

¹⁷ Testimony of SSC, Tr.V3, 187:14-189:19.

¹⁸ Testimony of SSC, Tr.V3, 188:11-25.

¹⁹ Testimony of SSC, Tr.V3, 190:19-19.

²⁰ Testimony of Private School Director, Tr.V2, 131:18-132:4.

16. On October 2, 2018, an IEP meeting was held with Home School, from which an IEP was prepared for Student (hereinafter referred to as “IEP-10/02/2018”).²¹
17. Present at the October 2, 2018 IEP meeting were Parent 1, General Education Teacher, Principal, SSC, SPED Teacher, School Psychologist, Speech-Language Pathologist 2, and Occupational Therapist.²² VP was also present at the October 2, 2018 IEP meeting.²³
18. During the October 2, 2020 IEP meeting, Student’s strengths and needs to establish Student’s present levels of educational performance (hereinafter “PLEP”)²⁴ were discussed and as the administrator, VP periodically paused the discussion to ask for Parent 1’s input.²⁵
19. At the time of the October 2, 2018 IEP meeting, Student was unable to use the restroom.^{26,27}
20. In the PLEPs section of the IEP-10/02/2018, the evaluation summary of all the assessments conducted on Student was noted.
21. Student was assessed, which assesses a child’s level of cognitive functioning. Student’s skills were rated within the Delayed range, but this rating was impacted by Student’s communication difficulties.²⁸

²¹ Testimony of SSC, Tr.V3, 190:20-23; P-Ex.1, 024-046, R-Ex.3, p.112-133.

²² P-Ex.1, p.045-046, R-Ex.3, p.133.

²³ Testimony of VP, Tr.V3, 276:8-277:5.

²⁴ This Hearings Officer notes that the more updated terminology for this section of the IEP is called the Present Level of Academic Achievement and Functional Performance, however, Student’s IEP and the witnesses in this case refer to this section of the IEP as the PLEPs.

²⁵ Testimony of VP, Tr.V3, 277:22-278:23.

²⁶ P-Ex.1, p.025, R-Ex.3, p.113.

²⁷ P-Ex.1, p.026, R-Ex.3, p.114.

²⁸ P-Ex.1, p. 027-028, R.Ex.3, p.115-116.

22. An educational evaluation was completed due to Student's diagnosis. The school psychologist determined that the pattern of Student's scores indicates that Student has symptoms directly related to the criteria.²⁹
23. Student's assessment reflected that Student had delays in communication, daily living skills, socialization and motor skills.³⁰
24. Student's speech-language assessment determined that Student was not using a consistent form of communication and had a verbal vocabulary of five (5) to seven (7) words. Student scored in the "severely reduced" criteria for both auditory comprehension and expressive communication, and had difficulties engaging in cooperative play. Student's reduced skills and reduced overall language skills resulted in difficulty in the educational environment.³¹
25. After the discussion of Student's PLEPs, the team discussion moved to developing goals and objectives for Student's IEP. VP again checked with Parent 1 during this discussion for input on the different goals and objectives that were being discussed.³²
26. At the October 2, 2018 IEP meeting, the IEP team determined that Student was not eligible for extended school year services due to the IEP team not having any data to reflect that Student experiences excessive regression or an extended time recouping lost skills following breaks from school. The IEP team determined that data would continue to be collected and another meeting would be held if necessary.³³
27. Student's IEP-10/02/2018 contained the following Supplementary Aids and Supports:

²⁹ P-Ex.1, p.028, R-Ex.3, p.116.

³⁰ P-Ex.1, p.028, R-Ex.3, p.116.

³¹ P-Ex.1, p.029, R-Ex.3, p.117.

³² Testimony of VP, Tr.V3, 278:24-281:1.

³³ P-Ex.1, p.043, R-Ex.3, p.131.

- “Provide visuals to help with a variety of tasks during school day,” “Provide appropriate modeling for asking and answering questions,” and “Use appropriate materials to deliver instruction.”³⁴
28. Each of the supplementary aids and supports for Student in the IEP-10/02/2018 were explained and examples were provided to Parent 1 in the discussion at the IEP meeting. Various Home School personnel would give examples of the supplementary aids and supports that were being suggested for Student and explaining to Parent 1 what the terms meant and how the aids and supports would be provided to Student.³⁵
29. Student’s educational placement statement in the IEP-10/02/2018 stated that “[Student] will participate with non-disabled students at lunchtime and school functions with accommodations and modifications. [Student] will not participate with non-disabled peers during instructional times or recess.”
30. Student was placed in Home School’s all-inclusive classroom for students with special needs under the program run by Private School Director and taught by SPED Teacher.³⁶
31. Some of the visual aids, modeling and appropriate materials used in Student’s program at Home School were part of the program run by Private School Director.³⁷
32. At the October 2, 2018 IEP meeting, Parent 1 was excited that Student would be placed in the new program for children with Student’s needs and did not object to nor

³⁴ P-Ex.1, p.043, R-Ex.3, p.131.

³⁵ Testimony of VP, Tr.V3, 281:16-283:6, 285:10-286:6, 286:25-287:20.

³⁶ Testimony of Private School Director, Tr.V2, 79:2-12, 87:8-23.

³⁷ Testimony of Private School Director, Tr.V2, 94:16-95:10 (relating to visuals); 95:11-21 (relating to modeling); 97:25-98:25 (relating to appropriate materials).

reject the IEP-10/02/2018.³⁸

Student's attendance at Home School for the 2018-2019 school year

33. Student began attending Home School in October 2018, during the second quarter of the school year.³⁹
34. When Student began attending Home School, Student was considered an early learner under the Assessment and had no consistent forms of communication. Student was quiet and needed assistance to transition and follow directions, and mild behaviors would occur when Student did not want to do an activity or sit in a group.⁴⁰
35. SPED Teacher was Student's teacher during the 2018-2019 school year and EA was assigned to Student's classroom as the educational assistant for students in the class.⁴¹ Students in Student's classroom had staff that were trained by Private School Director in Student's program, Student had supervision either one-to-one or in small groups, depending on the day.⁴²
36. Student's classroom contained many visual aids to assist with the students' learning in the classroom. These included things such as visual representations.⁴³
37. A communication system was also available for students like Student.⁴⁴
38. A token economy was also used for Student in the program, which is a form of positive reinforcement commonly used in teaching, where Student receives tokens

³⁸ Testimony of Parent 1, Tr.V1, 18:23-19:17.

³⁹ Testimony of Parent 1, Tr.V1, 20:18-20; Testimony of SSC, Tr.V3, 192:8-193:8; R-Ex.9, 446-447.

⁴⁰ Testimony of Private School Director, Tr.V2, 96:5-14, 98:8-11.

⁴¹ Testimony of EA, Tr.V3, 202:24-203:5.

⁴² Testimony of Private School Director, Tr.V2, 96:20-97:24.

⁴³ Testimony of EA, Tr.V3, 203:21-210:4; Testimony of SLP 1, Tr.V3, 238:7-239:3; R-Ex.9, p.448-451.

⁴⁴ Testimony of EA, Tr.V3, 217:5-218:7; Testimony of SLP 1, Tr.V3, 238:10-239:3.

- that are used to earn an ultimate reinforcement.⁴⁵
39. SLP 1 was assigned to provide Student's speech-language services under the IEP-10/02/2018.⁴⁶
40. Prior to beginning work with Student, SLP 1 reviewed the speech-language assessment that was done as part of Student's evaluation, as well as Student's IEP-10/02/2018. SLP 1 noted that Student previously was using a communication system, but it had been discontinued due to Student's parents wanting Student to be more verbal.⁴⁷
41. Some of the work that SLP 1 did with Student involved modeling for Student to imitate sounds or simple word sequences that others in the classroom would say. The modeling and imitation work was done due to Parent 1's desire for Student to be more verbal. This work included consulting with SPED Teacher about the work that SLP 1 was doing with Student to see if some of the targets could be carried throughout the school day.⁴⁸
42. During SLP 1's work with Student, SLP 1 was trying out different devices to determine whether and how they would work to assist Student with communication.⁴⁹
43. It was based on SLP 1's trial work with Student and a device during this period that led SLP 1 to suggest adding it to a future IEP for Student.⁵⁰
44. From the time SLP 1 began working with Student in October 2018 until May 2019,

⁴⁵ Testimony of Private School Director, Tr.V2, 95:22-96:4.

⁴⁶ Testimony of SLP 1, Tr.V3, 230:16-23.

⁴⁷ Testimony of SLP 1, Tr.V3, 230:24-231:7, 231:20-22, 245:1-10.

⁴⁸ Testimony of SLP 1, Tr.V3, 235:1-8, 237:4-19, 239:20-240:3.

⁴⁹ Testimony of SLP 1, Tr.V3, 243:5-244:25.

⁵⁰ Testimony of SLP 1, Tr.V3, 245:1-246:5.

Student made progress in speech-language and communication. Student's progress included being able to use signs, pictures and words to express Student's needs, imitate sounds made by others, label items, and interact more with Student's peers.⁵¹

Student's IEP-05/16/2019

45. Student's program for the 2018-2019 school year operated under a standard which is designed to help children prepare the skills they need, such as social, emotional, health safety and care, and toileting.⁵² Later, Student's curriculum would follow the common core standards, which includes language arts and math.⁵³
46. On May 16, 2019, the IEP team had a meeting in anticipation of Student's transition to the next grade. The main objectives in the May 16, 2019 IEP meeting was to adjust the minutes of services to reflect the school day and to review Student's goals and objectives.⁵⁴
47. The IEP team meeting on May 16, 2019 was not scheduled or presented as an annual IEP and was scheduled on a day with similar meetings for other students in the classroom that were transitioning.⁵⁵
48. Present at the May 16, 2019 IEP meeting were SPED Teacher, General Education Teacher 2, VP and Parent 1.⁵⁶ Student's IEP-10/02/2018 IEP was revised at the May 16, 2019 meeting and a written document was produced (hereinafter "IEP-05/16/2019"),⁵⁷ and a prior written notice dated May 17, 2019 (hereinafter "PWN-

⁵¹ Testimony of SLP 1, Tr.V3, 247:5-251:9; R-Ex.7, p.369-370.

⁵² Testimony of VP, Tr.V3, 279:18-280:1.

⁵³ Testimony of VP, Tr.V3, 295:14-296:5, 296:19-298:2.

⁵⁴ Testimony of VP, Tr.V3, 294:23-295:13, 296:6-18.

⁵⁵ Testimony of VP, Tr.V3, 295:3-10, 296:6-18.

⁵⁶ P-Ex.1, p.023.

⁵⁷ The IEP from the May 16, 2019 meeting is still dated October 2, 2018, however some notes

05/17/2019”)⁵⁸ was sent out regarding the May 16, 2019 IEP meeting.

49. No changes were made to Student’s PLEPs, goals and objectives, eligibility for extended school year, and supplementary aids and services in the IEP-05/16/2019.⁵⁹ Student’s Special Education minutes were revised in the IEP-05/16/2019 to reflect 1480 minutes per week from July 30, 2019 to October 2, 2019.⁶⁰
50. Student’s IEP-05/16/2019 also provided a clarification that “[Student] would participate in the transition that begins on August 5, 2019, which will include 2 half day sessions during that week. August 12, 2019 will be the first all day session for students. The exact days and times will be mailed to parents during the summer break. It will also include [Student’s] assessment day and parent orientation information. [Student] will be in the general education setting for 70 minutes per day which includes recess and lunch.”⁶¹
51. Student’s IEP-05/16/2019 also modified Student’s educational placement statement by adding “From 10/02/19 to 07/30/19 [Student] will participate with non-disabled students at lunchtime and school functions with accommodations and modifications. [Student] will not participate with non-disabled peers during instructional times, recess, and ___ time. From 07/30/19 to 10/02/2019 [Student] will participate with non-disabled peers for morning check-in, recess, lunch, and field trips. [Student] will not participate with non-disabled peers for 295 minutes per day when [Student] is in

and updates in the IEP indicate that they were from the meeting on May 16, 2019. P-Ex.1, p.001-023.

⁵⁸ P-Ex.1, p.047-048.

⁵⁹ Compare P-Ex.1, p.002-019, P-Ex.1, 025-042.

⁶⁰ P-Ex.1, p.020.

⁶¹ P-Ex.1, p.020.

- [Student's] special education classroom. [Student] will also receive 20 minutes per week for occupational therapy, and 30 minutes per week for speech and language therapy.”⁶²
52. The PWN-05/17/2019, indicates that the IEP team at the May 16, 2019 meeting considered placing Student in a general education classroom, but believed that Student needed individualized and specialized instruction with related services, and that a special education classroom for the majority of the day was most appropriate to meet Student's needs. The PWN-05/17/2019 also indicated that the team believed that a small class size and individual instruction would be beneficial for Student.⁶³
53. After the May 16, 2019 IEP meeting, Student stopped attending Home School. Home School did not realize that Student was still enrolled at Home School until approximately June 2020.⁶⁴ No attempts were made to schedule an IEP meeting for Student prior to the expiration of the IEP-10/02/2018.
54. Student's IEP-10/02/2018 had an annual review date of October 2, 2019. No IEP was completed for Student after the IEP-05/16/2019.⁶⁵
55. As of the date of the Hearing, no IEP meeting had been scheduled to develop an updated IEP for Student.⁶⁶
56. Parent 1 did not complete any withdrawal or other forms indicating Student would not be attending Home School for the 2019-2020 school year. Parent 1 also did not provide any written notice to Home School that Parent 1 would be sending Student to

⁶² P-Ex.1, p.021.

⁶³ P-Ex.1, p.047.

⁶⁴ Testimony of Parent 1, Tr.V1, 53:10-54:10; Testimony of Principal, Tr.V3, 326:25-327:8.

⁶⁵ Testimony of Parent 1, Tr.V1, 25:2-4, 27:16-17; P-Ex.1, p.024, R-Ex.3, p.112.

⁶⁶ Testimony of Principal, Tr.V3, 326:12-18.

a private school and seeking reimbursement for tuition and other expenses due to concerns with Student's IEPs.⁶⁷

57. Some time prior to the start of the 2019-2020 school year, Parent 1 heard about Program from Parent 1's parent, who told Parent 1 about a new school that would be opening that sounded really good for Student.⁶⁸

58. Parent 1 researched Program and was able to have a conversation about the program with Private School Director. In July 2019, Parent 1 enrolled Student in Program for the 2019-2020 school year.⁶⁹

59. Student attended Program for the 2019-2020 school year. Parent 1 enrolled Student in Private School for the 2020-2021 school year, even though the price of Private School rose substantially from Program's costs because Parent 1 and Student's family decided that they wanted Student to be in a good school that would help Student.⁷⁰

60. Parent 1 filed the instant Complaint and Amended Complaint with the hopes that winning the case will allow Student to attend Private School but Parent 1 understands that Parent 1 is still obligated to pay the total amount of the enrollment contract signed with Private School.⁷¹

Private School

61. Program was a non-profit program run by Private School Director using funding from private donors to determine the costs of running a private school for students with

⁶⁷ Testimony of Parent 1, Tr.V1, 53:10-54:10; Testimony of SSC, Tr.V3, 195:24-196:1.

⁶⁸ Testimony of Parent 1, Tr.V1, 28:8-15.

⁶⁹ Testimony of Parent 1, Tr.V1, 28:16-29:16.

⁷⁰ Testimony of Parent 1, Tr.V1, 25:18-26:13.

⁷¹ Testimony of Parent 1, Tr.V1, 26:14-27:12, 58:18-59:3, 59:20-60:9.

- special needs using teachings based on Assessment results.⁷²
62. Private School is a for-profit private school for children with special needs whose program is based on teaching and utilizes the program as the primary basis for creating programming for students.⁷³
63. Private School is not accredited; however Private School is currently engaged in the process of being accredited and has entered into a business agreement for accreditation purposes.⁷⁴
64. Private School is also currently in the process of becoming licensed by the Hawai'i Association of Independent Schools (hereinafter "HAIS"), however Private School Director was informed that they will not be providing licenses until December 2020.⁷⁵
65. Private School Director is licensed in the State of Hawai'i. Private School Director has been practicing for twenty (20) years. Private School Director has extensive experience in providing services in the private sector as well as in school environments.⁷⁶
66. Private School Director was originally contracted by the DOE to provide consultation for a program to be run in the DOE public schools for the 2018-2019 school year.⁷⁷
67. Private School Director's contract with the DOE expired in June of 2019 and shortly after that time, Private School Director established Program.⁷⁸
68. Private School Director is familiar with Student from guiding Student's program and

⁷² Testimony of Private School Director, Tr.V2, 100:25-101:2, 107:22-108:7, 110:3-22.

⁷³ Testimony of Private School Director, Tr.V2, 101:5-9, 109:9-15

⁷⁴ Testimony of Private School Director, Tr.V2, 121:6-18, 141:16-20.

⁷⁵ Testimony of Private School Director, Tr.V2, 141:4-142:2.

⁷⁶ Testimony of Private School Director, Tr.V2, 80:4-81:18; P-Ex.2, p.103-104.

⁷⁷ Testimony of Private School Director, Tr.V2, 85:3-86:8.

⁷⁸ Testimony of Private School Director, Tr.V2, 137:5-9.

- Home School for the 2018-2019 school year, having Student in a program in the end of June 2019, and also from working with Student at Program in the 2019-2020 school year.⁷⁹
69. The total tuition for Program charged to Parent 1 for the 2019-2020 school year was Eighteen Thousand Five Hundred Dollars (\$18,500). Parent 1 received tuition assistance, making Parent 1's total payments due to Program Five Thousand Eight Hundred Fifty-Nine Dollars and Forty Cents (\$5,859.40) plus a Fifty Dollar (\$50) registration fee.⁸⁰ Program waived the final payment for Parent 1 due to the closure of Program for COVID-19.⁸¹
70. On June 19, 2019, Program did an initial Assessment for Student Plan-06/19/2019.⁸²
71. The Assessment assesses milestone skills. The assessment also identifies barriers that students have with learning.⁸³
72. Student's Plan-06/19/2019 was based in part on Student's performance. Student's Plan-06/19/2019 provided goals and objectives for Student using teaching in a school environment.⁸⁴
73. Student attended Program from August 2019 through March 2020, when the COVID-19 global pandemic lockdown laws closed Program.⁸⁵
74. Assessment was conducted on Student on August 19, 2020, which showed that

⁷⁹ Testimony of Private School Director, Tr.V2, 79:15, 100:21-24, 101:10-103:7.

⁸⁰ Testimony of Parent 1, Tr.V1, 52:16-19, 55:3-56:8; P-Ex.2, p.098-102.

⁸¹ Testimony of Parent 1, Tr.V1, 54:14-56:3; Testimony of Private School Director, Tr.V2, 154:1-155:2-2; P-Ex.2, p.102.

⁸² Testimony of Private School Director, Tr.V2, 100:13-20, 103:8-18; P-Ex.2, p.051-058.

⁸³ Testimony of Private School Director, Tr.V2, 103:8-104:24; P-Ex.2, p.052.

⁸⁴ Testimony of Private School Director, Tr.V2, 105:10-16; P-Ex.2, p.051.

⁸⁵ Testimony of Parent 1, Tr.V1, 30:4-16.

- Student had made significant progress in Student's overall score. Student made notable progress in several areas⁸⁶
75. Parent 1 enrolled Student at Private School for the 2020-2021 school year and signed an enrollment contract on August 17, 2020. The total tuition costs for Student's program for the 2020-2021 school year is Two Hundred Thirty-One Thousand One Hundred Eighty-Six Dollars and Eighty Cents (\$231,186.80).⁸⁷
76. A new Plan dated August 17, 2020 was created for Student for the 2020-2021 school year.⁸⁸
77. Student's Plan-08/17/2020 includes results of Assessment conducted with Student on August 19, 2020, and it also includes updated goals and objectives for Student based on the results.⁸⁹
78. While Parent 1 did not provide written notice to Home School that Parent 1 would be sending Student to Private School and asking for tuition reimbursement, Parent 1 did file the instant Complaint on June 15, 2020 and the Amended Complaint on July 24, 2020, in which Parent 1 sought reimbursement of all educational and related expenses for Student and assumption of the cost of Student's private educational and related expenses.⁹⁰
79. The costs for Student's program for the 2020-2021 school year are itemized and are

⁸⁶ Testimony of Private School Director, Tr.V2, 101:10-103:7; P-Ex.2, p.060.

⁸⁷ Testimony of Parent 1, Tr.V1, 25:11-26:8; Testimony of Private School Director, Tr.V2, 107:10-16; P-Ex.2, p.068-069.

⁸⁸ Testimony of Private School Director, Tr.V2, 108:22-109:23; P-Ex.2, p.059-067.

⁸⁹ Testimony of Private School Director, Tr.V2, 104:25-106:4; P-Ex.2, p.063-065.

⁹⁰ See Petitioners' Complaint and Resolution Proposal, dated June 15, 2020, and Petitioners' First Amended Complaint and Resolution Proposal, dated July 23, 2020.

- based on prevailing rates for similar services in the area where Student resides.⁹¹
80. For the 2020-2021 school year, Student will receive the following services at Private School: Speech Language Therapy, Consultation, services, Special Education Teacher Consultation, Reverse Inclusion Program, Assessment and Program and Supplies if necessary.⁹²
81. Student will receive two thousand four hundred thirty-six (2,436) minutes of speech language therapy for the school year from August 17, 2020 to July 28, 2021, which is approximately sixty (60) minutes per week.⁹³ While this amount is higher than seems necessary for Student based on the results, it is not unreasonable.⁹⁴
82. Student will receive three thousand six hundred fifty-four (3,654) minutes of consultation for Student's Plan-08/17/2020. Student's program also includes services.
83. Currently, Private School Director is the sole provider employed by Private School.⁹⁵
84. Currently, Private School Director is the sole provider at Private School. At the present time, all the billed hours for Student indicated in Student's enrollment contract for services, would be completed by Private School Director.⁹⁶
85. Private School will provide Student with supervision for six (6) hours per day,⁹⁷ which is roughly the entire school day from 8:15 a.m. to 2:15 p.m. Student attends

⁹¹ Testimony of Private School Director, Tr.V2, 107:23-108:7; P-Ex.2, p.068, 089.

⁹² Testimony of Private School Director, Tr.V2, 108:14-116:15; P-Ex.2, p.069.

⁹³ Testimony of Private School Director, Tr.V2, 147:24-148:2; P-Ex.2, p.068-069.

⁹⁴ Testimony of SLP 1, Tr.V3, 267:13-268:10.

⁹⁵ Testimony of Private School Director, Tr.V2, 148:8-149:19.

⁹⁶ Testimony of Private School Director, Tr.V2, 147:21-148:7.

⁹⁷ P-Ex.2, p.069.

Private School Monday through Friday.⁹⁸

86. Student's Plan-08/17/2020 includes consultation from a special education teacher for Student's programming for a minimum of four thousand eight hundred seventy-two (4,872) minutes per year.⁹⁹

87. Currently Private School employs a special education teacher that is not licensed in Hawai'i but is licensed out of state. The special education teacher does not reside in Hawai'i but provides remote consultative services. This special education teacher is also certified at the doctoral level.¹⁰⁰

88. The Reverse Inclusion Program at Private School is a program where non-disabled students that are distance learning, home schooled, or otherwise available during the school day, come to Private School to interact with the students at Private School. The cost of Ten Thousand Dollars (\$10,000) is the rate for a provider to supervise the non-disabled students and encourage them to interact with the students at Private School, since the providers assigned to the Private School students need to focus their attention on their assigned student.¹⁰¹

89. The Assessment at Private School is an assessment to determine each Private School student's needs in the event of another school closure, similar to what happened from March 2020-August 2020. The assessment cost of One Thousand Dollars (\$1000) includes hours for two Private School staff to conduct a distance learning session with Student to see how Student reacts to learning virtually and what accommodations

⁹⁸ Testimony of Parent 1, Tr.V1, 63:1-20.

⁹⁹ P-Ex.2, p.069.

¹⁰⁰ Testimony of Private School Director, Tr.V2, 142:22-143:22, 148:24-149:19.

¹⁰¹ Testimony of Private School Director, Tr.V2, 113:16-114:15, 151:9-152:21; P-Ex.2, p.069.

- Student would need for such a situation.¹⁰²
90. The Program and Supplies cost of Two Thousand Dollars (\$2000) included in the itemized contract for Student includes any materials that would be provided to Student in the event of a school closure. This cost may be refunded in the event that the program is not needed.¹⁰³
91. Student's enrollment contract also includes assistive technologies, which are technologies that are or will be utilized as part of Student's program.¹⁰⁴
92. Private School also charges a fifteen (15) percent administrative fee to cover the costs of day-to-day operations, office supplies, legal fees, accounting, insurance and salary for administrators.¹⁰⁵
93. The billing rate of the costs for Student's individualized services, such as tuition, speech-language therapy, services rates, are comparable to other similar centers.¹⁰⁶
94. As of the date of the Hearing, Parent 1 has not paid more than the Two Hundred Fifty Dollar (\$250) registration fee toward Student's tuition at Private School.¹⁰⁷ The enrollment contract that Parent 1 signed indicates that Parent 1 is responsible for the tuition and program costs for Student's special education program at Private School.¹⁰⁸
95. Private School Director did not encourage Parent 1 to file the instant Complaint or

¹⁰² Testimony of Private School Director, Tr.V2, 113:16-115:17; P-Ex.2, p.069.

¹⁰³ Testimony of Private School Director, Tr.V2, 115:18-116:15; P-Ex.2, p.069.

¹⁰⁴ Testimony of Private School Director, Tr.V2, 150:8-13; P-Ex.2, p.069.

¹⁰⁵ Testimony of Private School Director, Tr.V2, 109:24-110:22, P-Ex.2, p.069.

¹⁰⁶ Testimony of Private School Director, Tr.V2, 108:4-13; *see* P-Ex.2, p.068, 089.

¹⁰⁷ Testimony of Parent 1, Tr.V1, 58:9-17.

¹⁰⁸ Testimony of Parent 1, Tr.V1, 25:13-26:22, 58:9-59:3, 64:6-13; Testimony of Private School Director, Tr.V2, 158:12-159:22; P.Ex-2, p.068-069.

make Student's tuition payments or enrollment status at Private School contingent upon the outcome of the instant Hearing.¹⁰⁹

V. CONCLUSIONS OF LAW

IDEA framework

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.”¹¹⁰ A FAPE includes both special education and related services.¹¹¹

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education.¹¹² 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.”¹¹³

The IEP is used as the “centerpiece of the statute's education delivery system for disabled children.”¹¹⁴ It is “a written statement for each child with a disability that is developed, reviewed, and revised” according to specific detailed procedures contained in the statute.¹¹⁵ The IEP is a collaborative education plan created by parents and educators who carefully consider the

¹⁰⁹ Testimony of Private School Director, Tr.V2, 159:20-160:6.

¹¹⁰ *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 (D. D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)).

¹¹¹ H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

¹¹² *Id.*

¹¹³ *Dep't of Educ. of Hawai'i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai'i 2016).

¹¹⁴ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

¹¹⁵ H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

child's unique circumstances and needs.¹¹⁶

The DOE is not required to “maximize the potential” of each student; rather, the DOE 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.”¹¹⁷ However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,¹¹⁸ 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.”¹¹⁹

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures set forth in IDEA; and (b) whether the student's IEP is reasonably calculated to enable the student to receive educational benefit.¹²⁰ “A state must meet both requirements to comply with the obligations of the IDEA.”¹²¹

Procedural violations do not necessarily constitute a denial of FAPE.¹²² 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 1'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.¹²³

¹¹⁶ H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

¹¹⁷ *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

¹¹⁸ 137 S.Ct. 988, 197 L.Ed.2d 335 (2017).

¹¹⁹ *Endrew F.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335; *See also, Blake C. ex rel. Tina F. v. Hawai'i Dept. of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Hawai'i 2009).

¹²⁰ *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

¹²¹ *Doug C. v. Hawai'i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013). *See also, Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

¹²² *Amanda J.*, 267 F.3d at 892.

¹²³ *Id.*

A. Respondents did not deny Student a FAPE in determining Student’s educational placement

Petitioners first argument addresses Student’s educational placement in Student’s IEP-10/02/2018 and IEP-05/16/2019. Petitioners argue that the IEP teams at the October 2, 2018 and May 16, 2019 meetings utilized improper factors to determine Student’s placement. Further, Petitioners argue that Student could succeed in a less restrictive placement.

The IDEA provides that “procedures to assure that, to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...”¹²⁴ The Ninth Circuit Court of Appeals has adopted a four-part balancing test in determining whether a student’s educational placement is the least restrictive environment to the maximum extent appropriate.¹²⁵ The four factors consisted of 1) the educational benefits of placement in full-time regular class; 2) the non-academic benefits of such placement, 3) the effect students have on the teacher and children in the regular class; and 4) the costs of mainstreaming the students.¹²⁶

1. Student’s IEP-10/02/2018

Student’s IEP-10/02/2018 noted Student’s educational placement as “[Student] will participate with non-disabled students at lunchtime and school functions with accommodations

¹²⁴ *Sacramento City Unified School Dist., Bd. of Educ. v. Rachel H. by and through Holland*, 14 F.3d 1398, 1403 (9th Cir. 1994) (citing 20 U.S.C. §1412(5)(b)); *see also* H.A.R §8-60-15.

¹²⁵ *Id.* at 1404.

¹²⁶ *Id.*

and modifications. [Student] will not participate with non-disabled peers during instructional times, and recess.”¹²⁷

No evidence exists that the IEP team discussed each of the factors of the balancing test at the meeting on October 2, 2018. However, the failure to discuss aspects of a student’s IEP amounts to a procedural violation under the IDEA. As noted *supra*, procedural violations require a secondary determination to find a denial of FAPE. Petitioners, having the burden of proof,¹²⁸ must also demonstrate that the procedural violation resulted in a loss of educational opportunity for Student, significantly impeded Parent 1’s opportunity to participate in the decision-making process or caused Student a deprivation of educational benefits.

In this case, when Student attended Home School in October 2018 and Student’s IEP-10/02/2018 had been created, Student had been diagnosed, had no consistent form of communication.¹²⁹ Student needed assistance with using the bathroom, and had needs in the areas of social and communication skills.¹³⁰ The IEP team determined that Student required specialized attention to provide appropriate modeling, visual aids, and appropriate instruction in the setting provided in Home School’s classroom.¹³¹ Student also received the benefits of being in Home School’s program, such as use of visual aids, a token economy, appropriate materials, occasional services of an aid, and speech and language therapy techniques both in individual sessions and throughout the day in the classroom.¹³² Student made progress in key aspects of the IEP-10/02/2018, such as gaining means of communication, making additional sounds and

¹²⁷ FOF 29.

¹²⁸ *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005) (holding that the burden of persuasion in IDEA cases lies with the party seeking relief).

¹²⁹ FOF 1, 22, 24, 34.

¹³⁰ FOF 19, 20, 23.

¹³¹ FOF 27.

¹³² FOF 7-8, 31, 35-38.

interacting with peers.¹³³ Petitioners have not proven that the failure to discuss the four-factor test at the IEP meeting on October 2, 2018 caused a loss of educational opportunity for Student, infringements of parental participation, or a deprivation of educational benefits.

2. Student's IEP-05/16/2019

It is undisputed that the IEP team meeting on May 16, 2019 was not an annual review, but it instead as a revision meeting that was held to address the transition of Student from Home School's program.¹³⁴ At the meeting, Student's educational placement was adjusted only to account for more activities that are available, such as morning check-in and field trips.¹³⁵ No evidence was presented to show that the IEP team discussed the four-factor test to determine Student's placement or to modify Student's placement as noted. However, shortly after the May 16, 2019 IEP revision meeting, Parent 1 discovered Private Program through some outside sources and chose to send Student there.¹³⁶ Parent 1 did not inform Home School that Parent 1 was rejecting Student's IEP-05/16/2019 and Parent 1 did not provide written notice to Home School that Student would not be returning to Home School for the 2019-2020 school year.¹³⁷ Petitioners have failed to prove that failure to discuss educational placement four-factor test resulted in a loss of educational opportunity when Parent 1 did not reject Student's IEP-05/16/2019 at or soon after the IEP team meeting on May 16, 2020.

B. Petitioners have failed to prove that the DOE failed to collect sufficient data/information to determine Student's eligibility for ESY services

¹³³ FOF 44.

¹³⁴ FOF 46-47.

¹³⁵ FOF 50.

¹³⁶ FOF 57-58.

¹³⁷ FOF 56.

Petitioners second issue asks whether Respondents denied Student a FAPE by failing to collect sufficient data/information necessary to determine whether Student was eligible for ESY services. A school must provide ESY services only if the child's IEP team determines that the services are necessary 'for the provision of FAPE to the child.'¹³⁸ To qualify for extended school year services, "a claimant seeking an ESY must satisfy an even stricter test, because 'providing an ESY is an exception and not the rule under the regulatory scheme.'"¹³⁹ The standard for ESY is higher than the standard for the provision of special education and related services due to the requirement to show that the benefits the student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during school breaks.¹⁴⁰

Here, Student did not attend Home School or any other consistent educational program until October 2018.¹⁴¹ While Student was evaluated and deemed eligible for IDEA services in 2017, Parent 1 revoked consent for services and Student received some services and some speech therapy services during the year prior to Student attending Home School.¹⁴² No data was available to the DOE regarding Student's ability to retain and/or recoup the benefits that Student

¹³⁸ *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008).

¹³⁹ *N.B.*, 541 F.3d at 1211, quoting *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6th Cir.) quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), cert. denied, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); see also *Dep't of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 *7 (holding that ESY is "educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information during a break in regularly scheduled classes, such as during the summer.").

¹⁴⁰ *Id.*, quoting *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002); see also *K.K. ex rel. K.S.K. v. Hawai'i*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6th Cir. 2004) (confirming that "it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.").

¹⁴¹ FOF 2.

¹⁴² FOF 3-4.

gained being jeopardized if Student was not provided an educational program during school breaks.¹⁴³ Petitioners do not point to any additional data that could have been used by the IEP team in determining whether Student was eligible for ESY services. Further, Private School Director testified and had worked with Student during the 2018-2019 school year, the summer of 2019, and during the 2019-2020 school year.¹⁴⁴ Private School Director did not point to any problems that Student may have been having or any data that was collected during the 2018-2019 school year to show a need for Student to have ESY services. Petitioners have failed to meet their burden of proving that Respondents failed to collect sufficient data/information or failed to determine that Student should have been eligible for ESY services.

C. Petitioners have failed to prove that Respondents did not collect sufficient data/information or include the participation of knowledgeable persons at Student's 10/02/2018 IEP meeting relating to assistive technology or communication skills

Petitioners next argue that Respondents failed to collect sufficient data/information or include participation of knowledgeable persons at Student's October 2, 2018 IEP meeting regarding assistive technology or communication skills. Petitioners further allege that the IEP-10/02/2018 was not appropriately updated to reflect Student's need for any devices.

"The standard for evaluating IEPs, commonly called 'the snapshot rule,' is not retrospective."¹⁴⁵ An IEP is to be judged by looking at whether the IEP goals and goal achieving methods were objectively reasonably calculated to confer Student with a meaningful benefit based on the information available to the IEP team at the time the IEP was created.¹⁴⁶ In

¹⁴³ FOF 26.

¹⁴⁴ FOF 68.

¹⁴⁵ *K.K. ex rel. K.S.K. v. Hawai'i*, 2015 WL 4611947 *16 (D. Hawai'i 2015) (quoting *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010)).

¹⁴⁶ *K.K.*, 2015 WL 4611947 *16 (quoting *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)).

determining appropriateness, “an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was drafted.”¹⁴⁷

For Student’s IEP-10/02/2018, Student was evaluated in 2018.¹⁴⁸ Part of Student’s evaluation included a speech-language assessment.¹⁴⁹ The report of the speech-language assessment was included in the IEP-10/02/2018 PLEPs and Speech Language Pathologist 2 was present at the IEP meeting.¹⁵⁰ Nothing in Student’s IEP-10/02/2018 PLEPs indicates that neither Parent 1 nor anyone else at the IEP meeting had any concerns or questions relating to Student needing a device.¹⁵¹

Petitioners argue that since the IEP team was informed that Student “enjoy[ed] using an iPad” at the October 2, 2018 IEP meeting, that information should have prompted an inclusion of a device into Student’s IEP-10/02/2018. This argument fails as no evidence was presented or included in the IEP that would indicate that Student enjoyed using the iPad for purposes of communication. iPads are a commonly known instrument that allows for many different applications, including watching videos, listening to music, looking at pictures, playing games, and many others. A statement that Student enjoys using an iPad, without more would not indicate anything about it being a needed device for Student for communication. Nothing in the speech language assessment portion of the IEP-10/02/2018 indicated that there were any devices being used by Student at the time of the assessment.¹⁵² Further, SLP 1 indicated that Student would benefit from the use of a device, but this was only after working with Student and trying

¹⁴⁷ *J.W.*, 626 F.3d at 439 (quoting *Adams v. Oregon*, 195 F.3d at 1149).

¹⁴⁸ FOF 13.

¹⁴⁹ FOF 17, 20, 24.

¹⁵⁰ FOF 21-24.

¹⁵¹ FOF 24.

¹⁵² FOF 24.

several types of devices that SLP 1 believed it would assist Student and should be included in a future IEP.¹⁵³

While Petitioners also point to Student's IEP-05/16/2019 lacking any mention of a device for Student, this again amounts to a procedural violation by Respondents for failing to consider or include a device for Student. As discussed *supra*, Petitioners have not proven that any procedural violation involved with the IEP-05/16/2019 rose to the level of a denial of FAPE, since Parent 1 did not reject the IEP-05/16/2019 and simply chose to send Student to a different school.

D. Petitioners have failed to prove that Student's IEP-10/02/2018 failed to provide sufficient supplementary aids and services for Student

Petitioners next allege that Respondents denied Student a FAPE by failing to provide sufficient supplementary aids and services for Student to be successful in the least restrictive environment or to make adequate gains in Student's academic, behavioral and social needs. Specifically, Petitioners argue that the phrases "Use appropriate materials to deliver instruction," "Provide visuals to help with a variety of tasks during school day," are vague and the phrase "Provide appropriate modeling for asking and answering questions" is not a sufficient means to support Student's acquisition of communication skills.

As discussed *supra*, an IEP is to be examined through the 'snapshot' rule, meaning that the analysis is focused on the information that was available to the IEP team at the time of the development of the student's IEP. In this case, in the October 2, 2018 IEP team meeting, the IEP team determined that Student would be placed in Home School's program with Private School

¹⁵³ FOF 42-43.

Director's program.¹⁵⁴ Throughout the process of the IEP meeting, the above-phrases that were used for Student's IEP-10/02/2018 were explained to Parent 1 and examples of each phrase were given.¹⁵⁵ Private School Director further testified that each term had meaning under the program that was being run in Student's classroom.¹⁵⁶ While the specific items included under each term used may not be readily understood by someone not involved with Student's program, the language itself does identify aids and supports that will be provided to Student under the IEP-10/02/2018.

Further, as confirmed by the record in this case, Student received the appropriate services under each of the phrases noted in the Supplemental Aids and Supports listed in Student's IEP-10/02/2018.¹⁵⁷ Petitioners have failed to prove that any defect in the specific language used in Student's IEP-10/02/2018 amounted to a denial of FAPE.

E. Respondents denied Student a FAPE by failing to review, revise or replace Student's IEP-10/02/2018 prior to its expiration and/or prior to the start of the 2020-2021 school year

Petitioners' final issue is that Student's IEP-10/02/2018 expired on or about October 2, 2019 and has not been replaced. As previously noted, this Hearings Officer previously granted judgment in favor of Petitioners that Respondents denied Student a FAPE by failing to review/revise Student's IEP annually and/or failed to have an IEP in place for Student at the start of the 2020-2021 school year.¹⁵⁸

F. Petitioners have proven that Private School is an appropriate placement for Student

¹⁵⁴ FOF 30, 32.

¹⁵⁵ FOF 28.

¹⁵⁶ FOF 31.

¹⁵⁷ FOF 35-38.

¹⁵⁸ See Order Granting Petitioners' Motion for Partial Summary Judgment, filed September 22, 2020.

Petitioners are seeking tuition reimbursement for Student's tuition at Private Center as a remedy for any denials of FAPE by Respondents. 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 private school and request reimbursement for tuition at said private school from the local educational agency.¹⁵⁹ However, parents are entitled to reimbursement for placement at a private school only if a court concludes both that the public placement violated the IDEA and the private school placement was proper under the Act.¹⁶⁰ The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in *Frank G. v. Bd. of Educ.*,¹⁶¹ 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."¹⁶²

Petitioners have established that Parent 1 paid tuition for Student for the 2019-2020 school year¹⁶³ and has signed an enrollment contract obligating Parent 1 to pay tuition for Student for the 2020-2021 school year.¹⁶⁴ As the tuition reimbursement relates to two separate

¹⁵⁹ *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).

¹⁶⁰ *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

¹⁶¹ 459 F.3d 356, 365 (2nd Cir. 2006).

¹⁶² *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.

¹⁶³ FOF 69.

¹⁶⁴ FOF 75.

school years and are distinguished by the allegations raised in this Complaint, each reimbursement request shall be addressed separately.

1. Tuition for 2019-2020 school year

Regarding tuition for Student's attendance at Private School for the 2019-2020 school year, this Hearings Officer has found that Petitioners have failed to prove that Respondents denied Student a FAPE in Student's IEP-10/02/2018 or IEP-05/16/2019. The IDEA provides that local educational agencies are not required to pay for the cost of education, including special education and related services at a private school or facility if the agency made a FAPE available to the child and the parents elected to place the child at the private school or facility.¹⁶⁵ Further, equitable considerations under the IDEA provide that limitations may be made on reimbursement orders if: 1) at the most recent IEP meeting parents did not inform the IEP team that they were rejecting the IEP and were seeking for their child to receive private education at public expense,¹⁶⁶ or 2) if within ten (10) business days of the removal of the child from the public school, parents did not give written notice to the public agency.¹⁶⁷ Finally, Hawai'i Revised Statutes Section 302A-443(a)(2) provides that

An impartial hearing may be requested by any parent or guardian of a child with a disability, or by the department, on any matter relating to the identification, evaluation, program, or placement of a child with a disability; provided that the hearing is requested: ... (2) Notwithstanding paragraph (1), within one hundred and eighty calendar days of a unilateral special education placement, where the request is for reimbursement of the costs of the placement.

Here, Parent 1 voluntarily chose to send Student to Private School for the 2019-2020 school year as an opportunity for Student, rather than an alternative to a deficient program

¹⁶⁵ 20 U.S.C. §1412(a)(10)(C)(i); H.A.R. 8-60-27(a).

¹⁶⁶ 20 U.S.C. §1412(a)(10)(C)(iii)(aa); H.A.R. 8-60-27(d)(1)(a).

¹⁶⁷ 20 U.S.C. §1412(a)(10)(C)(iii)(bb); H.A.R. 8-60-27(d)(1)(b).

offered by the DOE.¹⁶⁸ Parent 1 did not object to the IEP-10/02/2018 or the IEP-05/16/2019 at the IEP meetings, nor did Parent 1 provide notice to the DOE that Student would be enrolled in private placement and that tuition reimbursement would be sought.¹⁶⁹ Finally, Parent 1 filed the Complaint in this case on June 15, 2020 and the Amended Complaint on July 24, 2020.¹⁷⁰ As Parent 1 unilaterally placed Student at Private School in August 2019, more than one hundred eighty (180) days have passed between the enrollment of Student and Parent 1's request for reimbursement for the 2019-2020 school year. Petitioners' request for tuition reimbursement for Student's attendance at Private School for the 2019-2020 school year is denied.

2. Tuition for 2020-2021 school year

Petitioners seek tuition reimbursement for Student's tuition based on the enrollment contract signed by Parent 1 for the 2020-2021 school year. Petitioners' Motion for Partial Summary Judgment that was granted based on concessions by Respondents that Student was denied a FAPE when Home School failed to hold an annual IEP meeting to review Student's IEP prior to the expiration of Student's IEP-10/02/2018. Therefore, this Hearings Officer finds that Petitioners have proven a denial of FAPE for purposes of tuition reimbursement.

The second requirement for tuition reimbursement to be ordered is a determination that Private School is an appropriate placement for Student. Private School has completed two formal assessments of Students in June 2019 and August 2020.¹⁷¹ Based on the results of the assessments, Student has made significant overall progress and notable progress in many

¹⁶⁸ FOF 57-58.

¹⁶⁹ FOF 32, 56.

¹⁷⁰ See Petitioners' Complaint filed on June 15, 2020, and Petitioners' Amended Complaint filed on July 24, 2020.

¹⁷¹ FOF 70, 74.

skills.¹⁷² Private School has created an educational program with specific goals and objectives for Student for the 2020-2021 school year.¹⁷³ Private School will provide Student with speech-language therapy, services for Student throughout the school day, consultation from a special education teacher for Student's programming and a reverse inclusion program, which allows Student to interact with non-disabled peers of the same age.¹⁷⁴ Private School has also planned for a distance learning program if confronted with another government mandated shut-down due to a pandemic.¹⁷⁵ Private School has created a specific and detailed educational program for Student that addresses Student's individual needs. This Hearings Officer concludes that Private School is an appropriate placement for Student for purposes of tuition reimbursement.

3. Private School's accreditation status

Respondents argue that Private School cannot be determined to be an appropriate placement for Student because Private School is not a private elementary or secondary school under the IDEA.¹⁷⁶ Respondents argument is based on a new Hawai'i law that defines private school for purposes of compulsory education.¹⁷⁷ Respondents' argument is misplaced, however, as Hawai'i Revised Statutes Section 302A-443.5 is the relevant section for purposes of reimbursement for failures of the DOE to provide a FAPE, and provides:

¹⁷² FOF 74.

¹⁷³ FOF 76-77.

¹⁷⁴ FOF 80-82, 85-86, 88.

¹⁷⁵ FOF 89-90.

¹⁷⁶ 20 U.S.C. §1412(a)(10)(c)(ii).

¹⁷⁷ Hawai'i Revised Statutes Section 302A-1132 provide that beginning July 1, 2020, under compulsory education laws, "private school" means "an educational institution that teaches students in any grade from kindergarten through grade twelve and that is licensed or accredited by the Hawai'i Association of Independent Schools, Hawai'i Council of Private Schools, Western Association of Schools and Colleges, Western Catholic Educational Association, Association of Christian Schools International, or a similarly recognized entity that meets or exceeds the standards set by the aforementioned entities."

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

(c) Any nonpublic special education school or program that: (1) Is not accredited by the Western Association of Schools and Colleges, any Hawai'i affiliate of the Western Association of Schools and Colleges, the Hawai'i Association of Independent Schools, the National Association for the Education of Young Children, or the National Early Childhood Program for Accreditation; and (2) Receives funding from the State, either directly or through parental reimbursement, shall apply for accreditation within ninety days from the date of accepting a student with disabilities who was placed there as the result of a hearing officer's decision pursuant to section 302A-443, court order, settlement agreement, or placement by the department. Within the ninety-day application period, the nonpublic special education school or program shall provide proof of its application for accreditation to the department.

The relevant Hawai'i law, consistent with the IDEA,¹⁷⁸ affirms that a private institution may be deemed appropriate for reimbursement for failures of the DOE to provide a FAPE to students even if they do not meet the standards otherwise provided under other Hawai'i laws.

In this case, Private School is currently in the accreditation process by the HAIS.¹⁷⁹ Nothing in the compulsory education law that was raised by Respondents indicates that it applies to reimbursement cases under the IDEA.

4. Equitable considerations

The IDEA provides reviewing authorities with the power to consider equity in determining whether and in what amount tuition reimbursement is to be awarded to a parent that unilaterally places a child at a private program.¹⁸⁰ In *C.B. ex rel. Baquerizo v. Garden Grove*

¹⁷⁸ See *Carter*, 510 U.S. at 14, 114 S.Ct. at 365, 126 L. Ed.2d 284 (holding that reimbursement is not necessarily barred by a private school's failure to meet state education standards).

¹⁷⁹ FOF 63-64.

¹⁸⁰ *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011) (holding that if both criteria are met for reimbursement for unilateral placement at a

Unified School Dist., the district court determined that while the private placement where student was placed delivered many, but not all, of the special education services that the student needed, the full amount of tuition was appropriate for the because everything that the placement provided was “proper, reasonably priced, and appropriate, and the program benefitted [the student] educationally.”¹⁸¹ The Ninth Circuit Court of Appeals affirmed the district court’s decision, adopting the standard set forth in *Frank G.* as discussed *supra*.¹⁸²

Here, Respondents argue two related points in requesting that tuition reimbursement be reduced for equitable considerations. First, Respondents argue that tuition reimbursement be reduced because Private School is a step backward from Home School because it is a highly restrictive environment with a watered-down curriculum.¹⁸³ As an initial matter, the denial of FAPE by Respondents in this case is centered on the lack of a current, valid IEP for Student. Therefore, it is unclear how the program Student would be offered at Home School would compare with the program that was created for Student at Private School for the 2020-2021 school year. While Respondents allege that Student would be missing vital interaction with typically developing peers who are enrolled at the same school, Private School does provide a reverse inclusion program from which Student would receive interaction opportunities with non-disabled children at or near Student’s age.¹⁸⁴ Private School has also created an educational program for Student with goals and objectives based on the results of the assessment completed on August 19, 2020.¹⁸⁵ Private School’s programming is based upon Private School Director’s

private school, “the district court must exercise its ‘broad discretion’ and weigh ‘equitable considerations’ to determine whether, and how much, reimbursement is appropriate.”)

¹⁸¹ *Id.* at 1160.

¹⁸² *Id.*

¹⁸³ See Respondents’ Closing Brief, filed November 12, 2020, pages 28-29.

¹⁸⁴ FOF 88.

¹⁸⁵ FOF 76-77.

extensive experience in providing this style of assistance to children with, and in fact was the same type of program the DOE contracted Private School Director for consultation when the DOE began their own program.¹⁸⁶

Second, Respondents argue that Private School's 'exorbitant costs' and the fact that Private School Director is currently the primary provider of several of the itemized costs for Student's program should reduce the award of tuition reimbursement for Student. As discussed previously, Private School's hourly rates are based upon comparable programs for similar services.¹⁸⁷ This Hearings Officer recognizes that Private School is a new school and declines to reduce tuition reimbursement based on this argument, as it is conceivable that Private School may look to expand and hire additional staff to provide the itemized services for Student.

Finally, Respondents argue that this Hearings Officer should reduce the award of tuition reimbursement due to Parent 1 not having made any payments toward Student's tuition under the enrollment contract.¹⁸⁸ While this issue has not been decided by the Ninth Circuit, the Second Circuit Court of Appeals has provided guidance directly on point. In *E.M. v. New York City Dept. of Educ.*,¹⁸⁹ the Court determined that the broad equitable powers under the IDEA as well as within the framework of *Burlington-Carter*, allows for a "direct-payment" remedy for parents who opt to unilaterally place their child at a private program due to a failure by the educational agency to provide an appropriate education.¹⁹⁰ The Court noted that such a remedy also furthers the purposes of the IDEA "by extending the unilateral withdrawal options to parents with limited

¹⁸⁶ FOF 5-7, 65-66.

¹⁸⁷ FOF 92-93.

¹⁸⁸ See Respondents' Closing Brief, filed November 12, 2020, pages 30-31.

¹⁸⁹ 758 F.3d 442

¹⁹⁰ *Id.*

financial means, who otherwise could not avail themselves of it.”¹⁹¹ Here, similar to the facts of *E.M.*, Parent 1 signed a binding enrollment contract by which both Parent 1 and Private School understood to be an obligation to pay regardless of the outcome of the instant Hearing.¹⁹² While Parent 1 testified that Parent 1 hoped that Petitioners would prevail in this case, Parent 1 understood that Student’s tuition was still due to Private School even if they lost the case.¹⁹³ This Hearings Officer declines to reduce the tuition reimbursement award to Parent 1 based on Parent 1 not having made any payments to Private School for Student’s tuition.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not proven the allegations of Respondents denying Student a FAPE based on Student’s IEP-10/02/2018 and IEP-05/16/2019. Any reimbursement request made by Petitioners for Student’s tuition at Private School for the 2019-2020 school year is denied.

Based on the Motion for Partial Summary Judgment, Petitioners have proven that Respondents denied Student a FAPE by failing to convene an annual IEP meeting to review or revise Student’s IEP prior to its expiration without justification and failing to have a valid IEP in place for Student prior to the 2020-2021 school year. Petitioners have further proven that Private School is an appropriate placement for Student and that Parent 1 is entitled to tuition reimbursement to Private School for the 2020-2021 school year. This Hearings Officer finds that the equitable considerations in this case allow for Parent 1 to receive full tuition reimbursement or direct tuition payments to Private School for the 2020-2021 school year.

¹⁹¹ *Id.*

¹⁹² FOF 75, 94.

¹⁹³ FOF 60.

For the reasons stated above, IT IS HEREBY ORDERED –

1. Within sixty (60) days of this Decision, Home School shall hold an IEP meeting for Student to develop an IEP for Student.
2. Parent 1 is expected to provide all necessary consents for Home School to get current, updated information for use in developing Student's IEP.
3. Private School shall, in accordance with Hawai'i Revised Statutes Section 302A-443(f), allow Respondents to monitor Student at Private School.
4. Any delays in the provision of consents, scheduling, or any other delays in the development of the Student's IEP caused by Parent 1, Private School and/or their representatives shall be carefully documented by Home School and shall extend the sixty (60) day deadline set herein by the number of days attributable to Parent 1, Private School and/or their representative(s) actions.
5. Upon receipt of itemized invoice(s) which reflect the actual amount of service minutes/hours and/or assessments and/or supplies provided to Student, Respondents shall make payments for Student's tuition for the 2020-2021 school year to Private School in accordance with Hawai'i Revised Statutes Section 302A-443(f)-(j). In no event should the total payment to Private School exceed Two Hundred Thirty-One Thousand One Hundred Eighty-Six Dollars and Eighty Cents (\$231,186.80).

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 of the hearings officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a State court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2) and §8-60-70(b).

DATED: Honolulu, Hawai‘i, November 19, 2020.

CHASTITY T. IMAMURA
Hearings Officer
Richards Building
707 Richards Street, Suite 520
Honolulu, Hawai‘i 96813
Phone: (808) 587-7680
Fax: (808) 587-7682
atg.odr@hawaii.gov