



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-SY2021-004

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: November 5-6, 2020

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On July 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 July 28, 2020. Respondents also submitted a second response to Petitioners’ Complaint on July 30, 2020. A status conference was held on August 20, 2020, during which Petitioners were granted leave to file an Amended Complaint and Resolution Proposal (hereinafter “Amended Complaint”). Petitioners’ Amended Complaint was filed on August 20, 2020. Respondents filed DOE’s Response to Petitioners’ Amended Complaint on August 25, 2020.

A prehearing conference was held on September 21, 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 November 5-6, 2020.

The original deadline by which a decision must be submitted was November 3, 2020, but due to the setting of the Hearing on November 5-6, 2020, Respondents requested an extension of the deadline to December 18, 2020. An Order Granting Respondents’ Request for Extension was filed on October 27, 2020.

Respondents filed a Motion to Dismiss Issues 1 and 2, or in the alternative, for Partial Summary Judgment on the motions deadline of October 2, 2020. Petitioners filed their Memorandum in Opposition to Respondent’s Motion to Dismiss Issues on October 6, 2020. Respondents filed their Reply to Petitioners’ Memorandum in Opposition on October 14, 2020. A hearing on Respondents’ Motion was held on October 16, 2020. After review of the facts and legal arguments presented at the Hearing and through the briefs, this Hearings Officer denied

Respondents' Motion to Dismiss. The Order Denying Respondents' Motion to Dismiss Issues 1 and 2 was filed on October 22, 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 October 26, 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 November 5, 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 and Mr. Peck, on behalf of Petitioners; and District Educational Specialist (hereinafter "DES") and Ms. Murakami on behalf of Respondents, as well as the assigned court reporter. The Hearing continued to November 6, 2020 as scheduled, and the testimony was completed on that date.

At the Hearing, Petitioners called Parent 1 and Private Facility Administrator as their witnesses during their case-in-chief and rested. Respondents called Student Services Coordinator 1, and DES during their case and rested. Petitioners did not present any rebuttal

² See Governor of the State of Hawai'i's Fourteenth Proclamation Related to the COVID-19 Emergency, effective October 13, 2020.

evidence.

The disclosure deadline was originally set for October 28, 2020, but due to an emergency situation with Mr. Peck, Ms. Murakami agreed to extend the disclosure deadline to October 29, 2020. Each party submitted their exhibits for the Hearing by the disclosure deadline of October 29, 2020. On November 6, 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 November 13, 2020. Any objections to the proposed exhibits were due on November 18, 2020. The deadlines were outlined in a Post-Hearing Order filed on November 9, 2020. Neither Petitioners nor Respondents submitted any corrections or additional proposed exhibits to be received as evidence for consideration in the Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-014, 016-029; Exhibit 2, pages 030-052; and Exhibit 3, pages 053-057, 065-098. Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 4, pages 018-019; Exhibit 5, pages 021-035; and Exhibit 13, pages 044-045.

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 Wednesday, December 2, 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 three (3) issues in the Amended Complaint to be addressed at the Hearing:

1. Whether Respondents denied Student a free and appropriate public education (hereinafter “FAPE”) procedurally by using improper factors to determine Student’s placement. Additionally, whether Student was denied a FAPE due to Student’s placement in the Individualized Educational Program (hereinafter “IEP”) dated May 24, 2019.
2. Whether Respondents denied Student a FAPE in Student’s May 24, 2019 IEP by failing to provide sufficient Supplementary Aids and Services for Student to be successful in the least restrictive environment and/or make adequate gains on Student’s academic, behavioral and/or social needs. Specifically, the phrase “Support” during non-instructional time is vague.
3. Whether Respondents denied Student a FAPE when the May 24, 2019 expired and has not been replaced prior to the expiration on or about May 24, 2020.

IV. FINDINGS OF FACT

Student’s background

1. Student is eligible for IDEA services under Eligibility Category 1.³
2. On May 25, 2018, an IEP was prepared for Student (hereinafter referred to as “IEP-05/25/2018”), at a meeting which included Parent 1, Special Education Teacher 2,

³ Petitioners Exhibit 1, page 002, page 017 (hereinafter referenced as P-Ex.1, p.002, 017”).

Special Education Teacher 3, Special Education Teacher 4, Student Services Coordinator 2, Speech-Language Pathologist 2, Occupational Therapist 2, and Private Facility Administrator.⁴

3. In Student's IEP-05/25/2018, Student's needs in the area of Physical Well-Being, Health and Motor Development were listed as Student needs to increase the ability to age-appropriately meet Student's own needs in the areas of eating, dressing and toileting; Student needs to learn to draw pre-writing strokes while holding a marker or crayon with a tripod grasp, cut across paper, complete fasteners, and to sequence 2-3 step activities. Student's IEP-05/25/2018 noted that Student would benefit from having movement activities incorporated into the school day. Student's gross motor needs noted that Student would benefit from continued exposure to equipment, and the use of larger balls during ball play as well as modeling during play time.⁵
4. Student's needs in Social and Emotional development included needing to be able to engage in sustained interactive social play and to develop more self-direction and independence when learning a task.⁶
5. Student's needs in Cognition and General knowledge noted that Student needs to acquire knowledge in the areas of mathematics, color and shape knowledge, and increase Student's joint attention by imitating adult and peers motor functions and follow an adult's pointing to a specific object.⁷
6. Student's needs for Communication noted that Student had limited verbal skills and

⁴ P-Ex.1, p.029.

⁵ P-Ex.1, p.017.

⁶ P-Ex.1, p.018.

⁷ P-Ex.1, p.018.

- needed to increase receptive and expressive language skills.⁸
7. In Student's IEP-05/25/2018, Student's impact statement noted that Student had delays in the areas of physical/health/self-help, social-emotional needs, approaches to learning, cognitive knowledge, communication and overall development. The IEP team determined that Student's delays would directly impact Student's ability to fully participate in a general education classroom and that Student required specially designed instruction.⁹
 8. Student's IEP-05/25/2018 included six (6) goals and objectives in the areas of Physical Well-Being, Health and Motor Development (two (2) goals), Social and Emotional Development, Approaches to Learning, Cognition and General Knowledge, and English Language Arts and Literacy.¹⁰
 9. The supplemental aids and services provided in Student's IEP-05/25/2018 included consultation of eight hundred forty (840) minutes per year, daily placement in a classroom with personnel trained in applied strategies, daily support activities, physical therapy consult for twenty (20) minutes per quarter, daily visual supports and schedule, and a daily parent communication log.¹¹
 10. No functional behavioral assessment was conducted on Student for Student's services, nor was a behavioral services plan or behavioral intervention plan included with or attached to Student's IEP-05/25/2018.¹²
 11. At the time Student's IEP-05/25/2018 was prepared, Student was going to attend

⁸ P-Ex.1, p.018-019.

⁹ P-Ex.1, p.019.

¹⁰ P-Ex.1, p.021-026.

¹¹ P-Ex.1, p.027.

¹² Testimony of DES, Tr.V2, 302:13-24, 304:9-305:4.

- Previous School, at which Private Facility Administrator was contracted by the DOE to implement a program.¹³
12. Private Facility Administrator's program was based on practices, which is a methodology. The program's focus is more on language, which is then applied to social skills and learning skills.¹⁴
13. One of the key assessments used determine the student's level of current functioning based on achievement by neurotypical children of the same age.¹⁵
14. Student's educational placement in the IEP-05/25/2018 indicated that Student would not participate with non-disabled peers during meal times, instructional times, and other times. Student would participate with non-disabled peers during recess and other school functions with modifications and accommodations.¹⁶
15. Student attended Previous School in 2018 and then in January 2019, Student was relocated.¹⁷
16. In January 2019, Parent 1 did not inform Previous School nor Home School in writing that Student would be relocated and that Student would be attending Home School for the remainder of the 2018-2019 school year.¹⁸
17. In or before January 2019, Parent 1 discussed with Parent 2 having Student stay with Parent 2 from January 7, 2019 to June 7, 2019. Parent 1 signed a Minor (Child) Power of Attorney Form, giving Parent 2 power of attorney for Student, including

¹³ Testimony of Private Facility Administrator, Tr.V1, 66:22-14, 67:22-69:7.

¹⁴ Testimony of Private Facility Administrator, Tr.V1, 67:7-21, 69:8-14.

¹⁵ Testimony of Private Facility Administrator, Tr.V1, 69:15-70:8.

¹⁶ P-Ex.1, p.028.

¹⁷ See Testimony of Student Services Coordinator 1, Tr.V2, 284:2-17.

¹⁸ Testimony of Parent 1, Tr.V1, 31:2-20; Testimony of Student Services Coordinator 1, Tr.V2, 227:16-25, Testimony of DES, Tr.V2, 300:16-301:14.

- making educational decisions, for Student from January 7, 2019 to June 7, 2019.¹⁹
18. In January 2019, Parent 2 enrolled Student at Home School and provided them only with a copy of the Minor (Child) Power of Attorney Form. Parent 2 did not provide Home School with Student's IEP-05/25/2018.²⁰
19. Upon Student's enrollment at Home School, Home School scrambled to get services for Student, which they were able to do so in a reasonable amount of time.²¹

Home School's program

20. Home School has one self-contained special education classroom another classroom where non-disabled students attended. .²²
21. For the 2018-2019 school year, Student was placed in the special education classroom at Home School.²³
22. Home School's special education classroom was taught by Special Education Teacher 1 and was also staffed with educational assistants as well as another special educational teacher.²⁴
23. Student's special education classroom provided Student with numerous visual supports and sensory support activities, and Home School incorporated use of other languages after discovering that Student appeared to understand.²⁵

¹⁹ Testimony of Parent 1, Tr.V1, 30:10-31:1; R-Ex.13, p.044-045.

²⁰ Testimony of Student Services Coordinator 1, Tr.V2, 228:4-229:12.

²¹ Testimony of Student Services Coordinator 1, Tr.V2, 229:18-230:25; Testimony of DES, Tr.V2, 303:11-21, 305:5-306:5.

²² Testimony of Student Services Coordinator 1, Tr.V2, 272:2-22; Testimony of DES, Tr.V2, 302:25-303:1.

²³ Testimony of Student Services Coordinator 1, Tr.V2, 229:13-23, 233:23-234:22.

²⁴ Testimony of Student Services Coordinator 1, Tr.V2, 249:14-250; Testimony of DES, Tr.V2, 312:3-9.

²⁵ Testimony of Student Services Coordinator 1, Tr.V2, 278:12-15.; Testimony of DES, Tr.V2, 311:23-311:19.

24. Student also had a token economy system, in which Student could earn rewards of food when Student was able to do things independently in the classroom.²⁶
25. In accordance with the IEP-05/25/2018, Student was assigned a skills trainer for services.²⁷
26. Home School attempted to obtain information regarding Student's program from Private Facility Administrator but did not receive information.²⁸ At the time, Student had not completed the assessment at Previous School due to the teacher at Previous School leaving.²⁹
27. Student received speech-language therapy and occupational therapy in accordance with the IEP-05/25/2018 during Student's attendance at Home School for the 2018-2019 school year.³⁰
28. Home School used a daily communication log to communicate with Parent 2 during Student's attendance there.³¹ At some point prior to the May 24, 2019 IEP meeting, while Student was attending Home School, Parent 2 wrote a note in the communication log to inform Home School that Student would be transferring to another school. Parent 2 did not have any further information on the school that Student would be attending.³²
29. Parent 1 communicated with Parent 2 about Student during the period that Parent 2

²⁶ Testimony of Student Services Coordinator 1, Tr.V2, 278:1-11.

²⁷ Testimony of DES, Tr.V2, 303:11-304:8.

²⁸ Testimony of DES, Tr.V2, 305:14-23.

²⁹ Testimony of Private Facility Administrator, Tr.V1, 71:2-14.

³⁰ Testimony of Student Services Coordinator 1, Tr.V2, 231:13-25; Testimony of DES, Tr.V2, 298:9-19, 308:19-21.

³¹ Testimony of Student Services Coordinator 1, Tr.V2, 233:3-12.

³² Testimony of Student Services Coordinator 1, Tr.V2, 252:24-253:1, 289:14-19.

had power of attorney for Student. During these conversations, Parent 2 did not provide details, nor did Parent 1 ask about details regarding Student's schooling. Parent 1 was not informed by Parent 2 about the May 24, 2019 IEP meeting scheduled for Student.³³

May 24, 2019 IEP meeting

30. Despite Parent 2's note that Student would be transferring to another school, Home School did not make any effort to contact Parent 1 regarding the May 24, 2019 IEP meeting, nor did anyone from the Home School IEP team consider delaying the IEP meeting to sometime after the power of attorney was set to expire on June 7, 2019.³⁴
31. Rather than agree to delay the IEP annual review meeting, Home School held Student's annual review meeting to meet the annual due date.³⁵ Even though there were not enough people present at the IEP meeting to address all of Student's concerns for the upcoming school year,³⁶ a new IEP was developed for Student (hereinafter "IEP-05/24/2019").³⁷
32. As indicated on the sign-in sheet, present at the IEP meeting on May 24, 2019 were Parent 2, Special Education Teacher 1, and Student Services Coordinator 1 as the administrative designee.³⁸ The IEP team did not have a copy of Student's IEP-

³³ Testimony of Parent 1, Tr.V1, 52:19-53:7.

³⁴ Testimony of Student Services Coordinator 1, Tr.V2, 288:4-12.

³⁵ Testimony of Student Services Coordinator 1, Tr.V2, 239:6-240:18; Testimony of DES, Tr.V2, 313:20-24.

³⁶ Testimony of DES, Tr.V2, 313:25-3.

³⁷ P-Ex.1, p.001-014, R-Ex.5, p.022-035.

³⁸ Testimony of Student Services Coordinator 1, Tr.V2, 239:13-18; R-Ex.5, p.021. While the IEP-05/24/2019 attendance log indicates that more parties were present at the meeting, this Hearings Officer finds the sign-in in sheet, coupled with Student Services Coordinator 1's testimony more persuasive. *See* P-Ex.1, p.014, R-Ex.5, p.035.

- 05/25/2018 with them at the IEP meeting on May 24, 2019.³⁹
33. No data was presented or discussed at the IEP team at the May 24, 2019 IEP meeting regarding the supplemental aids and supports in the IEP-05/25/2018 that were provided to Student during the 2018-2019 school year.⁴⁰
34. Home School was looking to conduct a functional behavioral assessment on Student due to Student's services provided in Student's IEP-05/25/2018.⁴¹
35. During the May 24, 2019 IEP meeting, there was no discussion regarding whether Student should be placed in the class with non-disabled students, nor does it appear that the IEP team had any other discussion regarding least restrictive environment for Student to be placed.⁴²
36. Student's needs in the areas of fine motor skills and gross motor skills were basically the same as was described in Student's IEP-05/25/2018. The IEP-05/24/2019 also noted that Student would benefit from having activities incorporated into the school day.⁴³
37. Student's needs in Cognitive included needing to develop self-direction and independence when attending to a task (similar to the IEP-05/25/2018), practice an activity many times until successful, react to a problem and seek to achieve a specific goal, and place objects in two more more groups based on differences in a single characteristic.⁴⁴

³⁹ Testimony of Student Services Coordinator 1, Tr.V2, 289:20-290:4.

⁴⁰ Testimony of Student Services Coordinator 1, Tr.V2, 280:25-281:22.

⁴¹ Testimony of DES, Tr.V2, 314:3-315:2.

⁴² Testimony of Student Services Coordinator 1, Tr.V2, 272:23-273:3.

⁴³ P-Ex.1, p.002, R-Ex.5, p.023.

⁴⁴ P-Ex.1, p.003, R-Ex.5, p.024.

38. Student's communication needs in the IEP-05/24/2019 indicated that Student needed to increase Student's receptive and expressive language skills.⁴⁵
39. Student's IEP-05/24/2019's impact statement was identical to the impact statement in Student's IEP-05/25/2018.⁴⁶
40. Student's IEP-05/24/2019 included six (6) goals and objectives in the areas of Social and Emotional Development, Physical Well-Being, Health and Motor Development, Approaches to Learning, English Language Arts and Literacy (two (2) goals), and Cognition and General Knowledge. The goals and objectives for Student for the IEP-05/24/2019 were similar to the goals and objectives in Student's IEP-05/25/2018.⁴⁷
41. The supplemental aids and services provided in Student's IEP-05/24/2019 included support at the frequency of "during non instructional time." No clarifications of the services and supports were listed in Student's IEP-05/24/2019.⁴⁸
42. At the IEP meeting on May 24, 2019, Home School's IEP team explained to Parent 2 that the support was to ensure that as the children were traveling from place to place, during non-instructional times, there would be support within Student's classroom to be present to make sure that Student got where Student needed to be safely.⁴⁹
43. Student's educational placement in the IEP-05/24/2019 indicated that "[Student] will attend a separate special education class. [Student] will eat breakfast and lunch in cafeteria and attend school assemblies with general education population."⁵⁰

⁴⁵ P-Ex.1, p.004, R-Ex.5, p.025.

⁴⁶ Compare P-Ex.1, p.004, R-Ex.5, p.025 and P-Ex.1. p.019.

⁴⁷ P-Ex.1, p.006-011, R-Ex.5, p.027-032.

⁴⁸ P-Ex.1, p.012, R-Ex.5, p.033.

⁴⁹ Testimony of S Student Services Coordinator 1, Tr.V2, 248:17-25, 290:5-18.

⁵⁰ P-Ex.1, p.013, R-Ex.5, p.034.

44. Nowhere in Student's IEP-05/24/2019 does it indicate that the IEP team intended to have a functional behavior assessment or another round of IEP meetings to further address Student's needs once the 2019-2020 school year started.⁵¹
45. Parent 2 did not raise any concerns or objections to Student's IEP-05/24/2019 at the IEP meeting or shortly thereafter before June 7, 2019.⁵²
46. At the time of the IEP meeting on May 24, 2019, Home School assumed that Student would be returning to Home School for the 2019-2020 school year and to the same classroom setting that Student was in for January 2019-May 2019.⁵³
47. Parent 1 only became aware of Student's IEP-05/24/2019 when Student arrived home with it in Student's backpack. Parent 1 did not ask Parent 2 or anyone else about Student's IEP-05/24/2019, nor did Parent 1 review it.⁵⁴
48. No extension was made for the power of attorney for Student and Parent 1 resumed legal guardianship of Student in or around July 2019.⁵⁵

Post IEP-05/24/2019 meeting

49. Parent 1 discovered the Program some time prior to the 2019-2020 school year on a flier that Parent 1 saw in the neighborhood. Based on Parent 1's information and follow up, Parent 1 decided to send Student to the Program in July 2019.⁵⁶
50. Parent 1 did not attempt to enroll Student at any other public school, nor did Parent 1 provide any written notification to Home School that Student would be moving and

⁵¹ See P-Ex.1, p.001-014, R-Ex.5, p.022-035.

⁵² Testimony of Student Services Coordinator 1, Tr.V2, 251:2-252:10.

⁵³ Testimony of Student Services Coordinator 1, Tr.V2, 253:10-24.

⁵⁴ Testimony of Parent 1, Tr.V1, 34:2-14, 53:1-22.

⁵⁵ Testimony of Parent 1, Tr.V1,16:6-15, 17:8-12.

⁵⁶ Testimony of Parent 1, Tr.V1, 24:21-25:1, 42:15-25.

- attending the Program.⁵⁷
51. On or around August 5, 2019, Parent 1 called the registrar at Home School to ask about a transfer of Student's records for Student to attend private facility.⁵⁸
52. A transfer/release of records form was initiated by the registrar, which included Student's identification number, the date, Student's name, gender and birthdate, the school year 2019-2020, as well as the reason and the person requesting the release. A telephone number was also listed on that form.⁵⁹
53. The typical procedure used in association with this form is that there is a communication with the registrar and the parent is asked to pick up the form and complete the information. The principal of the school is also expected to sign the completed form. The form for Student was never completed by either Parent 1 or Principal.⁶⁰
54. Although Parent 2's authority had expired and Parent 1 was now the legal guardian of Student, Home School did not document attempts to contact Parent 1 to get updated information for Student and to see whether Student would be attending Home School for the 2019-2020 school year.⁶¹
55. At the beginning of the 2019-2020 school year, Home School made arrangements for Student, like scheduling buses, even though no contact was made with Parent 1.⁶²

⁵⁷ Testimony of Parent 1, Tr.V1, 34:15-19, 53:23-54:17.

⁵⁸ Testimony of Student Services Coordinator 1, Tr.V2, 261:3-262:5.

⁵⁹ Testimony of Student Services Coordinator 1, Tr.V2, 261:12-17; P-Ex.3, p.053.

⁶⁰ Testimony of Student Services Coordinator 1, Tr.V2, 262:12-18; Testimony of DES, Tr.V2, 333:8-338:18.

⁶¹ Testimony of Student Services Coordinator 1, Tr.V2, 253:4-254:11; Testimony of DES, Tr.V2, 333:19-23.

⁶² Testimony of DES, Tr.V2, 338:23-25.

The Program and Private Facility

56. The Program was a non-profit program run by Private Facility Administrator using funding from private donors to determine the costs of running a private facility for children with special needs using teachings.⁶³
57. Private Facility is a for-profit private facility that provides a program for children that need that level of programming based on their assessments.⁶⁴
58. Private Facility is not accredited; however Private Facility is currently engaged in the process of being accredited and has entered into a business agreement for accreditation purposes.⁶⁵
59. Private Facility is also currently in the process of becoming licensed, however Private Facility Administrator was informed that a program must be started before becoming licensed and that Private Facility is in line to become licensed.⁶⁶
60. Private Facility Administrator is licensed in the State of Hawai'i. Private Facility Administrator has extensive experience in providing services in the private sector as well as in school environments.⁶⁷
61. Private Facility Administrator 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.⁶⁸

⁶³ Testimony of Private Facility Administrator, Tr.V1, 95:11-20.

⁶⁴ Testimony of Private Facility Administrator, Tr.V1, 95:21-97:24, 98:3-20, 116:3-8.

⁶⁵ Testimony of Private Facility Administrator, Tr.V1, 119:18-121:1; P-Ex.3, p.065-077.

⁶⁶ Testimony of Private Facility Administrator, Tr.V1, 121:2-22, 145:22-146:14; Tr.V2, 168:10-13.

⁶⁷ Testimony of Private Facility Administrator, Tr.V1, 65:18-66:16, Tr.V2, 200:8-15, 214:12-18; P-Ex.3, p.56-57.

⁶⁸ Testimony of Private Facility Administrator, Tr.V1, 66:2-67:4, 96:16-97:20, 136:18-137:10.

62. Private Facility Administrator is familiar with Student from guiding Student's program at Previous School for the time Student attended during the 2018-2019 school year and from working with Student at the Program in the 2019-2020 school year.⁶⁹

2019-2020 School Year

63. At the time that Parent 1 enrolled Student in the Program for the 2019-2020 school year, the Program was funded by donors, so the Program was able to provide financial assistance to Parent 1 for Student's tuition and related expenses.⁷⁰

64. The total tuition for the 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 approximate monthly payments One Hundred Dollars (\$100) a month.⁷¹

65. On August 15, 2019, the Program did an assessment for Student and prepared a Plan dated August 23, 2019 (hereinafter "08/23/2019 Plan").⁷²

66. The assessment provides specific information about a child's current level of functioning relative to a neurotypical child's level of functioning, which helps determine what milestones and skills can be followed for a program for the child.⁷³

67. Student's 08/23/2019 Plan was based in part on Student's performance, as well as information from Student's background and medical history. Student's 08/23/2019

⁶⁹ Testimony of Private Facility Administrator, Tr.V1, 75:14-23.

⁷⁰ Testimony of Private Facility Administrator, Tr.V2, 164:7-165:1.

⁷¹ Testimony of Parent 1, Tr.V1, 51:15-52:4; Testimony of Private Facility Administrator, Tr.V2, 164:7-165:1.

⁷² Testimony of Private Facility Administrator, Tr.V1, 75:24-76:1, 76:24-77:10; P-Ex.2, p.030-035.

⁷³ Testimony of Private Facility Administrator, Tr.V1, 69:18-70:8.

- Plan provided goals and objectives for Student.⁷⁴
68. As part of Student's program at the Program for the 2019-2020 school year, Student received a number of supplementary aids and services, including student-specific positive reinforcers, a language program, parent communication books, visual aids, preferential seating, preferential location, access to preferred items and activities, reverse inclusion opportunities, and a program provided by the speech-language pathologist.⁷⁵
69. At the Program, Student received the services to implement Student's program.⁷⁶
70. The Program did another assessment of Student in January 2020 to measure any progress Student made in the Program.⁷⁷ Student's scores on the assessment in Student's skill area improved from January 2020.⁷⁸ Student's scores for barriers for learning decreased from 85 in August 2019 to 75 in January 2020, which is an improvement.⁷⁹
71. Student attended the Program from August 2019 through March 2020, when the COVID-19 global pandemic mandatory quarantine occurred, and Student stayed at home with Parent 1.⁸⁰
72. During Student's stay at home with Parent 1 during COVID-19 quarantine, Parent 1 noticed an increase in Student's behavior. Private Facility Administrator provided

⁷⁴ Testimony of Private Facility Administrator, Tr.V1, 77:8-22; P-Ex.2, p.030-035.

⁷⁵ Testimony of Private Facility Administrator, Tr.V1, 91:10-11; P-Ex.2, p.041.

⁷⁶ Testimony of Private Facility Administrator, Tr.V1, 94:21-95:2; P-Ex.2, p.041.

⁷⁷ Testimony of Private Facility Administrator, Tr.V1, 86:3-10; P-Ex.2, p.036-040.

⁷⁸ Testimony of Private Facility Administrator, Tr.V1, 86:11-18; P-Ex.2, p.036.

⁷⁹ Testimony of Private Facility Administrator, Tr.V1, 89:23-90:6; P-Ex.2, p.037.

⁸⁰ Testimony of Private Facility Administrator, Tr.V1 93:2-8.

support to Parent 1 during this time.⁸¹

2020-2021 School Year

73. Prior to the start of the 2020-2021 school year or the annual review date of Student's IEP-05/24/2019, Home School did not make any attempts to contact Parent 1.

Additionally, no attempts have been made to schedule an annual review meeting for Student as of the date of the Hearing.⁸²

74. On August 11, 2020, Parent 1 contacted Home School to inform Home School that Student would be attending Private Facility and inquire about having Student's IEP-05/24/2019 and records sent to Private Facility.⁸³

75. Home School informed Parent 1 that it needed signed consent forms to release information, such as Student's IEP-05/24/2019, to another entity, such as Private Facility. Consent forms were mailed to Parent 1 and emailed to Parent 1, but they were not returned to Home School.⁸⁴

76. Student was not enrolled at any Hawai'i Public School for the 2020-2021 school year.⁸⁵

77. In order to prepare an accurate updated IEP for Student for the 2020-2021 school year, the IEP team would need to have Student back in school to see what assessments Student had completed and what kind of learning program Student had during the 2019-2020 school year. Student's IEP for the 2020-2021 school year

⁸¹ Testimony of Private Facility Administrator, Tr.V1, 93:6-13.

⁸² See Testimony of Student Services Coordinator 1, Tr.V2, 258:17-259:25; Testimony of DES, Tr.V2, 318:25-319:19, 325:5-326:3.

⁸³ Testimony of Student Services Coordinator 1, Tr.V2, 255:17-256:10.

⁸⁴ Testimony of Student Services Coordinator 1, Tr.V2, 256:11-257:2.

⁸⁵ Testimony of Parent 1, Tr.V1, 35:23-36:9; Testimony of Student Services Coordinator 1, Tr.V2, 257:3-19; Testimony of DES, Tr.V2, 315:3-316:7.

would also be subject to the common core standards in the DOE.⁸⁶

78. On September 11, 2020, Parent 1 signed an enrollment contract with itemized costs for a program for Student to attend Private Facility for the 2020-2021 school year.

The total cost of Student's program for the 2020-2021 school year is Two Hundred Twenty-Four Thousand Three Hundred Nine Dollars and Eighty Cents (\$224,309.80).⁸⁷

79. Private Facility allowed Parent 1 to defer payments pending the outcome of the instant Hearing, so as of the time of the Hearing, Parent 1 had only made a Two Hundred Fifty Dollar (\$250) deposit.⁸⁸

80. While Parent 1 did not provide written notice to the DOE that Parent 1 would be sending Student to Private Facility and asking for tuition reimbursement, Parent 1 did file the instant Complaint on July 15, 2020 and the Amended Complaint on August 20, 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.⁸⁹

81. While Parent 1 is hoping that Student's tuition and expenses in the enrollment contract would be paid as a result of the instant due process complaint and Hearing, Private Facility has made it clear that the enrollment contract is a binding agreement making Parent 1 responsible for the payment of the total costs.⁹⁰

⁸⁶ Testimony of DES, Tr.V2, 315:3-317:20, 319:1-321:1.

⁸⁷ Testimony of Private Facility Administrator, Tr.V2, 191:12-24; P-Ex.2, p.049-050.

⁸⁸ Testimony of Parent 1, Tr.V1, 46:1-19; Testimony of Private Facility Administrator, Tr.V1, 118:6-119:7; P-Ex.2, p.049, 051.

⁸⁹ See Petitioners' Complaint and Resolution Proposal, dated July 15, 2020, and Petitioners' First Amended Complaint and Resolution Proposal, dated August 20, 2020.

⁹⁰ Testimony of Parent 1, Tr.V1, 29:8-25, 52:5-14; Testimony of Private Facility Administrator,

82. Student currently attends Private Facility for the 2020-2021 school year. There are two (2) other students in Student's class in Private Facility.⁹¹
83. A new Plan dated October 18, 2020 (hereinafter "10/18/2020 Plan") was created for Student for the 2020-2021 school year.⁹²
84. Student's 10/18/2020 Plan includes results of an assessment conducted with Student on October 15, 2020, and it also includes updated goals and objectives for Student based on the results.⁹³
85. Student's results in October 2020 showed that Student had some increased barriers to learning, which was indicative of the behaviors of Student that increased while Student was at home with Parent 1 during the mandatory quarantine for COVID-19.⁹⁴
86. The costs for Student's program for the 2020-2021 school year are itemized and are based on prevailing rates for similar services in the area where Student resides.⁹⁵
87. For the 2020-2021 school year, which runs from August 17, 2020 to July 28, 2021 for an approximate length of forty (40) weeks,⁹⁶ Student will receive the following services at Private Facility: Speech Language Therapy, Consultation services, Special Education Teacher Consultation, Reverse Inclusion Program, Program Assessment, and Assistive Technologies.⁹⁷
88. Student will receive two thousand four hundred thirty-six (2,436) minutes of speech

Tr.V1, 118:6-20.

⁹¹ Testimony of Private Facility Administrator, Tr.V2, 172:11-25.

⁹² Testimony of Private Facility Administrator, Tr.V1, 92:12-17; P-Ex.2, p.042-048.

⁹³ Testimony of Private Facility Administrator, Tr.V1, 92:18-93:18; P-Ex.2, p.043-048.

⁹⁴ Testimony of Private Facility Administrator, Tr.V1, 92:22-93:18; P-Ex.2, p.048.

⁹⁵ Testimony of Private Facility Administrator, Tr.V1, 99:22-101:7, 119:8-17; P-Ex.2, p.049-050, 052.

⁹⁶ Testimony of Private Facility Administrator, Tr.V2, 207:3-9.

⁹⁷ P-Ex.2, p.049-050.

- language therapy for the school year, which is based on Student's assessment and Student's difficulties. Student's speech language therapy minutes works out roughly to about one (1) hour a week.⁹⁸
89. Student will receive three thousand six hundred fifty-four (3,654) minutes of consultation for Student's 10/23/2020 Plan.
90. Currently, Private Facility Administrator is the sole staff licensed that is employed by Private Facility, however Private Facility also has discussed sharing supervisory duties. Two members of Private Facility's staff are also in the process of becoming licensed.⁹⁹
91. At the present time, all the billed hours for Student indicated in Student's enrollment contract for speech-language therapy, consultation service and supervision would be completed by Private Facility Administrator.¹⁰⁰
92. Private Facility will provide Student with supervision for six (6) hours per day which is roughly the entire school day from 7:45 a.m. to 2:15 p.m.¹⁰¹
93. Student's 10/23/2020 Plan 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, which is roughly two (2) hours per week.¹⁰²
94. Currently Private Facility employs a special education teacher that is not licensed.

⁹⁸ Testimony of Private Facility Administrator, Tr.V1, 109:3-110:9; P-Ex.2, p.050.

⁹⁹ Testimony of Private Facility Administrator, Tr.V1, 116:9-16, Tr.V2, 185:20-186:23.

¹⁰⁰ Testimony of Private Facility Administrator, Tr.V1, 116:9-16, Tr.V2, 174:24-175:20, 185:13-19.

¹⁰¹ Testimony of Parent 1, Tr.V1, 47:10-14; Testimony of Private Facility Administrator, Tr.V1, 112:1-4, Tr.V2, 176:15-17; P-Ex.2, p.050.

¹⁰² Testimony of Private Facility Administrator, Tr.V1, 112:5-24, Tr.V2, 176:18-177:10; P-Ex.2, p.050.

95. The Reverse Inclusion Program at Private Facility is a program where non-disabled children that are distance learning or home schooled, come to Private Facility to interact with the students at Private Facility. The cost of Four Thousand Dollars (\$4,000) is the rate for a staff to supervise the non-disabled students and guide them as to their role in the program. Student's program includes four thousand eight hundred (4800) minutes of reverse inclusion per year, which amounts roughly to two (2) hours per week.¹⁰³
96. The Assessment and Program at Private Facility was designed as a way to address Student's needs in the event of another school closure, similar to what happened due to COVID in 2020. The costs include hours for two Private Facility staff to conduct a distance learning session with Student to see how Student would respond to remote learning in the event of another mandatory quarantine.¹⁰⁴
97. Student's enrollment contract also includes assistive technologies, which are technologies that are or will be utilized as part of Student's program. For the 2020-2021 school year, an iPad was purchased for Student's use for Student to augment Student's communication development.¹⁰⁵
98. Private Facility also charges a fifteen (15) percent administrative fee to cover the costs of day-to-day operations, licensing fees, legal fees, accounting, insurance and salary for an operations manager.¹⁰⁶
99. The billing rate of the costs for Student's individualized services, such as tuition,

¹⁰³ Testimony of Private Facility Administrator, Tr.V1, 106:25-108:9, 112:25-114:6, 183:25-185:12, 219:16-220:3; P-Ex.2, p.050.

¹⁰⁴ Testimony of Private Facility Administrator, Tr.V1, 114:24-115:16; P-Ex.2, p.050.

¹⁰⁵ Testimony of Private Facility Administrator, Tr.V1, 115:17-116:2; P-Ex.2, p.050.

¹⁰⁶ Testimony of Private Facility Administrator, Tr.V1, 108:10-109:2, P-Ex.2, p.050.

speech-language therapy, therapy rates, and the administrative fee are comparable to other similar centers.¹⁰⁷

V. CONCLUSIONS OF LAW

A. 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.”¹⁰⁸ A FAPE includes both special education and related services.¹⁰⁹

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.¹¹⁰ 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.”¹¹¹

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”¹¹² 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.¹¹³ The IEP is a collaborative education plan created by parents and educators who carefully consider the

¹⁰⁷ Testimony of Private Facility Administrator, Tr.V1, 119:8-17; *see* P-Ex.2, p.052.

¹⁰⁸ *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)).

¹⁰⁹ H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

¹¹⁰ *Id.*

¹¹¹ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

¹¹² *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

¹¹³ H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

child's unique circumstances and needs.¹¹⁴

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.”¹¹⁵ However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,¹¹⁶ 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.”¹¹⁷

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.¹¹⁸ “A state must meet both requirements to comply with the obligations of the IDEA.”¹¹⁹

Procedural violations do not necessarily constitute a denial of FAPE.¹²⁰ 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.¹²¹

¹¹⁴ H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

¹¹⁵ *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

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

¹¹⁷ *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).

¹¹⁸ *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

¹¹⁹ *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).

¹²⁰ *Amanda J.*, 267 F.3d at 892.

¹²¹ *Id.*

A. Petitioners have not proven that Student's placement in Student's IEP-05/24/2019 resulted in a denial of FAPE

Petitioners first argument addresses Student's educational placement in Student's IEP-05/24/2019. Petitioners argue that the IEP team at the May 24, 2019 meetings utilized improper factors to determine Student's placement. Further, Petitioners argue that Student was denied a FAPE due to Student's placement in the IEP-05/24/2019.

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..."¹²² 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.¹²³ 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.¹²⁴

Student's IEP-05/24/2019 noted Student's educational placement as "[Student] will attend a separate special education class. [Student] will eat breakfast and lunch in cafeteria and attend school assemblies with general education population."¹²⁵

¹²² *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.

¹²³ *Id.* at 1404.

¹²⁴ *Id.*

¹²⁵ FOF 45.

No evidence exists that the IEP team discussed any of the factors of the balancing test at the meeting on May 24, 2019. In fact, the evidence presented at the Hearing indicates that no discussion regarding the least restrictive environment for Student occurred at the IEP meeting.¹²⁶ 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,¹²⁷ 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, Parent 1 was not the legal guardian for Student at the time of the May 24, 2019 IEP meeting, and while Home School was aware Parent 2 was not authorized as of June 7, 2019, the IEP meeting was held with valid team members at the time.¹²⁸ Parent 2 did not have any objections to the IEP-05/24/2019, nor did Parent 2 express any concerns regarding Student's placement.¹²⁹

Parent 1 did not have knowledge about Student's IEP-05/24/2019 until Student was with Parent 1.¹³⁰ Upon discovering Student's IEP-05/24/2019, Parent 1 did not review it or speak with Parent 2 or anyone from Home School about it.¹³¹ Having not reviewed the IEP-05/24/2019, Parent 1 could not have voiced any concerns to Home School about Student's placement in the IEP-05/24/2019. Further, shortly after Student returned home to Parent 1,

¹²⁶ FOF 36.

¹²⁷ 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).

¹²⁸ FOF 32-33.

¹²⁹ FOF 47.

¹³⁰ FOF 49.

¹³¹ FOF 49.

Parent 1 discovered Private Program through some information in the community and chose to send Student there.¹³² Parent 1 did not inform Home School that Parent 1 was rejecting Student's IEP-05/24/2019 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.¹³³ It appears that Parent 1's only attempt to inform Home School of Student's transfer from Home School was a telephone call requesting a transfer of records that was not followed up on.¹³⁴ Petitioners have failed to prove that failure to discuss Student's least restrictive environment at the May 24, 2019 IEP meeting resulted in a loss of educational opportunity when Parent 2 did not reject Student's IEP-05/24/2019 at or soon after the IEP team meeting on May 24, 2019, nor did Parent 1 review Student's IEP-05/24/2019 or discuss it with either Parent 2 or Home School.

B. Petitioners did not prove that Respondents denied Student a FAPE by failing to provide sufficient supplementary aids and services

Petitioners second issue asks whether Respondents denied Student a FAPE by failing to provide sufficient supplementary aids and services for Student to be successful in the least restrictive environment. Specifically, Petitioners argue that the "Adult supervision" listed as the sole supplementary aids and services in Student's IEP-05/24/2019 is vague.

A complete IEP that is fully compliant with the IDEA must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹³⁵ The IEP itself must also contain

 a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent possible, to be provided to the student, or on behalf of the student, and a statement of program modifications or supports for school personnel that will be provided to enable the student to: (A)

¹³² FOF 51.

¹³³ FOF 52.

¹³⁴ FOF 53-55.

¹³⁵ *Rachel H. v. Department of Education Hawai'i*, 868 F.3d 1085, 1088 (9th Cir. 2017).

advance appropriately toward attaining the annual goals; (B) to be involved in and make progress in the general education curriculum in accordance with paragraph (1), and to participate in extracurricular and other nonacademic activities; and (C) To be educated and participate with other students with disabilities and nondisabled students in the activities described in this section.

In this case, Student's IEP-05/25/2018 included a list of supplementary aids and services, including consultation, activities, physical therapy consult, visual supports and schedule, and a daily parent communication log.¹³⁶ Student's IEP-05/24/2019 also contained many of the same needs in the areas of Physical Well-Being, Health and Motor Development, Social and Emotional Development, Cognition and General Knowledge, and Communication as Student's IEP-05/25/2018.¹³⁷ Student appeared to still have very similar goals and objectives for the 2019-2020 school year written in the IEP-05/24/2019, however the sole supplementary aid and support provided to Student in the IEP-05/24/2019 was "supervision during non-instructional time."¹³⁸ Further, the clarification explained by Student Services Coordinator 1 both at the IEP meeting and at the Hearing was that the supervision to be provided was an adult escort to and from places.¹³⁹

No evidence was presented at the Hearing that any discussion was had with the IEP team members that Student no longer needed the same supports and services as listed in the IEP-05/25/2018. In fact, Student Services Coordinator 1 testified that Student was provided with all the supports and services listed in the IEP-05/25/2018 at Home School, including many visual supports in class, a daily communication log with Parent 2, and a support staff.¹⁴⁰ As argued by Respondents in their closing brief,¹⁴¹ Home School was able to provide Student a FAPE by

¹³⁶ FOF 9.

¹³⁷ FOF 3-6, 37-40.

¹³⁸ FOF 8, 42, 43.

¹³⁹ FOF 44.

¹⁴⁰ FOF 23, 24, 25, 28.

¹⁴¹ See Respondents Closing Brief, filed December 2, 2020.

successfully procuring the services, supplemental aids and services as listed in the IEP-05/25/2018, even with no notice being provided by Parent 1 or Previous School about Student's transfer.

Student Services Coordinator 1 further testified that no discussion was had with the IEP team at the May 24, 2019 meeting that the supplemental aids and services were or were not effective in allowing Student to reach the goals and objectives in the IEP-05/25/2018.¹⁴² Instead, the IEP team seemingly took away all of the previous supplemental aids and services that had previously been determined as necessary parts of Student's educational plan. While DES testified that the IEP team had intended to meet again and further determine Student's needs after the school year started and had intended to complete a functional behavior assessment on Student, none of those intentions were documented in Student's IEP-05/24/2019.¹⁴³

The IDEA envisions that if a student were to transfer to a different school or location, another IEP team at that student's new school could pick up the student's IEP from the old school to provide the student with a minimum amount of services until the new team could determine what program would meet the student's needs at the new school.¹⁴⁴ Here, for Student's IEP-05/24/2019, Student was eligible for services under the Eligibility Category 1¹⁴⁵ Student had delays and needs in the areas of physical/health/self-help, social-emotional needs, approaches to learning, cognitive knowledge, communication and overall development.¹⁴⁶ Yet, the only supplemental aid or service provided to Student in the IEP-05/24/2019 was the

¹⁴² FOF 34.

¹⁴³ FOF 35, 46.

¹⁴⁴ See 20 U.S.C. §1414(d)(2)(C)(i).

¹⁴⁵ FOF 1.

¹⁴⁶ FOF 7, 41.

assistance to go from one area of the school to another.¹⁴⁷ If Student had returned to Parent 1 and transferred to a different DOE public school, a new IEP team would likely have difficulty in determining how to address Student's unique needs based on the information in Student's IEP-05/24/2019.

What is further concerning to this Hearings Officer is that in this case, Home School had the written form from Parent 2, in which it clearly indicates that Parent 2's authority expired on June 7, 2019.¹⁴⁸ While Parent 2 was clearly the guardian for Student at the time of the IEP meeting, it does not appear that any thought was given to contact Parent 1 and invite Parent 1 to the meeting or communicate with Parent 1 regarding the expiration of Student's IEP. Further, the testimony at the Hearing indicated that the IEP meeting on May 24, 2019 was held despite two events involving two of the IEP team members, rather than attempting to delay the meeting to get Parent 1 involved or to have all the necessary people present at the meeting.¹⁴⁹ Notably missing at the May 24, 2019 meeting was staff, who would have likely been able to provide information on the supplemental aids and supports that Student's IEP-05/25/2018 contained and whether they were working or not working for Student.¹⁵⁰

While this Hearings Officer finds that Respondents failed to discuss or provide sufficient supplementary aids and services for Student in Student's IEP-05/24/2019, the question then becomes whether this failure by Respondents rises to the level of a denial of FAPE. As discussed *supra*, Parent 1 acknowledged receiving Student's IEP-05/24/2019 but did not attempt to review the IEP, discuss it with Parent 2 or speak with anyone at Home School about it.¹⁵¹

¹⁴⁷ FOF 44.

¹⁴⁸ FOF 17.

¹⁴⁹ FOF 30-32.

¹⁵⁰ FOF 33.

¹⁵¹ FOF 49.

Parent 1 did not voice any objections to Student's IEP itself when Parent 1 saw the flier for the Program and decided to send Student to the Program.¹⁵² Parent 1 further did not make any attempts to enroll Student at any public school.¹⁵³

Procedural violations committed by school districts must result in a loss of educational opportunity, infringement of a parent's ability to participate in the IEP development process or a deprivation of educational benefit. In this case, this Hearings Officer finds that none of those criteria are met when Parent 1 independently chose to send Student to the Program without even looking at Student's IEP-05/24/2019. In *Department of Educ., State of Hawai'i v. M.F. ex rel. R.F.*, the court admonished a hearings officers decision in granting summary judgment on a case where the parents of student had ignored notices by the DOE and did not challenge the offer of FAPE before sending their student to a private school. In recognizing that a loss of educational opportunity must be proven in addition to the procedural violation, the court further emphasized that the record must be developed to show such a loss.

Here, Respondents failed to adequately discuss and provide sufficient supplemental aids for Student in Student's IEP-05/24/2019, thereby committing a procedural violation under the IDEA. However, the record before this Hearings Officer shows that Parent 1 did not give any consideration to sending Student to any DOE public school for the 2019-2020 school year, did not contact Parent 2 or review Student's IEP-05/24/2019 after discovering it in Student's backpack and chose to send Student to the Program because it sounded like a good opportunity for Student. Petitioners have not met their burden of proving that Respondents denied Student a

¹⁵² FOF 51.

¹⁵³ FOF 52.

FAPE by failing to provide sufficient supplementary aids and services for Student in the IEP-05/24/2019.

C. Respondents denied Student a FAPE by failing to review, revise or replace Student's IEP-05/24/2019 prior to its expiration and/or prior to the start of the 2020-2021 school year

Petitioners' final issue is that Student's IEP-05/24/2019 expired on or about May 24, 2020 and has not been replaced. The Ninth Circuit Court of Appeals has previously determined that failure of a school district to update an outdated IEP to address the unique needs of a student can rise to the level of a denial of FAPE if it is not reasonably calculated to ensure educational benefits to a student in the next year of school.¹⁵⁴ In the *Anchorage School Dist. v. M.P.*, the court supported factual findings made by the hearings officer that a second grade IEP was not reviewed and revised appropriately to address the needs of the student who would be in third grade.¹⁵⁵

In this case, Student's IEP-05/24/2019 and IEP team failed to discuss or provide sufficient supplemental aids and services for Student for the 2019-2020 school year.¹⁵⁶ As discussed during the Hearing, students are subject to different standards for curriculum, indicating that Student may have had an even greater need for additional aids and services in Student's IEP.¹⁵⁷

No attempts to schedule or hold a meeting with Parent 1 for the annual review of Student's IEP were documented by the DOE.¹⁵⁸ While Home School may have lost track of Parent 1 after Student moved away from Home School, Parent 1's Complaint and Amended

¹⁵⁴ *Anchorage School Dist. v. M.P.*, 689 F.3d 1047, 1058 (9th Cir. 2012)

¹⁵⁵ 689 F.3d at 1058.

¹⁵⁶ FOF 1.

¹⁵⁷ FOF 80.

¹⁵⁸ FOF 76.

Complaint were filed for this case in July and August 2020.¹⁵⁹ In Parent 1's Complaint and Amended Complaint, Parent 1's current address and home school district were listed. No attempts were made by anyone at the DOE subsequent to the filing of the Complaint and Amended Complaint to contact Parent 1 for an annual review of Student's IEP or to have Parent 1 sign a revocation of services for Student.¹⁶⁰

Respondents had time prior to the start of the 2020-2021 school year to attempt to contact Parent 1 and schedule an IEP meeting to review and update Student's IEP for the 2020-2021 school year. Parent 1's notice to Respondents of a denial of FAPE for Student for the issue of not having an updated IEP for Student through the Complaint and Amended Complaint was given prior to Parent 1 enrolling Student in Private Facility on September 11, 2020.¹⁶¹ Even as of the date of the Hearing, no one from the DOE had documented any attempts to schedule an annual IEP meeting for Student.¹⁶² At the time when Parent 1 enrolled Student at Private Facility, Respondents had not made any offer of FAPE for Student to have a program at any DOE public school. In this case, Petitioners have proven that the failure of Respondents to review or replace Student's IEP to address Student's needs resulted in a loss of educational opportunity for Student and rose to the level of a denial of FAPE.

D. Petitioners have proven that Private Facility is an appropriate placement for Student

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

¹⁵⁹ See Petitioners' Complaint, filed July 15, 2020, and Petitioners' First Amended Complaint, filed August 20, 2020.

¹⁶⁰ FOF 76.

¹⁶¹ FOF 81.

¹⁶² FOF 76.

public school and place the child in private school and request reimbursement for tuition at said private school from the local educational agency.¹⁶³ 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.¹⁶⁴ The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in *Frank G. v. Bd. of Educ.*,¹⁶⁵ 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.”¹⁶⁶

Petitioners have established that Parent 1 paid tuition for Student for the 2019-2020 school year¹⁶⁷ and has signed an enrollment contract obligating Parent 1 to pay tuition for Student for the 2020-2021 school year.¹⁶⁸ As the tuition reimbursement relates to two separate 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

¹⁶³ *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).

¹⁶⁴ *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

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

¹⁶⁶ *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.

¹⁶⁷ FOF 67.

¹⁶⁸ FOF 81.

Regarding tuition for Student's attendance at the Program 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-05/24/2019. 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.¹⁶⁹ 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,¹⁷⁰ 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.¹⁷¹ 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 the Program for the 2019-2020 school year as an opportunity for Student, rather than an alternative to a deficient program offered by the DOE. Parent 1 did not review Student's IEP-05/24/2019, nor did Parent 1 provide notice to the DOE that Student would be enrolled in private placement and that tuition reimbursement would be sought.¹⁷² Finally, Parent 1 filed the Complaint in this case on July 15, 2020 and the

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

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

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

¹⁷² FOF 52.

Amended Complaint on August 20, 2020.¹⁷³ As Parent 1 unilaterally placed Student at the Program 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 the Program 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. Respondents in this case failed to make any attempts to update Student's IEP prior to the annual review date of May 24, 2020 or the start of the 2020-2021 school year, which resulted in a loss of educational opportunity for Student. 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 Facility is an appropriate placement for Student. Private Facility has completed three (3) formal assessments of Students in August 2019, January 2020, and October 2020.¹⁷⁴ Based on the results of the assessments, Student has made significant overall progress and notable progress in many skill areas.¹⁷⁵ Private Facility has created an educational program with specific goals and objectives for Student for the 2020-2021 school year.¹⁷⁶ Private Facility will provide Student with speech-language therapy, services including staff for Student throughout the school day, consultation from a special education teacher for Student's programming and a reverse

¹⁷³ See Petitioners' Complaint filed on July 15, 2020, and Petitioners' Amended Complaint filed on August 20, 2020.

¹⁷⁴ FOF 68, 73, 87.

¹⁷⁵ FOF 73, 88.

¹⁷⁶ FOF 86.

inclusion program, which allows Student to interact with non-disabled peers of the same age.¹⁷⁷

Private Facility has also planned for a distance learning program if confronted with another government mandated shut-down due to a pandemic.¹⁷⁸ Private Facility has created a specific and detailed educational program for Student that addresses Student's individual needs. This Hearings Officer concludes that Private Facility is an appropriate placement for Student for purposes of tuition reimbursement.

3. Private Facility's accreditation status

Respondents argue that Private Facility cannot be determined to be an appropriate placement for Student because Private Facility is not a private elementary or secondary school under the IDEA, as Private Facility is not licensed or accredited at this time.¹⁷⁹ The relevant Hawai'i law, consistent with the IDEA,¹⁸⁰ 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. Hawai'i Revised Statutes Section 302A-443.5 provides:

"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

¹⁷⁷ FOF 90-92, 95-96, 98.

¹⁷⁸ FOF 99.

¹⁷⁹ See Respondents' Closing Brief, filed December 2, 2020, pages 31-32.

¹⁸⁰ 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).

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.

In this case, Private Facility is currently in the accreditation process.¹⁸¹ This Hearing Officer finds that Private Facility is an appropriate program for Student as a nonpublic special education facility or program.

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.¹⁸² In *C.B. ex rel. Baquerizo v. Garden Grove 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 because everything that the placement provided was “proper, reasonably priced, and appropriate, and the program benefitted [the student] educationally.”¹⁸³ The Ninth Circuit Court of Appeals affirmed the district court’s decision, adopting the standard set forth in *Frank G.* as discussed *supra*.¹⁸⁴

Here, Respondents argue two related points in requesting that tuition reimbursement be reduced for equitable considerations. First, Respondents argue that tuition reimbursement be

¹⁸¹ FOF 60-61.

¹⁸² *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 private school, “the district court must exercise its ‘broad discretion’ and weigh ‘equitable considerations’ to determine whether, and how much, reimbursement is appropriate.”)

¹⁸³ *Id.* at 1160.

¹⁸⁴ *Id.*

reduced because Private Facility is a step backward from Home School because it is a highly restrictive environment without the opportunity for Student to be educated with non-disabled and age-appropriate children.¹⁸⁵ 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. Additionally, this Hearings Officer found *supra* that Student's IEP-05/24/2019 failed to provide sufficient supplementary aids and services for Student in the program for the 2019-2020 school year. At this time, Student does not have a current IEP to address Student's unique needs for a classroom and curriculum. While Respondents allege that at Private Facility, Student would not be educated with non-disabled age-appropriate peers, Student's IEP-05/24/2019 also placed Student in "a separate special education class" where Student would also not have been educated with non-disabled peers.¹⁸⁶ Further, Private Facility provides a reverse inclusion program from which Student receives interaction opportunities with non-disabled children at or near Student's age.¹⁸⁷ Private Facility has also created an educational program for Student with goals and objectives based on the results of the assessment completed on October 15, 2020.¹⁸⁸ Private Facility's programming is based upon Private Facility Administrator's extensive experience in providing this style of assistance to children, and in fact was the same type of program the DOE contracted Private Facility Administrator for consultation when the DOE began their own program.¹⁸⁹

Second, Respondents argue that Private Facility's 'exorbitant costs' and the fact that Private Facility Administrator 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

¹⁸⁵ See Respondents' Closing Brief, filed December 2, 2020, page 32.

¹⁸⁶ FOF 45.

¹⁸⁷ FOF 98.

¹⁸⁸ FOF 86-87.

¹⁸⁹ FOF62-63.

discussed previously, Private School's hourly rates are based upon comparable programs for similar services.¹⁹⁰ This Hearings Officer recognizes that Private Facility is a new school and declines to reduce tuition reimbursement based on this argument, as Private Facility is currently working on hiring additional staff to provide some of the itemized services for Student.¹⁹¹

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.¹⁹² 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.*,¹⁹³ 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.¹⁹⁴ The Court noted that such a remedy also furthers the purposes of the IDEA "by extending the unilateral withdrawal options to parents with limited financial means, who otherwise could not avail themselves of it."¹⁹⁵ Here, similar to the facts of *E.M.*, while Parent 1 testified that Parent 1 hoped that Petitioners would prevail in this case, Parent 1 signed an enrollment contract binding Parent 1 to the tuition listed in the contract.¹⁹⁶ This Hearings Officer declines to reduce the tuition reimbursement award to Parent 1 based on Parent 1 not having made any payments to Private Facility for Student's tuition.

VI. DECISION

¹⁹⁰ FOF 89, 102.

¹⁹¹ FOF 93.

¹⁹² See Respondents' Closing Brief, filed December 2, 2020, page 35.

¹⁹³ 758 F.3d 442.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ FOF 81, 84.

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-05/24/2019. Any reimbursement request made by Petitioners for Student's tuition at Private Facility for the 2019-2020 school year is denied.

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 Facility is an appropriate placement for Student and that Parent 1 is entitled to tuition reimbursement to Private Facility 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 Facility for the 2020-2021 school year.

For the reasons stated above, IT IS HEREBY ORDERED –

1. Within sixty (60) days of this Decision, Respondents shall hold an IEP meeting for Student to develop an IEP for Student.
2. Parent 1 is expected to provide all necessary consents for Respondents to get current, updated information for use in developing Student's IEP.
3. Private Facility shall, in accordance with Hawai'i Revised Statutes Section 302A-443(f), allow Respondents to monitor Student at Private Facility.
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 Facility 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 Facility 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 Facility in accordance with Hawai'i Revised Statutes Section 302A-443(f)-(j). In no event should the total payment to Private Facility exceed Two Hundred Twenty-Four Thousand Three Hundred Nine Dollars and Eighty Cents (\$224,309.80).

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, December 11, 2020.

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