



OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

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

Petitioner(s),

vs.

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

Respondents.

DOE-SY2021-008

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION

Due Process Hearing: January 19-21, 2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On July 17, 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 due process hearing entitled "Complaint and Resolution Proposal" (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in

accordance with the Individuals with Disabilities Education Act, from Student, by and through Parents (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on July 23, 2020. Petitioners requested and were granted leave to file an amended request for due process hearing. On August 17, 2020, Petitioners filed their First Amended Complaint and Resolution Proposal (hereinafter “Amended Complaint”). Respondents filed their response to Petitioners’ Amended Complaint on September 2, 2020.

On September 14, 2020, a prehearing conference was held before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Stuart N. Fujioka, Esq. (hereinafter “Mr. Fujioka”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for October 28-30, 2020.

Based on the availability of counsel and the witnesses, the first available date for the Hearing was set near the 45-day decision deadline of October 31, 2020. Petitioners requested an extension of the deadline to December 15, 2020 due to the earliest available Hearing date being set so close to the 45-day decision deadline. Petitioners’ request was granted and the deadline for the decision moved to December 15, 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 7, 2020, which set forth the parameters for the video conference hearing. These parameters

² See Governor of the State of Hawai‘i’s Thirteenth Proclamation Related to the COVID-19 Emergency, effective September 23, 2020; Fourteenth Proclamation Related to the COVID-19 Emergency, effective October 13, 2020; and Fifteenth Proclamation Related to the COVID-19 Emergency, effective November 16, 2020.

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.

On October 27, 2020, Mr. Peck requested a status conference with this Hearings Officer and Mr. Fujioka due to an emergency. At the status conference, a request to continue the Hearing was made by Mr. Peck due to the emergency. Hearing no objection from Mr. Fujioka or either of the parties, the Hearing was rescheduled to January 19-21, 2021. Petitioners requested another extension of the 45-day decision deadline due to the rescheduling of the Hearing based on Mr. Peck's request. Petitioners request for an extension was granted and the new 45-day decision deadline was set for January 29, 2021.

The Hearing commenced on January 19, 2021, 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 and Mr. Peck, on behalf of Petitioners; and District Resource Teacher and Mr. Fujioka, on behalf of Respondents; as well as the assigned court reporter. The Hearing continued to January 20 and 21, 2021 as scheduled, and the testimony of the witnesses was completed on the latter date.

At the Hearing, Petitioners called Parent, Neuropsychologist, Private School Director (hereinafter "PSD"), and Private Board-Certified Behavior Analyst (hereinafter "Private BCBA") to testify during their case-in-chief and rested. Respondents called Diagnostic Psychologist (hereinafter "DP"), General Education Teacher (hereinafter "GE Teacher"),

Summer Special Education Teacher (hereinafter “Summer SPED”), Special Education Teacher (hereinafter “SPED”), Student Services Coordinator (hereinafter “SSC”), and DOE Licensed Behavior Analyst (hereinafter “DOE LBA”) during their case and rested. Petitioners recalled Parent to present rebuttal evidence and rested.

Each party submitted their exhibits for the Hearing by the initial disclosure deadline of October 21, 2020. Upon continuation of the Hearing at the request of Mr. Peck, another disclosure deadline was provided for parties to disclose any additional exhibits prior to the hearing. The deadline was set for January 11, 2021. On January 15, 2021, Respondents submitted additional exhibits as part of their disclosure for the Hearing. Prior to the start of the Hearing on January 19, 2021, this Hearings Officer noted to the parties that the additional exhibits submitted by Respondents were untimely and inquired whether Petitioners were objecting to the exhibits from being introduced at the Hearing. Petitioners did not object to the additional exhibits or request that they be excluded based on late disclosure.

During the Hearing, all exhibits that were reviewed or discussed by the witnesses were marked and received into evidence. On January 22, 2021, a list of exhibits that were discussed during the Hearing was provided to counsel by this Hearings Officer. After the Hearing, this Hearings Officer allowed both parties to submit any additional exhibits that they wanted to be included in the record. A list of these additional exhibits, along with a summary of the relevance of the documents were due on January 29, 2021. Any objections to the proposed exhibits were due on February 5, 2021. Respondents submitted Respondents’ Exhibit 3, pages 158-159 as an additional exhibit to be considered in the decision for this case. Petitioners did not state objections to this exhibit being received as evidence for consideration in the decision, so Respondents’ Exhibit 3, pages 158-159, was received.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-019; Exhibit 19, pages 047-060; Exhibit 22, page 065; Exhibit 23, page 066; Exhibit 25, pages 083-088; Exhibit 26, pages 089-093; Exhibit 27, which was an audio file dated 05/27/2020; Exhibit 28, pages 094-107; Exhibit 29, pages 108-109; Exhibit 30, pages 110-127; Exhibit 31, pages 128-131; and Exhibit 32, pages 132-142. Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 021-029; Exhibit 2, pages 038-039, 050-059, 079-086; Exhibit 3, pages 139-159; Exhibit 4, pages 162-179, 184-193, 202-264; Exhibit 6, pages 291-294, 325-328, 333-336, 345-349, 352, 358-361, 364-369, 374-493; Exhibit 7, pages 514-534; Exhibit 8, pages 536-539; and Exhibit 9, pages 571-593, 598-686, 697-705, and four audio/video files dated 05/01/20, 05/06/20, 05/12/20, and 05/27/20.

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. Due to the request of both parties to prepare the closing briefs with the assistance of transcripts from the Hearing, Petitioners requested an extension of the 45-day deadline from January 29, 2021 to March 15, 2021, which was granted on January 27, 2021. The deadline by which the closing briefs were to be submitted was originally set for February 22, 2021; however, due to a delay in the receipt of transcripts, the deadline for submission of written closing briefs was extended to February 24, 2021. 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 § 8-60-1, *et seq.*

III. ISSUES PRESENTED

Petitioners assert eight (8) issues in the Amended Complaint to be addressed at the Hearing:

1. Whether Respondents denied Student a free, appropriate public education (hereinafter “FAPE”) both procedurally and substantively when the 05/27/2020 IEP did not address the individual needs of Student regarding Extended School Year (hereinafter “ESY”) services, such as duration of school day, and/or restrictiveness of environment. Petitioners list the following sub-arguments regarding this issue:
 - a. Petitioners argue that Parents were not provided data to review during the 5/27/2020 IEP meeting and that the DOE failed to collect sufficient information to address Student’s needs.
 - b. Petitioners argue that the DOE did not appropriately determine that Student would need a 19-day period before and after ESY.
 - c. Petitioners argue that the length of Student’s ESY day was not sufficiently addressed at the IEP meetings, affecting parental participation and resulting in a loss of educational opportunity.
 - d. Petitioners further assert that Student’s least restrictive environment for ESY was not appropriately addressed during the IEP meetings.
2. Whether Respondents denied Student a FAPE when the 05/27/2020 IEP team utilized improper factors to determine Student’s placement.
3. Whether Respondents denied Student a FAPE by failing to collect sufficient data/information and/or include participation by knowledgeable persons about Student’s needs at the 05/27/2020 IEP meetings. This includes a discussion about assistive technology, applied behavior analysis and/or communication skills.
4. Whether Respondents denied Student a FAPE when the 5/27/2020 IEP team improperly changed interpersonal communication skills (social skills) objectives and/or made social skills objectives that are insufficient in focus and/or formulation.
5. Whether Respondents denied Student a FAPE when the 05/27/2020 IEP fails 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. Petitioners list the following as examples for this issue:

- a. The phrase “Teacher Consultation” is vague and difficult for Parents to enforce and at 90 minutes each quarter, it is of insufficient frequency.
 - b. The frequency “Behavior Support Plan” does not describe the behavioral interventions Student will require. It is also not a plan that was discussed and developed during the IEP meeting and can be altered without parental input.
 - c. Student’s behavioral interventions were insufficiently discussed during the IEP meeting.
 - d. The phrase “Positive Reinforcement” is vague and will not allow Parents a means to enforce this modification.
 - e. Parents’ attempt to discuss applied behavioral analysis as a behavioral modification for Student was cut short by DOE citing to a policy that it cannot be provided unless Student needed a Behavioral Intervention Plan after an FBA was done.
 - f. Applied Behavioral Analysis is a medically necessary intervention for Student and the DOE has prevented Student’s access to this service at school.
 - g. Student requires Parental Education and Training to be a part of Student’s IEP.
6. Whether Respondents denied Student a FAPE when Parents were prevented from speaking with and/or gaining information from Student’s Individual Instruction Support service provided or through the use of an electronic device.
 7. Whether Respondents denied Student a FAPE by materially failing to implement Student’s 11/25/2019 IEP since around March 17, 2020 through around May 29, 2020.
 8. Whether Respondents denied Student a FAPE by failing to offer a safe and effective setting for the implementation of Student’s 05/27/2020 IEP since they informed Parents that the 5/27/2020 IEP would not be implemented with fidelity and/or they informed Parents there would be alterations in the implementation of Student’s IEP.

In their written closing brief, filed on February 24, 2021, Petitioners withdrew several issues in the Amended Complaint from consideration. Based on Petitioners’ Closing Brief, the following issues were withdrawn and will not be addressed in this Decision: Issue 4; Issue 5, parts (f) and (g); and Issue 7.

IV. FINDINGS OF FACT

Witness Background

1. Neuropsychologist has a master’s and doctoral degree in clinical psychology, and a post-doctoral certificate in clinical neuropsychology. Neuropsychologist has been

working with children with autism for approximately ___ years, including developing programs for children with autism and consulting with the Hawai‘i DOE to guide the process of developing a program for a child with high needs. While Neuropsychologist does not have any teaching certificates, Neuropsychologist has some experience as a classroom teacher in a private school setting.³

2. Neuropsychologist was qualified to testify as an expert witness in this Hearing in the evaluation of educational needs of children with autism spectrum disorder and their program.⁴
3. PSD has been the executive director for Private School for ___ years and prior to that, was a program director at Private School for about ___ years. PSD has a master’s degree in education, was an autism consultant, and has specialized training in working with autistic training from a mainland company specializing in autism and related services and disorders.⁵
4. Private BCBA is a licensed behavior analyst in the State of Hawai‘i who has been certified as a board-certified behavior analyst for ___ years and licensed in Hawai‘i for ___ years. Private BCBA has a master’s degree in psychology with an applied behavior analysis (hereinafter “ABA”) concentration. Private BCBA has experience in working with ABA programs for children with special needs since ____.⁶
5. DP has a master’s and doctoral degree in clinical psychology and is licensed in the

³ Testimony of Neuropsychologist, Transcript Volume 1, page 12, line 23 to page 21, line 17 (hereinafter referenced as “Tr.V1, 12:23-21:17”); Petitioners’ Exhibit 25, pages 083-088 (hereinafter referenced as “P-Ex.25, p.083-088”).

⁴ Testimony of Neuropsychologist, Tr.V1, 21:20-24.

⁵ Testimony of PSD, Tr.V1, 99:12-100:3, 111:10-112:23.

⁶ Testimony of Private BCBA, Tr.V2, 192:1-14; P-Ex.29, p.108-109.

State of Hawai‘i as a psychologist since _____. DP has been contracted by the Hawai‘i DOE to conduct comprehensive psychological evaluations for public schools since _____ and has experience in reviewing diagnostic testing reports from different trainees. DP has experience in neuro-developmental disorders through training, a fellowship, as well as _____ years of work experience in conducting neuropsychological assessments with children.⁷

6. DP was qualified to testify as an expert witness in this Hearing in diagnostic testing and psychology with a specific expertise in neurodevelopmental disorders.⁸
7. GE Teacher is a general education teacher who has been teaching children in _____ at Home School for around _____ years.⁹
8. SPED is a special education teacher at Home School who has been teaching special education in the Hawai‘i DOE for _____ years. SPED has a bachelor’s degree and master’s degree in special education. SPED also has certified training in the Orton-Gillingham Approach from _____.¹⁰
9. DOE LBA is a board-certified behavior analyst that has been certified since _____ and licensed in the State of Hawai‘i since _____. DOE LBA has a bachelor’s degree with a double major in psychology and linguistics and a master’s degree in clinical psychology with a concentration in ABA.¹¹
10. Parent is a _____.

⁷ Testimony of DP, Tr.V2, 247:20-262:11; Respondents’ Exhibit 9, pages 697-705 (hereinafter referenced as “R-Ex.9, p.697-705”).

⁸ Testimony of DP, Tr.V2, 263:14-18.

⁹ Testimony of GE Teacher, Tr.V2, 299:18-301:4.

¹⁰ Testimony of SPED, Tr.V2, 344:1-345:1, Tr.V3, 399:12-17.

¹¹ Testimony of DOE LBA, Tr.V3, 431:11-21.

Parent has a master's degree in child and adolescent psychiatric mental health and has done research on Student's diagnoses and the best way to support Student.¹²

11. Parent 2 is a [REDACTED] and is primarily responsible for assisting Student with Student's homework and any distance learning opportunities, as Parent 2's schedule is more accommodating for those purposes.¹³

Student's background

12. Student is ___ years old and currently attends Private School for the 2020-2021 school year.¹⁴
13. In July 2013, Student was found eligible for IDEA special education and related services under the category of "___" and began attending Home School's [REDACTED].¹⁵
14. In December 2014, Student was reevaluated and given a provisional diagnosis of ___ (hereinafter "___") and ___ (hereinafter "___"), but was still determined to be eligible for IDEA special education and related services under the category of "___".¹⁶
15. In December 2017, a triennial evaluation was conducted with Student and at that time, the IEP team determined that Student would be eligible for IDEA special education and related services under the eligibility category of "___".¹⁷
16. Student has been receiving ABA services in the home through a private company funded by medical insurance since at least the beginning of the 2019-2020 school

¹² Testimony of Parent, Tr.V1, 161:3-162:6, Tr.V2, 240:22-24.

¹³ Testimony of Parent, Tr.V1, 131:24-132:7, 169:11-170:16.

¹⁴ See Testimony of Parent, Tr.V1, 125:23-127:23, Tr.V2, 220:22-25; P-Ex.1, p.001, R-Ex.3, p.139; P-Ex.32, p.132-142.

¹⁵ R-Ex.2, p.050.

¹⁶ R-Ex.2, p.050.

¹⁷ R-Ex.2, p.050.

- year.¹⁸
17. For the 2018-2019 school year, Student attended Home School as a ___ grader, and Summer SPED was assigned as Student's care coordinator.¹⁹
 18. In Student's ___ grade year, Parents received reports of Student having behavioral issues at school, including a report of Student exposing Student's self and using a plastic fork in a weapon-like fashion toward other students. Parents also observed that Student was struggling more academically and starting to fall behind.²⁰
 19. In August 2019, the IEP team met and determined that Student would be given a comprehensive reevaluation for Student's IDEA eligibility. Student had previously been determined eligible under the category of "___," but Parents provided the IEP team with information from outside professionals that indicated that Student was diagnosed with ___. The comprehensive reevaluation of Student would include cognitive, academic, adaptive behavior, speech/language, and behavior assessments; as well as classroom observations of Student.²¹
 20. In August and September 2019, the reevaluation assessments were completed with Student and the classroom observations of Student were done in September 2019.²²
 21. Sometime during Student's ___ grade year at Home School, Private BCBA made observations of Student at Home School in response to a request by Parents to ensure that Student was accessing Student's education.²³ During Private BCBA's

¹⁸ Testimony of Parent, Tr.V1, 72:6-10, 74:19-22.

¹⁹ Testimony of Parent, Tr.V1, 76:6-12.

²⁰ Testimony of Parent, Tr.V1, 66:10-67:5, 68:5-71:24, Tr.V3, 480:8-15.

²¹ Testimony of SSC, Tr.V3, 407:19-408:9; R-Ex.2, p. 038-039.

²² See R-Ex.4, p.162-179, 184-187, 188-193, 202-204, 205-209, and 210-212.

²³ Testimony of Private BCBA, Tr.V2, 194:12-195:3.

observations, Private BCBA did not observe Student display any concerning behaviors, including the emotional dysregulations that Student was working on at home.²⁴ Private BCBA recommended that some strategies to Parents for Student at school, such as priming, which was letting Student know what was expected of Student before starting; redirection, which was redirecting Student back to the task or activity at hand; using timers to help Student understand when transitions would occur; and different prompting and prompt-fading strategies to work on Student's independence.²⁵

22. In November 2019, an annual IEP was developed for Student, dated November 25, 2019 (hereinafter "IEP-11/25/2019").²⁶
23. Parents continued to request that the DOE perform a functional behavior assessment (hereinafter "FBA") with Student based, in part, on recommendations from Student's private providers that Student receive ABA services at school.²⁷ Home School did not want to proceed with the FBA, due to the Home School believing that Student's behaviors did not warrant an FBA, but it was eventually determined that an FBA would be conducted with Student.²⁸
24. DOE LBA was assigned to conduct Student's FBA, which was conducted between December 13, 2019 through January 20, 2020.²⁹
25. Parents disagreed with the FBA conducted with DOE LBA and made a request to the

²⁴ Testimony of Private BCBA, Tr.V2, 199:16-201:1.

²⁵ Testimony of Private BCBA, Tr.V2, 196:25-197:17.

²⁶ P-Ex.28, p.094-107.

²⁷ Testimony of Parent, Tr.V1, 70:15-73:12, 74:19-75:2.

²⁸ Testimony of Parent, Tr.V1, 75:3-77:24; Testimony of SSC, Tr.V2, 414:5-18, 416:3-11; Testimony of DOE LBA, Tr.V3, 444:17-445:1.

²⁹ Testimony of DOE LBA, Tr.V3, 432:9-433:17; P-Ex.19, p.047-060, R-Ex.4, p.213-228.

DOE for an independent educational evaluation. The DOE filed a due process complaint, which was eventually withdrawn when Parent's withdrew their request for an independent educational evaluation.³⁰

26. Parents submitted a request to Home School to have a private evaluator come to Home School to observe Student. Parents requested that Student's special education services and supplemental aids and supports, including Student's one-to-one educational assistant (hereinafter "EA"), be removed during the period of the observation.³¹
27. In response, Home School informed Parents that the private evaluator would be allowed to observe Student during a mutually agreed-upon time with some restrictions and that Student's special education services and supplemental aids and supports would not be removed for purposes of the observation.³²
28. The restrictions for the private evaluator included prohibiting the evaluator from interacting with other children; ensuring that the evaluator does not interfere with instruction or unduly disrupt the classroom; terminating the observation in the event of distress to the students or disruption of routines or activities; and that the evaluator be accompanied to and from the classroom and during the observation.³³
29. The observation for private evaluator to observe Student at Home School was scheduled for March 31, 2020, however it did not occur due to Home School's closure in light of the COVID-19 global pandemic.³⁴

³⁰ Testimony of Parent, Tr.V1, 81:9-82:8.

³¹ Testimony of SSC, Tr.V3, 419:18-420:3; R-Ex.6, p.325-326.

³² Testimony of SSC, Tr.V3, 420:4-10; R-Ex.325-326.

³³ R-Ex.325-326.

³⁴ Testimony of SSC, Tr.V3, 419:18-23; R-Ex.6, p.333-334.

30. In December 2019, Neuropsychologist conducted a neuropsychological assessment with Student and prepared a report dated January 2, 2020. Student returned for a follow-up assessment in February 2020, and an amended report was prepared on February 12, 2020.³⁵

Student's assessments and reevaluation results

31. DP conducted an emotional behavior assessment (hereinafter "EBA") with Student as part of Student's reevaluation in 2019. DP prepared an assessment report on September 29, 2019, which gave Student a provisional diagnosis for ___, a diagnosis for ___, and listed by history but did not confirm, a diagnosis of ___.³⁶
32. DP's EBA report also included recommendations for an FBA to be conducted with Student to get a better understanding of why Student's behaviors occur and what can be done to correct them. DP's recommendation for the FBA was not based on any observations of Student displaying concerning behaviors at school.³⁷
33. Student's cognitive assessment was completed by Cognitive Assessor on August 22, 2019. Student's cognitive assessment results indicated that Student's verbal comprehension, working memory, and processing speed are significantly delayed areas and weaknesses for Student. Cognitive Assessor noted that Student's difficulty with working memory and processing speed may impact Student's reading and writing fluency and math learning.³⁸
34. SSC conducted Student's academic assessment on August 20, 2019. Student's

³⁵ Testimony of Neuropsychologist, Tr.V1, 28:2-13, 40:1-19; R-Ex.4, p.229-264.

³⁶ Testimony of DP, Tr.V2, 265:20-274:1, R-Ex.4, p.162.

³⁷ Testimony of DP, Tr.V2, 274:2-25.

³⁸ R-Ex.4, p.184-187.

academic assessment results indicate that Student's overall academic skills fall significantly below age expectations, with most of Student's reading, writing and math scores falling in the low to very low range. SSC recommended that Student would benefit from accommodations, supports, and modifications; such as visual cues and prompts, to assist with Student's learning.³⁹

35. SSC also conducted the classroom observations of Student at Home School in September 2019. These observations were conducted over the course of two (2) days in the general education class with Student's EA and the special education resource room.⁴⁰
36. During SSC's first classroom observation of Student, SSC noted that when Student was in the general education classroom working on a computer-based program, Student worked independently and did not need any teacher cuing or redirection during the observation.⁴¹
37. For SSC's second classroom observation, Student was in the general education classroom and the teacher had given the students a group project. Student's EA provided modifications for Student for the assignment, and Student needed periodic reminders and redirection from the EA. Student interacted appropriately with other students in Student's group and did not display any behaviors that interfered with Student's ability to complete the assignments. Student was able to ask Student's teacher and EA for assistance and attempted to initiate interaction with peers. Student did not appear to be paying attention to the teacher during two (2) times when the

³⁹ Testimony of SSC, Tr.V3, 409:3-24; R-Ex.4, p.188-193.

⁴⁰ Testimony of SSC, Tr.V3, 409:25-441:1.

⁴¹ Testimony of SSC, Tr.V3, 411:4-9; R-Ex.4, p.202-204.

teacher was giving instructions and displayed a fixation behavior that lasted a short time.⁴²

38. The last classroom observation conducted by SSC was in the special education resource room during Student's math instructional period. On the day that SSC's observation was conducted, a substitute teacher was teaching. Student needed multiple reminders and prompts to follow the instructions given by the teacher. Student also became easily distracted and needed to be redirected over the course of the instructional period, but eventually was able to complete Student's assignment. Student was provided with visual and verbal cues to get back on task and praise and a token system upon Student's completions of tasks.⁴³
39. Student's FBA was completed by DOE LBA, who conducted a records review; interviews with Parents, Student's EA, and SPED; observations of Student at school on three (3) different occasions (two before and one after winter break); and two (2) assessments completed by SPED and Student's EA. DOE LBA also attended the initial meeting where the determination was made to conduct the FBA and spoke with Parents regarding their specific concerns for Student.⁴⁴
40. The two problem behaviors identified in Student's FBA were non-compliance and off-task behavior. DOE LBA reviewed data collected by Home School and collected data during the observation periods of Student in relation to the two problem behaviors identified in the FBA. DOE LBA determined that the FBA results would be accurate even though the observations were done with Student's supports in

⁴² Testimony of SSC, Tr.V3, 411:10-17; R-Ex.4, p.205-209.

⁴³ Testimony of SSC, Tr.V3, 411:18-23; R-Ex.4, p.210-212.

⁴⁴ Testimony of DOE LBA, Tr.V3, 431:22-439:20; R-Ex.4, p.213-215.

place.⁴⁵

41. Upon completion of the FBA, DOE LBA recommended that the teachers and staff members that work closely with Student receive consultation, training, and education regarding Student's behaviors and appropriate antecedent strategies. DOE LBA did not recommend that a behavior intervention plan be prepared by an ABA professional for Student, as Student did not display any behaviors that were not manageable by classroom management strategies.⁴⁶
42. DOE LBA's FBA also included a long-term behavior goal of increasing on-task behavior by 50% for two consecutive months by the next IEP date, and several short-term behavior objective suggestions.⁴⁷
43. Neuropsychologist conducted a neuropsychological evaluation of Student in December 2019. Neuropsychologist's evaluation included a clinical interview with Student, a child registration and history form, four (4) assessments conducted with Student, and six (6) assessments completed by Parents and/or Private BCBA.⁴⁸
44. Neuropsychologist's report was revised in February 2020 due to Student undergoing a sleep study. Neuropsychologist conducted one of the assessments to measure Student's cognitive functioning a second time after the sleep study. In the second administration of the cognitive functioning assessment, Student's score raised from the "poor" range (score of 75) to the "low average" range (score of 82).⁴⁹
45. Neuropsychologist's diagnoses of Student included: [REDACTED]

⁴⁵ Testimony of DOE LBA, Tr.V3, 433:4-8; R-Ex.4, p.215-227.

⁴⁶ Testimony of DOE LBA, Tr.V3, 439:21-441:4, 449:24-451:14, 457:6-458:11.

⁴⁷ R-Ex.4, p.228.

⁴⁸ R-Ex.4, p. 230-257.

⁴⁹ Testimony of Neuropsychologist, Tr.V1, 51:17-53:11; R-Ex.4, p.232-233.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁵⁰

46. Some recommendations included in Neuropsychologist’s report include: ABA services in school that includes teacher training; speech therapy; special education services; occupational therapy; multi-sensory learning; praise and reinforcement, including “positive reinforcement;” consistent routines; visual reminders; daily planner or calendar; and a distributed practice, which includes providing Student with breaks and the use of a timer.⁵¹

Student’s background during the 2019-2020 school year

47. Student attended Home School as a ___ grader for the 2019-2020 school year, until March 2020, when Home School and all other public schools in the State of Hawai‘i were shut down due to the COVID-19 global pandemic. For the 2019-2020 school year, SPED was Student’s special education teacher and care coordinator, and GE Teacher was Student’s teacher for general education.⁵²

48. For the 2019-2020 school year, Student was assigned an EA to accompany Student during the general education class periods, and any unstructured periods, such as

⁵⁰ R-Ex.4, p.260-261.

⁵¹ R-Ex.4, p.261-263.

⁵² See Testimony of Parent, Tr.V1, 69:22-70:2, 149:16-17; Testimony of SPED, Tr.V2, 345:5-24, Tr.V3, 399:4-401:16; Testimony of SSC, 409:25-411:1; R-Ex.4, p.202-212; R-Ex.6, p.386-493; R-Ex.7, p.514-534; R-Ex.9, p.588-592.

lunch and recess.⁵³

49. Student participated in the general education class setting for all times during the school day, except for math and language arts, when Student would get instruction from SPED in the special education classroom.⁵⁴
50. In the special education setting for math and language arts, Student would receive individual instruction from SPED or one of the classroom assistants.⁵⁵
51. Beginning the first day of the 2019-2020 school year, SPED completed a daily communication data sheet prepared by Private BCBA to communicate Student's behavior data, concerns, activities, and overall review of Student's day. SPED completed a communication data sheet for every day that SPED was present to instruct Student. Occasionally, GE Teacher would complete the log individually or in conjunction with SPED.⁵⁶
52. The communication data measured Student's classroom behavior and behavior during unstructured times and included a legend for the teachers to indicate the number of prompts needed or if any significant prompting was necessary. The logs also included areas for the teachers to write Student's interaction with peers and other notes. A section was also available for Parents to acknowledge reading the log and to write any questions or concerns. Based on the communication log, during the 2019-2020 school year, Student did not display any significant behavioral incidents in

⁵³ Testimony of GE Teacher, Tr.V2, 323:4-19; Testimony of SPED, Tr.V2, 349:18-350:3.

⁵⁴ Testimony of GE Teacher, Tr.V2, 322:18-323:3.

⁵⁵ Testimony of SPED, Tr.V2, 353:14-356:2, Tr.V3, 397:16-398:17, 399:22-25; R-Ex.9, 05/01/20 [time]

⁵⁶ Testimony of GE Teacher, Tr.V2, 323:20-324:15; Testimony of SPED, Tr.V3, 375:1-378:22; *see also* R-Ex.R-Ex.6, p.386-493.

school.⁵⁷

53. In the logs, SPED and GE Teacher would sometimes inform Parents of the interventions or incentives that were used to address Student's behavior in school.⁵⁸
54. Student's behavior as reflected in the daily communication log before and after the winter break were consistent, with some higher levels of prompting necessary for the first few days after school resumed in January 2020.⁵⁹
55. One of the regular assignments completed by Student in the general education classroom was a computer-based program called "iReady," which is a program that Home School uses to help students with math and reading. The assignments on iReady are calibrated by the program to adjust to Student's level based on Student's past performance. Student was able to complete these assignments independently in the general education setting.⁶⁰
56. For the iReady language arts assignments, Student completed assignments starting from the ___ level and progressed to the early ___ level. For Student's iReady math assignments, Student completed assignments starting from the mid-___ level and progressed to the late ___ level.⁶¹
57. Student continued to complete assignments on the iReady program after the winter break and progressed from adding and subtracting in multiples of ten to adding one-

⁵⁷ See R-Ex.6, p.386-493.

⁵⁸ See e.g., R-Ex.6, p.396-397, 400, 406, 416, 419, 425-426, 438, 445, 448, 457.

⁵⁹ See e.g., R-Ex.6, p.450-460.

⁶⁰ Testimony of GE Teacher, Tr.V2, 309:5-310:15; Testimony of SSC, Tr.V3, 411:2-9; see also R-Ex.4, p.203.

⁶¹ R-Ex.9, p.598-608; see also R-Ex.9, 05/27/2020 IEP meeting video recording, approximate time stamp [49:20-52:38] (hereinafter referenced as "R-Ex.9, 05/27/2020 [49:20-52:38]").

digit number to two-digit numbers in the math program.⁶² Student also continued to have passing scores on assignments in the phonics section of the iReady reading program.⁶³

58. Parents requested that Student's EAs be involved in the IEP meetings, so that Parents could gather information from the EAs about Student's behaviors.⁶⁴ Home School's policy is that the adult support (EAs) do not attend IEP meetings or speak with parents, as they are there to work with students directly, and the special education teachers supervise and work with the EAs to gather information and are the point of contact for parents. This is done for all students with EAs at Home School.⁶⁵
59. During the 2019-2020 school year, Parents also attempted to speak directly with Student's EA about Student's behaviors and progress at Home School but was informed that Parent 2 was making the staff and teachers uncomfortable.⁶⁶
60. In around February 2020, Parents sent Student to school with a watch containing an electronic recording device. Parents claim that from the recording device, they were able to hear Student having "meltdowns," crying, screaming, yelling at the EA, arguing with the EA, and running away from the EA.⁶⁷
61. Parents also indicated that at some points during the recording when Student was yelling or running away, other children were heard in the background and it appeared that the recording was taking place during an unstructured time, such as recess.⁶⁸

⁶² R-Ex.9, p.605,

⁶³ R-Ex.9, p.600-601.

⁶⁴ Testimony of Parent, Tr.V1, 82:22-83:5.

⁶⁵ Testimony of SPED, Tr.V2, 349:5-350:3, Tr.V3, 383:24-384:19, 399:18-400:3.

⁶⁶ Testimony of Parent, Tr.V1, 83:6-13.

⁶⁷ Testimony of Parent, Tr.V1, 83:14-85:15; R-Ex.6, p.382-383.

⁶⁸ Testimony of Parent, Tr.V1, 229:23-230:21.

62. SPED discovered the watch on Student after around a week of Student wearing it to school, and notified Parents that the use of an electronic recording device was not appropriate on campus and was a violation of the Family Educational Rights and Privacy Act (hereinafter “FERPA”).⁶⁹
63. Parents did not send Student to school with the watch after receiving the email from SPED.⁷⁰
64. No recording of Student’s behavior at Home School in February 2020 from the electronic recording device was produced as evidence in this case.
65. Student’s IEP progress reports for the reporting periods of February 6, 2020 and April 1, 2020 measured Student’s progress on Student’s IEP goals from Student’s IEP-11/25/2019 for the second and third quarter of the 2019-2020 school year. The date of the reporting period reflects the date that the progress report was provided to Parent. Student also received a ___-grade report card prepared by GE Teacher, which was based on the common core general learner outcomes.⁷¹
66. Student’s IEP progress reports for the reporting periods for second and third quarter of the 2019-2020 school year reflected that Student either maintained or progressed on all of the IEP goals in the IEP-11/25/2019. These time periods reflect the quarters before and after the winter break. Student’s third-grade report card also reflected maintenance of Student’s abilities before and after the winter break.⁷²

⁶⁹ Testimony of Parent, Tr.V1, 85:16-86:25; Testimony of SPED, Tr.V2, 348:2-16; R-Ex.6, p.382-383.

⁷⁰ Testimony of Parent, Tr.V1, 87:1-10.

⁷¹ Testimony of GE Teacher, Tr.V2, 304:3-305:4; Testimony of SPED, Tr.V2, 358:19-359:25, 365:6-367:4.

⁷² R-Ex.7, p.514-523; R-Ex.9, p.589-591; *see also* R-Ex.9, 05/27/2020 [26:54-XX].

67. For example, Student's progress report indicated that during the third quarter, Student mastered the goal of recognizing half of Student's peers with 90% accuracy over four (4) of five (5) opportunities; Student mastered the goal of being able to start an assignment independently within two (2) minutes of receiving a task in 80% of all observation opportunities; and Student mastered the skill of telling time by the half hour, fifteen (15) minute, five (5) minute, and one (1) minute increments with 80% accuracy for four (4) of five (5) consecutive recording trials.⁷³
68. Student's IEP progress reports were completed by Student's teachers and service providers based on their observations of Student and their analysis of Student's school work toward Student's IEP goals and objectives.⁷⁴
69. Spring break for the 2019-2020 school year started on March 16, 2020 and was scheduled to end on March 20, 2020. Due to the COVID-19 global pandemic, spring break was extended for Home School for one (1) week, whereupon teachers provided enrichment learning opportunities to students virtually, but did not provide new instruction. Home School was not allowed to have teachers, staff, or students on campus for the remainder of the 2019-2020 school year.⁷⁵
70. Student completed enrichment activities through an online program called Seesaw from the period between March 30, 2020 and May 23, 2020. These activities included work for math, such as telling time and bar graphs; language arts, such as identifying words, capitalization of words, and organizing words by sound; coloring;

⁷³ R-Ex.9, p.518-519, 523.

⁷⁴ Testimony of SPED, Tr.V2, 365:6-367:4, Tr.V3, 392:10-396:6.

⁷⁵ Testimony of GE Teacher, Tr.V2, 301:13-303:16, 316:17-318:18; Testimony of SSC, Tr.V3, 425:7-425:18.

drawing pictures of activities; and watching science videos and answering questions about the videos.⁷⁶

71. On Friday, May 22, 2020, Summer SPED teacher contacted Parents to inform them that Student was eligible for ESY services from June 17, 2020 to July 15, 2020, but told Parents that the DOE was still trying to figure out how the ESY services would be delivered.⁷⁷
72. On June 11, 2020, Summer SPED followed up with Parents to inform them that Student was eligible for in-person ESY services beginning on June 17, 2020. Summer SPED also provided Parents with information about how the school would be addressing safety and health concerns during the provision of in-person services at Home School.⁷⁸
73. Parent noted that one of their concerns was whether Student would be able to wear a mask for the entire duration of the ESY session (four (4) hours). Summer SPED assured Parent that students in the ESY classroom would be kept in separate areas of the classroom with at least thirteen (13) feet distance between them.⁷⁹
74. Student attended ESY for the first two (2) days, after which time, Parents informed Home School that Student would no longer be attending due to health risks and concerns. At that time, Parents also noted that they were concerned that there were no non-disabled students in the ESY session, so the risks of Student attending ESY

⁷⁶ Testimony of Parent, Tr.V1, 130:15-132:5; R-Ex.9, p.611-686.

⁷⁷ Testimony of Parent, Tr.V1, 177:2-12; Testimony of Summer SPED, Tr.V2, 331:8-22; R-Ex.6, p.358.

⁷⁸ Testimony of Summer SPED, Tr.V2, 332:4-333:12; R-Ex.6, p.359-361.

⁷⁹ Testimony of Parent, Tr.V1, 146:5-17, 177:15-178:25; Testimony of Summer SPED, Tr.V2, 333:17-334:5; R-Ex.6, p.359-360.

outweighed the benefits.⁸⁰

75. During the two (2) days Student attended ESY, Student did not demonstrate any significant behavioral concerns and was able to continue to work on reading and multiplication without significant concerns.⁸¹
76. Summer SPED offered to provide virtual/online services, including online schoolwork and virtual one-to-one time with Summer SPED, to Student during the remainder of the ESY session; however, Parents did not respond until around one week later and declined the services for Student.⁸²

Student's May 2020 IEP meetings

77. Student's IEP team held a series of IEP meetings in May to revise Student's IEP based on the FBA that was done in December 2019 and January 2020. Student's IEP team previously met to do an annual IEP for Student in November 2019.⁸³
78. On May 1, 2020, the first of four (4) IEP meetings was held virtually on a videoconferencing platform. Present at the meeting were Speech-Language Pathologist (hereinafter "SLP"), Behavior Health Specialist (hereinafter "BHS"), Parents, SPED, Clinical Psychologist, Counselor, Principal, DOE LBA, GE Teacher, SSC, Private BCBA, and Private Psychologist.⁸⁴
79. During this IEP meeting on May 1, 2020, the team reviewed the draft IEP and discussed the list of Parents' concerns that were emailed to Home School shortly

⁸⁰ Testimony of Parent, Tr.V1, 180:8-181:15; Testimony of Summer SPED, Tr.V2, 334:18-335:19; R-Ex.6, p.364.

⁸¹ Testimony of Summer SPED, Tr.V2, 339:12-340:5.

⁸² Testimony of Parent, Tr.V2, 213:13-214:3; Testimony of Summer SPED, Tr.V2, 336:7-337:12; R-Ex.6, p.366-369.

⁸³ Testimony of SPED, Tr.V2, 350:4-12; P-Ex.28, p.094.

⁸⁴ P-Ex.1, p.016, R-Ex.3, p.154; R-Ex.9, 05/01/20 [02:15-03:00].

before the beginning of the meeting.⁸⁵ This list of concerns included seven (7) concerns regarding: 1) Student's regression during the COVID-19 shutdown; 2) a request for additional information from Neuropsychologist's report be included in the IEP and also a request for occupational therapy; 3) not enough needs being listed in Student's PLEPs section; 4) a request for clarification on what "with support" means as written in the IEP; 5) an inquiry into the methodologies that the school is using to assist Student with reading; 6) concerns about Student's goals and objectives for interpersonal communication and self-management; and 7) concerns about the FBA conducted by DOE LBA.⁸⁶

80. The IEP team then reviewed Student's present levels of educational performance (hereinafter "PLEPs"). During this time, Parents brought up questions about the curriculum being taught to Student and the qualifications of the staff members working with Student.⁸⁷

81. The team continued working through the review of Student's PLEPS until the end of the meeting, which was limited to an hour, and another meeting was scheduled. During the rescheduling portion, team members were asked about their availability for the next meeting. This specifically included Private BCBA and Parents' availability.⁸⁸

82. The next IEP meeting was held on May 6, 2020, again virtually through videoconferencing. Present at the May 6, 2020 meeting were: Private BCBA, SLP,

⁸⁵ R-Ex.9, 05/01/20 [07:05-21:10].

⁸⁶ R-Ex.6, p.348-349.

⁸⁷ R-Ex.9, 05/01/20 [24:01-26:06].

⁸⁸ R-Ex.9, 05/01/20 [1:02:37-1:07:20].

Parents, SPED, Clinical Psychologist, Counselor, Principal, DOE LBA, GE Teacher, and SSC. BHS and OT were unable to attend the meeting but were excused with the consent of Parents.⁸⁹

83. The meeting began by reviewing the draft IEP and addressing some concerns raised by Parents. These concerns focused on Student's ABA services being consistent at home and in school and questions about one of the reading programs that Student was receiving at home and school.⁹⁰
84. The team then discussed the goals and objectives that were in Student's IEP-11/25/2019. Parents had specific concerns regarding the terms using "supports," and input was taken from Parents and Private BCBA. Home School made some changes to address those concerns based on their input. Parents wanted the team to write specific teaching strategies in Student's IEP, but the IEP team declined to do so. SPED and GE Teacher offered to meet with Parents later to further discuss specific strategies that are used with Student.⁹¹
85. During the discussions of Student's goals and objectives, Parents actively participated in raising questions or concerns or making requests of the IEP team. For example, Parents questioned one of Student's communications skills objectives and the rewording of the objective, and the Home School members of the team explained to Parents that the goal still covered the skills that Student needed to work on, but provided more real interactions versus contrived conversations for Student to work on

⁸⁹ P-Ex.1, p.017, R-Ex.3, p.155; R-Ex.9, 05/06/20 [00:51-02:35].

⁹⁰ R-Ex.9, 05/06/20 [9:00-17:20].

⁹¹ R-Ex.9, 05/06/20 [20:15-25:35].

that goal.⁹²

86. The meeting concluded at around the one (1) hour mark and another IEP meeting was scheduled. Parents specifically requested an earlier time of day for the meeting to accommodate Private Psychologist's schedule. The IEP team scheduled the next IEP meeting at a time that worked with the schedule that Parents provided for Private Psychologist.⁹³

87. On May 12, 2020, the next IEP meeting was held via videoconferencing. Present at the meeting were Private BCBA, BHS, Parents, SPED, Clinical Psychologist, Counselor, OT, Principal, DOE LBA, GE Teacher, and SSC. SLP was also present at the meeting but had to leave early. Private Psychologist did not attend the meeting. The meeting started a little later than expected due to some technical difficulties with the videoconferencing.⁹⁴

88. At the May 12, 2020 IEP meeting, the team continued with the discussion on Student's goals and objectives for communication due to Parents having objections to the way that the goals were worded. Input was received from Parents and Private BCBA, some changes were made, and the language was determined by the IEP team.⁹⁵

89. The IEP team then began discussing the special education and services that Student would receive in the IEP. Parent had sought clarification about the number of minutes that had been designated in Student's IEP-11/25/2019 and the draft IEP. The

⁹² R-Ex.9, 05/06/20 [18:25-55:00].

⁹³ R-Ex.9, 05/06/20 [55:15-59:45].

⁹⁴ P-Ex.1, p.018, R-Ex.3, p.156; R-Ex.9, 05/06/20 [00:20-03:22].

⁹⁵ R-Ex.9, 05/12/20 [04:30-16:43].

minutes were explained as follows: seven hundred fifty minutes (750) per week for special education in the special education setting for Student to receive specialized instruction in math and language arts; five hundred (500) minutes per quarter of speech language therapy as that is what SLP recommended, and it would be in the general education and special education setting to allow for flexibility; and one thousand eighty (1080) minutes per week of special education for the one-to-one EA assigned to Student in the general education setting and all non-structured times, like lunch and recess.⁹⁶

90. The supplementary aids and supports were also discussed at the May 12, 2020 IEP meeting. The team first discussed the supports that were already in place from the IEP-11/25/2019 and some team members added additional supports. For example, SPED suggested that the team add: reminders to stay on task; provide reassurance and choices to Student; and add in the behavioral support plan (hereinafter “BSP”).⁹⁷ Private BCBA suggested the addition of timers, positive reinforcement, and modeling.⁹⁸
91. Parents wanted the team to describe Student’s typical day during the IEP meeting, but since the team wanted to try to complete the IEP, Home School members of the team suggested that they meet with Parents separately to further discuss it. Upon Parents’ insistence, some team members attempted to describe some of Student’s day.⁹⁹
92. Parents and Private BCBA also raised numerous questions about what Student’s EA

⁹⁶ R-Ex.9, 05/12/20 [16:48-28:54].

⁹⁷ R-Ex.9, 05/12/20 [29:15-30:23]

⁹⁸ R-Ex.9, 05/12/20 [30:55-32:25].

⁹⁹ R-Ex.9, 05/12/20 [32:28-37:33]

- does during the school day, who the EAs are, and who the EAs report to. Both GE Teacher and SPED attempted to answer Parents' questions and concerns.¹⁰⁰
93. Parents again raised a concern about Student receiving ABA services in school, but DOE LBA explained to Parents that some ABA strategies were suggested for the IEP and that DOE LBA would be available to SPED and GE Teacher if they have questions about Student's behavior.¹⁰¹
94. The IEP team then considered putting "teacher consultation" on Student's IEP to reflect that the teachers would have access to DOE LBA or anyone who could advise them on ABA-type strategies to address Student's behavior. DOE LBA suggested that the description be flexible to allow for the teacher to consult with other qualified persons besides DOE LBA.¹⁰²
95. At the one (1) hour mark, the meeting was concluded, and another meeting was scheduled. At this time, Parents requested that the time of the meeting be kept in the morning to accommodate Private Psychologist's schedule. The next meeting was scheduled at a time when Parents indicated that Private Psychologist would be available.¹⁰³
96. On May 27, 2020, the final IEP meeting was held for Student virtually via videoconferencing. Present at the meeting were: SLP, BHS, Parents, SPED, Clinical Psychologist, Counselor, OT, Principal, DOE LBA, GE Teacher, SSC, and Private BCBA joined the meeting after it started.¹⁰⁴ Private Psychologist did not attend the

¹⁰⁰ See R-Ex.9, 05/12/20 [35:00-35:38], [37:30-42:40].

¹⁰¹ R-Ex.9, 05/12/20 [42:47-44:10].

¹⁰² R-Ex.9, 05/12/20 [46:22-47:22].

¹⁰³ R-Ex.9, 05/12/20 [47:30-49:35].

¹⁰⁴ R-Ex.9, 05/27/20 [00:40-02:45].

- meeting.¹⁰⁵
97. The meeting began with a review of the special education and related services and supplementary aids and supports that the IEP team had discussed at the previous meeting. The discussion began regarding the addition of a teacher consultation supplementary support that was suggested to address some concerns regarding Student's behavior.¹⁰⁶
98. During this discussion, Parents objected to Student not being specifically provided ABA services in the IEP and reiterated their objections to the FBA. The IEP team considered Parents' concerns but decided that ABA services were not warranted for Student at this time. This decision was made with the concurrence of DOE LBA, who also explained that even if ABA is not specifically listed in the IEP, many of the strategies that are listed are consistent with ABA practices.¹⁰⁷
99. The discussion then considered the number of minutes that would be provided for teacher consultation and ninety (90) minutes per quarter was determined to be an appropriate amount.¹⁰⁸
100. After discussing Student's special education services and supports, the team discussed Student's eligibility for ESY. The team noted that Student was previously determined to be eligible based on Student's regression and extended rate of recoupment in math and language arts. Student's IEP-11/25/2019 provided that Student would receive ESY after nineteen (19) calendar days.¹⁰⁹

¹⁰⁵ P-Ex.1, p.019, R-Ex.3, p.157.

¹⁰⁶ R-Ex.9, 05/27/20 [03:58-11:30].

¹⁰⁷ R-Ex.9, 05/27/20 [12:24-17:35].

¹⁰⁸ R-Ex.9, 05/27/20 [19:00-19:56].

¹⁰⁹ R-Ex.9, 05/27/20 [21:45-23:00].

101. The Home School team suggested that Student should continue to be eligible for ESY after the same duration as the IEP-11/25/2019 and opened the topic up for discussion. SPED explained that Student made progress on IEP goals after returning to school from the winter break in the 2019-2020 school year, which showed that Student was able to go without ESY services for the winter break, which was around seventeen (17) days. GE Teacher also explained that after winter break, Student was able to adjust back to class routines and participate appropriately in class.¹¹⁰
102. Parents expressed concern that they believe that Student has regressed after being home due to the school's shutdown. The Home School IEP team members agreed that Student's regression is consistent with Student's ESY eligibility since the COVID-19 shutdown had lasted longer than nineteen (19) calendar days.¹¹¹
103. In response to Parents' concerns and requests to see the data that Home School was using to determine ESY, SPED indicated that they were looking at Student's progress reports, which reflected that Student was able to either maintain or progress on Student's IEP goals when comparing before and after winter break.¹¹²
104. Parents acknowledged having Student's progress reports, but still requested data from Home School that was being used in the consideration for Student's ESY eligibility after nineteen (19) days of non-instruction.¹¹³
105. SPED was able to show a sample of Student's work after the winter break to Parents, demonstrating that Student still retained the skills necessary to complete the work and

¹¹⁰ R-Ex.9, 05/27/20 [23:00-26:50].

¹¹¹ R-Ex.9, 05/27/20 [26:50-30:10].

¹¹² R-Ex.9, 05/27/20 [26:54-30:10].

¹¹³ R-Ex.9, 05/27/20 [34:40-37:50].

- discussed how the progress reports also reflected Student's performance before and after the winter break and was consistent with Student not needing ESY during that break.¹¹⁴
106. Parents dismissed the efforts by Home School team members, saying "I don't see how that's data" and "this isn't data." Private BCBA requested that Home School provide tests for Student from before and after the break, but SPED explained that since they were at home due to the COVID-19 shutdown, the team did not have the raw data that Parents were requesting.¹¹⁵
107. The Home School IEP team members, at Private BCBA's suggestion, then offered to gather additional data and present it to the team at a later meeting so that the team can further discuss Student's ESY eligibility. At that time, Parent 2 became upset and insisted that the team provide the data immediately, saying "we are absolutely not in agreement with getting data next time, we are in agreement to getting the data currently right now," despite this being the first request from Parents to receive such data.¹¹⁶
108. At that time, GE Teacher was able to pull up and share Student's iReady data from the 2019-2020 school year, which showed that Student's performance on assignments before and after winter break were consistent, and that Student continued to make progress after the winter break.¹¹⁷
109. Parents refused to accept GE Teacher's classroom work data reports, saying that

¹¹⁴ See R-Ex.9, 05/27/20 [28:15-30:10], [33:18-36:12], [49:20-52:38].

¹¹⁵ R-Ex.9, 05/27/20 [36:13-48:43].

¹¹⁶ R-Ex.9, 05/27/20 [48:43-49:15].

¹¹⁷ R-Ex.9, 05/27/20 [49:20-52:38].

Parents had helped Student with iReady during the shutdown and do not agree with the data provided at the meeting.¹¹⁸

110. Throughout the ESY discussion, Parents did not make any suggestions as to the length of time after which Student should be eligible for services; they simply noted their concerns that they had and disagreements that they had with Home School's data. Parents insisted that they wanted to do their own analysis of the data and needed the raw data, such as Student's schoolwork, to make their own decision.¹¹⁹

111. After over thirty (30) minutes of discussion on Student's ESY eligibility, the IEP team decided to keep Student's ESY statement the same as in the IEP-11/25/2019, and provided an option for the team to meet again make changes if necessary.¹²⁰

112. The team moved on to discuss Student's least restrictive environment (hereinafter "LRE") statement and SPED reviewed the LRE statement from the IEP-11/25/2019 and asked for discussion. At that time, Parents did not have any questions, concerns, or comments about Student's school year LRE, but did ask about the LRE for ESY.¹²¹

113. The Home School team members explained to Parents that the LRE for ESY is separate and that Student would just receive services in special education for ESY, as there was no non-special education ESY offered at Home School.¹²²

114. After the brief LRE discussion was held, Principal made the offer of FAPE to Parents. Parents noted that they had "made all [their] concerns clearly communicated in all of these meetings," and did not state whether they were accepting the offer of FAPE at

¹¹⁸ R-Ex.9, 05/27/20 [55:54-56:32].

¹¹⁹ *See generally*, R-Ex.9, 05/27/20 [21:40-58:16].

¹²⁰ R-Ex.9, 05/27/20 [53:15-53:50].

¹²¹ R-Ex.9, 05/27/20 [58:40-59:30].

¹²² R-Ex.9, 05/27/20 [59:31-59:57].

that time.¹²³

Student's IEP-05/27/2020

115. After the conclusion of the last IEP meeting, a written IEP was developed and sent to Parents (hereinafter referred to as "IEP-05/27/2020").¹²⁴

116. Student's IEP-05/27/2020 documented Student's PLEPS, including all of Student's recent assessments for reading (grade standardized tests); reading and math (iReady diagnostic tests); the academic, adaptive, cognitive, sensory processing, speech/language, and motor skills testing done as part of Student's reevaluation; Neuropsychologist's assessment; and the FBA done by DOE LBA.¹²⁵

117. The PLEPs also reviewed Student's strengths and needs in reading, writing, math, and social/behavioral skills. Some of Parents' concerns were also documented in the PLEPs section of the IEP-05/27/2020.¹²⁶

118. The IEP-05/27/2020 has two (2) IEP goals and objectives to address Student's behavior. The first goal focuses on Student increasing on-task behavior and the second goal focuses on Student's interpersonal communication skills by having appropriate communication skills.¹²⁷

119. The IEP-05/27/2020 contains the following statement for Student's ESY "[Student] has demonstrated regression and an extended rate of recoupment in Language Arts and Math after breaks of no instruction. Based on data, [Student] is able to go without special education for no more than 19 days. Services will be provided on a

¹²³ R-Ex.9, 05/27/20 [1:02:35-1:02:43].

¹²⁴ P-Ex.1, p.001-019, R-Ex.3, p.139-157.

¹²⁵ P-Ex.1, p.001-003, R-Ex.3, p.139-141.

¹²⁶ P-Ex.1, p.004-005, R-Ex.3, p.142-143.

¹²⁷ P-Ex.1, p.010, 012, R-Ex.3, p.148, 150.

DOE campus. SUMMER BREAK: [Student] will receive special education by the 20th calendar day for 240 minutes a day. Services will end 19 days prior to the first instructional day of 2020-2021.”¹²⁸

120. The IEP-05/27/2020 contains the following special education and related services: special education, 750 minutes per week in the special education setting; speech/language therapy, 500 minutes per quarter in the general/special education setting; counseling, 360 minutes per quarter in the general/special education setting; and special education, 1180 minutes per week in the general education setting.¹²⁹

121. The IEP-05/27/2020 provides for Student the following supplementary aids and services: Individual Instructional Support for 1180 minutes per week in the general education setting; OT consultation for 60 minutes per quarter (clarified as “consult will address sensory, fine motor and visual integration with staff members working with [Student]”); and Teacher consultation for 90 minutes per quarter (clarified as “will address behavior concerns with teachers”).¹³⁰

122. The following supplementary aids and services were also listed with the frequency of ‘daily’ in the general education and special education settings: reminders to stay on task; check for understanding after instruction is given; communication with parents; visual schedule; preferential seating; provide opportunities for movement breaks; provide clear/concise instructions; have student repeat instructions back; frequent checks for understanding; prime or prep student before assignment or activity; clear expectations; use of manipulatives; headphones available; visual supports (schedule,

¹²⁸ P-Ex.1, p. 013, R-Ex.3, p.151.

¹²⁹ P-Ex.1, p. 013, R-Ex.3, p.151.

¹³⁰ P-Ex.1, p. 013-014, R-Ex.3, p.151-152.

task list, visual instructions); provide reassurance before a lesson; provide choices; varying modes of writing instruments; multi-sensory approach; positive reinforcement; timers; modeling; and behavior support plan (BSP).¹³¹

123. Student's LRE statement in the IEP-05/27/2020 was written as follows: "[Student] will participate with non-disabled peers for social studies, science, PE, GLAD classes, recess, lunch, field trips and school wide activities. [Student] will not participate with non-disabled peers for math and language arts (reading and writing). [Student] will receive special education services at [Student's] home school on a public DOE school campus."¹³²

2020-2021 school year

124. On August 11, 2020, SPED sent a letter to the parents of Home School's special education students, including Parents, regarding the procedures that Home School will be following for the start of the 2020-2021 school year, due to the COVID-19 restrictions still in place. This letter informed parents that special education students were invited to participate for the entire school day from August 17-20, 2020, to meet with general education teachers and receive special education services when not in the general education class. The letter also informed parents that students would be receiving special education and related services per their IEPs beginning on August 24, 2020. Parents were allowed to choose to have their students remain at home and participate online, and that the care coordinators would be able to further discuss the students' ability to access the general education classes through online learning. The

¹³¹ P-Ex.1, p. 013-014, R-Ex.3, p.151-152.

¹³² P-Ex.1, p. 015, R-Ex.3, p.153.

letter also encouraged parents to contact the care coordinators with any questions or concerns.¹³³

125. In no way did the letter sent by Home School indicate that the implementation of Student's IEP would be altered.

126. On August 18, 2020, Parents notified Home School that they were enrolling Student in Private School. In the email, Parents specified that their concern was that there would be alterations to the implementation of Student's IEP, noting that Student's IEP provided that Student would be with non-disabled peers for all classes besides language arts and math.¹³⁴

127. Principal responded to Parents' emailed concerns, noting that Student would be allowed to attend school in-person to receive support both with special education and related services programming along with opportunities to participate with non-disabled students online. Principal invited Parents to contact Principal to further discuss their concerns.¹³⁵

128. Parents reiterated their belief that the plans that Home School had for providing Student's special education and related services was unsatisfactory and inappropriate for Student. Principal again offered to meet with Parents to discuss their concerns, but Parents did not respond.¹³⁶

Private School

129. Parents enrolled Student at Private School in August 2020. The contract with Private

¹³³ R-Ex.6, p.376.

¹³⁴ Testimony of Parent, Tr.V1, 147:12-21; R-Ex.6, p.379.

¹³⁵ R-Ex.6, p.378.

¹³⁶ R-Ex.6, p.378.

School required Parents to pay a yearly tuition for Student in the amount of Thirty-Eight Thousand Five Hundred Dollars (\$38,500). After a request for financial assistance, Parents were informed that their tuition would be reduced by Ten Thousand Dollars (\$10,000).¹³⁷

130. Private School is a non-profit, non-graded school for students with special needs. No non-disabled children attend Private School.¹³⁸

131. Private School is accredited and licensed by the Western Association of Schools and Colleges and the Hawai'i Association of Independent Schools.¹³⁹

132. Private School follows a common core standards curriculum as a guide but allows teachers to pull from various curricula to meet the individual needs of the students.¹⁴⁰

133. Students at Private School are given assessments at the start of the school year to determine the needs of the students. The students there are also given informal quarterly assessments to check on the students' progress and to determine if goals and objectives need to be adjusted.¹⁴¹

134. Some of the decisions made to the students' programs are based on teacher recommendations based on how they see the student performing in the classroom.¹⁴²

135. All of the teachers working at Private School have bachelor's degrees and have experience working with students with special needs.¹⁴³

¹³⁷ Testimony of PSD, Tr.V1, 116:14-25; Testimony of Parent, Tr.V1, 151:25-152:15, Tr.V2, 221:1-222:16.

¹³⁸ Testimony of PSD, Tr.V1, 100:9-11, 114:14-15.

¹³⁹ Testimony of PSD, Tr.V1, 100:15-101:8.

¹⁴⁰ Testimony of PSD, Tr.V1, 105:19-106:13.

¹⁴¹ Testimony of PSD, Tr.V1, 106:14-108:19.

¹⁴² Testimony of PSD, Tr.V1, 108:20-109:3.

¹⁴³ Testimony of PSD, Tr.V1, 110:8-15.

136. Student does not have the services of a registered behavioral technician at Private School. An FBA was not conducted with Student at Private School due to Student not demonstrating behaviors at Private School to warrant an FBA.¹⁴⁴
137. Student has an academic program at Private School which includes goals and objectives from language arts, math, science, social studies, art, and PE. The program for Student at Private School is similar to a DOE IEP but has less details about goals and objectives and contains an overarching goal and sometimes smaller objectives to reach.¹⁴⁵
138. Student receives speech/language therapy and occupational therapy at Private School.¹⁴⁶
139. Student does not have a behavior program at Private School because Student's behaviors did not warrant an FBA or a related behavior program.¹⁴⁷
140. Student has made progress on Private School's goals and objectives for the first quarter of the 2020-2021 school year.¹⁴⁸
141. Private BCBA made observations of Student at Private School in October 2020 and observed that Student had transitioned well to Private School. Private BCBA noted that Student benefitted from the small class size where Student was able to get individualized attention from the teachers and aids.¹⁴⁹

V. CONCLUSIONS OF LAW

¹⁴⁴ Testimony of PSD, Tr.V1, 102:1-18, 112:24-113:9, 120:8-121:12.

¹⁴⁵ Testimony of PSD, Tr.V1, 121:24-122:23.

¹⁴⁶ P-Ex.32, p.139-142.

¹⁴⁷ Testimony of PSD, Tr.V1, 121:18-23.

¹⁴⁸ Testimony of Parent, Tr.V1, 126:17-129:7, 148:23-149:25; P-Ex.32, p.132-138.

¹⁴⁹ Testimony of Private BCBA, Tr.V2, 202:7-23.

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.”¹⁵⁰ A FAPE includes both special education and related services.¹⁵¹

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.¹⁵² To provide a 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.”¹⁵³

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”¹⁵⁴ 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.¹⁵⁵ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.¹⁵⁶

Denials of FAPE determinations are based on one of two categories of review. Procedural violations can occur when the educational agency has not complied with the

¹⁵⁰ *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)).

¹⁵¹ H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

¹⁵² *Id.*

¹⁵³ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

¹⁵⁴ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

¹⁵⁵ H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

¹⁵⁶ H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

procedures set forth in the IDEA.¹⁵⁷ Procedural violations do not automatically result in a denial of FAPE, however, as a secondary determination must be made as to whether the violation resulted in: 1) loss of educational opportunity, 2) significant infringement on parental participation, or 3) deprivation of educational benefits.¹⁵⁸

Substantive violations of the IDEA require an examination of the child's IEP. 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."¹⁵⁹ However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,¹⁶⁰ 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."¹⁶¹

"The standard for evaluating IEPs, commonly called 'the snapshot rule,' is not retrospective."¹⁶² 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.¹⁶³ In

¹⁵⁷ *Amanda J. ex rel. Annette J. v. Clark County School Dist.* 267 F.3d 877, 890 (9th Cir. 2001) (citing *Rowley*, 458 U.S. at 206-207, 102 S.Ct. at 3034), see also *L.J. by and through Hudson v. Pittsburg Unified School District*, 850 F.3d 996, 1003 (9th Cir. 2017).

¹⁵⁸ *Id.* at 892.

¹⁵⁹ *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

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

¹⁶¹ *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).

¹⁶² *K.K. ex rel. K.S.K. v. Hawaii*, 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).

¹⁶³ *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.”¹⁶⁴

A. Petitioners failed to prove that Respondents denied Student a FAPE when the IEP-05/27/2020 did not address the individual needs of Student regarding ESY services, such as duration of the school day and/or restrictiveness of environment.

Petitioners’ first issue is that Respondents denied Student a FAPE both procedurally and substantively when the IEP-05/27/2020 did not address the individual needs of Student regarding ESY services, such as duration of the school day and or restrictiveness of environment. As part of this issue, Petitioners also set forth the following arguments: 1) Parents were not provided data to review during the May 27, 2020 IEP meeting and the DOE failed to collect sufficient information to address Student’s needs; 2) the DOE did not appropriately determine that Student would need a nineteen (19) day period before and after ESY; 3) the length of Student’s ESY day was not sufficiently addressed at the IEP meetings, affecting parental participation and resulting in a loss of educational opportunity; and 4) Student’s least restrictive environment (hereinafter “LRE”) for ESY was not appropriately addressed during the IEP meetings.

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.’¹⁶⁵ 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.’”¹⁶⁶ The standard for ESY

¹⁶⁴ *J.W.*, 626 F.3d at 439 (quoting *Adams v. Oregon*, 195 F.3d at 1149).

¹⁶⁵ *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008).

¹⁶⁶ *Hellgate*, 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

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.¹⁶⁷ Schools are not required to provide a student with all services in the student's IEP; ESY services may be limited to the goals necessary to prevent skills or benefits already accrued from the prior year from facing significant jeopardy due to regression or lack of retention.¹⁶⁸

In this case, the IEP team determined that Student would continue to be eligible for ESY services for math and language arts due to Student demonstrating regression and an extended rate of recoupment after breaks of no instruction.¹⁶⁹ Student was determined to be eligible for ESY services after nineteen (19) days of a school break and Student's ESY services would end nineteen (19) days prior to the start of regular school.¹⁷⁰

As Petitioners have broken down this ESY argument into several sub-arguments, each will be addressed separately.

1. Parents were in possession of data on which the IEP team based their determination and Petitioners have not demonstrated that Respondents failed to gather sufficient information to address Student's needs

Petitioners argue that Parents were not provided data to review during the May 27, 2020 IEP meeting during the discussion of Student's eligibility for ESY. Parents were in possession of the progress reports on which the IEP team based the determination of Student's continued

summer.”).

¹⁶⁷ *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. Hawaii*, 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.”).

¹⁶⁸ *McQueen v. Colorado Springs Sch. Dist. No. 11*, 45 IDELR 157 (2006).

¹⁶⁹ FOF 100, 119.

¹⁷⁰ FOF 119.

eligibility for ESY.¹⁷¹ While Petitioners suggest that Parents should have been provided the raw data used by SPED and Student's other providers to determine Student's eligibility, Petitioners provide no basis for their argument. Parents are not educators and do not have training in teaching, providing special education, or analyzing data.¹⁷² The IEP team explained to Parents during that the ESY was based on whether Student demonstrated regression during extended breaks, such as winter breaks, which would be reflected in Student's IEP progress reports.¹⁷³ Student's progress reports were based on Student's schoolwork which was analyzed by SPED, GE Teacher, and other service providers, in determining Student's performance in school.¹⁷⁴ SPED, GE Teacher, and other members of the IEP team who prepared Student's progress reports interact with Student regularly and make observations of Student's progress in school.¹⁷⁵ Student's progress reports before and after the winter break reflect that Student either maintained or progressed in all of Student's IEP goals.¹⁷⁶ Student's daily communication log also reflected that Student did not have regression with an extended rate of recoupment in behaviors after the winter break.¹⁷⁷ Petitioners have failed to prove that Parents not being provided the raw data during the May 27, 2020 IEP meeting affected Parent's ability to participate in the IEP meeting.

Petitioners have not presented any evidence or argument to suggest what information the DOE should have collected to address Student's needs. While Petitioners argue that Student's behavioral needs and social skills deficits are significant issues for Student, this is unsupported by the record. While Student's assessments and evaluations demonstrate that Student has

¹⁷¹ FOF 104.

¹⁷² FOF 10-11.

¹⁷³ FOF 103, 105, 108.

¹⁷⁴ FOF 65-66.

¹⁷⁵ FOF 66.

¹⁷⁶ FOF 67-68.

¹⁷⁷ FOF 54.

difficulties with off-task behaviors and non-compliance, nothing in Student's evaluations, assessments, communication logs, behavior charts, or current progress at Private School supports Petitioners' argument that Home School should have gathered additional data to determine regression or recoupment for Student's behavioral needs or social skills deficits.¹⁷⁸

Petitioners have failed to prove that Parents were not provided with data to review during the May 27, 2020 IEP meeting or that the DOE failed to collect sufficient information to address Student's needs.

2. The IEP team appropriately determined that Student would have a nineteen (19) day period before and after ESY

Petitioners have not presented any evidence or argument that would demonstrate that the IEP team failed to properly determine the number of days before and after Student's ESY. Student's ESY was based, in part, on Student's ESY in the IEP-11/25/2019, and the additional review of Student's progress before and after the winter break during the 2019-2020 school year, which was roughly seventeen (17) days, which showed that Student did not demonstrate regression with an extended rate of recoupment during that time.¹⁷⁹

3. Petitioners have failed to demonstrate how the length of Student's ESY day was not sufficiently addressed at the IEP meeting

Petitioners argue that the IEP team did not sufficiently address the length of Student's ESY day, which affected parental participation and resulted in a loss of educational opportunity. Student's ESY was determined to be two hundred forty (240) minutes per day, or four (4) hours per day, for math and language arts.¹⁸⁰ During the school year, Student receives seven hundred fifty (750) minutes per week of special education for math and language arts, roughly one

¹⁷⁸ See FOF 31-46, 52, 54, 138.

¹⁷⁹ FOF 100-101, 103, 105, 108.

¹⁸⁰ FOF 119.

hundred fifty (150) minutes per day.¹⁸¹ This allotted time for Student's ESY is more than the special education Student gets for math and language arts during the school year, and Petitioners have not demonstrated that the amount decided upon by the IEP team is insufficient. While the IEP team did not specifically discuss the length of Student's ESY school day, this was never raised as a concern by Parents at the IEP meeting. Petitioners also do not provide a basis as to why the length of Student's ESY day was not appropriate.

4. Petitioners have failed to prove that Student's LRE for ESY was not appropriately addressed during the IEP meetings

Petitioners finally argue that the IEP team did not properly discuss Student's least restrictive environment for ESY. Petitioners cite to the United States Department of Education, Office Special Education Programs (hereinafter "OSEP") instructions to school districts regarding LRE requirements applying to ESY services.¹⁸² OSEP noted that

Least restrictive environments do apply when an IEP is developed for extended school year services. School districts do not have to establish public programs for students without disabilities for the sole purpose of being implement the least restrictive environment provision for children with disabilities who require an extended year program. However, a school district must meet the least restrictive environment provision by alternative means, such as private placements, when it is determined that a student with a disability must have interaction with students without disabilities.¹⁸³

While Petitioners argue that the IEP team at the May 27, 2020 did not properly discuss Student's least restrictive environment for Student during ESY, the instruction from OSEP does support the IEP team's decision to place Student in a special education setting for ESY. In this case, nothing in the record supports the position that the ability to have interaction with students without disabilities is necessary to provide Student a FAPE. The cases cited by Petitioners

¹⁸¹ FOF 120.

¹⁸² *Letter to Myers*, 16 IDLER 290 (OSEP 1989).

¹⁸³ *Id.*

support the position that the LRE requirement for ESY is to be applied in the same way as the special education component of a Student's IEP. Here, Student is in the general education classroom for all subjects and periods besides math and language arts, when Student receives individual instruction in the special education resource setting.¹⁸⁴

Contrary to Petitioners argument, a discussion of LRE options was not necessary for Student's IEP-05/27/2020 because Student's least restrictive environment for math and language arts was determined by the IEP team to be individual instruction in the special education setting.

5. Petitioners have failed to prove that even if any of the above issues were a denial of FAPE, that the determination of Student's ESY resulted in a denial of FAPE by Respondents

Finally, even if any of the arguments set forth by Petitioners above were violations of the procedures set forth by the IDEA, Petitioners still must prove that the violation resulted in a loss of educational opportunity, significant infringement on parental participation, or deprivation of educational benefits.¹⁸⁵

Petitioners cite to *Doug C. v Hawaii Dept. of Educ.*,¹⁸⁶ to support their contention that failure of the IEP team to provide data, discuss the number of days before and after ESY, length of ESY, or the LRE for ESY during the May 2020 IEP meetings resulted in a loss of educational opportunity or in a significant infringement of Parents' ability to meaningfully participate in the development of Student's IEP-05/27/2020, which resulted in a denial of FAPE.

In *Doug C.*, the Ninth Circuit held that simply failing to include the parent in the IEP meeting clearly infringed on the parent's ability to meaningfully participate in the IEP

¹⁸⁴ FOF 120.

¹⁸⁵ *Amanda J.*, 267 F.3d at 892.

¹⁸⁶ 720 F.3d 1038 (9th Cir. 2013).

formulation process.¹⁸⁷ Here, Parents were at all the May 2020 IEP meetings and were accompanied by Private BCBA.¹⁸⁸ The IEP team further accommodated Parents' request to schedule the meeting at a time so that Private Psychologist could be there as well.¹⁸⁹ Parents were active participants in the discussions of Student's ESY determination and presented their concerns to the other members of the IEP team. The ESY discussion lasted for over thirty minutes, during which a proposal for ESY was extended to Parents with the provision that more data can be taken from Student during the school year and another meeting can be held to revise Student's ESY determination if necessary.¹⁹⁰ Petitioners have failed to prove that even if the issues addressed above could be considered procedural violations, that it significantly infringed on Parent's ability to meaningfully participate in the development of Student's IEP-05/27/2020.

Petitioners also cite to *Doug C.* to support their contention that a failure to discuss the length of the ESY services or the LRE for ESY resulted in a loss of educational opportunity. The Ninth Circuit noted that "a procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'"¹⁹¹ As noted above, Petitioners did not present any evidence of alternative educational possibilities that were proposed or suggested by Parents for the IEP team's consideration.¹⁹² The only proposal offered by Parents was information to the team that Student had regressed during the COVID-19 shutdown, which was considered by the team and was consistent with Student's ESY eligibility determination.¹⁹³

¹⁸⁷ *Id.* at 1047.

¹⁸⁸ FOF 78, 82, 87, 96.

¹⁸⁹ FOF 88, 95.

¹⁹⁰ FOF 111.

¹⁹¹ *Id.*, citing *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 637 (9th Cir. 2005).

¹⁹² FOF 110.

¹⁹³ FOF 102.

Petitioners have failed to prove that there was a strong likelihood that alternative educational possibilities would have been discussed or considered by the IEP team.

B. Petitioners have failed to prove that Respondents denied Student a FAPE by using improper factors to determine Student's placement

Petitioners next argument is that Respondents denied Student a FAPE because the IEP team at the May 2020 IEP meetings utilized improper factors to determine Student's placement.

Under the IDEA, an IEP is a "written statement of for each student with a disability that is developed, reviewed and revised in a meeting ... and that shall include: ... (5) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in [] activities..."¹⁹⁴ This portion of the IEP is commonly referred to the statement regarding LRE or the student's educational placement. A reviewing body or court, considers a four (4) factor balancing test, commonly referred to as the *Holland* factors, which includes: 1) the academic benefits to the student being in the general education setting; 2) the non-academic benefits for the student being in the general education setting; 3) the effect of the student on the teachers and the other students in the class; and 4) the costs of mainstreaming the student.

Student's LRE in the IEP-05/27/2020 placed Student in the general education setting during the school day, except for math and language arts instruction.¹⁹⁵ In this case, the undisputed evidence presented at the Hearing demonstrates that Student experiences significant difficulty in the subjects of math and language arts.¹⁹⁶ Student is behind grade-level expectations in those subjects and the recommendations in the various assessments conducted

¹⁹⁴ H.A.R. §8-60-44(a)(5); 34 C.F.R. §300.320(a)(5).

¹⁹⁵ FOF 120.

¹⁹⁶ FOF 33-34, 38, 45.

with Student includes Student receiving special education services with a low student-to-teacher ratio, frequent monitoring by the teacher to ensure that Student is on task, multisensory learning approaches, time extensions, frequent breaks, chunking of materials, and a reduction in academic demands.¹⁹⁷ Even observations of Student currently at Private School show that Student benefits from environments where Student can get individualized attention from teachers and aids to get redirection and concentrate better.¹⁹⁸

During the IEP meeting itself, the team discussed Student's placement in the special education class for seven hundred fifty (750) minutes per week, which reflected the amount of time Student would spend in math and language arts classes. The IEP team reviewed Student's educational placement from Student's IEP-11/25/2019 and opened the meeting for discussion or concerns to be raised by the team members about Student's LRE statement.¹⁹⁹ While Parents did raise a concern about LRE for ESY, Parents did not raise any concerns during the IEP meeting or in the list of concerns sent to the IEP team on May 1, 2020.²⁰⁰

While Parent testified at the Hearing that Parents would have liked to have a discussion about possible opportunities for Student to be in the general education setting for math, reading, or writing,²⁰¹ the IEP team's failure to elicit a discussion from Parents about "possible opportunities" is a procedural violation, which Petitioners must prove rose to the level of a denial of FAPE.

As discussed *supra*, Petitioners must demonstrate that the procedural violation of Respondents resulted in a loss of educational opportunity, significant infringement on parental

¹⁹⁷ FOF 34, 41, 46.

¹⁹⁸ FOF 141.

¹⁹⁹ FOF 112.

²⁰⁰ FOF 79, 112.

²⁰¹ Testimony of Parent, Tr.V2, 232:10-17.

participation, or a deprivation of educational benefits. Petitioners have not presented any evidence or argument that would support this position. The evidence presented at the Hearing supports Student's placement in a special education setting for just the two specific subjects in which Student has the most difficulty and where Student received individual instruction from SPED or the classroom assistants.²⁰² Student also received instruction in language arts and math in the general education setting through the iReady computer program, which was completed in the general education classroom.²⁰³ Parents were active participants throughout the IEP meetings and did not suggest any additional placements that would have been more suitable to address Student's needs.²⁰⁴ Petitioners have not met their burden of proving that the IEP team utilized improper factors in determining Student's placement and denied Student a FAPE.

C. Petitioners have failed to prove that Respondents denied Student a FAPE by failing to collect sufficient data/information and or include participation by knowledgeable persons about Student's needs at the May 2020 IEP meetings

Petitioners' next argument is that Respondents failed to collect sufficient data/information and/or include participation by knowledgeable persons about Student's needs at the May 2020 IEP meetings. During the prehearing conference, this issue was clarified further and combined with another issue related specifically to the FBA conducted with Student.²⁰⁵ Petitioners argue that the FBA conducted by DOE LBA was incomplete as it was conducted while Student was receiving supports and services under Student's IEP and a subsequent attempt by Parents to have a private evaluator observe Student at Home School was refused unless Student was also provided the supports and services under Student's IEP.

²⁰² FOF 49-50, 120.

²⁰³ FOF 55-56.

²⁰⁴ FOF 112.

²⁰⁵ See Prehearing Order, filed September 14, 2020.

Petitioners have not presented evidence of any additional persons that have knowledge of Student's needs who were excluded from the IEP meetings in May 2020. Parents were both present at all of the May 2020 IEP meetings.²⁰⁶ Private BCBA was also present and participated actively in the discussions at all of the IEP meetings.²⁰⁷ Private Psychologist was present at the first IEP meeting on May 1, 2020, and the team attempted to accommodate Private Psychologist's schedule to allow attendance at the reschedule meetings.²⁰⁸ No evidence was presented that Parents had requested that additional persons be included or invited to the meeting and it was refused by Home School.

Petitioners have also not suggested any additional data or information regarding Student's needs related to assistive technology and/or communication skills. Additionally, Student's IEP-05/27/2020 contains numerous supplementary aids and supports that address Student's need for assistive technology or that support Student's communication skills.²⁰⁹

Petitioners primary focus is on the FBA conducted by DOE LBA and the attempt by Parents to have a private BCBA conduct an observation of Student at Home School. To this end, Petitioners argue that DOE LBA's FBA was inaccurate due to the supports that Student was receiving at the time of the DOE LBA's observations for the FBA. DOE LBA conducted the FBA with Student using a series of observations, data collection, interviews, as well as an assessment.²¹⁰ DOE LBA determined that it was appropriate for DOE LBA to conduct the FBA

²⁰⁶ FOF 78, 82, 87, 96.

²⁰⁷ FOF 78, 82, 87, 96.

²⁰⁸ FOF 78, 86, 95.

²⁰⁹ FOF 122.

²¹⁰ FOF 39.

while the supports for Student were in place.²¹¹ Petitioners have failed to produce any evidence that DOE LBA's statement is untrue or inaccurate.

Petitioners raised a concern that Home School created certain provisions that were required for Parent's private evaluator to come to observe Student at Home School.²¹² This is undisputed; however, Petitioners have failed to prove that these requirements by Home School resulted in a procedural violation. While reviewing bodies such as administrative hearing officers and courts must thoroughly review disputes between parents and school districts regarding the provision of FAPE to students, "courts should not substitute their own notions of sound educational policy for those of the school authorities which they review," and must grant deference to the sound judgement of various state educational agencies.²¹³ Here, Petitioners have not presented evidence or argument that the requirements presented by Home School were not based on sound educational policy. Petitioners have further failed to support any argument that the observation must have been completed without Student receiving supports and services provided in Student's IEP.

Petitioners have failed to prove that Respondents denied Student a FAPE by failing to collect sufficient data/information and/or include participation by knowledgeable persons about Student's needs at the May 2020 IEP meetings.

D. Petitioners have failed to prove that Respondents denied Student a FAPE when the IEP-05/27/2020 failed to provide sufficient Supplementary Aids and Services for Student to be successful in the LRE and/or make adequate gains on Student's academic, behavioral, and/or social needs

²¹¹ FOF 40.

²¹² FOF 26-28.

²¹³ *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051; *Wilson v. Marana Unified School Dist. No. 6 of Pima County*, 735 F.2d 1178, 1183 (9th Cir. 1984); *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994); *K.D. ex rel. C.L. v. Department of Educ., Hawaii*, 665 F.3d 1110, 1117 (9th Cir. 2011).

Petitioners next argument is that Respondents failed to provide sufficient supplementary aids and services for Student to be successful in the LRE and/or make adequate gains on Student's academic, behavioral, and/or social goals. Petitioners include specific examples for this argument, including: "teacher consultation" being vague and of insufficient frequency; "behavior support plan" not describing behavioral interventions that Student will require; Student's behavioral interventions not being sufficiently discussed at the IEP meeting; "positive reinforcement" being vague and difficult to enforce; and the failure of the IEP team to discuss ABA services for Student.

As discussed *supra*, the IDEA requires that a student be provided an education program that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.²¹⁴ This does not require school districts to provide every conceivable supplementary aid or service to assist the child.²¹⁵

Student's progress reports from the 2019-2020 school year demonstrate that Student was making progress on Student's IEP goals and objectives.²¹⁶ Petitioners have failed to demonstrate how the addition of more supplementary aids and supports was a failure of Respondents to provide sufficient supplementary aids and supports to allow Student to make progress on Student's academic, behavior and/or social needs.

Petitioners point specifically to a failure to describe necessary behavioral interventions or a behavioral support plan in the IEP as a violation of the IDEA. The IDEA requires that where a child's behavior impedes appropriate learning, the student's IEP must reasonably address those

²¹⁴ *Andrew F.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335.

²¹⁵ *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

²¹⁶ FOF 65-68.

behavioral issues.²¹⁷ While in some instances, a denial of FAPE could be found where an IEP does not contain a behavioral support plan for a child with significant behavioral issues,²¹⁸ the facts of this case do not support such a conclusion. Here, the undisputed evidence is that Student does not have significant behaviors that affect Student's ability to access Student's education.²¹⁹ Student's identified problem behaviors as of the 2019-2020 school year were identified as non-compliance and off-task behavior.²²⁰ Unlike the students in *L.S.* and *Carrie I.*, both of whom were teenagers who had significant behaviors such as leaving class and refusing to return, making verbal threats to staff and peers, quickly running away from others, and lifting people's clothes or putting hands inside people's shirts; Student does not demonstrate significant behaviors at school that would warrant a behavior support plan being included in Student's IEP.²²¹ Nevertheless, the IEP team did reasonably address Student's behavioral issues by providing two goals and objectives related to Student's behaviors, counseling, an EA for Student, and a multitude of other behavioral supports.²²² Simply because the IEP team did not discuss Student's behavioral support plan at the IEP meeting does not amount to the IEP team failing to reasonably consider the use of positive behavioral interventions, supports, and strategies to address Student's behavior.

Petitioners also argue that Parent's request for and attempt to discuss ABA services for Student at the May 2020 IEP meetings were cut short by the DOE citing to a policy that it cannot

²¹⁷ *Dep't of Educ. State of Hawaii v. L.S., by and through C.S.*, 2019 WL 1421752 (D. Hawai'i 2019)

²¹⁸ *See L.S.*, 2019 WL 1421752 *12; *Carrie I. ex rel. Greg I. v. Dept. of Educ., Haw.*, 869 F.Supp.2d 1225, 1242, 1246 (D.Hawai'i 2012) (finding a denial of FAPE when an IEP did not contain a behavioral support plan for a student with significant behavioral issues);

²¹⁹ FOF 36-41, 51-52.

²²⁰ FOF 40.

²²¹ FOF 41, 136, 139.

²²² FOF 118, 120-122.

be provided unless Student needed a behavioral intervention plan after an FBA. Petitioners have failed to point to anywhere in the meeting recording that shows that Parent's request was rejected due to a DOE policy. The evidence in this case is that the recommendation of DOE LBA was for Student to have some ABA strategies in Student's IEP, but that based on the FBA, Student's behaviors did not warrant a behavioral intervention plan.²²³ This determination by DOE LBA is further supported by Private School Director, who noted that Private School did not conduct an FBA with Student because Student's behaviors did not warrant one.²²⁴

Petitioners have failed to prove that Respondents failed to provide sufficient supplementary aids and supports for Student to be successful in the LRE or make adequate gains on Student's academic, behavioral, and/or social needs.

- E. Petitioners have failed to prove that Respondents denied Student a FAPE when Parents were prevented from speaking with and/or gaining information from Student's Individual Instructional Support service provided or through the use of an electronic device

Petitioners next argument is that Respondents denied Student a FAPE by preventing Parents from speaking directly with Student's aids or allowing Parents to send Student to school with an electronic recording device. Petitioners provide no authority under the IDEA that requires school districts to allow parents direct communication with service provides for children receiving services under the IDEA. Indeed, discussions with school personnel or independent contractors would fall under the purview of educational policy that reviewing bodies should not question. Home School's policy was that teachers would be the points of contact for parents and

²²³ FOF 41.

²²⁴ FOF 136.

that other staff at school servicing students were not involved in conversations with parents or in IEP meetings.²²⁵

Petitioners further indicate that Respondents denied Student a FAPE by prohibiting Parents from sending an electronic recording device to school to gather information on Student's interactions and behaviors at school. In February 2020, Parents secretly sent Student to school with a recording device, to reportedly record Student's behaviors and interactions at school, due to Home School's refusal to allow Parents to speak directly to Student's EAs.²²⁶ Home School informed Parents that the recordings included other students, which violated FERPA, and was not allowed at Home School.²²⁷ While both Petitioners and Respondents present arguments questioning the rights of parents to obtain information about their children and how it pertains to the rights of other students, that is not the issue that is pertinent to this Decision. Petitioners have again not provided any basis under the IDEA that allows parents to secretly gather information about their children's behaviors at school. In this case, Home School had expressed their policy to Parents and this Hearings Officer declines to question a policy set forth by Respondents related to educational policy and personnel matters.

- F. Petitioners have failed to prove that Respondents denied Student a FAPE by failing to offer a safe and effective setting for the implementation of Student's IEP-05/27/2020 since they informed Parents that the IEP-05/27/2020 would not be implemented with fidelity and/or they informed Parents there would be alterations in the implementation of Student's IEP

Petitioners' final argument questions whether Respondents denied Student a FAPE by failing to offer a safe and effective setting for the implementation of Student's IEP-05/27/2020.

Petitioners indicate that Respondents informed Parents that the IEP-05/27/2020 would not be

²²⁵ FOF 58-59.

²²⁶ FOF 60.

²²⁷ FOF 62.

implemented with fidelity and/or they informed Parents that there would be alterations in the implementation of Student's IEP-05/27/2020. In their closing brief, Petitioners argue that since the May 27, 2020 IEP team did not develop the IEP-05/27/2020 with the idea that Student would be completely separated from non-disabled peers, this amounted to anticipatory repudiation of the implementation of Student's IEP in a material way.

The Ninth Circuit Court of Appeals has reviewed IDEA cases in relation to implementation failures alleged against school districts. In *Van Duyn ex rel. Van Duyn v. Baker School Dist.*, the Court reviewed the IDEA's definition of a free appropriate public education as "special education and related services that ... are provided in conformity with the [child's] individualized education program," and determined that "[t]here is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education."²²⁸ The Ninth Circuit also explored the analysis done by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*,²²⁹ and recognized the court's conclusion that implementation failures did not violate the IDEA because "the significant provisions of [the child's] IEP were followed, and, as a result, he received an educational benefit."²³⁰

In the month of March 2020, the global pandemic COVID-19 entered into the State of Hawai'i, resulting in numerous closures of businesses, government offices, public places and both public and private schools under emergency orders issued by the Governor of the State of Hawai'i, Mayors of the Hawai'i Counties, and the Superintendent of the Hawai'i Public

²²⁸ 502 F.3d 811, 821 (9th Cir. 2007).

²²⁹ 200 F.3d 341 (5th Cir. 2000).

²³⁰ *Van Duyn*, 502 F.3d at 821.

Schools.²³¹ Home School was included in the physical closures, which prevented teachers, students and staff from entering onto the school grounds.²³²

Upon the outbreak of COVID-19 in the United States, the United States Department of Education (hereinafter “USDOE”) provided some guidance to the school districts in how to address providing IDEA services during school closures. In the *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, the USDOE noted that “the IDEA, Section 504 and Title II of the American Disabilities Act do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time because of exceptional circumstances, such as an outbreak of a particular disease.”²³³ However, the USDOE went on to say

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA...²³⁴

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

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

²³¹ See Governor of the State of Hawai‘i’s First through Thirteenth Proclamations Related to the COVID-19 Emergency; and Hawai‘i Department of Education Press Releases.

²³² FOF 69.

²³³ 76 IDELR 77 (EDU 2020).

²³⁴ *Id.*

provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online or telephonically.²³⁵

Petitioners argue that Student's IEP-05/27/2020 was not created with the idea that Student would be completely separated from Student's non-disabled peers and as a result, the services, supplementary aids and supports in the IEP-05/27/2020 would not have been provided as discussed, due to Student's class participating in distance learning during the beginning of the 2020-2021 school year because of COVID-19 restrictions. Petitioners do not suggest how the IEP-05/27/2020 would not be materially implemented.

Student was determined to be eligible for in-person ESY services under the IEP-05/27/2020 and attended ESY for two (2) days in June 2020.²³⁶ Parents had decided to pull Student out of ESY due to their concerns about the COVID-19 virus.²³⁷ Home School then provided options for Student to receive services virtually in a variety of methods, but those were also rejected by Parents.²³⁸

Student was also allowed to participate on campus for the entire school day for the first week of the 2020-2021 school year.²³⁹ During this week, all special education students would be able to interact with general education teachers and learn classroom procedures and would be provided special education services during the remainder of the times, with a focus on collecting data to determine what skills students retained or lost.²⁴⁰

²³⁵ *Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, 120 LRP 10623 (OSERS/OCR March 21, 2020).

²³⁶ FOF 71-72.

²³⁷ FOF 74.

²³⁸ FOF 76.

²³⁹ FOF 124.

²⁴⁰ FOF 124.

Parents were informed that individual discussions would be held with the care coordinators for the students to determine whether the students could benefit from distance learning, and if it was determined necessary, then students could remain on campus to receive the online general education class instruction.²⁴¹

Even after Parents informed Home School of their intention to send Student to Private School, Home School offered to fully implement Student's IEP-05/27/2020 in-person, subject to any state or county provisions allowing schools to remain open.²⁴²

Petitioners have failed to prove that Respondents denied Student a FAPE by anticipatorily failing to materially implement Student's IEP-05/27/2020.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the issues in the Amended Complaint by a preponderance of the evidence. As Petitioners have failed to prove that Respondents denied Student a FAPE, Petitioners' request for tuition reimbursement for Private School or for compensatory education is denied.

²⁴¹ FOF 124.

²⁴² FOF 127-128.

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, March 12, 2021.

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