



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

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

Petitioner,

vs.

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

Respondent.

DOE-SY1819-022

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: March 13, 2019;
March 14, 2019;

Hearings Officer : Jennifer M. Young

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. JURISDICTION

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

¹ Personal identifiable information is provided in the Legend.

II. PROCEDURAL HISTORY (“BACKGROUND”)

Petitioners are the parents of a ___-year-old student with a disability. On November 8, 2018, Petitioners filed a Due Process Complaint and Resolution Proposal (“Complaint”) against the DEPARTMENT OF EDUCATION, STATE OF HAWAII, and CHRISTINA KISHIMOTO, Superintendent of the Hawai‘i Public Schools pursuant to the Individuals with Disabilities Education Act (“IDEA”).² This Hearings Officer was appointed to preside over this case on or about November 12, 2018.

On November 14, 2018, the prehearing conference notice; and subjects to be considered agenda was provided to the parties. The prehearing conference was scheduled for December 5, 2018, at 9:00 a.m.

On November 15, 2018, Petitioner filed a “Corrected Hearing Request”. The Corrected Hearing Request is not considered an amendment, as there were no substantive changes to the Complaint.³ On December 3, 2018, Respondent filed their “Response to Petitioner’ Corrected Hearing Request”.⁴

On November 16, 2018, the parties participated in a resolution session but were unable to resolve the issues presented in the Complaint. The 30-day resolution period ended on December 8, 2018.

On December 5, 2018, an in person prehearing conference was conducted from about 9:00 a.m. to about 9:50 a.m. Participating in the conference were: Jennifer M. Young, Hearings Officer; Carl M. Varady, Esq. for Petitioner; and Kris S. Murakami, Esq. for Respondent. On December 6, 2018, the prehearing conference summary and order (“Prehearing Order”) was issued. The parties agreed that the 45-day due process hearing timeline began on January 22, 2019, and would expire on April 22, 2019.

On December 20, 2018, Respondent informed the undersigned and Petitioner that the DOE’s witnesses were unavailable to testify until January 7, 2019. Petitioner had no objection to rescheduling the hearing dates and the parties confirmed hearing availability for January 4, 7, and 8, 2019. As a result, the hearing dates were taken off-calendar and rescheduled to January 4, 7, 8, 2019, at 9:00 a.m.

On December 24, 2018, Petitioner and Respondent submitted a joint request to continue the January 4, 7 and 8, 2019 hearing dates and extend the decision deadline. On December 26,

² Respondent did not challenge the sufficiency of the Complaint.

³ The corrected renewed hearing request corrected the name of Student’s current educational placement but did not alter the issues presented for determination.

⁴ If Respondent has not sent a prior written notice under 34 C. F. R. § 300.503 to the parent regarding the subject matter contained in the parent’s due process complaint, Respondent must, within 10 days of receiving the due process complaint, send to the parent a response that includes (i) an explanation of why the agency proposed or refused to take the action raised in the due process complaint; (ii) a description of other options that the IEP team considered and the reasons why those options were rejected; (iii) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) a description of the other factors that are relevant to the agency’s proposed or refused action. 34 C. F. R. § 300.508 (e).

2018, Petitioner submitted a supplemental declaration in support of the joint request to continue the hearing and extend the decision deadline, as Student's relative had passed away. On December 26, 2018, the undersigned notified the parties via e-mail that the hearing scheduled for January 4, 7, and 8, 2019 was taken off-calendar and the disclosure dates associated with said hearing were suspended.

On January 2, 2019, the undersigned requested that the parties confer and choose three dates for hearing during the first two weeks of February. This same day, the parties confirmed hearing and witness availability for February 13, 14 and 15, 2019. Therefore, the hearing was rescheduled to February 13, 14, and 15, 2019 and the decision deadline was extended from January 22, 2019 to March 8, 2019.

On January 30, 2019, Petitioner and Respondent participated in a telephonic status conference where Respondent's Attorney notified the undersigned that she had a family health issue requiring her to be available and on another island from January 29, 2019, until March 5, 2019. Respondent's attorney then summarized the health issue and apprised this Hearings Officer that she had previously spoken to Petitioners' Attorney and Petitioners' Attorney contacted his clients, who confirmed that they had no objection to rescheduling the hearing. Respondent requested an extension of the 45-day deadline from March 9, 2019 to April 22, 2019 and that the hearing be rescheduled.

On February 1, 2019, the hearing was rescheduled to March 13, 14 and 15, 2019, and the Respondent's request for extension from March 9, 2019, to April 22, 2019 was granted.

On March 6, 2019, Petitioner submitted their "Memorandum of and in Support of Request for Relief.

On March 9, 2019, Petitioner informed the undersigned that their case could be presented in a half day. Therefore, Petitioner was scheduled for a half day on March 13, 2019 and Respondent was notified that they would begin their case in chief on the afternoon of March 13, 2019 and have 1.5 days to present their case. The due process hearing was scheduled for March 13 and 14, 2019.

The due process hearing commenced from March 13, 2019, at 9:00 a.m. until 4:00 p.m., and March 14, 2019, at 9:00 until 6:00 p.m. Petitioner presented two witnesses on their behalf: Parent 1 and Parent Advocate. Respondents presented six witnesses on their behalf: 1) Public School Special Education Teacher; 2) Public School General Education Teacher; 3) DOE School 3 Special Education Teacher; 4) Public School Student Services Coordinator; and 5) Public School Psychologist and 6) District Education Specialist.

At the close of the hearing this Hearing Officer entered into evidence all of Petitioners' proposed exhibits⁵, and Respondent's proposed exhibits 2-4⁶ and exhibit 8, inclusive, and exhibit 6, pages: 128; 133-142; 145-154; 158-183; 308-316; 324 and 332-335.⁷

III. BACKGROUND

Student is a bright, ___-year-old who has a high average I.Q., and is currently in the ___ grade. While Student does as well or better than peers academically, Student's disability adversely affects Student's behavior. Student's last IEP was created at the end of Student's ___ grade year and the IEP is currently in place via "Stay Put". Student's eligibility was rescinded in April of 2018. Parents seek continued IDEA eligibility for Student.

IV. ISSUES PRESENTED

This Hearings Officer certified the following three issues for adjudication:

- A. Whether or not the DOE properly implemented Student's May 9, 2017, IEP.
- B. Whether or not the DOE predetermined Student's ineligibility.
- C. Whether or not Student's IDEA eligibility was properly determined.

V. FINDINGS OF FACT

Students Academics

1. Student has a full scale intelligence quotient of 116.⁸ Student scored at the 86th percentile, meaning that Student scored as well or better than 86 percent of the Students who were administered the same Intelligence Quotient test.⁹ 116 falls into the high average range of the classification.¹⁰

⁵ This Hearings Officer admitted into evidence Petitioner's exhibits 1-12, inclusive. Neither party objected to the admission of the other party's exhibits.

⁶ Respondent Exhibit 4, report is missing page 13. The entire assessment can be found in Petitioner Ex. 2, pages 2-2.14.

⁷ This Hearings Officer admitted into evidence Respondent's exhibits 1-25, excluding Ex. 3 (IEP) as bate stamping conceals text at the bottom of the page. Neither party objected to the admission of the other party's exhibits.

⁸ Assessment conducted by former School Psychologist. Respondents Ex. 4, 85-92. DOE School Psychologist Testimony.

⁹ *Id.*

¹⁰ *Id.*

2. Student scored in the “very superior” range, 98th percentile in “Letter Word Identification” which measures Students ability to read isolated words aloud.¹¹ Student’s performance is above that of the average individual at age 30.¹²
3. Student scored in the high average range or 81st percentile in “Spelling” which measures Students ability to write orally presented words correctly.¹³
4. Student scored in the high average range or 82nd percentile in “Calculation” which measures Student’s ability to perform mathematical computations.¹⁴
5. On Assessment, Student demonstrated a *relative* weakness in Academic Skills.¹⁵ Student did not score in the 6th percentile in Academic Skills.¹⁶ The computer predicted Student would score a specific score in Academic Skills but Student did not score that specific score and only 6% of Student’s tested scored in the same manner that Student did in predicted vs. actual scores.¹⁷
6. Student performs as well or better than peers in the academic subject areas¹⁸ required by the ___ grade curriculum.¹⁹

Student’s Emotional/Behavior

7. Student was diagnosed in 2012 by Clinical Psychologist and continues to be diagnosed.²⁰
8. Student has a secondary diagnosis, which was diagnosed in April, 2018. Student exhibited behaviors.²¹
9. Student exhibits behaviors at home.²²
10. Student is a “people pleaser”.²³ Student wants to do a “good job” and be a “good student”, Student attends very well to classroom instruction and actively participates.²⁴
11. Student exhibits behaviors but is able to calm themselves down during class.²⁵

¹¹ Findings from Assessment, dated February 6, 2018, Respondent Ex. 4, pgs. 93-100

¹² Respondent Ex. 4, pgs. 93-100.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ DOE School Psychologist Testimony; Respondent Ex. 4, pg. 95.

¹⁶ *Id.*

¹⁷ DOE School Psychologist Testimony.

¹⁸ Academic Subject are: Math, Science, Language Arts, and Social Studies.

¹⁹ DOE School SPED Teacher; DOE School Gen. Ed Teacher.

²⁰ Parent 1 Testimony.

²¹ *Id.*

²² Parent 1 Testimony.

²³ Parent 1’s Testimony.

²⁴ DOE School 3 SPED Teacher Testimony.

²⁵ *Id.*

12. Student had no behaviors during SY 2017-2018.²⁶
13. Student had no behaviors during SY 2018-2019.²⁷
14. Student did not have difficulty transitioning between class activities or classrooms while in the — grade at Public School.²⁸ Student would also remind the teacher of the prospective transitions.²⁹
15. Student actively participates in class.³⁰
16. Student has worked very well with peers during the 2018/2019 School Year.³¹
17. During the 2018/2019 School year Student has exhibited behaviors.³²
18. Student has minor sensitivity to environmental factors.³³
19. Student's Psychoeducational Evaluation notes that Student's Clinical Psychologist noted that in years prior that student "continued to exhibit symptoms consistent with diagnosis, without accompanying intellectual impairment, and without accompanying language impairment."³⁴
20. Student's Psychoeducational Evaluation states that the following recommendations may be beneficial for Student in the educational setting or home:
 - a. In order to continue to build Student's strong verbal skills, Student may benefit from shared reading activities, such as dialogic reading³⁵;
 - b. Adults may wish to encourage Student to engage in elaborative conversation by creating an open, positive environment for communication. Further, adults may wish to give Student positive feedback when Student participates in conversation. Positive feedback can include reciprocal conversation, asking Student to elaborate on thoughts, and complimenting Student's contributions to the conversation;³⁶
 - c. Student may benefit from mental rotation activities such as drawing in shape from different perspectives;³⁷
 - d. If Student has a difficult situation due to not understanding others subtle, non-verbal cues, it would be helpful to prepare Student for novel situations. For example, before a new situation, adults can talk to Student about what to expect.

²⁶ DOE School 1 SPED Teacher Testimony; DOE School Gen. Ed. Teacher Testimony

²⁷ *Id.*

²⁸ DOE School Gen. Ed. Teacher Testimony

²⁹ *Id.*

³⁰ DOE School SPED Teacher; DOE School Gen. Ed. Teacher

³¹ DOE School 3 SPED Teacher Testimony

³² *Id.*

³³ Parent 1's Testimony; DOE School 3 SPED Teacher Testimony

³⁴ Respondent Ex. 4, p. 85

³⁵ DOE School Psychologist; Petitioner Exs. 4.14-4.15.

³⁶ *Id.*

³⁷ *Id.*

If Student is anxious about how to respond or behave, roleplaying may help. Modeling appropriate responses to ambiguous situation and then discussing these interactions afterward may help teach Student how to interpret nonverbal cues;³⁸

- e. Student may benefit from structure and practice when approaching tasks that are challenging to Student. Student may benefit from identifying patterns to look at a series and identify what comes next;³⁹
 - f. Asking questions about stories can further build fluid reasoning skills. For example, when reading a book or watching a movie, Student can be asked to identify the main idea of the story. Further Student could be encouraged to answer open-ended questions such as, ‘What do you think would happen if...’ and then think logically about his responses. Reinforcing Student’s ideas with positive feedback may encourage Student to grow in this area⁴⁰.
21. Student’s IEP requires that Student receive:
- a. 100 minutes of special education per week;
 - b. 320 minutes of Speech and Language Therapy per quarter; and
 - c. 270 minutes of Counseling per quarter Student’s.⁴¹
22. Student’s IEP also requires that Student receive the following supplementary aids and services, modifications, supports for school personnel:
- a. visual schedule (daily);
 - b. end of the day checklist to ensure Student has everything (daily);
 - c. transition time and reminders between activities (daily);
 - d. rainy day schedule (daily);
 - e. allow for movement breaks, including bathroom breaks (daily);
 - f. support oral instructions with visuals (daily);
 - g. home/school communication (daily);
 - h. parent education and training were to be provided 60 minutes per month;
 - i. occupational therapy consult to parent educator or classroom teacher at rate of 60 minutes per quarter; and
 - j. a transition plan to — grade was to be provided during the summer, before the beginning of the school year.⁴²
23. Under Student’s “Present Level of Academic Achievement and Functional Performance” (“PLAAFP”), a section entitled “BEHAVIOR/ PERFORMANCE” reads as follows:
- BEHAVIOR/ PERFORMANCE
“[Student] demonstrates leadership skills in class and in group. Student initiates conversation with peers and can remain on topic during a conversation. Student gives eye contact most of the time and references speakers in conversations. [Student]

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Petitioner Ex. 8.11.

⁴² *Id.*

usually handles schedules changes and transition well with the use of a written schedule, advanced notice, and reminders, and or with calm explanation.

CURRENT BEHAVIOR NEED

- initiate and sustain play with same age peers during unstructured settings such as recess and before school;
- engage in play that is chosen by peers and not necessarily Student choice;
- had difficulty at times accepting correction/ideas from teacher/peers;
- needs to demonstrate perspective taking;
- needs to independently use calming strategies (including movement/stretch/quiet time break when frustrated);
- negotiates and understands/accepts when things are not negotiable with peers and adults;
- Stay on task when regulated when Student does not get Student's way;
- effective strategies to support behavior /emotional regulation;
- "Regulation Plan";
- "Behavior Plan";
- Daily home school communication;
- Continue to use a variety of regulation strategies including sensory exercised, adult support as well as learning to identify Student's internal state and select a coping strategy; and
- Need support to learn how to handle emotions and feelings".⁴³

24. Student's IEP contains the following goals focused on Health and Interpersonal Communication:

- a. During unstructured time such as recess or before school, Student will play with peers 5 times per week for 3 consecutive weeks: a) with support and b) independently;
- b. During unstructured times, Student will be able to hold conversations and stay on topic –of a peer's interest- with a peer for at least 4 loops, 5 times per week in 3 consecutive weeks;
- c. During unstructured times, Student will be able to hold conversation and stay on topic with a peer for at least 4 loops, 5 times per week in 3 consecutive weeks,
- d. During structured times, Student will be able to hold a conversation and stay on topic with a peer at least 4 loops, 5 times per week in 3 consecutive weeks
- e. Student will independently follow "an end of day checklist (list of what Student needs to do to prepare to go home) for 20 consecutive school days
- f. When deregulated, Student will be able to problem solve using a scale of 1-10 to determine the: a) severity, b) solvability and for the concern/ problem in 4 out of 5 opportunities within 4 consecutive weeks.
- g. During structured time, Student will demonstrate perspective taking via commenting what another person may say or do or how he or she may feel in a specific situation in 4 out of 5 opportunities.

⁴³ Petitioner Ex. 8.4.

- h. During structured time, Student will accept correction ideas from: a) teacher and b) peers in 4 out of 5 times.⁴⁴
25. Although Parents have concerns regarding Student's toileting, Student does not need assistance and is physically capable of independently using the bathroom.⁴⁵ Toileting is not a need that was identified in Student's IEP.

Student's Services Received 2017-2018

26. Student received over 100 minutes of Special Education per week.
27. Student's 100 minutes of Special Education acknowledged by Public School General Education and Public School Special Education Teacher consisted of a daily communication log that Student or Teacher would complete.⁴⁶
28. Student's placement during Student's — grade year at Public School was a fully inclusion classroom consisting of two teachers (one special education and one general education).⁴⁷ The class functioned according to a co-teaching model, which includes two teachers who are able to teach lessons, break the class into small groups, and differentiate instructions.⁴⁸
29. Public School General Education Teacher and Public School Special Education Teacher would pull students out into small groups 2-3 times per day.⁴⁹ At other times there would be two teachers in the single classroom providing prompts and instruction, and checking student's work.⁵⁰ The teachers would consult weekly, design small group instruction based on student needs and curriculum content, and pull specific children out into small groups to provide instruction.⁵¹
30. The Inclusion class would not exist if not for the five special education children in the classroom.⁵²
31. Public School General Education Teacher used ___ as a way for students to show their understanding of what they learn and learn group collaboration.⁵³ An example is if a student was learning the word pandemonium, they are put in a small group and discuss

⁴⁴ Petitioner Ex. 8.8-8.9.

⁴⁵ Parent Testimony, SPED Teacher Testimony

⁴⁶ Public School SPED Teacher Testimony, Parent Testimony.

⁴⁷ Public School Gen Ed Teacher, Public School SPED Teacher Testimony.

⁴⁸ Public School Gen Ed Teacher.

⁴⁹ Public School SPED Teacher Testimony and Public School Gen Ed Teacher.

⁵⁰ Public School SPED Teacher Testimony.

⁵¹ *Id.*

⁵² Public School General Education Teacher.

⁵³ Public School General Education Teacher.

what the word means in their small group.⁵⁴ The group would then narrate that work in a sentence and then show the class their understanding of the word.⁵⁵

32. Student received Speech and Language Services one day per week.⁵⁶

33. Student was part of a “group” led by Behavioral Health Specialist at Public School and was doing well in this group.⁵⁷ Student received services via DOE School 1’s Behavioral Health Specialist and DOE School 1 SPED teacher would receive reports.⁵⁸

34. Student’s General Education Teacher Provided Student with a visual schedule.⁵⁹

35. Parent 1 believes if Student had an end of the day checklist that Student would not forget items at school and correlates Student forgetting items at school with the absence of an end of the day checklist.

36. Student would leave class to take breaks to self-regulate.⁶⁰

37. While Parent 1 argues that the communication between the school and Parent 1 was lacking, the weight of the evidence is contrary to Parent 1’s claim, as Student’s communication log went back and forth between Parent 1 and the DOE daily via Student from August 7, 2017 until May 10, 2018, and consists of 688 pages.⁶¹ Additionally, Student’s Parents requested to help revise Students communication log in September 2017. Parents and DOE staff met as a group to ensure that Student’s Communication log was purposeful for Student.⁶²

38. While Student’s communication log varies in length and detail of each activity, Parent 1’s specificity expectations exceed the requirement of the DOE.⁶³

39. Parent 1 conceded that both Parent 1 and Parent 2 had received parent training and that the training was helpful to both Student and Parents.⁶⁴ The training focused on socialization in the community.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Public School SPED Teacher Testimony.

⁵⁷ Parent Advocate.

⁵⁸ Public School SPED Teacher Testimony.

⁵⁹ Public School SPED Teacher Testimony.

⁶⁰ Public School SPED Teacher Testimony.

⁶¹ Respondent Ex 8, pgs. 433-688.

⁶² Public School SPED Teacher Testimony; Public School General Education Teacher; Respondents Ex. 4, p. 133.

⁶³ On many occasions parents were unsatisfied with the level of specificity included Student’s communication log, which Parents helped design. Parents would request additional details via written notes in the log. On August 7, 2017, Parent asked staff to identify themselves when they were writing in the communication log. Two days later, when Parent did not clearly see who had written in the log, Parent wrote back “Who wrote this? Did I not make myself clear for everyone to identify their comments? [] How can I have confidence that [Student’s] IEP will be followed if simple directions aren’t?” Respondents Ex 8, p. 686. Parent 1 is reminded that Parent 1 is a necessary *partner* in Students Individualized Education Program.

⁶⁴ Parent Testimony.

40. Parent 1 conceded that Parents received required Occupational Therapy Consult.⁶⁵

41. From August, 2017 thru December of 2017 Student also received services due to a prior settlement agreement between Petitioner and Respondent.⁶⁶

Services Received 2018-Present

42. Student presently attends DOE School 3.⁶⁷ Student has four subjects: ___ and uses the same curriculum that the general population utilizes.⁶⁸

43. On the first day of classes in August 2018, Student was provided with a visual schedule at DOE School 3 created by DOE School 3 Special Education Teacher, but Student declined the visual schedule.⁶⁹ DOE School 3 SPED Teacher notified Parents of Student declining the visual schedule.⁷⁰

44. OT consult services are provided at DOE School 3.⁷¹ Student utilizes ___ to use when Student gets anxious and or upset.⁷² Student may also utilize the use of fidget toys to distract Student from chewing.⁷³

45. Student attends a group provided at DOE School 2.⁷⁴

46. DOE School 3 SPED Teacher attempts to provide the services listed in Students IEP which was developed at the end of Student's — grade year, however, DOE School 3 SPED Teacher does not force the services, as Student has met the majority of Student's goals, including but not limited to Speech and Language Therapy.⁷⁵ Student continues to receive Speech and Language Therapy and Occupational Therapy.

47. Parent 1 testified that the decrease in services in 2018 may be correlated to Student's behaviors.

Eligibility Meeting of April 5 and April 23

48. The DOE conducted the following assessments to determine Student's Eligibility:

- a. Occupational Therapy Evaluation, dated February 22, 2018, conducted by DOE School 1 Occupational Therapist⁷⁶

⁶⁵ Parent Testimony.

⁶⁶ Petitioner Exs. 11.1-11.2

⁶⁷ DOE School 3 Teacher Testimony.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ DOE School 3 Teacher Testimony; District Educational Specialist Testimony.

⁷⁶ Respondent Ex. 4, pgs. 83-84.

- b. Psychoeducational Evaluation, dated February 7, 2018, conducted by DOE School 1 previous School Psychologist, and consisting of the Assessment⁷⁷;
 - c. the Assessment, dated February 6, 2018, conducted by DOE School 1 SSC⁷⁸;
 - d. Speech/Language Evaluation, conducted by DOE School 1 Speech Therapist based on five testing dates in early 2018 consisting of the clinical evaluation of Assessment and Assessment⁷⁹; and
 - e. Three separate observations from DOE School 1 SSC occurring on January 30, 2018, February 6, 2018, and February 28, 2018⁸⁰.
49. Petitioner presented the following for consideration during eligibility:
- f. Occupational Therapy Evaluation dated February 26, 2018, from Private Occupational Therapist⁸¹
 - g. a letter from Student's Clinical Psychologist.⁸²
50. On April 5, 2018, Assistant Principal, School Psychologist, Speech and Language Pathologist, DOE School 1 SPED Teacher, Public School 1 Gen. Ed Teacher, Behavioral Health Specialist, a Clinical Psychologist and Parent 1 met to determine Student's Eligibility for IDEA.
51. On April 23, 2018, Vice Principal, School Psychologist, Speech and Language Pathologist, DOE School 1 SPED Teacher, DOE School 1 Gen. Ed Teacher, Behavioral Health Specialist, Parent Advocate, Parent 1, Parent 2 and District Education Specialist met to determine Student's Eligibility for IDEA.
52. Student's eligibility team considered Student's Clinical Psychologist letter.⁸³ Clinical Psychologist's letter states that Student "has had behaviors in recent weeks, because of fears of disappointing others, and not being able to anticipate how Student's actions impact others."⁸⁴ The letter further states that Student "is about to transition to the next school. This is a time when a child with a disability is likely to experience a lot of stressful adjustment issues"⁸⁵.
53. SSC facilitated the eligibility meetings. SSC's practice is to make introductions, offer the procedural safeguard notice, and present an agenda for the meeting. SSC testified that SSC's typical practice is to review cognitive assessments, then academic observation, and service provider input. After each assessment SSC asks for team member input and questions.

⁷⁷ Respondent Ex. 4, pgs. 85-92.

⁷⁸ Respondent Ex. 4, pgs. 93-100.

⁷⁹ Respondent Ex. 4, pgs. 103-110

⁸⁰ Respondent Ex. 4, pgs. 101-103.

⁸¹ Petitioner Exs. 2.1-2.14.

⁸² Petitioner Ex. 1.1.

⁸³ SPED Teacher Testimony.

⁸⁴ Petitioner Ex. 1.1.

⁸⁵ *Id.*

54. Special Education Teacher and General Education teacher provided work samples, observations, and classroom assessment.
55. Student's eligibility according to the classification was evaluated but the IEP team found that Student did not exhibit a discrepancy in actual vs cognitive ability.⁸⁶
56. There was no dispute during the eligibility meeting that Student met the required criteria for Disability as defined in the IDEA and that Disability created an adverse effect on Student's educational performance in situations.⁸⁷
57. Parent 1 shared additional information that Student had engaged in repetitive activities, resistance to environmental change and unusual responses and the team included these characteristics under "Evidence of Disability" even though School staff had not noted Student engage in those behaviors while School was at school.
58. However, Student's eligibility team determined that Student did not need specialized instruction.⁸⁸ "[Student] does not need specially designed instruction to access Student's academics in the general education setting."⁸⁹
59. Parent Advocate testified that Parent Advocate raised a predetermination issue during an IEP meeting held during a previous year but ultimately an IEP was developed for Student after Parent Advocate commented to the IEP team that Parent Advocate believed the team was predetermining Student's IDEA eligibility.⁹⁰
60. DOE School 1 SPED teacher testified that Student did not need specialized instruction because Student was making sufficient *Academic* progress.⁹¹
61. Student's Prior Written Notice dated April 27, 2018 states:

"Student does not need specially designed instruction in the general education setting. The content, methodology, and delivery of instruction does not need to be modified for [Student]."

Reasons: Student had a documented average intellectual function. [Student's] academic scores are in the average to above average range, not 1.5 standard deviation below the cognitive functioning ability

Student had a diagnosis and parents shared a recent report by [Student's Therapist] stating Student had a second diagnosis. However, does not need specially designed

⁸⁶ DOE School 1 SSC Testimony.

⁸⁷ SPED Teacher Testimony.

⁸⁸ DOE School 1 SSC Testimony, DOE School 1 SPED Teacher Testimony, and DOE School 1 Gen Ed Teacher Testimony.

⁸⁹ Respondent Ex. 2, pgs. 28-29.

⁹⁰ Parent Advocate Testimony.

⁹¹ DOE School 1 SPED Teacher Testimony.

instruction in the general education setting. The content methodology and delivery of instruction does not need to be modified”.⁹²

Credibility

62. DOE School 1 Special Education Teacher, DOE School 3 Special Education Teacher were qualified as experts in Special Education Instruction and credibility is not at issue.
63. School Psychologist was qualified as an expert in School Psychology and credibility is not at issue.
64. Due to Parent 1’s nervousness, Parent 1’s testimony was disjointed and addressed Student generally as opposed to specific, detailed testimony.
65. Parent Advocate’s testimony was not clear regarding what years Parent Advocate was testifying about as Parent Advocate has been advising Parents for multiple years. Additionally, Disability is personal to Parent Advocate, as Parent Advocate’s child is diagnosed and was eligible for services under IDEA.
66. General Education Teacher was not forthcoming and General Education Teacher’s testimony is given less weight.
67. Throughout the hearing, District Educational Specialist was overly participatory. District Educational Specialist would nod, shake the head, and/or smile during witness testimony. At one point during DOE School 1 SSC’s testimony, District Educational Specialist answered DOE School SSC’s question before the witness did. While I do not find the behavior as coaching, it is inappropriate during an administrative hearing.

VI. CONCLUSIONS OF LAW

The IDEA is a comprehensive scheme set up by Congress to aid the states in complying with their Constitutional obligation to provide public education for children with disabilities.⁹³ 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”.⁹⁴ The IDEA provides state’s with federal funding to educate children with disabilities if a state can demonstrate that it has policies and procedures in effect to assure that all disabled children the right to a free appropriate public education.⁹⁵

A FAPE requires that special education and related services are:

1. provided at public expense, under public supervision and direction, and without charge;
2. meet the standards of the State Education Agency;

⁹² Petitioner Exs. 5.1-5.2.

⁹³ *Smith v. Robinson*, 468 U.S. 992 (1984).

⁹⁴ *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. §1400(d)(1)(A)).

⁹⁵ *Rowley*, 458 U.S. 181, 179-91 (1982) (citing 20 U.S.C. § 1412(1)).

3. include an appropriate preschool, elementary school or secondary school education in the state involved; and,
4. Provided in conformity with the individualized education program (“IEP”) requirements.⁹⁶

To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP”.⁹⁷

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (1) whether the Department of Education (“DOE”) complied with the procedures set forth in IDEA; and (2) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit.⁹⁸

Harmless procedural errors do not constitute a denial of FAPE.⁹⁹ A Hearings Officer may find that a child not receive a FAPE only if the procedural inadequacies:

- (i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or
- (iii) Caused the student a deprivation of educational benefit.¹⁰⁰

Where a court identifies a procedural violation that denied a student a FAPE, the court need not address the second prong requiring the IEP to be reasonably calculated to enable the student to receive educational benefit.¹⁰¹

In determining the second prong whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit a school district need not maximize the potential of the child, however, the standard is more demanding than “de minimis” progress.¹⁰² The standard “requires an educational program be reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”.¹⁰³ The IEP must be “appropriately ambitious in light of [the child’s] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives”.¹⁰⁴ The IDEA also does not guarantee “the absolute best or ‘potential’ maximizing education,¹⁰⁵ but the educational benefits must be meaningful, not trivial.¹⁰⁶

⁹⁶ H.A.R. §8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R §300.22.

⁹⁷ *Dep’t of Educ. of Hawaii v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Haw. 2016).

⁹⁸ *Rowley*, 458 U.S. at 206-7.

⁹⁹ *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008).

¹⁰⁰ 34 C.F.R §300.513.

¹⁰¹ *Id.*

¹⁰² *Andrew F. ex rel. Joseph F. vs. Douglas County School Dist.* 137 S. Ct. 988.

¹⁰³ *Id.* at 1001.

¹⁰⁴ *Id.* at 1000.

¹⁰⁵ *Gregory k. v. Longview Sch. Dist.*, 811 F. 2d 1307, 1314 (9th Cir. 1987).

¹⁰⁶ *See M.C. v. Antelope Valley Uniton High Sch. Dist.*, 858 F. 3d 1189, 1200 (9th Cir. 2017).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,¹⁰⁷ establishes annual goals related to those needs,¹⁰⁸ and provides appropriate specialized instruction and related services.¹⁰⁹ Whether an IEP is reasonably calculated to enable a student to make appropriate progress is judged under the "snapshot rule"; that is, the IEP is to be evaluated from the times created, with the information available at the time, not from hindsight.¹¹⁰

The burden of proof is properly placed upon the party seeking relief.¹¹¹ Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹¹² The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.¹¹³

I. DISCUSSION

1. Petitioner did not prove that Respondent materially failed implement Student's May 9, 2017, IEP.

Legal Standard

A FAPE requires that special education and related services are provided in conformity with individualized education program ("IEP") requirements.¹¹⁴ After a Student's IEP is written, the district is obligated to provide the student with the special education and related services listed in the IEP.¹¹⁵ That includes all supplementary aids and services and program modifications that the IEP team has identified as necessary for the student to advance appropriately toward the established IEP goals, to be involved in and progress in the general curriculum, and to participate in other school activities.

However, the Ninth Circuit Court of Appeals, in *Van Duyn v. Baker School District*, stated that the IDEA, "counsels against making minor implementation failures actionable given that 'special education and related service' need only be provided 'in conformity with' the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education."¹¹⁶ The Court held that only a *material failure* to implement an IEP violates the

¹⁰⁷ 34 C.F.R. §300.320.(a)(1)

¹⁰⁸ 34 C.F.R. §300.320.(a)(2)

¹⁰⁹ 34 C.F.R. §300.320.(a)(4)

¹¹⁰ See *L.J. v. Pittsburgh Unified Sch. Dist.*, 850 F. 3d 996, 1004 (9th Cir. 2017); *Adams v. Oregon*, 195 F. 3d 1141, 1149 (9th Cir. 1999).

¹¹¹ *Van Duyn ex. Rel. Van Duyn v. Baker Sch. Dist.*, 502 F. 3d 811, (9th Cir. 2007) *Schaffer v. Weast*, 546, US 59, 56-57 (2005).

¹¹² 20 U.S.C. §§ 1415(i)(2)(c).

¹¹³ *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622(1993) (internal quotation marks omitted).

¹¹⁴ H.A.R. §8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R. §300.22.

¹¹⁵ 34 CFR 300.323 (c).

¹¹⁶ *Van Duyn ex. Rel. Van Duyn v. Baker School Dist.* 5J, 502 F 3d 811, 821 (9th Cir. 2007).

IDEA. A material failure occurs when there is “more than a minor discrepancy between the services a school provides to a disabled child and the services requires by the child’s IEP”¹¹⁷.

“The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.”¹¹⁸ The Court went on to instruct an analysis of the specific circumstances of the denial of services. “For instance, if the child is not provided the reading instruction called for and there is a shortfall in the child's reading achievement that would certainly tend to show that the failure to implement the IEP was material. On the other hand, if the child performed at or above the anticipated level that would tend to show that the shortfall in instruction was not material”¹¹⁹.

Analysis

Petitioner claims that the DOE did not provide the special education, speech and language therapy and or counseling required by Student’s May 9, 2017 IEP during the 2017 - 2018 School Year and during the 2018-2019 School Year, required as a result of “Stay Put”.¹²⁰ Petitioner also claims that the ten (10) supplementary aids and services, modifications, supports for school personnel listed in Student’s IEP were improperly implemented.

Special Education

Petitioner did not provide sufficient evidence to prevail on their claim that Student did not receive 100 minutes of special education, 320 minutes of speech and language therapy, and 270 minutes of counseling per quarter.

During the 2017-2018 School Year, Student was provided with significantly more than 100 minutes of special education due to Student’s completion of a daily communication log and placement in an inclusion setting.¹²¹ Over 250 pages of a documented communication log, which Parents helped design has been admitted into evidence.¹²² Parent 1 conceded that Student would complete Student’s daily communication log either with DOE School 1 Special Education Teacher or independently.¹²³ Typically, Students in general education do not complete a communication log on a daily basis. Nor are general education parents involved in designing a specific form to help parents understand their child’s emotional state through the school day.

Additionally, Student was placed in an inclusion room for Student’s education, which provided small group differentiated instruction based on student need and specifically designed

¹¹⁷ *Id.* at 822.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Student's last known IEP is dated May 9, 2017 as Student’s eligibility was rescinded in April 2018.¹²⁰ While Student has no new IEP for the 2018-2019 school year, Student’s services according to Student’s May 9, 2018, IEP are still in place during the pendency of this claim via “Stay Put” (November 2018- April 2019).

¹²¹ FOF 32-37; 43

¹²² FOF 37, 42-43.

¹²³ FOF 42-43.

instruction.¹²⁴ While general education students benefit from inclusion, the fact that general education students are benefitting from small groups and differentiated instruction does not negate that fact that the education is specially designed. The groups are chosen by teachers by them considering each student's need according to the instruction to be provided.¹²⁵ The inclusion class would not exist but for the five special education student requiring specialized instruction.¹²⁶

The inclusion setting allowed Student to benefit from role play and peer modeling.¹²⁷ Student's disability adversely affects educational performance in the areas of "situations", "pragmatic speech" and the "reading of situations".¹²⁸ It is specifically recommended for Student that teachers use modeling and role play as a means to diminish Student's anxiety in novel situations.¹²⁹ DOE School 1 General Education Teacher utilizes a teaching methodology as a way for students to show their understanding of what they learn as through group collaboration.¹³⁰ Not all general education teachers will use ___ and require small groups to acting out words as a means of learning new vocabulary.¹³¹ While General Education Teacher is using the method for all students who are in the inclusion setting, the same methodology is specifically recommended for student to reduce anxiety and learn. Therefore, Student was receiving specially designed instruction during the 2017/2018 School Year, even if some general education students who were placed in the inclusion setting were receiving the same instruction.

Petitioner did not provide sufficient evidence to prevail on their claim that Student did not received at least 100 minutes of special education during the duration of "Stay Put".¹³²

Speech and Language Therapy and Counseling

Student received and continues to receive Speech and Language Services during both 2017/2018 and "Stay Put".¹³³ Petitioner did not provide sufficient evidence to prevail on their claim that Student did not receive Counseling during either time period.¹³⁴ DOE School 1 Special Education Teacher and DOE School 3 Special Education Teacher both testified that Student receives services as a part of a group led by a behavioral health specialist.¹³⁵

¹²⁴ *Id.*

¹²⁵ FOF 31.

¹²⁶ FOF 32-37.

¹²⁷ FOF 20.

¹²⁸ FOF 7, 58.

¹²⁹ FOF 20.

¹³⁰ FOF 37.

¹³¹ *Id.*

¹³² FOF 46.

¹³³ FOF 32, 46.

¹³⁴ FOF 33, 41, 45; Counseling is referred to during Parent 1's Testimony- Q "And my understanding is the DOE has never, as far as you know, provided any kind of mental health counseling for [] since the episode, would that be correct? A.- No. Q.- Your answer would be "yes, that is correct." A.- Oh, that is correct. Yes, they never did. – Parent 1's Testimony

¹³⁵ FOF 33, 41, 45.

Petitioner did not Provide Sufficient Evidence to Prevail in their Claim regarding Respondents Failure to Implement Student’s Supplementary Aids and Services¹³⁶

Student was provided with a visual schedule.¹³⁷ Petitioner did not provide sufficient evidence that Student was not provided with an end of the day checklist¹³⁸, that Student did not receive transition time and reminders between activities, movement breaks, and visual aids with oral instructions or receive the rainy day schedule. Parent 1 conceded that Parent 1 previously received parent education and training¹³⁹ and that the training was helpful to Parent 1, Parent 2 and Student. Parent 1 also conceded Parent 1 had received an Occupational Therapy Consult.¹⁴⁰

While Student required a transition plan to transition into DOE School 2¹⁴¹ Student’s Eligibility was rescinded in April, 2018, while Student was still attending DOE School 1. Student was no longer eligible for services under May 9, 2017, IEP therefore the creation and implementation of a future transition plan was not required. Student’s Transition plan was to be implemented during the summer, before the beginning of the 2018/2019 School Year. Student’s transition plan was not an implementation failure because Student’s IDEA eligibility was rescinded before the creation of transition plan was required¹⁴².

Student’s May 9, 2019, IEP Required 3 Additional Services

While the IDEA does not prohibit the inclusion of additional information in a child’s IEP, the DOE should be mindful about the information that they enter into the child’s IEP because the inclusion may create an obligation to provide a particular service.¹⁴³ Recommendations submitted or discussed at IEP meetings but not adopted for the IEP are not required to be documented in said IEP.¹⁴⁴ Additionally, the law does not require the IEP team to include information under one component of a child’s IEP that is already contained in another part of the document.¹⁴⁵ This provision means that the IEP must be read as a whole.¹⁴⁶

Here, Student’s “Present Level of Academic Achievement and Functional Performance” (“PLAAPF”), include a section called BEHAVIORAL / PERFORMANCE”, and documents

¹³⁶ FOF 22 (1) visual schedule; (2) end of the day checklist; (3) transition time and reminders between activities; (4) rainy day schedule; (5) allow for movement breaks, including bathroom breaks; (6) support oral instructions with visuals; (7) home/school communication; (8) parent education and training; (9) occupational therapy consult to parent educator or classroom teacher and (10) a transition plan to – grade was to be provided during the summer, before the beginning of the school year.

¹³⁷ FOF 34, 34.

¹³⁸ FOF 35, 46.

¹³⁹ FOF 39.

¹⁴⁰ FOF 40, 44.

¹⁴¹ FOF 22.

¹⁴² Even if the transition plan is deemed a material failure, Petitioner did not file the Complaint until November to enact “Stay Put” and provide services. Student had already transitioned to DOE School 2 for about four months when the Complaint was filed.

¹⁴³ 34 CFR 300.320 (d)(1). *See Boise Sch. Dist. No. 1*, 56 IDELR 116 (SEA ID 2010); and *Letter to Anonymous*, 17 IDELR 180 (OSEP 1990).

¹⁴⁴ *Letter to Anonymous*, 20 IDELR 1460 (OSEP 1994).

¹⁴⁵ 34 CFR 300.320 (d)(2).

¹⁴⁶ *See, e.g., Los Angeles Unified Sch. Dist.*, 60 IDELR 29 (SEA CA 2012) (finding that because a student’s IEP stated that she required one-to-one assistance throughout the day at least once throughout the document, it met the IDEA’s content requirements).

Student's need in a section entitled "CURRENT BEHAVIOR NEED"¹⁴⁷. The wording is not ambiguous. Student's IEP required documented that Student needed a "Regulation Plan" a "Behavior Plan" and that Student initiate and sustain play with same age peers during unstructured settings such as recess and before school.¹⁴⁸ The DOE created an obligation to provide Student services aimed at appropriate interaction with peers, and a plan for appropriate regulation and behavior.

Student's needs are that of self-regulation and proper behavior.¹⁴⁹ Student's regulation and behavior while not addressed in a formal plan are addressed via Student's benchmark goals. One benchmark goal focuses on behavior and self-regulation stating that "when deregulated, Student will be able to problem solve using a scale of 1-10 to determine the a) severity, b) solvability and for the concern/ problem".¹⁵⁰ This means that when Student is deregulated, Student will be tasked with understanding how severe Student's issue is and then coming up with a means to understand if Student can solve the problem. Another goal is focused on Student taking a difference perspective to see if student can understand what another person may say or do or feel in a given situation.¹⁵¹ This addresses proper skills and behavior. Another goal focuses on Student's ability to receive correction by both Student's peers and teachers¹⁵² the goals indicated teach student impulse control and self-regulation by targeting specific skills and having Student performs in a manner more consistent with norms. The goals also give Student a method to problem solve, by rating the problem using a number system to determine how solvable and how severe the problem is. The remainder of Student's goals focus on Student holding conversations, staying on topic and acting appropriately with both peers and adults.¹⁵³ The goals require Student to stay on topic even when the topic is of a peer choice and not Student's chosen topic. Student is required to independently follow an end of the day checklist. Here, Student's goals address Student's behavior.

While the IEP requires a regulation plan, behavior plan and services aimed at appropriate interaction with peers, Student's IEP is read as a whole, and Student's articulated goals satisfy Student's need for a regulation plan, behavior plan, and appropriate interaction.

For the reasons stated above, Petitioner did not prove that Respondent Failed Implement Student's May 9, 2017, IEP.

B. Petitioner did not prove that Respondent Predetermined Student's IDEA eligibility.

The IDEA requires the DOE to ensure that the parents of each child with a disability are members of any group that makes decisions about their child's educational placement.¹⁵⁴ In Hawai'i, the eligibility determination is made by a group of qualified professionals and the parent of the student, this means that student's IEP team is not necessarily responsible for

¹⁴⁷ FOF 23.

¹⁴⁸ FOF 23.

¹⁴⁹ FOF 23.

¹⁵⁰ FOF 24.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 34 CFR 300.327 , 34 CFR 300.501 (c)(1).

determining Student's eligibility.¹⁵⁵ Predetermination occurs when members of the team decide a student's placement in advance of the meeting without the parents' participation or input. Predetermination constitutes a denial of FAPE because it significantly impedes parental participation in the IEP development process.

In *A.G. v. State of Hawaii, Dep't of Educ.*, the Court held that the parent's predetermination claim was undermined because the DOE illustrated a willingness to discuss the parents' concerns and explanation of the evaluative data supporting the recommendation. The DOE may prepare for perspective meetings about a student, as the difference between the DOE's "preparation" and "predetermination" is the team's willingness to listen to the parents' concerns.¹⁵⁶

The appropriateness of a student's eligibility should be assessed in terms of its appropriateness at the time of the child's evaluation and not from the perspective of a later time with the benefit of hindsight.¹⁵⁷ When making the assessment of whether an eligibility determination is "appropriate" under the IDEA, the tribunal looks to the time of the child's evaluation and employs what is termed the "snapshot" rule, which instructs the Hearings Officer to judge the appropriateness of the determination on the basis of the information reasonably available to the parties at the time of the meeting.¹⁵⁸ We judge the eligibility decision on the basis of whether it took the relevant information into account, not on whether or not it worked.¹⁵⁹

In this case, it is undisputed that the snapshot period was the period surrounding the two eligibility meetings: on April 5, 2018, and April 23, 2018, when Student was in the ___ grade. This was the critical period on which the DOE based its eligibility decisions, and the DOE correctly focused on Student's eligibility for special education by looking at Student's behavior, academic progress, and behavior needs at that time.

Here, Student's Eligibility team met on April 5, 2018.¹⁶⁰ SSC facilitated the meeting. SSC began per SSC's usual process of making introductions, offering the procedural safeguard notice, and presenting an agenda for the meeting.¹⁶¹ SSC testified that SSC's typical practice is to review cognitive assessments, then academic observation, and service provider input.¹⁶² SSC after each assessment was read asked if team members had any questions regarding the assessments after that specific assessment was presented.¹⁶³ Special Education Teacher and General Education teacher provided work samples, observations, and classroom assessment. Parents had the opportunity to review and ask questions regarding each assessment which was

¹⁵⁵ H.A.R. § 8-60-38.

¹⁵⁶ *P.F. and S.F. v. Board of Educ. of the Bedford Cent. Sch. Dist.*, 67 IDELR 148 (S.D.N.Y. 2016).

¹⁵⁷ *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).

¹⁵⁸ *L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1175–76 (9th Cir. 2016), opinion amended and superseded on denial of reh'g sub nom. *L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996 (9th Cir. 2017)

¹⁵⁹ *Id.*

¹⁶⁰ FOF 49, 50. Although the DOE calls Student's eligibility meeting an SST meeting, the meeting goal is to determine eligibility and the meeting participants are composed of the necessary individuals to determine Student's eligibility.

¹⁶¹ FOF 53-55.

¹⁶² *Id.*

¹⁶³ *Id.*

used to determine Students Eligibility.¹⁶⁴ These facts illustrate that the DOE involved Parent 1 and attempted to provide explanation of the evaluative data presented in the meetings in order for parents to actively participate.

The team then considered whether or not Student qualified for special education and related services under the categories of Eligibility Category 1 and Eligibility Category 2. The team thoroughly discussed Eligibility Category 1 before ruling that category out.¹⁶⁵

The team then determined that Student met the criteria for Eligibility Category 2 as defined in the IDEA.¹⁶⁶ Parent 1 shared additional information that Student had engaged in behaviors and the team included these behaviors even though School staff had not noted Student engage in those behaviors while School was at school.¹⁶⁷ This exemplifies the DOE's willingness to listen to the parents' concerns and be open to discussion around the characteristics of Disability.

The team also agreed that Student experienced an adverse effect on Student's education from Disability.¹⁶⁸ However, the team could not agree if Student needed "special education" as a result of Student's Disability.¹⁶⁹ The team had met for two hours on April 5, 2018, to discuss student Eligibility.

On April 23, 2018, another eligibility meeting occurred and the majority of team members determined that Student did not need special education as a result of Disability. Parent Advocate attended this meeting and voiced Parent Advocate's concerns regarding predetermination because the DOE had prepared material regarding the possibility of 504 eligibility.¹⁷⁰

The Eligibility team met on two separate occasions and thoroughly discussed Student's eligibility. The DOE was open and willing to listen to parents concerns as demonstrated by the two hour meeting to explain test results, engaging parents in the evaluation results, and adding Parent 1's observations about the child at home and discussing eligibility.

Petitioner did not prove that Respondent predetermined Student's ineligibility.

C. Petitioner Proved that Respondent Improperly Determined Students IDEA Eligibility By Determining that Student's Disabling Condition did not require Special Education and Related Services.

Petitioner alleged that Student's IDEA eligibility was improperly determined. Respondent asserted that Student did not need "special education" therefore, Student is ineligible for IDEA.

¹⁶⁴ FOF 48.

¹⁶⁵ FOF 1-5, 53.

¹⁶⁶ FOF 53-58.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ FOF 51, 59, 65.

An eligibility determination consists of four (4) steps. The first step is that the child is evaluated in accordance with IDEA regulations.¹⁷¹ The next step requires that the child have the characteristics of one of the thirteen (13) enumerated disability conditions delineated in the IDEA.¹⁷² The third step requires that the child's disabling condition have an "adverse effect" on the child's educational performance.¹⁷³ The last step is that the child's disabling impairment require "special education" and related services".¹⁷⁴ A child who has one of the thirteen enumerated disabilities needing only related services and not special education, is not a child with a disability under the IDEA.¹⁷⁵

A Student shall be eligible for Eligibility Category if the student has a developmental disability significantly affecting verbal and nonverbal communication and interaction[], that adversely affects the student's educational performance.¹⁷⁶ Student's eligibility team agreed that Student met the required criteria for Eligibility Category 2 and that Student's Disability adversely affects Student's educational performance in the areas of situations.¹⁷⁷

Student's Need for Special Education and Related Services

Educational performance consists of both academic and functional performance. A student who needs special education because of a qualifying disability retains a student's rights under the IDEA, even if the student is intellectually gifted.¹⁷⁸ A gifted student with Disability could be doing very well academically, but be eligible under a disability classification and require services to address behavioral challenges.¹⁷⁹ A student that is eligible as a "student with a disability" is eligible under the IDEA regardless of the student's academic success. The student's academic achievement is irrelevant when the student otherwise meets the eligibility criteria.¹⁸⁰

More specifically, special education is "specially designed instruction to meet the unique needs of a child with a disability" and related services are "the supportive services required to assist a student to benefit from their special education".¹⁸¹ Hawai'i defines special education as "specially designed instruction, at no cost to the parents to meet the unique needs of a student

¹⁷¹ 34 C.F.R. §§ 300.304-300.311; (Evaluation is not at issue and will not be addressed. However, a list of assessment used to determine Student's eligibility can be found at FOF 48).

¹⁷² *Capistrano Unified School Dist.*, 59 F.3d at 899; 34 C.F.R. §300.8(a)(ii)(c)(1)). Here, Student's eligibility team considered Student's eligibility for Eligibility Category 1 and Eligibility Category 2. The eligibility team ruled out Eligibility Category 1. See FOF 1-5, 53.

¹⁷³ *Id.* 34 C.F.R. §300.8(c) Although the definition of disability does not include the term, "adversely affects a child's educational performance", the requirement that the disability condition must adversely affect the child's education performance is implied.

¹⁷⁴ *Id.* See 34 C.F.R. §300.8(a).

¹⁷⁵ 34 C.F.R. § (a)(2)(i)

¹⁷⁶ H.A.R §8-60-39(a)(1).

¹⁷⁷ FOF 54.

¹⁷⁸ *Id.*

¹⁷⁹ *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010).

¹⁸⁰ *Williamson County Bd of Educ. V. C.K.*, 52 IDELR 40 (M.D. Tenn. 2009) (holding that despite a 143 IQ and passing grades, the student's ADHD adversely affected Student's educational performance, qualifying the student for special education).

¹⁸¹ *Id.*

with a disability” and specially designed instruction as “adapting, as appropriate to the needs of an eligible student, the content, methodology or delivery of instruction”.¹⁸²

Here, Respondent has conceded that Student has an adverse effect because of the Disability in situations.¹⁸³ The special education Student should receive should not focus on academics but on situations.¹⁸⁴ The evidence is uncontroverted that Student performs at or above grade level in academics.¹⁸⁵ Student has an I.Q. that is above average.¹⁸⁶ DOE School 1 SPED teacher testified that Student did not need specialized instruction because Student was making sufficient *Academic* progress.¹⁸⁷ Respondents did not take Student’s deficits into account when determining eligibility.¹⁸⁸ Student’s Prior Written Notice (“PWN”) does not address Student’s known deficits, yet provides Student’s academic progress as a reason for Student’s ineligibility.¹⁸⁹ The PWN states “Student does not need specially designed instruction in the general education setting. The content, methodology, and delivery of instruction does not need to be modified for [Student]”. The reason provided for Student not needing the content methodology and delivery of instruction specialized is that “student had a documented average intellectual function. [Student’s] academic scores are in the average to above average range, not 1.5 standard deviation below the cognitive functioning ability”.¹⁹⁰ The focus of the PWN is on Student’s academic progress, while the areas that the team conceded adversely affects Student’s education are absent. Student continues to have Disability and this PWN does not address if Student has effectively learned coping skills, to compensate for the Disability and or if the skills were properly considered by the team.

Student’s issues were still in part present when Student’s eligibility was determined. Parents shared with the eligibility team a letter from Student’s Clinical Psychologist, which stated that Student has had behaviors in recent weeks in part because Student is not “able to anticipate how Student’s actions impact others.”¹⁹¹ This same team determined that Disability negatively affected Student in the area of situations.

One of Student’s known behavioral needs according to Student’s 2017, IEP was that Student “needs to use a variety of regulation strategies to identify an internal state and select a coping strategy.”¹⁹² One of Student’s learning recommendations from Student’s 2017 Psychoeducational report is that “[i]f student has a difficult situation, it would be helpful to prepare student for those situations. For example, before a new situation, adults can talk to Student about what to expect.”¹⁹³ Additionally, role playing may help Student to learn.¹⁹⁴ While

¹⁸² H.A.R. § 8-60-2.

¹⁸³ FOF 54.

¹⁸⁴ FOF 20.

¹⁸⁵ FOF 1-6.

¹⁸⁶ *Id.*

¹⁸⁷ FOF 60.

¹⁸⁸ FOF 55.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ FOF 50.

¹⁹² FOF 23.

¹⁹³ FOF 20.

¹⁹⁴ FOF 20.

some of Student's deficits may have lessened in the school environment¹⁹⁵, some of student's other deficits still existed when eligibility was determined.¹⁹⁶

*L.J. v. Pittsburg Unified School District*¹⁹⁷, held that a district should consider the services a student is already receiving in determining whether the student requires special education and that the eligibility team must distinguish between general education interventions and specialized instruction. In that case, the district's classification of special education services as general education interventions available to all students did not support the District's argument that the student had no need for special education services.¹⁹⁸

Here, Student's inclusion classroom provided Student with special education on a daily basis.¹⁹⁹ Here, Student received the specially designed instruction that Student required via the use of DOE School 1 Gen. Ed Teacher's use of ____.²⁰⁰ Here, Student was part of a group led by a behavioral health specialist.²⁰¹ Here, Student would leave the classroom at times to self-regulate.²⁰² Here, Student would receive OT and Speech and Language Therapy.²⁰³ Here, Student would reflect upon Student's day and communicate this via a log to Student's parents.²⁰⁴ As a whole, general education students do not have access to the services Student was receiving. Student was receiving specially designed instruction and continues to need specially designed instruction in the areas where the Disability adversely affects the educational performance.

VII. REMEDY

The DOE violated the IDEA by improperly rescinding Student's IDEA eligibility.²⁰⁵ Student is IDEA eligible.

IT IS HEREBY ORDERED that Petitioners are entitled to an IEP developed based on Student's unique needs. The IEP should focus on Student's skills and utilize the instructional methods recommended in Student's Psychoeducational Evaluation. Student's needs are not

¹⁹⁵ FOF 11-17 (Student does not have ____, is able to calm ____self during class and only has minor environmental stimuli issues). (Student has heightened oral fixation and stimulation behavior and continues to struggle with the ability to read subtle cues)

¹⁹⁶ *Id.*

¹⁹⁷ 116 LRP 37786 (9th Cir. 09/01/16).

¹⁹⁸ *Id.*

¹⁹⁹ See *Supra.*

²⁰⁰ FOF 31.

²⁰¹ FOF

²⁰² FOF 36.

²⁰³ FOF 40, 32

²⁰⁴ FOF 37.

²⁰⁵ See Section C "Eligibility" *infra.*

limited to the needs outlined in this decision as Student needs may change. The IEP team meeting should take place no later than 30 days after this decision is issued.

ORDER

Based upon the findings of fact and conclusion of law herein, it is this 22nd day of April 2019, hereby:

ORDERED THAT, Student is eligible under the IDEA.

IT IS FURTHER ORDERED THAT, an IEP team meeting should be convened no later than 30 days after this decision is issued.

IT IS FURTHER ORDERED THAT, the IEP should be finalized 45 days after this decision is issued.

Nothing in this order shall be interpreted to preclude the IEP team from reviewing new or additional information.

DATED: Honolulu, Hawai'i, April 22, 2019.

/s/ JENNIFER M. YOUNG

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NOTICE OF APPEAL RIGHTS

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

Unofficial redacted hearing decision