



OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

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

Petitioner(s),

vs.

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

Respondents.

DOE-SY1920-051

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing: September 17-18, 2020

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On June 10, 2020, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE") received a request for a due process hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities

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

Education Act, from Student, by and through Parent 1 (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on June 19, 2020.

A prehearing conference was held on July 13, 2020, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Ryan W. Roylo, Esq. (hereinafter “Mr. Roylo”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for August 16-17, 2020. At a status conference with counsel on August 10, 2020, the parties requested a continuance of the Hearing date to allow the parties time to see if a settlement could be reached in this case. During the August 10, 2020 status conference, the Hearing was rescheduled to September 17-18, 2020. An Amended Prehearing Order was issued to reflect the new deadlines associated with the new Hearing dates.

Due to the scheduling of the Hearing, Respondents requested an extension of the original deadline by which a decision was to be made from August 24, 2020 to October 8, 2020. Petitioners did not object to the request for extension, and Respondents’ request for an extension was granted and the new deadline was set at October 8, 2020. After completion of the Hearing, Respondents requested the opportunity to prepare a closing brief using transcripts from the Hearing. Respondents requested another extension to allow time for the transcripts and closing briefs to be prepared, and the request was granted, setting the new deadline for November 22, 2020.

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

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<sup>2</sup> See Governor of the State of Hawaii’s Twelfth Proclamation Related to the COVID-19

6, 2020, which set forth the parameters for the video conference hearing. These parameters included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

The Hearing commenced on September 17, 2020, using the Zoom video conferencing platform. Each attendee to the Hearing was sent a link through email to access the Hearing by the Office of Dispute Resolution. Present in the video conference Hearing were Hearings Officer Chastity T. Imamura; Parent 1 and Mr. Peck, on behalf of Petitioners; and District Educational Specialist and Mr. Roylo on behalf of Respondents, as well as the assigned court reporter. The Hearing continued to September 18, 2020, as scheduled, and the testimony was completed on that date.

At the Hearing, Petitioners called Parent 1 as their sole witness during their case-in-chief and rested. Respondents called Special Education Teacher (hereinafter “SPED Teacher”) during their case. Upon entering into a stipulation with Petitioners, Respondents submitted documentary exhibits in lieu of testimony for the remainder of their witnesses. Petitioners did not present any rebuttal evidence.

Each party submitted their exhibits for the Hearing by the disclosure deadline of September 10, 2020. At the conclusion of the Hearing, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits that were not discussed at the Hearing to be received as evidence

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Emergency, effective August 20, 2020.

in this matter. The lists of proposed additional exhibits were due on September 24, 2020. Any objections to the proposed exhibits were due on September 28, 2020. Respondents proposed several additional exhibits and Petitioners did not submit any objections nor any proposed exhibits. Respondents did note that this Hearings Officer had marked several pages of Petitioners' exhibits (Exhibit 2, pages 083-097) that were not discussed by the witnesses at the hearing as received and objected to the admission of those documents on the grounds that there was no foundation laid for the documents.<sup>3</sup> After a request by Petitioners to have the documents received, this Hearings Officer received the documents over the objection of Respondents.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-023, 041-044; and Exhibit 2, pages 045-077, 082-097.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 2 pages 006-022, 029-051; Exhibit 5, pages 159-223, 225-230, 232-322, 325-352, 354-356, 359, 367-371, 373, 375-376, 379-380, 382, 385-386, 388-391, 393-398, 400-403; Exhibit 6, pages 404-435; Exhibit 7, pages 444-457.

Both parties wanted the opportunity to submit closing briefs regarding the legal issues and the relevant facts supporting those issues to this Hearings Officer for review. The deadline by which the briefs were to be submitted was October 9, 2020. Both parties timely submitted their closing briefs on October 9, 2020.

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.

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<sup>3</sup> Petitioners' Exhibit List had listed Exhibit 2, pages 082-097 as "Vineland-3," however only page 082 was reviewed and discussed by Parent 1 during Parent 1's testimony, but this Hearings Officer had marked the entire page sequence as being discussed.

## **II. JURISDICTION**

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

## **III. ISSUES PRESENTED**

Petitioners assert three (3) issues in the Complaint to be addressed at the Hearing:

1. Whether Respondents denied Student a free and appropriate public education (hereinafter “FAPE”) by committing the following procedural violations:
  - a. Student’s placement in Student’s Individualized Education Programs (hereinafter “IEP”) dated February 19, 2020 and May 22, 2020 was insufficiently defined and/or was overly restrictive.
  - b. Student’s placement discussion at the IEP meetings were insufficient and affected parental participation.
2. Whether Respondents denied Student a FAPE substantively because Student’s February 19, 2020 and May 22, 2020 IEPs failed to adequately address the following concerns:
  - a. Student’s IEPs prevents Student from accessing medically necessary services resulting in diminished and/or insufficient amount of academic instruction. Petitioners submit this claim under both the IDEA and Section 504 of the Rehabilitation Act of 1973.
  - b. Student’s IEPs fail to address Student’s need for safety at the start and end of the school day when Student is unattended and when Student is in the bathroom unattended.
  - c. Student’s IEPs fail to sufficiently address Student’s need for development of social skills.
  - d. Student’s placement in the IEPs are insufficiently defined and/or overly restrictive.
3. Whether Respondents denied Student a FAPE by materially failing to implement Student’s IEP from March 17, 2020 to the present.

## **IV. FINDINGS OF FACT**

Student’s background

1. Student is eligible for special education and related services pursuant to the IDEA<sup>4</sup> and HAR Chapter 60 under the category of Eligibility Category 1.
2. Student was eligible under Eligibility Category 1.<sup>5</sup>
3. Student attended Home School for the 2019-2020 School Year.<sup>6</sup>
4. Student receives services that are covered by Parent 1, but these services cannot be used for academic purposes.<sup>7</sup>
5. No evidence was provided to confirm that services were medically necessary for Student, nor did any professional testify or provide any reports, data, or other information that confirmed or corroborated Student's medical need for services.
6. On February 13, 2020, DOE Provider 1 conducted a parent consultation meeting with Parent 1 and SPED Teacher. During this meeting, Student's behavior data from September 2019 through February 2020 were discussed, as well as Student's progress on goals and Parent 1's concerns. DOE Provider 1 prepared a written report of the meeting.<sup>8</sup>
7. DOE Provider 1 further provided a written follow up to Parent 1's concerns from the parent consultation meeting, wherein DOE Provider 1 documented the responses that were provided to each of Parent 1's concerns discussed at the meeting.<sup>9</sup>
8. On March 6, 2020, DOE Provider 1 also provided updates to be included in Student's

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<sup>4</sup> 20 U.S.C. §§ 1400, *et seq.*

<sup>5</sup> Petitioners' Exhibit 1, page 002 (hereinafter referenced as "P-Ex.1, p.002"), Respondents' Exhibit 2, page 007 (hereinafter referenced as "R-Ex.2, p.007"); R-Ex.2, p.030.

<sup>6</sup> P-Ex.1, p.002, R-Ex.2, p.007; R-Ex.2, p.030.

<sup>7</sup> Testimony of Parent 1, Transcript Volume 1, page 86, lines 15 to page 87 line22 (hereinafter referenced as "Tr.V1, 86:15-87:22").

<sup>8</sup> P-Ex.2, p.045-051, R-Ex.7, p.444-450.

<sup>9</sup> R-Ex.7, p.451-453.

IEP-5/22/2020 in the present levels of academic achievement and functional performance (hereinafter “PLAAFP”) section.<sup>10</sup>

9. These updates included the summary and recommendations from the Assessment, which was updated in November 2019 and February 2020. Student had demonstrated many skills assessed.<sup>11</sup>
10. DOE Provider 1 observed that Student did not demonstrate impeding behaviors that were atypical to the norm that would be 1) harmful to self or other, 2) interfere with Student’s ability to learn and participate in the general curriculum, or 3) affect socialization with peers.<sup>12</sup> DOE Provider 1 also noted that the strategies currently in place for Student at Home School have been effective in maintaining near zero rates of behaviors. As a result, DOE Provider 1 recommended that a functional behavior assessment was not necessary for Student.<sup>13</sup>
11. Based on the data collected by DOE Provider 1, Student had four (4) incidents of physical aggression, two (2) instances of task refusal, four (4) occasions of crying or whining that lasted for more than five (5) minutes, and four (4) occasions of the use of inappropriate language. This information was shared with Parent 1 at the parent consultation meeting.<sup>14</sup>
12. Between September 2019 and February 2020, Student had four (4) instances of wandering off or eloping before and after school. The incidents after school were in September and December 2019 where Student walked off instead of meeting at the

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<sup>10</sup> R-Ex.7, p.454-457.

<sup>11</sup> R-Ex.7, p.454-457.

<sup>12</sup> R-Ex.7, p.454-455.

<sup>13</sup> R-Ex.7, p.455-456.

<sup>14</sup> R-Ex.7, p.451.

pick-up location. The incidents before school were on two (2) occasions where Student arrived late to school in January 2020, where Student was found near the entrance of the class building or outside the classroom door.<sup>15</sup>

13. DOE Provider 1 also recommended a reduction in hours for teacher consultation with the provider from six (6) hours a week to three (3) hours a week based on Student's progress between May 2019 and March 2020.<sup>16</sup>

#### Student's February 19, 2020 IEP

14. On February 19, 2020, an IEP meeting was held with Student's IEP team. Present at the IEP meeting were: DOE Provider 1, General Education Teacher 1, Speech-Language Pathologist (hereinafter "SLP"), SPED Teacher, DOE Behavior Health Specialist, Parent 1, Principal, Parent Advocate, and Occupational Therapist (hereinafter "OT").<sup>17</sup>

15. A written IEP was prepared from the IEP meeting on February 19, 2020 (hereinafter referred to as "IEP-2/19/2020").<sup>18</sup>

16. In Student's IEP-2/19/2020, Student's PLAAFP<sup>19</sup> are addressed in the areas of Academic, Behavior, Functional, and Communication.<sup>20</sup>

17. Parent 1 did not share any concerns at the IEP meeting in the areas of Academic and Functional, had one (1) concern for Communication, and had expressed the most

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<sup>15</sup> R-Ex.7, p.452.

<sup>16</sup> R-Ex.7, p.456.

<sup>17</sup> R-Ex.2, p.022.

<sup>18</sup> R-Ex.2, p.006-022.

<sup>19</sup> This Hearings Officer notes that the forms used for both of Student's IEPs labels this section uses the old terminology, "Present Levels of Educational Performance."

<sup>20</sup> R-Ex.2, p.007-009.



- concerns in the area of Behavior.<sup>21</sup>
18. One area of concern for Parent 1 was elopement by Student in the morning and after school. This concern was addressed by a plan and Student would check out with the teacher. In the mornings, Student would be escorted by parents to the classroom.<sup>22</sup>
19. Another area of concern noted by Parent 1 was incidents that Student was having at recess that Student was not reporting to the teachers. The IEP team discussed having a check-in with Student's teacher after recess to address this concern.<sup>23</sup>
20. Student's IEP-2/19/2020 noted that Student would leave early for Student's services.<sup>24</sup>
21. Student's IEP-2/19/2020 had six (6) annual goals: four (4) for language arts, one (1) for mathematics, and one (1) for health.<sup>25</sup> Student's health goal primarily addressed Student's behaviors and social skills.<sup>26</sup>
22. At the time of the IEP-2/19/2020, Student was able to follow most familiar classroom routines, started to participate more by pointing and following along, raising Student's hand to answer questions, was able to wait after asking for help if Student was acknowledged right away, and was able to initiate tasks by starting to write Student's name and dates on assignments.<sup>27</sup>
23. Benchmarks for Student's health annual goal included: 1) During group activities, Student will independently participate in instructions with peers, 2) After teacher

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<sup>21</sup> R-Ex.2, p.008-009, 011.

<sup>22</sup> R-Ex.2, p.011.

<sup>23</sup> R-Ex.2, p.011.

<sup>24</sup> R-Ex.2, p.011.

<sup>25</sup> R-Ex.2, p.013-018.

<sup>26</sup> R-Ex.2, p.017.

<sup>27</sup> R-Ex.2, p.017.

- instructions are given, Student will initiate task or directions by going back to seat, writing Student's name and date then moving onto the first item of the assignment, 3) During independent work time, Student will stay on task through completion, and 4) When making a request, Student will raise hand or say the requested's name to get their attention, and use a complete sentence to make the request.<sup>28</sup>
24. Student was determined to be eligible for extended school year (hereinafter "ESY") after a break of ten (10) calendar days to address Student's academic and behavioral skills.
25. Student's IEP-2/19/2020 provided for Student to receive special education for six hundred (600) minutes per week in the general education setting, speech and language therapy for two hundred seventy (270) minutes per quarter in the general education or special education setting, and occupational therapy services for one hundred twenty (120) minutes per quarter in the general education or special education setting.<sup>29</sup>
26. Student's IEP-2/19/2020 provided the following supplemental aids and services daily: visual supports, repetition, checks for understanding, gain attention, model prompting, chunking, movement breaks/calming strategies, visuals to aid in understanding. Additional services included parent consultation for sixty (60) minutes per month with services and teacher consultation for three hundred sixty (360) minutes per week.<sup>30</sup>
27. A parent communication log was also provided in Student's IEP-2/19/2020 for daily

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<sup>28</sup> R-Ex.2, p.017.

<sup>29</sup> R-Ex.2, p.020.

<sup>30</sup> R-Ex.2, p.020.

communication between parents, teachers and service providers.<sup>31</sup>

28. During the IEP meeting on February 19, 2020, a discussion was held regarding Student's educational placement, during which it was clarified that Student would be placed in the general education class and only removed or taken aside if a specific IEP goal needed to be addressed that the other students were not working on. Parent 1 understood this discussion and it was the same placement that Student had been in since the beginning of the 2019-2020 school year, which had been discussed at two (2) prior IEP meetings.<sup>32</sup>
29. The explanation of the extent to which Student will not participate with students without disabilities in the general education class, extracurricular activities and other non-academic activities (hereinafter referred to the "educational placement statement") in the IEP-2/19/2020 read as follows: "[Student] will not participate with peers without disabilities while working in IEP goals and objectives and during speech and language therapy sessions."<sup>33</sup>
30. Throughout the discussion at the February 19, 2020 IEP meeting, Parent 1 was asked for any concerns or questions Parent 1 may have had about any of the sections or areas of the IEP that was being discussed.<sup>34</sup>
31. At the February 19, 2020 IEP meeting, Parent 1 informed the IEP team that Parent 1 would be preparing a list of concerns for the IEP team to be added to Student's IEP.<sup>35</sup>
32. On February 20 and 21, 2020, Parent 1 provided the IEP team with a written list of

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<sup>31</sup> R-Ex.2, p.020.

<sup>32</sup> Testimony of Parent 1, Tr.V1, 47:15-52:9; Testimony of SPED Teacher, Tr.V2, 186:6-187:20.

<sup>33</sup> R-Ex.2, p.020.

<sup>34</sup> Testimony of SPED Teacher, Tr.V2, 187:17-20.

<sup>35</sup> R-Ex.2, p.011.

- concerns that Parent 1 wanted to be added to Student's IEP.<sup>36</sup> Parent 1 prepared this list of concerns with the help of Parent Advocate.<sup>37</sup> Some of the items on Parent 1's list of concerns did not appear to be directly related to Student's IEP.<sup>38</sup>
33. Parent Advocate did not provide any testimony, reports or any other information as evidence in this case.
34. Based on Parent 1's list of concerns submitted after the IEP meeting on February 19, 2020, the IEP team met again on May 22, 2020 to discuss Parent 1's list of concerns.<sup>39</sup>
35. Beginning in around January or February 2020 to sometime in March 2020, Parent 1 pulled Student out of school three (3) days a week to receive services at a private clinic.<sup>40</sup>

#### Student's May 22, 2020 IEP

36. On May 22, 2020, the IEP team members present at the meeting included: DOE Provider 1, General Education Teacher, SLP, Student Services Coordinator, SPED Teacher, Behavioral Health Specialist, Parent 1, Principal, and OT.<sup>41</sup>

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<sup>36</sup> Testimony of Parent 1, Tr.V1, 30:6-17; Testimony of SPED Teacher, Tr.V2, 127:16-128:2, 177:24-178:10; P-Ex.2, p.075-076.

<sup>37</sup> Testimony of Parent 1, Tr.V1, 30:6-15.

<sup>38</sup> See e.g. "[Student] has been prescribed medically necessary services, at the density of 20 hours per week (in addition to the 6 hours/week at school)." P-Ex.1, p.011, R-Ex.2, p.039. "Requesting that the team provide to me, a copy of, services, in order to maintain transparency, and to know when, how much & how often direct services are being provided," which is not directly related to Student's IEP since Student's IEP did not provide for direct services to Student. P-Ex.1, p.011, R-Ex.2, p.039. "Hopeful that Student will receive adequate services, as stated in Student's IEP as part of the consult," which is not directly related since Student's IEP did not provide for any services. P-Ex.1, p.011, R-Ex.2, p.039.

<sup>39</sup> Testimony of SPED Teacher, Tr.V2, 127:2-18; P-Ex.1, p.006, R-Ex.2, p.034.

<sup>40</sup> Testimony of Parent 1, Tr.V1, 37:20-38:5, 40:1-41:4, 94:17-95:18.

<sup>41</sup> P-Ex.1, p.023, R-Ex.2, p.051.

37. The written IEP resulting from the IEP meeting on May 22, 2020 (hereinafter referred to as “IEP-5/22/2020”) was a revision IEP that included updates from DOE Provider 1, Student’s assessment information, and Parent 1’s list of concerns shared with the IEP team after the February 19, 2020 meeting.<sup>42</sup>
38. Many of Parent 1’s concerns focused on the lack of services provided to Student in the IEP-2/19/2020.<sup>43</sup> Student’s IEP-2/19/2020 did not provide a supplemental aid or service, however it did provide consult with parents and teachers with a provider.<sup>44</sup>
39. At the May 22, 2020 IEP meeting, the IEP team discussed that Student was getting services. The IEP team further discussed that Home School has not recommended or observed the need for services due to the team’s previous assessment that a functional behavior assessment was not warranted based on observations of Student.<sup>45</sup>
40. Parent 1 also raised concerns to the IEP team that had been observed at home, but not

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<sup>42</sup> P-Ex.1, p.001-023, R-Ex.2, p.029-051.

<sup>43</sup> See e.g. Parent 1 concerns noted in IEP-5/22/2020 such as: “not having a professional, with [Student] during unstructured activities such as recess, lunch, and bathroom breaks,” “monthly turnover of professionals who work with [Student],” “team preventing provider from recommending service by consistently turning over personnel that had been working directly with [Student],” “transitioned to new provider and supervisor who did not work with [Student] directly,” “same provider is transitioning off case failed to make appropriate recommendations stating that provider needed ‘more information’ despite working over three (3) months, approximately forty (40) hours with [Student],” “[Student] has been prescribed medically necessary services, at the density of twenty (20) hours per week (in addition to the six (6) hours/week at school),” “concerns that [Student] has been waiting all year to access services. Services outlined in IEP were not provided as intended,” “requesting that the team provide to me, a copy of Form, in order to maintain transparency, and to know when, how much and how often direct services are being provided,” “Requesting support at current school. Or requesting support and wish to transfer to a neighboring school. Or requesting private school placement and DOE must pay for it. Or request that DOE pay for transportation and co-pays associated with [Student’s] medical care, since they are refusing to [Student’s] services at school,” “hopeful that [Student] will receive adequate services, as stated in [Student’s] IEP as part of the consult.” P-Ex.1, p.010, R-Ex.2, p.038-039.

<sup>44</sup> R-Ex.2, p.020.

<sup>45</sup> See P-Ex.1, p.005, R-Ex.2, p.033.

at school. At the IEP team meeting on May 22, 2020, these concerns were addressed by the IEP team for monitoring at school and recommendations were made to Parent 1 to reduce the behaviors at home.<sup>46</sup>

41. Additional concerns of Parent 1 were addressed at the May 22, 2020 IEP meeting, including concerns of Parent 1 for before school, after school and during recess and lunch breaks. The IEP team prepared a plan for Student to be ‘primed’ by teachers before recesses and check-in with teachers after recess to obtain any information about incidents that occurred during the recess.<sup>47</sup> The IEP team prepared a plan for drop-off procedures and check-out procedures to address Student elopement for the remainder of the 2019-2020 school year. This plan involved, in part, checking Student out of class after school and escorting Student to the pick-up area.<sup>48</sup>

42. The IEP team noted that a new plan for drop-off procedures and check-out procedures to address Student’s potential elopement would be formulated when more information is obtained from Parent 1 in the 2020-2021 school year.<sup>49</sup>

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<sup>46</sup> P-Ex.1, p.011, R-Ex.2, p.039.

<sup>47</sup> See IEP-5/22/2020 “The team incorporated a check in after recess and restroom breaks to allow [Student] opportunities to report incidents that were being reported at home, but not at school. Reports from check ins were recorded in the parent communication log and sent home daily. To prevent inappropriate behaviors during recess, adults prime [Student] prior to recess, check in with [Student] after recess, and reinforce appropriate social responses.” P-Ex.1, p.004, R-Ex.2, p.032.

<sup>48</sup> See IEP-5/22/2020 “Parents are permitted on campus to escort tardy students to the classroom. During the school day, [Student] travels to other locations with [Student’s] class, is escorted by an adult, or at least two buddies. After school, the team incorporated a check out procedure; [Student’s] waiting area this year was right outside the classroom, due to the concerns about wandering off, [Student] checks out with the teacher by giving a high five and saying bye to the teacher. [Student] is released to [\_\_\_\_] and the two walk to and wait at the parent pick up area in front of the office.” P-Ex.1, p.004-005, R-Ex.2, p.032-033.

<sup>49</sup> See IEP-5/22/2020 “Next year, [\_\_\_\_] will be going to [different school]; parents will let the team know what before and after school pick up and drop off will look like. The team will formulate a plan when school resumes.” P-Ex.1, p. 005, R-Ex.2, p.033.

43. Recommendations from DOE Provider 1 regarding Student’s assessment and future skills/goals were also included in Student’s IEP-5/22/2020. These future goals included: spontaneously requesting peers to participate and/or end participation in games, social play, etc. appropriately; engaging in five (5) or more verbal exchanges on one (1) topic with peers for multiple topics; giving directions, instructions, or explanations as to how to do something or participate in an activity (e.g., repeats classroom instructions and executes instructions independently without prompts).<sup>50</sup>
44. The IEP team at the May 22, 2020 meeting did not change Student’s goals and objectives in the IEP-2/19/2020, and they were listed in the same fashion in the IEP-5/22/2020.<sup>51</sup>
45. Student’s IEP-5/22/2020 contained two (2) additional supplementary aids and services, labeled “Check-In” and “Check-Out,” both to be provided daily to Student, which were clarified with the specific plans for both services.<sup>52</sup>
46. Student’s IEP-5/22/2020 also contained a provision for teacher consultation with the provider for six (6) hours per week “to address anticipated regression and transition back to school after the COVID-19 Corona Virus extended school closure and monitor or give suggestions/strategies if needed to minimize impeding behaviors. If classroom strategies are not sufficient, direct instruction/intervention will be provided as needed.”<sup>53</sup>
47. Student’s educational placement statement in the IEP-5/22/2020 remained the same

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<sup>50</sup> P-Ex.1, p.005, R-Ex.2, p.033.

<sup>51</sup> Compare IEP-2/19/2020, R-Ex.2, p.013-019, and IEP-5/22/2020, P-Ex.1, p.013-019, R-Ex.2, p.041-047.

<sup>52</sup> P-Ex.1, p.020-021, R-Ex.2, p.048-049.

<sup>53</sup> P-Ex.1, p.021, R-Ex.2, p.049.

as the IEP-2/19/2020,<sup>54</sup> and Student's educational placement statement was not raised as a concern for Parent 1 at the May 22, 2020 IEP meeting.<sup>55</sup>

48. Parent 1 agreed that Student's least restrictive environment was in the general education classroom, but Parent 1 was concerned that Student should have help or services.<sup>56</sup>

49. At the May 22, 2020 IEP meeting, the IEP team discussed Parent 1's request for support for Student but determined that Student was not eligible for an for services because Student's behaviors did not warrant a need for services.<sup>57</sup>

#### Student's education from March 2020 to September 2020

50. On or about March 17, 2020, the Department of Education for the State of Hawai'i ordered all DOE public schools to shut down to students and teachers on campus due to the COVID-19 global pandemic. School did not resume with in-person instruction for the remainder of the 2019-2020 School Year.<sup>58</sup>

51. During the period of school closure in the 2019-2020 school year, from March 2020 through the end of May 2020, the students at Home School were provided assignments through a communication application called Application 1, wherein teachers could post things as stories that are similar to a social media site. Teachers and parents are also able to send private messages through that account to communicate.<sup>59</sup>

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<sup>54</sup> P-Ex.1, p.022, R-Ex.2, p.050.

<sup>55</sup> Testimony of SPED Teacher, Tr.V2, 127:4-18, 128:13, 180:12-181:1.

<sup>56</sup> Testimony of Parent 1, Tr.V1, 75:11-77:5, 107:12-22.

<sup>57</sup> Testimony of Parent 1, Tr.V1, 31:25-32:15, Tr.V2, 105:19-107:1; P-Ex.1, p.041-042.

<sup>58</sup> See Hawai'i Department of Education Press Release, March 19, 2020 "HIDOE extends school closures, implements remote work to maintain essential functions."

<sup>59</sup> Testimony of SPED Teacher, Tr.V2, 130:18-131:8.



52. Application 1 also had a feature in the private messaging where the teachers were able to see if the private message sent by the teacher was delivered or viewed/opened by the family.<sup>60</sup>
53. Student's family was able to access the Application 1 and communicate with Student's teachers, and Student's teachers and other service providers would communicate through Application 1 with Student's family.<sup>61</sup>
54. In March 2020, the teachers notified families through Application 1 that the school campus would be shut down and to be on the lookout for weekly assignments for students to complete.<sup>62</sup>
55. The weekly assignments provided were a list of activities that students were encouraged to complete and internet links to access the different activities.<sup>63</sup> Families who did not have access to the internet or a device were allowed to request hard copy of the weekly assignments.<sup>64</sup>
56. Parent 1 confirmed with SPED Teacher that Student had the necessary access to internet and a device through which Student could complete the assignments, so Student was provided with the activity links through Application 1.<sup>65</sup>
57. SPED Teacher provided Parent 1 with the weekly assignment list and separate links to videos and worksheets for activities on the list with additional supports for Student throughout the school closure period from March 2020 to May 2020.<sup>66</sup>

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<sup>60</sup> Testimony of SPED Teacher, Tr.V2, 192:19-194:3.

<sup>61</sup> Testimony of SPED Teacher, Tr.V2, 131:9-14.

<sup>62</sup> Testimony of SPED Teacher, Tr.V2, 130:17-24; R-Ex.5, p.159.

<sup>63</sup> Testimony of SPED Teacher, Tr.V2, 131:17-132:3; R-Ex.5, p.159.

<sup>64</sup> Testimony of SPED Teacher, Tr.V2, 133:4-16; R-Ex.5, p.161.

<sup>65</sup> Testimony of SPED Teacher, Tr.V2, 133:17-22.

<sup>66</sup> Testimony of SPED Teacher, Tr.V2, 141:12-142:2, 145:7-14; R-Ex.5, p.162, p.182, p.203,

58. SPED Teacher frequently checked in with Parent 1 regarding Student's progress with the enrichment assignments and to see if there were other concerns that Parent 1 wanted to discuss.<sup>67</sup>
59. SPED Teacher also provided Parent 1 with links to the websites of the speech-language pathologists for Student to access some speech programs and provided packets of activities from OT for Parent 1 to complete with Student to work on at home during distance learning.<sup>68</sup>
60. On April 29, 2020, a virtual meeting was held with Parent 1, OT, SPED Teacher, DOE Provider 1 and SLP to discuss tele-health sessions with Student for occupational therapy, speech-language therapy, and services. Parent 1 consented to group tele-therapy sessions and the first session was scheduled for May 5, 2020.<sup>69</sup>
61. Several group tele-therapy sessions were scheduled for Student to receive occupational, speech-language and services virtually during the month of May 2020. Student did not attend all the sessions scheduled.<sup>70</sup>
62. Parent 1 verbally informed Home School that Student would be attending extended school year (hereinafter "ESY") sessions but did not complete the requested forms. Parent 1 later testified at the Hearing that Parent 1 chose not to have Student attend ESY due to medical concerns relating to COVID-19.<sup>71</sup>

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p.232, p. 291, p.334.

<sup>67</sup> Testimony of SPED Teacher, Tr.V2, 136:23-137:25, 145:18-147:25, 149:11-150:11, 151:4-153:13; R-Ex.5, p.178-179, p.223, p.227, p.284-287, p.331.

<sup>68</sup> Testimony of SPED Teacher, Tr.V2, 140:6-22, 142:8-143:10; R-Ex.5, p.192-202, p.219, p.226, p.228, p.318-319.

<sup>69</sup> R-Ex.5, p.288-289.

<sup>70</sup> See e.g., R-Ex.5, p.321-322, p.326-330, p.332-333, p.348, p.350, p. 351-352, p.354-356.

<sup>71</sup> Testimony of Parent 1, Tr.V1, 20:24-21:9.

63. From June 5, 2020 through July 1, 2020 Summer School Teacher attempted to contact Parent 1 to set up Student's ESY sessions, providing the option for virtual session for Student. Parent 1 requested virtual ESY sessions, but Student failed to attend any of the virtual sessions set up by Summer School Teacher.<sup>72</sup>
64. Parent 1 initially informed Home School that Student would be attending school full-time in virtual distance learning instruction due to concerns with face-to-face interaction for the first quarter of the 2020-2021 school year but did not complete the necessary forms for full virtual distance learning.<sup>73</sup>
65. Parent 1 later decided that Student would attend the first quarter of the 2020-2021 school year in-person, but it is unclear if that was communicated to Home School.<sup>74</sup>
66. Due to continued school closures associated with the COVID-19 global pandemic, Home School later determined that only certain students were given the option of attending school in-person for the first quarter of the 2020-2021 school year. General education students and special education students who are in the general education classes were not given the option to attend school in-person.<sup>75</sup>
67. On August 17, 2020, the 2020-2021 school year began at Home School with a week of access to technology sessions, where families were instructed to log on to the various school accounts to ensure that they would be able to access the regular virtual classrooms and assignments websites. Actual academic instruction began on August 24, 2020.<sup>76</sup>

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<sup>72</sup> R-Ex.5, p.379-380.

<sup>73</sup> R-Ex.5, p.371, p.373, p.376.

<sup>74</sup> Testimony of Parent 1, Tr.V1, 70:23-24; R-Ex.5, p.371, p.373, p.376.

<sup>75</sup> Testimony of SPED Teacher, Tr.V2, 195:16-196:22.

<sup>76</sup> Testimony of SPED Teacher, Tr.V2, 166:2-13.

68. Student is included with the general education class for the 2020-2021 school year with virtual distance learning classes scheduled from 8:15 a.m. to around 9:45 a.m. and then again from around 11:00 a.m. to around 11:30 a.m., on Mondays, Tuesdays, Thursdays and Fridays. On Wednesdays, the class meeting begins at 7:45 a.m. The virtual distance learning classes included a virtual meeting with the general education teacher, special education teacher and the general and special education students in Student's class.<sup>77</sup>
69. Student has received occupational therapy tele-health sessions on Mondays at 8:30 a.m. since August 31, 2020.<sup>78</sup>
70. Student does not attend virtual distance learning classes on Tuesdays and Thursdays.<sup>79</sup>
71. SLP had made attempts to schedule speech and language therapy tele-health sessions with Student for the 2020-2021 school year on August 24, 2020 and August 28, 2020, but as of the Hearing date, no speech-language therapy sessions have been scheduled.<sup>80</sup>
72. SPED Teacher monitors Student's general education class sessions to collect data and to see if Student is struggling on a specific assignment. As Student's online participation increases, SPED Teacher plans to offer additional meetings with Student to work on Student's specific IEP goals and objectives.<sup>81</sup> SPED Teacher had offered

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<sup>77</sup> Testimony of Parent 1, Tr.V1, 70:25-73:6, 108:6-110:12; Testimony of SPED Teacher, Tr.V2, 160:11-24.

<sup>78</sup> Testimony of SPED Teacher, Tr.V2, 160:25-7; R-Ex.5, p.394-396, p.398, p.400-402.

<sup>79</sup> Testimony of Parent, Tr.V1, 40:2-41:4; Testimony of SPED Teacher, Tr.V2, 163:10-18.

<sup>80</sup> Testimony of SPED Teacher, Tr.V2, 163:23-164:2; R-Ex.5, p.390, p.397.

<sup>81</sup> Testimony of SPED Teacher, Tr.V2, 166:17-168:12.

additional time if necessary for Student for assignments done in the general education classes, but Student had not been able to attend those sessions.<sup>82</sup>

73. In August 2020, Parent 1 completed a Form for Assessment.<sup>83</sup> The Assessment information appears to be based solely on Parent 1's report of Student's behaviors<sup>84</sup> and no evidence of any previous assessments were presented as evidence. While Student's score on the test was rated as "moderately low," this score is meaningless without any additional information.<sup>85</sup>

#### Private Center

74. Parent 1 discovered Private Center in around July 2020 after speaking with Parent 1's attorney about options for Student.<sup>86</sup>

75. No one from Private Center provided any testimony, documents, or other information about a proposed program for Student at Private Center regarding academics, speech-language therapy, occupational therapy or services.

76. Private Center works to provide services to Student throughout the school day at Private Center. The services may or may not be covered by Parent 1, but it has not been determined at the time of the Hearing.<sup>87</sup>

77. Student was scheduled to start at Private Center on September 21, 2020.<sup>88</sup>

78. Parent 1's primary focus in choosing Private Center for Student to attend was the

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<sup>82</sup> Testimony of Parent 1, Tr.V2, 109:21-110:12.

<sup>83</sup> See P-Ex.2, p.083-097.

<sup>84</sup> See Overall Summary: "[Student] was evaluated using the Assessment Form on 08/21/2020. [Parent 1], completed the form." P-Ex.2, p.084.

<sup>85</sup> P-Ex.2, p.097.

<sup>86</sup> Testimony of Parent 1, Tr.V1, 44:10-23.

<sup>87</sup> Testimony of Parent 1, Tr.V1, 55:17-56:7, 88:4-20, 93:12-17, 94:2-7.

<sup>88</sup> Testimony of Parent 1, Tr.V1, 21:14-22, 44:5-9.

assurance that Student would be provided services throughout the school day, and Parent 1 did not provide any information on other services to be provided to Student, such as speech and language therapy, occupational therapy, or the type of academic program and structure that would be provided to Student.<sup>89</sup> Parent 1 also was not aware of whether any non-disabled students attended Private Center.<sup>90</sup>

79. Parent 1 does not have a clear understanding of the financial responsibilities Parent 1 would have to Private Center for Student's attendance there.<sup>91</sup>

## V. CONCLUSIONS OF LAW

### A. IDEA Requirements

The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.”<sup>92</sup> A FAPE includes both special education and related services.<sup>93</sup>

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.<sup>94</sup> 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.”<sup>95</sup>

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<sup>89</sup> See Testimony of Parent 1, Tr.V1, 54:24-58:2, 76:22-77:5, 84:13-18, 86:15-87:6, 93:18-94:1, Tr.V2, 107:23-108:5.

<sup>90</sup> Testimony of Parent 1, Tr.V1, 54:9-23.

<sup>91</sup> Testimony of Parent 1, Tr.V1, 91:25-94:7.

<sup>92</sup> *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)).

<sup>93</sup> H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

<sup>94</sup> *Id.*

<sup>95</sup> *Dep't of Educ. of Hawai'i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D.

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”<sup>96</sup> 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.<sup>97</sup> The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.<sup>98</sup>

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.”<sup>99</sup> However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,<sup>100</sup> 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.”<sup>101</sup>

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures set forth in IDEA; and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit.<sup>102</sup> “A state must meet both requirements to comply with the obligations of the IDEA.”<sup>103</sup>

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Hawai`i 2016).

<sup>96</sup> *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

<sup>97</sup> H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

<sup>98</sup> H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

<sup>99</sup> *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

<sup>100</sup> 137 S.Ct. 988, 197 L.Ed.2d 335 (2017).

<sup>101</sup> *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).

<sup>102</sup> *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

<sup>103</sup> *Doug C. v. Hawai`i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013). *See also, Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

Procedural violations do not necessarily constitute a denial of FAPE.<sup>104</sup> If procedural violations are found, a further inquiry must be made to determine whether the violations: 1) resulted in a loss of educational opportunity for Student; 2) significantly impeded Parent 1’s opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or 3) caused Student a deprivation of educational benefits.<sup>105</sup>

B. Petitioners have failed to prove that the deficiencies in Student’s IEP-2/19/2020 and IEP-5/22/2020 regarding Student’s educational placement amounted to a denial of FAPE

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...”<sup>106</sup> This portion of the IEP is commonly referred to the statement regarding least restrictive environment (hereinafter “LRE”) or the student’s educational placement.

Here, Petitioners argue two faults with Student’s educational placement in the IEP-2/19/2020 and IEP-5/22/2020: first that the IEP team did not sufficiently discuss Student’s placement, and second, that the resulting statement as written in Student’s IEP was insufficiently described and/or was overly restrictive. Student’s IEP-2/19/2020 and IEP-5/22/2019 both contained the same language for Student’s educational placement: “[Student] will not participate with peers without disabilities while working in IEP goals and objectives and during speech and language therapy sessions.”<sup>107</sup> It is clear from the evidence presented at the Hearing that this

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<sup>104</sup> *Amanda J.*, 267 F.3d at 892.

<sup>105</sup> *Id.*

<sup>106</sup> H.A.R. §8-60-44(a)(5); 34 C.F.R. §300.320(a)(5).

<sup>107</sup> FOF 29, 47.



statement does not accurately describe the educational placement or least restrictive environment that the IEP team envisioned at the time of the IEP meetings.<sup>108</sup> Both the testimony of Parent 1 and the testimony of SPED Teacher were clear that Student’s placement was in the general education classroom, with individual or ‘pull-out’ support for Student if necessary to assist Student in specific IEP goals and objectives, and pull-out speech and language therapy sessions.<sup>109</sup> This Hearings Officer agrees that the language in Student’s IEP-2/19/2020 and IEP-5/22/2020 was insufficiently defined and overly restrictive.

In determining whether this type of deficiency in Student’s IEPs resulted in a denial of FAPE, the Ninth Circuit Court of Appeals has provided guidance that a reviewing authority examine the deficiency as a procedural violation.<sup>110</sup> While the IDEA does envision that the written IEP offer would constitute a “formal, specific offer from a school district [that] will greatly assist parents in presenting complaints with respect to any matter relating to the educational placement of the child,”<sup>111</sup> omissions or imprecise language do not always amount to

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<sup>108</sup> FOF 28.

<sup>109</sup> FOF 28.

<sup>110</sup> *See Union School Dist. v. Smith*, 15 F.3d 1519, 1526 (9<sup>th</sup> Cir. 1994) (holding that a failure to formally provide a written offer for an appropriate educational placement to parents was a procedural violation under the IDEA); *M.C. by and through M.N. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1195 (9<sup>th</sup> Cir. 2017) (holding that the school district’s failure to properly document the offer of visually impaired services was a procedural violation that precluded parents from meaningful participation in the IEP process); *William Hart Union Sch. Dist. California State Educational Agency*, 119 LRP 32329, 14 (2019) (holding that failure to make a clear written offer of FAPE is a procedural violation); *Tamalpais Union High School District v. D.W.*, 271 F.Supp.3d 1152 (N.D.Ca. 2017), 117 LRP 41035, 8 (holding that the school district’s IEP offer was so unclear as to the provision of individual and group speech and language therapy that as a procedural violation, it impeded parent’s opportunity to participate in the IEP process and rose to the denial of FAPE); *see also P.C. and K.C. individually and on behalf of A.C. v. Rye City School Dist.*, 232 F.Supp.3d 394 (S.D.N.Y. 2017), 117 LRP 4653, 16 (holding that while the failure to include IEP goals in the written offer amounted to a procedural violation, the uncontroverted evidence that the goals were discussed at the IEP meeting did not impede parental participation in the IEP development process).

<sup>111</sup> *M.C. v. Antelope*, 858 F.3d at 1197.

a denial of FAPE. Once determining that a violation has been committed, such as in this case, the review must continue onto whether the procedural violation amounted to a loss of educational opportunity, a significant impediment to parental participation or a deprivation of educational benefits to Student.<sup>112</sup>

The undisputed evidence presented is that at Home School, Student was placed in the least restrictive environment as discussed at the IEP meetings. Student was in the general education class with specific pull-out or additional instructional services as determined necessary by Student's teachers.<sup>113</sup> Not only was Student placed in Student's appropriate least restrictive environment, but Parent 1 was also aware that Student was in this placement.<sup>114</sup> In this case, Parent 1 participated in the discussion at the IEP meeting regarding Student's placement,<sup>115</sup> was satisfied with the placement as discussed at the IEP meeting, but was only concerned with Student having services at school.<sup>116</sup> Petitioners have not proven that the language used in Student's IEPs, while defective, resulted in a procedural violation that rose to the level of a denial of FAPE because of a loss of educational opportunity, significant impediment to parental participation, or deprivation of educational benefits.

C. Respondents did not deny Student a FAPE substantively by failing to sufficiently address Student's needs

Petitioners next argument argues that Respondents did not address Student's needs in the IEP-2/19/2020 and the revised IEP-5/22/2020. Specifically, Petitioners allege the following: 1) Student's IEPs prevented Student from accessing medically necessary services; 2) Student's

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<sup>112</sup> *Amanda J.*, 267 F.3d at 892.

<sup>113</sup> FOF 28, 68.

<sup>114</sup> FOF 28, 68, 72.

<sup>115</sup> FOF 28.

<sup>116</sup> FOF 29.

IEPs fail to address Student’s needs for safety at the beginning and end of the school day or when Student is in the bathroom unattended; 3) Student’s IEPs fail to address Student’s need for social development skills; and 4) Student’s placement is insufficiently defined and/or overly restrictive.

“The standard for evaluating IEPs, commonly called ‘the snapshot rule,’ is not retrospective.”<sup>117</sup> 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.<sup>118</sup> In 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.”<sup>119</sup>

#### 1) Services

Petitioners allege that Student’s IEP-2/19/2020 and IEP 5/22/2020 both prevent Student from accessing services. While in the Complaint, Petitioners have not specified what type of services Student requires, the evidence presented by Parent 1’s testimony at the Hearing suggests that Petitioners specifically sought for Student to have services as part of the IEPs.<sup>120</sup> Further, Student’s IEP team noted that Parent 1 concerns at the May 22, 2020 IEP meeting were that Parent 1 believed that Student was not getting services.<sup>121</sup> Petitioners have not presented any kind of evidence to support that the services that Parent 1 wants for Student is medically

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<sup>117</sup> *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 (9<sup>th</sup> Cir. 2010)).

<sup>118</sup> *K.K.*, 2015 WL 4611947 \*16 (quoting *Adams v. Oregon*, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999)).

<sup>119</sup> *J.W.*, 626 F.3d at 439 (quoting *Adams v. Oregon*, 195 F.3d at 1149).

<sup>120</sup> FOF 38, 48.

<sup>121</sup> FOF 38.

necessary. The record is devoid of any testimony of medical professionals testimony or reports, any doctor's notes, prescriptions or assessments to support Student's need for services.<sup>122</sup>

The evidence that was presented consists of the testimony of Parent 1 and the prior written notice from the May 22, 2020 IEP meeting that the IEP team discussed the possibility of conducting a functional behavior assessment for Student, however that idea was rejected by the team because the Student did not display behaviors at school warranting such an assessment.<sup>123</sup> This determination was supported by the findings and recommendations by DOE Provider 1, who after completing an assessment of Student in February 2020, determined that the interventions currently in place at Home School were successful in reducing Student's behaviors.<sup>124</sup>

Petitioners further argue that by preventing Student from accessing proscribed services, it has resulted in diminished and/or insufficient amount of academic instruction. Student's IEP-2/19/2020 notes that Parent 1 concerns include that Student needs to leave early for services.<sup>125</sup> There is no evidence that Student was prevented from leaving early for this service as indicated in Student's IEPs. Nonetheless, the testimony by Parent 1 is that it was Parent 1's decision to pull Student out of school for services three (3) days a week.<sup>126</sup> Parent 1's testimony did not provide any basis for why Student needed to attend the services instead of school or why this service was necessary for Student to attend during school hours.<sup>127</sup> The only testimony provided by Parent 1 is that covered payment for Student's services does not cover the services for

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<sup>122</sup> FOF 5.

<sup>123</sup> FOF 49.

<sup>124</sup> FOF 10.

<sup>125</sup> FOF 20.

<sup>126</sup> FOF 35.

<sup>127</sup> FOF 5.

Student's academic needs.<sup>128</sup> Petitioners have failed to present any evidence to support that Student's IEP-2/19/2020 and IEP-5/22/2020 prevented Student from accessing medically necessary services, resulting in diminished academic instruction.

## 2) Safety Needs

Petitioners next focus on the failure of Student's IEP-2/19/2020 and IEP-5/22/2020 to address the safety needs of Student at the start and end of the school day and when Student is in the bathroom unattended. The evidence presented in this case is that Parent 1's concerns regarding Student's incidents of wandering off before and after school were discussed at the IEP meeting on February 19, 2020 and proposals were made to address those concerns.<sup>129</sup> Parent 1's list of concerns was presented to the team after the meeting, and the May 22, 2020 IEP meeting was held to address those concerns.<sup>130</sup> In Student's IEP-5/22/2020, supplemental aids and services for "Check In" and "Check Out" were added with clarifications on procedures that Student will follow to address the concerns for Student during those times.<sup>131</sup>

Petitioners argument that the IEP-5/22/2020 fails to address safety at the start and end of the day because a "plan" will be formulated ignores the plan that was written in the IEP-5/22/2020 for Student's drop-off and pick-up procedures. As it is clearly stated in the IEP-5/22/2020, the new plan will be formed based on the information that the IEP team needed from Parent 1 regarding how Student's pick-up and drop-offs will be conducted.<sup>132</sup> Petitioners have not met their burden of proving that the IEP-2/19/2020 and IEP-5/22/2020 fails to address safety concerns of Student.

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<sup>128</sup> FOF 4.

<sup>129</sup> FOF 18-19.

<sup>130</sup> FOF 32, 34.

<sup>131</sup> FOF 41, 42, 45.

<sup>132</sup> FOF 42.

### 3) Social Skills

Petitioners argue that Student's IEP-2/19/2020 and IEP-5/22/2020 do not sufficiently address Student's need for development of social skills. Student's IEP-2/19/2020 and IEP-5/22/2020 did include one (1) health goal addressing behavioral and social skills of Student.<sup>133</sup> While Petitioners do not specify what areas of development needed to be addressed, Student's IEP-5/22/2020 included benchmarks and social skills with peers that Student demonstrated in the Assessments in November 2019 and February 2020.<sup>134</sup> Additionally, DOE Provider 1 had future goals and recommendations in maintaining and developing Student's skills that involve the socialization of Student with Student's peers.<sup>135</sup> Petitioners have not put forth any argument or evidence to support that Student's IEPs do not address Student's need for development of social skills.

### 4) Educational Placement

Petitioners argue that Student's IEP-2/19/2020 and IEP-5/22/2020 substantively deny Student a FAPE as written in Student's IEPs. However, in accordance with the legal analysis set forth *supra* in Section C, this Hearings Officer finds that Student's educational placement, while incorrectly written in Student's IEPs, was appropriately provided in the least restrictive environment for Student.

#### D. Respondents have not failed to materially implement Student's IEP-2/19/2020 and IEP-5/22/2020 since approximately March 17, 2020

Petitioners final argument is that Respondents have denied Student a FAPE because the DOE has failed to materially implement Student's IEP-2/19/2020 and IEP-5/22/2020 since

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<sup>133</sup> FOF 21-23.

<sup>134</sup> FOF 8-9.

<sup>135</sup> FOF 43.

approximately March 17, 2020. 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.”<sup>136</sup> The Ninth Circuit also explored the analysis done by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*,<sup>137</sup> 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.”<sup>138</sup>

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 Hawaii Counties, and the Superintendent of the Hawai`i Public Schools.<sup>139</sup> Student’s school was included in the closures, which prevented teachers, students and staff from entering onto the school grounds.<sup>140</sup> During the period of school closures, general education students in Student’s grade level at Home School were offered enrichment learning

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<sup>136</sup> 502 F.3d 811, 821 (9<sup>th</sup> Cir. 2007).

<sup>137</sup> 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

<sup>138</sup> *Van Duyn*, 502 F.3d at 821.

<sup>139</sup> 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.

<sup>140</sup> FOF 50, 54.

through online applications or hard-copy packets if requested due to lack of internet or devices.<sup>141</sup>

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.”<sup>142</sup> 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...<sup>143</sup>

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 provision of FAPE may include, as appropriate, special education and related

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<sup>141</sup> FOF 51, 55.

<sup>142</sup> 76 IDELR 77 (EDU 2020).

<sup>143</sup> *Id.*



services provided through distance instruction provided virtually, online or telephonically.<sup>144</sup>

During the initial period of school closure from around March 17, 2020 to May 28, 2020, Home School provided enrichment opportunities to the general education students.<sup>145</sup> This enrichment opportunities were provided through distance learning, which could be done online or using packets of work picked up at the school.<sup>146</sup>

Student's family had the necessary equipment and internet access, and Parent 1 opted for Student to participate in the distance learning online instead of hard-copy packets.<sup>147</sup> Student's general education peers were provided with weekly assignments through an internet application with links to a website where they could access the class materials.<sup>148</sup> Student was provided special links with different websites with assignments that had been reviewed and modified as needed to meet Student's needs.<sup>149</sup> Tele-health sessions were also arranged for Student during this period of time for occupational therapy, speech-language therapy and services.<sup>150</sup>

During the extended school year period from June 2020 to July 2020, Parent 1 was given the option for Student to attend school in-person to receive Student's services, but Parent 1 opted out due to concerns related to the COVID-19 virus.<sup>151</sup> Student was offered extended school year sessions online but did not participate in those sessions.<sup>152</sup>

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<sup>144</sup> *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).

<sup>145</sup> FOF 51-54.

<sup>146</sup> FOF 55.

<sup>147</sup> FOF 56.

<sup>148</sup> FOF 55, 57.

<sup>149</sup> FOF 59.

<sup>150</sup> FOF 60-61.

<sup>151</sup> FOF 62.

<sup>152</sup> FOF 63.

In the beginning of the 2020-2021 school year, Student was again provided education through distance learning online with Student's general education peers.<sup>153</sup> This distance learning involved virtual classes in a virtual meeting with the general education teacher, SPED Teacher and the general education and other special education students.<sup>154</sup> Student was also scheduled for occupational therapy sessions and Home School had begun attempting to schedule speech and language therapy tele-health sessions.<sup>155</sup>

As noted by the USDOE in their questions and answers to educational agencies, schools are required to provide students eligible for IDEA services access to the same educational opportunities that are available to the general education students. In this case, Student was provided all the same access to opportunities to the enrichment and educational opportunities available to general education students in accordance with Student's IEP.

Petitioners have not demonstrated that Student failed to receive an educational benefit in due to a significant failure to implement Student's IEPs. Further, in light of the guidance provided by the USDOE, Student was provided the educational and related services to the greatest extent possible during this unprecedented time. This Hearings Officer concludes that Petitioners have not met their burden to prove that Respondents have materially failed to implement Student's IEP since around March 17, 2020.

E. Petitioners have not established that Private Center is an appropriate placement for Student

The IDEA recognizes the rights of parents to withdraw their child from a public school and unilaterally enroll them in a private school if they are unsatisfied with the services their child

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<sup>153</sup> FOF 67.

<sup>154</sup> FOF 67.

<sup>155</sup> FOF 68.

is receiving.<sup>156</sup> Parents are then able to request reimbursement for such private programs, but are awarded such reimbursement only if a court or an administrative body determines that the public placement violated the IDEA and denied the student a FAPE and that the private placement was proper under the IDEA.<sup>157</sup> In the Ninth Circuit, the standard of review requires that parents “demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.”<sup>158</sup>

Here, Petitioners have failed to prove that Respondents denied Student a FAPE. This Hearings Officer also finds that Petitioners have not met their burden of proof in demonstrating that Private Center was an appropriate placement for Student. The only evidence proffered as to the program that is available to Student at Private Center was through Parent 1’s testimony.<sup>159</sup> Parent 1 did not know anything about Student’s program at Private Center except that Student would have services throughout the school day.<sup>160</sup> Despite Parent 1’s belief that Student would have services at Private Center, Parent 1 also did not know whether Parent 1 would cover the necessary payment for Private Center.<sup>161</sup> Parent 1 could not provide evidence on whether Student would receive any academic instruction, speech and language therapy, occupational

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<sup>156</sup> 20 U.S.C. §1415(b)(6), (f)(1)(A); *see also Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 364-365, 126 L. Ed.2d 284 (1993), *citing School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369-370, 105 S.Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985).

<sup>157</sup> *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

<sup>158</sup> *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9<sup>th</sup> Cir. 2011) (*citing Frank G. v. Bd. of Educ.*, 459 F.3d at 365 (2<sup>nd</sup> Cir. 2006)).

<sup>159</sup> FOF 75.

<sup>160</sup> FOF 76.

<sup>161</sup> FOF 76.

therapy or have access to non-disabled students at Private Center.<sup>162</sup> Finally, even if Private Center had been found to be appropriate, there is no record of what tuition obligations Parent 1 would have to Private Center for Student's program for reimbursement purposes.<sup>163</sup> Based on the sparse record in this case, this Hearings Officer cannot conclude that Private Center is an appropriate placement for Student.

## **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 Complaint by a preponderance of the evidence. As Petitioners have failed to prove that Respondents denied Student a FAPE, Petitioners' request for tuition reimbursement at Private Center or for compensatory education is denied.

## **RIGHT TO APPEAL**

The decision issued by this Hearings Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearings Officer shall have 30 days from the date of the decision 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, October 21, 2020.

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<sup>162</sup> FOF 78.

<sup>163</sup> FOF 79.

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