



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

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

Petitioner(s),

vs.

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

Respondents.

DOE-SY1920-054

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: September 9-10, 2020

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

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

¹ Personal identifiable information is contained in the Legend.

Education Act, from Student, by and through Parent 1 (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on June 26, 2020.

A prehearing conference was held on July 16, 2020, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Carter K. Siu, Esq. (hereinafter “Mr. Siu”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for September 9-10, 2020.

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 29, 2020 to October 13, 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 13, 2020.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure compliance with government mandated social distancing.² An Order Regarding Video Conference Due Process Hearing was issued on August 31, 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 9, 2020, using the Zoom video conferencing

² See Governor of the State of Hawai‘i’s Twelfth Proclamation Related to the COVID-19 Emergency, effective August 20, 2020.

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. Siu on behalf of Respondents, as well as the assigned court reporter. The Hearing continued to September 10, 2020, as scheduled, and the testimony was completed on that date.

At the Hearing, Petitioners called Private Center's Clinical Supervisor and Parent 1 as witnesses during their case-in-chief and rested. Respondents called General Education Teacher (hereinafter "GE Teacher"), Agency Provider 1, DOE Provider 1, Student Services Coordinator (hereinafter "SSC"), and Special Education Teacher (hereinafter "SPED Teacher"). Petitioners did not present any rebuttal evidence.

Each party submitted their exhibits for the Hearing by the disclosure deadline of September 1, 2020. At the conclusion of the Hearing, both parties were allowed to propose additional exhibits that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on September 18, 2020. Any objections to the proposed exhibits were due on September 23, 2020. Respondents proposed two (2) additional exhibits (Respondents' Exhibit 5, page 081 and Respondents' Exhibit 8, pages 577-578) and Petitioners submitted a statement of no objection to the proposed exhibits.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-025;³ Exhibit 2, pages 026-032, 040; Exhibit 3, pages 041-052, 064-066, and page 068. Respondents' exhibits that were received and considered as part of this

³ This Hearings Officer will note that Petitioners' Exhibit 1 contained two exhibit pages marked as page "012." In accordance with Petitioners' exhibit list, the second page "012" of the exhibit was marked as "012a."

Decision are as follows: Exhibit 3, pages 008-021; Exhibit 4, pages 030-043; Exhibit 5, pages 053, 058-062, 065-066, 068-069, 072-073, 081-082, 084, 089-090, 173, 199-208, 234-238, 262-277, 295-297, 306-308, 313-321, 342-345, 350-351, 354-367, 373-392; Exhibit 7, pages 432, 435, 437, 444-446, 480, 497-498, 534-540, 546-547; Exhibit 8, pages 560-578.

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 September 29, 2020. Both parties timely submitted their closing briefs on September 29, 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.

II. JURISDICTION

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

III. ISSUES PRESENTED

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

1. Whether Respondents denied Student a free and appropriate public education (hereinafter “FAPE”) procedurally and substantively when the September 20, 2019 Individualized Education Program (hereinafter “IEP”) team had inadequate information on Student’s needs and/or failed to define them.
2. Whether Respondents denied Student a FAPE substantively because the

September 20, 2019 IEP's statement on Student's placement is improper since it provides Student's teachers with the responsibility of determining when Student will not be allowed to participate in a setting with non-disabled peers without defining the parameters of that determination.

3. Whether Respondents denied Student a FAPE procedurally when the DOE failed to collect sufficient data/information, prior to the September 20, 2019 IEP meeting, necessary to determine whether Student qualified for extended school year (hereinafter "ESY") services. The discussion held regarding Student's eligibility for ESY services was insufficient.

4. Whether Respondents denied Student a FAPE procedurally when the DOE failed to collect sufficient data/information and/or include participation of knowledgeable persons about Student's needs at the September 20, 2019 IEP meeting. This includes a discussion about assistive technology and/or why providing Student academic instruction at the appropriate instructional level is important to Student's needs. This allegation relates to the concept of lost educational opportunity.'

5. Whether Respondents denied Student a FAPE substantively because the September 20, 2019 IEP fails to provide sufficient Supplementary aids and Services for Student to make adequate gains on Student's needs.

6. Whether Respondents have denied Student a FAPE because the DOE has materially failed to implement the September 20, 2019 IEP since approximately March 17, 2020.

IV. FINDINGS OF FACT

Student's background

1. Student is eligible for special education and related services pursuant to the IDEA⁴

⁴ 20 U.S.C. §§ 1400, *et seq.*

and HAR Chapter 60 under Eligibility Category.

2. Student has been diagnosed.⁵
3. Student takes several daily medications for these diagnoses and is currently being treated by several medical professionals, including Medical Provider 1 and Private Provider 1.⁶
4. Prior to November 21, 2019, Agency Provider 1 had consent to review medical records and contact Student's medical service providers to complete a consultation. Agency Provider 1 was not allowed to provide Student's medical information to Home School other than through the consultation.⁷
5. Parent 1 refused to give consent to Home School to access Student's medical records.⁸
6. In June 2019, Student underwent an evaluation done by Private Provider 1. Private Provider 1 prepared a report dated July 10, 2019.⁹
7. During the evaluation, Student demonstrated a failure to comply with requests when Student did not want to do the task. This non-compliance appeared to be a learned behavior used by Student to avoid completion of a task that Student perceived to be difficult or that Student perceived that Student would not be successful at completing.¹⁰

⁵ Petitioners' Exhibit 1, page 2 (hereinafter referenced as "P-Ex.1, p.2"); P-Ex.3, p.042-052.

⁶ Respondents' Exhibit 5, pages 267-272 (hereinafter referenced as "R-Ex.5, p.267-272").

⁷ Agency Provider 1's Testimony, Tr.V1, 149:23-150:11.

⁸ Parent 1's Testimony, Tr.V1, 113:14-114:20; Agency Provider 1's Testimony, Tr.V1, 149:4-9.

⁹ P-Ex.3, p.042-052; R-Ex.4, p.030-040.

¹⁰ See P-Ex.3, p.042-052, R-Ex.4, p.030-040: Private Provider 1 indicated that Student had a "pension for self-terminating tests that [Student] didn't want to do, which was almost all of the tests[,] and on the second day of testing, "despite having had better sleep and knowing more of what to expect, [Student] stopped participating when [Student] wanted to." Private Provider 1

8. In Private Provider 1's report, several supports and services were mentioned by Private Provider 1 to assist Student in school. One of these services recommended by Private Provider 1 was a functional behavior assessment (hereinafter "FBA") to be done at school to determine the antecedents and consequences of Student's behavior as well as potential prevention and intervention strategies. Private Provider 1 also suggested that Student receive counseling and the use of positive support strategies.¹¹
9. The purpose of an FBA is to identify and hypothesize the reasons behind behaviors. An FBA is completed by doing direct observations, indirect observations, interviews with the subject and those working with the subject, and the collection of data on the subject's behaviors.¹²
10. It would be unethical for a provider to conduct an FBA if a parent does not provide information about the student's behaviors.¹³
11. As noted in Private Provider 1's report, an FBA for Student would have been done

further noted that "[i]t was clear from the start that [Student] does what [Student] wants to do and doesn't if [Student] doesn't want to (mostly [Student's] words)" and that "[Student] appeared to self-terminate on tests when [Student] felt [Student] was not being successful or when the test became subjectively stressful (which didn't take much)." P-Ex.3, p.043, R-Ex.4, p.031. Private Provider 1 further observed that "[h]owever, as soon as item difficulty past some invisible threshold in [Student's] mind, [Student's] effort ceased and [Student] self-terminated very rapidly (less than a minute)." P-Ex.3, p.044, R-Ex.4, p.032. Private Provider 1 later determined that "[Student] appeared to exhibit a combination of passive resistance and (maybe) behaviors, though [Student's] behaviors were timely (as soon as [Student] felt [Student] was no longer experiencing success with a task). In all tests ... , the onset pattern behavior was rapid and very quickly learned and applied as an escape avoidance tactic." P-Ex.3, p.044, R-Ex.4, p.032. Private Provider 1 concluded that "[Student] self-terminated earlier on tests in which [Student's] areas of cognitive difficulty/challenged or exposed, so [Student's] motivation to push [Student] was, and likely is a significant and ongoing impediment to [Student's] learning/progress-this appears to be behavioral/learned rather than neuropsychological or epilepsy-related." P-Ex.4, p.045, R-Ex.4, p.033.

¹¹ P-Ex.3, p.052; R-Ex.4, p.040.

¹² Clinical Supervisor's Testimony, Tr.V1, 25:21-27:14.

¹³ Clinical Supervisor's Testimony, Tr.V1, 46:9-17.

through an observation of Student in Student's academic environment to observe Student's problem behaviors associated with academic tasks.¹⁴

12. Private Provider 1 also prepared a letter dated September 10, 2019, regarding additional recommendations for Student's supports and services, including preferential seating, extended time to do work, frequent short breaks, modified assignments or mode of completing the assignments, and visual supports.¹⁵

13. On September 29, 2019, Agency Provider 1 prepared a consultation to provide to Home School. In the consultation, Agency Provider 1 indicated that Agency Provider 1 spoke with Medical Provider 1 who said that Student did not need to have a provider with Student all day to monitor Student, and that it was sufficient to have a provider on campus to provide services to Student.¹⁶

Student's history at Home School for the 2018-2019 School Year

14. Home School provides Home Hospital Instruction for all students who are not able to physically attend school. A form is required to be completed by the students' treating physicians. This service is not specific or unique to students receiving services under the IDEA.¹⁷

15. The doctor's note required for Home Hospital Instruction must specify the start date and the estimated end date that the student will be unable to attend school. If the student is cleared prior to the estimated end date, a subsequent doctor's note clearing

¹⁴ Clinical Supervisor's Testimony, Tr.V1, 26:11-27:21; P-Ex.3, p.052, R-Ex.4, p.040.

¹⁵ This Hearing Officer notes that although the letter submitted by Petitioners and Respondents appear to be different, a careful review of both documents indicate that the contents of the letters are identical. P-Ex.2, p.030-031; R-Ex.4, p.041-043.

¹⁶ Agency Provider 1's Testimony, Tr.V1, R-Ex.7, p.444-446.

¹⁷ SSC's Testimony, Tr.V2, 180:15-182:3; 183:20-23; 184:3-18.

- the student to return to school will end the period of Home Hospital Instruction.¹⁸
16. Once a student is approved for Home Hospital Instruction, a tutor will be assigned to the student and the parent(s) will be given the tutor's information. Because the Home Hospital Instruction is in the home, it is up to the parent to contact the tutor to set up a suitable schedule for the tutoring.¹⁹
17. Student was enrolled at Home School for the 2018-2019 School Year and the 2019-2020 School Year.²⁰
18. Student had an IEP dated September 26, 2018 (hereinafter "IEP-9/26/2018").
19. In Student's IEP-9/26/2018, Student's educational placement was in the general education classroom except for small group or individual instruction as deemed necessary by Student's teachers. Student was not placed in a home-bound setting.²¹
20. During the 2018-2019 School Year, Parent 1 observed that Student received most of Student's education instruction in the general education classroom with general education peers but would only go to the special education classroom inconsistently.²²
21. Student's IEP-9/26/2018 provided Student with a provider to be present with Student during the school day. Student's IEP-9/26/2018 also provided Student with Home Hospital Instruction to Student if Student is absent for three (3) or more days. This Home Hospital Instruction provision did not change Student's placement to home-bound.²³

¹⁸ SSC's Testimony, Tr.V2, 180:20-181:2;

¹⁹ SSC's Testimony, Tr.V2, 181:9-182:15.

²⁰ SPED Teacher's Testimony, Tr.V2, 213:12-214:9; P-Ex.1, p.012a-025.

²¹ P-Ex.1, p.024.

²² Parent 1's Testimony, Tr.V1, 82:16-83:6.

²³ SSC's Testimony, Tr.V2, 182:24-183:23; P-Ex.1, p.022-023.

22. Parent 1 was still required to complete a written request signed by Student's Medical Provider 1 for Student to receive Home Hospital Instruction, despite the provision noted in the IEP-9/26/2018 above.²⁴
23. The 2018-2019 School Year began on or about August 6, 2020, which was scheduled to be the first day of school for students and ended on May 31, 2020 as the last day of school for students. The total amount of school days in the 2018-2019 School Year for students was one hundred eighty (180) days.²⁵
24. In the 2018-2019 School Year, Student had eight (8) excused absences, sixty (60) unexcused absences, and seventy (70) tardy check-ins to school. Student's attendance was marked as "Home Hospital Instruction" for thirty-two (32) days from April 16, 2019 to and including May 31, 2019.²⁶
25. SPED Teacher was Student's special education teacher and care coordinator for the 2018-2019 School Year and the 2019-2020 School Year. SPED Teacher was familiar with Student and Student's educational needs and concerns.²⁷
26. Pursuant to the IEP-9/26/2018, for the 2018-2019 School Year, a provider was assigned by a private company to come to Home School to accompany Student during the school day. The providers contracted to accompany Student were not paid unless they provided services to Student. Oftentimes, Student would either not come to school or would frequently be tardy to school, resulting in the providers wasting time waiting for Student while not getting paid for their services.²⁸

²⁴ Parent 1's Testimony, Tr.V1, 93:3-24, 97:19-98:19; R-Ex.7, p.534-535.

²⁵ R-Ex.8, p.577.

²⁶ R-Ex.8, p. 565-572.

²⁷ SPED Teacher's Testimony, Tr.V2, 214:10-16.

²⁸ Agency Provider 1's Testimony, Tr.V1, 155:23-156:20; R-Ex.5, p. 265.

27. On April 16, 2019, Parent 1 submitted a Request for Home Hospital Instruction signed by Medical Provider 1 for the period between April 16, 2019 and August 1, 2019.²⁹
28. Tutor 1 was assigned to conduct Student's Home Hospital Instruction. Student was scheduled to receive six (6) hours and forty (40) minutes per week of Home Hospital Instruction from April 15, 2019 to May 31, 2019.³⁰ Student did not receive Home Hospital Instruction from June 1, 2019 to August 1, 2019 because that period included summer break, and Student's IEP-2018 did not provide for ESY services.³¹
29. Between April 2019 and May 2019, Parent 1 cancelled several of Student's Home Hospital Tutoring sessions.³² During this time, Student received just over thirteen (13) total hours of Home Hospital Tutoring.³³

IEP-9/20/2019 information and background

30. On or before August 27, 2019, Parent 1 had provided Home School with the report and the letter from Private Provider 1.³⁴
31. On August 27, 2019, DOE Provider 1 and Private Provider 1 made attempts to contact Parent 1 to get permission to speak with Private Provider 1 regarding the report and the recommendations in the report.³⁵
32. The Home School IEP team members were not able to confer with Private Provider 1

²⁹ SPED Teacher's Testimony, Tr.V2, 222:7-16; P-Ex.3, p.041; R-Ex.534-535.

³⁰ R-Ex.5, p.535.

³¹ SPED Teacher's Testimony, Tr.V2, 222:17-223:1.

³² SPED Teacher's Testimony, Tr.V2, 223:9-225:19; R-Ex.5, p.058-062.

³³ R-Ex.5, p.538-540.

³⁴ Parent 1's Testimony, Tr.V1, 79:4-80:24.

³⁵ DOE Provider 1's Testimony, Tr.V2, 191:14-21, 192:4-9; R-Ex.5, p.066.

- regarding the recommendations contained in the report.³⁶
33. DOE Provider 1 attempted to assist Parent 1 in getting support and services for Student in the home, consistent with Private Provider 1's report, through Agency.³⁷
34. DOE Provider 1, SPED teacher, GE Teacher and Principal arranged a meeting with Parent 1 to discuss a behavior plan for Student due to Private Provider 1's report and letter. The meeting was scheduled for September 17, 2020 at 2:30 p.m. and was canceled by Parent 1 via email on September 16, 2020 at 9:23 p.m. Parent 1 indicated that Parent 1 was still gathering information from Student's doctor for the meeting.³⁸
35. On September 20, 2019, the IEP team for Student met and held an annual IEP review meeting. Present at the meeting were SPED Teacher, Parent 1, Principal, Agency Provider 1, DOE Provider 1, GE Teacher, a DOE district educational specialist and another Agency Provider. A written IEP was created for Student at this September 20, 2019 meeting (hereinafter referred to as IEP-9/20/2019").³⁹
36. The IEP team determined that Student was not eligible for extended school year (hereinafter "ESY") in the IEP-9/20/2019, due to Home School not being able to collect data on Student due to the very sporadic attendance of Student during the 2018-2019 School Year.⁴⁰ Student's eligibility for ESY was discussed with Parent 1 at the IEP meeting.⁴¹

³⁶ DOE Provider 1's Testimony, Tr.V2, 209:5-12.

³⁷ DOE Provider 1's Testimony, Tr.V2, 192:10-24, 203:19-205:2, 209:13-17; R-Ex.5, p.069.

³⁸ DOE Provider 1's Testimony, Tr.V2, 193:6-194:9; R-Ex.5, p.205-208.

³⁹ P-Ex.1, p.012; R-Ex.3, p.021.

⁴⁰ SPED Teacher's Testimony, Tr.V2, 216:10-217:1.

⁴¹ SPED Teacher's Testimony, Tr.V2, 216:10-217:17.

37. At the September 20, 2019 IEP meeting, despite not having been able to confer with Private Provider 1, the IEP considered Private Provider 1's report in creating Student's IEP-9/20/2019 and included supports and services to reflect the some of the concerns raised by Private Provider 1.⁴²
38. Student's IEP-9/20/2019 also provided Student with modified assignments in math and language arts. These assignments would be modified by SPED Teacher and GE Teacher to a level appropriate for Student.⁴³
39. Student's IEP-9/20/2019 did not include the clarification that Student would be accompanied by a provider throughout the school day due to Agency Provider 1 informing the team that Medical Provider 1 did not believe it was medically necessary for Student to be accompanied by a medical provider to monitor Student. Services would be provided to Student by a provider on campus to provide services to Student if necessary.⁴⁴
40. Student's IEP-9/20/2019 included an emergency action plan and training of adults working with Student to be trained.⁴⁵ The emergency action plan was previously completed by Agency Provider 1 and shown to Parent 1.⁴⁶
41. Student's IEP-9/20/2019 also included a clarification that Student is to _____ throughout the day to protect Student from potential injury. Provisions were included

⁴² DOE Provider 1's testimony, Tr.V2, 195:11-196:21; *See e.g.* IEP-9/20/2019, P-Ex.1, p.010, R-Ex.3, p.019.

⁴³ GE Teacher's Testimony, Tr.V1, 136:11-21, 136:1-137:12; SPED Teacher's Testimony, Tr.V2, 215:20-216:9; P-Ex.1, p.010, R-Ex.3, p.019.

⁴⁴ Agency Provider 1's Testimony, Tr.V1, 153:5-154:15; 164:3-165:15; P-Ex.1, p.010, R-Ex.3, p.019; R-Ex.3, p.009.

⁴⁵ P-Ex.1, p.010, R-Ex.3, p.019.

⁴⁶ Agency Provider 1's Testimony, Tr.V1, 152:10-152:24, 166:8-21; 169:4-21; R-Ex.7, p.546-547.

- to allow for what steps to be taken in the event Student became ill.⁴⁷
42. In Student's IEP-9/20/2019, Student's educational placement was in the general education classroom except for small group or individual instruction as deemed appropriate by Student's teachers.⁴⁸ The language used in Student's IEP-9/20/2019 was similar to the language used in Student's IEP-9/26/2018.⁴⁹
43. Student could receive the small group or individual instruction either in the general education classroom or in a separate room. SPED Teacher would assess whether Student needed the individual instruction or small group instruction based on the assignment that was given to the class.⁵⁰
44. After the IEP meeting on September 20, 2019, Home School attempted to reschedule the meeting for Student's behavioral plan with Parent 1 but received no response.⁵¹

2019-2020 School Year

45. The 2019-2020 School Year began on or about August 5, 2019, which was scheduled to be the first day of school for students and ended on May 28, 2020 as the last day of school for students.⁵²

⁴⁷ P-Ex.1, p.010, R-Ex.3, p.019.

⁴⁸ P-Ex.1, p.011, R-Ex.3, p.020.

⁴⁹ IEP-9/26/2018 stated "[Student] will participate with [] general education peers for all subjects and grade level activities except when [Student's] teachers agree it would be beneficial for [Student] to participate in small group instruction or individual instruction during language arts, math, writing or counseling services;" P-Ex.1, p.024. IEP-9/20/2019 stated "[Student] will participate with [] non-disabled peers for all subjects and activities except for some sessions and some pull-out instruction to receive additional support in math and language arts determined by general education and special education teacher;" P-Ex.1, p.011, R-Ex.3, p.020.

⁵⁰ SPED Teacher's Testimony, Tr.V2, 214:23-16, 248:19-252:17.

⁵¹ DOE Provider 1's Testimony, Tr.V2, 197:16-199:4; SPED Teacher's Testimony, Tr.V2, 257:16-258:12. R-Ex.5, p.73; R-Ex.5, p.342-344.

⁵² R-Ex.8, p.578.

46. In the 2019-2020 School Year, Student attended Home School for eight (8) days⁵³ but checked-in tardy on all those days. On the eight (8) days of instruction that Student attended, Parent 1 attended school with Student.⁵⁴ Student's attendance was marked as "Home Hospital Instruction" for forty-eight (48) days from December 2, 2019 to and including March 13, 2020. This count does not include any of the days of the school shut down from March 17, 2020 to May 28, 2020.⁵⁵
47. On September 3, 2019, September 23, 2019, and October 17, 2019, Agency Provider 1 conducted training for the school year 2019-2020 to adults working with Student, including Principal, SPED Teacher, GE Teacher, and DOE Provider 1.⁵⁶
48. On the occasions when Parent 1 would attend school with Student, Student would demonstrate different behaviors, such as frequently lying on Parent 1, putting Student's head down, or being more resistant to doing assignments based on Parent 1's suggestion that the assignment could cause Student to have an episode.⁵⁷
49. During the times that Parent 1 would attend school with Student, SPED Teacher and GE Teacher would have more difficulty with Student and were unable to collect data on Student's behaviors.⁵⁸
50. SPED Teacher was able to conduct some observations on Student's behaviors and provided that information to Parent 1 in preparation for an upcoming appointment

⁵³ Student attended school on August 12-14, 2019, August 19, 2019, August 22-23, 2019, September 3-4, 2019. R-Ex.8, p.560-564.

⁵⁴ Parent 1's Testimony, Tr.V1, 78:5-9; SPED Teacher's Testimony, Tr.V2, 216:23-217:5.

⁵⁵ R-Ex.8, p.560-564.

⁵⁶ Agency Provider 1's Testimony, Tr.V1, 159:12-160:22; R-Ex.7, p.432, 435, 437.

⁵⁷ SPED Teacher's Testimony, Tr.V2, 217:4-14.

⁵⁸ SPED Teacher's Testimony, Tr.V2, 220:1-20, 255:19-22.

Student had with Private Provider 1.⁵⁹

51. On September 16, 2019, Parent 1 informed Home School that Student will not be attending school until after the IEP meeting scheduled on September 20, 2019.

During that communication, Parent 1 also informed Home School that Parent 1 was declining Home Hospital Instruction because it is not helpful, and nothing gets accomplished.⁶⁰

52. After the IEP meeting on September 20, 2019, Student had appointments and due to medical complications, Student remained in the hospital until approximately November 16, 2019.⁶¹

53. During the time that Student was not attending school from September 2019 to November 2019, Home School continued to contact Parent 1 to get updates on Student's condition and to notify Parent 1 that Home Hospital Instruction was available to Student if requested by Parent 1.⁶²

54. On November 26, 2019, Home School was notified by Parent 1 that Student was out of the hospital. At that time, Parent 1 informed Home School that Student will need Home Hospital Instruction, but that Student would not do anything until Student's health is better. Parent 1 also indicated that Parent 1 wanted a tutor assigned that had qualifications.⁶³

55. On November 30, 2019, Parent 1 submitted a Request for Home Hospital Instruction for Student signed by Medical Provider 1, for the period of November 19, 2019 to

⁵⁹ SPED Teacher's Testimony, Tr.V2, 255:23-256:7.

⁶⁰ R-Ex.8, p.563.

⁶¹ Parent 1's Testimony, Tr.V1, 107:21-108:19; R-Ex.5, p. 342-344.

⁶² SPED Teacher's Testimony, Tr.V2, 221:21-222:1; 228:5-229:3, 230:1-15; R-Ex.5, p.295

⁶³ R-Ex.5, p.314.

April 1, 2020.⁶⁴

56. On December 9, 2019, SPED Teacher contacted Parent 1 to provide Parent 1 with available dates during which Home School was able to meet with Parent 1 to talk about Student's progress and/or needs. Parent 1 declined the meeting but noted some concerns that Parent 1 had about Student's return to school.⁶⁵
57. In response to Parent 1's concerns, on December 18, 2019, Home School attempted to schedule an IEP team meeting to discuss Student's needs and Parent 1's concerns. Parent 1 did not commit to any of the dates provided by Home School, citing medical appointments, and did not follow up with Home School with dates that Parent 1 was available to meet.⁶⁶
58. In January 2020, Tutor 2 was assigned for Student's Home Hospital Instruction. Parent 1 was provided Tutor 2's telephone number and email address to contact Tutor 2 to arrange Home Hospital Instruction.⁶⁷ Parent 1 did not set up tutoring for Student during the Home Hospital Instruction period between November 19, 2019 and March 17, 2020.⁶⁸
59. In February 2020, Home School attempted to follow up with Parent 1 regarding Home Hospital Instruction for Student, since no sessions had been scheduled. Home

⁶⁴ Parent 1's Testimony, Tr.V1, 108:20-24; R-Ex.7, p.536.

⁶⁵ SPED Teacher's Testimony, Tr.V2, 230:16-231:7; R-Ex.5, p.316.

⁶⁶ R-Ex.5, p.316-319.

⁶⁷ SPED Teacher's Testimony, Tr.V2, 232:1-233:21; R-Ex.5, p.345, R-Ex.5, p.350-351; R-Ex.5, p.354-355.

⁶⁸ While Parent 1 testified that Parent 1 contacted Tutor 2 and was waiting for Tutor 2 to call back to set up tutoring, this Hearings Officer finds that the testimony of SPED Teacher and the email sent by Principal to Parent 1 are more reliable evidence that Parent 1 failed to follow up with Tutor 2 to schedule Home Hospital Instruction for Student. *See* Parent 1's Testimony, Tr.V1, 108:22-112:10, Email from Parent 1 to SPED Teacher, R-Ex.5, p.350, *compared with* SPED Teacher's Testimony, Tr.V2, 232:1-233:21; R-Ex.5, p.354-355.

School also contacted Medical Provider 2 and Social Worker to do a home visit to work with Parent 1 to set up Home Hospital Instruction.⁶⁹

60. At the time of the home visit by Medical Provider 2 on or about March 4, 2020, Student was in no condition to attend school or schedule tutoring due to Student's medical condition and erratic sleeping schedule. Medical Provider 2 recommended that Student be homeschooled by Parent 1 until Student is on a better schedule to set up tutoring.⁷⁰
61. 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.⁷¹
62. Due to the closure of schools in March 2020, students at Home School were provided with enrichment opportunities that were not mandatory to be completed and were not counted toward part of the students' yearly grade. These enrichment opportunities were provided in the form of online learning through Google Classroom or WebEx.⁷²
63. SPED Teacher contacted Parent 1 in an email on April 6, 2020 to provide Parent 1 with the link to Student's enrichment opportunities and to see if Parent 1 had any questions about the enrichment opportunities that were available to Student during the school closures.⁷³ SPED Teacher modified the enrichment opportunities to meet

⁶⁹ SPED Teacher's Testimony, Tr.V2, 234:23-235:23; R-Ex.5, p. 356-357.

⁷⁰ R-Ex.5, p.081; R-Ex.5, p.358-359.

⁷¹ SPED Teacher's Testimony, Tr.V2, 235:24-236:1; *see also* Hawai'i Department of Education Press Release, March 19, 2020 "HIDOE extends school closures, implements remote work to maintain essential functions."

⁷² SPED Teacher's Testimony, Tr.V2, 236:7-16, 264:7-266:3; R-Ex.5, p.382.

⁷³ SPED Teacher's Testimony, Tr.V2, 236:17-237:9; R-Ex.5, p.373.

Student's needs based on Student's IEP-9/20/2019.⁷⁴

64. In April 2020, DOE Provider 1 contacted Parent 1 to set up virtual counseling session with Student and Parent 1 during the school closure period. A virtual session was scheduled but Parent 1 canceled the session, stating that Student was tired and unable to attend.⁷⁵ DOE Provider 1 offered to set up another session with Student, but Parent 1 did not respond.⁷⁶
65. In May 2020, SPED Teacher contacted Parent 1 to provide information about WebEx sessions that SPED Teacher would be conducting and offered for Student to participate either in a small group setting or individually to work on Student's skills.⁷⁷
66. Parent 1 did not respond to any of SPED Teacher's email correspondence during the school closures⁷⁸ and Parent 1 did not engage Student in any distance learning opportunities under the belief that it would not be beneficial for Student.⁷⁹

Post 2019-2020 School Year Activity

67. On August 13, 2020, Parent 1 emailed School 2 in response to a call from School 2's student services coordinator. In the email, Parent 1 indicated that Student was fragile, but wanted in person services as much as possible. Parent 1 also inquired about Home Hospital Instruction being available to Student.⁸⁰
68. On August 18, 2020, School 2 student services coordinator responded to Parent 1's

⁷⁴ SPED Teacher's Testimony, Tr.V2, 237:13-241:7; R-Ex.5, p.383-386.

⁷⁵ DOE Provider 1's Testimony, Tr.V2, 199:8-201:6; R-Ex.5, p.82, R-Ex.5, p.381, R-Ex.5, p.387; R-Ex.5, p.389.

⁷⁶ DOE Provider 1's Testimony, Tr.V2, 200:14-23; R-Ex.5, p.389.

⁷⁷ SPED Teacher's Testimony, Tr.V2, 242:13-243:2; R-Ex.5, p.392.

⁷⁸ SPED Teacher's Testimony, Tr.V2, 237:10-12, 243:13-17.

⁷⁹ Parent 1's Testimony, Tr.V1, 84:11-20.

⁸⁰ P-Ex.2, p.029.

inquiry about Home Hospital Instruction, indicating that it is available to Student once Student's physician completes the request forms.⁸¹

69. On August 23, 2020, Parent 1 contacted School 2 to inquire about educational opportunities for Student. School 2 informed Parent 1 that Student would remain in the general education setting for distance learning and that Student would have the option of participating from home or in-person. School 2 suggested that if Student attended in-person, School 2 would be able to support Student in using the technology for accessing distance learning. School 2 also informed Parent 1 that equipment such as a laptop or WiFi could be provided to Student if necessary for distance learning.⁸²
70. School 2 offered special education and counseling support to Student virtually or in-person. School 2 also inquired with Parent 1 whether Parent 1 wanted to have an IEP meeting.⁸³

Private Center

71. Private Center currently has twenty-five (25) clients in the age range from four (4) years old to nineteen (19) years old, all of whom have disabilities and behavioral challenges.⁸⁴
72. Parent 1 enrolled Student at Private Center in August 2020.⁸⁵ Parent 1 has not seen or

⁸¹ Parent 1's Testimony, Tr.V1, 87:11-88:7; P-Ex.2, p.28.

⁸² Parent 1's Testimony, Tr.V1, 86:2-87:10; P-Ex.2, p.026.

⁸³ P-Ex.2, p.026.

⁸⁴ Clinical Supervisor's Testimony, Tr.V1, 42:43:9.

⁸⁵ Parent 1 testified that Parent 1 did not remember the date Parent 1 enrolled Student at Private Center when Parent 1 was asked on cross-examination. Tr.V1, 94:23-95:8. This Hearings Officer notes that in various parts during Parent 1's cross-examination, Parent 1 could not recall details or dates. Parent 1 would make comments such as "I don't remember the exact date," Tr.V1, 95:1-3; "I'm not sure of the exact dates. ... I'm confused because there's so many dates," Tr.V1, 98:4-6. This testimony or apparent inability to recall information spanned the entirety of Parent 1's testimony, so the testimony provided by Parent 1 was considered by this Hearings

signed a contract for payment for Student's attendance at Private Center, nor does Parent 1 have an understanding of the financial obligations that Parent 1 is under for Private Center.⁸⁶

73. Student began attending Private Center on or about August 26 or August 27, 2020.

Student attends Private Center three (3) days a week from 8:00 a.m. to 2:00 p.m.⁸⁷

74. Private Center has not completed an FBA for Student and currently does not have a behavior services plan in place for Student.⁸⁸

75. It is unclear whether Student has an educational program available to Student at Private Center.⁸⁹

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."⁹⁰ A FAPE includes both special education and

Officer with that in mind.

⁸⁶ Parent 1's Testimony, Tr.V1, 94:23-95:18, 124:4-23, 126:19-127:15, 128:8-20.

⁸⁷ Clinical Supervisor's Testimony, Tr.V1, 43:24-44:25.

⁸⁸ Clinical Supervisor's Testimony, Tr.V1, 34:23-35:7.

⁸⁹ While Clinical Supervisor testified that Private Center's provider and special education teacher conducted assessments of Student, Clinical Supervisor did not know what assessments were done. Tr.V1, 51:2-13, 62:13-34:7. Clinical Supervisor further testified that Student has a program, but no further testimony was provided to establish that the program was a program designed to provide educational benefit to Student. Tr.V1, 61:24-63:6. Clinical Supervisor also testified that Clinical Supervisor is not familiar with the details of Student's academic program other than Student doing some reading and some math. Tr.V2, 47:6-11. Clinical Supervisor's other testimony regarding the contents of Private Provider 1's letter does not specifically address or provide useful information on Student's current program. *See* Tr.V1, 24:3-34:22. Based on Clinical Supervisor's testimony, it is unclear whether Clinical Supervisor has any personal knowledge of Student's current program at Private Center.

⁹⁰ *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)).

related services.⁹¹

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.⁹² 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.”⁹³

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”⁹⁴ 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.⁹⁵ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.⁹⁶

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.”⁹⁷ However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,⁹⁸ 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

⁹¹ H.A.R. §8-60-2; 20 U.S.C. § 1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

⁹² *Id.*

⁹³ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

⁹⁴ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

⁹⁵ H.A.R. §8-60-2; 20 U.S.C. § 1401(14); 34 C.F.R §300.22.

⁹⁶ H.A.R. §8-60-45; 20 U.S.C. § 1414; 34 C.F.R §300.321-300.322.

⁹⁷ *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

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

appropriate in light of the child's circumstances."⁹⁹

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.¹⁰⁰ "A state must meet both requirements to comply with the obligations of the IDEA."¹⁰¹

Procedural violations do not necessarily constitute a denial of FAPE.¹⁰² 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.¹⁰³

B. Respondents did not deny Student a FAPE by failing to address Student's needs at the IEP meeting and in the resulting IEP-9/20/2019

Petitioners' first argument is that Respondents denied Student a FAPE by failing to address Student's needs at the IEP meeting on September 20, 2019 and in the resulting IEP-9/20/2019. While Petitioners do not specify what needs of Student were not addressed in the IEP meeting or the resulting IEP-9/20/2019, an examination of whether Student's needs were discussed and/or addressed in Student's IEP is applicable to this analysis.

"The standard for evaluating IEPs, commonly called 'the snapshot rule,' is not retrospective."¹⁰⁴ An IEP is to be judged by looking at whether the IEP goals and goal achieving

⁹⁹ *Andrew 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).

¹⁰⁰ *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

¹⁰¹ *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).

¹⁰² *Amanda J.*, 267 F.3d at 892.

¹⁰³ *Id.*

¹⁰⁴ *K.K. ex rel. K.S.K. v. Hawai'i*, 2015 WL 4611947 *16 (D. Hawai'i 2015), *quoting J.W. ex rel.*

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.¹⁰⁵

Prior to the IEP meeting on September 20, 2019, Student had very sporadic attendance at Home School for the 2018-2019 School Year,¹⁰⁶ and had been enrolled in Home Hospital Instruction for two (2) months but had only received just over thirteen (13) hours of tutoring.¹⁰⁷ During the 2019-2020 School Year, Student only attended Home School for eight (8) days and Parent 1 had attended school with Student, making it difficult to collect behavioral data on Student.¹⁰⁸ The IEP team had attempted to schedule a consultation with Private Provider 1 to gain more information on Student's needs based on Student's new diagnoses but were unable to do so.¹⁰⁹ The IEP team had also attempted to meet with Parent 1 prior to the September 20, 2019 IEP meeting regarding a behavioral plan for Student but it was canceled by Parent 1.¹¹⁰

The IEP team used the information that was available to them at the September 20, 2019 IEP meeting. Student's IEP-9/20/2019 included provisions to address some of the concerns listed in Private Provider 1's report and letter.¹¹¹

Petitioners have not provided evidence to establish that at the time the IEP-9/20/2019 was created, the IEP team failed to address the needs of Student either at the September 20, 2019 IEP meeting or in the resulting IEP.

C. Respondents did not deny Student a FAPE in determining Student's Least Restrictive Environment or by using the language in Student's IEP-9/20/2019's regarding Student's placement

J.E.W. v. Fresno Unified Sch. Dist., 626 F.3d 431, 439 (9th Cir. 2010).

¹⁰⁵ *K.K.*, 2015 WL 4611947 *16, quoting *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).

¹⁰⁶ FOF 23-24.

¹⁰⁷ FOF 28-29.

¹⁰⁸ FOF 45-46.

¹⁰⁹ FOF 31-32.

¹¹⁰ FOF 34.

¹¹¹ FOF 37.

Petitioners argue that the language in Student's IEP-9/20/2019 and PWN-9/25/2019 regarding Student's educational placement is improper, which has resulted in a denial of FAPE. To highlight their argument, Petitioners have asserted that the language used in Student's IEP-9/20/2019 is vague and allows for Student's teachers to determine when Student will not participate in a setting with non-disabled peers without defining the parameters of the determination.

Student's educational placement in the IEP-9/20/2019 was in the general education setting except for some counseling sessions and pull-out instruction to receive additional support in math and language arts as determined by Student's teachers.¹¹² Petitioners fail to specify how Student's educational placement could have been less restrictive in Student's IEP-9/20/2019. Further, courts have recognized the importance of having flexible language in IEPs to provide services to students in a less restrictive environments.¹¹³ In *K.D. ex rel. C.L. v. Department of Education, Hawai'i*, the Ninth Circuit Court of Appeals approved a student's IEP that included the placement language "participate with general education peers for the following activities, when deemed appropriate: lunch in the cafeteria, recess and school wide assemblies."¹¹⁴ This same IEP also "indicated that [student] may participate with non-disabled peers in after-school group activities and outings if deemed appropriate."¹¹⁵ The language used in *K.D.*, is similar to the language in this case, which allows for Student's teachers to assess Student's situation and determine whether small group or individual instruction for a specific assignment is necessary

¹¹² FOF 42.

¹¹³ See *K.D. ex rel. C.L. v. Department of Education, Hawai'i*, 665 F.3d 1110 (9th Cir. 2011), see also *R.E.B., ex rel. J.B. v. State of Hawai'i Dep't of Educ.*, 74 IDELR 125, 770 F.App'x 796 (9th Cir. 2019).

¹¹⁴ 665 F.3d at 1127.

¹¹⁵ *Id.*

based on Student's needs.¹¹⁶ The educational placement statement in Student's IEP-9/20/2019 "creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any."¹¹⁷ Moreover, Parent 1 was aware of this placement for Student, as Student had essentially the same language in Student's IEP-9/26/2018 and had observed Student in the classroom on the occasions when Parent 1 accompanied Student to school.¹¹⁸

Petitioners have failed to prove that the educational placement language in Student's IEP-9/20/2019 is improper and therefore denied Student a FAPE.

D. Respondents did not deny Student a FAPE by failing to collect sufficient data or information to determine whether Student was eligible for ESY

Petitioners next argument is that Respondents denied Student a FAPE by failing to collect sufficient data or information prior to the September 20, 2019 IEP meeting necessary to determine Student's eligibility for ESY. A school must provide ESY services only if the child's IEP team determines that the services are necessary 'for the provision of FAPE to the child.'¹¹⁹ To qualify for extended school year services, "a claimant seeking an ESY must satisfy an even stricter test, because 'providing an ESY is an exception and not the rule under the regulatory scheme.'"¹²⁰ The standard for ESY is higher than the standard for the provision of special

¹¹⁶ FOF 42-43.

¹¹⁷ *K.D.*, 665 F.3d at 1127.

¹¹⁸ FOF 19-20, 46.

¹¹⁹ *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008).

¹²⁰ *N.B.*, 541 F.3d at 1211, quoting *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6th Cir.) quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), cert. denied, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); see also *Dep't of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 *7 (holding that ESY is "educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information

education and related services due to the requirement to show that the benefits the student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during school breaks.¹²¹

Due to Student's sporadic attendance at school and Student's limited Home Hospital Instruction, Home School had no opportunities to collect data on Student's regression during school breaks, as the inconsistent attendance for full school days provided no useful information.¹²² This information was discussed with Parent 1 at the IEP meeting on September 20, 2019 when Student was determined to be ineligible for ESY.¹²³

Petitioners have offered no alternative data or information of which Respondents should have been aware or in possession of for discussion on Student's eligibility for ESY. Petitioners' argument that Student missed a significant amount of school is not a recognized factor for determining eligibility for ESY. Petitioners have not met their burden of proving that Respondents failed to collect sufficient data or information in determining Student's eligibility for ESY or that the discussion on ESY at the IEP meeting was insufficient.

E. Respondents did not deny Student a FAPE by failing to collect sufficient data or information or by failing to include knowledgeable persons at Student's September 20, 2019 IEP meeting

Petitioners argue that Respondents failed to have knowledgeable persons at Student's IEP meeting, specifically as to discussions about assistive technology and the importance of

during a break in regularly scheduled classes, such as during the summer.”).

¹²¹ *Id.*, quoting *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002); see also *K.K. ex rel. K.S.K. v. Hawaii*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6th Cir. 2004) (confirming that “it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.”).

¹²² FOF 36, 49.

¹²³ FOF 36.

providing Student academic instruction at the appropriate level to Student's needs. Petitioners have failed to allege or present evidence, names, or qualifications of the knowledgeable persons that were not included at the September 20, 2019 IEP meeting.

At the time of the September 20, 2019 IEP meeting, Respondents did not have consent to speak with any of Student's medical treatment providers, so Parent 1 was the only person in a position to invite those providers to the IEP meeting.¹²⁴ Agency Provider 1 was present at the IEP meeting but based on Student's medical records and conversations with Medical Provider 1 there was no evident need for Student to use assistive technology.¹²⁵ The DOE Provider 1 and the DOE Private Provider 1 attempted to get Parent 1 to allow them to speak with Private Provider 1 for further information on Student's situation and how to better support Student, but Parent 1 did not respond.¹²⁶ Student's SPED Teacher was present at the IEP meeting, and SPED Teacher was knowledgeable about the level of academic instruction being provided to Student.¹²⁷

Petitioners have failed to present evidence or argument to meet their burden of proof for this issue by a preponderance of the evidence.

F. Petitioners have failed to prove that Student's IEP-9/20/2019 failed to provide sufficient supplementary aids and services for Student to make adequate gains on Student's needs

Petitioners raise the question of whether Student's IEP-9/20/2019 failed to provide sufficient supplementary aids and services for Student to make adequate gains on Student's needs. Petitioners specifically list the following in their Complaint: 1) Student should be permitted to receive tutoring in the home and/or other appropriate setting; 2) Student needs

¹²⁴ FOF 2.

¹²⁵ FOF 13.

¹²⁶ FOF 31-32.

¹²⁷ FOF 25, 35.

service/support; 3) the word “Daily” is vague as applied to services; 4) The providers utilized to provide the services are inadequate to keep Student safe; 5) Student needs the providers to accompany Student to the bathroom; 6) Student needs assistive technology to monitor Student and needs to have water at all times; 7) Student needs positive behavioral interventions, not punishment for off-task calming and disruptive behaviors; 8) the frequency and/or duration of home tutoring services offered to Student has been inadequate; and 9) Student is given work significantly beyond Student’s instructional level, which causes Student to shut down or become quiet. At the Hearing and in their closing briefs,¹²⁸ Petitioners did not allege any additional supplemental aids or service that was insufficient in Student’s IEP-9/20/2019, therefore this Hearings Officer will address the specified aids and services.

As discussed *supra*, an IEP is to be examined through the ‘snapshot’ rule, and this Hearings Officer must consider the creation of the IEP based on the information that was available to the IEP team at the time of the September 20, 2019 IEP meeting. Based on the foregoing discussion, this Hearings Officer concludes that Petitioners have not met their burden of proving that Student’s IEP-9/20/2019 was not reasonably calculated to enable Student to make progress appropriate in light of the Student’s circumstances.

Petitioners argue that Student needed aids and services in the IEP-9/20/2019, including services, assistive technology to monitor health and water at all times. Petitioners did not present any evidence from any medical professional to support these items as being necessary aids for Student to receive an education. In fact, the only evidence that was presented was that Student’s Medical Provider 1 did not believe that a provider needed to be present with Student at school

¹²⁸ See Petitioners’ Closing Brief, filed September 29, 2020, and Petitioners’ First Amended Closing Brief, filed September 29, 2020.

throughout the day.¹²⁹ The main requirement regarding a provider for Student was that one needed to be present at the school in the event that Student became unhealthy, to provide Student with the necessary action, which was included in the IEP-9/20/2019.¹³⁰ No evidence was presented that having water at all times was necessary to address Student's unique needs such that it needed to be in Student's IEP-9/20/2019. Additionally, to address Parent 1 concerns regarding Student's safety at school, the IEP-9/20/2019 included that the teachers and staff working with Student be provided training.¹³¹ Agency Provider 1 conducted three separate trainings to the teachers and staff working with Student at Home School in compliance with the IEP provision to address the concerns for Student's safety.¹³² Additionally, several other supports were included in Student's IEP-9/20/2019 to address safety concerns for Student.¹³³ Petitioners have failed to prove that the specified services mentioned above were required to meet Student's unique needs for Student to receive an educational benefit.

Relatedly, Petitioners allege that the language in the IEP-9/20/2019 failed to address safety concerns of Student, specifically that the providers utilized to provide the services are inadequate to keep Student safe, and that Student needs the provider to accompany Student to the bathroom. Petitioners have failed to provide any evidence that the supports and services included in the IEP-9/20/2019 does not address Student's safety concerns. Student's IEP-9/20/2019 provides a statement specifically addressing Student's accommodations at school and being able to go to the health room.¹³⁴ No evidence has been presented from any of Student's

¹²⁹ FOF 39.

¹³⁰ FOF 39.

¹³¹ FOF 40.

¹³² FOF 47.

¹³³ FOF 41.

¹³⁴ FOF 41.

medical professionals that Student requires someone to accompany Student to the bathroom or that the providers used to provide Student's services were inadequate to address Student's safety needs.

Petitioners also argue that Student should be permitted to receive tutoring in the home and that the frequency or duration of home tutoring services offered to Student has been inadequate. During the Hearing, Petitioners pointed to language that was in Student's previous IEP-9/26/2018 that provided Student would receive Home Hospital Instruction after an absence from school for more than three (3) days. While it is undisputed that this language was not included in Student's IEP-9/20/2019, Petitioners have failed to prove that Student was not permitted to receive tutoring in the home or that the frequency or duration of the tutoring was inadequate. Home School has the same procedures for Home Hospital Instruction for all students, regardless of whether they are eligible for IDEA services.¹³⁵ Student was offered and provided Home Hospital Instruction for all the periods when it was requested.¹³⁶ Due to the nature of the tutoring being in a student's home, the requirement for the Parent 1 to coordinate the schedule of the tutoring directly with the tutor is reasonable. Parent 1 in this case frequently canceled tutoring in the 2018-2019 school year and failed to contact the tutor for services in the 2019-2020 school year.¹³⁷ Failure for Parent 1 to follow the procedures for Home Hospital Instruction tutoring services for Student was not a denial of FAPE by Respondents. Additionally, as this tutoring service is available to all students who are unable to attend school due to medical injury or sickness, failure to include the language offering Home Hospital Instruction in Student's IEP-9/20/2019 was not a denial of FAPE.

¹³⁵ FOF 14-15.

¹³⁶ FOF 27-28, 54, 58.

¹³⁷ FOF 29, 58.

Finally, Petitioners argue that Student needs positive behavioral interventions, not punishment, for Student's off-task behaviors and that Student is given work significantly beyond Student's instructional level, which causes Student to shut down or become quiet. Petitioners have presented evidence that Student needs behavioral interventions, such as the report and letter by Private Provider 1. However, Petitioners have not met their burden of proving that Respondents did not adequately address Student's behavioral needs. The evidence presented at the Hearing shows that Respondents attempted to get permission from Parent 1 to consult with Private Provider 1 to discuss how to better support and address Student's needs, however Parent 1 did not provide consent for the school to have such communication.¹³⁸ Home School set up a meeting with Parent 1 to discuss a behavioral plan and supports for Student prior to the September 20, 2019 IEP meeting, however Parent 1 canceled that meeting.¹³⁹ Nonetheless, Student's IEP-9/20/2019 includes behavioral supports designed to address Student's needs.¹⁴⁰

Petitioners have not provided any evidence that the work that Student is being given to complete is significantly beyond Student's instructional level. On the contrary, Private Provider 1's report supports the conclusion that Student shuts down or becomes quiet on occasions that Student does not want to do the work or that the work approaches a level of difficulty that Student does not want to complete, rather than having an obstacle in completing or difficulty understanding or doing the work.¹⁴¹ This behavior is further supported by SPED Teacher's testimony that Student has adopted some of Parent 1's statements in class that Student is unable to do work because it may cause a condition.¹⁴² SPED Teacher has been working with

¹³⁸ FOF 31-32.

¹³⁹ FOF 34.

¹⁴⁰ FOF 37.

¹⁴¹ FOF 7.

¹⁴² FOF 48.

Student on modifying the assignments to match Student's appropriate level of education.¹⁴³

Petitioners have not demonstrated that the work being given to Student is significantly beyond Student's instructional level.

Petitioners have failed to prove that the supports and services provided in Student's IEP-9/20/2019 were not reasonably calculated to confer an educational benefit upon Student at the time that it was created.

G. Respondents have not failed to materially implement Student's IEP-9/20/2019 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-9/20/2019 since approximately March 17, 2020. In the month of March 2020, the global pandemic COVID-19 entered into the State of Hawai'i, resulting in numerous closures of businesses, government offices, public places and both public and private schools under emergency orders issued by the Governor of the State of Hawai'i, Mayors of the Hawai'i Counties, and the Superintendent of the Hawai'i Public Schools.¹⁴⁴ Student's school was included in the closures, which prevented teachers, students and staff from entering onto the school grounds.¹⁴⁵ During the period of school closures, students were offered enrichment learning, which did not count as part of their yearly grades for the 2019-2020 school year.¹⁴⁶

Petitioners argue that Respondents' failure to hold classes in-person, or alternatively the failure of Parent 1 to contact and schedule tutoring for Student's Home Hospital Instruction is a

¹⁴³ FOF 38, 43.

¹⁴⁴ 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.

¹⁴⁵ FOF 61.

¹⁴⁶ FOF 62.

material failure to implement Student's IEP-9/20/2019. To support their argument, Petitioners argue that the IEP team should have met to revise Student's IEP-9/20/2019.¹⁴⁷ Petitioners have failed to provide any suggestions or examples of how or why Student's IEP-9/20/2019 needed to be revised. Additionally, Respondents also made repeated attempts to contact Parent 1 to check on Student's current condition and see if there were any supports or alternatives that could be provided to Student during the school closures.¹⁴⁸ While it is not Parent 1's burden to contact Respondents, failure to respond to the repeated check-ins made by Respondents,¹⁴⁹ coupled with medical information that was withheld from Respondents,¹⁵⁰ made it virtually impossible for Home School to know what was going on with Student to properly evaluate Student's situation and needs or determine that the IEP needed to be revised.

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 on 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*,¹⁵¹ 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." 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

¹⁴⁷ See Petitioners' Closing Brief, filed September 29, 2020, and Petitioners' Amended Closing Brief, filed September 29, 2020.

¹⁴⁸ FOF 63-65.

¹⁴⁹ FOF 66.

¹⁵⁰ FOF 5.

¹⁵¹ 76 IDELR 77 (EDU 2020).

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...¹⁵²

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 services provided through distance instruction provided virtually, online or telephonically.¹⁵³

During the fourth quarter of the 2019-2020 school year, the general education students were provided with enrichment learning opportunities through distance learning and SPED Teacher reviewed and modified those same materials to provide to Student, consistent with the IEP-9/20/2019.¹⁵⁴ SPED Teacher further offered WebEx meetings both in a group setting or one-on-one for Student to get assistance with participating in the enrichment programs offered by Home School.¹⁵⁵ DOE Provider 1 set up a tele-health counseling session with Student, but Parent 1 canceled the session and did not respond to attempts to reschedule.¹⁵⁶ Respondents attempted, to the greatest extent possible, to offer Student enrichment opportunities that were

¹⁵² *Id.*

¹⁵³ *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).

¹⁵⁴ FOF 63.

¹⁵⁵ FOF 65.

¹⁵⁶ FOF 64.

offered to the general education population. Parent 1 chose not to have Student participate in the distance learning enrichment opportunities based on Parent 1's belief that it would not be beneficial for Student.¹⁵⁷ Parent 1's failure to avail Student of these opportunities did not amount to a failure of Respondents to materially implement Student's IEP-9/20/2019 during the fourth quarter of the 2019-2020 school year.

Petitioners have not offered any evidence to show that Respondents failed to implement Student's IEP-9/20/2019 for the beginning of the 2020-2021 school year. The only evidence that was presented was that Parent 1 contacted School 2 to see what services would be offered to Student for the 2020-2021 school year.¹⁵⁸ School 2 offered Student online or in-person services in an inclusion setting with Student's general education peers, who would be participating through distance learning. The offer suggested that in-person attendance would allow for additional assistance for Student in participating in distance learning.¹⁵⁹ Student was also offered special education support and counseling online or in-person, and Parent 1 was asked if an IEP meeting was necessary to review Student's situation.¹⁶⁰ Again, Parent 1's failure to avail Student of the opportunities offered by Respondents or the unilateral placement of Student at Private Center for in-person instruction do not amount to Respondents failure to materially implement Student's IEP-9/20/2019.

H. 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

¹⁵⁷ FOF 66.

¹⁵⁸ FOF 67.

¹⁵⁹ FOF 69.

¹⁶⁰ FOF 70.

is receiving.¹⁶¹ 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.¹⁶² 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.”¹⁶³

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. No evidence has been presented by Petitioners that Student is receiving educational instruction specially designed to meet Student’s unique needs. While Clinical Supervisor provided some testimony about Student having a program, it did not appear that Clinical Supervisor was familiar with the academic or educational aspects of the program, nor was Clinical Supervisor familiar with the assessments that were completed for Student prior to Student’s attendance at Private Center.¹⁶⁴ Additionally, no evidence was presented regarding Student’s school schedule, any assessments or data collection practices to be completed with Student, specific target goals or areas for improvement. The only other evidence presented was that there are no non-disabled students attending Private

¹⁶¹ 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).

¹⁶² *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

¹⁶³ *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011) (*citing Frank G. v. Bd. of Educ.*, 459 F.3d at 365 (2nd Cir. 2006)).

¹⁶⁴ FOF 75.

Center,¹⁶⁵ and that no FBA had been done for Student and that there was no behavioral services plan in place for Student at this time.¹⁶⁶ Based on the record, 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 Program or for compensatory education is denied.

¹⁶⁵ FOF 71.

¹⁶⁶ FOF 74.

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 6, 2020.

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