



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

In the Matter of STUDENT, by and through  
PARENT,<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-SY2021-013

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing: December 7-9, 2020

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On July 28, 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 Complaint and Resolution Proposal (hereinafter “Complaint”) under the Hawai‘i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities

Education Act, from Student, by and through Parent (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on August 7, 2020. Petitioners were granted leave to file an Amended Complaint and Resolution Proposal (hereinafter “Amended Complaint”), which they submitted on September 9, 2020. Respondents filed their response to Petitioners’ Amended Complaint on September 18, 2020.

A prehearing conference was held on October 9, 2020, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Kevin M. Richardson, Esq. (hereinafter “Mr. Richardson”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for December 7-9, 2020.

Due to the scheduling of the Hearing, Petitioners requested an extension of the original deadline by which a decision was to be made from November 23, 2020 to January 7, 2021. Respondents did not object to the request for extension, and Petitioners’ request for an extension was granted and the new deadline was set at January 7, 2021.

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 November 9, 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

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

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 December 7, 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 and Mr. Peck, on behalf of Petitioners; and District Educational Specialist and Mr. Richardson on behalf of Respondents; as well as the assigned court reporter. The Hearing continued to December 8 and 9, 2020, as scheduled, and the testimony was completed on that date.

At the Hearing, Petitioners called Parent and Private School Director as their witnesses during their case-in-chief and rested. Respondents called Special Education Teacher (hereinafter “SPED”) and Student Services Coordinator (hereinafter “SSC”) during their case and rested. Petitioners did not present any rebuttal evidence.

Each party submitted their exhibits for the Hearing by the disclosure deadline of November 30, 2020. On December 21, 2020, a list of exhibits that were discussed during the Hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on December 29, 2020. Any objections to the proposed exhibits were due on January 4, 2021. Respondents submitted the following additional proposed exhibits to be received as evidence for consideration in the Decision: Respondents’ Exhibit 24, page 127; Exhibit 25, page 128; Exhibit 51, pages 229-252; Exhibit 58, page 263; and Exhibit 59, page 264. Respondents additionally requested to provide

the attachments to Petitioners' Exhibits 3, pages 131-132 and 133-137, and provided those attachments, which were subsequently marked as Respondents' Exhibit 61, pages 280-312 and received. Petitioners did not state objections to these exhibits being received as evidence for consideration in the decision. On January 6, 2021, a List of Exhibits Received at Hearing was issued, outlining all the exhibits that would be considered as part of this Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-022; Exhibit 2, pages 050-076, 078-081, 085-086, 089-092, 095-101, 103-104, 111-112; and Exhibit 3, pages 113-171. Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-007, Exhibit 7, page 022; Exhibit 11, page 026; Exhibit 12, page 027; Exhibit 13, page 028; Exhibit 14, page 029; Exhibit 16, page 031; Exhibit 18, pages 035-054; Exhibit 19, pages 055-057; Exhibit 20, pages 058-084; Exhibit 21, pages 085-117; Exhibit 22, pages 118-121; Exhibit 23, pages 122-126; Exhibit 24, page 127; Exhibit 25, page 128; Exhibit 27, page 130; Exhibit 29, pages 133-149; Exhibit 30, pages 150-155; Exhibit 31, pages 156-157; Exhibit 34, pages 160-162; Exhibit 35, page 163; Exhibit 38, pages 167-169; Exhibit 39, page 170; Exhibit 40, page 171; Exhibit 41, page 172; Exhibit 42, pages 173-176; Exhibit 43, pages 177-180; Exhibit 44, pages 181-188; Exhibit 45, pages 189-208; Exhibit 46, page 209; Exhibit 47, page 210; Exhibit 48, pages 211-216; Exhibit 49, pages 217-219; Exhibit 50, pages 220-228; Exhibit 51, pages 229-252; Exhibit 52, pages 253-254; Exhibit 53, pages 255-257; Exhibit 54, pages 258-259; Exhibit 55, page 260; Exhibit 56, page 261; Exhibit 57, page 262; Exhibit 58, page 263; Exhibit 59, page 264; Exhibit 61, pages 280-312.

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 Friday, January 15, 2021. Both parties timely submitted their closing briefs on that date.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the undersigned Hearings Officer renders the following findings of fact, conclusions of law and decision.

## **II. JURISDICTION**

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

## **III. ISSUES PRESENTED**

Petitioners assert seven (7) issues in the Complaint to be addressed at the Hearing:

1. Whether denying Student an Individualized Educational Program (hereinafter “IEP”) unless Parent formally enrolled Student at Student’s public school was a denial of a free and appropriate public education (hereinafter “FAPE”).
2. Whether the DOE denied Student a FAPE when the IEP team failed to evaluate Student’s behavioral needs prior to the August 27, 2020 IEP meeting, resulting in a functional behavioral assessment being ordered at the IEP meeting.
3. Whether the DOE denied Student a FAPE when representatives from Student’s private program were not invited to the August 27, 2020 IEP meeting to provide information about Student’s needs.
4. Whether the DOE denied Student a FAPE when the August 27, 2020 IEP team did not consider data from Student’s private programs or the nature and severity of Student’s disability in denying Student extended school year services.
5. Whether the DOE denied Student a FAPE when Student’s August 27, 2020 IEP fails to include assistive technology, behavioral interventions, applied behavior analysis under the statement of supplementary aids and services.
6. Whether the DOE denied Student a FAPE when the August 27, 2020 IEP team did not discuss or consider the factors for determining least restrictive environment for

Student's educational placement.

7. Whether the DOE denied Student a FAPE when Student's August 27, 2020 IEP does not describe an appropriate least restrictive environment for Student.

#### IV. FINDINGS OF FACT

##### Background

1. Private School Director is a board-certified behavior analyst (hereinafter "BCBA") who has been licensed in Hawai'i since \_\_\_ and has been practicing as a BCBA for over \_\_\_ years.<sup>3</sup>
2. Private School Director is also a speech language pathologist and has been working in that capacity for approximately \_\_\_ years and has been licensed in Hawai'i since \_\_\_\_.<sup>4</sup>
3. Private School Director has extensive experience in consulting with public and private schools on developing, training, and guiding applied behavioral analysis (hereinafter "ABA") programs in school settings.<sup>5</sup>
4. In \_\_\_, Private School Director was contracted by the DOE [REDACTED]  
[REDACTED]  
[REDACTED].<sup>6</sup>
5. Private School Director is qualified as an expert in the development of ABA programs in the school setting.<sup>7</sup>
6. SPED is a certified special education teacher that is licensed in Hawai'i and has been

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<sup>3</sup> Testimony of Private School Director, Transcript of Proceedings, Volume 1, page 20, line 19 through page 21, line 20 (hereinafter referenced as "Tr.V1, 20:19-21:20"); Petitioners' Exhibit 3, pages 127-128, and 129 (hereinafter referenced as "P-Ex.3, p.127-128, 129").

<sup>4</sup> Testimony of Private School Director, Tr.V1, 97:6-13; P-Ex.3, p.127-128, 130.

<sup>5</sup> Testimony of Private School Director, Tr.V1, 22:22-23:8.

<sup>6</sup> Testimony of Private School Director, Tr.V1, 28:10-29:3.

<sup>7</sup> Testimony of Private School Director, Tr.V1, 29:4-13.

teaching for approximately \_\_\_ years. SPED has a bachelor's degree and a post-baccalaureate degree in special education [REDACTED].<sup>8</sup>

7. SPED has also completed many trainings for special education related to topics such as autism, classroom management, and behavior supports.<sup>9</sup>

8. [REDACTED]

[REDACTED] Parent's memory about the meeting dates and the different meetings that were held is not clear.<sup>10</sup>

Student's background

9. Student is \_\_\_ years old and is a resident in Home School's district.<sup>11</sup>

<sup>8</sup> Testimony of SPED, Tr.V2, 268:16-269:22.

<sup>9</sup> Testimony of SPED, Tr.V2, 296:23-270:7.

<sup>10</sup> See, e.g., Testimony of Parent, Tr.V2, 161:7-10

<sup>11</sup> Testimony of Parent, Tr.V2, 203:5-204:25.

10. Student was diagnosed with \_\_\_ in June 2019.<sup>12</sup>
11. Since around August 2019, Student had been receiving year-round insurance-funded ABA services from Clinic.<sup>13</sup>
12. Clinic is a specialized setting for children [REDACTED] who are getting treatment, such as ABA services, in a clinical setting. Clinic is not considered an educational setting.<sup>14</sup> [REDACTED]  
[REDACTED]<sup>15</sup>
13. In October 2019 and March 2020, Clinic completed a Verbal Behavior Milestones and Placement Program (hereinafter “VB-MAPP”) assessment with Student to identify Student’s strengths and weaknesses across a variety of critical skills. The VB-MAPP assessment is used to also compare and contrast Student’s skills with those of typically developing children.<sup>16</sup>
14. Clinic also conducted a functional behavior assessment (hereinafter “FBA”) with Student due to Student’s problem behaviors in Student’s home and day \_\_\_ environments.<sup>17</sup>
15. Based on the assessments, Clinic came up with treatment plans, dated October 2019 and April 2020, for Student to target certain problem behaviors and to increase other positive behaviors in Student. Some of these problem behaviors included throwing tantrums; self-injurious behaviors; and tolerance to being told “no.” Some of the target behaviors

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<sup>12</sup> See R-Ex.20, p.058.

<sup>13</sup> Testimony of Parent, Tr.V2, 191:20-193:12; R-Ex.20, p.058.

<sup>14</sup> Testimony of Private School Director, Tr.V1, 110:13-111:4; Testimony of SPED, Tr.V2, 293:18-294:14.

<sup>15</sup> Testimony of Parent, Tr.V2, 203:10-22.

<sup>16</sup> Testimony of Private School Director, Tr.V1, 32:7-21; see R-Ex.20, p.058-084, R-Ex.21, p.085-117.

<sup>17</sup> See R-Ex.20, p.059-066.



included having Student request items through vocal language, picture exchange, or sign language; Student responding to Student's name when called; following directions; and getting dressed after using the restroom.<sup>18</sup>

16. The DOE provides services for students who are determined to be eligible under the IDEA for special education and related services that are ages three (3) and older.<sup>19</sup>

17. On May 7, 2020, Parent emailed Home School to request that IEP [REDACTED]

[REDACTED].<sup>20</sup>

18. In another email communication on May 11, 2020, Parent communicated with Home School that, despite the recency of the request for services for Student, Parent would seek private education instead of public school for Student and would be asking for reimbursement for such expenses.<sup>21</sup>

19. On May 13, 2020, Parent reiterated the request to start the process for Student, and on that same date, SSC proposed May 21, 2020 as a meeting date for the initial student services team (hereinafter "SST") meeting.<sup>22</sup>

20. The SST meetings are for the parent and DOE personnel to meet to determine what the student's needs are and what assessments would be completed to determine the student's eligibility for IDEA services.<sup>23</sup>

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<sup>18</sup> See R-Ex.20, p.075-082, R-Ex.21, p.097-115.

<sup>19</sup> Testimony of SPED, Tr.V2, 273:16-274:2.

<sup>20</sup> Testimony of Parent, Tr.V2, 202:21-204:25; Testimony of SSC, Tr.V3, 466:22-467:19; R-Ex.27, p.130.

<sup>21</sup> Testimony of Parent, Tr.V2, 206:3-207:7; Testimony of SSC, Tr.V3, 469:1-24; R-Ex.29, p.133.

<sup>22</sup> Testimony of SPED, Tr.V2, 272:13-273:9; Testimony of SSC, Tr.V3, 470:2-20; R-Ex.29, p.134.

<sup>23</sup> Testimony of SPED, Tr. V3, 418:5-419:2; Testimony of SSC, Tr.V3, 465:21-466:2, 470:21-471.

21. The SST meeting for Student was held on May 21, 2020 and included Parent, SPED, SSC, and a speech pathologist.<sup>24</sup>
22. At the SST meeting, the SST proposed an initial evaluation for Student which included assessments for psycho-educational (cognitive, adaptive, behavior); VB-MAPP (behavioral skills, communication skills, developmental skills); Occupational Therapy (sensory regulation); as well as an observation of Student to be used to determine Student's eligibility under the IDEA.<sup>25</sup>
23. On May 18, 2020, SSC sent Parent forms for proof of residence and enrollment forms, which SSC requested Parent complete and send back to SSC, along with a copy of Student's birth certificate.<sup>26</sup>
24. After the May 21, 2020 SST meeting, a Prior Written Notice (hereinafter "PWN") was issued (hereinafter "PWN-5/21/2020") in which the DOE proposed an initial evaluation of Student for determination of eligibility for IDEA services.<sup>27</sup>
25. After the SST meeting on May 21, 2020, SSC sent Parent additional forms to be completed, including a Request for Evaluation form and a Consent for Assessment as Part of an Initial Evaluation form. In the same email, Parent was sent the Meeting Notice for the May 21, 2020 meeting, the PWN-05/21/2020, and a copy of the Procedural Safeguards Notice.<sup>28</sup>
26. On June 1, 2020, at approximately 10:02 a.m., after SSC did not receive the forms from

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<sup>24</sup> Testimony of SPED, Tr.V2, 272:13-15; Testimony of SSC, Tr.V3, 471:9-473:8.

<sup>25</sup> Testimony of Parent, Tr.V2, 208:15-211:25; Testimony of SSC, Tr.V3, 471:2-472:2; R-Ex.7, p.022.

<sup>26</sup> Testimony of Parent, Tr.V2, 214:9-19; R-Ex.29, p.135-147.

<sup>27</sup> R-Ex.7, p.022.

<sup>28</sup> R-Ex.29, p.135-147.

Parent, SSC sent a follow up email requesting that Parent complete the Request for Evaluation form, the Consent for Assessment as Part of an Initial Evaluation form and the student enrollment forms. SSC also requested that Parent attach a proof of residency for Student and Student's birth certificate.<sup>29</sup>

27. In the afternoon of June 1, 2020, Parent completed and emailed SSC the Request for Evaluation form and Consent for Assessment as Part of an Initial Evaluation form. Parent inquired at that time if a mortgage statement would be accepted as proof of residency.<sup>30</sup>

28. On June 3, 2020, Parent emailed a payment stub for Parent's mortgage, the completed and signed Consent for Assessment as Part of an Initial Evaluation and Request for Evaluation, and Student's birth certificate.<sup>31</sup>

29. Upon receipt of the forms, SSC informed Parent that Home School needed the enrollment forms completed. Parent responded to SSC by saying that Parent did not want to enroll Student at public school until Parent knows what Student's IEP will be.<sup>32</sup>

30. On June 4, 2020, SSC informed Parent that Home School needed the forms to input into the DOE computer system and that it was not to enroll Student at that time. After asking for the forms to be resent, Parent thereafter refused to complete the enrollment forms.<sup>33</sup>

31. On June 10, 2020, SSC emailed Parent to ask if Student had completed a VB-MAPP assessment with Student's previous providers and let Parent know that if Student had a

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<sup>29</sup> Testimony of SSC, Tr.V3, 473:9-474:11; R-Ex.29, p.136.

<sup>30</sup> R-Ex.29, p.136-137.

<sup>31</sup> R-Ex.30, p.150-155.

<sup>32</sup> Testimony of Parent, Tr.V2, 215:25-216:7; Testimony of SSC, Tr.V3, 476:8-16; R-Ex.30, p.154-155.

<sup>33</sup> Testimony of Parent, Tr.V2, 216:4-218:15; Testimony of SSC, Tr.V3, 476:17-478:2; R-Ex.30, p.155.

recently completed VB-MAPP, then another one would not need to be completed. Parent indicated that Student had a current or would get an updated one and that Parent would get it to Home School once it was completed.<sup>34</sup>

32. On June 29, 2020 the team met and decided that because Student had or would be completing a VB-MAPP, the DOE would request a speech/language assessment instead. SSC provided Parent another Consent for Assessment as Part of an Initial Evaluation form for the speech/language assessment that the team decided to do instead of the VB-MAPP assessment.<sup>35</sup>

33. On July 3, 2020, SSC received the signed Consent for Assessment form for the speech/language assessment from Parent. Parent had noted on the form that “My child should be eligible w/o speech test, I don’t want a delay. I agreed to all requested tests on 5/21/2020.”<sup>36</sup>

34. On July 10 and 11, 2020, Occupational Therapist (hereinafter “OT”) conducted Student’s occupational therapy assessment with Parent 2 and Parent, respectively, but did not conduct the occupational therapy assessment with Student in person. OT prepared a report for Student’s occupational therapy assessment and provided recommendations for treatment.<sup>37</sup>

35. On July 14, 2020, SSC requested that Parent sign a Consent for Release of Information form for Home School to obtain treatment plans, assessment data, and current progress

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<sup>34</sup> Testimony of Parent, Tr.V2, 221:24-223:2; Testimony of SSC, Tr.V3, 478:15-483:12; R-Ex.31, p.156-157.

<sup>35</sup> Testimony of SPED, Tr.V2, 275:19-276:5; Testimony of SSC, Tr.V3, 483:13-484:15; R-Ex.11, p.026.

<sup>36</sup> Testimony of SSC, Tr.V3, 484:13-23; R-Ex.12, p.027.

<sup>37</sup> P-Ex.2, p.062-065, R-Ex.22, p.118-121.

monitoring data from Student's private program to assist with the educational decisions, program and placement for Student. Parent signed and returned the forms the same day.<sup>38</sup>

36. On July 15, 2020, Psychologist prepared Student's psychoeducational evaluation report based on the evaluations that took place between June 25, 2020 and July 8, 2020. Student's cognitive assessment results revealed that Student's cognitive abilities were in the delayed range and Psychologist prepared recommendations for the IEP team. On July 15, 2020, Psychologist also did an in-person observation of Student as part of the psychoeducational evaluation and prepared a report for the observation as well.<sup>39</sup>
37. On July 16, 2020, Speech-Language Pathologist prepared a report on Student's speech language assessment, which included implications for Student's learning.<sup>40</sup>
38. On July 16, 2020, an eligibility meeting was held for Student, during which the results of Student's assessments were discussed, and Student was determined to be eligible for special education services under the eligibility category of \_\_\_\_.<sup>41</sup> Parent was present at that eligibility meeting.<sup>42</sup>
39. On July 19, 2020, Parent signed a Consent for Initial Provision of Special Education and Related Services, which was received by Home School on July 21, 2020.<sup>43</sup>
40. Home School repeatedly requested Parent fill out the enrollment form for Student to

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<sup>38</sup> Testimony of SSC, Tr.V3, 486:16-487:20; R-Ex.34, p.160-162.

<sup>39</sup> P-Ex.2, p.055-059, 066, R-Ex.23, p.122-126, R-Ex.24, p.127.

<sup>40</sup> P-Ex.2, p.060-061, R-Ex.25, p.128.

<sup>41</sup> Testimony of SPED, Tr.V2, 278:8-281:5; Testimony of SSC, Tr.V3, 489:18-25; R-Ex.14, p.029.

<sup>42</sup> See Testimony of SSC, Tr.V3, 490:9-14.

<sup>43</sup> Testimony of SSC, Tr.V2, 491:21-492:14; R-Ex.16, p.031.

obtain Student's information to put into the Hawai'i DOE computer system.<sup>44</sup> Parent never sent Home School a completed enrollment form for Student.<sup>45</sup>

41. On July 23, 2020, SPED called and emailed Parent to set up Student's IEP meeting for July 30, 2020 at 2:30 p.m.<sup>46</sup>

42. SPED followed up with Parent about the proposed July 30, 2020 meeting to develop Student's IEP with an email sent on July 27, 2020.<sup>47</sup>

43. Parent received the emails from SPED but did not reply. Parent forwarded the July 27, 2020 email to Parent's attorney, asking if Parent needed to respond to the email.<sup>48</sup>

44. Parent did not respond to the emails from SPED and Parent did not attend the IEP meeting on July 30, 2020 for Student. The Home School IEP team members were present for the virtual IEP meeting but did not commence with the meeting due to Parent not being present.<sup>49</sup>

45. At 3:19 p.m. on July 31, 2020, Parent informed Home School that Parent "need[ed] more notice to schedule an IEP meeting than 1 day." Parent also informed Home School that Parent wanted the family's attorney to be present at meetings. Parent informed Home School of three (3) dates in late August when the family's attorney would be available for an IEP meeting.<sup>50</sup>

46. Parent enrolled Student at Private School on August 17, 2020 and signed an enrollment

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<sup>44</sup> Testimony of Parent, Tr.V2, 214:9-217:22; Testimony of SSC, Tr.V3, 474:12-19, 475:4-476:16, 491:8-13; R-Ex.29, p.133-149, R-Ex.30, p.154-155, R-Ex.35, p.163, R-Ex.38, p.169.

<sup>45</sup> Testimony of Parent, Tr.V2, 218:2-15; Testimony of SSC, Tr.V3, 474:17-19.

<sup>46</sup> Testimony of SPED, Tr.V2, 282:14-283:19; R-Ex.39, p.170.

<sup>47</sup> Testimony of SPED, Tr.V2, 286:22-287:13; R-Ex.40, p.171.

<sup>48</sup> Testimony of Parent, Tr.V2, 232:21-233:19; R-Ex.41, p.172.

<sup>49</sup> Testimony of SPED, Tr.V2, 287:2-289: 19; Testimony of SSC, Tr.V3, 494:17-495:13.

<sup>50</sup> Testimony of Parent, Tr.V2, 238:4-239:5; R-Ex.42, p.173.

contract for Student on that same date.<sup>51</sup>

47. Parent enrolled Student at Private School because a spot had become available, Student's schedule at Clinic had changed, and Parent had been informed that Parent would have to return to work. Based on Parent's work schedule, Parent would not be available to pick Student up from Clinic on some days, so Parent decided to send Student to Private School because Student's sibling was also attending Private School and the schedule was better for Parent's work schedule.<sup>52</sup>

48. Parent received a call that the spot at Private School was available and immediately took it to prevent getting stuck with no transportation for Student from Clinic.<sup>53</sup>

49. Parent did not inform Home School or any DOE school that Parent had enrolled Student at Private School.<sup>54</sup>

50. On August 26, 2020, SPED sent Parent conference announcement for Student's IEP meeting scheduled for August 27, 2020; and a draft IEP for Student, which contained information from the assessments for Student, reported concerns from Parent, notes or any information gained at previous meetings for Student, as well as the VB-MAPP completed by Clinic. The draft IEP also included goals and objectives for the identified needs of Student based on the assessments.<sup>55</sup>

51. At 10:00 a.m. on August 27, 2020, Parent emailed a list of parent concerns to be discussed at Student's IEP meeting to Principal. In this list, Parent indicated that Parent "want[s] the team to consider [Private School] as [Student's] program" and "[Private

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<sup>51</sup> Testimony of Private School Director, Tr.V1, 30:17-25, 46:22-47:2; P-Ex.3, p.113-114.

<sup>52</sup> Testimony of Parent, Tr.V2, 195:21-196:12.

<sup>53</sup> Testimony of Parent, Tr.V2, 196:22-197:2.

<sup>54</sup> Testimony of SPED, Tr.V3, 353:5-8.

<sup>55</sup> Testimony of SPED, Tr.V2, 290:3-293:13; R-Ex.45, p.198-208.

School] uses all supports [Student] needs to help [Student] during the day.” Parent did not list the supports that Private School provided to Student.<sup>56</sup>

52. Some of Parent’s concerns included [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>57</sup>

#### Student’s IEP meeting

53. Student’s IEP meeting was held on August 27, 2020 at around 10:00 a.m. Present at the IEP meeting were Parent, SPED, SSC, OT, Special Education Teacher 2, Principal, Speech-Language Pathologist, General Education Teacher and District BCBA.<sup>58</sup>

54. The August 27, 2020 IEP meeting was held virtually and was approximately three and a half (3.5) hours.<sup>59</sup>

55. Unbeknownst to the Home School IEP team members, Parent recorded the IEP meeting.<sup>60</sup>

56. The recording of the August 27, 2020 IEP meeting was not received as evidence in this case.<sup>61</sup>

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<sup>56</sup> Testimony of SPED, Tr.V2, 296:3-9; P-Ex.2, p.089, R-Ex.47, p.210.

<sup>57</sup> P-Ex.2, p.089.

<sup>58</sup> Testimony of Parent, Tr.V2, 172:19-21, 179:6-16; Testimony of SPED, Tr.V2, 295:11-16; *see* R-Ex.18, p.054.

<sup>59</sup> Testimony of SPED, Tr.V2, 297:1-6.

<sup>60</sup> Testimony of Parent, Tr.V2, 173:23-24, 179:17-22, 251:7-252:1; Testimony of SPED, Tr.V3, 391:12-393:4.

<sup>61</sup> This finding is to note that Petitioners’ attempted to use the IEP meeting recording as impeachment evidence for cross-examination of SPED and was proposed by Petitioners’ to be used as rebuttal evidence; however, the IEP meeting recording was not provided to Respondents by the disclosure deadline of November 30, 2020, and Respondents objected to



57. At the August 27, 2020 IEP meeting, Home School IEP team members provided explanations to Parent of terms, vocabulary, and acronyms being used during the meeting; being that this was Parent's first IEP meeting. Parent was also asked for input throughout the discussions in the IEP meeting.<sup>62</sup>
58. During the August 27, 2020 IEP meeting, the IEP team members discussed the special factors to be considered in developing Student's IEP and then went on to discuss the present levels of Student's educational performance and the goals and objectives for Student's IEP.<sup>63</sup>
59. During that portion of the discussion, input was received regarding the parent concerns that were emailed to the team shortly before the meeting, as well as information from the professionals who completed Student's eligibility assessments, and the information provided to the IEP team from Clinic. Parent's concerns regarding safety of Student were discussed throughout the meeting.<sup>64</sup>
60. After completing the goals and objectives, the IEP team moved to a discussion regarding Student's eligibility for ESY. At the time of the IEP meeting, the team did not have any data regarding Student's performance before and after extended breaks, due to Student's not having extended breaks from Clinic, other than the COVID-19 shutdown. No data had been collected from Clinic after the COVID-19 shutdown to measure Student's

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the recording being used at all in the proceedings. Based on the objection of Respondents and pursuant to the nature of the rule set forth in H.A.R. §8-60-66(a)(3), this Hearings Officer did not allow Petitioners to use the IEP meeting recording as impeachment or rebuttal evidence. See Tr.V3, 395:17-396:3, 440:4-446:25.

<sup>62</sup> Testimony of SPED, Tr.V2, 297:9-20.

<sup>63</sup> Testimony of SPED, Tr.V2, 297:7-303:4.

<sup>64</sup> Testimony of SPED, Tr.V2, 297:21-303:4; *see also* R-Ex.19, p.055-057.

regression.<sup>65</sup>

61. During this discussion, Parent's input was received about Student's regression at home during the shutdown of Clinic during the COVID-19 pandemic. Parent was able to provide two examples of ways that Student had regressed during the shutdown: that Student no longer used a fork to eat, and no longer responded to Student's name when called. SPED explained that due to Student not having mastered these skills to show regression or loss of the skills, the IEP team was not able to base any decisions for ESY on those examples.<sup>66</sup>

62. At the IEP meeting, the team believed that Student would likely be eligible for ESY services, so the team decided to take data during the fall and winter breaks and meet again after the breaks to discuss Student's ESY.<sup>67</sup>

63. The IEP team also discussed supplementary aids and services to be provided to Student in Student's IEP.<sup>68</sup> The supplementary aids and services discussed were: Individual Instructional Support (hereinafter "IIS"); a sensory support plan; a visual schedule; and visual supports. The team also attempted to discuss the supports that Student was receiving at Private School, however Parent was unable to provide much information on those supports.<sup>69</sup>

64. The team discussed the possibility of providing ABA services to Student, since Student had been receiving ABA services at Clinic, however the team decided to conduct a functional behavior assessment (hereinafter "FBA") with Student after Student began

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<sup>65</sup> Testimony of SPED, Tr.V2, 307:16-20, 308:10-310:4.

<sup>66</sup> Testimony of SPED, Tr.V2, 307:20-308:9, 313:12-314:17.

<sup>67</sup> Testimony of SPED, Tr.V2, 308:15-309:13; R-Ex.19, p.055-057.

<sup>68</sup> Testimony of SPED, Tr.V2, 320:3-13

<sup>69</sup> Testimony of SPED, Tr.V2, 320:7-339:1, Tr.V3, 346:18-355:5.

attending Home School and would revisit the discussion upon completion of the FBA.<sup>70</sup>

65. An FBA is an assessment that examines a student's maladaptive (problem) behaviors and attempts to determine the functions of the behaviors. The FBA also identifies the antecedents and consequences of the behavior to develop a plan to eliminate the behaviors. The FBA can result in the development of a behavior intervention plan, which is a specific plan developed by a BCBA to provide ABA services to a student using a registered behavior technician (hereinafter "RBT").<sup>71</sup>

66. FBAs are best conducted in the most natural setting for the student in which the problem behavior may occur; for example, an FBA for the DOE would ideally be conducted in a classroom environment with other students present.<sup>72</sup>

67. While Clinic had conducted an FBA on Student, the IEP team did not believe that the FBA would provide the necessary information for the team due to Clinic being a clinical setting and not an educational setting like Home School.<sup>73</sup>

68. The reasons for the FBA being conducted prior to providing Student with ABA services were explained to Parent by District BCBA and OT. Upon hearing their explanation, Parent agreed to the FBA and to sign the necessary paperwork to get the FBA for Student once Student started school.<sup>74</sup>

69. The IEP team determined that one of the supplementary aids and supports that would be

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<sup>70</sup> Testimony of Parent, Tr.V2, 174:3-7, 175:23-176:4, 247:11-248:6; Testimony of SPED, Tr.V2, 326:3-12.

<sup>71</sup> Testimony of Private School Director, Tr.V1, 70:1-9, 117:21-118:16; Testimony of SPED, Tr.V2, 327:1-331:23.

<sup>72</sup> Testimony of Private School Director, Tr.V1, 133:7-23; Testimony of SPED, Tr.V2, 327:14-24, 328:7-329:5, Tr.V3, 381:24-382:2, 420:1-13.

<sup>73</sup> Testimony of SPED, Tr.V2, 332:18-333:9.

<sup>74</sup> Testimony of Parent, Tr.V2, 247:15-248:6; Testimony of SPED, Tr.V2, 333:10-334:17, Tr.V3, 413:11-16.

provided to Student was a one-to-one adult support in the form of an IIS, until the team was able to discuss the completed FBA. The purpose of assigning Student an IIS was to address Parent's concerns of Student's safety and attempts to elope.<sup>75</sup>

70. SPED also explained to Parent during the IEP meeting that another safety measure that Home School could implement would be to install gates on the classroom doors for Student's class, as well as having Student's teachers and staff all be trained in safety restraint techniques.<sup>76</sup>

71. The IEP team then discussed the provision of a sensory support plan for Student as a supplementary aid and support. This sensory support plan was described as a plan to be designed by OT that will be used to ensure that Student's sensory needs are met throughout the day, across all settings and areas of the campus.<sup>77</sup>

72. Student's supplementary aids and supports also included a visual schedule and visual supports. These terms were discussed as being a depiction of Student's schedule or daily routine for school, pictures, and other visual aids to support Student during the school day.<sup>78</sup>

73. SPED explained that the terms visual schedule and visual supports were used to provide flexibility for SPED and other related services providers to try different supports to determine what worked best for Student.<sup>79</sup>

74. During the IEP meeting, Parent had raised the suggestion of using sign language for Student, and Speech-Language Pathologist agreed to try to incorporate that skill into

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<sup>75</sup> Testimony of SPED, Tr.V2, 322:4-19, 325:6-10, Tr.V3, 346:18-348:12, 350:22-351:14.

<sup>76</sup> Testimony of SPED, Tr.V3, 347:17-22, 349:21-350:21, 434:22-436:5.

<sup>77</sup> Testimony of SPED, Tr.V2, 334:18-336:4; R-Ex.18, p.051.

<sup>78</sup> Testimony of SPED, Tr.V2, 336:5-339:1, Tr.V3, 428:25-430:20; R-Ex.18, p.051.

<sup>79</sup> Testimony of SPED, Tr.V3, 429:10-430:20.

Student's therapy to see if it would be beneficial.<sup>80</sup>

75. The IEP team asked Parent during the IEP meeting about the specific supports that Private School provided to Student. Parent was unable to list or describe the supports that were provided by Private School.<sup>81</sup>

76. The IEP team then moved on to discuss the least restrictive environment, or educational placement, for Student.<sup>82</sup>

77. During the IEP meeting, SPED had a chart that was provided to SPED by the DOE that depicted the least restrictive environment continuum and the factors that need to be discussed during the educational placement portion of the IEP meeting.<sup>83</sup>

78. At the time of the IEP meeting, Student was working on multiple skills that are prerequisite skills for a general education \_\_\_ setting, such as head-banging and other self-injurious behaviors; requesting items; responding to speakers; potty training; and eating and being able to feed [Student's] self.<sup>84</sup>

79. The IEP team also discussed Student's maladaptive behaviors and their potential effect on students in a general education \_\_\_ classroom, as well as Student's lack of basic skills in the areas of health and safety.<sup>85</sup>

80. At the conclusion of the placement discussion, the IEP team determined that Student would be placed in a fully self-contained special education \_\_\_ classroom. A fully self-contained \_\_\_ classroom describes a setting where students receive all services inside the

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<sup>80</sup> Testimony of SPED, Tr.V3, 352:2-18.

<sup>81</sup> Testimony of SPED, Tr.V3, 352:20-353:18.

<sup>82</sup> Testimony of SPED, Tr.V3, 355:20-356:3, 359:6-377:7.

<sup>83</sup> Testimony of SPED, Tr.V3, 366:9-367:10, 406:2-407:1, 408:15-409:19.

<sup>84</sup> Testimony of SPED, Tr.V3, 359:8-24; *see also* Testimony of Private School Director, Tr.V1, 35:2-44:15; P-Ex.3, p.118-119; R-Ex.21, p.085-117.

<sup>85</sup> Testimony of SPED, Tr.V3, 360:6-363:3.

classroom and does not include non-disabled peers within the classroom.<sup>86</sup>

81. During the IEP meeting, SPED explained to Parent that while Student would not be placed with non-disabled peers, there were opportunities for Student to interact with non-disabled peers and that the IEP team wanted to observe Student in school and possibly adjust Student's IEP as they are able to see Student adjust to the school environment.<sup>87</sup>

82. During the placement discussion, Parent was asked if Parent had any questions or wanted to provide input for the team to discuss. Parent did not provide input or have any questions about Student's placement, nor did Parent inform the IEP team that Parent was rejecting Student's educational placement.<sup>88</sup>

83. Upon the completion of the discussion of Student's IEP, Principal then provided Parent with Home School's offer of FAPE, which included the supplemental aids and supports, and educational placement discussed above.<sup>89</sup>

84. At no time during the IEP meeting did Parent inform the IEP team that Parent was rejecting the IEP and intended to keep Student at Private School at the DOE's expense.<sup>90</sup>

85. At the IEP meeting, Parent accepted Principal's offer of FAPE and the IEP team determined Student's start date to be September 14, 2020. The team also discussed with Parent what Student would need for school, such as transportation and school supplies.<sup>91</sup>

Student's IEP-08/27/2020 and PWN-08/31/2020

86. Based on the IEP team meeting on August 27, 2020, a written IEP was developed for

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<sup>86</sup> Testimony of SPED, Tr.V3, 368:15-370:1.

<sup>87</sup> Testimony of SPED, Tr.V3, 372:17-373:12.

<sup>88</sup> Testimony of SPED, Tr.V3, 376:17-377:7.

<sup>89</sup> Testimony of SPED, Tr.V3, 377:20-378:5.

<sup>90</sup> Testimony of SPED, Tr.V3, 377:4-17.

<sup>91</sup> Testimony of SPED, Tr.V3, 377:23-379:4, 426:18-428:10; *see also* R-Ex.18, p.051.

Student (hereinafter “IEP-08/27/2020”).<sup>92</sup>

87. Student’s IEP-08/27/2020 contained a summary of the discussion held at the IEP meeting on August 27, 2020 regarding Student’s background information, present levels of educational performance, special factors to consider for developing Student’s IEP, and Parent’s concerns.<sup>93</sup>

88. Student’s IEP-08/27/2020 contained nine (9) goals and objectives for Student in the areas of physical well-being, health, and motor development; social and emotional development; approaches to learning; cognition and general knowledge; and English language arts and literacy.<sup>94</sup>

89. Student’s IEP-08/27/2020 indicated that Student does not meet the standard for ESY services.<sup>95</sup>

90. Student’s special education and related services from the projected dates of September 14, 2020 to August 27, 2021 included: transportation daily; special education for one thousand seven hundred fifty minutes (1750) per quarter; speech/language therapy for four hundred sixty (460) minutes per quarter; occupational therapy services for sixty (60) minutes per quarter; and speech/language therapy for sixty (60) minutes per year. Each of those items were clarified further in Student’s IEP-08/27/2020.<sup>96</sup>

91. Student’s IEP-08/27/2020 also contained the following supplementary aids and services to be provided daily to Student: IIS; sensory support plan; visual schedule; and visual

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<sup>92</sup> P-Ex.1, p.001-020, R-Ex.18, p.035-054.

<sup>93</sup> P-Ex.1, p.002-006, R-Ex.18, p.036-040.

<sup>94</sup> P-Ex.1, p.008-016, R-Ex.18, p.042-050.

<sup>95</sup> P-Ex.1, p.017, R-Ex.18, p.051.

<sup>96</sup> P-Ex.1, p.017, R-Ex.18, p.051.

supports.<sup>97</sup>

92. IIS was described further in Student's IEP-08/27/2020 as "[t]his [one-to-one] adult support will be primarily used to ensure [Student's] safety and support [Student] with visual aids, prompts and using [Student's] visual schedule."<sup>98</sup>

93. Sensory support plan was described in Student's IEP-08/27/2020 as "[t]his plan will be designed by the occupational therapist and will be used daily and throughout the day to ensure that sensory needs are met throughout the school day and across all settings and areas of the campus."<sup>99</sup>

94. The visual schedule was described as "[Student] will have a visual schedule to support [Student's] learning of the school routines and aid in regulation."<sup>100</sup>

95. The term visual supports was clarified as "[v]isual supports will be used throughout the school day and paired with verbal prompts to give the student a multisensory means of receiving commands and understanding expectations."<sup>101</sup>

96. Student's educational placement in the IEP-08/27/2020 was described as follows:  
"[Student] will attend a special education [ ] program at [Student's] home school. [Student] will not participate with [Student's] peers when receiving 1:1 speech and language therapy, occupational therapy, skills practice/acquisition or being assessed for the purpose of progress monitoring or program design."<sup>102</sup>

97. On August 31, 2020, a PWN was prepared based on the August 27, 2020 IEP meeting

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<sup>97</sup> P-Ex.1, p.017, R-Ex.18, p.051.

<sup>98</sup> P-Ex.1, p.017, R-Ex.18, p.051.

<sup>99</sup> P-Ex.1, p.017, R-Ex.18, p.051.

<sup>100</sup> P-Ex.1, p.017, R-Ex.18, p.051.

<sup>101</sup> P-Ex.1, p.018, R-Ex.18, p.052.

<sup>102</sup> P-Ex.1, p.019, R-Ex.18, p.053.



(hereinafter “PWN-08/31/2020”).<sup>103</sup>

98. The PWN-08/31/2020 repeated the special education and supplementary aids and supports that Student would get in the IEP-08/27/2020. The PWN-08/31/2020 also indicated that “[t]he team proposes to collect data before and after the fall and winter breaks and then meet as a team to review the data collected to determine frequency and duration of ESY.”<sup>104</sup>

99. Regarding Student’s placement, the PWN-08/31/2020 indicated that “[t]he team proposes placement in a special education [ ] classroom at [Student’s] home school as the least restrictive environment where [Student] will participate with [Student’s] class unless [Student] is receiving 1:1 speech and language therapy, occupational therapy, skills practice/acquisition or being assessed for the purpose of progress monitoring or program design.” The PWN-08/31/2020 further indicated that “[d]ue to [Student’s] limited communication skills, safety concerns and academic needs a [ ] special education setting was proposed.”<sup>105</sup>

#### Post-IEP meeting

100. On August 31, 2020, SSC sent Parent a meeting notice and other documents regarding the FBA that the IEP team had agreed to be conducted with Student.<sup>106</sup>

101. On September 1, 2020, SPED emailed Parent Student’s IEP-08/27/2020 and PWN-08/31/2020. In that email, SPED notified Parent that Private School had been contacted to set up a transition meeting and that a transportation request has just been put in for

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<sup>103</sup> P-Ex.1, p.021-022, R-Ex.19, p.055-056.

<sup>104</sup> P-Ex.1, p.021, R-Ex.19, p.055.

<sup>105</sup> P-Ex.1, p.021, R-Ex.19, p.055.

<sup>106</sup> Testimony of SSC, Tr.V3, 496:17-497:17; R-Ex.50, p.220-228.

Student to start on September 14, 2020.<sup>107</sup>

102. SSC attempted to set up the transition meeting with Private School Director and Parent and the other IEP team members. The transition plan meeting was confirmed for September 8, 2020 at 9:30 a.m.<sup>108</sup>

103. On September 8, 2020, Private School Director emailed SSC and informed SSC that Private School Director was unable to attend the transition plan meeting. In that email, Private School Director also indicated that Private School Director reviewed Student's IEP-08/27/2020 and did not believe that a successful transition from Private School to Home School was possible due to Student having an ABA program at Private School. Private School Director indicated that Student's IEP-08/27/2020 was missing significant aspects of the program, including an RBT, a BCBA and behavioral interventions.<sup>109</sup>

104. On September 8, 2020, SSC responded to Private School Director to ask for another possible date to meet. SSC noted that "[i]n order for the DOE to provide a successful transition, we need to collaborate with [Student's] current school/program, and team members."<sup>110</sup>

105. On September 9, 2020, SSC inquired with Private School Director about DOE personnel going to Private School to observe Student's program, environment, and supports.<sup>111</sup>

106. Private School Director informed SSC that it would be very difficult to coordinate such a visit to observe Student due to the number of authorizations that would need to be

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<sup>107</sup> R-Ex.51, p.229-252.

<sup>108</sup> Testimony of SSC, Tr.V3, 497:18-499:8; P-Ex.2, p.103, R-Ex.53, p.255-257.

<sup>109</sup> Testimony of Private School Director, Tr.V1, 125:24-128:3; P-Ex.2, p.103, R-Ex.53, p.255-257.

<sup>110</sup> P-Ex.2, p.103, R-Ex.53, p.255-257.

<sup>111</sup> P-Ex.2, p.103, R-Ex.53, p.255-257.

obtained from other students' parents.<sup>112</sup>

107. Prior to September 11, 2020, SPED prepared the \_\_\_ special education classroom for Student's attendance. SPED placed Student's area in the back of the classroom, furthest away from the door due to safety reasons. SPED also had gates installed on the classroom doors as a deterrent for Student's elopement.<sup>113</sup>

108. On September 11, 2020, SPED emailed Parent to remind Parent of the supplies that Student would need on Monday, September 14, 2020 and to see if Parent had any questions or concerns.<sup>114</sup>

109. For the first time on September 13, 2020, Parent informed Home School that Student would not be attending Home School and that Parent disagreed with the IEP offer.<sup>115</sup>

#### Private School

110. Private School is a for-profit school that is based largely on an ABA-VB program developed by Private School Director.<sup>116</sup>

111. Private School does not have any non-disabled students enrolled and each student at Private School has their own assigned RBT.<sup>117</sup>

112. Private School's 2020-2021 school year runs from August 17, 2020 to July 28, 2021 with one (1) week breaks in the fall and spring, and a two (2) week break in the winter. These breaks run at around the same times as the fall, winter, and spring breaks of the DOE

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<sup>112</sup> Testimony of Private School Director, Tr.V1, 130:14-131:12; P-Ex.2, p.103, R-Ex.53, p.255-257.

<sup>113</sup> Testimony of SPED, Tr.V3, 388:13-389:14; *see also* R-Ex.58, p.263, R-Ex.59, p.264.

<sup>114</sup> R-Ex.54, p.258.

<sup>115</sup> R-Ex.54, p.258.

<sup>116</sup> Testimony of Private School Director, Tr.V1, 26:14-28:6, 44:16-24, 45:15-19, 48:3-25.

<sup>117</sup> Testimony of Private School Director, Tr.V1, 59:7-60:11.

public schools.<sup>118</sup>

113. Parent requested that Student have shorter breaks or services while attending Private School; however as of the Hearing date, Parent still needed to meet with Private School Director to determine any adjustments to breaks that Student would receive.<sup>119</sup>

114. Student began attending Private School on August 17, 2020.<sup>120</sup>

115. Private School Director did not conduct a VB-MAPP assessment with Student until September 1, 2020, due to Student needing some time to acclimate being in a school environment.<sup>121</sup>

116. Private School did not use the April 2020 VB-MAPP from Clinic due to Clinic being a different environment from Private School. Clinic's VB-MAPP assessment results would not provide accurate data for Private School's use due to the clinical setting of Clinic.<sup>122</sup>

117. The best practice in performing assessments like the VB-MAPP is to conduct it in the environment to which it will be applied because some children exhibit the same behaviors across environments, but others do not.<sup>123</sup>

118. Student's September 1, 2020 VB-MAPP assessment results indicated that: Student was a level \_\_\_ learner [REDACTED], meaning that Student lacked many basic skills that typical non-disabled children would have at Student's age.<sup>124</sup>

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<sup>118</sup> Testimony of Private School Director, Tr.V1, 70:25-71:5, 76:14-17, 76:24-77:25.

<sup>119</sup> Testimony of Parent, Tr.V2, 190:5-191:13.

<sup>120</sup> Testimony of Parent, Tr.V2, 191:14-19; Testimony of Private School Director, Tr.V1, 76:18-22.

<sup>121</sup> Testimony of Private School Director, Tr.V1, 30:20-31:19; P-Ex.3, p.116-122.

<sup>122</sup> Testimony of Private School Director, Tr.V1, 31:20-32:6, 111:5-19.

<sup>123</sup> Testimony of Private School Director, Tr.V1, 111:20-112:25, 140:1-10.

<sup>124</sup> Testimony of Private School Director, Tr.V1, 32:22-34:1; P-Ex.3, p.118.

119. Student's overall VB-MAPP skills score was \_\_\_ out of a total of one hundred seventy (170) points. In the \_\_\_ categories of assessment, Student [REDACTED] demonstrated skills in \_\_\_ of them.<sup>125</sup>

120. The VB-MAPP barriers assessment scores the number of barriers that children have for learning, such as behavior problems, impaired social skills, articulation problems, obsessive-compulsive behavior, and failure to make eye contact. The higher a child scores on the VB-MAPP barriers assessment, the more difficulty the child has with learning.<sup>126</sup> Student's score on the VB-MAPP barriers assessment on September 1, 2020 was \_\_\_ out of a total possible \_\_\_ points.<sup>127</sup>

121. Based on Student's September 1, 2020 VB-MAPP results, an individualized applied behavior analysis educational program (hereinafter "IABAEP") was created for Student on September 4, 2020 (hereinafter "IABAEP-09/04/2020").<sup>128</sup>

122. Student's IABAEP-09/04/2020 has \_\_\_ target behavior objectives in the following areas: Mand (asking or protesting); Tact (naming, expressive labeling); Listener Responding; Visual Perceptual Skills & Matching-to-Sample; Independent Play; Social Behavior and Play; Motor Imitation; Group (activities); and Spontaneous Vocal.<sup>129</sup>

123. Private School did not conduct an FBA on Student because Student did not display maladaptive behaviors that the personnel at Private School could not address using ABA techniques.<sup>130</sup>

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<sup>125</sup> Testimony of Private School Director, Tr.V1, 35:8-40:24; P-Ex.3, p.116, 121.

<sup>126</sup> Testimony of Private School Director, Tr.V1, 34:2-12, 138:4-139:14.

<sup>127</sup> Testimony of Private School Director, Tr.V1, 41:15-42:2; P-Ex.3, p.117, 122.

<sup>128</sup> P-Ex.3, p.115-123.

<sup>129</sup> P-Ex.3, p.118-119.

<sup>130</sup> Testimony of Private School Director, Tr.V1, 70:1-14.

124. Private School did not develop a behavioral intervention plan or behavioral support plan for Student as it was not deemed to be necessary for Student to access Student's education at Private School.<sup>131</sup>

125. Private School is an ABA-based program, so all of Student's teachers and assistants are either RBTs or BCBAs. The RBTs at Private School are overseen by a BCBA.<sup>132</sup>

126. Parent signed an enrollment contract on August 17, 2020, obligating Parent to pay Two Hundred Nineteen Thousand Two Hundred Twenty-Six Dollars and Eighty Cents (\$219,226.80) for Student's attendance at Private School from August 17, 2020 to July 28, 2021.<sup>133</sup>

127. The enrollment contract includes the following: Monthly Tuition; Speech Language Therapy for two thousand four hundred thirty-six (2436) minutes per school year; BCBA consultation for three thousand six hundred fifty-four (3654) minutes per school year; RBT for six (6) hours per school day; Special Education Consultation for a minimum of four thousand eight hundred seventy-two (4872) minutes; Mandatory RBT Supervision monthly; a yearly Distance Bridge Program Assessment and Supplies; Assistive Technologies; an administrative fee of fifteen (15) percent; and State of Hawai'i general excise tax.<sup>134</sup>

128. Some of the assistive technologies used for Student at Private School include different kinds of visual aids. Private School has an iPad that can be used for Student's program but has not been incorporated into Student's program due to Student still developing

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<sup>131</sup> Testimony of Private School Director, Tr.V1, 118:17-119:19.

<sup>132</sup> Testimony of Private School Director, Tr.V1, 53:7-20, 60:3-11, 119:20-120:9.

<sup>133</sup> P-Ex.3, p.113-114.

<sup>134</sup> *See generally* Testimony of Private School Director, Tr.V1, 46:22-60:15; P-Ex.3, p.113-114.

necessary skills.<sup>135</sup>

129. Private School developed the fees listed in the enrollment contract based on other facilities that provide similar services in the State of Hawai‘i and based on a pilot program [REDACTED].<sup>136</sup>

130. Private School’s program usually includes Reverse Inclusion, which is a program where non-disabled students that are distance learning, home schooled, or otherwise available during the school day, come to Private School to interact with the students at Private School.<sup>137</sup>

131. At the time of the development of Student’s program at Private School, Student did not qualify for the Reverse Inclusion program due to Student not having developed necessary skills with an adult that could be generalized to peers. Student needed exclusively one-on-one support from an adult to develop those skills.<sup>138</sup>

132. As of December 7, 2020, Parent had only paid One Hundred Dollars (\$100) toward Student’s enrollment contract fees for the 2020-2021 school year at Private School.<sup>139</sup>

## V. CONCLUSIONS OF LAW

### IDEA framework

The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.”<sup>140</sup> A FAPE includes both special education and

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<sup>135</sup> Testimony of Private School Director, Tr.V1, 55:19-56:4.

<sup>136</sup> Testimony of Private School Director, Tr.V1, 48:3-21, 60:16-61:25, 87:25-93:13; P-Ex.3, p.126.

<sup>137</sup> Testimony of Private School Director, Tr.V1, 47:10-16.

<sup>138</sup> Testimony of Private School Director, Tr.V1, 47:6-9, 17-21, 124:12-125:12.

<sup>139</sup> Testimony of Private School Director, Tr.V1, 62:22-63:4; P-Ex.3, p.125.

<sup>140</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91, 102 S.Ct. 3034, 3037-3043 (1982); *Hinson v.*

related services.<sup>141</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>142</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>143</sup>

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”<sup>144</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>145</sup> The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.<sup>146</sup>

In determining whether a student has been denied a FAPE, the initial inquiry is whether the educational agency complied with the procedures set forth in the IDEA.<sup>147</sup> Procedural violations do not automatically result in a denial of FAPE, however, as a secondary determination must be made as to whether the violation resulted in a loss of educational opportunity, significantly infringed on parental participation or resulted in a deprivation of educational benefits.<sup>148</sup>

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*Merritt Educ. Ctr.*, 579 F.Supp.2d 89, 98 (D. D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)).

<sup>141</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>142</sup> *Id.*

<sup>143</sup> *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

<sup>144</sup> *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

<sup>145</sup> H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

<sup>146</sup> H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

<sup>147</sup> *Amanda J. ex rel. Annette J. v. Clark County School Dist.* 267 F.3d 877, 890 (9<sup>th</sup> Cir. 2001) (citing *Rowley*, 458 U.S. at 206-207, 102 S.Ct. at 3034).

<sup>148</sup> *Id.* at 892.



A. Respondents did not deny Student an IEP unless Parent formally enrolled Student at Home School.

Petitioners argue that Respondents denied Student an IEP unless Parent formally enrolled Student at Home School, which resulted in a denial of FAPE. However, the evidence presented at the Hearing shows that while Home School did repeatedly ask Parent to complete enrollment forms for Student, Home School proceeded with the process to evaluate Student, determine Student's eligibility, and attempted to schedule an initial IEP meeting to develop Student's IEP.

The State of Hawai'i Department of Education's IDEA procedures are codified in the Hawai'i Administrative Rules §8-60-1 *et seq.* These rules set forth the timelines by which the procedures for the initial request, evaluation, determination of eligibility and IEP meeting for students must follow. Hawai'i Administrative Rules §8-60-33(c)(1) provides that the initial evaluation for students shall be conducted within sixty (60) days of the receipt of parental consent for evaluation.<sup>149</sup> Hawai'i Administrative Rules §8-60-38(a)(1) provides that upon completion of the assessments and other evaluation measures, a group of qualified professionals and the parent shall meet to determine if student is a student with a disability.<sup>150</sup> Finally, Hawai'i Administrative Rules §8-60-47(c)(1) provides that within fifteen (15) days of receipt of parental consent for services, the DOE shall ensure that an IEP meeting is conducted to develop the student's IEP.<sup>151</sup>

After Parent made an initial request for evaluation of Student, Home School scheduled the SST meeting to determine what assessments would be necessary for Student's evaluation.<sup>152</sup> Student's evaluation for eligibility was conducted within sixty (60) days of Parent signing the

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<sup>149</sup> H.A.R. §8-60-33(c)(1); 20 U.S.C. §1414(a)(1)(C)(1); 34 C.F.R. §300.301(c)(1).

<sup>150</sup> H.A.R. §8-60-38(a)(1); 20 U.S.C. §1414(b)(4)(A); 34 C.F.R. §300.306(a)(1).

<sup>151</sup> H.A.R. §8-60-47(c)(1); *see also* 34 C.F.R. §300.323(c)(1).

<sup>152</sup> FOF 19-20.

Consent for Evaluation forms on June 3, 2020.<sup>153</sup> Student was determined to be eligible for special education services on July 16, 2020.<sup>154</sup> On July 21, 2020, Home School received Parent's signed Consent for Initial Provision of Special Education and Related Services and attempted to schedule a meeting to develop Student's IEP within fifteen (15) days, on July 30, 2020.<sup>155</sup> Nothing in the record supports Petitioners' position that Respondents denied Student an IEP for failure to enroll in Home School.

Petitioners argue that by telling Parent that Home School needed Parent to complete enrollment forms before they could proceed with Student's IEP, that was an effective refusal to complete Student's IEP. This argument fails because despite the repeated requests by Home School for the enrollment forms and Parent's repeated refusal to complete the forms, Home School continued with the process of evaluating Student, determining Student's eligibility and attempting to develop an IEP for Student. While it is worth noting that a parent may have been confused by the statements by Home School and may not have kept up with communications from Home School, believing that their student was being refused an IEP, that is clearly not the case here. In this case, Parent was aware of the steps that Home School was taking in evaluating Student. Parent was present at the eligibility meeting.<sup>156</sup> Parent also received the emails to schedule the IEP meeting for Student but chose not to respond to Home School until after Student's proposed meeting date had passed.<sup>157</sup> Any argument that Parent was led to believe that Student was being refused an IEP for failure to enroll Student at Home School is not supported by the record in this case.

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<sup>153</sup> FOF 28, 34, 36-37.

<sup>154</sup> FOF 38.

<sup>155</sup> FOF 39, 41-42.

<sup>156</sup> FOF 38.

<sup>157</sup> FOF 43.

Petitioners further argue that Home School did not move forward with the IEP process for Student until after Parent filed the initial due process complaint in this case. The IDEA envisions situations where schools may commit some kind of procedural error in the development of a student's IEP, and one of the avenues for a parent to get the school to correct the error is by way of raising a complaint to the school district.<sup>158</sup> In these situations, the IDEA also allows for school districts to correct the error and make efforts to remedy the situation.<sup>159</sup> Here, even if it appeared that Home School originally believed enrollment was necessary before proceeding with an IEP for Student; Home School's attempts after the fact to proceed forward with the IEP process in conducting the evaluation, eligibility meeting, and scheduling the IEP meeting for Student rendered any procedural error that Home School may have committed a harmless error, which does not rise to the level of a denial of FAPE.

B. Respondents did not deny Student a FAPE by failing to evaluate Student's behavioral needs prior to the August 27, 2020 IEP meeting.

Petitioners' second argument asserts that Respondents denied Student a FAPE by failing to evaluate Student's behavioral needs prior to the August 27, 2020 meeting, resulting in an FBA being ordered at the meeting. Petitioners allege that an FBA should have been conducted with Student prior to the IEP meeting on August 27, 2020 so that the IEP team would have been able to provide Student with necessary behavioral supports in Student's IEP.

A failure to properly evaluate a student in all areas of disability is a procedural violation that can result in a denial of FAPE.<sup>160</sup> For example, the failure of a school district to assess a

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<sup>158</sup> See *Kutasi v. Las Virgenes Unified School Dist.*, 494 F.3d 1162, 1166 (9<sup>th</sup> Cir. 2007) (citing 20 U.S.C. §1415(b)(6)(A)).

<sup>159</sup> *Id.* (citing 20 U.S.C. §1415(f)(1)(B)(i)(IV)).

<sup>160</sup> *Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d 1105, 1126 (9<sup>th</sup> Cir. 2016); see also e.g. *Butte School District No. 1 v. C.S., et al.*, 76 IDELR 204 (2020).

child who is suspected to be autistic with an assessment for autism has resulted in a denial of FAPE through a loss of educational opportunities and infringement of parental participation.<sup>161</sup>

In this case, however, Respondents conducted agreed-upon assessments for Student in all areas of suspected disability and was able to confirm Student's diagnosis of \_\_\_ and determined Student to be eligible for IDEA services under the category of \_\_\_.<sup>162</sup> No other areas of suspected disability was requested by Parent for assessment by Respondents prior to Student's eligibility or IEP meetings, and in fact, Parent wrote on the consent for the speech-language assessment form that Parent objected to any delay.<sup>163</sup>

The functional behavior assessment is a tool that is used to determine the functions of a child's behavior in the environment in which the behaviors occur. As stated by Private School Director, who is an expert in the development of ABA programs in the school setting, such assessments are ideally conducted in the environment in which it will be used since some children display behaviors across settings, but others do not.<sup>164</sup> In this case, Student had not been in a school setting until August 17, 2020, when Student began attending Private School.<sup>165</sup> Student had been receiving ABA services in a clinical setting at Clinic, which is not an accurate setting to obtain valuable information for Student's behaviors in an educational setting.<sup>166</sup> Private School had not yet even conducted any formal assessment on Student as of August 27, 2020 to allow Student to acclimate being in an educational environment.<sup>167</sup> Finally, the IEP team had not been made aware that Student had been attending Private School until Parent sent

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<sup>161</sup> *Timothy O.*, 822 F.3d at 1126.

<sup>162</sup> FOF 38.

<sup>163</sup> FOF 33.

<sup>164</sup> FOF 66, 117.

<sup>165</sup> FOF 11-12, 46.

<sup>166</sup> FOF 116-117.

<sup>167</sup> FOF 115.

an email to Home School at the start of the IEP meeting for Student on August 27, 2020.<sup>168</sup>

Respondents did not commit a procedural violation by failing to conduct an FBA prior to the August 27, 2020 IEP meeting when Student had not yet been in an educational environment from which accurate data could have been taken.

Additionally, even if Respondents' failure to conduct an FBA with Student prior to the IEP meeting on August 27, 2020 were a procedural violation, Petitioners have failed to prove that the violation rose to the level of a denial of FAPE due to a loss of educational opportunity, infringement on parental participation, or deprivation of educational benefits.

The IEP team had only learned of Student in May 2020 [REDACTED].<sup>169</sup> Student only recently qualified for IDEA services from the DOE and had not been in any educational setting as of that time.<sup>170</sup> Student did not have a previous IEP that needed to be updated or revised and Student had not yet been enrolled by Parent at Home School.<sup>171</sup> Petitioners have not pointed to any loss of educational opportunity or deprivation of educational benefits that Student had as a result of any procedural violation by Respondents.

Parent testified that Parent chose to send Student to Private School due to an immediate opening for Student at Private School in combination with Parent needing to return to work.<sup>172</sup> Student was still eligible for services from Clinic, however due to Parent's schedule, Parent chose to send Student to Private School.<sup>173</sup> Parent did not notify Respondents that Parent was even considering Private School for Student and had also previously ignored Home School's

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<sup>168</sup> FOF 49, 51.

<sup>169</sup> FOF 16-17.

<sup>170</sup> FOF 12, 16.

<sup>171</sup> FOF 40.

<sup>172</sup> FOF 47.

<sup>173</sup> FOF 12.

initial attempt to schedule Student's IEP meeting on July 30, 2020.<sup>174</sup> Parent's input was received and discussed at the August 27, 2020 IEP meeting and based on that discussion, the IEP team decided to conduct an FBA with Student; even though only one or two people from the Home School IEP team had even met Student and Student had not been in an educational environment for very long.<sup>175</sup> Petitioners have not pointed to any infringement of parental participation resulting from any alleged failure of Respondents to conduct an FBA prior to the IEP meeting on August 27, 2020.

C. Respondents did not deny Student a FAPE by failing to invite representatives to Student's IEP meeting on August 27, 2020.

Petitioners argue that representatives from Private School should have been invited to provide input at the IEP meeting on August 27, 2020. The undisputed testimony in this case is that Parent did not inform Home School until shortly before the August 27, 2020 IEP meeting that Student had been attending Private School since August 17, 2020.<sup>176</sup> Petitioners have not presented any evidence to dispute SPED's testimony that Home School believed that Student would be coming directly from Clinic and that the first time that Home School became aware was in the email sent to Home School prior to the IEP meeting. Petitioners have not produced any evidence that Private School Director was prevented from attending the IEP meeting on August 27, 2020.

Petitioners have failed to prove that Respondents knew or should have known that Student was attending Private School prior to immediately before the August 27, 2020 IEP meeting. Therefore, Petitioners have failed to prove that in failing to invite Private School

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<sup>174</sup> FOF 43-44.

<sup>175</sup> FOF 64-68.

<sup>176</sup> FOF 49, 51.

Director to the meeting, Respondents committed any procedural violation that resulted in a denial of FAPE.

D. Respondents did not deny Student a FAPE by failing to consider data from Student's private program or the nature and severity of Student's disability in denying Student ESY services.

Petitioners fourth argument is that Respondents failed to review data from Student's private programs or consider the nature and severity of Student's disability in determining whether Student qualified for ESY services. Here, Petitioners argue that instead of proposing to collect data over the fall and winter breaks to determine frequency and duration of ESY, Respondent should have allowed reviewed data from Student's private programs or discussing Student's disabling condition to determine the impact of an eight (8) week break during the summer intersession.

"The standard for evaluating IEPs, commonly called 'the snapshot rule,' is not retrospective."<sup>177</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>178</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>179</sup>

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.'<sup>180</sup> To qualify for extended school

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<sup>177</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>178</sup> *K.K.*, 2015 WL 4611947 \*16 (quoting *Adams v. Oregon*, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999)).

<sup>179</sup> *J.W.*, 626 F.3d at 439 (quoting *Adams v. Oregon*, 195 F.3d at 1149).

<sup>180</sup> *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9<sup>th</sup> Cir. 2008).

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.’”<sup>181</sup> The standard for ESY is higher than the standard for the provision of special education and related services due to the requirement to show that the benefits the student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during school breaks.<sup>182</sup>

As discussed *supra*, this Hearings Officer has concluded that Home School was not aware that Student was attending Private School until the time of the August 27, 2020 IEP meeting.<sup>183</sup> Student had also just begun Private School’s 2020-2021 school year and did not have an extended break scheduled until the fall break, which coincided with the DOE’s fall break.<sup>184</sup> Petitioners did not provide any data that Private School had collected data on Student’s performance before and after school breaks, and it is highly unlikely that any would exist, given that Student had not been attending Private School long enough to have such breaks.

On August 27, 2020, the IEP team did discuss the data that was provided by Clinic; however, prior to the COVID-19 shutdown, Student did not have any extended breaks in service

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<sup>181</sup> *N.B.*, 541 F.3d at 1211, quoting *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6<sup>th</sup> Cir.) quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6<sup>th</sup> Cir. 1990), cert. denied, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); see also *Dep’t of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 \*7 (holding that ESY is “educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information during a break in regularly scheduled classes, such as during the summer.”).

<sup>182</sup> *Id.*, quoting *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4<sup>th</sup> Cir. 2002); see also *K.K. ex rel. K.S.K. v. Hawai’i*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6<sup>th</sup> 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.”).

<sup>183</sup> FOF 49, 51.

<sup>184</sup> FOF 112, 114.



at Clinic.<sup>185</sup> Petitioners have not provided any evidence that Clinic had data to assist the IEP team in deciding ESY services for Student.

Further, the IEP team did discuss the nature and severity of Student's disability, which is why the IEP team decided to collect the necessary data over the shorter upcoming DOE school breaks (fall, winter) and meet again to qualify Student for ESY services.<sup>186</sup> As SPED indicated, the IEP team believed that Student would likely qualify for ESY services, but they needed more data to determine the frequency, duration, and scope of the services for Student.<sup>187</sup>

Finally, even if the IEP team's decision not to qualify Student for ESY services prior to obtaining the necessary data was a procedural violation, Petitioners' have failed to demonstrate a loss of educational opportunity or infringement of parental participation. The IEP team did consider Parent's input about Student's regression, such as Student's use of a fork and Student's responding to Student's own name.<sup>188</sup> Petitioners have not demonstrated that Parent was prevented from meaningfully participating in the IEP development process. Petitioners have also failed to prove any loss of educational opportunity,<sup>189</sup> when the IEP team clearly informed Parent and wrote in the PWN-08/31/2020 that the team intended to collect data regarding ESY and meet again to determine the frequency, duration, and scope of Student's ESY.<sup>190</sup>

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<sup>185</sup> FOF 11.

<sup>186</sup> FOF 60-62.

<sup>187</sup> FOF 62.

<sup>188</sup> FOF 61.

<sup>189</sup> This Hearings Officer notes that Petitioners set forth a curious argument that in order for the DOE to collect data for ESY, Parent would have to remove Student from Private School, have Student attend a DOE school, pay for private services and hope that the DOE would make Student eligible for ESY services in the future. This Hearings Officer notes that no evidence was presented that Student would be required to attend a DOE school for data to be collected or that there would be any kind of private services that Parent would need to pay for, so it is unclear on what Petitioners' argument is based. *See* Petitioners' Closing Brief, filed January 15, 2021, pages 9-10.

<sup>190</sup> FOF 62, 98.

E. Respondents did not deny Student a FAPE when Student's IEP-08/27/2020 fails to include assistive technology, behavioral interventions, and ABA under the supplementary aids and services

Petitioners turn to Student's IEP-08/27/2020's supplementary supports and services section and allege that Respondents denied Student a FAPE due to not including assistive technology, behavioral interventions, and ABA services. Petitioners argue specifically that since Student had behavioral issues that would impede Student's ability to access learning in the classroom, the IEP team should have agreed to provide ABA services in Student's IEP-08/27/2020. Petitioners also argue that Student's IEP-08/27/2020 does not include assistive technology that is similar to what Student receives at Private School to assist Student in communication.

1. Behavioral interventions and ABA services

In viewing the IEP-08/27/2020 through the 'snap-shot' rule, Petitioners' argument fails. First, it is undisputed that prior to August 17, 2020, ten (10) calendar days before the IEP meeting, Student had not been receiving services in an educational setting.<sup>191</sup> While Clinic was providing Student with ABA services, Private School Director confirmed that Clinic's data would not provide sufficient information to create a program for Student and that Private School conducted their own assessment of Student on September 1, 2020.<sup>192</sup> So, while Petitioners allege that Home School knew of Student's considerable behavioral needs, no evidence supports that Home School should have had knowledge of the maladaptive behaviors Student would have in an educational setting that would impede Student's ability to access Student's education. Indeed, Private School has not had to conduct an FBA for Student because Student has not had

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<sup>191</sup> FOF 46-49.

<sup>192</sup> FOF 115-116.

any problem behaviors at Private School that is interfering with Student's educational program.<sup>193</sup>

Parent did have specific concerns regarding Student's behaviors, with the primary one being Student's tendency and ability to elope.<sup>194</sup> The IEP team did address this potential behavior for Student in Student's IEP-08/27/2020, by providing Student with a one-to-one IIS and beginning the process for an FBA.<sup>195</sup> While Private School Director did opine that Student could not be transitioned successfully from an ABA to a non-ABA program, Private School Director did not offer any other specific behavioral interventions that Student's IEP-08/27/2020 was missing.<sup>196</sup> Petitioners also do not point to any behavioral interventions besides the IIS that was provided to Student that should have been included in Student's IEP-08/27/2020. At the time of the IEP meeting on August 27, 2020, the IEP team did not have any ability to assess Student in an educational setting to determine what behavioral interventions or supports Student would require to access Student's education. Based on this, the team set in motion the process for obtaining additional data to determine Student's specific needs and address them accordingly.

The cases cited by Petitioners are distinguishable from the facts of this case. In all of those cases, the students had been in educational settings and had demonstrated maladaptive or problem behaviors in the school setting and the IEP teams proposed to address them by creating a behavioral support plan that was not included in the students' IEPs.<sup>197</sup> Those courts found that

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<sup>193</sup> FOF 123.

<sup>194</sup> FOF 52, 69, 70, 79.

<sup>195</sup> FOF 64-69.

<sup>196</sup> FOF 103.

<sup>197</sup> See *Andrew F.*, 137 S.Ct. at 996-997 (where the student had been attending school from preschool through fourth grade and had IEPs every year to address the student's educational and functional needs); *E.H. v. Board of Educ. of Shenendehowa Central School Dist.*, 361

the various IEP teams' the students behavioral concerns needed to be addressed in the students' IEPs. The facts here are that Student had not been in any educational setting prior to August 17, 2020, and the IEP team was not aware that Student was attending Private School until August 27, 2020. The IEP team attempted to address Student's reported behaviors through Student's IEP-08/27/2020 and through a follow-up assessment. Petitioners have failed to prove that failing to include ABA services or other behavioral interventions in Student's IEP-08/27/2020 resulted in a denial of FAPE.

## 2. Assistive technology

Petitioners also allege that Student's IEP-08/27/2020 did not provide Student with sufficient assistive technology to support Student's communication needs. Student's IEP-08/27/2020 includes supplementary supports "visual schedule" and "visual supports."<sup>198</sup> SPED explained that these include various visual aids that SPED has available to use with Student to determine what would be most beneficial to Student. SPED noted that the terms that were used to describe the items in Student's IEP-08/27/2020 were to allow for flexibility to determine what supports worked best for Student.<sup>199</sup> This is similar to the term "assistive technology" that is used in Private School's enrollment contract.<sup>200</sup> Private School Director testified that the

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Fed.Appx.156, 159 (2<sup>nd</sup> Cir. 2009) (where student had been attending school for at least two years prior to the IEPs for which claims were examined); *Carrie I. ex rel. Greg I. v. Dept. of Educ., Hawaii*, 869 F.Supp.2d 1225, 1229 (D. Hawai'i 2012) (where student had been attending a 'private mental health treatment facility with a school component' for at least ten (10) years prior to the challenged IEP was prepared); *Department of Education v. L.S. by and through C.S.*, 2018 WL 1421752 (D. Hawai'i 2019) (where student had attended public school for at least two (2) years prior to the development of the challenged IEP); *J.L. v. Mercer Island School Dist.*, 592 F.3d 938 (9<sup>th</sup> Cir. 2010) (where student had been in school settings since the first grade and was challenging an IEP created for tenth grade).

<sup>198</sup> FOF 94-95.

<sup>199</sup> FOF 72.

<sup>200</sup> FOF 127.

assistive technology that is provided to Student includes visual aids and while Student may later have access to an iPad when it is appropriate, it is not currently in Student's program.<sup>201</sup>

Petitioners have not proven that Student's IEP-08/27/2020 does not provide sufficient assistive technology to support or address Student's needs in communication.

F. Respondents did not deny Student a FAPE by not discussing or considering the factors for determining the least restrictive environment for Student's educational placement

Petitioners argue that Respondents denied Student a FAPE by failing to discuss or consider the factors for determining Student's educational placement. Specifically, Petitioners' argument centers around the fact that the IEP team may not have gone specifically through each of the factors during the discussion of Student's least restrictive environment.<sup>202</sup>

The IDEA provides that "procedures to assure that, to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily..."<sup>203</sup> The Ninth Circuit Court of Appeals has adopted a four-part balancing test in determining whether a student's educational placement is the least restrictive environment to the maximum extent appropriate.<sup>204</sup> The four factors, commonly referred to as the "Holland factors," consist of 1) the educational benefits of placement in full-time regular class; 2) the non-

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<sup>201</sup> FOF 128.

<sup>202</sup> See Petitioners' Closing Brief, filed January 15, 2021, page 19.

<sup>203</sup> *Sacramento City Unified School Dist., Bd. of Educ. v. Rachel H. by and through Holland*, 14 F.3d 1398, 1403 (9<sup>th</sup> Cir. 1994) (citing 20 U.S.C. §1412(5)(b)); see also H.A.R §8-60-15.

<sup>204</sup> *Id.* at 1404.

academic benefits of such placement, 3) the effect students have on the teacher and children in the regular class; and 4) the costs of mainstreaming the students.<sup>205</sup>

In this case, it is unclear whether each specific factor was discussed during the portion of the IEP meeting dedicated to determining Student's educational placement. Parent testified that the IEP team did not go through the factors at all and that Parent did not hear the term "Holland factors" during Parent's review of the IEP meeting recording. SPED indicated that during the discussion on educational placement, SPED had a chart that is required for IEP meetings at Home School.<sup>206</sup> The IEP team discussed the skills that Student was still developing and Student's reported maladaptive behaviors and the effects they could have on a general education classroom.<sup>207</sup> While it is possible that the IEP team did not specifically go through each level on the least restrictive environment continuum or discuss the academic and non-academic factors, the effect of Student or the costs of mainstreaming for each level, the failure to specifically discuss those issues is a procedural violation.

Petitioners have not proven that the IEP team's alleged failure to discuss each specific environment on the continuum or the factors for each resulted in a loss of educational opportunity or an infringement on parental participation. Petitioners have not provided any evidence or support that Student would have benefitted from a less restrictive environment. Parent's request for the IEP team was to place Student in Private School;<sup>208</sup> however, Private School is a more restrictive environment because only disabled students with one-to-one RBTs are enrolled.<sup>209</sup> Other than the Reverse Inclusion program, there are no opportunities for Student

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<sup>205</sup> *Id.*

<sup>206</sup> FOF 77.

<sup>207</sup> FOF 78-79.

<sup>208</sup> FOF 51.

<sup>209</sup> FOF 111.

to be educated at Private School with non-disabled peers.<sup>210</sup> Additionally, Student is not included in Private School's Reverse Inclusion program based on Private School's assessment that Student lacks the necessary level of skills to be able to generalize the skills and benefit from being educated with non-disabled peers.<sup>211</sup> Nothing in the record suggests that the possible failure of the IEP team to not specifically address each Holland factor during the educational placement discussion resulted in a loss of educational opportunity or infringement of parental participation.

G. Respondents did not deny Student a FAPE when Student's IEP-08/27/2020 did not describe an appropriate least restrictive environment for Student

Petitioners final argument is that Respondents denied Student a FAPE due to the specific language in Student's IEP-08/27/2020 not listing the specific times of the day when Student would be around non-disabled peers. Student's IEP-08/27/2020 does not specifically describe opportunities that Student will have to be around non-disabled peers.<sup>212</sup> During the IEP meeting, Parent was informed of the available opportunities that Student could have interaction with non-disabled peers.<sup>213</sup> SPED indicated that these were not listed specifically in Student's IEP-08/27/2020 to allow Home School time to determine what opportunities would be best for Student once Student was comfortable to Home School.<sup>214</sup>

While the failure to specifically list the opportunities that Student would have to be with non-disabled peers may be a procedural violation, Petitioners still must prove that it rose to the level of a denial of FAPE based on a loss of educational opportunity or an infringement of

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<sup>210</sup> FOF 130.

<sup>211</sup> FOF 131.

<sup>212</sup> FOF 96.

<sup>213</sup> FOF 80-81.

<sup>214</sup> FOF 81.

parental participation.<sup>215</sup> As discussed *supra*, the IEP team did not know how Student would acclimate to an educational setting and as a result, the IEP team had planned on meeting again to review and revise the IEP with new information. The record here also indicates that Student does not have the necessary skills to benefit from being around non-disabled peers, so any lack of clarity in the specific times of day when Student would interact with non-disabled peers did not result in Student being deprived of educational benefits.<sup>216</sup> Finally, Parent did not provide any additional input or object to the educational placement decision by the IEP team at the IEP meeting on August 27, 2020.<sup>217</sup> Even though Parent knew that Student had been enrolled at Private School on August 17, 2020 and had requested that Private School be considered for Student, Parent did not inform Home School that Parent was rejecting the educational placement for Student in the IEP-08/27/2020 until September 13, 2020, the day before Student was supposed to start attending Home School.<sup>218</sup> Nothing in the record supports Petitioners' argument that the failure to appropriately describe the least restrictive environment for Student rises to the level of a denial of FAPE.

## VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have failed to meet their burden of proving that Respondents denied Student a FAPE. Petitioners' request for reimbursement and assumption of the costs of Student's educational and related expenses is denied.

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<sup>215</sup> *A.G. v. Hawaii*, 2015 WL 3822309 at \*5 (D. Hawai'i 2015) (*citing L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9<sup>th</sup> Cir. 2009)).

<sup>216</sup> FOF 131.

<sup>217</sup> FOF 82.

<sup>218</sup> FOF 109.



## **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, February 9, 2021.

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