



OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

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

Petitioner(s),

vs.

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

Respondents.

DOE-SY2021-016

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION

Due Process Hearing: December 10-11, 2020

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On July 31, 2020,² the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE") received a request for a due process hearing (hereinafter "Complaint") under the Hawai'i

¹

[REDACTED]

² Petitioners submitted an incomplete request for due process hearing on July 30, 2020 and submitted the full request on July 31, 2020.

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 10, 2020. On August 31, 2020, Petitioners’ filed a Notice of Appearance of Counsel, noting that Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”) would be representing Petitioners. On September 11, 2020, Petitioners requested and were granted leave to file an amended request for due process hearing. On September 14, 2020, Petitioners filed their First Amended Complaint and Resolution Proposal (hereinafter “Amended Complaint”). Respondents filed their response to Petitioners’ Amended Complaint on September 24, 2020.

On October 9, 2020, a prehearing conference was held before Hearings Officer Chastity T. Imamura, with Mr. Peck, representing Petitioners, and Anne T. Horiuchi, Esq. (hereinafter “Ms. Horiuchi”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for December 10-11 and 14-15, 2020.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure compliance with government mandated social distancing.³ An Order Regarding Video Conference Due Process Hearing was issued on November 13, 2020, which set forth the parameters for the video conference hearing. These parameters included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the

³ 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.

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 10, 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 Ms. Horiuchi on behalf of Respondents; as well as the assigned court reporter. The Hearing continued to December 11, 2020 as scheduled, and the testimony of the witnesses was completed on that date.

At the Hearing, Petitioners called Parent and Private School Instructor to testify during their case-in-chief and rested. Respondents called Fully Self-Contained Special Education Teacher (hereinafter “FSC SPED”), Behavioral Health Specialist (hereinafter “BHS”), and Inclusion Special Education Teacher (hereinafter “ISPED”) 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 December 3, 2020. On December 11, 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 28, 2020. Any objections to the proposed exhibits were due on December 30, 2020. Respondents submitted the following additional exhibits for consideration in the decision in this case. Respondents’ Exhibit 1, pages 1-6; Exhibit 3, pages 9-14; Exhibit 4, pages 15-21; Exhibit 6, pages 23-27; Exhibit 10, page 51; Exhibit 11, pages 59-60; Exhibit 19, pages 165-173; Exhibit 20, pages 174-226; Exhibit

21, pages 227-240; Exhibit 22, pages 241-243; Exhibit 23, pages 244-249; Exhibit 41, page 280; Exhibit 43, page 282; Exhibit 46, pages 285-286; Exhibit 47, pages 287-288; Exhibit 50, pages 294-297; Exhibit 51, pages 298-305; Exhibit 52, pages 306-308; Exhibit 54, pages 311, 313; Exhibit 56, pages 315-320; Exhibit 86, pages 416-424; Exhibit 119, page 475; Exhibit 120, page 476; Exhibit 121, page 477; Exhibit 123, page 479; Exhibit 124, page 480; Exhibit 125, page 481; Exhibit 130, page 486; Exhibit 131, page 487; Exhibit 132, page 488; Exhibit 133, page 489; Exhibit 134, page 490; Exhibit 139, page 495; Exhibit 144, page 515; Exhibit 145, page 516; Exhibit 146, page 517; Exhibit 152, page 533; Exhibit 153, page 534; Exhibit 159, page 541; Exhibit 160, page 542; Exhibit 162, page 544; Exhibit 163, page 545; Exhibit 167, page 555; Exhibit 168, pages 556-567; Exhibit 173, page 572; Exhibit 174, page 573; Exhibit 175, page 574; Exhibit 176, page 575; Exhibit 177, page 576; Exhibit 178, page 577; Exhibit 179, page 578; Exhibit 180, page 579; Exhibit 181, page 580; Exhibit 182, page 581; Exhibit 183, page 582; and Exhibit 185, pages 584-610. Petitioners did not object to the introduction of any of these exhibits, so they were also received in addition to any exhibits that were discussed or mentioned at the Hearing.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-015, 018-037, 041; Exhibit 2, pages 042-045, 050-094; and Exhibit 3, pages 101-143, and four (4) audio files dated 06/18/2020, 08/18/2020, 08/19/2020 and 08/20/2020. Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-006; Exhibit 3, pages 009-014; Exhibit 4, pages 015-021; Exhibit 6, pages 023-027; Exhibit 10, pages 047-048, 050-051; Exhibit 11, pages 059-061; Exhibit 15, pages 111-126; Exhibit 16, pages 137-156; Exhibit 19, pages 165-173; Exhibit 20, pages 174-226; Exhibit 21, pages 227-240; Exhibit 22, pages 241-243; Exhibit 23, pages 244-

249; Exhibit 41, page 280; Exhibit 43, page 282; Exhibit 46, pages 285-286; Exhibit 47, pages 287-288; Exhibit 50, pages 294-297; Exhibit 51, pages 298-305; Exhibit 52, pages 306-308; Exhibit 54, pages 311, 313; Exhibit 56, pages 315-320; Exhibit 86, pages 416-424; Exhibits 118-125, pages 474-481; Exhibits 130-134, pages 486-490; Exhibit 139, page 495; Exhibits 144-146, pages 515-517; Exhibits 152-153, pages 533-534; Exhibits 159-160, pages 541-542; Exhibits 162-163, pages 544-545; Exhibit 165, pages 547-553; Exhibits 167-168, pages 555-567; Exhibits 171-183, pages 570-582; Exhibits 185-187, pages 584-612; Exhibit 199, page 639; Exhibit 202, page 642; Exhibit 205, page 645; Exhibits 221-222, pages 685-686; Exhibit 227, pages 696-697; Exhibit 230, pages 710-711; and Exhibits 231-235, which were audio recordings.

Upon review of the audio recordings submitted by Petitioners and Respondents, this Hearings Officer notes that Petitioners' recordings were made on Parent's end of the conversation and Respondents' recordings were made by someone on Home School's end, so the audio of Parent's statements are clearer in Petitioners' Exhibits, but due to background noise, Respondents' recordings are clearer. The content of nearly all the recordings are the same except for Petitioners' Exhibit 3, the audio recording dated 06/18/2020, which started earlier than Respondents' recording, but did not record the entirety of the meeting. Therefore, this Hearings Officer will use Respondents' Exhibits 231-235 as reference points for the meeting recordings, except for those portions that are either clearer or only included in Petitioners' exhibits.

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 22, 2021. Mr. Peck requested an extension of the deadline and Ms. Horiuchi had no objection, so the deadline for written closing briefs was extended to Friday, January 29, 2021. Both parties timely submitted their closing

briefs on that date.

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

II. JURISDICTION

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

III. ISSUES PRESENTED

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

1. Whether Respondents denied Student a free and appropriate public education (hereinafter “FAPE”) when the team at Student’s Individualized Educational Program (hereinafter “IEP”) meeting on June 18, 2020 did not consider or discuss what assistive technology Student could benefit from.
2. Whether Respondents denied Student a FAPE when the IEP team at the June 18, 2020 IEP meeting failed to discuss Student’s eligibility for extended school year services.
3. Whether the DOE denied Student a FAPE when the IEP team at the June 18, 2020 IEP meeting failed to place Student in the least restrictive environment. This issue had three sub-issues:
 - a. The IEP team failed to provide/discuss supports and services for Student prior to determining Student’s placement.
 - b. The IEP team refused to consider Parent’s request to accommodate Student by having a smaller general education class size.
 - c. The IEP team informed Parent that Student needed to at grade level to be placed in general education classes.
4. Whether the DOE denied Student a FAPE when the June 18, 2020 IEP team did not provide transition supports and services for Student’s transition from Student’s private program into the placement as described in Student’s IEP.

5. Whether the DOE denied Student a FAPE when Student's June 18, 2020 IEP fails to include behavioral interventions, a behavioral interventions plan or applied behavior analysis needed to address Student's needs.
6. Whether the DOE denied Student a FAPE when Student's June 18, 2020 IEP could not be materially implemented with regard to Student's placement and exposure to other students due to COVID-19.
7. Whether the DOE denied Student a FAPE when Student's August 20, 2020 IEP could not be materially implemented with regard to Student's placement and exposure to other students due to COVID-19.

IV. FINDINGS OF FACT

Background

1. Private School Instructor is an experienced teacher who has been licensed to teach in the State of Hawai'i for over ___ years. Private School Instructor does not have specialized training or instruction as a special education teacher, but does have experience in working with and teaching special education students.⁴
2. FSC SPED is a licensed special education teacher in the State of Hawai'i and has been teaching as the fully self-contained special education teacher at Home School for ___ years and was a special education resource teacher for ___ years prior to that.⁵
3. BHS has been a behavioral health specialist with the DOE for ___ years and has also previously worked as a registered behavioral technician. BHS is also a behavioral safety certified trainer, a board-certified assistant behavior analyst, and is in a

⁴ Testimony of Private School Instructor, Transcript Volume 1, page 12, line 23 to page 17, line 11 (hereinafter referenced as "Tr.V1, 12:23-17:11"), Petitioners' Exhibit 2, pages 091-094 (hereinafter referenced as "P-Ex.2, p.091-094").

⁵ Testimony of FSC SPED, Tr.V2, 150:15-151:21; R-Ex.227, p.686.

doctoral program for psychology.⁶

4. ISPED is a licensed special education teacher in the State of Hawai'i and has been the inclusion special education teacher at Home School since _____. ISPED has a Master's of Education degree in Special Education.⁷

Student's background

5. Student is ____ years old and currently attends Private School.⁸
6. Student was diagnosed with _____ (hereinafter "_____") when Student was ____ years old.⁹
7. Student had been receiving applied behavior analysis (hereinafter "ABA") services from ABA Company since September 2018.¹⁰
8. In the 2019-2020 school year, Student attended Private School from the beginning of the school year until around March 2020, when the COVID-19 global pandemic forced Private School to shut down for in-person services.¹¹
9. At Private School, a registered behavioral technician (hereinafter "RBT") from ABA Company accompanied Student throughout the school day.¹² Student was not allowed to attend Private School without Student's assigned RBT due to Student's behavioral issues.¹³

⁶ Testimony of BHS, Tr.V2, 172:8-174:19; R-Ex.227, p.696-697.

⁷ Testimony of ISPED, Tr.V2, 203:14-204:11; R-Ex.221, p.685.

⁸ Testimony of Parent, Tr.V2, 100:18-20, 142:25-143:1; P-Ex.1, p.001.

⁹ Testimony of Parent, Tr.V2, 100:7-17.

¹⁰ R-Ex.20, p.175.

¹¹ Testimony of Private School Instructor, Tr.V1, 34:8-35:7, 74:14-17; P-Ex.2, p.063-068.

¹² Testimony of Private School Instructor, Tr.V1, 85:21-24; Testimony of Parent, Tr.V2, 120:7-10.

¹³ Testimony of Private School Instructor, Tr.V1, 73:6-23, 81:25-82:11, 87:19-25, 88:19-25; Testimony of Parent, Tr.V2, 134:6-8.

10. At Private School, Student worked primarily on computer-based assignments where instructions would be given through a teacher on the computer program and Student would follow the instructions and complete the assignments.¹⁴
11. Private School students also had group lessons and class activities, which included arts and crafts, learning to count, learning about money, [REDACTED] time, and a poetry competition.¹⁵
12. Private School did not modify Student's assignments, but allowed Student additional time to complete assignments or take breaks. During class, Student would work independently on the computer program in class and the RBT would monitor Student's behaviors and provide redirection.¹⁶
13. In March 2020, when Private School had to shut down due to the COVID-19 pandemic, Private School immediately switched their students to online learning, which was possible due to most of the assignments at Private School being computer-based.¹⁷
14. Student had RBT services from ABA Company for a short time after the COVID-19 shutdown; [REDACTED]
[REDACTED].¹⁸
15. For several sessions without Student's RBT present, Parent attempted to assist Student in participating in Private School's virtual learning; however, both Parent and Private School Instructor determined that it would not be successful for Student

¹⁴ Testimony of Private School Instructor, Tr.V1, 66:3-70:17.

¹⁵ Testimony of Private School Instructor, Tr.V1, 54:13-56:11, 73:24-74:13.

¹⁶ Testimony of Private School Instructor, Tr.V1, 51:6-52:18, 70:18-71:3.

¹⁷ Testimony of Private School Instructor, Tr.V1, 76:2-10.

¹⁸ Testimony of Parent, Tr.V2, 102:2-12.

- without Student's RBT present.¹⁹
16. Based on Student's inability to participate in Private School's virtual learning, Parent disenrolled Student from Private School in April 2020.²⁰
 17. Prior to April 2020, Parent filed a request for due process hearing, from which a decision was filed. As a result of the decision, the IEP team scheduled a conference with Parent to discuss a reevaluation of Student.²¹
 18. On April 24, 2020, the IEP team met with Parent and determined that fine motor and academic assessments would be conducted with Student as part of Student's reevaluation.²²
 19. On May 1, 2020, Student Services Coordinator Clerk sent Parent the Consent for Assessment as Part of a Reevaluation form to sign for the fine motor and academic assessments that were to be conducted with Student. This consent form was not signed by Parent prior to June 18, 2020, so the assessments had not been conducted with Student before the IEP meeting.²³
 20. Prior to the IEP meeting on June 18, 2020, Parent sent a note to the IEP team which said "[Student] has made amazing progress in all areas. [Student] is able to follow along in school, and academically [Student] has gained so much. [Student's] goals need to be rewritten. The biggest reason for [Student's] progress was to small size of

¹⁹ Testimony of Private School Instructor, Tr.V1, 28:11-30:2, 75:22-77:3; Testimony of Parent, Tr.V2, 101:18-102:1, 102:13-103:4, 143:21-145:19; R-Ex.165, p.547.

²⁰ Testimony of Parent, Tr.V2, 101:14-22.

²¹ Testimony of FSC SPED, Tr.V2, 163:24-165:2.

²² Testimony of FSC SPED, Tr.V2, 165:3-23; R-Ex.22, p.241-243, R-Ex.23, p.244-249.

²³ Testimony of FCS SPED, Tr.V2, 165:3-19; R-Ex.41, p.280, R-Ex.43, p.282; *see also* R-Ex.232, 06/18/2020 IEP meeting recording, approximate time stamp [00:04:44-00:05:36], [1:43:20-1:43:44] (hereinafter referenced as "R-Ex.232, 06/18/2020 IEP [00:04:44-00:05:36], [1:43:20-1:43:44]").

the classes. I am afraid that because of this break, [Student] will have difficulty when it is time to return to school. [Student] needs to be reassessed to show how much progress [Student] has made.”²⁴

Student’s June 18, 2020 IEP meeting

21. On June 18, 2020, an IEP meeting was held for Student via videoconferencing. Present at the IEP meeting were FSC SPED, DOE Licensed Behavior Analyst 1 (hereinafter “DOE LBA1”), Speech-Language Pathologist (hereinafter “SLP”), Parent, Student Services Coordinator (hereinafter “SSC”), General Education Teacher, BHS, and Principal.²⁵
22. Parent made a recording of the meeting which ended around twelve (12) minutes prior to the end of the meeting.²⁶ Home School also made a recording of the meeting, which did not include the initial introductions contained on Parent’s recording, but did contain the second round of introductions and the rest of the IEP meeting.²⁷
23. At the time of the IEP meeting, Home School had received a progress report for Student from Private School for the 2019-2020 school year.²⁸
24. The IEP team also had an October 2019 functional behavior assessment conducted with Student by Behavioral Health Company²⁹ and an ABA reassessment and treatment plan from February 2020 for Student from ABA Company.³⁰

²⁴ Testimony of Parent, Tr.V2, 105:21-106:12; P-Ex.2, p.041.

²⁵ P-Ex.1, p.015, R-Ex.15, p.124; R-Ex.231, 06/18/2020 IEP.

²⁶ See P-Ex.3, 06/18/2020 IEP meeting recording.

²⁷ See R-Ex.231, R-Ex.232.

²⁸ Testimony of FSC SPED, Tr.V2, 161:9-15; R-Ex.86, p.416-424, see R-Ex.232, 06/18/2020 IEP [00:01:55-00:02:10].

²⁹ R-Ex.19, p.165-173.

³⁰ R-Ex.20, p.174-226; R-Ex.232, 06/18/2020 IEP [00:01:55-00:02:10].

25. During the IEP meeting, the team began the discussion using a draft IEP that was shared during the meeting through the videoconference. Parent was able to view the draft IEP.³¹
26. Some of the factors to consider for Student's IEP that were discussed included Student's communication needs, needs for assistive technology, and Student's behaviors.³²
27. The DOE IEP team members reminded Parent throughout the meeting that if Parent had any questions or concerns, that Parent should raise them, and they can be discussed.³³
28. The IEP team discussed Student's pending reevaluation and noted that once Parent returned the signed Consent for Assessment as Part of a Reevaluation form, the assessments could be completed, and the team would meet again to further discuss Student's IEP and make any revisions deemed necessary based on the reevaluation.³⁴
29. The IEP team discussion began with Student's present levels of academic achievement and functional performance (hereinafter "PLAAFP") in the areas of reading, writing, math, behaviors, sensory, gross motor, fine motor, and communication.³⁵
30. Student's reading, writing, and math PLAAFPs were discussed mostly based on Student's progress report/report card from Private School for the 2019-2020 school

³¹ P-Ex.3, 06/18/2020 IEP meeting recording [00:05:20-00:05:39].

³² Testimony of FCS SPED, Tr.V2, 152:18-153:8; R-Ex.232, 06/18/2020 IEP [00:00:01-00:01:43].

³³ See e.g., P-Ex.3, 06/18/2020 IEP meeting recording [00:05:03-00:05:11], R-Ex.232, 06/18/2020 IEP [1:02:16-1:02:48], [1:41:35-1:41:55].

³⁴ R-Ex.232, 06/18/2020 IEP [00:05:39-00:05:50].

³⁵ R-Ex.232, 06/18/2020 IEP [00:05:51-00:22:00].

year. Parent did not have any additional input for those sections regarding Student's progress or needs.³⁶

31. The behavior portion of the PLAAFP discussion began by DOE LBA1 discussing the behaviors targeted in the October 2019 FBA. The team then discussed Student's skills and needs in Student's behavior. The DOE LBA1 also noted to the team some observations that were made of Student at Private School, which included Student's ability to sit for longer periods of time, such as an hour.³⁷
32. During this discussion, the team requested input from Parent regarding Student's current achievements and needs for behavior. Parent provided input about Student's new behavior of [REDACTED].³⁸ Parent also provided updates as to Student's behavior skills, such as engaging with peers and siblings.³⁹ Parent further informed the team that Student may experience some previous behaviors due to regression because of the COVID-19 pandemic, such as [REDACTED].⁴⁰
33. Student's functional performance was also discussed during the IEP meeting, during which time Student's skills and needs were discussed, and Parent did not have input or corrections to provide.⁴¹
34. During the discussion on Student's sensory achievements and needs, Parent provided additional input; including an update that even if there is no noise Student sometimes

³⁶ R-Ex.232, 06/18/2020 IEP [00:03:13-00:07:00].

³⁷ R-Ex.232, 06/18/2020 IEP [00:07:05-00:14:57].

³⁸ R-Ex.232, 06/18/2020 IEP [00:08:05-00:09:55].

³⁹ R-Ex.232, 06/18/2020 IEP [00:10:58-00:11:24].

⁴⁰ R-Ex.232, 06/18/2020 IEP [00:12:51-00:13:35].

⁴¹ R-Ex.232, 06/18/2020 IEP [00:14:59-00:15:35].

- still asks for Student's headphones, hums, or covers Student's ears when Student is not wearing headphones.⁴²
35. Parent also provided information to the team regarding Student's fine motor successes, like Student using Student's right hand and holding the pencil correctly, and concerns of Student having difficulty with buttoning clothes.⁴³
36. The team noted that since a fine motor assessment was to be done with Student, the team could further discuss Student's needs and necessary supports at a later meeting.⁴⁴
37. SLP led the discussion for Student's communications PLAAFPs section, and Parent did not have any additional input to provide.⁴⁵
38. After the PLAAFPs discussion, the team looked at intervention supports and strategies that may help to address Student's needs. These included: visual supports, like a daily schedule and pictures; visual and verbal directives prior to transitions; use of a timer; token board system; modeling of new skills and routines; tactile supports; preferential seating; and proximity to an adult.⁴⁶
39. During this discussion, Parent raised a concern about Student's placement in a general education class. Parent requested that Student be placed in a general education classroom with a small group of students, like how Student's class was at Private School. That discussion was deferred to a later time in the IEP meeting for

⁴² R-Ex.232, 06/18/2020 IEP [00:15:38-00:17:43].

⁴³ R-Ex.232, 06/18/2020 IEP [00:18:40-00:19:27].

⁴⁴ R-Ex.232, 06/18/2020 IEP [00:19:30-00:19:50].

⁴⁵ R-Ex.232, 06/18/2020 IEP [00:20:05-00:22:03].

⁴⁶ R-Ex.232, 06/18/2020 IEP [00:22:05-00:22:45].

Student's placement.⁴⁷

40. After discussing Student's impact statement, post-high school goals, and interests; the team moved on to discussing Student's IEP goals and objectives. Parent did express some questions and provided input, and explanations and clarifications were provided to Parent during this discussion.⁴⁸
41. During this discussion, Parent expressed a desire for Student to be allowed to bring Student's personal phone to school as a reward for Student accomplishing tasks. The Home School team explained to Parent that students are not allowed to bring personal phones to school, however Student would have access to an iPad at school which can be used as a reward for Student. Parent was satisfied with this substitute during the meeting on June 18, 2020.⁴⁹
42. The IEP team then moved onto discuss Student's eligibility for extended school year (hereinafter "ESY") services. At the time of the IEP meeting, the team explained to Parent that they usually look at whether students adjust well in coming back to school after extended breaks. Due to not having any data on Student's regression or recoument after extended breaks, the team asked Parent to provide information.⁵⁰
43. Parent informed the team that Student regressed significantly during the shutdown during the COVID-19 pandemic, but did not provide details or examples of Student's regression.⁵¹
44. Parent informed the team that prior to the COVID-19 shutdown, Student was able to

⁴⁷ R-Ex.232, 06/18/2020 IEP [00:22:46-00:25:43].

⁴⁸ R-Ex.232, 06/18/2020 IEP [00:27:25-00:40:45].

⁴⁹ R-Ex.232, 06/18/2020 IEP [00:34:59-00:35:55].

⁵⁰ Testimony of FCS SPED, Tr.V2, 153-9-25R-Ex.232, 06/18/2020 IEP [00:40:53-00:41:49].

⁵¹ R-Ex.232, 06/18/2020 IEP [00:41:50-00:42:17].

transition back to school well after weekends due to Student having ABA services on the weekends at home to help with Student's homework and behaviors.⁵² Parent stated that during the winter break from Private School, Student also had ABA services at home and Student was able to adjust to going back to school with little difficulty.⁵³

45. While Parent still requested that Student be found eligible for ESY services based on Student's regression during the COVID-19 shutdown,⁵⁴ the team determined that based on Parent's information, they do not find Student eligible for ESY, but will assess Student upon Student's return to school to see if Student needs compensatory education to make up for any losses Student suffered due to the COVID-19 shutdown.⁵⁵

46. After the ESY discussion, the IEP team moved onto discussing the setting in which Student would receive special education and related services. At this time, the different settings available at Home School were discussed. The different settings discussed were general education, which was described as a class of around ___ to ___ students; an inclusion setting, where students would receive special education inside of the general education classroom with the same ___ to ___ students; and the fully self-contained special education class setting, which would include a small class of disabled peers receiving special education.⁵⁶

47. Parent noted that Student would work best in small groups and requested that Home

⁵² R-Ex.232, 06/18/2020 IEP [00:42:20-00:43:32].

⁵³ R-Ex.232, 06/18/2020 IEP [00:46:52-00:48:08].

⁵⁴ R-Ex.232, 06/18/2020 IEP [00:44:40-00:45:05].

⁵⁵ R-Ex.232, 06/18/2020 IEP [00:45:09-00:45:50], [00:48:06-00:48:55].

⁵⁶ R-Ex.232, 06/18/2020 IEP [00:49:00-00:50:21].

- School put Student in a general education classroom with only ___ students per classroom.⁵⁷
48. The IEP team discussed the possibility of starting Student in the special education class setting primarily, but provide for Student to attend the general education classroom for subjects in which Student excels, such as English and language arts. One of the IEP team members explained that some students go to the general education classroom for a trial basis with their adult support to collect data to see how the students adjust to the general education setting.⁵⁸
49. Parent wanted Student to be in general education classes for all subjects, but the DOE LBA1 expressed concerns about whether Student has certain skills to benefit from a large group instruction in the general education class. DOE LBA1 noted that at Private School, Student worked primarily one-on-one and not interactively like a general education setting would be.⁵⁹
50. BHS provided information to the IEP team about observations of Student during Student's experience at ___ and that Student was able to attend and participate in the group once Student had become accustomed to the routine of being in the group setting.⁶⁰
51. After that discussion, Parent informed the team that Parent wanted to think about it further but said that Parent had no further questions at that time.⁶¹
52. The IEP team suggested to Parent that Student start in the special education

⁵⁷ R-Ex.232, 06/18/2020 IEP [00:50:22-00:50:53].

⁵⁸ R-Ex.232, 06/18/2020 IEP [00:58:33-00:59:22].

⁵⁹ R-Ex.232, 06/18/2020 IEP [00:59:55-1:00:31].

⁶⁰ R-Ex.232, 06/18/2020 IEP [1:00:46-1:00:27].

⁶¹ R-Ex.232, 06/18/2020 IEP [1:01:55-1:02:16].

- classroom, since Student would be transitioning from a small class setting at Private School to Home School, but that Student go to the general education class for English and language arts to see how Student is able to adjust to the larger general education class size and setting.⁶²
53. Parent wanted to discuss Student's supplementary aids and services before agreeing to Student's placement and the team moved on to discuss Student's speech-language therapy minutes and setting.⁶³
54. SLP discussed the number of minutes proposed for Student's speech-language therapy and informed Parent that SLP wanted to try having Student in a group setting. Parent expressed some concerns about Student being in a group setting rather than individual therapy but agreed to try starting Student in group therapy and adjusting to individual therapy if necessary. Parent agreed with SLP that Student would be pulled out and receive speech-language therapy in a special education setting and Parent also agreed on the number of minutes proposed for Student's speech-language therapy.⁶⁴
55. The IEP team then discussed the supplemental aids and services that Student would receive as part of Student's IEP, which included ABA services, including an RBT; visual supports; a visual timer; a token board; modeling; preferential seating; and close proximity to an adult.⁶⁵
56. The IEP team explained that Student's RBT and ABA services would be listed in the clarifications of supports and services, and that DOE LBA1 was working on

⁶² R-Ex.232, 06/18/2020 IEP [1:03:38-1:04:46].

⁶³ R-Ex.232, 06/18/2020 IEP [1:04:58-1:06:24].

⁶⁴ R-Ex.232, 06/18/2020 IEP [1:06:25-1:08:50].

⁶⁵ R-Ex.232, 06/18/2020 IEP [1:08:56-1:09:50].

developing a behavioral intervention plan (hereinafter “BIP”), which will be implemented by Student’s RBT.⁶⁶

57. Parent was also informed that Student would have RBT services throughout the school day and that the ABA services listed in the IEP would include the five percent (5%) supervision hours of the RBT by the BCBA, as well as teacher consultation and parent training to be provided by the BCBA. The total hours of teacher consultation would be two (2) hours per week and the total amount of parent consultation and training would be (1) hour per quarter.⁶⁷
58. Parent was also informed that a behavioral intervention plan (BIP) was in the process of being prepared for Student, would be overseen by an LBA/BCBA, and would be implemented by the RBT during the school day.⁶⁸
59. At the end of the discussion of Student’s supplemental aids and services, Parent was asked whether Parent had any questions or required any clarifications for Student’s supplemental aids and services and Parent indicated that Parent did not have any questions or need additional clarification.⁶⁹
60. After concluding the discussion of Student’s supplemental aids and services, the IEP team moved back to the topic of Student’s placement. Parent wanted to wait until the reevaluation was completed to determine Student’s placement, but the Home School team members informed Parent that they needed to make a determination as to placement for the IEP and that after the reevaluation, the team can meet again and

⁶⁶ Testimony of BHS, Tr.V2, 177:25-180:11; R-Ex.232, 06/18/2020 IEP [1:09:55-1:10:23].

⁶⁷ R-Ex.232, 06/18/2020 IEP [1:11:45-1:18:50].

⁶⁸ R-Ex.232, 06/18/2020 IEP [1:18:57-1:19:06].

⁶⁹ R-Ex.232, 06/18/2020 IEP [1:19:17-1:19:53].

discuss placement again based on the results of the reevaluation.⁷⁰

61. The IEP team explained to Parent that while the team can revisit the placement discussion again at Student's reevaluation meeting, the team needed to determine the placement due to school possibly starting prior to the reevaluation being completed.⁷¹
62. Parent noted that Parent felt that Student should be in the general education setting but that it sounded like the team wanted Student to start in the special education setting. The team explained to Parent that the decision was a team decision and that even if the team makes a decision as to Student's placement, the IEP can always be revisited and revised.⁷²
63. Upon hearing that Student's placement and the IEP can always be adjusted, Parent then agreed to start Student off in the special education setting, but the team continued to have further discussion about the most appropriate setting for Student.⁷³
64. At no time during the IEP meeting on June 18, 2020, did the IEP team inform Parent that Student needed to be working at grade level to be included in a general education class setting.⁷⁴
65. Near the end of the discussion of Student's placement, Parent was disconnected from the meeting.⁷⁵ When Home School was able to get Parent back onto the videoconference, the IEP team continued to discuss Student's placement until Parent expressed a desire to end the meeting. At that time, Parent agreed to have Student

⁷⁰ R-Ex.232, 06/18/2020 IEP [1:20:10-1:20:44].

⁷¹ R-Ex.232, 06/18/2020 IEP [1:20:50-1:21:40].

⁷² Testimony of FCS SPED, Tr.V2, 154:155:5; R-Ex.232, 06/18/2020 IEP [1:21:41-1:23:42].

⁷³ Testimony of FCS SPED, Tr.V2, 155:3-7; R-Ex.232, 06/18/2020 IEP [1:23:43-1:29:55].

⁷⁴ See generally R-Ex.232.

⁷⁵ R-Ex.232, 06/18/2020 IEP [1:29:57-1:34:50].

start in special education with the understanding that Student's placement could be changed later.⁷⁶

66. Student's least restrictive environment statement was also read to Parent, including Student participating with non-disabled students during grade-level field trips, teacher study groups, Hawaiian studies, and Japanese. Parent agreed to the statement as read.⁷⁷

67. Parent was then informed that the items discussed during the meeting was the DOE's offer of FAPE for Student and when asked if Parent accepted the offer, Parent responded by saying "yes."⁷⁸

68. The IEP team then moved onto a discussion about a transition plan for Student to transition from Private School to Home School. The Home School team initially suggested that Student's transition plan include two (2) days for Student to visit Home School's campus and then a one-week transition to Home School.⁷⁹

69. Parent did not agree with the transition plan proposed and instead proposed a transition plan that included an observation of Student by the DOE-assigned RBT at Private School and then a three-week transition plan. During the first week, Student would attend Home School for two (2) hours a day; for the second week, Student would attend Home School for a full day on Monday, Wednesday and Friday, and half days for Tuesday and Thursday; and for the third week, Student would attend Home School for full days for the whole week.⁸⁰

⁷⁶ Testimony of FCS SPED, Tr.V2, 155:3-7; R-Ex.232, 06/18/2020 IEP [1:34:50-1:38:55].

⁷⁷ R-Ex.232, 06/18/2020 IEP [1:39:55-1:41:30].

⁷⁸ R-Ex.232, 06/18/2020 IEP [1:41:55-1:42:05].

⁷⁹ Testimony of FCS SPED, Tr.V2, 155:8-24; R-Ex.232, 06/18/2020 IEP [1:46:30-1:47:30].

⁸⁰ R-Ex.232, 06/18/2020 IEP [1:47:50-1:49:30].

70. During this discussion, Parent informed Home School that Student was not attending Private School but that Private School might start before Home School started for the 2020-2021 school year. Home School team suggested that the DOE RBT go to Private School to observe Student with Student's private RBT as part of the transition and Parent agreed and said that Parent would look into that.⁸¹
71. The IEP team agreed to Parent's proposed transition plan, except that Parent agreed that instead of two (2) hours, Student could go for half days, or three (3) hours, as Student's transition plan and informed Parent that it would be included in Student's IEP.⁸²

Student's IEP-06/18/2020

72. From the IEP meeting on June 18, 2020, a written IEP was developed (hereinafter "IEP-06/18/2020").⁸³
73. Student's IEP-06/18/2020 contained a written summary of the PLAAFPs that were discussed during the June 18, 2020 IEP meeting, which was based on information from Private School progress reports, notes from ABA Company, and Parent and other team members input.⁸⁴
74. Included in the written PLAAFPs were specific target behaviors listed in Student's February 2020 ABA reassessment and treatment plan provided by ABA Company, which included: 1) elopement-defined as any actual or attempt to leave the designated area without first asking for and waiting for permission; 2) flopping and dropping-

⁸¹ Testimony of FCS SPED, Tr.V2, 155:25-156:16; R-Ex.232, 06/18/2020 IEP [1:52:34-1:53:35].

⁸² R-Ex.232, 06/18/2020 IEP [1:56:07-1:56:43].

⁸³ P-Ex.1, p.001-015, R-Ex.15, p.111-124.

⁸⁴ P-Ex.1, p.002-004, R-Ex.15, p.112-114.

- defined as any incident of Student dropping all of Student's body weight to the floor at an inappropriate time; and 3) crying/screaming-crying defined as whining with or without tears for at least five (5) seconds, and screaming defined as a high pitched loud noise.⁸⁵
75. Parent's concerns that were discussed at the meeting, including Student's placement in a general education class, mouthing non-edibles, and regression during the COVID-19 shutdown were also listed in the IEP-06/18/2020.⁸⁶
76. Student's IEP-06/18/2020 contained six (6) annual goals; three (3) for language arts, one (1) for math, and two (2) for health. Both health goals and one (1) of the language arts goals involved Student's behaviors, emotional behaviors, and social skills.⁸⁷
77. The IEP-06/18/2020 indicated that Student was not eligible for ESY services.⁸⁸
78. Student's special education and related services in the IEP-06/18/2020 included special education in the special education setting for one thousand four hundred eighty-five (1485) minutes per week, and speech-language therapy in the special education setting for three hundred sixty (360) minutes per quarter.⁸⁹
79. The supplementary aids and supports in Student's IEP-06/18/2020 included: individual instructional support of one thousand eight hundred twenty-five (1825) minutes per week; ABA services of eight hundred twenty-eight (828) minutes per quarter; visual supports provided daily; visual and verbal directions prior to

⁸⁵ P-Ex.1, p.002-003, R-Ex.15, p.112-113.

⁸⁶ P-Ex.1, p.004, R-Ex.15, p.114.

⁸⁷ P-Ex.1, p.005-011, R-Ex.15, p.116-121.

⁸⁸ P-Ex.1, p.012, R-Ex.15, p.122.

⁸⁹ P-Ex.1, p.012, R-Ex.15, p.122.

transitions provided daily; use of a timer provided daily; token board system provided daily; modeling of new skills and routines provided daily; tactile supports provided daily; preferential seating provided daily; proximity to an adult provided daily; teacher consultation of one thousand eighty (1080) minutes per quarter; and parent education and training of sixty (60) minutes per quarter.⁹⁰

80. In the clarification of services and supports, the individual instructional support and the implementation of the BIP were clarified as being implemented by an RBT.

81. The clarification of services and supports also indicated that the ABA services, teacher consultation, and parent education and training were to be completed by an LBA or BCBA or a board-certified assistant behavior analyst (hereinafter “BCaBA”) under the supervision of an LBA or BCBA.⁹¹

82. The clarification of supports and services also stated that a BIP will be developed, implemented, and overseen by an LBA or BCBA or BCaBA under the supervision of an LBA or BCBA.⁹²

83. The clarification of supports and services also included the transition plan that was proposed by Parent and adopted by the IEP team, which indicated that Student would attend Home School for three (3) hours per day for the first week; would attend for full days on Monday, Wednesday, and Friday and for three (3) hours on Tuesday and Thursday for the second week; and all day for the entire third week.⁹³

84. Student’s IEP-06/18/2020 described Student’s educational placement as follows:

⁹⁰ P-Ex.1, p.012, R-Ex.15, p.122.

⁹¹ P-Ex.1, p.012, R-Ex.15, p.122.

⁹² P-Ex.1, p.012, R-Ex.15, p.122.

⁹³ P-Ex.1, p.012, R-Ex.15, p.122.

“[Student] will not participate with students without disabilities during academic and speech/language therapy sessions. [Student] will participate with students without disabilities in the general education class during grade level field trips, Teacher Study Group (TSG) or rotation, Hawaiian Studies, Japanese, and lunch/recess.”⁹⁴

Communications after the June 18, 2020 IEP meeting

85. On Saturday, June 20, 2020, Parent emailed FSC SPED, SSC, and Principal and stated that Parent felt trapped at the IEP meeting on June 18, 2020 and that everyone talked over Parent. Parent stated in the email that Parent did not agree to start Student in special education classes and that the team refused to consider a smaller inclusion class. Parent also stated that Parent disagreed with Student not being eligible for ESY and that Parent believed that the team used the wrong idea. Parent informed the IEP team that Parent was rejecting the IEP and would be seeking reimbursement for private services for Student.⁹⁵
86. On Monday, June 22, 2020, at around 2:16 p.m., OT called and sent an email to Parent to schedule Student’s fine motor assessment. Parent responded via email to OT on Tuesday, June 23, 2020, at around 6:23 a.m.⁹⁶
87. On Wednesday, June 24, 2020, Principal called and sent an email to Parent regarding the concerns stated in Parent’s June 20, 2020 email. Principal requested that the IEP team meet again to address Parent’s concerns and proposed two dates of June 25, 2020 and June 26, 2020.⁹⁷

⁹⁴ P-Ex.1, p.013, R-Ex.15, p.123.

⁹⁵ Testimony of FSC SPED, Tr.V2, 156:17-157:2; P-Ex.3, p.142, R-Ex.118, p.474.

⁹⁶ R-Ex.118, p.475; R-Ex.119, p.476.

⁹⁷ Testimony of FSC SPED, Tr.V2, 157:3-8; R-Ex.122, p.478.

88. Parent responded on June 24, 2020 to Principal and indicated that Parent wanted Parent's attorney to be involved in the new IEP meeting, and that Parent's attorney was unavailable on the dates provided by Principal.⁹⁸
89. Parent followed up with an email to Principal requesting the written IEP-06/18/2020 and the prior written notice and stated that Parent would "schedule the IEP after I see your offer in there and determine what it is that needs to be changed."⁹⁹
90. Principal responded to Parent on June 28, 2020 and told Parent that the IEP and PWN will be mailed home soon and requested that Parent provide two to three dates and times for proposed meetings.¹⁰⁰
91. On June 30, 2020, Home School prepared a PWN for the June 18, 2020 meeting (hereinafter "PWN-06/30/2020").¹⁰¹
92. Between July 23, 2020 and July 24, 2020, SSC made multiple attempts to contact Parent or Parent 2 to schedule Student's eligibility meeting for July 27, 2020 at noon, as the reevaluation assessments had been completed.¹⁰²
93. Parent responded by telling SSC that due to Parent's work schedule, Parent would not know until July 26, 2020, whether Parent could make it to the meeting.¹⁰³
94. On July 26, 2020, Parent emailed SSC and stated that Parent could not attend meeting due to Parent wanting an advocate to be present at the meeting and that Parent would

⁹⁸ R-Ex.123, p.479.

⁹⁹ R-Ex.124, p.480.

¹⁰⁰ R-Ex.125, p.481.

¹⁰¹ P-Ex.1, p.018-019, R-Ex.15, p.125-126.

¹⁰² Testimony of FSC SPED, Tr.V2, 157:15-158:7; R-Ex.50, p.294-297, R-Ex.51, p.298-302, R-Ex.130, p.486, R-Ex.132, p.488, *see also* R-Ex.129, p.487.

¹⁰³ R-Ex.51, p.303, R-Ex.133, p.489.

- let Home School know when Parent found someone.¹⁰⁴
95. On July 26, 2020, SSC requested that Parent provide two or three dates to Home School for the meeting and the team will work on scheduling a meeting soon.¹⁰⁵
96. On July 30, 2020, Parent sent Respondents the instant Request for IDEA Impartial Due Process Hearing (hereinafter “Complaint”). The document received by Respondents was incomplete as it was missing the first page.¹⁰⁶
97. On July 30, 2020, SSC emailed Parents to confirm that Home School had received the Complaint and to inform Parents of the missing page. SSC also proposed the dates of August 6, 2020 and August 7, 2020 to hold a resolution session based on the Complaint. SSC also reminded Parents that Home School was still attempting to schedule Student’s eligibility meeting.¹⁰⁷
98. Parent’s initial response to SSC’s email was that Parent “will provide dates for an IEP meeting once I find an advocate,” but later Parent provided the dates of August 7, 2020 and August 10, 2020 for the resolution session and IEP meetings, respectively. Parent also provided the missing page of the Complaint to Home School.¹⁰⁸
99. Due to various scheduling issues of Home School team and Parent, Student’s eligibility meeting was not held until August 18, 2020.¹⁰⁹
100. On August 14, 2020, Parent emailed SSC to inquire about whether Home School would have students attending in person, through distance learning or a mixture of the

¹⁰⁴ R-Ex.52, pg.307, R-Ex.145, p.516.

¹⁰⁵ R-Ex.146, p.517.

¹⁰⁶ R-Ex.54, p.311.

¹⁰⁷ R-Ex.54, p.311.

¹⁰⁸ R-Ex.54, p.313, R-Ex.152, p.533, R-Ex.153, p.534.

¹⁰⁹ See R-Ex.162, p.544, R-Ex.163, p.545, R-Ex.173 to 185, p.571-610.

- two. SSC responded that Student is eligible for in-person services based on the IEP-06/18/2020, but that Parent may opt into virtual learning for Student.¹¹⁰
101. On August 18, 19 and 20, 2020, the IEP team met to do Student's eligibility meeting, to develop a revised IEP based on the reevaluation and Parent's concerns, and to discuss the transition plan for Student.¹¹¹
102. During the eligibility portion of the meetings, Student's completed assessments were reviewed with the team and Student was determined to be eligible for IDEA special education and related services under the category of _____. The category of _____ was considered, but the team did not find Student to be eligible under that category, so Student's eligibility was not changed. Parent was in agreement with Student's eligibility category.¹¹²
103. A revised IEP was developed from the IEP meetings on August 18-20, 2020 (hereinafter "IEP-08/20/2020").¹¹³ A PWN for the IEP revision meetings was also prepared for these meetings on August 28, 2020 (hereinafter "PWN-08/28/2020").¹¹⁴

Student's August IEP meetings and resulting IEP-08/20/2020

104. Student's IEP-08/20/2020 contained an update to the PLAAFPs for the occupational therapy section based on Student's fine motor assessment results, and an additional goal and objective was created for Student for Student's occupational therapy needs. The PLAAFPs also contained updates to Student's academic needs based on the academic assessment results in math comprehension, and Student's math goal and

¹¹⁰ R-Ex.186-187, p.611-612.

¹¹¹ See R-Ex.233.

¹¹² R-Ex.233, 08/18/2020 Meeting [07:15-43:55].

¹¹³ P-Ex.1, p.020-037, R-Ex.16, p.137-154.

¹¹⁴ R-Ex.16, p.155-156.

objective was modified to include word problems.¹¹⁵

105. The IEP team then discussed ESY for Student based on Parent's concerns in Parent's June 20, 2020 email. Parent noted during the eligibility meeting that one of the skills that Student was lacking in the July 2020 academic assessment was something that Student was previously able to do before the COVID-19 shutdown, which showed Student's regression during the shutdown.¹¹⁶

106. Parent also informed the team during the August 18, 2020 meeting that Student loses both behavioral and academic skills after breaks longer than fourteen (14) days. The team then discussed the skills that Student needs to work on during an ESY session and the IEP team ultimately found Student to be eligible for ESY services.¹¹⁷

107. With Parent's agreement, the IEP team determined at the August 20, 2020 IEP meeting that Student would receive ESY services after fourteen (14) days and that the ESY services would focus on Student's reading comprehension, math comprehension skills, and behavior goals.¹¹⁸

108. The duration of the ESY services was determined by the team to be sixty (60) minutes but could be revised based on data collected during the fall and winter breaks. The placement for Student's ESY was also determined to be in a special education class due to Home School not having an ESY inclusion class.¹¹⁹

109. Parent had concerns about the ESY duration and the special education setting,

¹¹⁵ P-Ex.1, p.021-023, R-Ex.16, p.138-140; R-Ex.233, 08/18/2020 Meeting [44:00-55:00].

¹¹⁶ R-Ex.233, 08/18/2020 Meeting [14:57-17:17].

¹¹⁷ R-Ex.233, 08/18/2020 Meeting [55:30-1:00:25].

¹¹⁸ R-Ex.233, 08/18/2020 Meeting [1:00:25-1:01:48].

¹¹⁹ Testimony of BHS, Tr.V2, 191:14-194:14; P-Ex.1, p.032, R-Ex.16, p.149; R-Ex.235, 08/20/2020 Meeting [06:35-32:50].

- however Parent agreed to the team's decision at the meeting but noted that Parent may have questions or concerns to express once Parent received the written IEP.¹²⁰
110. During the August 18, 19 and 20, 2020 meetings, the IEP team also discussed Student's placement due to the concerns expressed by Parent. Parent reiterated to the team that it was important to Parent that Student be placed in a general education setting.¹²¹
111. The IEP team discussed an inclusion setting for Student, which would be placement of Student in the general education class with special education and related services provided to Student in that classroom. During the discussion, Parent provided input and participated in the discussion.¹²²
112. The IEP team discussed the benefits of having Student in the inclusion classroom and Parent agreed that Student's placement should be in the general education classroom with special education supports and services.¹²³
113. The IEP team also discussed that Student would receive speech-language therapy and occupational therapy both in the general education class and through special education 'pull-out' services, where Student would be pulled out of the general education class on occasion to work on speech-language and occupational therapy.¹²⁴
114. Also during the August 2020 IEP revision meetings, Home School team informed

¹²⁰ R-Ex.235, 08/20/2020 Meeting [15:35-16:42], [20:22-20:56], [28:17-28:36], [30:09-30:30], [31:55-32:35].

¹²¹ R-Ex.233, 08/18/2020 Meeting [1:20:30]; R-Ex.235, 08/20/2020 Meeting [20:22-20:56], [28:17-28:36], [30:09-30:30]

¹²² R-Ex.233, 08/18/2020 Meeting [1:17:15-1:22:44]; R-Ex.234, 08/19/2020 Meeting [05:23-07:25], [59:19-1:00:15].

¹²³ R-Ex.235, 08/20/2020 Meeting [32:55-33:20].

¹²⁴ R-Ex.235, 08/20/2020 Meeting [33:21-34:20].

Parent that since Student was in the inclusion class with general education students, student would not be eligible to receive face-to-face instruction for the first few weeks of school, since only the fully self-contained students were eligible for face-to-face instruction.¹²⁵

115. Parent was informed that Student would still receive the services of an RBT virtually and participate virtually in the inclusion class, but Parent stated that Student needed to be in school to receive services.¹²⁶

116. The IEP team offered to start Student with the virtual inclusion class with Student's RBT and take data and meet again if it appeared that Student was not able to participate virtually.¹²⁷

117. During the IEP revision meetings, the team discussed Student's behavioral intervention plan (hereinafter "BIP") that was prepared by DOE LBA1 on June 13, 2020.¹²⁸

118. The BIP, as described for Student, is an ABA-based plan that is created by an LBA or BCBA based on a functional behavior assessment, where specific target problem behaviors are observed and specific interventions-either before or after the behavior-are created to reduce and eventually eliminate the occurrence of the problem behaviors. The BIP can only be implemented by an RBT due to the ABA-based principles of the BIP.¹²⁹

¹²⁵ R-Ex.234, 08/19/2020 Meeting [07:40-10:00], [16:35-17:00].

¹²⁶ R-Ex.234, 08/19/2020 Meeting [17:16-20:36], [55:55-56:30].

¹²⁷ Testimony of BHS, Tr.V2,191:4-13; Testimony of ISPED, Tr.V2, 212:10-213:8; R-Ex.234, 08/19/2020 Meeting [19:45-20:01], [20:39-21:05], [56:31-57:11].

¹²⁸ R-Ex.233, 08/18/2020 Meeting [1:02:23-1:05:50]; R-Ex.234, 08/19/2020 Meeting [22:25-44:35].

¹²⁹ Testimony of BHS, Tr.V2,197:3-198:1, *see also* R-Ex.19, p.172; R-Ex.20, p.196, 225.

119. DOE Licensed Behavior Analyst 2 (hereinafter “DOE LBA2”) reviewed Student’s BIP and Parent did not have any questions, concerns, or additions to make to the BIP. DOE LBA2 informed Parent that the BIP was an evolving document but that any revisions that would be made would be discussed with Parent. The team also discussed the behavior goals for Student.¹³⁰
120. Student’s IEP-08/20/2020 included Student’s eligibility for ESY after a break of fourteen (14) calendar days, where Student will receive ESY services for sixty (60) minutes per day in the special education setting to work on reading comprehension, math comprehension word problems, and behavior skills. The IEP-08/20/2020 noted that for ESY, Student will receive RBT services for sixty (60) minutes per day and ABA services of three hundred (300) minutes per month.¹³¹
121. Student’s IEP-08/20/2020 included revised minutes of special education and related services as follows: one hundred eighty (180) minutes per week of special education in the general education setting; three hundred sixty (360) minutes per quarter of speech-language therapy in the general education and special education setting; and one hundred twenty (120) minutes per quarter of occupational therapy in the general education and special education setting.¹³²
122. Student’s list of supplementary aids and services was modified to include the BIP to be provided to Student daily.¹³³
123. Student’s clarifications of supports and services was modified in the IEP-08/20/2020

¹³⁰ R-Ex.233, 08/18/2020 Meeting [1:02:23-1:05:50]; R-Ex.234, 08/19/2020 Meeting [22:25-44:35]; R-Ex.235, 08/20/2020 Meeting [08:28-13:00].

¹³¹ P-Ex.1, p.032, R-Ex.16, p.149.

¹³² P-Ex.1, p.032, R-Ex.16, p.149.

¹³³ P-Ex.1, p.032, R-Ex.16, p.149.

as to the BIP to read “[a] Behavior Intervention Plan has been developed and shared with parent. Parent did not have concerns regarding the Behavior Intervention Plan. The plan will be implemented and overseen by a Licensed Behavioral Analyst (LBA/BCBA) or a BCaBA Board Certified Assistant Behavioral Analyst under the supervision of an LBA/BCBA.”¹³⁴

124. Student’s educational placement statement in the IEP-08/20/2020 was revised to read “[Student] will not participate with nondisabled students in the general education class during Speech and Occupational Therapy sessions, and when [Student] is working one to one on IEP goals.” The wording of this section was explained to Parent at the IEP meetings in August 2020.¹³⁵

Post-August 20, 2020 IEP meetings

125. For the 2020-2021 school year, Home School began having only selected students on campus, such as the students in the fully self-contained special education classroom and students who did not have the resources to participate in distance learning and came to school to use the school’s computers in a ‘hub.’¹³⁶

126. Students assigned to the inclusion classes at Home School participated by distance learning using visual supports and virtual supports created by the teachers. Students requiring the services of an RBT were assigned a virtual RBT, who would participate with the virtual class and provide cues, visual token boards, and other supports while taking data on the students to determine whether they were benefitting from virtual

¹³⁴ P-Ex.1, p.033, R-Ex.16, p.150.

¹³⁵ P-Ex.1, p.034, R-Ex.16, p.151; R-Ex.234, 08/19/2020 Meeting [58:41-1:00:16].

¹³⁶ Testimony of BHS, Tr.V2, 183:5-184; Testimony of ISPED, Tr.V2, 211:20-212:4.

learning.¹³⁷

127. After determining which students were not benefitting from distance learning, Home School was able to bring those students back to campus to have them participate in the classroom setting with the RBT accompanying them in-person.¹³⁸

128. ISPED made attempts to have Student participate in Home School's inclusion class by sending an invitation to Student through the school's email and by sending Parent information and instructions on how to join the classroom and when to pick up materials from Home School.¹³⁹

Private School

129. On August 21, 2020, Parent enrolled Student at Private School.¹⁴⁰

130. Private School has a total of ___ students in Student's class, which is the ___-grade class.¹⁴¹

131. [REDACTED]
[REDACTED]
[REDACTED]¹⁴²

132. The staff at the ___-grade class consists of Private School Instructor and two teaching assistants. Neither of the teaching assistants has a secondary degree or specialized training in education, nor are they licensed or certified teachers.¹⁴³

¹³⁷ Testimony of BHS, Tr.V2, 184:5-185:11; Testimony of ISPED, Tr.V2, 206:5-207:11.

¹³⁸ Testimony of BHS, Tr.V2,185:12-186:3, 188:8-190:7; Testimony of ISPED, Tr.V2, 209:12-211:15.

¹³⁹ Testimony of ISPED, Tr.V2, 208:3-14.

¹⁴⁰ Testimony of Parent, Tr.V2, 133:22-134:14; P-Ex.2, p.077-087.

¹⁴¹ Testimony of Private School Instructor, Tr.V1, 19:22-20:7, 37:19-20,

¹⁴² Testimony of Private School Instructor, Tr.V1, 18:9-19:23,

¹⁴³ Testimony of Private School Instructor, Tr.V1, 35:14-24, 37:25-38:6, 53:2-4.

133. Student's class at Private School consists of non-disabled students, plus Student and ___ other student that is currently being tested for a disability.¹⁴⁴
134. Private School's curriculum primarily consists of work that is completed by students on a computer, where lessons are taught, and students are required to pass each lesson at eighty (80) percent or higher to advance to the next lesson.¹⁴⁵
135. The students at Private School do interact with each other during spelling, handwriting, lunch, recess, arts and crafts, [REDACTED] workshop, and some learning videos.¹⁴⁶
136. In order to attend Private School, Student must be accompanied by an RBT. If Student's RBT is unavailable or needs to leave at some point during the school day, Student will be sent home from Private School.¹⁴⁷
137. Private School does not modify Student's computer curriculum itself but does provide modifications as to the time that Student is allowed to complete assignments.¹⁴⁸ Some of Student's non-computer-based curriculum is modified to meet Student's needs.¹⁴⁹
138. Private School Instructor does not have formal training in working with disabled students, nor any training in ABA services, but does meet regularly with Student's RBT to discuss Student's behavioral and academic needs.¹⁵⁰

¹⁴⁴ Testimony of Private School Instructor, Tr.V1, 20:11-17, 36:16-25.

¹⁴⁵ Testimony of Private School Instructor, Tr.V1, 23:25:4, 25:20-28:5, 30:3-34:7, 39:7-40:16, 44:17-45:3, 66:3-70:17.

¹⁴⁶ Testimony of Private School Instructor, Tr.V1, 54:13-55:10, 73:24-74:13.

¹⁴⁷ Testimony of Private School Instructor, Tr.V1, 73:6-23, 87:19-25.

¹⁴⁸ Testimony of Private School Instructor, Tr.V1, 51:6-52:5, 53:18-54:12.

¹⁴⁹ Testimony of Private School Instructor, Tr.V1, 63:15-66:2.

¹⁵⁰ Testimony of Private School Instructor, Tr.V1, 57:25-64:20.

139. Student made progress at Private School during the 2019-2020 school year until the COVID-19 pandemic shut down Private School for in-person learning.¹⁵¹
140. Student also made progress since starting Private School in August 2020, and Private School Instructor noted that even though Student had not been in school since March 2020, Student did not have much regression in academics and most behaviors, except that Student required continual redirection in class.¹⁵²
141. Parent and Parent 2 signed an enrollment contract for Student on August 21, 2020, which included an agreement to pay the total tuition of Private School in the amount of Eleven Thousand Six Hundred Sixty-Four Dollars (\$11,664.00) with a possible additional curriculum of approximately Five Hundred Dollars (\$500.00).¹⁵³
142. As of January 2021, Parents have made five (5) payments of One Thousand Six Hundred Six Dollars and Forty Cents (\$1166.40), plus a book fee of Two Hundred Twenty-One Dollars (\$221.00) and a software fee of Three Hundred Seventy-Five Dollars (\$375.00).¹⁵⁴

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.”¹⁵⁵ A FAPE includes both special education and

¹⁵¹ Testimony of Private School Instructor, Tr.V1, 30:3-31:18, 33:21-34:1, 40:9-16, 76:16-20; P-Ex.2, p.063-071.

¹⁵² Testimony of Private School Instructor, Tr.V1, 41:22-42:13; P-Ex.2, p.052-062, 072-076.

¹⁵³ P-Ex.2, p.077-087.

¹⁵⁴ Testimony of Private School Instructor, 85:25-17; see P-Ex.2, p.088.

¹⁵⁵ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91, 102 S.Ct. 3034, 3037-3043 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F.Supp.2d 89, 98 (D. D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)).

related services.¹⁵⁶

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.¹⁵⁷ To provide a FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.”¹⁵⁸

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”¹⁵⁹ 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.¹⁶⁰ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.¹⁶¹

Denials of FAPE determinations are based on one of two categories of review. Procedural violations can occur when the educational agency has not complied with the procedures set forth in the IDEA.¹⁶² Procedural violations do not automatically result in a denial of FAPE, however, as a secondary determination must be made as to whether the violation resulted in: 1) loss of educational opportunity, 2) significant infringement on parental participation, or 3) deprivation of educational benefits.¹⁶³

¹⁵⁶ H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

¹⁵⁷ *Id.*

¹⁵⁸ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

¹⁵⁹ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

¹⁶⁰ H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

¹⁶¹ H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

¹⁶² *Amanda J. ex rel. Annette J. v. Clark County School Dist.* 267 F.3d 877, 890 (9th Cir. 2001) (citing *Rowley*, 458 U.S. at 206-207, 102 S.Ct. at 3034), see also *L.J. by and through Hudson v. Pittsburg Unified School District*, 850 F.3d 996, 1003 (9th Cir. 2017).

¹⁶³ *Id.* at 892.

Substantive violations of the IDEA require an examination of the child’s IEP. The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.”¹⁶⁴ However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,¹⁶⁵ held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”¹⁶⁶

“The standard for evaluating IEPs, commonly called ‘the snapshot rule,’ is not retrospective.”¹⁶⁷ 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.¹⁶⁸ 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.”¹⁶⁹

A. Petitioners failed to prove that Respondents denied Student a FAPE by failing to consider or discuss what assistive technology Student could benefit from at the June 18, 2020 IEP meeting

Petitioners’ first issue is that Respondents denied Student a FAPE at the June 18, 2020 IEP meeting by failing to consider or discuss what assistive technology Student could benefit

¹⁶⁴ *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

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

¹⁶⁶ *Endrew F.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335; *See also, Blake c. ex rel. Tina F. v. Hawai‘i Dept. of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Hawai‘i 2009).

¹⁶⁷ *K.K. ex rel. K.S.K. v. Hawaii*, 2015 WL 4611947 *16 (D. Hawai‘i 2015) (*quoting J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010).

¹⁶⁸ *K.K.*, 2015 WL 4611947 *16 (*quoting Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)).

¹⁶⁹ *J.W.*, 626 F.3d at 439 (*quoting Adams v. Oregon*, 195 F.3d at 1149).

from. Petitioners do not assert what specific assistive technology should have been discussed or provided to Student.

An assistive technology device is defined under the IDEA as “any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability.”¹⁷⁰ Student’s IEP-06/18/2020 contains the following supplemental aids and supports: visual supports, visual and verbal directions prior to transitions, use of a timer, token board system, modeling of new skills and routines, and tactile supports.¹⁷¹ All these aids and supports were discussed at the June 18, 2020 IEP meeting and fall under the definition of assistive technology device.¹⁷² While the discussion on the various aids and supports that would be provided to Student in Student’s IEP was not lengthy or extensive, there was discussion and consideration of what items would be of assistance to Student. The IEP team also discussed Parent’s request for Student to bring a personal smartphone to school, but the team discussed a satisfactory alternative that complied with school rules.¹⁷³ Additionally, Parent was asked about whether Parent had any questions or concerns about the supplementary aids and supports and did not provide any additional items that Parent wanted to discuss.¹⁷⁴ Petitioners have failed to prove that Respondents failed to consider or discuss what assistive technology Student could benefit from.

B. Petitioners failed to prove that Respondents denied Student a FAPE when the IEP team at the June 18, 2020 IEP meeting failed to discuss Student’s eligibility for ESY services

¹⁷⁰ 20 U.S.C. §1401(1)(a); H.A.R. §8-60-2.

¹⁷¹ FOF 79.

¹⁷² See e.g., *E.F. by Fulsang v. Newport Mesa Unified Sch. Dist.*, 726 F.App’x 535, 71 IDELR 161 (2018) *unpublished decision.

¹⁷³ FOF 41.

¹⁷⁴ FOF 59.

Petitioners' second argument is that the June 18, 2020 IEP team failed to discuss Student's eligibility for ESY services. Petitioners assert that the team simply told Parent that Student would only qualify for ESY if Student showed regression after fall break or after a three to four-day weekend. Petitioners point to the IEP team's revision of Student's eligibility during Student's August 2020 IEP meetings to demonstrate the June 2020 IEP team's failure to discuss ESY eligibility.

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.'¹⁷⁵ To qualify for extended school year services, "a claimant seeking an ESY must satisfy an even stricter test, because 'providing an ESY is an exception and not the rule under the regulatory scheme.'"¹⁷⁶ 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.¹⁷⁷ Here, the IEP team at the June 18, 2020 IEP meeting discussed the lack of data about Student's regression during breaks and asked Parent about Student's performance after breaks at

¹⁷⁵ *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008).

¹⁷⁶ *N.B.*, 541 F.3d at 1211, quoting *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6th Cir.) quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), cert. denied, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); see also *Dep't of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 *7 (holding that ESY is "educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information during a break in regularly scheduled classes, such as during the summer.").

¹⁷⁷ *Id.*, quoting *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002); see also *K.K. ex rel. K.S.K. v. Hawaii*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6th Cir. 2004) (confirming that "it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.").

Private School.¹⁷⁸ While Parent insisted on Student's eligibility based on the COVID-19 shutdown, Parent did inform the IEP team that Student, through the assistance of Student's RBT, was able to recoup any losses that Student had over the weekends and during winter break.¹⁷⁹ The IEP team explained to Parent at the June 18, 2020 IEP meeting that because of the unusual nature of the COVID-19 shutdown, the schools would be reassessing students after their return to school to determine what skills the students lost and would be addressing them as compensatory services rather than a qualification for ESY services.¹⁸⁰

The COVID-19 shutdown for many, if not all Hawai'i public schools, began in March 2020 and continues to the present day, where many students are still attending an alternative type of schooling, whether it be distance learning, blended in-person learning, or in-person learning for some select students. At the time of the June 18, 2020 IEP meeting, no clear direction was provided as to how the loss of skills due to the school shutdown would be addressed.¹⁸¹ It was reasonable at the time of the June 18, 2020 IEP meeting to address the regression of all students due to the COVID-19 shutdown once school resumed. Due to the length and unusual nature of the COVID-19 shutdown, any regressions demonstrated by students may not be typical or something that a student would experience during a normal extended school break. The discussion about Student's eligibility for ESY services at the June 18, 2020 IEP meeting correctly focused on Student's regression and recoupment of skills during extended school breaks. The fact that the IEP team later decided to address the matter again based on Parent's email about Parent's unhappiness with the IEP-06/18/2020 is not reflective of any violation on

¹⁷⁸ FOF 42.

¹⁷⁹ FOF 44.

¹⁸⁰ FOF 45.

¹⁸¹ See Testimony of ISPED, Tr.V2, 190:12-191:3.

the IEP team's part during the June 18, 2020 meeting.

Even if the IEP team's failure to further discuss Student's eligibility at the June 18, 2020 IEP meeting were a violation, it would amount to a procedural violation. In order to prove a denial of FAPE, Petitioners must also prove that any possible procedural violation in this area rose to the level of a loss of educational opportunity, significant infringement of parental participation, or deprivation of educational benefits. At the time of the June 18, 2020 IEP meeting, the IEP team was aware of the pending reevaluation for Student that was just awaiting Parent's signed consent forms.¹⁸² The IEP team discussed during the June 18, 2020 IEP meeting that they would be meeting again to discuss the reevaluations and could also revise the IEP as necessary after the assessments were completed.¹⁸³ Ultimately, the IEP team did review and revise Student's IEP prior to Student being enrolled at Private School and did change the determination as to Student's eligibility for ESY based on Parent's concern and the additional information provided by Parent and the reevaluation assessments. Petitioners have failed to prove that any failure of the IEP team to further discuss Student's eligibility for ESY resulted in a loss of educational opportunity, denial of parental participation or deprivation of educational benefits.

C. Petitioners have failed to prove that Respondents denied Student a FAPE when the IEP team on June 18, 2020 failed to place Student in the least restrictive environment

Petitioners third argument is that Respondents denied Student a FAPE by failing to place Student in the least restrictive environment at the June 18, 2020 IEP meeting. Petitioners have made three specific claims regarding this issue: 1) the IEP team failed to provide/discuss supports and services for Student prior to determining Student's placement; 2) the IEP team

¹⁸² FOF 28.

¹⁸³ FOF 36, 60, 65.

refused to consider Parent's request to accommodate Student by having a smaller general education class size; and 3) the IEP team informed Parent that Student needed to be at grade level to be placed in general education classes.

Under the IDEA, an IEP is a "written statement of for each student with a disability that is developed, reviewed and revised in a meeting ... and that shall include: ... (5) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in [] activities..."¹⁸⁴ This portion of the IEP is commonly referred to the statement regarding least restrictive environment (hereinafter "LRE") or the student's educational placement. Typically, in determining a student's LRE, an IEP team should discuss four factors, commonly referred to as the *Holland* factors, which include: 1) the academic benefits to the student being in the general education setting; 2) the non-academic benefits for the student being in the general education setting; 3) the effect of the student on the teachers and the other students in the class; and 4) the costs of mainstreaming the student. While these factors should guide the placement decisions of the IEP team, a failure to specifically discuss the factors is a procedural violation.

Here, the IEP team at the June 18, 2020 meeting did not specifically go through the *Holland* factors during the placement discussion for Student.¹⁸⁵ The IEP also team mistakenly attempted to determine the location of Student's special education and related services before going through the supplementary aids and supports that Student would receive in the IEP. Initially, a discussion of the various settings from the general education classroom, inclusion class, and the fully self-contained special education class took place after the ESY eligibility

¹⁸⁴ H.A.R. §8-60-44(a)(5); 34 C.F.R. §300.320(a)(5).

¹⁸⁵ See FOF 46-50, 60-63.

determination.¹⁸⁶ However, once Parent pointed out that Parent wanted to hear the supports that Student would receive in the IEP, the team paused the placement discussion to talk about Student's supplementary aids and supports.¹⁸⁷

During the placement discussions, both before and after the supplementary aids section of the IEP meeting, Parent expressed a desire for Student to be in a small class with general education students.¹⁸⁸ Home School informed Parent that the general education classes have around ___ students, and expressed concern about Student having the skills to benefit from the large general education setting.¹⁸⁹ Based on Parent's concerns about Student being more successful in a smaller setting and the transfer of Student from Private School's small setting to Home School, the IEP team suggested starting Student in the fully self-contained special education classroom, due to the size of the class.¹⁹⁰ The IEP team discussed with Parent the possibility of starting Student in the fully self-contained special education classroom and then including Student in the general education class for certain subjects in which Student excels.¹⁹¹ While a discussion on the specific *Holland* factors was not held, the team did discuss with Parent the concerns that Parent had and the various options available for Student. The team also noted that the decision on Student's placement could easily be revisited once the team observes how Student adjusts to attending Home School.¹⁹²

At the end of the discussion on Student's placement, Parent agreed to start Student in a fully self-contained special education classroom with the understanding that the placement could

¹⁸⁶ FOF 46

¹⁸⁷ FOF 53.

¹⁸⁸ FOF 47, 62.

¹⁸⁹ FOF 49.

¹⁹⁰ FOF 48-49.

¹⁹¹ FOF 52.

¹⁹² FOF 61-62.

be revisited by the IEP team for further discussion.¹⁹³ Parent did not voice Parent's objection to Student's placement until Parent sent Home School an email on June 20, 2020, after which Home School made repeated attempts to schedule a meeting with Parent. Petitioners have failed to prove that the June 18, 2020 IEP team failed to place Student in the least restrictive environment.¹⁹⁴

Petitioners argue that the subsequent change in Student's placement at the August 2020 IEP meetings demonstrate that the June 18, 2020 IEP team erroneously placed Student in a more restrictive environment. As previously stated, the IEP must be examined based on the information that was available to the IEP team at the time of the creation of the IEP.¹⁹⁵ During the IEP meeting on June 18, 2020, the IEP team discussed the various placements and options for Student's placement in light of Parent's expressed concerns. Based on Parent's emphasis that Student performs best in a small group of students and Student's difficulty with transitions, the rest of the IEP team decided to start Student in the small special education classroom setting and collect data on Student to determine whether Student should be in a different setting.

At the August 2020 IEP meetings, the team made it a priority to address Parent's concerns due to Parent expressing dissatisfaction with Student's placement in the IEP-06/18/2020. While Parent still inquired about the class size, Parent was no longer adamant about Student being in a class of a certain size and was more adamant about Student being around general education peers. This time, Parent was amenable to the inclusion setting for Student and that was the setting that was ultimately agreed upon by the IEP team.¹⁹⁶

¹⁹³ FOF 62.

¹⁹⁴ FOF 85-91.

¹⁹⁵ See *K.K.*, 2015 WL 4611947 *16, *J.W.*, 626 F.3d at 439.

¹⁹⁶ See FOF 110-112.

While the IEP team did not have a clear discussion about the *Holland* factors at either the June 18, 2020 or the August 2020 IEP meetings, Petitioners have not proven that this resulted in a loss of educational opportunity or denial of parental participation. On the contrary, it is clear from the record that Parent's concerns about Student were the focus of the discussions of Student's placement at the various meetings. Even if Home School's revision of Student's IEP's educational placement were demonstrative of a failure to place Student in the least restrictive environment, 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.¹⁹⁷ In these situations, the IDEA also allows for school districts to correct the error and make efforts to remedy the situation.¹⁹⁸ As previously discussed, once Parent raised concerns about Student's placement to Home School in Parent's June 20, 2020 email, Home School immediately attempted to address those concerns by attempting to schedule a meeting to revise Student's IEP.¹⁹⁹ Additionally, at the time of the June 18, 2020 IEP meeting, the IEP team had offered to review and revise Student's placement once more information was received about Student's performance and adjustments to the class in which Student was placed, and the team also was aware of a further meeting that would be held for Student's reevaluation.²⁰⁰ Even if the placement of Student in Student's IEP-06/18/2020 was determined improperly, Petitioners have failed to prove that it resulted in a denial of FAPE.

¹⁹⁷ See *Kutasi v. Las Virgenes Unified School Dist.*, 494 F.3d 1162, 1166 (9th Cir. 2007) (citing 20 U.S.C. §1415(b)(6)(A)).

¹⁹⁸ *Id.* (citing 20 U.S.C. §1415(f)(1)(B)(i)(IV)).

¹⁹⁹ FOF 86-90.

²⁰⁰ FOF 61-63.

D. Petitioners have failed to prove that Respondents denied Student a FAPE when the June 18, 2020 IEP team did not provide transition supports and services for Student's transition from Private School to the placement as described in Student's IEP.

Petitioners argue that the June 18, 2020 IEP team failed to provide transition supports and services for Student's transition from Student's private program into Home School. While it may be important for an IEP to include necessary transitional supports for a student to transfer from a private program into different program, it does not apply in this case. At the time of the June 18, 2020 IEP meeting, Student was not enrolled in any program, as Student was previously enrolled in Private School for the 2019-2020 school year, but Parent disenrolled Student in April 2020.²⁰¹ Student was also previously receiving ABA services from ABA Company for the 2019-2020 school year, but those services were also cancelled by Parent during the COVID-19 shutdown and had not been resumed at the time of the meeting.²⁰² Parent appeared to lead the IEP team to believing that Student would be attending Private School and would have RBT services prior to starting Home School, so the IEP team did discuss a transition plan for Student at the June 18, 2020 meeting.²⁰³

Despite Student not attending Private School and not receiving ABA services, the June 18, 2020 IEP team did create and include a transition plan in Student's IEP-06/18/2020. This transition plan was initially suggested by Parent and was adopted by the team and subsequently written into the IEP-06/18/2020.²⁰⁴

²⁰¹ FOF 16.

²⁰² FOF 14.

²⁰³ FOF 70.

²⁰⁴ FOF 68-69, 71, 83.

Petitioners have failed to prove that the June 18, 2020 IEP team failed to provide transition supports and services for Student's transition from Student's private program into Home School.

E. Petitioners have failed to prove that Respondents denied Student a FAPE when the June 18, 2020 IEP failed to include behavioral interventions, a behavioral intervention plan, or applied behavior analysis needed to address Student's needs

Petitioners next argument is that Respondents failed to include behavioral interventions, a behavioral intervention plan, or applied behavior analysis needed to address Student's needs. The record in this case shows that Petitioners' argument fails.

Petitioners cite cases in which a student's IEP fails to specify supports and services necessary to address the student's behaviors, such as *Dep't of Educ. State of Hawaii v. L.S., by and through C.S.*²⁰⁵. In *L.S.*, the IEP attempted to address Student's behavioral issues by requiring that a behavioral support plan be followed daily, however upon further review, the behavioral support plan was not made a part of the IEP, nor was it ever sent to or shown to parents until the administrative hearing.²⁰⁶ The record in this case is distinguishable from the *L.S.* case. First, the *L.S.* case involved a school-level behavioral support plan, which is not developed, reviewed, or revised by an LBA/BCBA. Here, the BIP, which was in the process of being developed by an LBA/BCBA at the time of the June 18, 2020 IEP meeting, was described in the IEP-06/18/2020.²⁰⁷ Parent was aware of the October 21, 2019 FBA from which DOE LBA was developing the BIP.²⁰⁸ The FBA identified specific target behaviors to be addressed in the BIP and those were discussed with Parent during the June 18, 2020 IEP meeting.²⁰⁹ Parent

²⁰⁵ 2019 WL 1421752 (D. Hawai'i 2019).

²⁰⁶ 2019 WL 1421752 at *11-12.

²⁰⁷ FOF 56, 58.

²⁰⁸ FOF 24.

²⁰⁹ FOF 31.

was also asked to provide information about any additional behaviors that Student had and provided the team with both improvements in Student's behaviors and additional problem behaviors that were seen.²¹⁰

ABA services and behavioral supports for Student were discussed extensively during the IEP meeting on June 18, 2020 and were included in the IEP-06/18/2020.²¹¹ The IEP-06/18/2020 provided Student an Individual Instructional Support daily throughout the entire school day, which was clarified to be the services of an RBT.²¹² The IEP-06/18/2020 also included RBT supervision and programming minutes by an LBA/BCBA, as well as teacher consultation and parent training by the LBA/BCBA.²¹³ Finally, the IEP-06/18/2020 provided supplementary aids and supports of visual aids, visual and verbal directions prior to transitions, use of a timer, token board system, preferential seating, and proximity to an adult.²¹⁴

Petitioners have failed to prove that the IEP-06/18/2020 failed to include behavioral interventions, a behavioral intervention plan or applied behavioral analysis to address Student's needs.

F. Petitioners have failed to prove that Respondents denied Student a FAPE when Student's IEP-06/18/2020 and IEP-08/20/2020 could not be materially implemented with regard to placement and exposure to other students due to COVID-19

Petitioners' final two arguments involve the potential failure of Respondents to materially implement Student's IEP. Petitioners' first argument focuses on Student's IEP-06/18/2020, in which Student's educational placement was in a fully self-contained special education classroom.

²¹⁰ FOF 32-33.

²¹¹ FOF 55-58.

²¹² FOF 79-80.

²¹³ FOF 81.

²¹⁴ FOF 79-82.

Petitioners' second argument involves Student's IEP-08/20/2020, in which Student was placed in an inclusion setting.

The Ninth Circuit Court of Appeals has reviewed IDEA cases in relation to implementation failures alleged against school districts. In *Van Duyn ex rel. Van Duyn v. Baker School Dist.*, the Court reviewed the IDEA's definition of a free appropriate public education as "special education and related services that ... are provided in conformity with the [child's] individualized education program," and determined that "[t]here is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education."²¹⁵ The Ninth Circuit also explored the analysis done by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*,²¹⁶ and recognized the court's conclusion that implementation failures did not violate the IDEA because "the significant provisions of [the child's] IEP were followed, and, as a result, he received an educational benefit."²¹⁷

In the month of March 2020, the global pandemic COVID-19 entered into the State of Hawai'i, resulting in numerous closures of businesses, government offices, public places and both public and private schools under emergency orders issued by the Governor of the State of Hawai'i, Mayors of the Hawai'i Counties, and the Superintendent of the Hawai'i Public Schools.²¹⁸ Private School was included in the physical closures, which prevented teachers, students and staff from entering onto the school grounds.²¹⁹

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

²¹⁶ 200 F.3d 341 (5th Cir. 2000).

²¹⁷ *Van Duyn*, 502 F.3d at 821.

²¹⁸ See Governor of the State of Hawaii's First through Thirteenth Proclamations Related to the COVID-19 Emergency; and Hawaii Department of Education Press Releases.

²¹⁹ FOF 8, 13.

Upon the outbreak of COVID-19 in the United States, the United States Department of Education (hereinafter “USDOE”) provided some guidance to the school districts in how to address providing IDEA services during school closures. In the *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, the USDOE noted that “the IDEA, Section 504 and Title II of the American Disabilities Act do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time because of exceptional circumstances, such as an outbreak of a particular disease.”²²⁰ However, the USDOE went on to say

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA...²²¹

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

School districts must provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students. In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online or telephonically.²²²

²²⁰ 76 IDELR 77 (EDU 2020).

²²¹ *Id.*

²²² *Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, 120 LRP 10623 (OSERS/OCR March 21, 2020).

A. Student's IEP-06/18/2020

Although Student's IEP-06/18/2020 was revised and replaced with Student's IEP-08/20/2020, Petitioners nonetheless argue that the IEP-06/18/2020 could not be materially implemented, thereby resulting in a denial of FAPE. Since the record is unclear as to the start of the 2020-2021 school year, it is possible that Student's IEP-06/18/2020 could have been implemented prior to the revision IEP-08/20/2020. Therefore, this argument will be addressed separately from the IEP-08/20/2020.

For the IEP-06/18/2020, Student's educational placement was in the fully self-contained special education classroom.²²³ On August 14, 2020, Parent inquired with Home School about Student's ability to attend school in-person and Parent was informed that Student would be eligible for in-person services due to Student's placement.²²⁴ Petitioners have failed to demonstrate how Student's IEP-06/18/2020 would not have been materially implemented due to COVID-19 restrictions.

B. Student's IEP-08/20/2020

Petitioners argue that Student's IEP-08/20/2020 would not have been provided as discussed, due to Student's class participating in distance learning during the beginning of the 2020-2021 school year because of COVID-19 restrictions. Petitioners do not suggest how the IEP-08/20/2020 would not be materially implemented, except to say that Student may be the only student attending school in the inclusion class and that Student was unable to benefit from distance learning.

²²³ FOF 63.

²²⁴ FOF 100.

Parent did express concerns to the team that Student was unable to benefit from distance learning when Private School shut down due to COVID-19, however the undisputed evidence in the record was that at the time Parent attempted to do distance learning with Student, Student was not receiving the services of an RBT.²²⁵ There were no attempts made to conduct virtual learning with the services of an RBT for Student, whether in-person or virtually. Notably, the majority of assignments done at Private School are done on a laptop computer where Student watches an assignment with an audio program through Student's headphones and Student completes the assignments online.²²⁶ Student's RBT is primarily responsible for watching what Student is doing on the assignments and to identify when Student is feeling frustrated and needs a break or during transitions to different assignments or subjects.²²⁷ At Home School, Student would have an RBT assigned to observe Student virtually during the inclusion class and would be implementing the BIP and taking data on Student's performance.²²⁸ The IEP team also explained to Parent during the August 20, 2020 IEP meeting that the team would take data to see if Student were benefitting from virtual learning, and if not, the team could review Student's plan.²²⁹

Petitioners have not demonstrated how having other students in Student's class interact with Student virtually would be a material failure to implement Student's IEP. While Student may not have face-to-face interaction in-person, Student would be participating in the general education classroom in the same fashion as the other students in Student's class. Student would still receive the services of an RBT and would still have ABA services by the LBA, who could

²²⁵ FOF 15.

²²⁶ FOF 10, 134.

²²⁷ FOF 12.

²²⁸ FOF 126.

²²⁹ FOF 127.

observe Student during virtual learning and adjust Student's BIP or other ABA programming as needed.

Finally, although ISPED sent Parent the information and links to join the virtual classroom, Parent made no efforts to have Student attempt to participate.²³⁰ Parent essentially prevented Home School from implementing Student's IEP-08/20/2020 by enrolling Student in Private School on August 21, 2020, the day after the IEP meeting and did not make any efforts to allow Home School to begin implementation of the IEP. Petitioners have failed to prove that Respondents denied Student a FAPE when the IEP-08/20/2020 could not be materially implemented.

VI. DECISION

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

²³⁰ FOF 128.

RIGHT TO APPEAL

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

DATED: Honolulu, Hawai'i, February 24, 2021.

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