



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

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

Petitioner(s),

vs.

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

Respondents.

DOE-SY2021-028

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing: October 23, 2020  
November 10, 2020

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

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

Education Act, from Student, by and through Parent (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on September 22, 2020.

On September 23, 2020, Petitioners informed the Office of Dispute Resolution that the parties had agreed that no resolution could be reached and that the parties were waiving the resolution session. On September 25, 2020, a prehearing conference was held before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Kris S. Murakami, Esq. (hereinafter “Ms. Murakami”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for October 23 & 26, 2020. On September 25, 2020, the parties submitted a signed written waiver of the resolution session pursuant to Hawai‘i Administrative Rules (hereinafter “H.A.R.”) §8-60-64(c)(2), and the deadline for the decision in this matter was set for November 9, 2020.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure compliance with government mandated social distancing.<sup>2</sup> An Order Regarding Video Conference Due Process Hearing was issued on October 7, 2020, which set forth the parameters for the video conference hearing. These parameters included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

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<sup>2</sup> See Governor of the State of Hawai‘i’s Thirteenth Proclamation Related to the COVID-19 Emergency, effective September 22, 2020.

The Hearing commenced on October 23, 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, Mr. Peck and Mark Nugent, Esq., on behalf of Petitioners; and Resource Teacher (hereinafter “RT”) and Ms. Murakami on behalf of Respondents, as well as the assigned court reporter. The Hearing was scheduled to continue on October 26, 2020, however Mr. Peck had an emergency situation and notified both Ms. Murakami and this Hearings Officer. By agreement of the parties, the continued Hearing on October 26, 2020 was postponed to November 10, 2020. Due to the postponement of the continued Hearing date, Petitioners requested an extension of the deadline, which was granted from November 9, 2020 to December 24, 2020. The Hearing proceeded on November 10, 2020 with Parent and Mr. Peck on behalf of Petitioners, and RT and Ms. Murakami on behalf of Respondents, and the testimony of the witnesses was completed on that date.

At the Hearing, Petitioners called Parent and Board-Certified Behavior Analyst (hereinafter “BCBA”) as their witnesses during their case-in-chief and rested. Respondents called District Clinical Psychologist (hereinafter “DCP”) and Principal during their case and rested. Petitioners called Parent to testify regarding rebuttal evidence.

Each party submitted their exhibits for the Hearing by the disclosure deadline of October 16, 2020. On November 12, 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 November 19, 2020. Any objections to the proposed exhibits were due on November 23, 2020. Neither Petitioners nor Respondents

submitted any corrections or additional proposed exhibits to be received as evidence for consideration in the Decision. This Hearings Officer additionally inquired with the parties whether either party wanted to provide the audio recordings of the IEP meetings of November 20, 2019 and December 17, 2019, due to Respondents submitting transcripts of the meetings. As neither party submitted or requested that the audio recordings be included for consideration, this Hearings Officer did review and consider the transcripts that were received from Respondents' exhibits. This Hearings Officer notes that Petitioners submitted two (2) of Respondents' exhibits (Respondents' Exhibit 5, pages 285-288) attached to their Closing Brief.<sup>3</sup> Due to the deadlines set for the parties for the submission of additional exhibits, this Hearings Officer did not consider Petitioners' proposed additional exhibits attached to Petitioners' Closing Brief as part of this Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-025; Exhibit 2, pages 026-027; Exhibit 3, pages 028-030; Exhibit 4, page 031; Exhibit 5, pages 032-034; Exhibit 6, pages 035-036; Exhibit 7, pages 037-039; Exhibit 8, pages 040-043; Exhibit 9, pages 044-045; Exhibit 10, pages 046-072; Exhibit 11, page 073; Exhibit 12, pages 074-089; Exhibit 13, pages 090-091; Exhibit 14, page 092; Exhibit 15, page 093; Exhibit 16, pages 094-115; Exhibit 17, pages 116-117; Exhibit 18, pages 118-119; Exhibit 19, pages 120-122; Exhibit 20, page 123; Exhibit 21, page 124; Exhibit 22, page 125; Exhibit 23, pages 126-132; Exhibit 24, pages 133-138; and Exhibit 25, pages 139-144.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-005, Exhibit 2 pages 067, 071-072; Exhibit 3, pages 104-130; and Exhibit 4, pages 145-152; Exhibit 5, pages 217-221, 227-241, 300-306; Exhibit 6, pages 391-421, 423-

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<sup>3</sup> See Petitioners' Closing Brief, Filed December 7, 2020.

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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 Monday, December 7, 2020. 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 two (2) issues in the Complaint to be addressed at the Hearing:

1. Whether Respondents denied a free and appropriate public education (hereinafter “FAPE”) by failing to create an Individualized Educational Program (hereinafter “IEP”) for Student subsequent to February 2020.
2. Whether Respondents denied Student a FAPE by terminating Student’s eligibility on or before February 2020.

## **IV. FINDINGS OF FACT**

### Student’s background

1. Student is \_\_\_ years old and is a resident in Home School’s district.<sup>4</sup>

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<sup>4</sup> Testimony of Parent, Transcript of Proceedings Volume 1, page 26, lines 8-10, page 41, lines 16-18 (hereinafter referenced as “Tr.V1, 26:8-10, 41:16-18”); Petitioners’ Exhibit 1, page 001

2. Student has been diagnosed with [REDACTED] [REDACTED] and has a long history of other medical ailments [REDACTED] [REDACTED] [REDACTED].<sup>5</sup>
3. An eligibility meeting for Student was held on May 11, 2015, during which Student was determined to be eligible for IDEA services.<sup>6</sup> On May 24, 2016, an IEP was developed for Student (hereinafter “IEP-05/24/2016”).<sup>7</sup> The IEP-05/24/2016 contained information in Student’s Present Levels of Educational Performance (hereinafter “PLEPs”) from the assessments conducted with Student in 2015.<sup>8</sup>
4. On July 13, 2015, Neuropsychologist prepared a report of a neuropsychological examination of Student. This report was considered by the May 24, 2016 IEP team.<sup>9</sup> In this neuropsychological examination of Student, the diagnosis of \_\_\_ was not mentioned, nor were there any signs/symptoms of \_\_\_ noted in Neuropsychologist’s report.<sup>10</sup>
5. Student’s IEP-05/24/2016 indicated that due to Student’s medical history and the neuropsychological examination, Student was determined to be eligible under the category of \_\_\_\_.<sup>11</sup>
6. Student’s educational placement in the IEP-05/24/2016 was in a fully self-contained

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(hereinafter referenced as “P-Ex.1, p.001”).

<sup>5</sup> P-Ex.1, p.003.

<sup>6</sup> P-Ex.1, p.002.

<sup>7</sup> P-Ex.1, p.001-025.

<sup>8</sup> See P-Ex.1, p.002-006.

<sup>9</sup> P-Ex.1, p.006.

<sup>10</sup> Testimony of DCP, Tr.V2, 139:7-23; P-Ex.1, p.006.

<sup>11</sup> P-Ex.1, p.006.

- special education classroom with a modified schedule from 8:00 a.m. to 11:30 a.m. and would participate with non-disabled students for recess, field-trips, Hawaiiana, Music, school-wide activities and assemblies.<sup>12</sup>
7. Student's IEP-05/24/2016 indicated that Student's reevaluation was due in May 2018.<sup>13</sup>
  8. On March 10, 2017, a team meeting was held to determine what assessments the IEP team needed in Student's reevaluation to develop a new IEP for Student, since Student did not attend Home School for the 2016-2017 school year. The team determined that Student would be given cognitive, speech/language, academic, behavior, occupational therapy, and physical therapy assessments and a functional listening evaluation.<sup>14</sup>
  9. In February 2017, Neuropsychologist completed another neuropsychological assessment of Student, and prepared a report dated March 30, 2017 (hereinafter "Neuro-03/30/2017"). This report of Neuropsychologist was not mentioned nor presented to the team at the March 10, 2017 meeting.<sup>15</sup> In the Neuro-03/30/2017, Student was diagnosed with \_\_\_\_.<sup>16</sup>
  10. Since August 2017 until around March 2020, Student attended ABA Clinic's intensive applied behavioral analysis (hereinafter "ABA") program full-time and did not attend any DOE school. In March 2020, ABA Clinic closed to students due to the

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<sup>12</sup> P-Ex.1, p.024.

<sup>13</sup> P-Ex.1, p.001.

<sup>14</sup> R-Ex.2, p.067.

<sup>15</sup> Testimony of Parent, Tr.V1, 57:25-60:24.R-Ex.3, p.104-130.

<sup>16</sup> R-Ex.3, p.119-122.

COVID-19 global pandemic.<sup>17</sup>

11. In April 2019, Neuropsychologist conducted another neuropsychological assessment of Student and prepared a report dated June 12, 2019 (hereinafter “Neuro-06/12/2019”).<sup>18</sup> In this report, Neuropsychologist again diagnosed Student with \_\_\_\_.<sup>19</sup>

12. Neuro-06/12/2019 was a thirty-one (31) page report that documented Neuropsychologist’s two (2) day assessment of Student, which included a clinical interview and a battery of assessments conducted with Student, questionnaires and assessments conducted with Parent and with ABA Clinic Teacher. Neuro-06/12/2019 included recommendations for Student regarding provision of ABA services, speech therapy, occupational therapy, school accommodations, and daily recommendations for Student’s continued development.<sup>20</sup>

13. Prior to November 14, 2019, Respondents conducted academic, cognitive, occupational therapy, physical therapy, speech/language assessments and a functional listening evaluation for Student’s reevaluation,<sup>21</sup>

14. An eligibility meeting was scheduled for November 20, 2019 to review the assessments that had been completed to see if the team would be able to determine Student’s eligibility and possibly try to proceed to develop an IEP for Student based on the information they had.<sup>22</sup>

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<sup>17</sup> Testimony of Parent, Tr.V1, 36:20-38:1, 57:12-15.

<sup>18</sup> R-Ex.6, p.391-421.

<sup>19</sup> R-Ex.6, p.392.

<sup>20</sup> See R-Ex.6, p.391-421.

<sup>21</sup> R-Ex.5, p.217-221.

<sup>22</sup> Testimony of Principal, Tr.V2, 201:2-11, 203:1-20; 233:10-18, 241:21-242:17; R-Ex.2, p.072.



15. Email communications between Parent and Principal confirmed the meeting and receipt by Parent of the assessments to be discussed at the meeting on November 20, 2019. In the emails, Principal further requested that Parent provide the school with “any new/updated student information (ex. – assessments, reports) in the areas that are identified in [the] IEP as well as any additional areas related to [Student’s] educational programming.”<sup>23</sup>

16. On November 14, 2019, Parent provided Home School with Neuro-06/12/2019.<sup>24</sup> At that time, Parent did not provide Home School with Neuro-03/30/2017.<sup>25</sup>

November 20, 2019 meeting

17. Present at the eligibility meeting on November 20, 2019 was Student Services Coordinator (hereinafter “SSC”), DCP, Special Education Resource Teacher, Speech Pathologist (hereinafter “SLP”), Physical Therapist (hereinafter “PT”), Parent, Parent Friend, Special Education Teacher, Principal, Clinical Psychologist (hereinafter “CP”), Teacher, Occupational Therapist (hereinafter “OT”), and State Resource Teacher.<sup>26</sup>

18. At the eligibility meeting, each of the assessors presented the results of their assessments conducted with Student as part of the reevaluation. SSC presented the results of the academic assessments, CP presented the results of the cognitive assessment, OT presented the results of the occupational therapy assessment, PT

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<sup>23</sup> R-Ex.5, p.217-221.

<sup>24</sup> Testimony of Parent, Tr.V1, 61:15-63:7; Testimony of Principal, Tr.V2, 204:9-205:4; R-Ex.6, p.391.

<sup>25</sup> Testimony of Parent, Tr.V1, 59:7-60:4; Testimony of Principal, Tr.V2, 207:10-16; R-Ex.3, p.104.

<sup>26</sup> R-Ex.2, p.071; R-Ex.6, p.424, Meeting Transcript page 2, lines 3-18 (hereinafter referenced as “11/20/19-MTR.2:3-18”).

- presented the results of the physical therapy assessment that was completed by another physical therapist, SLP presented the results of the speech-language assessment, and State Resource Teacher presented the results of the functional listening evaluation.<sup>27</sup>
19. Student's composite scores in the academic assessment were in the low range when compared to Student's \_\_\_-grade peers for academic skills, academic applications and brief achievement cluster scores.<sup>28</sup>
20. CP conducted an in-person cognitive assessment with Student and noted that CP could "confidently say that [Student is] performing below the majority of [Student's] same-age peers with regard to [Student's] cognitive functioning."<sup>29</sup>
21. OT's July 2018 assessment of Student determined that Student scored in the very low range. OT noted that Student had a hard time copying a horizontal line during the testing, did not use a consistent grasp of a pencil and needed assistance positioning a scissors appropriately, but was able to complete some of the fine motor activities like stringing beads and stacking blocks.<sup>30</sup>
22. PT reviewed the physical therapy assessment conducted by a different physical therapist in May 2018, in which the assessment determined that Student scored in the fifth percentile for locomotor, and sixteenth percentile for object control.<sup>31</sup>
23. Student's speech assessment was completed and presented by SLP, who determined that Student's [REDACTED] score was in the borderline

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<sup>27</sup> See R-Ex.6, p.428-468, 11/20/19-MTR.6:3-46:11.

<sup>28</sup> R-Ex.6, p.432, 11/20/19-MTR.10:2-22.

<sup>29</sup> R-Ex.6, p.435-439, 11/20/19-MTR.13:3-17:25.

<sup>30</sup> R-Ex.6, p.441-446, 11/20/19-MTR.19:20-24:20.

<sup>31</sup> R-Ex.6, p.450-453, 11/20/19-MTR.28:10-31:21.

impaired or delayed range. Student was also given an articulation test in which Student's standard score result was extremely low.<sup>32</sup>

24. State Resource Teacher conducted and presented the results for Student's functional listening evaluation, which determined that Student's FM system needed to be updated.<sup>33</sup>

25. Several of the presenters also commented on Student's behaviors during their assessments. These included the academic assessment by SSC,<sup>34</sup> the cognitive assessment by CP,<sup>35</sup> and the speech assessment by SLP.<sup>36</sup>

26. After the assessments were discussed, the team moved onto discussion of the report by Neuropsychologist, Neuro-06/12/2019, provided by Parent.<sup>37</sup>

27. During this discussion, CP informed Parent that the team wanted to complete the behavioral assessment that had not yet been completed because the DOE is "trying to determine what's going to be the impact and then how we can most support [Student] in the school setting, [CP] had questions about school functioning a little bit more."<sup>38</sup> CP later explained to Parent that Neuro-06/12/2019 was lacking information about behaviors that Student has when Student is trying to generalize skills outside of ABA Clinic.<sup>39</sup>

28. At the eligibility meeting on November 20, 2019, the team decided to continue the

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<sup>32</sup> R-Ex.6, p.455-464, 11/20/19-MTR.34:1-42:6.

<sup>33</sup> R-Ex.6, p.466-467, 11/20/19-MTR.44:2-45:21.

<sup>34</sup> R-Ex.6, p.429-430, 11/19/20-MTR.7:19-8:4.

<sup>35</sup> R-Ex.6, p.440-441, 11/19/20-MTR.18:9-19:2.

<sup>36</sup> R-Ex.6, p.458, 11/19/20-MTR.36:5-25.

<sup>37</sup> R-Ex.6, p.471-499, 11/19/20-MTR.49:12-77:21.

<sup>38</sup> R-Ex.6, p.501, 11/19/20-MTR.79:18-22.

<sup>39</sup> R-Ex.6, p.503-504, 11/19/20-MTR.81:18-82:3.

meeting due to a difference of opinion that CP had with Neuro-06/12/2019. The team wanted to continue with the behavioral assessment, but Parent requested that CP speak with Neuropsychologist to see if CP's questions could be answered to the team could move forward with Student's eligibility and develop an updated IEP for Student.<sup>40</sup>

29. At the November 20, 2019 meeting, the team requested that Parent provide them with the Neuro-03/30/2017. On November 21, 2019, Home School received the Neuro-03/30/2017 from Parent.<sup>41</sup>

30. On November 21, 2019, CP spoke with Neuropsychologist regarding the Neuro-06/12/2019.<sup>42</sup> CP obtained information that the assessment conducted for the Neuro-06/12/2019 was primarily based on Parent's reported information.<sup>43</sup> CP did not provide any of the information obtained from Neuropsychologist to any of the team members prior to the December 17, 2019 meeting.<sup>44</sup>

#### December 17, 2019 meeting

31. Present at the December 17, 2019 meeting were DCP, Special Education Resource Teacher, SLP, PT, Parent, Parent Friend, Special Education Teacher, Principal, CP, Teacher, and OT.<sup>45</sup>

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<sup>40</sup> See R-Ex.6, p.506-509, 11/19/20-MTR.84:13-87:8.

<sup>41</sup> Testimony of Parent, Tr.V1, 59:7-16; Testimony of Principal, Tr.V2, Tr.205:15-206:3; R-Ex.3, p.104.

<sup>42</sup> Although Principal had testified that there were some difficulties with speaking with Neuropsychologist, this is contradicted with the transcript of the December 17, 2019 meeting where CP informs Parent that CP spoke with Neuropsychologist on November 21, 2019. R-Ex.6, p.596, 12/17/19-MTR.45:16-17.

<sup>43</sup> Testimony of Principal, Tr.V2, 208:3-10; R-Ex.6, p.598, Meeting Transcript page 47, lines 11-24 (hereinafter referenced as "12/17/19-MTR.47:11-24").

<sup>44</sup> Testimony of Principal, Tr.V2, 237:17-239:14.

<sup>45</sup> R-Ex.6, p.553, 12/17/19-MTR-2:5-15.

32. At the December 17, 2019 meeting, CP explained that after CP's conversation with Neuropsychologist, CP still wanted a more comprehensive assessment that included an observation of Student at ABA Clinic, speaking to Student's assigned licensed behavior analyst about Student's programming and what current interventions are working for Student at ABA Clinic.<sup>46</sup>
33. When Parent suggested that the team proceed with eligibility and possibly a functional behavioral assessment to get the DOE's licensed behavior analyst to participate in Student's IEP meetings to consult on Student's needs, DCP stated that the team needed to observe Student and "[w]ithout that, we're not able to move forward." DCP further told Parent "[w]e're not asking to interpret the ABA program [that Student was currently attending]. And the licensed behavioral analyst does not have the ability to make the diagnosis and further make the recommendations in the school setting that you're asking us." When Parent inquired as to what diagnosis the team was looking for, DCP stated "[m]a'am, have you ever had surgery or a root canal? Please leave it up to the professionals to observe the patient, to observe the student."<sup>47</sup>
34. After discussions with other team members at the December 17, 2019 meeting, the Home School team generally concluded that they needed more information, even though all the assessments besides the behavioral assessment had been completed.<sup>48</sup>

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<sup>46</sup> R-Ex.6, p.596-597, 12/17/19-MTR.45:21-46:10.

<sup>47</sup> Testimony of Parent, Tr.V1, 249:5-16; R-Ex.6, p.566-567, 12/17/19-MTR.15:14-16:5.

<sup>48</sup> This Hearings Officer notes that the most concrete answer that was provided at the meeting as to the type of information that they needed to determine Student's eligibility was to observe Student so that they could get more information as to Student's behaviors in a school setting. Testimony of Parent, Tr.V1, 249:17-250:9; *see also generally*, Principal's Testimony, Tr.V2, 239:5-240:1; R-Ex.6, p.554-639.

35. At the December 17, 2019 meeting, Parent expressed frustration that despite speaking with Neuropsychologist on November 21, 2019, CP did not share further information with the team so that Parent could have made arrangements to bring someone from ABA Clinic to the meeting to provide the team with information.<sup>49</sup> Parent further offered for the DOE's licensed behavioral analyst to meet with ABA Clinic to observe Student, review Student's records and programming and meet with Student's current service providers.<sup>50</sup>
36. At the meeting, Principal explained to Parent that Home School wanted to conduct a behavior assessment, "which might include an observation at [ABA Clinic], but it might also include other tools that the assessors would use to gather information related to [Student's] behavior needs." Principal did not allow any discussion on the alternative options provided by Parent and kept questioning Parent as to whether Parent would make Student available for the behavioral testing.<sup>51</sup>
37. At the December 17, 2019 meeting, Parent attempted to get the team to determine Student's eligibility and stated that Parent had hoped to possibly develop an IEP for Student within a few weeks and have Student transition to Home School in January 2020. The rest of the team refused to discuss Student's eligibility for special education and related services, despite having six (6) assessments that determined that Student was functioning well below same-aged peers.<sup>52</sup>

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<sup>49</sup> R-Ex.6, p.597, 12/17/19-MTR.46:11-16.

<sup>50</sup> See e.g. R-Ex.6, p.581-582, 12/17/19-MTR.30:16-31:25, R-Ex.6, p.589, 12/17/19-MTR.38:12-20, R-Ex.6, p.591, 12/17/19-MTR.40:6-8, R-Ex.6, p.592, 12/17/19-MTR.41:10-17, R-Ex.6, p.604, 12/17/19-MTR.53:9-24, R-Ex.6, p.624, 12/17/19-MTR.73:10-17.

<sup>51</sup> R-Ex.6, p.625, 12/17/19-MTR.74:19-24.

<sup>52</sup> Testimony of Parent, Tr.V1, 42:21-43:23; see also e.g., R-Ex.6, p.603, 12/17/19-MTR.52:21-53:2, R-Ex.6, p.610-621, 12/17/19-MTR.59:5-70:3.

38. During the December 17, 2019 meeting, Principal informed Parent that Home School's offer of FAPE at that time was Student's IEP-05/24/2016 and that the school was working toward determining Student's eligibility.<sup>53</sup> At no time during the meeting did any member of the team suggest that Student would no longer be eligible for special education and related services under the IDEA.<sup>54</sup>
39. On December 17, 2019, Parent sent an email to Principal and attached a Consent for Release of Information Form for Home School to send a Hawai'i DOE licensed behavior analyst to conduct an observation of Student at ABA Clinic to try to complete Student's eligibility process.<sup>55</sup>
40. On December 24, 2019, a prior written notice (hereinafter "PWN-12/24/2019") was issued. The PWN-12/24/2019 reflected the team's decision to complete a comprehensive behavioral assessment on Student and Parent's disagreement with the decision. The PWN-12/24/2019 also indicated that Home School's offer of FAPE to Student was the IEP-05/24/2016. Nowhere in the PWN-12/24/2019 did it indicate that the team suggested that Student was no longer eligible for special education or related services under the IDEA.<sup>56</sup>
41. No new IEP was developed for Student after the IEP-05/24/2016. Home School's offer of FAPE for Student remains the IEP-05/24/2016, as that was the last completed IEP for Student.<sup>57</sup>

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<sup>53</sup> R-Ex.6, p.621, 12/17/19-MTR.70:8-14.

<sup>54</sup> See R-Ex.6, p.554-639.

<sup>55</sup> R-Ex.5, p.304-306.

<sup>56</sup> P-Ex.2, p.026-027.

<sup>57</sup> Testimony of Parent, Tr.V1, 40:13-20, 43:24-44:5; Testimony of Principal, Tr.V2, 209:12-20, 222:19-223:22.

42. On December 27, 2019, Principal sent a Consent for Assessment form to Parent via email for the behavioral assessment that was indicated in the PWN-12/24/2019.<sup>58</sup>
43. On January 28, 2020, Parents emailed Home School requesting that the school hold an eligibility meeting for Student to update Student's IEP-05/24/2016. In response, Principal informed Parents that Home School had not received the Consent for Assessment form and that an eligibility meeting for Student would be scheduled upon completion of the behavioral assessment.<sup>59</sup>
44. In July 2020, Parents sent an email to Principal indicating that due to the delays in the evaluation and eligibility process for Student, Student's IEP-05/24/2016 was several years out-of-date. Parents informed Principal at that time that they would be looking for a private school for Student and would be seeking reimbursement from the DOE for the 2020-2021 school year.<sup>60</sup>
45. No response was submitted by Home School to Parents' email regarding sending Student to a private school and requesting reimbursement for the 2020-2021 school year.<sup>61</sup>

#### Litigation background

46. In 2017, Petitioners filed a due process complaint that resulted in a due process hearing. The decision of the 2017 due process hearing is unrelated to this case.<sup>62</sup>
47. On September 10, 2019, Petitioners filed a Complaint and Resolution Proposal

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<sup>58</sup> Testimony of Parent, Tr.V1, 44:6-17; Testimony of Principal, Tr.V2, 234:5-235:5; P-Ex.3, p.028-030.

<sup>59</sup> P-Ex.3, p.028-030.

<sup>60</sup> Testimony of Parent, Tr.V1, 15:14-16:6; P-Ex.4, p.031.

<sup>61</sup> Testimony of Parent, Tr.V1, 16:8-10.

<sup>62</sup> Testimony of Parent, Tr.V1, 52:22-55:16.



(hereinafter “Complaint-9/10/2019”) under DOE-SY1920-010. The main issue in the Complaint-9/10/2019 was that Respondents had not updated Student’s IEP since the IEP-05/24/2016.<sup>63</sup> On February 21, 2020, a fully executed settlement agreement (hereinafter “SA-2/21/2020”) resolved the issues in Petitioners’ Complaint-9/10/2019 and any claims or actions relating to Student’s education up until the date of execution. Part of the SA-2/21/2020 included Respondents providing tutoring for Student.<sup>64</sup>

48. On February 28, 2020, the DOE filed a Request for IDEA Impartial Due Process Hearing under DOE-SY1920-039. On August 19, 2020, a signed settlement agreement (hereinafter “SA-8/19/2020”) was signed between Parent and the DOE, resolving the most recent request for due process hearing prior to the filing of this case.<sup>65</sup>

49. The primary complaint in DOE-SY1920-039 was that Parent refused to consent to Respondents conducting a comprehensive behavioral assessment with Student. The main agreement in the SA-8/19/20 was that “the DOE is authorized to conduct a Comprehensive Behavioral Assessment of Student in accordance with 34 C.F.R. Sec. 300.305(a)(2)(i)(A) & (B); and 34 C.F.R. Sec. 300.[3]00(c).”<sup>66</sup>

50. Nowhere in the SA-8/19/20 does it require or note that Parent will or has signed consent forms and all necessary agreements for the DOE to conduct the comprehensive behavioral assessment.<sup>67</sup>

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<sup>63</sup> Testimony of Parent, Tr.V1, 19:5-7.

<sup>64</sup> Testimony of Parent, Tr.V1, 18:22-19:4; P-Ex.23, p.126-132.

<sup>65</sup> P-Ex.24, p.133-138.

<sup>66</sup> Testimony of Principal, Tr.V2, 224:3-20; P-Ex.24, p.134.

<sup>67</sup> Testimony of Principal, Tr.V2, 243:2-10; P-Ex.29, p.133-138.

### Post-Litigation activity

51. On September 22, 2020, Principal sent a letter to Petitioners requesting that Petitioners sign consent forms for eight (8) of Student's medical professionals, ABA Clinic, and Private School.<sup>68</sup>
52. On October 1, 2020, Parent sent Principal an email indicating that Parents never refused their consent to assessments. Parent stated that Parent was under the impression that at the November and December 2019 meetings, the team would determine eligibility of Student and update Student's IEP. Parent further stated that Parent requested that the team explain what further information would be needed or obtained from the additional assessment and the team refused to provide that information to Parents.<sup>69</sup>
53. On October 15, 2020, Principal sent another email to Parents informing them that per the SA-08/19/2020, Home School will conduct a comprehensive behavioral assessment of Student. Principal explained that "[t]his assessment will be conducted in accordance with 34 C.F.R. Sec. 300(a)(2)(i)(A) & (B); and 34 C.F.R. Sec. 300.00(c), which may include but not limited to a thorough records review, student observation (direct/virtual), student rating scales (parent/staff), and interviews."<sup>70</sup>
54. Principal further stated in the October 15, 2020 email "[Home School] would like to hold an Eligibility meeting for [Student] as soon as possible to allow the IEP team to determine the primary category of disability for [Student] based on [Student's] needs,

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<sup>68</sup> Testimony of Parent, Tr.V1, 46:10-25; Testimony of Principal, Tr.V2, 216:7-15; P-Ex.5, p.032-034.

<sup>69</sup> Testimony of Parent, Tr.V1, 47:1-11; P-Ex.6, p.035-036.

<sup>70</sup> Testimony of Parent, Tr.V1, 48:3-25; P-Ex.8, p.040-043.

given all the information presented. The IEP team has previously determined that [Student's] primary category of disability is \_\_\_\_, but based on your representations at the last Eligibility meeting held on December 17, 2019, that the IEP team should make [Student] eligible under the category of \_\_\_\_, it is imperative that the comprehensive behavior assessment be allowed to be completed so that the IEP team can discuss and determine the primary category of disability for [Student] moving forward.”<sup>71</sup>

55. Parent responded to Principal's email on the same date saying that the team must meet pursuant to 34 C.F.R. 300.305 prior to Parents signing the consent forms. Parent indicated in that email that “[i]n other words, we must first meet as a team and do what is written above, Only then can I have ‘informed consent’ when signing the consent forms. You are asking me to consent to the unknown based on a process that did not follow the rules laid out in the recent settlement.”<sup>72</sup>
56. Parent did not sign the consent forms sent by Principal until approximately within one to two weeks of the Hearing. It is unclear if Parent signed all the consent forms but did sign the forms for ABA Clinic and Private School.<sup>73</sup>
57. Between February 2020 and the Hearing date, no attempts were made to schedule the behavioral assessment with Student, as Home School was waiting for Parent to sign the consent forms.<sup>74</sup>

#### Other background information

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<sup>71</sup> P-Ex.8, p.040-043.

<sup>72</sup> Testimony of Parent, Tr.V1, 49:1-12; P-Ex.9, p.044-045.

<sup>73</sup> Testimony of Principal, Tr.V2, 211:2-212:6.

<sup>74</sup>

58. At the instant Hearing, DCP was not offered as an expert, nor would DCP have likely qualified as an expert in the area of \_\_\_\_.<sup>75</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>76</sup>

59. When asked specifically why the team could not determine Student's eligibility without the behavioral assessment, both Principal and DCP testified that Student was still eligible for services, but the team felt they needed a more comprehensive look at Student.<sup>77</sup>

60. It is clear from both the testimony at the Hearing and the transcripts of both the November 20, 2019 and December 17, 2019 meetings, that the Home School team did not trust Neuropsychologist's reports because they were based primarily on Parent's reports and did not want to find Student eligible under the category of \_\_\_\_.<sup>78</sup>

61. No team member besides Parent at the November 20, 2019 or December 17, 2019

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<sup>75</sup> This Hearings Officer notes that DCP's single-page resume does not list any work experience other than being a clinical psychologist [REDACTED]

[REDACTED]  
Tr.V2, 130:9-14.

[REDACTED]  
Tr.V2, 147:6-15.

[REDACTED] R-Ex.6, p.556, 12/17/2019-MTR.5:16-23.

<sup>76</sup> Testimony of DCP, Tr.V2, 147:24-149:11.

<sup>77</sup> Testimony of DCP, Tr.V2, 178:15-180:20; Testimony of Principal, Tr.V2, 240:19-242:17.

<sup>78</sup> Testimony of DCP, Tr.V2, 138:15-24, 141:16-142:10, 143:5-144:9, 161:14-22, 165:1-24, 167:5-13, 170:11-13, 173:2-22, 176:8-20, 178:15-181:13; Testimony of Principal, Tr.V2, 207:17-208:18, 228:10-229:13, 231:1-5, 240:2-242:17; see *also generally* R-Ex.6, p.424-514, R-Ex.6, p.554-640.

meetings suggested completing Student's eligibility determination under a different eligibility category with the information that the team had, developing an IEP for Student, and bringing Student to Home School to make further observations of Student in Home School's setting.<sup>79</sup>

#### Private School

62. Private School is an accredited private school that is licensed in the State of Hawai'i.<sup>80</sup>
63. At Private School, Student receives services from Private ABA Company through Student's medical insurance, including a registered behavior technician (hereinafter "RBT") assigned to Student throughout the school day, and group sessions run by BCBA.<sup>81</sup>
64. BCBA is a licensed behavioral analyst in the State of Hawai'i. In order to attain this licensure, BCBA has obtained a Master's in Counseling Psychology, completed BCBA coursework, provided a required number of service hours under supervision and has completed a certification exam.<sup>82</sup>
65. As part of Student's ABA program, a functional behavior assessment was done on Student, which was documented as part of Student's treatment plan, dated September 16, 2020. Student was also given the Assessment of Basic Language and Learning Skills-Revised.<sup>83</sup>
66. These assessments allowed BCBA to create an ABA-based treatment plan for

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<sup>79</sup> See generally R-Ex.6, p.424-514, R-Ex.6, p.554-640.

<sup>80</sup> Testimony of Parent, Tr.V1, 30:17-24.

<sup>81</sup> Testimony of Parent, Tr.V1, 82:1-83:5; Testimony of BCBA, Tr.V1, 102:22-106:21.

<sup>82</sup> Testimony of BCBA, Tr.102:7-12.

<sup>83</sup> Testimony of BCBA, Tr.V1, 94:5-98:2; P-Ex.10, p.048-056, p.057-059.

Student's services at Private School. These assessments were also necessary for Student's medical insurance. BCBA oversees Student's program at Private School, collects data and adjusts Student's program as needed.<sup>84</sup>

67. In Student's program at Private School, Student receives academic instruction for math, language arts, social studies, science, art and physical education. Student also receives occupational therapy and speech and language therapy. Student attends school five (5) days a week except holidays, and Student's school day is from 8:00 a.m.-2:00 p.m.<sup>85</sup>

68. Student's program at Private School is specifically tailored to Student's behavioral, academic and social needs.<sup>86</sup>

69. Parent is kept updated as to Student's educational program through things such as weekly newsletters that Private School prepares for each student and sends to the families of the students. Parent also receives training from BCBA once a month as part of Student's program.<sup>87</sup>

70. The ABA services that Student receives from Private ABA Company is mostly covered by Student's medical insurance, but Parent does contribute a co-payment for the services that are not completely covered by insurance.<sup>88</sup>

71. The total amount of tuition for Student at Private School, which includes Student's academic instruction, occupational therapy and speech-language therapy, is Thirty-

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<sup>84</sup> Testimony of BCBA, Tr.V1, 90:7-19, 91:4-7, 93:1-96:3; P-Ex.10, p.046-072.

<sup>85</sup> Testimony of Parent, Tr.V1, 26:17-22, 82:1-83:8; Testimony of BCBA, Tr.V1, 102:22-106:21.

<sup>86</sup> Testimony of Parent, Tr.V1, 80:14-81:9; Testimony of BCBA, 108:13-109:16.

<sup>87</sup> Testimony of Parent, Tr.V1, 30:3-16, 32:9-34:20; Testimony of BCBA, Tr.V1, 106:13-21; P-Ex.13, p.090-091.

<sup>88</sup> Testimony of Parent, Tr.V1, 24:5-23; Testimony of BCBA, Tr.V1, 91:14-17; P-Ex.19, p.120-122.

Eight Thousand Five Hundred Dollars (\$38,500) for the 2020-2021 school year.

Parent signed a contract with Private School to pay the full amount of tuition for the 2020-2021 school year in ten (10) installments of Three Thousand Eight Hundred Fifty Dollars (\$3,850).<sup>89</sup> Parent is obligated to pay the full tuition amount to Private School regardless of the outcome of this case.<sup>90</sup>

72. Parent drives Student from their home to Private School every day of Student's attendance, which is approximately eighteen (18) miles roundtrip.<sup>91</sup>

73. Parent had to buy Student uniform shirts that they are required to wear at Private School. The total cost for four (4) uniform shirts was Fifty-Five Dollars (\$55), which Parent paid on August 14, 2020.<sup>92</sup>

## V. CONCLUSIONS OF LAW

### IDEA framework

The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.”<sup>93</sup> A FAPE includes both special education and related services.<sup>94</sup>

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a

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<sup>89</sup> Testimony of Parent; P-Ex.17, p.116-117.

<sup>90</sup> Testimony of Parent, Tr.V1, 22:1-23:4; P-Ex.17, p.116-117.

<sup>91</sup> Testimony of Parent, Tr.V1, 26:6-24; P-Ex.20, p.123.

<sup>92</sup> Testimony of Parent, Tr.V1, 25:14-26:5; P-Ex.22, p.125.

<sup>93</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91, 102 S.Ct. 3034, 3037-3043 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F.Supp.2d 89, 98 (D. D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)).

<sup>94</sup> H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

student to benefit from their special education.<sup>95</sup> To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.”<sup>96</sup>

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”<sup>97</sup> It is “a written statement for each child with a disability that is developed, reviewed, and revised” according to specific detailed procedures contained in the statute.<sup>98</sup> The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.<sup>99</sup> At the beginning of each school year, a student eligible for IDEA services shall have an IEP in effect, and these IEPs must be reviewed periodically, but not less than annually, and revised as appropriate.<sup>100</sup>

An educational agency is required to conduct a reevaluation of a student that is determined to be eligible for IDEA services at least once every three (3) years, unless the parent and the department agree that a reevaluation is unnecessary.<sup>101</sup>

In determining whether a student has been denied a FAPE, the initial inquiry is whether the educational agency complied with the procedures set forth in the IDEA.<sup>102</sup> Procedural violations do not automatically result in a denial of FAPE, however, as a secondary determination must be made as to whether the violation resulted in a loss of educational

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<sup>95</sup> *Id.*

<sup>96</sup> *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

<sup>97</sup> *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

<sup>98</sup> H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

<sup>99</sup> H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

<sup>100</sup> H.A.R. §§8-60-47, 8-60-48(b); 20 U.S.C. §§1414(d)(2)(A), 1414(d)(4)(A).

<sup>101</sup> H.A.R. §8-60-35; 20 U.S.C. §1414(a)(2); 34 C.F.R. §300.303

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



opportunity, significantly infringed on parental participation or resulted in a deprivation of educational benefits.<sup>103</sup>

A. Respondents denied Student a FAPE by failing to develop an IEP for Student prior to the start of the 2020-2021 school year

Petitioners' first issue is that Respondents denied Student a FAPE by not developing an IEP for Student subsequent to the settlement agreement in February 2020. One of the procedural requirements for any educational agency under the IDEA is to develop and/or review an IEP for a student not less than annually or at a minimum, to have an IEP in place for a student at the beginning of each school year.<sup>104</sup> Failing to develop a timely IEP for Student is a procedural violation. In this case, it is undisputed that no IEP was developed for Student since the IEP-05/24/2016.<sup>105</sup>

Not every procedural violation results in a denial of FAPE. In order to find a denial of FAPE, Petitioners must prove that the procedural violation committed by Respondents resulted in a loss of educational opportunity, a significant infringement on parental participation or a deprivation of educational benefits.<sup>106</sup> Here, Petitioners argue that the failure of Home School to have an IEP in place for Student at the beginning of the 2020-2021 school year resulted in a loss of educational opportunity for Student, as Student was unable to attend Home School or any DOE public school because no program was in place to address Student's unique needs.

The Ninth Circuit Court of Appeals has determined that failure of a school district to update an outdated IEP to address the unique needs of a student can rise to the level of a denial

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<sup>103</sup> *Id.* at 892.

<sup>104</sup> H.A.R. §§8-60-47(a), 8-60-48(b); 34 C.F.R. §§300.323(a), 300.324(b); 20 U.S.C. §§1414(d)(2)(A), 1414(d)(4)(A).

<sup>105</sup> FOF 41.

<sup>106</sup> *Amanda J.*, 267 F.3d at 892.

of FAPE if it is not reasonably calculated to ensure educational benefits to a student in the next year of school.<sup>107</sup> In the *Anchorage School Dist. v. M.P.*, the court reviewed the failure of a school district to update a student's IEP due to the parents' litigious approach to their child's education. The IEP in dispute was developed for that student's second grade year, and upon completion of second grade, the student was moved to the third grade. The school was unable to complete an IEP for student's third grade, prior to the expiration of the original IEP due, in part, to the many administrative hearing complaints filed by the parents. The Court held that rather than postponing its obligation to revise the student's outdated IEP, the school district should have either continued working with the parents to develop a mutually acceptable IEP or unilaterally completed an IEP and filed an administrative complaint to obtain approval of the IEP.<sup>108</sup>

While Respondents' position is that Home School could not complete the evaluation of Student for the eligibility determination and subsequent development of Student's IEP due to Parent's lack of cooperation, Home School also acknowledged that Student was certainly still eligible for IDEA services and made an offer of FAPE as Student's IEP-05/24/2016.<sup>109</sup> Additionally, Home School's completed assessments also demonstrated Student's likely eligibility to receive special education and related services, due to Student's scores being well-below Student's same-aged peers.<sup>110</sup> Respondents' argument and actions boil down to placing the blame for not updating or developing a new IEP for Student on Parent's actions. The Ninth Circuit Court of Appeals has repeatedly held that this shifting the blame to the parents is contrary

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<sup>107</sup> *Anchorage School Dist. v. M.P.*, 689 F.3d 1047, 1058 (9<sup>th</sup> Cir. 2012)

<sup>108</sup> *Id.* at 1056.

<sup>109</sup> FOF 40, 41, 59.

<sup>110</sup> FOF 19-23.

to the very ideals of the IDEA. “The IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents’ preferences do not align with those of the educational agency. The statute is particularly protective of parents’ right to participate in the formulation of their child’s IEP because “[p]arents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.”<sup>111</sup>

In this case, Parent is clearly a vocal advocate for Student. As Respondents demonstrated through cross-examination of Parent and testimony of Principal, Parent has filed due process complaints against Home School on at least two (2) occasions for Student’s education.<sup>112</sup> Even after the November and December 2019 meetings, two additional due process complaints were filed, one by Parents and one by Home School.<sup>113</sup> The issues in those complaints were resolved through settlement, but even after all of that, Student still does not have an updated IEP proposed by Respondents.<sup>114</sup>

The current offer of FAPE provided by Home School is a four (4) year-old IEP.<sup>115</sup> The IEP-05/24/2016 scheduled Student for half-days of school in a fully self-contained special education classroom.<sup>116</sup> The November and December 2019 meetings were scheduled as eligibility meetings and no discussions took place regarding whether the team determined that

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<sup>111</sup> *Anchorage*, 689 F.3d at 1055.

<sup>112</sup> FOF 46, 47.

<sup>113</sup> FOF 47, 48.

<sup>114</sup> This Hearings Officer notes that nothing in either the SA-02/21/20 or SA-08/19/20 provides that Respondents may postpone the development of an IEP for Student until the behavioral assessment is completed.

<sup>115</sup> FOF 1, 3.

<sup>116</sup> FOF 6.

Student continued to be eligible for special education services, nor were there any attempts to discuss developing Student's new IEP.<sup>117</sup> At the time that Parents wrote to Home School in July 2020, Student was facing the start of the 2020-2021 school year and still no meeting had taken place to determine Student's continued eligibility for special education services, despite various team members beliefs that Student remained eligible.<sup>118</sup> Even if Parent had decided to send Student to Home School in August 2020, according to Student's IEP-05/24/2016, Student would only be able to attend school from 8:00-11:30 a.m.<sup>119</sup> Based on the record in this case, Petitioners have proven that Respondents denied Student a FAPE by failing to develop an IEP for Student after February 2020, which resulted in a loss of educational opportunity for Student.

This Hearings Officer notes that Respondents' position is that Home School was unable to complete its determination of eligibility and Student's IEP due to one (1) of the seven (7) assessments that were requested in Student's reevaluation had not been completed. While the team had reviewed all the completed assessments and determined that Student scored below Student's same-aged peers in almost all of the areas of assessments completed,<sup>120</sup> the team did not attempt to determine eligibility based on what information it had from the six (6) completed assessments.<sup>121</sup> It also appears that a large part of the reason for the insistence on the remaining behavioral assessment's completion is the Home School's IEP team's refusal to accept Neuropsychologist's reports as presenting an accurate diagnosis of \_\_\_ for Student.<sup>122</sup> No specific questions of accuracy to the assessments done with Student by Neuropsychologist has

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<sup>117</sup> FOF 28, 34, 37, 61.

<sup>118</sup> FOF 40, 59.

<sup>119</sup> FOF 6.

<sup>120</sup> FOF 19-24.

<sup>121</sup> FOF 28, 33, 34, 37, 61.

<sup>122</sup> FOF 60.

been presented, no repudiation of the validity of the assessments or interviews that were completed has been presented, nor has any contradictory evidence of Student's diagnosis has been presented. The only seemingly concrete basis for the team's insistence on the behavioral assessment was because the team needed more information as to Student's behaviors in a structured learning environment.<sup>123</sup> DCP testified that there were some questions that the team had regarding the assessments that Neuropsychologist completed, but this Hearings Officer gives little weight to DCP's testimony in that regard, given DCP's inability or refusal to present DCP's experience or qualifications to give such an opinion.<sup>124</sup> Even when asked about why the team did not even attempt to determine Student's eligibility, both DCP and Principal testified that Student was still eligible, but that they needed to complete the behavioral assessment.<sup>125</sup> The only explanation that was given by Respondents' witnesses as to why the team could not determine Student's eligibility was that they wanted a better, more well-rounded picture of Student and Student's needs.<sup>126</sup> Based on the testimony of Respondents' witnesses, Student would have been determined to be eligible for services under the IDEA, but the team refused to proceed further with the IEP development process for Student so that they could get a better picture of Student.

This Hearings Officer notes that this case would have an entirely different posture had the team simply found Student eligible back in one of the 2019 meetings, or at any subsequent time, under a different diagnosis<sup>127</sup> and developed an IEP based on the information that the team had

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<sup>123</sup> FOF 59.

<sup>124</sup> FOF 57.

<sup>125</sup> FOF 59.

<sup>126</sup> FOF 27-28, 32, 34, 36.

<sup>127</sup> DCP did state during questioning by this Hearings Officer that Student would likely been eligible under [REDACTED]. [Tr.V2, 178:15-24]

at the time, which included the results of Student's assessments in the areas of adaptive, cognitive, academic, speech/language, and fine and gross motor. If Parent at that time had contested the resulting IEP, then Respondents could then have pointed to Parent's failure to make Student available for the additional testing requested by the team to demonstrate the appropriateness of the developed IEP. Conversely, Respondents could have prepared an IEP based on the information that they had and filed their own due process complaint to get a reviewing body to approve of the IEP without completing the behavioral assessment. This is the situation envisioned by the Court in *Anchorage*, where the school district could have done whatever they could to develop an IEP for the student and asked a reviewing body to determine that the IEP was appropriate based on what was available to them at the time.<sup>128</sup> Instead, Respondents, much like the school district in *Anchorage*, simply put its obligation to develop an IEP for Student on hold until it got Parent's cooperation for what the rest of the team wanted. This is antithetical to the ideals of the IEP and punishes Student for the actions of Parent.

B. Petitioners have failed to prove that Respondents denied Student a FAPE by terminating Student's eligibility on or before February 2020

Petitioners' second argument is that Respondents denied Student a FAPE by terminating Student's eligibility on or before February 2020. Petitioners' argument is based on terminology used in emails and writings to Parent where Home School indicated that they wanted to proceed to discuss Student's "continued eligibility" for services under the IDEA. Petitioners have provided no statutory or case law that supports their position.

As discussed supra, this Hearings Officer has already made a finding that Respondents failed to develop an IEP for Student prior to the 2020-2021 school year based, in part, on the

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<sup>128</sup> *Anchorage*, 689 F.3d at 1056.

testimony of Respondents' witnesses that Student continues to be eligible for IDEA services, despite the team not having proceeded with the eligibility meeting for Student. Further, no record of any prior written notice was submitted by Home School regarding a change in Student's status as a child with a disability.<sup>129</sup> The record presented in this case also demonstrates that Home School never terminated Student's eligibility, based on its attempts to continue to conduct a behavioral assessment with Student, and its offer of FAPE as Student's IEP-05/24/2016.<sup>130</sup> Petitioners have failed to prove that Respondents terminated Student's eligibility on or before February 2020.

C. Petitioners have proven that Private School is an appropriate placement for Student

Petitioners are seeking tuition reimbursement for Student's tuition at Private School as a remedy for any denials of FAPE by Respondents. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in private school and request reimbursement for tuition at said private school from the local educational agency.<sup>131</sup> However, parents are entitled to reimbursement for placement at a private school only if a court concludes both that the public placement violated the IDEA and the private school placement was proper under the Act.<sup>132</sup> The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in *Frank*

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<sup>129</sup> A prior written notice must be provided to parents before the DOE proposes a change in identification of a student as a student with a disability. H.A.R. §8-60-58(a)(1).

<sup>130</sup> FOF 38, 40, 41.

<sup>131</sup> *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 364-365, 126 L. Ed.2d 284 (1993), citing *School Comm. of Burlington v. Department of Ed. Of Mass.*, 471 U.S. 359, 369-370, 105 S.Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985), see also 20 U.S.C. §1415(b)(6), (f)(1)(A).

<sup>132</sup> *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

*G. v. Bd. of Educ.*,<sup>133</sup> where “to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.”<sup>134</sup>

In this case, Petitioners argue that due to the denial of FAPE by Respondents, Parent was forced to enroll Student at Private School for the 2020-2021 school year, and Petitioners are seeking reimbursement for tuition, co-payments on Student’s ABA services, uniform costs, and transportation. As this Hearings Officer has made a finding that Petitioners have proven that Respondents denied Student a FAPE by not developing an IEP for Student prior to the 2020-2021 school year, the next step is to determine whether Petitioners have proven that Private School is an appropriate placement for Student.

Private School is an accredited and licensed school in the State of Hawai‘i, where Student attends school five (5) days a week from around 8:00 a.m. until 2:00 p.m.<sup>135</sup> Student is accompanied throughout the school day by an RBT, which is provided to Student through medical insurance from ABA Service Provider.<sup>136</sup> Student receives general education, speech and language therapy, and occupational therapy.<sup>137</sup> BCBA oversees Student’s ABA program at Private School and supervises Student’s RBT.<sup>138</sup> BCBA also updates treatment plans to provide

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<sup>133</sup> 459 F.3d 356, 365 (2<sup>nd</sup> Cir. 2006).

<sup>134</sup> *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9<sup>th</sup> Cir. 2011), citing *Frank G. v. Bd. of Educ.*, 459 F.3d at 365.

<sup>135</sup> FOF 62, 67.

<sup>136</sup> FOF 63, 70.

<sup>137</sup> FOF 67.

<sup>138</sup> FOF 66.



to Student's medical insurance carrier and adjusts Student's program as necessary.<sup>139</sup> BCBA also provides parent training every month, and Private School communicates with Parent through a weekly newsletter that is sent to Parent specifically about Student's performance at Private School.<sup>140</sup> Private School has created an individualized program for Student's education that is specifically tailored to address Student's needs.<sup>141</sup> Petitioners have proven that Private School is an appropriate placement for Student.

D. Equitable considerations

The IDEA provides reviewing authorities with the power to consider equity in determining whether and in what amount tuition reimbursement is to be awarded to a parent that unilaterally places a child at a private program.<sup>142</sup> In *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, the district court determined that while the private placement where student was placed delivered many, but not all, of the special education services that the student needed, the full amount of tuition was appropriate for the because everything that the placement provided was "proper, reasonably priced, and appropriate, and the program benefitted [the student] educationally."<sup>143</sup> The Ninth Circuit Court of Appeals affirmed the district court's decision, adopting the standard set forth in *Frank G.* as discussed *supra*.<sup>144</sup>

Here, Respondents argue that the failure of Respondents to develop a current IEP for Student was due primarily to Parent's refusal to consent to the behavioral assessment that the

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<sup>139</sup> FOF 66.

<sup>140</sup> FOF 69.

<sup>141</sup> FOF 68.

<sup>142</sup> *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9<sup>th</sup> Cir. 2011) (holding that if both criteria are met for reimbursement for unilateral placement at a private school, "the district court must exercise its 'broad discretion' and weigh 'equitable considerations' to determine whether, and how much, reimbursement is appropriate.")

<sup>143</sup> *Id.* at 1160.

<sup>144</sup> *Id.*

team believed was necessary to proceed with the eligibility and IEP development process. The Ninth Circuit has held that “[a]n agency cannot blame a parent for its failure to ensure meaningful procedural compliance with the IDEA because the IDEA's protections are designed to benefit the student, not the parent.”<sup>145</sup> Upon a thorough review of the record, including the transcripts of the November and December 2019 meetings, this Hearings Officer finds that the equitable considerations in this case favor Parent, who was trying to press forward with the determination of eligibility and the IEP development for Student.

During the November 2019 meeting, the Home School team members, primarily CP and DCP, first informed Parent that they believed that the behavioral assessment that was previously not completed was now necessary due to Neuropsychologist’s report being just recently presented to them.<sup>146</sup> Respondents also point to the fact that Parent had not presented either Neuro-03/30/2017 or Neuro-06/12/2019 to the team prior to the November 14, 2019.<sup>147</sup> As both Parent and Principal testified, the team had requested that Parent provide them with all assessments that Parent had for Student by that exchange date, which was also the same date that Parent would receive the assessments that had been completed for Student’s reevaluation.<sup>148</sup> Respondents presented no evidence of a prior meeting or previous requests by Home School for Parent to provide updated assessments for Student, so based upon this record, Parent’s providing Neuro-06/12/2019 on November 14, 2019 was well within the parameters set by Home School.

While CP was able to speak with Neuropsychologist as early as November 21, 2019, CP did not provide any indication to the team or Parent that CP still had unanswered questions and

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<sup>145</sup> *Doug C. v. Hawai‘i Dept. of Educ.*, 720 F.3d 1038, 1045 (9<sup>th</sup> Cir. 2013).

<sup>146</sup> FOF 27-28.

<sup>147</sup> FOF 9, 16.

<sup>148</sup> FOF 15.

still wanted to complete the behavioral assessment before proceeding with Student's eligibility and IEP.<sup>149</sup> It is clear from the transcript that Parent expected that at the December 2019 meeting, Student's eligibility and IEP development would proceed, thus allowing Student to transition into Home School as early as January 2020.<sup>150</sup> During the December 2019 meeting, in an attempt to move forward with Student's eligibility and IEP, Parent offered for the DOE to have its LBA go to ABA Clinic to meet with Student's service providers and review Student's treatment plans.<sup>151</sup> Parent even provided Home School with consent forms for the LBA to observe Student, speak with providers and review Student's records at ABA Clinic.<sup>152</sup> Instead of exploring that option, Respondents simply asserted that the psychologists needed to be the ones to do the assessment and provided Parent with a 'take it or leave it' option of either consenting to the behavioral assessment for Student or basically nothing.<sup>153</sup>

Parent made multiple attempts during the meeting to discuss Student's eligibility and to urge the team to move forward so that Student could begin transitioning into Home School as soon as possible.<sup>154</sup> Parent did not even make any mention of sending Student to any private school prior to the July 2020 email sent to Principal.<sup>155</sup>

It was Respondents in this matter who insisted on halting any forward progress on Student's eligibility and IEP development, even with the knowledge that the last IEP available for Student was from May 2016. In fact, even upon reaching the SA-08/19/2020, wherein Respondents were "authorized to conduct a Comprehensive Behavioral Assessment of Student in

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<sup>149</sup> FOF 30.

<sup>150</sup> FOF 33, 35, 37.

<sup>151</sup> FOF 35.

<sup>152</sup> FOF 39.

<sup>153</sup> FOF 33, 36.

<sup>154</sup> FOF 28, 33, 37.

<sup>155</sup> FOF 44.

accordance with 34 C.F.R. Sec. 300.305(a)(2)(i)(A) & (B); and 34 C.F.R. Sec. 300.00(c),” no attempts were made to schedule or conduct the behavioral assessment.<sup>156</sup> The only actions taken by Respondent after the SA-08/19/2020 was to send Parent a multitude of consent forms for Student’s doctors, ABA Clinic and Private School.<sup>157</sup>

This Hearings Officer finds that the equities in this case do not favor a reduction in reimbursement for Student’s tuition and related expenses, as it the was Respondents who refused to move forward with Student’s eligibility and IEP development, even while Parent attempted to get an offer of FAPE from Respondents, which resulted in Student not having an appropriate program for the 2020-2021 school year.

## **VI. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have proven that Respondents denied Student a FAPE by failing develop a valid IEP for Student after the settlement agreement in February 2020 and prior to the start of the 2020-2021 school year. Petitioners have further proven that Private School is an appropriate placement for Student and that Parent is entitled to reimbursement for tuition and related expenses for Student’s attendance at Private School for the 2020-2021 school year. This Hearings Officer finds that the equitable considerations in this case allow for Parent to receive full reimbursement for tuition and related expenses or direct tuition payments to Private School for the 2020-2021 school year.

For the reasons stated above, IT IS HEREBY ORDERED –

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<sup>156</sup> FOF 57.

<sup>157</sup> FOF 51, 53-54.

1. Within sixty (60) days of this Decision, Respondents shall hold an eligibility meeting for Student to determine Student's continued eligibility for IDEA services, and if Student is found eligible, develop an IEP for Student.
2. Parent is expected to provide all necessary consents for Respondents to get current, updated information for use in developing Student's IEP, specifically including the consent forms necessary for the Comprehensive Behavioral Assessment agreed upon in the SA-08/19/2020 that were sent to Parent on September 22, 2020.
3. Respondents shall conduct the Comprehensive Behavioral Assessment referenced in the SA-08/19/2020 as soon as possible upon the receipt of the consent forms. Parent is expected to make Student available for the assessment.
4. Private School shall, in accordance with Hawai'i Revised Statutes Section 302A-443(f), allow Respondents to monitor Student at Private School.
5. Any delays in the provision of consents, scheduling, or any other delays in the scheduling of the eligibility meeting for Student or in the subsequent development of the Student's IEP caused by Parent, Private School and/or their representatives shall be carefully documented by Home School and shall extend the sixty (60) day deadline set herein by the number of days attributable to Parent, Private School and/or their representative(s) actions.
6. Upon receipt of itemized invoice(s) from Private School for Student's tuition, Respondents shall make payments for Student's tuition for the 2020-2021 school year to Private School in accordance with Hawai'i Revised Statutes Section 302A-443(f)-(j).

7. Respondents shall reimburse Parent for payment of Student's uniform required for Student's attendance at Private School in the amount of Fifty-Five Dollars (\$55).
8. Upon receipt of a log and/or attendance sheet from Parent for Student's days of attendance at Private School since the start of the 2020-2021 school year, Respondents shall reimburse Parent for mileage for transportation of Student from Student's residence to Private School, which is equal to eighteen total miles (18) roundtrip, two (2) times a day (for a total of thirty-six (36) miles a day). This mileage reimbursement shall be set at fifty-seven and a half cents (\$0.575) per mile, which is the current State of Hawai'i mileage reimbursement rate.
9. Upon receipt of invoices and/or receipts of payment for co-payments made to Student's ABA service provider, Respondents shall reimburse Parent for the co-payments made since Student's start of the 2020-2021 school year at Private School. If Parent has not yet made the co-payments to the ABA service provider, Respondents shall make direct payments to the ABA service provider on behalf of Parent.

## **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, December 22, 2020.

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