



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

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

Petitioner(s),

vs.

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

Respondents.

DOE-SY2122-001

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: September 21, 2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On July 6, 2021, 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 Parents (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on July 14, 2021.

A prehearing conference was held on August 4, 2021, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Stuart N. Fujioka, Esq. (hereinafter “Mr. Fujioka”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for September 8, 2021. Due to a scheduling conflict, Mr. Fujioka requested a continuance of the Hearing to later in September. Mr. Peck had no objection, and the Hearing was rescheduled to September 21, 2021.

Based on the continued Hearing date of September 21, 2021, Respondents submitted a request for an extension of the deadline from the original deadline of September 19, 2021 to November 3, 2021. Petitioners did not have any objection to the request for extension and Petitioners’ request for extension was granted. The deadline by which a decision in this case must be rendered is November 3, 2021.

The Due Process Hearing began and concluded on September 21, 2021. Petitioners called Parent 1 to testify and rested their case. Respondents called Special Education Teacher (hereinafter “SPED Teacher”) to testify and rested. Petitioners did not have any rebuttal witnesses to present.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure safety for all the participants in the Hearing. An Order Regarding Video Conference Due Process Hearing was issued on August 12, 2021, 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.

Each party submitted their exhibits for the Hearing by the disclosure deadline of September 14, 2021. Both parties were informed that any exhibits that were discussed or mentioned during the proceeding would be received for consideration in the Decision in this case, but that this Hearings Officer would allow the parties to proposed additional exhibits after the Hearing was complete. On September 21, 2021, 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 September 29, 2021. Any objections to the proposed exhibits were due on October 4, 2021.

Petitioners submitted a list of exhibits that were discussed at the Hearing through Parent 1's testimony but had not been marked as received in the lists provided by this Hearings Officer. These exhibits were Respondents' Exhibit 80, pages 219-220; and Respondents' Exhibit 92, pages 261-262. Petitioners also requested the following exhibits be received into evidence: Petitioners' Exhibit 1, page 011; Petitioners' Exhibit 2, pages 029-034 and 035-044; and Petitioners' Exhibit 4, page 083. Respondents did not have any objection to the admission of these documents, so they were received as requested by Petitioners. Respondents did not have any additional exhibits to submit.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-028; Exhibit 2, pages 029-044, 049-070; Exhibit 3, pages 071-082;

and Exhibit 4, pages 083-146, 160-166. Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 15, pages 045-054; Exhibit 16, page 055; Exhibit 37, pages 113-116; Exhibit 48, pages 130-131; Exhibit 62, page 159; Exhibit 64, pages 162-167; Exhibits 74-76, pages 206-215; Exhibits 80-81, pages 219-221; Exhibit 89, pages 253-256; Exhibit 92, pages 261-262; and Exhibit 115, pages 328-329.

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 Tuesday, October 19, 2021. Both parties timely submitted their closing briefs on that date.

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

II. JURISDICTION

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

III. ISSUES PRESENTED

Petitioners assert one (1) issue in the Complaint to be addressed at the Hearing:

1. Whether there was a material failure in the implementation of Student's April 8, 2021 Individualized Education Program (hereinafter "IEP-04/08/2021") where:
 - a. Parents did not receive documentation of Student's food intake after about March 22, 2021, as agreed/discussed in the IEP-04/08/2021; and/or
 - b. Where an aide did not record Student's food intake as agreed/described in the IEP-04/08/2021.

IV. FINDINGS OF FACT

Student's background

1. Student is [REDACTED] years old and has [REDACTED]. Student has had [REDACTED] [REDACTED] surgeries and had a [REDACTED] (hereinafter "[REDACTED]") [REDACTED] in 2017 due to Student previously being diagnosed with [REDACTED] [REDACTED]. Student continues to have the [REDACTED] and is being monitored by a pediatric [REDACTED] at [REDACTED] Hospital.²
2. Student and Student's family lived in [REDACTED] until January 2021, when they moved to [REDACTED] Hawai'i.³
3. At [REDACTED] Hospital, a neuropsychological assessment was conducted with Student in November/December 2019, wherein Student was diagnosed with [REDACTED] [REDACTED]. The neuropsychological assessment noted that Student had age-appropriate verbal and visual reasoning abilities; solid learning and memory for visual and verbal materials; appropriately developed visual-motor integration skills; and spelling and math abilities consistent with grade expectations. The weaknesses identified in Student's neuropsychological assessment were in attention and executive functioning; processing speed; and concerns for fine and gross motor development.⁴
4. In August 2020, the IEP team from Student's prior school in [REDACTED] developed an IEP for Student (hereinafter "IEP-8/19/2020"). Student's IEP-8/19/2020 had four

² Testimony of Parent 1, Transcript page 18, line 21 to page 19, line 23 (hereinafter referenced as Tr. 18:21-19:23"); *see also* Petitioners' Exhibit 1, page 002 (hereinafter referenced as "P-Ex.1, p.002"), and Respondents' Exhibit 15, page 046 (hereinafter referenced as "R-Ex.15, p.046"); P-Ex.1, p.015; P-Ex.2, p.038-039; P-Ex.2, p.050-052.

³ Testimony of Parent 1, Tr. 24:21-25:9.

⁴ P-Ex.1, p.002, R-Ex.15, p.046; P-Ex.1, p.015; P-Ex.2, p.038-039; P-Ex.2, p.050-052.

- (4) IEP goals for Student in the areas of Social-Emotional, Reading, Writing, and Behavior. None of the goals included in Student's IEP-8/19/2020 involved Student's eating or food intake.⁵
5. In Student's IEP-8/19/2020, a [REDACTED] and support was included for Student which read "Paraprofessional support during lunch and in classroom during key instructional times to support focus/attention goal."⁶ Student's IEP-8/19/2020 did not include a provision for data collection of Student's food intake.⁷
6. In [REDACTED], schools had not resumed in-person instruction, so at the time of the IEP-8/19/2020 development and implementation, Student had only participated in school through distance learning.⁸
7. The meeting notes from the August 19, 2020 IEP team meeting indicate that once schools reopen for in-person instruction, Parents would work with school nurse regarding [REDACTED] during lunch. The IEP-8/19/2020 notes indicated that Parents would provide Student's most recent doctor's orders to the school before school reopens and Student would receive thirty (30) minutes of support for [REDACTED] [REDACTED] during lunch daily provided by an agency nurse.⁹
8. In September 2020, a psychoeducational assessment was conducted with Student in [REDACTED], which was requested to determine Student's eligibility for special education and related services under the category of [REDACTED]. The psychoeducational assessment determined that Student was eligible for IDEA

⁵ See P-Ex.1, p.012-028.

⁶ P-Ex.1, p.024.

⁷ P-Ex.1, p.012-026.

⁸ Testimony of Parent 1, Tr. 25:1-3; *see also* P-Ex.1, p.027.

⁹ P-Ex.1, p.028.

- services under the category of [REDACTED] and confirmed Student's diagnosis of [REDACTED].¹⁰
9. The psychoeducational assessment provided recommendations for Student's educational program, which included accommodations to allow Student to accomplish less items in a task than peers, preferential seating, access to fidgets and movement breaks, and frequent check-ins for understanding.¹¹
10. None of the recommendations included in the psychoeducational assessment discussed or suggested any data collection for Student's food intake or any support for such data collection for Student in school.¹²
11. In January 2021, Parents moved Student and Student's family to Hawai'i from [REDACTED], in part because Parents wanted Student to be in an in-person learning situation. Student's home in Hawai'i was in Home School's district.¹³
12. In January 2021, when Student was enrolled in Home School, SPED Teacher was assigned as Student's care coordinator at Home School.¹⁴
13. As early as January 5, 2021, Student Services Coordinator emailed Parent 2 to put Parents in contact with the public health nurse that would be helping to arrange Student's [REDACTED] in school.¹⁵
14. On January 13, 2021, Home School had a meeting with Parents regarding Student's IEP from [REDACTED]. During this meeting, Parents and Home School discussed

¹⁰ P-Ex.2, p.035.

¹¹ P-Ex.2, p.043.

¹² See P-Ex.2, p.035-044.

¹³ Testimony of Parent 1, Tr. 24:21-25:12.

¹⁴ Testimony of SPED Teacher, Tr. 117:15-22, 118:20-22.

¹⁵ R-Ex.37, p.113-116.

- Student's need for a public health nurse to provide Student's [REDACTED] at school. Parents were informed that a prescription from Student's doctor was needed for the public health nurse to provide the [REDACTED].¹⁶
15. During the January 13, 2021 meeting, Parents and Home School agreed that Student would receive specialized instruction in a special education setting for English/language arts and that counseling would also be provided to Student in a pull-out fashion. Student would otherwise be in the general education setting with the supports listed in Student's IEP-8/19/2020 from [REDACTED].¹⁷
16. At the January 13, 2021 meeting, SPED Teacher also had a conversation with Parents about Student's [REDACTED]. During that conversation, Parents told SPED Teacher that the [REDACTED] was for Student to get [REDACTED]. SPED Teacher also understood that Student received [REDACTED] at home but could also [REDACTED] [REDACTED].¹⁸
17. On January 13, 2021, Public Health Nurse also provided Parent 2 with forms for Student's doctors to complete to arrange for Student's [REDACTED] in school. Public Health Nurse followed up with Parent 2 on March 12, 2021 to request the forms to be completed by Student's doctor for the [REDACTED] in school.¹⁹
18. Parents never submitted the forms to either Home School or Public Health Nurse for arrangements to be made for Student to receive [REDACTED] in school.²⁰
19. From the time that Student started attending classes at Home School, SPED Teacher

¹⁶ P-Ex.1, p.002, R-Ex.15, p.046.

¹⁷ P-Ex.1, p.002, R-Ex.15, p.046.

¹⁸ Testimony of SPED Teacher, Tr. 118:23-120:9.

¹⁹ R-Ex.48, p.130-131; R-Ex.64, p.162-167.

²⁰ Testimony of Parent 1, Tr. 85:9-88:6; Testimony of SPED Teacher, Tr. 149:3-15.

- began taking data on Student's daily food intake at lunch. SPED Teacher began taking data on Student's food intake to provide the data to the public health nurse for Student to receive [REDACTED] in school.²¹
20. SPED Teacher initially started taking the food intake data on a google spreadsheet in which SPED Teacher would manually enter the food that Student ate at lunch on each school day. SPED Teacher would obtain this information from educational assistants or from Student.²²
21. In March 2021, Parents requested access to the food intake data that SPED Teacher was collecting.²³
22. After Parents requested the information, SPED Teacher changed the google spreadsheet that SPED Teacher had been using into a form spreadsheet, where the educational assistants would enter the food intake data onto a google form which would be automatically entered into the google spreadsheet, and the selected 'viewers' of the spreadsheet would be able to see the data in spreadsheet form. The educational assistants were not able to see the information in the spreadsheet.²⁴
23. On March 3, 2021, SPED Teacher provided Parents with links to the google spreadsheet so that they could see the spreadsheet of the data that were entered in by SPED Teacher and the educational assistants.²⁵
24. On March 11, 2021, Parent 2 emailed SPED Teacher and asked that more detail be added to the data being collected about Student's food intake. SPED Teacher spoke

²¹ Testimony of SPED Teacher, Tr. 119:8-121:1.

²² Testimony of SPED Teacher, Tr. 120:22-121:1, 125:16-25.

²³ Testimony of Parent, Tr.25:25-26:6; Testimony of SPED Teacher, 121:2-24.

²⁴ Testimony of SPED Teacher, Tr. 121:2-24, 125:3-25; R-Ex.62, p.159; R-Ex.115, p.328-329.

²⁵ Testimony of SPED Teacher, Tr. 121:3-24; R-Ex.62, p.159

- with the educational assistants and asked them to put more detail into the data collection.²⁶
25. On April 8, 2021, an IEP meeting was held with Parents, SPED Teacher, Principal, and General Education Teacher.²⁷
26. At the IEP meeting, a written IEP was developed for Student (hereinafter referenced as “IEP-04/08/2021”).²⁸
27. Prior to the April 8, 2021 IEP meeting, Parents had not returned the necessary forms from Student’s doctor to allow the public health nurse to provide [REDACTED] assistance to Student at school.²⁹
28. SPED Teacher testified that at the April 8, 2021 meeting, Parents did not inform the IEP team about their plan for weaning Student off Student’s [REDACTED] by collecting data about Student’s food intake so they could adjust Student’s overnight feeding intake.³⁰ While Parent 1 testified that this information was presented to the IEP team,³¹ this Hearings Officer finds SPED Teacher’s testimony in this regard to be more credible, as it is supported by the documents presented at the Hearing in this case, including the IEP-04/08/2021,³² as well as the prior written notice dated April 26, 2021,³³ and the neuropsychological assessment³⁴ conducted by

²⁶ Testimony of SPED Teacher, Tr. 122:6-123:4, P-Ex.3, p.075-077; R-Ex.74, p.206-207.

²⁷ See P-Ex.1, p.010, R-Ex.15, p.054.

²⁸ See P-Ex.1, p.001-010, R-Ex.15, p.045-054.

²⁹ Testimony of SPED Teacher, Tr. 126:17-25.

³⁰ Testimony of SPED Teacher, Tr. 129:1-13.

³¹ Testimony of Parent, Tr. 32:1-33:1.

³² P-Ex.1, p.001-010, R-Ex.15, p.045-054.

³³ P-Ex.1, p.011, R-Ex.16, p.055.

³⁴ P-Ex.2, p.049-070.

Neuropsychologist in July and August 2021.³⁵

29. In the IEP-04/08/2021, Student had goals for math and English/language arts. While the IEP-04/08/2021 does mention Student's [REDACTED] and medical history, it does not provide any goals, objectives, services, and/or support for Student in the form of a [REDACTED] [REDACTED] or a feeding program.³⁶
30. The IEP-04/08/2021 did provide that Student would receive as a daily supplemental aid and support, "Adult support for self-care in a group of no more than 3 students to 1 adult support." This supplemental aid and support was further clarified to say that "[Student] will receive 30 minutes per day of adult support (in a ratio of no more than 3 students per 1 adult support) during lunch block to give reminders to eat [Student's] lunch and document food intake."³⁷
31. The intention of the IEP team in providing the adult support for Student at lunch was to prompt Student to remember to eat due to medical concerns³⁸ and to document the food intake for the public health nurse to use when Student's [REDACTED] was arranged for school.³⁹
32. On April 10, 2021, after the IEP meeting, Parents informed SPED Teacher that they were still not able to see the updated information in the google spreadsheet that SPED

³⁵ This Hearings Officer also notes that while Parents claimed to not have received Student's IEP until May 2021, Petitioners did not file their Complaint and Resolution Proposal until July 2021, wherein they did not raise any issues as to the contents of Student's IEP-04/08/2021, including the lack of any mention of a feeding plan that was supposedly raised by Parents in the IEP meeting on April 8, 2021. This further lends credibility to SPED Teacher's testimony that Parents did not raise the issue of Student's feeding plan to wean Student off the [REDACTED] at the April 8, 2021 IEP meeting.

³⁶ See P-Ex.1, p.006-007, R-Ex.15, p.050-051.

³⁷ P-Ex.1, p.008, R-Ex.15, p.052

³⁸ Testimony of Parent, Tr.34:3-11.

³⁹ Testimony of SPED Teacher, Tr. 127:2-6; *see also* P-Ex.1, p.011, R-Ex.16, p.055.

- Teacher had sent them for Student's food intake information.⁴⁰
33. Parents also requested that the educational assistants take photos of the food that Student received and what was remaining after Student was done eating to get a more accurate picture of Student's food intake.⁴¹
34. SPED Teacher informed Parents that SPED Teacher would check on the spreadsheet to try to fix the problems with the information not being updated. SPED Teacher also informed Parents that the educational assistants could not take photographs of Student's food intake due to not having school-issued cameras available for that purpose. Educational assistants were not allowed to use their own cellphones to take pictures for school-related activities.⁴²
35. Parents did not provide any tips or information to SPED Teacher to pass onto the educational assistants that were providing support to Student during lunch.⁴³
36. On May 4, 2021, Parents wrote a letter to Principal with a list of dates and incidents that were of concern to Parents regarding Student's special education and related services. One of these included March 12, 2021, where Parent 2 emailed SPED Teacher to indicate that the notes were too vague. Parents also noted that Student mentioned that the "lunch person was on [their] phone a lot during lunch time" and that this was mentioned to SPED Teacher who responded by saying that the person was taking notes. Parents' letter also noted that the last updated information in the

⁴⁰ Testimony of Parent 1, Tr.27:15-29:1, Testimony of SPED Teacher, Tr. 12124:11-125:2; P-Ex.3, p.073-074; P-Ex.3, p.075-077; R-Ex.74, p.206-207; R-Ex.115, p.328-329.

⁴¹ Testimony of Parent 1, Tr.62:6-18; Testimony of SPED Teacher, Tr. 122:13-123:9; P-Ex.3, p.075-077; R-Ex.74, p.206-207; R-Ex.115, p.328-329.

⁴² Testimony of SPED Teacher, Tr.123:5-124:6.

⁴³ Testimony of SPED Teacher, Tr. 124:3-7.

- spreadsheet was data from March 22, 2021 and no updates had been made since that time.⁴⁴
37. On May 11, 2021, Parent 1 emailed SPED Teacher to ask about Student's food intake log and noted that there was still no updated information on the log since March 22, 2021. SPED Teacher responded on May 12, 2021 by informing Parents that SPED Teacher thought that the issue had been resolved and that SPED Teacher would check with the school technology person to try to resolve the issue.⁴⁵
38. At no time did Parents indicate to SPED Teacher that they could not access the spreadsheet through the link that was sent to them by SPED Teacher on March 3, 2021. Parents' complaint was that the data on the spreadsheet was not being updated after March 22, 2021.⁴⁶
39. SPED Teacher checked with the school technology person and attempted to resolve the issue by re-inviting all the parties to the google spreadsheet. SPED Teacher believed that the problem had been resolved because SPED Teacher could access the information through the link that was sent to Parents. Parents did not inform SPED Teacher after May 12, 2021 that the spreadsheet continued to not include updated information.⁴⁷
40. SPED Teacher continued to collect data on Student's food intake from the educational assistants and occasionally inputted data manually into the spreadsheet due to technical problems that the educational assistants were having with the google

⁴⁴ P-Ex.3, p.073-074.

⁴⁵ P-Ex.3, p.075-076.

⁴⁶ Testimony of SPED Teacher, Tr. 141:9-143:13; *see also* P-Ex.3, p.075-077; P-Ex.3, p.079.

⁴⁷ Testimony of SPED Teacher, Tr.145:5-148:5.

forms. The educational assistants continuously collected data on Student's food intake for the remainder of the school year 2020-2021, even though some of the data was not included in the spreadsheet due to technical difficulties.⁴⁸

41. The Home School's school year ended on or about May 31, 2021.⁴⁹

42. Student had made progress on at least two (2) of Student's IEP-04/08/2021 goals, including being able to "use 100s chart to help [Student] add two-digit numbers with regrouping in 8 out of 10 opportunities" and "distinguishing long from short vowel sounds in spoken single-syllable words in 8 out of 10 documented trials." The rest of Student's IEP-04/08/2021 goals were considered emerging, and Student was still working on the goals at the end of the reporting period of May 28, 2021.⁵⁰

43. Sometime in the summer of 2021, Parents began to implement a feeding program with Student to wean Student off the [REDACTED]. The feeding program monitored what Student ate by mouth throughout the day so that the daily number of calories provided to Student in the [REDACTED] overnight could be adjusted accordingly. The goal was to provide Student less [REDACTED] calories so that Student would be hungry enough to consume food by mouth throughout the day.⁵¹

44. On July 6, 2021, Petitioners filed the instant due process complaint.

45. On July 21, August 2, and August 19, 2021, a neuropsychological assessment was completed for Student. The neuropsychological assessment included a history of Student, particularly in the areas of Student's birth/development and medical

⁴⁸ Testimony of SPED Teacher, Tr. 155:8-21; *see also* R-Ex.92, p.261-262; R-Ex.115, p.328-329.

⁴⁹ *See* R-Ex.89, p.253-256.

⁵⁰ Testimony of SPED Teacher, Tr.133:13-134:10; R-Ex.89, p.253-256.

⁵¹ Testimony of Parent, Tr.20:4-21:10, 22:3-24, 66:21-67:5,107:3-13.

concerns. In the medical concerns section of the assessment, Neuropsychologist noted that “[Student] continues to be followed by [REDACTED] at [medical facility] and is receiving nighttime [REDACTED] in addition to oral intake, but at the time of the present evaluation [Student’s] medical providers had indicated [Student] could begin weening off of the [REDACTED]”⁵²

46. Neuropsychologist made many recommendations for an educational program for Student at school, as well as recommendations for Parents to implement at home for Student’s success. None of the recommendations included any information about data collection for food intake nor any recommendations for an educational assistant to provide prompts or techniques to encourage Student to eat.⁵³

47. On July 29, 2021, Parents signed an enrollment contract for Student to attend Private School for the 2021-2022 school year. The total cost of Student’s tuition and related services for the 2021-2022 school year was Twenty-Five Thousand Seven Hundred Seventy-Six Dollars (\$25,776) and a Four Hundred Fifty Dollar (\$450) mandatory tuition protection plan cost.⁵⁴

48. On August 19, 2021, Parents reached an agreement with Private Aide for Private Aide to go to Private School at lunch to assist Student with eating and daily documentation of Student’s food intake. A Lunch Time Food Consumption Documentation Agreement was signed with Private Aide on September 13, 2021 wherein Parents agreed to pay Private Aide Fifty Dollars (\$50) per day for Private

⁵² P-Ex.2, p.051.

⁵³ See P-Ex.2, p.057-066.

⁵⁴ Testimony of Parent, Tr. 59:18-7, 101:1-14; P-Ex.4, p.160-163.

Aide's services.⁵⁵

49. Private Aide is a neighbor of Parents and does not have any special training in data collection nor has any background in education or health care, as far as Parent 1 knows.⁵⁶

50. Since Parents started the feeding program with Student, the number of calories required for Student's overnight [REDACTED] has been reduced from around one thousand one hundred (1100) calories to around four hundred (400) calories.⁵⁷

Private School

51. Private School is a school that works with students that are "often [REDACTED] [REDACTED]." Private School "provides a strength-based program, complemented by outreach and training, that empowers students to become effective learners and confident self-advocates."⁵⁸

52. Private School has been provided with Student's July 2021 neuropsychological assessment and has implemented many of the recommendations in the assessment into Student's program at Private School.⁵⁹

53. Private School provides Student with modified reading and mathematics instruction using different approaches for Student to benefit from the instruction provided at Private School.⁶⁰

54. At Private School, Student is in a classroom with [REDACTED] children in Student's class

⁵⁵ Testimony of Parent, Tr. 60:13-21, 65:3-67:5, 101:22-103:20; P-Ex.4, p.166.

⁵⁶ Testimony of Parent, Tr. 102:7-18.

⁵⁷ Testimony of Parent, Tr. 107:3-13.

⁵⁸ P-Ex.4, p.085, 090.

⁵⁹ Testimony of Parent, Tr. 53:23-56:21.

⁶⁰ Testimony of Parent, Tr. 74:15-75:19.

and curriculum aides to assist the teacher as necessary.⁶¹

55. Private School continually communicates with Parents about Student's progress through a communication sheet and has a counselor available for Student to address Student's needs.⁶²

56. Private School does not provide an aide to provide prompts to Student at lunch, nor collect data on food intake, but allowed Parents to bring in their own aide to provide those services to Student at Private School.⁶³

57. Parents have observed that Student has been making progress on reading and has shown excitement about attending school at Private School. At the time of the Hearing, Student was still in the first quarter of school and progress reports or parent-teacher conferences had not been completed yet for the first quarter of the 2021-2022 school year.⁶⁴

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.”⁶⁵ A FAPE includes both special education and related services.⁶⁶

Special education means “specially designed instruction to meet the unique needs of a

⁶¹ Testimony of Parent, Tr.75:20-76:7.

⁶² Testimony of Parent, Tr.77:11-78:23.

⁶³ Testimony of Parent, Tr.102:19-103:2.

⁶⁴ Testimony of Parent, Tr. 107:17-108:4.

⁶⁵ *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)).

⁶⁶ H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

child with a disability” and related services are the supportive services required to assist a student to benefit from their special education.⁶⁷ 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.”⁶⁸

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”⁶⁹ 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.⁷⁰ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.⁷¹

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.”⁷² However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,⁷³ 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.”⁷⁴

Questions regarding implementation of an IEP that was developed for a student involve a

⁶⁷ *Id.*

⁶⁸ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

⁶⁹ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

⁷⁰ H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

⁷¹ H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

⁷² *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

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

⁷⁴ *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).

determination of whether the failure of the school or educational agency to implement the IEP was a material failure, meaning whether “there [was] more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.”⁷⁵

The party raising the concerns about the implementation of a student’s IEP bear the burden to prove by a preponderance of the evidence that the failure to implement the IEP was material.⁷⁶

A. Petitioners have failed to prove that Respondents denied Student a FAPE by failing to implement substantial or significant portions of Student’s IEP-04/08/2021

Petitioners argue that the DOE failed in this case to properly implement Student’s IEP-04/08/2021 IEP by failing to provide Parents with access to the food intake data collection information taken by the educational assistants and/or that the educational assistants failed to properly collect the food intake data for Student at school. Petitioners have the burden of proof in showing that these failures occurred and that they were material failures in implementing Student’s IEP-04/08/2021. Based on the analysis below, this Hearings Officer finds that Petitioners have failed to meet their burden.

The Ninth Circuit Court of Appeals in *Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, set forth the standard for reviewing cases brought under the IDEA for failure to implement an IEP developed for a student. In *Van Duyn*, there were several complaints brought by the parents of the student regarding implementation of the student’s IEP. The complaints consisted of a

⁷⁵ *Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 823 (9th Cir. 2007), see also *L.J. by N.N.J. v. School Board of Broward County*, 927 F.3d 1203, 1211 (11th Cir. 2019) (holding that the standard for the Eleventh Circuit for implementation failure cases is a determination of whether “a school has failed to implement substantial or significant portions of a child’s IEP.”); *Houston Independent School Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (holding that a party challenging the implementation of an IEP must demonstrate that “the school board or other authorities failed to implement substantial or significant portions of the IEP.”).

⁷⁶ *Van Duyn*, 502 F.3d at 819-820.

discrepancy between the number of math instructional hours that were to be provided to the student; several elements of the student's behavioral management plan were not implemented the same way as it was at student's prior school; that student was not presented work at his level; and that the student was not placed in a self-contained classroom.⁷⁷ After a thorough review of the administrative decision and the district court's decision, the Court determined that the only material implementation failure by the school district was the number of math instructional hours that were provided to the student. This was the same determination made by the administrative hearing officer and had been remedied by the order below.⁷⁸ Despite the Court's finding that several of the student's behavioral management plan services was not implemented, the Ninth Circuit still sided with the administrative hearings officer's finding that the failure to implement those services was not a material failure to implement the student's IEP.⁷⁹

In this case, through testimony of Parent, Petitioners presented a series of facts alluding to the IEP team's intention to collect food intake data and share that data with Parents as part of a feeding plan that was included in Student's IEP-04/08/2021. However, Petitioners have not presented any proof to show that the IEP team was aware of any such feeding plan proposed by Student's physicians or Parents. When the team met in January 2021, Parents informed the IEP team that they would be seeking to get a prescription for Student to receive supplemental feedings in the form of a [REDACTED].⁸⁰ The Home School personnel informed Parents that a prescription was needed from Student's doctor and that a public health nurse would be responsible for such supplemental [REDACTED].⁸¹ Public Health Nurse contacted Parents at

⁷⁷ *Van Duyn*, 502 F.3d at 823.

⁷⁸ *Id.*

⁷⁹ *Id.* at 823-824.

⁸⁰ FOF 14.

⁸¹ FOF 13-14.

least two (2) times to inform them that the prescription was needed and that they would not be able to start the supplemental [REDACTED] until the prescription and necessary forms were completed by Student's doctor.⁸²

SPED Teacher had begun collecting data of Student's food intake at lunch in school to provide that information to Public Health Nurse at the request of Public Health Nurse, so they could later determine how many supplemental calories Student would require in the [REDACTED].⁸³ SPED Teacher willingly shared this information with Parents when it was requested in March 2021.⁸⁴

Beginning in March 2021, when Parents were provided access to the food intake data by SPED Teacher, they began making requests of the educational assistants, such as requesting more detailed information about the amounts of food that Student was consuming, taking photographs of Student's food, and meeting with Parents to discuss ways to prompt Student to eat.⁸⁵ SPED Teacher addressed each of these concerns with Parents and Parents did not express any further concerns regarding Student's food intake log or the educational assistants data at that time.⁸⁶

At the April 8, 2021 IEP meeting, there was no discussion with the team about a proposed feeding plan to be implemented for Student at the request or suggestion of Student's doctors, nor were any such letters, notes, or other written documentation presented by Parents to the IEP team from Student's doctors indicating that the feeding plan was necessary for Student.⁸⁷

⁸² FOF 17.

⁸³ FOF 19.

⁸⁴ FOF 22-23.

⁸⁵ FOF 24, 33.

⁸⁶ FOF 35-36.

⁸⁷ FOF 28.

The team did determine that Student needed prompting to eat lunch due to Student's lack of attention and educational assistants were assigned to Student to assist Student with eating and also collecting data of Student's food intake.⁸⁸ Clarifications were provided that the educational assistants were to be assigned in a three to one (3:1) student to aide ratio.⁸⁹

Reviewing courts have held that before parents can “fairly argue that the best that the school authorities had to offer was or is not good enough, the critical pre-requisite is that the parents must have cooperated with the school authorities ... to try to develop the IEP.”⁹⁰ Here, the evidence presented by both Petitioners and Respondents show that Home School attempted to meet with Parents to discuss Student's medical concerns and need for a doctor's note or prescription to get Student the services that Student apparently needed.⁹¹ SPED Teacher also offered for Parents to provide SPED Teacher with tips and information to pass onto the educational assistants who were monitoring Student at lunch and provided Parents with access to the data being collected by SPED Teacher for the public health nurse to use once Parents presented the school with the necessary paperwork from Student's doctor.⁹² Parents failed to get the requisite documents signed by Student's doctor, did not provide any tips or information to SPED Teacher to pass onto the educational assistants, and did not raise the feeding plan or any information thereon to the IEP team at the April 8, 2021 IEP meeting.⁹³ Petitioners claim that Home School materially failed to implement to Student's IEP-04/08/2021 because of the google spreadsheet not updating the data being collected and because it was due to a feeding plan that

⁸⁸ FOF 31.

⁸⁹ FOF 30.

⁹⁰ *M.D. v. Hawaii, Dept. of Educ.*, 864 F.Supp.2d 993, 1007 (D. Hawai'i 2012) (citing *S.M. v. Weast*, 240 F.Supp.2d 426, 436 (D.Md.2003).

⁹¹ FOF 13-14, 16-17.

⁹² FOF 22-24, 32-34.

⁹³ FOF 27-28, 35.

was never presented to the IEP team is not a convincing argument.

Petitioners raise the data collection and lunchtime supervision as a significant part of Student's IEP-04/08/2021 due to Parents' claim that its purpose was to implement a feeding plan for Student to reduce Student's dependence on the [REDACTED]. However, this is unsupported by the written IEP-04/08/2021 itself and all the correspondence presented at the Hearing in this case.⁹⁴ One of Student's diagnoses is [REDACTED], and one of the notes documented in both Student's IEP-04/08/2021 and Student's prior IEP from [REDACTED] is that Student needs prompting to eat due to Student's medical conditions.⁹⁵ SPED Teacher's explanation as to what the IEP team considered in adding the supplemental support of an educational assistant to provide reminders for Student to eat and document food intake is supported by the IEPs.

Finally, Petitioners' claim that Parents proposed or informed the IEP team of Student's feeding plan at the meeting is further unsupported by the July 2021 neuropsychological assessment. In that assessment, which took place after the end of the 2020-2021 school year and after the April 8, 2021 IEP meeting, Neuropsychologist noted that at the time of the assessment, Student's doctors had indicated that Student "could begin weening off the [REDACTED]," and not that a plan had already been put in place by Parents and Student's doctors.⁹⁶ Parent 1's testimony further confirmed that Student's feeding plan did not begin until the summer of 2021, which was well after the April 8, 2021 IEP meeting.⁹⁷

Petitioners have not proven that Home School failed to implement Student's IEP-04/08/2021 by not providing Parents access to the food intake data that Student's educational

⁹⁴ FOF 29-30.

⁹⁵ FOF 3, 5.

⁹⁶ FOF 45.

⁹⁷ FOF 43.

assistants were collecting. The evidence presented at the Hearing shows that Parents did have access to the information, although some of the information may not have been updated due to technical difficulties, and that the data was being collected by the educational assistants continuously during the spring semester of the 2020-2021 school year. Further, even if the evidence presented supported Petitioners' claim that Home School failed to provide Parents the information or collect the food intake data, Petitioners have not demonstrated that this was a failure to materially implement a significant or substantial portion of Student's IEP-04/08/2021. The evidence presented by Respondents shows that Student's IEP-04/08/2021 goals and objectives were being worked on and Student was making some progress of those goals and objectives.⁹⁸

B. Petitioners have failed to prove a denial of FAPE and their request for tuition reimbursement must also be denied

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.⁹⁹ 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.¹⁰⁰ The

⁹⁸ FOF 42.

⁹⁹ *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).

¹⁰⁰ *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in *Frank G. v. Bd. of Educ.*,¹⁰¹ 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.”¹⁰²

Petitioners have failed to prove that Respondents denied Student a FAPE, so the inquiry of whether Petitioners are entitled to tuition reimbursement ends here. However, in the case of an appeal, this Hearings Officer makes the following conclusions if an appellate court disagrees with the conclusion in this Decision that Petitioners have failed to prove a denial of FAPE.

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

Petitioners seek tuition reimbursement for Student’s tuition based on the enrollment contract signed by Parents for the 2021-2022 school year. Petitioners have presented evidence through the testimony of Parent that Private School does provide services and special accommodations to Student for Student to benefit from instruction at Private School. Private School provides Student modified curriculum in language arts and mathematics, has a counselor available to Student at Private School, and provides continuous communication with Parents on Student’s progress in school.¹⁰³ While Private School does not provide the eating assistance and data collection that is at issue in this case, that fact alone does not prevent this Hearings Officer

¹⁰¹ 459 F.3d 356, 365 (2nd Cir. 2006).

¹⁰² *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011), citing *Frank G. v. Bd. of Educ.*, 459 F.3d at 365.

¹⁰³ FOF 51-53.

from finding that Private School is not appropriate. Parents were able to find a supplemental support for that purpose with the agreement with Private Aide.

2. 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.¹⁰⁴ 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.”¹⁰⁵ The Ninth Circuit Court of Appeals affirmed the district court’s decision, adopting the standard set forth in *Frank G.* as discussed *supra*.¹⁰⁶

Here, Respondents argue that if Petitioners are awarded tuition reimbursement, then the costs associated with the agreement that Parents have with Private Aide is excessive and unreasonable. This Hearings Officer agrees. Based on the testimony of Parent 1, Private Aide’s job is to go to Private School at lunch and sit by Student, encourage Student to eat, and collect information about Student’s food intake daily. None of this work requires any special training or expertise and the Fifty Dollar (\$50) payment per day for the services noted is excessive.¹⁰⁷

While this Hearings Officer notes that Petitioners are not being awarded tuition reimbursement

¹⁰⁴ *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th 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.”)

¹⁰⁵ *Id.* at 1160.

¹⁰⁶ *Id.*

¹⁰⁷ FOF 48-49.

due to no denial of FAPE being proven, if reimbursement was awarded by a reviewing body, then the recommendation of this Hearings Officer is that reimbursement to Private Aide should be reduced by fifty percent (50%), totaling Twenty-Five Dollars (\$25) per day for the services provided to Student.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not proven that Respondents denied Student a FAPE by materially failing to implement Student's IEP-04/08/2021. Petitioners' request for reimbursement and assumption of the costs of Student's educational and related expenses is denied.

RIGHT TO APPEAL

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

DATED: Honolulu, Hawai'i, October 22, 2021.

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