



OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

In the Matter of STUDENT, by and through  
PARENT/LEGAL GUARDIAN,<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-SY2122-007

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND DECISION

Due Process Hearing: November 2-3, 2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On August 4, 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 Complaint and Resolution Proposal (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities

Education Act, from Student, by and through Parent/Legal Guardian (hereinafter “Petitioners”), by and through their attorney Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”). Respondents submitted a response to Petitioners’ Complaint on August 16, 2021. Student is currently over the age of eighteen (18), however Parent has previously been appointed as Student’s legal guardian to make decisions regarding Student’s education including in IDEA due process proceedings, IEP meetings, and other educational decisions.<sup>2</sup>

On October 4, 2021, a prehearing conference was held before Hearings Officer Chastity T. Imamura, with Mr. Peck, representing Petitioners, and Anne T. Horiuchi, Esq. (hereinafter “Ms. Horiuchi”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for November 2-4, 2021. The parties indicated that no substantive motions were necessary for this proceeding, and a status conference was scheduled for Friday, October 22, 2021.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure compliance with government mandated social distancing. An Order Regarding Video Conference Due Process Hearing was issued on October 6, 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

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<sup>2</sup> While the parties did not present any record of this guardianship appointment in this proceeding, this Hearings Officer has had a previous proceeding for Student under DOE-SY2021-034 in which the parties stipulated to the admission of such documents establishing Parent’s guardianship over Student for educational purposes. This Hearings Officer therefore takes judicial notice of such documents and notes that Respondents are not contesting Parent’s ability or standing to represent Student in these proceedings.

and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

The Hearing commenced on November 2, 2021, 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/Legal Guardian (hereinafter referred to as “Parent”) and Mr. Peck, on behalf of Petitioners; and District Educational Specialist 1, District Resource Teacher 1, Michael Azuma, Esq., and Ms. Horiuchi on behalf of Respondents; as well as the assigned court reporter. The Hearing continued to November 3, 2021 as scheduled, and the testimony of the witnesses was completed on that date.

At the Hearing, Petitioners called Parent to testify during their case-in-chief and rested. Respondents called Occupational Therapist (hereinafter “OT”), Special Education Department Chair (hereinafter “SPED Dept. Chair”), and Student Services Coordinator (hereinafter “SSC”) during their case and rested. Petitioners did not present any rebuttal evidence.

Each party submitted their exhibits for the Hearing by the disclosure deadline of October 26, 2021. On November 3, 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 November 12, 2021. Any objections to the proposed exhibits were due on November 17, 2021. This Hearings Officer filed a List of Exhibits Received at Due Process Hearing and an Amended List of Exhibits Received at Due Process Hearing on November 18, 2021 and November 24, 2021, respectively. Respondents submitted the following additional exhibits for consideration in the decision in this case:

Respondents' Exhibit 1, pages 0001-0007; Exhibit 2, pages 0008-0010; Exhibit 50, pages 0152-0155; Exhibit 160, pages 0524-0526; Exhibit 193, pages 1479-1481; Exhibit 196, pages 1487-1493; Exhibit 197, audio/video recordings from meetings on February 10, 2021, February 26, 2021, and August 2, 2021. Petitioners did not object to the introduction of any of these exhibits, so they were also received in addition to any exhibits that were discussed or mentioned at the Hearing. Petitioners did not submit any corrections or additional exhibits for consideration in this Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-029, 091-139; Exhibit 2, pages 141-185, 187-203, 206, and an audio file dated August 2, 2021. Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 1-2, pages 0001-0010; Exhibit 50, pages 0089-0155; Exhibits 51-52, pages 0162-0215; Exhibit 160, pages 0524-0526; Exhibit 163, pages 0535-0536; Exhibit 165, pages 0541-1207; Exhibit 177, pages 1312-1350; Exhibit 179, pages 1352-1353; Exhibit 180, pages 1354-1367; Exhibits 184-186, pages 1394-1424; Exhibit 193, pages 1479-1481; Exhibit 195, page 1486; Exhibit 196, pages 1487-1493; Exhibit 197, three (3) audio/video files dated February 10, 2021, February 26, 2021, and August 2, 2021.

Upon review of the August 2, 2021 audio recordings submitted by Petitioners and Respondents, this Hearings Officer notes that Petitioners' audio recording was made on Parent's end of the conversation and Respondents' audio recording was made on Respondents' end of the conversation. For clarity, this Hearings Officer will be referencing Petitioners' copy of the August 2, 2021 audio recording in this Decision.

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. Due to the

number of issues, documentary exhibits, and audio recordings received in this case, Respondents requested an extension of the 45-day Decision deadline to allow the parties additional time to submit their written closing briefs. This Hearings Officer granted Respondents' request and the Decision deadline was extended to January 16, 2022. Based on the extension request, the deadline by which the briefs were to be submitted was Wednesday, December 1, 2021. Both parties timely submitted their closing briefs on that date.

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

## **II. JURISDICTION**

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

## **III. ISSUES PRESENTED**

Petitioners assert three (3) issues in the Complaint to be addressed at the Hearing:

1. Whether the reduction in service "Teacher Consultation" in the Individualized Education Plan (hereinafter "IEP") dated August 2, 2021 (hereinafter "IEP-08/02/2021") was appropriate where Parent sought to discuss the basis of the reduction of this service but was not provided the information sufficient for meaningful participation in this decision.
2. Whether the elimination of the service "Occupational Therapy" consultation in the IEP-08/02/2021 was appropriate where Parent sought to obtain information and discussion on the basis of the termination of this service, but the DOE refused.
3. Whether the failure to provide Parent with the records on the provision of past "Teacher Consultation" services in Student's IEP was a denial of FAPE under the circumstances.

#### IV. FINDINGS OF FACT

##### Background

1. OT is an occupational therapist for the DOE ██████████ District and has been employed in that capacity since ██████. As an occupational therapist for the DOE, OT's duties include providing occupational therapy to students, completing assessments, writing reports, monitoring responses to interventions, attending meetings, conducting trainings, and supervising other occupational therapy personnel. OT has a Bachelor of Science degree in occupational therapy and is licensed to practice in Hawai'i. Testimony of OT, Tr.V1, 92:16-93:13; R-Ex.195, p.1486.
2. OT is the occupational therapist that provided the occupational therapy consultation services to Student's teachers in Student's previous IEPs and has been on Student's IEP team since August 2019. OT does not provide direct services to Student. Testimony of OT, Tr.V1, 93:14-94:10.
3. SPED Dept. Chair is a special education teacher in the State of Hawai'i and is the special education department chair at Home School. SPED Dept. Chair has been a special education teacher at Home School for ██████████ years. SPED Dept. Chair currently has Student in one of SPED Dept. Chair's regular school day classes and worked with Student during extended school year in the summer of 2021. SPED Dept. Chair is also Student's care coordinator and attends Student's IEP meetings. Testimony of SPED, Tr.V1, 116:3-118:12.
4. SSC is the student services coordinator at Previous School. Prior to becoming the student services coordinator, SSC was a special education teacher and the special education department chair. SSC worked with Student at Previous School since Student first attended

Previous School and taught Student in Student's extended school day sessions. Testimony of SSC, Tr.V2, 133:3-135:15.

Student's background

5. Student is currently [REDACTED] old and is eligible for special education and related services under the IDEA under the category of [REDACTED] (hereinafter "[REDACTED]"). Testimony of Parent, Transcript Volume 1, page 15, line 3 to line 8 (hereinafter referenced as "Tr.V1, 15:3-8"); Petitioners' Exhibit 1, page 002 (hereinafter referenced as "P-Ex.1, p.002").
6. Student attended Previous School for [REDACTED] years and received special education and related services under IEPs created by Student's IEP team at Previous School. The IEP team at Previous School included Parent, Parent Consultant, SSC, Previous Special Education Teacher (hereinafter "Previous SPED Teacher"), OT, Principal, and other IEP team members. *See e.g.* R-Ex.50, p.0139-0151; R-Ex.51, p.0212-0213.
7. Prior to Student's [REDACTED] year at Previous School, Student was on a diploma track, which would have meant that Student would have various teachers throughout the school day to take the classes necessary to receive a high school diploma. During Student's [REDACTED] year, Student changed from a diploma track to a certificate track in a fully self-contained special education classroom, which meant that Student would only have one (1) primary teacher during the school day and possibly a different teacher during the extended school day sessions. Testimony of SSC, Tr.V2, 150:18-151:5.
8. When Student started attending Previous School, Student was having accidents where Student would not realize that Student needed to get to the [REDACTED] quickly enough to get to the [REDACTED] [REDACTED]. As a result, Parent had Student evaluated by an occupational

therapist through Student's health insurance. One of the recommendations by the occupational therapist was to have Student perform core muscle exercises to strengthen Student's core to allow Student to realize when Student needed to use the [REDACTED] in an appropriate [REDACTED]. Testimony of Parent, Tr.V1, 35:25-36:25; Testimony of OT, Tr.V1, 94:11-95:5; Testimony of SSC, Tr.V2, 138:1-4.

9. Based on this information, Student's IEPs prior to August 2021 contained occupational therapy consultation services for an occupational therapist to work with Student's teachers to assist Student in performing the core muscle exercises daily in school. Testimony of OT, Tr.V1, 94:11-95:5.
10. OT provided occupational therapy consultation services to Student's teachers at Previous School and continued providing the consultation services to Student's teachers at Home School when Student transferred there in May 2021. Testimony of OT, Tr.V1, 94:4-8, 95:6-96:16.
11. Student had been doing Student's daily core muscle exercises at Previous School from as early as August 2019 until Student transferred to Home School in May 2021. Testimony of OT, Tr.V1, 94:18-95:12; Testimony of SSC, Tr.V2, 139:20-140:4.
12. At Home School, Student has also been doing Student's daily core muscle exercises daily without any problems reported by Student's teachers. Testimony of OT, Tr.V1, 97:4-11.
13. During the school closure during the COVID-19 lockdown in 2020, Parent was implementing Student's core muscle exercises while Student was at home. Parent did not report any problems with Student's performance of the core muscle exercises at home. Testimony of Parent, Tr.V1, 37:1-6, 78:21-79:7, 80:17-81:5.
14. Student's teachers at Previous School and Home School indicated that Student did not need



any assistance in performing the core muscle exercises each day in school and that Student performed the exercises without any instruction or additional guidance by the teachers.

Testimony of SSC, Tr.V2, 139:24-140:4.

15. In the 2020-2021 school year, Student has not had any reported [REDACTED] accidents<sup>3</sup> at either Previous School or Home School. Testimony of SSC, Tr.V2, 138:16-139:4, 140:16-22; *see also* R-Ex.165, p.0541-705.
16. Student's previous IEPs also contained "sensory strategies" that were in place to address Student's [REDACTED] behaviors. Testimony of Parent, Tr.V1, 81:12-83:13. According to OT, SSC, and Previous SPED Teacher, the sensory strategies were prepared as a backup strategy for teachers to use to redirect Student from [REDACTED] if necessary. Testimony of OT, Tr.V1, 100:6-101:2; Testimony of SSC, Tr.V2, 140:23-141:6.
17. SSC and Previous SPED Teacher did not have to use any of the sensory strategies to get Student away from [REDACTED] behavior as Student was easily redirected from [REDACTED] by verbal reminders/redirection. Testimony of Parent, Tr.V1, 84:21-85:4; Testimony of OT, Tr.V1, 103:21-104:5; Testimony of SSC, Tr.V2, 141:7-23; *see also* P-Ex.2, audio file of IEP meeting on August 2, 2021, approximate time stamp [1:00:12-1:10:13] (hereinafter referenced as "P-Ex.2, IEP 8/2/2021 [1:00:12-1:10:13]").
18. Current Special Education Teacher (hereinafter "Current SPED Teacher") has never had to use the sensory strategies and was able to redirect Student from [REDACTED] verbally as well. Testimony of OT, Tr.V1, 104:6-105:11; *see also* P-Ex.2, IEP 8/2/2021 [1:00:12-1:10:13].
19. The IEP in place for Student at Previous School for the 2020-2021 school year was

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<sup>3</sup> Meaning that Student has not had any incidents where Student did not make it to the [REDACTED] [REDACTED] to [REDACTED] Student's self appropriately.

developed at IEP meetings held between April 9, 2020 and June 9, 2020 (hereinafter “IEP-06/09/2020”). R-Ex.50, p.0089-0151.

20. Student receives applied behavior analysis services outside of school through insurance. In February 2021, Student’s insurance provider created an updated treatment plan that contains goals in the areas of targeted behavior, social skills, communication skills, cognitive skills, adaptive skills, and vocational skills. None of the concerns or goals in the insurance treatment plan addressed either Student’s inability to get to the [REDACTED] in an appropriate [REDACTED] to avoid [REDACTED] or Student’s [REDACTED] behavior. P-Ex.2, p.142-167.
21. IEP meetings were held on February 10, 2021 and February 26, 2021 to address concerns Parent raised during the 2020-2021 school year and a revised IEP (hereinafter “IEP-02/26/2021”) was developed and presented to Parent. R-Ex.51, p.0162-0213; *see also* R-Ex.52, p.0214-0215.
22. Some notable supports and services included in IEP-06/09/2020 and the IEP-02/26/2021 were occupational therapy consultation services of ninety (90) minutes per quarter; teacher consultation for one thousand eighty (1080) minutes per month, parent training and education for one hundred twenty (120) minutes per month, monthly team meetings for sixty (60) minutes per month, and daily sensory strategies. R-Ex.50, p.0135-0137; R-Ex.51, p.0208-0210.
23. The IEP-06/09/2020 and IEP-02/26/2021 clarified the above-mentioned supports as follows:  
“Occupational Therapy (OT) consultation will be provided to [Student’s] service providers regarding sensory strategies. Incorporate strategies to support core muscle activation throughout the school day. (Sensory walk, deep pressure, based on OT recommendations).  
Parent Education and Training: Parent Training services will be provided for 120 minutes per month. Goals and objectives will be identified and data collected. It is the option of the parent to request the parent trainer to attend the team meeting using a portion of the parent training time.  
Team Meeting: Team meetings will be scheduled for 60 minutes per month. Agenda topics

will be organized in advance and sent home via communication log.

Teacher Consultation: Teacher consultation at least once per school week to increase teacher's expertise in strategies and teaching practices to address [Student's] ██████ and behavioral needs.

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Sensory Strategies (daily): Incorporate strategies to support core muscle activation throughout the school day (Sensory walk, deep pressure, based on OT recommendation).” R-Ex.50, p.136; R-Ex.51, p.209.

24. The supplementary service and support of teacher consultation was included in Student's IEPs at the rate of one thousand eighty (1080) minutes per month prior to Student starting high school at Previous School. The number of minutes of teacher consultation continued for Student's IEP through the 2020-2021 school year, however SSC and Previous SPED Teacher were discussing reducing the number of minutes for teacher consultation for Student's next IEP. Testimony of SSC, Tr.V2, 150:3-153:2.
25. In May of 2021, Student transferred from Previous School to Home School. Home School agreed to implement Student's IEP-02/26/2021 until the IEP team was able to develop a new IEP for Student. Testimony of SSC, Tr.V2, 164:10-16.
26. Between June 2021 and August 2021, eight (8) IEP team meetings<sup>4</sup> were held to develop a new or revised IEP for Student for the 2021-2022 school year. The IEP team members included some members from Previous School and some members from Home School, as well as Parent and Parent Consultant. P-Ex.1, p.022-029.
27. Student's IEP offer by Home School was made to Parent verbally at the IEP meeting on August 2, 2021, with the written IEP being provided to Parent on August 10, 2021 (hereinafter referred to as IEP-08/02/2021”). R-Ex.165, p.1074-1105.
28. The relevant differences between IEP-02/26/2021 and IEP-08/02/2021 for purposes of this

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<sup>4</sup> The dates of these meetings were June 1, 9, 23, 2021, July 1, 9, 21, 30, 2021, and August 2, 2021.

decision are as follows:

- a. IEP-02/26/2021 contains the supplementary service and support of occupational therapy consultation for ninety (90) minutes per quarter, while IEP-08/02/2021 does not contain the supplementary service of occupational therapy consultation.
- b. IEP-02/26/2021 contains the supplementary service and support of teacher consultation for one thousand eighty (1080) minutes per month; IEP-08/02/2021 contains the supplementary service and support of teacher consultation for one hundred twenty (120) minutes per month.
- c. IEP-02/26/2021 contains the supplementary service and support of “sensory strategies daily” while the IEP-08/02/2021 contains the supplementary service and support of “core muscle exercises.” *See* R-Ex.51, p.0208-0210 (IEP-02/26/2021); P-Ex.1, p.019-021 (IEP-08/02/2021).

IEP meeting on February 26, 2021

29. On February 10 and 26, 2021, the IEP team met to address some of Parent’s concerns regarding the implementation of Student’s IEP-06/09/2020. The primary concerns that were addressed in the February 10 and February 26, 2021 meetings were Parent’s concerns about the gender of Student’s aide that accompanied Student to the [REDACTED] during the extended school day period and the implementation of the full teacher consultation minutes. *See generally* R-Ex.197, IEP meeting audio files from February 10, 2021<sup>5</sup> and February 26,

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<sup>5</sup> The entire discussion during the February 10, 2021 meeting revolved around the gender of Student’s aide, and the meeting was cut short due to Parent’s internet connection. Because that discussion is irrelevant to the issues in the Complaint, the February 10, 2021 IEP meeting recording is referenced generally for background purposes.

2021.

30. Parent's concern with the teacher consultation minutes arose from the parent trainer informing Parent that parent trainer was only providing about half of the one thousand eighty (1080) minutes per month of teacher consultation. *See* R-Ex.197, February 26, 2021 IEP Meeting recording, approximate time stamp [32:25-50:09] (hereinafter referenced as R-Ex.197, 02/26/21 IEP [32:25-50:09]”).
31. During the discussion regarding the teacher consultation minutes, Parent was informed by the school team that other DOE personnel were providing some of the teacher consultation minutes provided in Student's IEP-06/09/2020. Parent objected to the teacher consultation being provided by people unknown to Parent because no discussion regarding the provision of teacher consultation was had with Parent. *See* R-Ex.197, 02/26/21 IEP [32:25-43:54].
32. Principal explained to Parent that teacher consultation was a service provided directly to the teacher based on the needs of the teacher to gain expertise in working with Student, as stated in the IEP-06/09/2020. R-Ex.197, 02/26/21 IEP [32:25-43:54].
33. Parent continued to object and demand information from the IEP team regarding the person providing the teacher consultation and requested sign-in logs for the teacher consultation provider. Principal offered to have a meeting with Parent and the teacher consultation provider but noted that no sign-in logs existed because the teacher consultation provider was a DOE employee housed on Previous School's campus. R-Ex.197, 02/26/21 IEP [32:25-43:54].
34. Principal also informed Parent that because the service being provided was not a direct service to Student, the teacher consultation provider was not a necessary member of the IEP team. R-Ex.197, 02/26/21 IEP [32:25-43:54].

35. On March 29, 2021, Parent emailed Principal and requested “service verifications and agency referrals” for Student’s IEP services beginning in 2018 for “teacher consultation.” P-Ex.2, p.187. Parent’s understanding of service verifications were documents that show that a service provider was at the school, with the date and times, and the purpose of their visit. Parent’s understanding of agency referrals was a document that would go to the provider of the service authorizing the number of service minutes. Testimony of Parent, Tr.V1, 70:19-74:6.
36. Service verifications are a billing tool that the DOE uses to pay contracted agencies for any contracted services. The agency logs their time of service and the DOE uses that documentation to calculate the hours that the agency is allowed to bill. Testimony of SSC, Tr.V2, 146:18-147:6.
37. Principal did inform Parent in a prior email communication that some documents that Parent had previously requested were not part of Student’s educational records and would not be provided. Testimony of SSC, Tr.V2, 145:11-25; P-Ex.2, p.177.
38. Previous School did not provide any “service verifications and agency referrals” to Parent in response to Parent’s request because “service verifications and agency referrals” are considered personnel procurement documents that are not part of a student’s educational records or kept within the student’s files. Testimony of SSC, Tr.V2, 148:1-9.

IEP meeting on August 2, 2021

39. The IEP team met again between June and August 2021 to develop Student’s annual IEP for the 2021-2022 school year. See P-Ex.1, p.022-029.
40. The discussion regarding the supplementary services and supports for Student’s IEP-08/02/2021 took place during the August 2, 2021 IEP team meeting. P-Ex.2, IEP 08/02/21

[24:43-1:33:26].

41. During the IEP meeting the discussion of occupational therapy consultation was discussed. OT recommended to the IEP team that the occupational therapy consultation supplemental service and support be removed from Student's IEP as it was no longer necessary. OT explained that the primary reasons for the occupational therapy consultation was to guide Student's teachers in having Student go through core muscle activation exercises to get Student to recognize the need to go to the [REDACTED] in a [REDACTED]. OT also explained that Student's teachers were familiar with the exercises for Student and that Student was also familiar with the exercises and did not need any assistance in performing them daily. P-Ex.2, IEP 08/02/21 [32:55-34:35].
42. Parent objected to the removal of the occupational therapy consultation minutes being removed from Student's IEP and demanded that Parent be provided data to support the removal of the service. P-Ex.2, IEP 08/02/21 [34:36-44:22].
43. During the discussion at the IEP meeting, OT and other IEP team members explained to Parent that since the service was a service to Student's teachers and not directly to Student, if the teachers agreed the service was not necessary, then it was not necessary to add it to Student's IEP. See P-Ex.2, IEP 08/02/21 [32:55-44:22].
44. The IEP team informed Parent that since the primary purpose of the occupational therapy consult was initially to get Student to do the core muscle exercises to avoid [REDACTED] accidents, the consultation was no longer necessary since Student could perform the exercises without assistance from the teachers. The IEP team also informed Parent that the data they relied upon was whether Student could perform the exercises and whether Student had any [REDACTED] accidents in the previous school years. See P-Ex.2, IEP 08/02/21 [32:55-

44:22].

45. The IEP team reminded Parent that the information that Parent sought was contained in the daily communication logs that were used to communicate with Parent. These logs contained a checklist for whether Student performed the core muscle exercises and had an area for the teachers to inform Parent if Student had any [REDACTED] accidents during the school day. *See* P-Ex.2, IEP 08/02/21 [32:55-44:22].
46. Despite the lengthy discussion and explanation provided to Parent by the IEP team regarding the occupational therapy consultation services no longer being necessary for Student's IEP, Parent continued to object and demand 'data.' *See* P-Ex.2, IEP 08/02/21 [32:55-44:22].
47. The IEP team moved onto discussing the supplementary service and support of teacher consultation. Student's primary special education teacher at Home School, Current SPED Teacher informed the IEP team that based on Current SPED Teacher's experience with Student so far and Current SPED Teacher's experience as a special education teacher, that teacher consultation for one hundred twenty (120) minutes per month was sufficient to meet Current SPED Teacher's needs. *See* P-Ex.2, IEP 08/02/21 [44:22-47:10].
48. Parent objected to the reduction of teacher consultation minutes and demanded that the IEP team provided data to support the reduction. Parent noted that Student just started at Home School and that Student still needed to be taught under the umbrella of applied behavior analysis. *See* P-Ex.2, IEP 08/02/21 [44:51-46:03], [47:12-47:30].
49. The IEP team again explained to Parent that the teacher consultation supplementary service and support was a direct service to Student's teachers to assist the teachers to understand how to address Student's [REDACTED] and behavioral needs and that it was not a direct service to



- Student. *See* P-Ex.2, IEP 08/02/21 [44:22-47:10].
50. The IEP team also explained that there was no data to present to Parent regarding the teacher consultation, as the service itself was based on the teacher's needs or areas of concerns in providing instruction to Student. *See* P-Ex.2, IEP 08/02/21 [46:04-48:26].
  51. The last relevant supplementary service and support that the IEP team discussed for Student's IEP at the August 2, 2021 meeting was the removal of "sensory strategies" and its replacement with "core muscle exercises." *See* P-Ex.2, IEP 08/02/21 [1:00:12-1:10:13].
  52. During this discussion, OT discussed sensory strategies as a whole for supplementary service and support versus a more specific support like the core muscle exercises. OT noted that Student does not currently use any other sensory strategies at school besides the core muscle exercises. *See* P-Ex.2, IEP 08/02/21 [1:00:12-1:10:13].
  53. Parent raised the concern that Student needs the sensory strategies to help Student 'attend' in class and to stop engaging in [REDACTED] behavior. *See* P-Ex.2, IEP 08/02/21 [1:00:12-1:10:13].
  54. SSC, Previous SPED Teacher, and Current SPED Teacher both informed Parent that Student did not require the sensory strategies at school and that Student was easily redirected from [REDACTED] verbally and without the use of any deep pressure or other sensory items. *See* P-Ex.2, IEP 08/02/21 [1:00:12-1:10:13].
  55. Parent again asked for the IEP team to provide data to support the removal of the sensory strategies and both SSC and Previous SPED Teacher informed Parent that they provided the data in the daily communication logs, which were also discussed at the various monthly team meetings that were held pursuant to Student's IEP-06/09/2020. *See* P-Ex.2, IEP 08/02/21 [1:00:12-1:10:13].

56. Based on the discussion at the IEP team meeting on August 2, 2021, the changes recommended by OT and Current SPED Teacher regarding the removal of occupational therapy consult, the reduction in teacher consultation minutes, and the change from “sensory strategies (daily)” to “core muscle exercises (daily)” were adopted by the IEP team over Parent’s objection. *See generally* P-Ex.2, IEP 08/02/21.

Student’s performance at Previous School and Home School

57. Between August 2020 and May 2021, Previous School completed daily communication log checklists, which included an item labeled “core muscle activities” to indicate whether Student completed the core muscle activities in school on the specified school day. The communication log also had an area for Parent or Student’s teachers to write notes to each other or to log unusual events during Student’s day. None of these logs indicated that Student did not perform the core muscle activities or had an incident involving Student’s inability to get to the [REDACTED] in a [REDACTED]. None of the logs indicated that Student needed significant redirection or intervention to stop Student’s [REDACTED] behavior. *See* R-Ex.165, p.0541-705.

58. From June 2, 2021 to July 29, 2021, Student attended Home School for extended school year. During the extended school year session, daily communication logs were also completed by Student’s teachers at Home School and sent home to Parent. Starting from June 11, 2021, the daily communication log indicated that Student did the core muscle activities every day during the extended school year session. None of the logs during the extended school year session indicated that Student had any [REDACTED] accidents or needed significant redirection or intervention to stop Student’s [REDACTED] behavior. None of Student’s teachers noted any specific difficulties with Student during the extended school

year session. *See* R-Ex.165, p.730-1002.

59. Between August 3, 2021 and October 14, 2021, Student's teachers at Home School completed daily communication logs and on most of them, Student's core muscle activities were noted to be completed in school. Parent and Student's teachers communicated regularly on the daily communication log, and at no time during this period was there an indication that Student had a [REDACTED] accident or needed significant redirection or intervention to stop Student's [REDACTED] behavior. *See* R-Ex.165, p.1055-1207.
60. Previous SPED Teacher prepared progress reports for all four (4) quarters of Student's 2020-2021 school year, as the teachers at Home School did not believe they had enough information to complete the progress reports based on the short time that Student attended Home School for the 2020-2021 school year. Testimony of SPED Dept. Chair, Tr.V1, 119:19-121:6.
61. Student's progress reports for the 2020-2021 school year show that Student made progress or mastered all of Student's IEP objectives during the course of the school year. Included in these objectives were specific objectives relating to Student's [REDACTED] behavior or Student's ability to attend without distractions or return to the task at hand after getting distracted. R-Ex.177, p.1312-1350 (specific scripting or distraction objectives are on pages 1315-1317, 1341-1343).
62. Current SPED Teacher prepared a report regarding Student's performance at Home School during the extended school year session in the summer of 2021. Current SPED Teacher's report indicated that Student was able to attend to tasks given and group activities and redirect Student's self back to given a task given a verbal prompting. Current SPED Teacher noted that Student needed several verbal prompting reminders to complete tasks as

Student was easily distracted in group situations. R-Ex.179, p.1352-1353.

63. SPED Dept. Chair prepared Student's IEP progress report for the first quarter of the 2021-2022 school year. Regarding Student's ██████ behavior and attending to tasks, SPED Dept. Chair noted that Student was progressing or had emerging skills in the objectives related to those behaviors. R-Ex.180, p.1354-1355, 1366-1367.
64. Between February 2020 and June 2021, OT conducted occupational therapy consultations and logged the consultations in the DOE event log system. OT noted in each of the consultation sessions that no concerns were reported by any of Student's teachers. R-Ex.186, p.1410-1424.
65. In June 2020, Home School began collecting logs of the teacher consultation minutes, which included the name of teacher receiving the consultation, the name of the consultant, the date of service, the duration of the service, and the target (topic) of the consultation. These logs did not include notes, agendas, or any other information besides the target to indicate what was discussed during the consultation. Home School began collecting these records because Parent raised a concern that Student's IEP minutes were not being fully provided. Testimony of SSC, Tr.V2, 148:10-149:13, 158:17-162:2; *see* R-Ex.184, p.1394-1397; R-Ex.185, p.1389-1409.

## V. CONCLUSIONS OF LAW

### IDEA framework

To “ensure that the rights of children with disabilities and parents of such children are protected, the IDEA guarantees a FAPE to children with disabilities.” *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038, 1043 (2013) (citing 20 U.S.C. §1400(d)(1)(B), 20 U.S.C. §1412(a)(1)(A), and 34 C.F.R. §§300.1(b) & 300.101)). A FAPE includes both special

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

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education. *Id.* 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.” *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988). 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. H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22. The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs. H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

Denials of FAPE determinations are based on one of two categories of review. Procedural violations can occur when the educational agency has not complied with the procedures set forth in the IDEA. *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), *see also L.J. by and through Hudson v. Pittsburg Unified School District*, 850 F.3d 996, 1003 (9<sup>th</sup> Cir. 2017). Procedural violations do not automatically result in a denial of FAPE, however, as a secondary determination must be made as to whether the violation resulted in: 1) loss of

educational opportunity, 2) significant infringement on parental participation, or 3) deprivation of educational benefits. *Id.* at 892.

Substantive violations of the IDEA require an examination of the child’s IEP. The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048. However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*, held that the educational benefit must be more than *de minimus*. 137 S.Ct. 988, 197 L.Ed.2d 335 (2017). 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.” *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).

Courts and reviewing agencies may “defer to the application of expertise and exercise of judgment by school authorities. The [IDEA] vests these officials with responsibility for decisions of critical importance to the life of a disabled child. ... A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [the child’s] circumstances.” *Endrew*, 137 S.Ct. at 1001-1002, 197 L.Ed.2d 335.

A. Petitioners have not proven that Respondents denied Student a FAPE based on the reduction of “Teacher Consultation” in the IEP-08/02/2021

Petitioners’ first issue questions whether the reduction of “Teacher Consultation” minutes in the IEP-08/02/2021 was appropriate where Parent questioned the basis of the reduction in

minutes and requested records from the DOE to review for a discussion on the reduction of minutes.

Student's previous IEP-02/26/2021, which was developed by Previous School and was implemented there until Student's transfer to Home School included one thousand eighty (1080) minutes per quarter of Teacher Consultation. *Findings Of Fact paragraph 22 (hereinafter referenced as "FOF 22."* The service of Teacher Consultation was a direct service provided to Student's teachers to assist them in addressing Student's behaviors and any other concerns that they encountered with Student. *FOF 23.* Prior to the August 2, 2021 IEP meeting, SSC and Previous SPED Teacher discussed reducing the number of minutes for Teacher Consultation, noting that since Student was no longer on a diploma track and since both SSC and Previous SPED Teacher had been working with Student during Student's attendance at Previous School, the one thousand eighty (1080) minutes were excessive. *FOF 24.*

Student transferred to Home School, where Current SPED Teacher became Student's primary teacher. Current SPED Teacher had worked with Student during the extended school year session prior to the August 2, 2021 IEP meeting and was able to work with Student on numerous goals and objectives for the extended school year session. *FOF 62.*

During the August 2, 2021 IEP meeting, the team very thoroughly discussed with Parent that the Teacher Consultation service minutes were solely based on the amount of assistance and consultation that Student's teachers needed and was not a direct service to Student. *FOF 47.*

Current SPED Teacher informed the IEP team that Current SPED Teacher believed that one hundred twenty (120) minutes per month were sufficient for Current SPED Teacher to get the appropriate amount of assistance to advance Current SPED Teacher's expertise in teaching Student. *FOF 47.* While Parent demanded that the team produce data to support this reduction

in minutes, Parent did not articulate what data Parent believed the team could show that would support a reduction or even an increase in minutes. *FOF 48.*

Since the Teacher Consultation supplementary service and support was a service provided directly to the teachers that worked with Student, it is difficult to imagine that any data besides statements from the teachers themselves would support either a reduction or increase in service minutes. While Parent requested that the school provide service verification logs and agency referrals, Petitioners have not presented any argument as to how this log of service minutes for billing purposes would provide any insight to Parent in determining whether the teachers for Student needed additional consultation. *FOF 35-38.*

This Hearings Officer concludes that the IEP team discussed with Parent at length during at least two (2) of the IEP meetings that the Teacher Consultation service was a service solely to the teacher and the need for it, as well as the necessary service providers, would be based upon what the teachers believed they needed assistance with. *FOF 30-34.* This Hearings Officer also finds that Petitioners have failed to prove that failure to provide the requested procurement documents resulted in Parent's inability to sufficiently discuss the reduction in Teacher Consultation minutes. Parent had ample opportunity to express Parent's concerns to the IEP team about the reduction in minutes and Petitioners have not demonstrated how the log of minutes of service provided would have assisted Parent in further expressing any position on the matter.

As a failure to further discuss or provide data to Parent regarding the reduction in Teacher Consultation minutes would be, at most, a procedural violation, Petitioners also need to prove that the procedural violation resulted in a loss of educational opportunity, significant infringement on parental participation, or a deprivation of educational benefits, in order to prove



that Respondents denied Student a FAPE. This Hearings Officer concludes that even if Respondents' failure to further discuss or provide data to support the reduction in Teacher Consultation resulted in a procedural violation, Petitioners have failed to prove that it resulted in a denial of FAPE.

As noted above, Parent was heard in at least two (2) of the IEP meetings regarding concerns about Teacher Consultation service in Student's IEP. In the February 26, 2021 meeting, Parent expressed concern about the people providing the service and demanded that Parent be provided more information about the service providers. *FOF 30-33*. Previous School accommodated Parent's request by setting up a meeting with the teacher consultant and acknowledged Parent's concern. *FOF 34*. At the August 2, 2021 IEP meeting, the IEP team again explained to Parent the purpose of the Teacher Consultation service and the reasons for the reduction in minutes and Parent was able to fully express Parent's concerns and objections to the reduction in minutes. *FOF 47-50*. Petitioners have not demonstrated that Parent's ability to participate was significantly infringed upon. A disagreement of the IEP team with the request or demand of a Parent does not in itself result in a denial of parent participation. *See e.g. D.A. v. Meridian Joint School Dist. No. 2*, 2014 WL 43639 (U.S.D.C. Idaho 2014).

Petitioners have also failed to prove that any possible procedural violation related to the Teacher Consultation minute reduction resulted in any loss of educational opportunities or a deprivation of educational benefits to Student. Petitioners have not presented any evidence of opportunities that Student could have had if the Teacher Consultation minutes remained at one thousand eighty (1080) minutes, nor any lack of progress or regression of Student's progress after the reduction was done. In fact, Respondents have presented evidence that Student continues to make progress at Home School under the IEP-08/02/2021 and has not shown

regression despite the reduced number of Teacher Consultation minutes. *FOF 63*. Petitioners have failed to prove that the failure to further discuss or provided documentary data to support the reduction in Teacher Consultation minutes was a denial of FAPE.

B. Petitioners have not proven that Respondents denied Student a FAPE based on the elimination of the service “Occupational Therapy Consultation” in the IEP-08/02/2021

Petitioners’ second issue is similar in nature to Petitioners’ first issue in that it relates to whether the service of Occupational Therapy Consultation was a denial of FAPE based on the lack of discussion or documentary data to support the IEP team’s decision. In Student’s IEP-02/26/2021, Occupational Therapy Consultation was a service provided directly to Student’s teachers to assist with Student’s sensory needs, including core muscle exercises. *FOF 23*. The inclusion of this service began when Student was having [REDACTED] accidents and was evaluated by Student’s insurance-based occupational therapist. *FOF 8*. That occupational therapist recommended that Student do core muscle exercises to allow Student’s body to better evaluate Student’s need to use the [REDACTED]. Student’s IEP-02/26/2021 also included sensory strategies that were in place as a back up plan for occasions where Student needed additional prompting to redirect from [REDACTED] behavior. *FOF 22*.

Over the course of Student’s attendance at Previous School, Student did the core muscle exercises daily to the point where Student no longer needed assistance to do the exercises. *FOF 41*. Student’s teachers were also familiar with the exercises and no longer needed consultation by the occupational therapist to work with Student on them. Student’s daily communication logs from the 2020-2021 school year showed that Student did the core muscle exercises daily and did not have any [REDACTED] accidents. *FOF 57*. The daily communication logs also noted that Student did not need significant redirection from [REDACTED] behavior and Student’s teachers all noted that Student is easily redirected from [REDACTED] by a verbal prompt.

Based on this information, OT recommended that both the Occupational Therapy Consultation and the daily sensory strategies be taken out of Student's IEP and that the core muscle exercises be included as a daily support for Student. At the August 2, 2021 IEP meeting, OT explained in detail to Parent why these services were no longer needed and both Student's past and current teachers were in agreement. *FOF 41-44*. Parent again demanded "data" from the team, and when Parent was told that the data was in the communication logs and was evidence by the lack of [REDACTED] accidents or need for sensory strategies, Parent was not satisfied with that response. *FOF 45-56*. Parent expressed Parent's concerns regarding the need for Student to have occupational therapy in either the form of Occupational Therapy Consultation or sensory strategies, but ultimately, the rest of the IEP team agreed with OT and Student's teachers with the removal of the service in Student's IEP-08/02/2021.

This Hearings Officer concludes that Petitioners have failed to prove that Respondents committed a procedural violation by failing to provide additional information or further discussion to support the basis of the removal of the Occupational Therapy Consultation or sensory strategies. As noted above, the IEP team thoroughly discussed the basis for the removal of both services with Parent at the IEP meeting and explained to Parent that Parent had received the data and information necessary in the form of the daily communication logs.

As discussed, *supra*, Petitioners must also prove that any procedural violation that may have occurred has also resulted in a loss of educational opportunity, significant infringement on parental participation, or a deprivation of educational benefits. While this Hearings Officer concludes that no procedural violation took place, for further clarity, this Hearings Officer also concludes that Petitioners have not proven any infringement on parental participation, loss of educational opportunity, or deprivation of educational benefits.

As stated before, Parent had ample opportunity at the August 2, 2021 IEP meeting to express Parent's concerns about the removal of the Occupational Therapy Consultation and sensory strategies supplementary service and support. *FOF 41-46*. The IEP team, including OT, discussed at length the reasons for the services and the lack of need for the services. OT did note that the core muscle activities did seem to be an essential part of Student's occupational therapy needs and recommended keeping that in Student's IEP to address Parent's concerns. Student's teachers also expressed to Parent the lack of need for Student to have the additional services and provided information to Parent on why the services were no longer needed.

Petitioners have not pointed to any loss of educational opportunities that Student may have had or any deprivation of educational benefits that resulted in the reduction of the above-mentioned services. Student's progress reports and daily communication logs from the 2021-2022 school year to October 2021 also show that Student continues to do the core muscle exercises and continues to not have [REDACTED] accidents or need additional sensory strategies to be redirected from [REDACTED] behavior. *FOF 57-63*. It is notable that while Parent is able to provide comments in the communication log as well, Parent also did not mention any regression in Student's behavior based on the removal of the Occupational Therapy Consultation or sensory strategies. Petitioners have failed to prove that the elimination of the Occupational Therapy Consultation or sensory strategies from Student's IEP-08/02/2021 were in appropriate and resulted in a denial of FAPE.

- C. Petitioners have failed to prove that Respondents denied Student a FAPE by failing to provide Parent with records on the provision of past "Teacher Consultation" services pursuant to Student's IEPs

Petitioners' final argument raises a concern that Respondents did not provide Parent with logs of the Teacher Consultation minutes pursuant to Student's previous IEPs. Petitioners do not

present any legal argument that Parent is entitled to the documents that Parent is requesting. Petitioners also do not raise any issue with implementation of Student's previous IEPs related to the failure of Respondents providing records for Teacher Consultation.

As discussed *supra*, Parent asked Previous School for any service verifications or agency referrals for the Teacher Consultation service in Student's IEP. *FOF 35*. Petitioners have failed to demonstrate that these documents are part of Student's educational records that need to be provided to Parent. On the contrary, SSC testified that the documents requested by Parent are personnel and procurement documents that allow the DOE to monitor billing by the service providers or their agencies. *FOF 36*. Parent's own understanding of the documents were similar in nature, being that they were simply documents that the DOE uses for contracting and payment.

Petitioners have also not presented any argument as to why failure to provide these records amounted to a denial of FAPE to Student. While Petitioners' attorney simply asked Parent whether the logs could have generated discussion about the reduction of the teacher consultation services, no follow up question demonstrate why the documents were necessary for Parent or how they would have helped Parent in preparing for the IEP meetings. *See* Testimony of Parent, Tr.V1, 49:3-10. A review of the logs that SSC began to prepare regarding the Teacher Consultation minutes also leaves doubt as to how they would have helped Parent in any way during the discussion of the Teacher Consultation reduction of minutes or in any other part of the IEP meetings. *See* R-Ex.184, p.1394-1397; R-Ex.185, p.1398-1409.

While Parent during the IEP meetings expressed a concern that Parent should be involved in the decision-making process of who the teachers request consultation from pursuant to Student's IEPs, Petitioners have pointed to no legal authority to support this notion. Here,

Petitioners have raised a concern regarding documents that are not a part of Student's records as they do not relate directly to Student, and only to payments made to Student's service providers.

Petitioners have failed to prove that failure to provide Parent with documents relating to the Teacher Consultation service in Student's IEPs resulted in a denial of FAPE to Student.

## **VI. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving that Respondents have denied Student a FAPE as outlined in the issues in the Complaint by a preponderance of the evidence. As Petitioners have failed to prove that Respondents denied Student a FAPE, Petitioners' request to have Respondents revise Student's IEP-08/02/2021 or any other relief requested by Petitioners 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 thirty (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, January 7, 2022.

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