



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

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

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAI'I,

Respondents.

DOE-SY2122-029

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: May 12, 13, 16, 17, 18,
19, 20, 23, 25, 2022

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On March 28, 2022, the Department of Education, State of Hawai'i (hereinafter "Respondents" or "DOE") received a request for a due process hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act, from Student, by and through Parent (hereinafter "Petitioners"). Respondents submitted a response to Petitioners' Complaint on April 7, 2022.

A prehearing conference was held on April 19, 2022, before Hearings Officer Chastity T. Imamura, with Parent representing Petitioners, and Ryan W. Roylo, Esq. (hereinafter “Mr. Roylo”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for May 12, 13, 16, 17, and 18, 2022.

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. Both parties agreed to the following: 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 witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting. An Order Regarding Video Conference Due Process Hearing was filed on May 6, 2022, which set forth the parameters of the video conference due process hearing.

Prior to the Hearing, the parties agreed to both question the witnesses during their scheduled times since Petitioners’ witnesses were DOE employees, so that none of the witnesses would need to return to testify again during Respondents’ case-in-chief. The Due Process Hearing began on May 12, 2022. Present at the Hearing were Parent, on behalf of Petitioners, District Educational Specialist and District Representative² and Mr. Roylo on behalf of Respondents, this Hearings Officer, and the assigned court reporter. The first witness called was Student Services Coordinator (hereinafter “SSC”), who’s testimony was completed on May 18, 2022. Current Special Education Teacher (hereinafter “Current SPED Teacher”) testified on May 18, and 19, 2022. Occupational Therapist (hereinafter “OT”) and District Resource Teacher

² District Educational Specialist could not attend the Hearing on a couple of occasions, so District Representative attended the Hearing on District Educational Specialist’s behalf.

(hereinafter “DR Teacher”) testified on May 20, 2022, and DR Teacher’s testimony continued to May 23, 2022. Educational Assistant (hereinafter “EA”) testified on May 23, 2022. Petitioners then submitted a declaration of Parent in lieu of live testimony of Parent, and Parent was questioned by Mr. Roylo and this Hearings Officer on May 25, 2022.

Each party submitted their exhibits for the Hearing by the disclosure deadline of May 5, 2022. The parties met and conferred regarding the proposed exhibits by May 10, 2022, and a status conference was held with this Hearings Officer, Parent, and Mr. Roylo on May 11, 2022. At the status conference, Respondents raised an objection to some exhibits submitted by Petitioners that were dated years before the instant case. While Respondents acknowledged that one allegation submitted by Petitioners involved documents dating back to 2017, Respondents objected to documents that were unrelated to the issues in the current case being admitted as exhibits for consideration in the decision. The objections were noted, and Respondents were informed that they could raise the objection as to relevance at any time during the Hearing. During the Hearing, several documents that were dated back to 2013 were mentioned or offered as exhibits. After consideration of the documents submitted and the issues in this case, this Hearings Officer accepted the documents submitted by the Petitioners that date back to 2013 as background information and to get a better understanding of Student and the issues in this case.

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 propose additional exhibits after the Hearing was completed. On May 25, 2022, 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 from their previously disclosed documents that were not discussed at the Hearing to be

received as evidence in this matter. The lists of proposed additional exhibits were due on June 1, 2022. Any objections to the proposed exhibits were due on Friday, June 3, 2022.

Petitioners requested that the following additional exhibits be received as evidence: Petitioners' Exhibit P2, pages 0024-0028; Exhibit P3, pages 0093-0118; Exhibit P4, pages 0145-0151; Exhibit P10, pages 0459-0465; Exhibit P16, pages 0635-0649; Exhibit P17, pages 0650-0676; Exhibit P21, page 1175; Exhibit P32, pages 2271-2273; and Respondents' Exhibit 16, pages 042-054.

Respondents' requested that the following additional exhibits be received as evidence: Respondents' Exhibits 25-29, pages 099-109; Exhibits 37-39, pages 122-127; Exhibit 42, page 132; Exhibits 44-45, pages 135-141; Exhibits 50-51, pages 151-154; Exhibit 53, pages 156-157, Exhibit 55, page 160; Exhibit 57, page 162; Exhibit 59, pages 164-166; Exhibit 62, page 172; Exhibit 66, pages 178-179; Exhibits 87-89, pages 253-256; Exhibit 91, pages 258-259; Exhibit 93, page 262; Exhibits 95-97, pages 265-267; Exhibits 99-110, pages 302-361; Exhibit 112, pages 363-384; Exhibit 114, pages 386-387; Exhibit 116, pages 389-393; Exhibit 118, pages 395-401; Exhibits 120-123, page 405-413; Exhibit 125, pages 437-440; Exhibits 127-133, pages 442-459; Exhibits 135-139, pages 461-488; Exhibit 141, page 490; Exhibit 148³, pages 519-532.

After considering the additional items of evidence requested by the parties, this Hearings Officer accepted most of the additional items of evidence for consideration in this decision. On June 6, 2022, a List of Exhibits Received at Due Process Hearing was filed with the final list of

³ This Exhibit was already entered into evidence at the Hearing but was listed on Respondents' list of additional exhibits to be received as evidence.

exhibits submitted and received by the parties for consideration in this Decision.⁴

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit P1, pages 0001-0006; Exhibit P2, pages 0007-0092; Exhibit P3, pages 0093-0143; Exhibit P4, pages 0144-0153; Exhibit P5, pages 0154-0287; Exhibit P6, pages 0288-0390; Exhibit P7, pages 0391-0408; Exhibit P8, pages, 0409-0420; Exhibit P9, pages, 0421-0427; Exhibit P10, pages 0428-0465; Exhibit P11, pages 0466-0487; Exhibit P12, pages 0488-0525; Exhibit P13, pages 0526-0532; Exhibit P14, pages 0533-0547; Exhibit P15, pages 0548-0627; Exhibit P16, pages 0628-0649; Exhibit P17, pages 0650-0693; Exhibit P18, pages, 0694-0760; Exhibit P19, pages 0761-0824, 0830-0855, 0878-0881, 0931-0957, 0969-1013, 1016-1023, 1026, 1030-1031, 1042-1062, 1085-1086, 1090-1096, 1109, 1113-1114, 1141; Exhibit P20, pages 1164-1167, 1172-1174; Exhibit P21, page 1175; Exhibit P22, pages 1176-1179, 1201-1202, 1217-1226, 1228-1266; Exhibit P24, pages 1550-1678; Exhibit P25, pages 1679-1913; Exhibit P26, pages 1914-2103; Exhibit P27, pages 2104-2111; Exhibit P28, pages 2112-2121; Exhibit P29, pages 2122-2127; Exhibit P30, pages 2128-2268; Exhibit P31, pages 2269-2270; Exhibit P32, pages 2271-2273; and Exhibit P34, pages 2276-2360.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 1-9, pages 001-019; Exhibits 13-24, pages 026-098; Exhibit 30, page 110; Exhibits 32-47, pages 112-144; Exhibits 49-51, pages 147-154; Exhibit 53, pages 156-157; Exhibit 55, page 160; Exhibit 57, page 162; Exhibits 59-60, pages 164-168; Exhibit 62, page 172; Exhibits 64-67, pages 174-180; Exhibit 69, pages 183-185; Exhibit 71, page 189; Exhibits 73-74, pages 194-197; Exhibit 76, pages 199-209; Exhibit 78, pages 211-212; Exhibits 80-81,

⁴ The objections and reasons for admitting or not accepting certain items into evidence are more thoroughly described in the List of Exhibits Received at Due Process Hearing, filed on June 6, 2022.

pages 215-218; Exhibit 83, pages 220-222; Exhibit 85, pages 245-249; Exhibits 87-91, pages 253-259; Exhibits 93-98, pages 262-298; Exhibits 99-116, pages 302-393; Exhibits 118-125, pages 395-440; Exhibits 127-141, pages 442-490; Exhibits 143-148, pages 498-532; Exhibits 149-166, pages 533-628; and Exhibits 167-174, pages 629-653.

Both parties wanted the opportunity to submit written closing briefs regarding the legal issues to this Hearings Officer for review. To allow the parties to provide a written closing brief within the timeframe of the decision deadline, the parties agreed to prepare their closing briefs without the use of a transcript of proceedings. The parties did agree that this Hearings Officer should have transcripts of the proceeding to prepare the decision in this matter, particularly due to the number of witnesses and the extended testimony of a few of the witnesses. The court reporter informed the parties and this Hearings Officer that the transcripts of the nine (9) day proceeding would take at least until June 15, 2022, which was past the original decision deadline of June 11, 2022. The parties requested an extension of the decision deadline to allow for the preparation of transcripts and for this Hearings Officer to have sufficient time to review the exhibits and transcripts in preparation for the decision. The request was granted, and the decision deadline was extended from June 11, 2022 to June 27, 2022. Based on the extension request, the deadline by which the briefs were to be submitted was Wednesday, June 15, 2022. 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 “H.A.R.”) §8-60-1, *et seq.*

III. ISSUES PRESENTED

Petitioners assert six (6) issues in the Complaint to be addressed at the Hearing:

Issue 1 – Whether the DOE denied Student a free appropriate public education (hereinafter “FAPE”) by failing to address requests for evaluations in a timely manner.

- a. When addressing the requests for evaluations, the DOE inappropriately denied them or did not issue a proper prior written notice (hereinafter “PWN”) articulating the decision-making process;
- b. The DOE failed to provide the standards and applicable criteria for evaluating requests for evaluation;
- c. The DOE has failed to request an evaluation to ensure Student’s FAPE;
- d. The DOE has failed to determine sufficiency of its data under Appendix B of Hawai‘i Administrative Rules Chapter 60 Guidelines (page 56) and/or failed to obtain additional data;
- e. The DOE failed to discuss the relevance of conducting a social/emotional behavior assessment;
- f. The DOE failed to have a behavior support plan (hereinafter “BSP”) in place for multiple years;
- g. The DOE failed to adequately document the adverse effect of Student’s involvement and progress in the general education curriculum;
- h. The DOE failed to follow procedures associated with an independent educational evaluation (hereinafter “IEE”);
- i. The DOE failed to convene IEP meetings in a timely manner.

Issue 2 – Whether the DOE denied Student a FAPE by failing to develop appropriate Individual Educational Programs (hereinafter “IEPs”) for Student.

- a. The DOE failed to perform an annual review and/or have an IEP in place at the start of the 2020-2021 and 2021-2022 school years;
- b. The DOE failed to properly consider and document Student’s present levels of educational performance (hereinafter “PLEPs”);⁵
- c. Student’s PLEPs do not reflect significant discussion of Student’s diagnoses of

[REDACTED] (hereinafter “[REDACTED]”),
and [REDACTED];

⁵ As part of this argument, Petitioners allege that the DOE uses the older standard of “present levels of educational performance” and not the current standard of “present levels of academic achievement and functional performance,” which also relates to the failure of the DOE to properly consider and document Student’s current levels for Student’s IEP.

- d. The DOE failed to consider transition services for Student [REDACTED];
- e. The DOE failed to create appropriate goals and objectives for Student;
- f. The DOE failed to document a one-to-one goal and objectives with the PLEPs for Student;
- g. The DOE failed to ensure that Student's goals are measurable;
- h. The DOE failed to define the standard for extended school year (hereinafter "ESY") and failed to authorize Student for ESY services;
- i. The DOE failed to provide sufficient special education, related services, supplemental aids and program supports for Student;
- j. The IEP team failed to consider accommodations for Student in statewide assessments;
- k. The DOE failed to properly state an appropriate least restrictive environment (hereinafter "LRE") for Student;
- l. The DOE failed to ensure necessary attendees at the IEP meetings for Student.

Issue 3 – Whether the DOE denied Student a FAPE by failing to properly implement the IEPs for Student.

Issue 4 – Whether the DOE denied Student a FAPE by failing to provide procedural safeguards to Parent(s) for the 2020-2021 school year.

Issue 5 – Whether the DOE denied Student a FAPE by failing to provide records or provide an opportunity for Parent(s) to examine Student's records in a timely manner.

Issue 6 – Whether the DOE denied Student a FAPE by failing to provide prior written notices to Parent(s).

IV. FINDINGS OF FACT

Witness Background information

1. SSC is a certified special education and elementary education teacher in the State of Hawai'i but has served as the student services coordinator at Home School for the past [REDACTED] years. SSC has a bachelor's degree in elementary and special education and a master's degree in curriculum studies under language arts and literacy. Testimony of SSC, Transcript of Proceedings, Volume 1, page 11, line 23 through page 15, line 6 (hereinafter referenced as "Tr.V1, 11:23-15:6").
2. SSC has worked with Student since Student's involvement at Home School in October 2013. Testimony of SSC, Tr.V1, 69:24-70:1.
3. SSC occasionally acted as the administrator-designee at Student's IEP meetings,

where SSC was authorized to authorize or commit some resources of the DOE as part of Student's services. Some services need higher approval for authorization, such as placement of a student at a private school, and some services require a different type of authorization, like a professional's opinion on the necessity of a service, like the services of a registered behavior technician to implement a student's behavior intervention plan. Testimony of SSC, Tr.V1, 128:13-133:7.

4. Current SPED Teacher is licensed in the State of Hawai'i as special education teacher for grades Kindergarten through twelfth (12th) grade and is a "highly qualified teacher" under the State of Hawai'i standards. Current SPED Teacher has a post-baccalaureate in special education, a master's degree in curriculum instruction with a specialization in language arts and English. Testimony of Current SPED Teacher, Tr.V5, 869:13-870:2, Tr.V6, 1012:1-16.
5. Current SPED Teacher has worked with Student as Student's special education teacher since the 2017-2018 school year, when Student was in [REDACTED] grade. Testimony of Current SPED Teacher, Tr.V5, 866:10-16.
6. OT has a master's degree in occupational therapy and is licensed in the State of Hawai'i as an occupational therapist. OT has worked for the Hawai'i DOE since [REDACTED] but has worked with other school-based occupational therapy patients since around [REDACTED]. Testimony of OT, Tr.V6, 1101:21-1106:17.
7. OT has worked with Student since the start of the 2021-2022 school year at Home School. Testimony of OT, Tr.V6, 1101:12-14.
8. Parent is a licensed attorney in the State of Hawai'i [REDACTED]
[REDACTED] [REDACTED] [REDACTED]. Testimony of

Parent, Tr.V9, 1419:17-1421:18.

Student's background prior to the 2019-2020 school year

9. Student is currently [REDACTED] years old and just completed the [REDACTED] grade at Home School. Student has been attending Home School since the [REDACTED] school year and has been eligible for special education and related services since that time. Testimony of Parent, P-Ex.P34, p.2282⁶; P-Ex.P5, p.0172.
10. Student was first evaluated for special education and related services by the DOE after Student's [REDACTED] teachers noticed that Student was not progressing at the same rate as other students of the same age. Testimony of Parent, P-Ex.P34, p.2277-2278; P-Ex.P5, p.0155.
11. Student's initial evaluation with the DOE in December 2013 included the following: cognitive assessment, academic assessment, speech-language assessment, fine motor assessment, adaptive behavior assessment, social/emotional assessment, and an observation. P-Ex.P3, p.0093-0095.
12. After the completion of the December 2013 initial evaluation, an additional behavior evaluation was requested by Parent and was authorized by the student-focused team. Testimony of Parent, P-Ex.34, p.2279-2280; P-Ex.P3, p.0096.
13. An emotional/behavioral assessment (hereinafter "EBA") was completed on January 24, 2014, which determined that Student's behaviors did not warrant a diagnosis at that time due, in part, to Student's age, but did affect Student's functioning at school. Testimony of Parent, P-Ex.P34, p.2280; P-Ex.2, p.0007-0021.

⁶ By agreement, Parent's direct testimony was presented via written declaration, received into evidence as Petitioners' Exhibit P34, pages 2276-2360, and supplemented with live direct testimony and cross-examination on the record during the Hearing.

14. Based on the initial evaluation completed with Student, Student was determined to be eligible for special education and related services under the category of [REDACTED]. P-Ex.P3, p.0095; P-Ex.P5, p.0164.
15. On May 22, 2014, an IEP meeting was held, and a written IEP was developed for Student. Present at the IEP meeting were Parent and Parent 2, the clinical psychologist who completed the EBA, Principal, SSC, and other IEP team members. Student's written IEP offer included one thousand seven hundred forty (1740) minutes of special education per week, daily transportation, and supplementary aids and supports including behavioral monitoring, a structured environment, a visual schedule, modified writing tools, and daily communication books. Student was placed in a general education [REDACTED] inclusion classroom for the school day, with the option to go into a quieter room for behavioral breaks and naps. Testimony of Parent, P-Ex.P34, p.2282; P-Ex.P5, p.0154-0174.
16. Parents received copies of the December 6, 2013 evaluation summary report, the February 7, 2014 evaluation summary report, the May 22, 2014 IEP and the May 22, 2014 PWN. See P-Ex.P1, p.0001; P-Ex.P3, p.0093-0102; P-Ex.P4, p.0144; P-Ex.P5, p.0154-0174.
17. On June 12, 2015, an IEP meeting was held, and a new written IEP was developed for Student. Present for the IEP meeting were Parent and Parent 2, a behavioral health specialist, Home School's vice principal, and two (2) general education teachers. Testimony of Parent, P-Ex.34, p.2284; P-Ex.P5, p.0188-0189.
18. Student's June 12, 2015 IEP included three hundred (300) minutes of special education per week, transportation once per day, and supplementary aids and supports

- including a behavior support plan, preferential seating, a structured environment, the use of a timer, occupational therapy consultation, behavioral consultation, and adult support throughout activities on campus. Student was placed in a general education setting on a public school campus.
19. A PWN was also developed as a result of the IEP meeting on June 12, 2015. Both the June 12, 2015 IEP and PWN were received by Parents. P-Ex.P4, p.0145; P-Ex.P5, p.0176-0188.
 20. In June and July 2016, a reevaluation was conducted with Student, in which Student was evaluated using an academic assessment, a fine motor assessment, an observation, and an EBA. Based on the reevaluation, Student was determined to be eligible for special education and related services under the category of [REDACTED]. Testimony of Parent, P-Ex.P34, p.2291-2292; P-Ex.2, p.0024-0045; P-Ex.P3, p.0108-0111.
 21. On July 20, 2016, an eligibility meeting was held for Student and an evaluation summary report and PWN was produced and provided to Parent in August 2016. Testimony of Parent, P-Ex.P34, p.2293; P-Ex.P3, p.0108-0113.
 22. A draft IEP and PWN were prepared on July 20, 2016 and were sent to Parent, but the IEP team did not complete an IEP meeting or IEP for Student in July 2016. Meetings were held in September, October, and November to complete Student's IEP for the 2016-2017 school year. Testimony of Parent, P-Ex.P34, p.2293-2296; P-Ex.22, p.1221-1230, 1232-1234.
 23. On November 10, 2016, Student's IEP meeting was held, and an IEP was developed. Present at the IEP meeting were Parent and Parent 2, SSC, Previous Principal,

- Behavioral Health Specialist (hereinafter “BHS”), Previous SPED Teacher, Psychologist, and two (2) general education teachers. P-Ex.5, p.0211.
24. Student’s November 10, 2016 IEP offer included three hundred (300) minutes of special education, daily transportation, counseling for one hundred twenty (120) minutes per quarter, and supplementary aids and supports including chunking assignments, preferential seating, extended time, clear and consistent expectations, visual supports, daily communication book to include a behavior checklist, a behavior support plan, adult support throughout activities on campus, occupational therapy consultation, assistive technology strategies, consultation with a clinical psychologist, and fine motor strategies. Student was placed in a general education setting with academic and behavioral supports provided by a special education teacher in that setting. P-Ex.P5, p.0200-0211.
25. A PWN dated November 10, 2016 was also developed and provided to Parents, along with the IEP dated November 10, 2016 and a copy of the behavioral support plan (hereinafter “BSP”) that was developed in accordance with the IEP. Parent acknowledged receiving the IEP, BSP, and PWN on November 23, 2016. Testimony of Parent, P-Ex.34, p.2296; P-Ex.P4, p.0149; P-Ex.P5, p.0200-0211; P-Ex.P22, p.1235-1237.
26. On April 21, 2017, an IEP meeting was held, and a written IEP offer was developed for Student. Present at the IEP meeting were Parent and Parent 2, Previous SPED Teacher, BHS, SSC, and a general education teacher. Testimony of Parent, P-Ex.P34, p.2299; P-Ex.P5, p.0220; P-Ex.P22, p.1243-1247.
27. Student’s April 21, 2017 IEP offer included three hundred (300) minutes of special

education per week, daily transportation, and supplementary aids and supports including chunking assignments, preferential seating, extended time, clear and consistent expectations, visual supports, daily communication book to include a behavior checklist, a behavior support plan, occupational therapy consultation, assistive technology strategies, consultation with a clinical psychologist, walk-in counseling, and fine motor strategies. Student was placed in the general education setting with academic and behavioral support from a special education teacher in that setting. P-Ex.P5, p.0200-0220.

28. Parents received copies of the IEP and BSP from the May 21, 2017 meeting and accepted Home School's offer. The BSP included with the April 21, 2017 IEP was the November 2016 BSP. Testimony of Parent, P-Ex.P34, p.2299; P-Ex.P22, p.1248.
29. On August 28, 2017, an IEP meeting was held, and a written IEP was developed for Student. Present at the IEP meeting were Parent, SSC, two (2) school psychologists, a speech-language pathologist, and a general education teacher. The only change in the August 28, 2017 IEP from the April 21, 2017 IEP was Student's updated grade level assessment, Kid Biz, and Go Math scores. No changes were made to Student's goals and objectives, special education and related services, or supplementary aids and supports.⁷ Testimony of Parent, P-Ex.P34, p.2299; P-Ex.P5, p.0221-0228.
30. On April 13, 2018, an IEP meeting was held, and a written IEP was developed for Student. Present at the IEP meeting were Parent and Parent 2, SSC, Current SPED

⁷ Petitioners' Exhibit P5, pages 0221-0228, appears to be missing a page of the IEP where Student's educational placement would normally be written. No arguments were made regarding a change of educational placement in Student's August 28, 2017 IEP so this Hearings Officer is presuming that Student's educational placement remained the same and finds that an analysis of whether it changed is not relevant to the issues in the instant proceeding.

- Teacher, a school psychologist, and a general education teacher. Testimony of Parent, P-Ex.P34, p.2303; P-Ex.P5, p.0229-0239.
31. Student's April 13, 2018 IEP offer included six hundred (600) minutes per week of special education, daily transportation, and supplementary aids and supports including chunking assignments, preferential seating, extended time, clear and consistent expectations, daily communication book to include a behavior checklist, visual supports, a behavior support plan, occupational therapy consultation, assistive technology strategies, consultation with a clinical psychologist, and walk-in counseling. Student was placed in the general education inclusionary setting with behavioral and academic support from a special education teacher in that setting. P-Ex.P5, p.0229-0239.
32. A PWN was also developed on April 13, 2018 and provided to Parents, along with Student's April 13, 2018 IEP. P-Ex.P4, p.0149; P-Ex.P5, p.0229-0239.
33. On May 30, 2018, an IEP meeting was held to review occupational therapy testing completed with Student, and a written IEP was developed for Student. Present at the IEP meeting were Parent, Current SPED Teacher, a general education teacher, Home School's vice principal at the time, and an occupational therapist. Testimony of Parent, P-Ex.P34, p.2304; P-Ex.P5, p.0240-0251.
34. Student's May 30, 2018 IEP offer included one hundred eighty (180) minutes of occupational therapy per quarter, six hundred (600) minutes of special education per week, daily transportation, two hundred seventy (270) minutes of counseling per quarter, and supplementary aids and supports including preferential seating, daily communication book to include a behavior checklist, chunking assignments, clear and

- consistent expectations, extended time, visual supports, a behavior support plan, assistive technology strategies, and walk-in counseling. Student was placed in the general education inclusionary setting with behavioral and academic support from special education staff in that setting. P-Ex.P5, p.0240-0251.
35. A PWN dated May 30, 2018 was developed for the May 30, 2018 IEP meeting and both the PWN and the IEP from that date were provided to Parents. P-Ex.P4, p.0150; P-Ex.P5, p.0240-0251.
36. In August 2018, student focused team meetings were held, wherein the team determined that as part of a reevaluation, Student would be assessed in the areas of academic performance and executive function. Testimony of Parent, P-Ex.P34, p.2305-2306; P-Ex.P1, p.003-004.
37. A speech-language assessment was conducted with Student in September 2018. Parent received a copy of the report in October 2018. Testimony of Parent, P-Ex.P34, p.2306; P-Ex.P2, p.0049-0054.
38. Two academic assessments for Student were conducted in September and October 2018 by SSC. Parent received copies of both academic assessment reports. Testimony of Parent, P-Ex.P34, p.2307; P-Ex.P2, p.0055-0067.
39. A cognitive assessment was completed by [REDACTED] [REDACTED] on October 24, 2018. A copy of the report was provided to Parent on October 26, 2018. Student's scores on the October 24, 2018 cognitive assessment were unusually low based, in part, on Student's behaviors with the unfamiliar assessors conducting the assessment. Testimony of Parent, P-Ex.P34, p.2308; Testimony of SSC, Tr.V2, 338:3-340:7; P-Ex.P2, p.0068-0073.

40. Due to concerns regarding Student's score on the cognitive assessment in October 2018, another cognitive assessment was conducted with Student in January 2019 by the DOE at Parents' request. A copy of the report was provided to Parents in February 2019. Testimony of Parent, P-Ex.P34, p.2310; P-Ex.3, p.0116.
41. An evaluation summary report containing information from the various assessments that constituted the reevaluation for Student was developed and provided to Parent on April 18, 2019. Based on the assessments from Student's reevaluation, Student was determined to be eligible for continued special education and related services under the category of [REDACTED]. P-Ex.P3, p.0114-0118.
42. On April 18, 2019, an IEP meeting was held, and a written IEP was developed for Student (hereinafter "IEP-04/18/2019"). Present at the IEP meeting were Parent and Parent 2, SSC, Current SPED Teacher, a general education teacher, a speech-language pathologist, and an occupational therapist. Testimony of Parent, P-Ex.P34, p.2313; P-Ex.P5, p.0252-0265; R-Ex.13, p.026-039.
43. Student's IEP-04/18/2019 contained a review of Student's present levels of educational performance (hereinafter "PLEPs"), which included a summary of supplementary aids and supports Student had been receiving through Student's IEPs at Home School and a list of various assessment scores that Student had received from [REDACTED] through [REDACTED] grade. The PLEPs also included information from the evaluation summary report from Student's reevaluation. P-Ex.P5, p.0253-0257; R-Ex.13, p.027-031.
44. Student's IEP-04/18/2019 included six hundred (600) minutes of special education per week, daily transportation, one hundred thirty-five (135) minutes of occupational

- therapy per quarter, and supplemental aids and supports including repeating and chunking directions, checking for understanding frequently, preferential seating, use of mechanical aids, speech therapy consultation (teacher directed) regarding narrative discourse, small group testing, copies of textbooks to stay at home, pdf copies of books if available to work with assistive technology programs, speech-to-text function, text-to-speech on assignments and assessments, structured learning environment, behavioral supports including walk-in counseling, visual supports, and assistive technology strategies. P-Ex.P5, p.0262; R-Ex.13, p.036.
45. In the IEP-04/18/2019, Student's placement was in the general education inclusion setting with behavioral and academic support from special education staff in that setting. P-Ex.P5, p.0264; R-Ex.13, p.038.
46. A PWN for the April 18, 2019 IEP meeting was developed and provided to Parents, along with the IEP-04/18/2019. P-Ex.P4, p.0151; R-Ex.14, p.040.
47. Parent was present at all IEP meetings held for Student from 2013 through April 2019 and participated in the meetings, providing input and information from Student's medical doctors as necessary, as well as requesting assessments and additional testing for Student to determine Student's needs. *See e.g.* Testimony of Parent, P-Ex.P34, p.2282-2314; P-Ex.4, p.0144-0153; P-Ex.P5, p.0154-0265.
48. Parent was also provided with IEP progress reports and grade-level report cards for Student's IEPs from 2014 through and including May 28, 2020. P-Ex.P6, p.0288-0346; P-Ex.P17, p.0650-0684.

School Year 2019-2020

49. During the 2019-2020 school year, Parents had requested that Student's teachers

complete a series of National Institute for Children's Health Quality (NICHQ) Vanderbilt Assessment Scales (hereinafter "NICHQ Assessments"). These scales were completed by Student's teachers for the purpose of monitoring changes in Student's behavior after a change in Student's medication. These scales were not provided by the DOE but other students at Home School also have NICHQ Assessments completed by their teachers, so the teachers at Home School were familiar with them. Testimony of Parent, P-Ex.P34, p.2315; Testimony of SSC, Tr.V2, 398:21-401:23, Tr.V5, 859:5-17; P-Ex.15, p.0548-0601.

50. While these NICHQ Assessments were received as evidence in this case, no testimony was presented to explain Student's teachers' understanding of how these assessments were to reflect Student's behaviors. For example, it is unclear how Student's teachers rated Student's behaviors relative to Student's normal behaviors in school, as opposed to rating them without context. *See e.g.* P-Ex.P15, p.0548-0627.
51. Additionally, the ratings in the NICHQ Assessments do not reflect whether the actions noted interfere with Student's ability to access Student's education. For example, Current SPED Teacher and EA both testified that Student can have behaviors, such as [REDACTED], but still attend to the instruction being presented by the teachers in class. Testimony of Current SPED Teacher, Tr.V6, 1063:15-1064:2; Testimony of EA, Tr.V8, 1344:9-13.
52. In March 2020, the COVID-19 global pandemic forced a shutdown of DOE public schools, as well as many other facilities and businesses in the State of Hawai'i. This shutdown prevented general education students from attending any DOE public school for the remainder of the 2019-2020 school year after spring break in March

2020. Testimony of Current SPED Teacher, Tr.V6, 1070:19-24; *see also* Governor of the State of Hawai'i Third Supplemental Emergency Proclamation, effective March 23, 2020.
53. While Student's IEP-04/18/2019 was due for review in around April 2020, Home School notified Parents through a PWN dated April 7, 2020, that the school would delay the review and development of IEPs until the team could meet in person. The PWN noted that Student's IEP-04/18/2019 would remain in effect until a new IEP could be developed for Student. Testimony of Parent, P-Ex.P34, p.2318-2319; P-Ex.P4, p.0152; R-Ex.15, p.041.
54. In response to the PWN dated April 7, 2020, Parent emailed Current SPED Teacher and stated that Parent wished to delay the annual IEP meeting until school resumes and classroom assessment data can be obtained. Current SPED Teacher also expressed interest in gathering additional information on Student's abilities before drafting a new IEP for Student. Testimony of Parent, P-Ex.P34, p.2318-2319; Testimony of SSC, Tr.V2, 430:20-22; R-Ex.17, p.055; R-Ex.36, p.119-121.
55. In April and May 2020, Student did not attend school in-person but completed enrichment assignments provided to Student from Current SPED Teacher. Current SPED Teacher sent weekly emails to Parents with a "Plan for the week" of assignments and activities for Student to do, as well as links to additional resources for Student and Parents to review for enrichment. Testimony of Parent, P-Ex.P34, p.2318; Testimony of Current SPED Teacher, Tr.V6, 1071:5-1072:9; *see also* R-Ex.35, p.116-118; R-Ex.36, p. 119-121; R-Ex.38, p.123-124; R-Ex.39, p.125-127; R-Ex.43, p.133-134; R-Ex.44, p.135-137.

56. Student also received occupational therapy services virtually and attended four (4) one-hour weekly video conference sessions with Student's regular education class. These one-hour weekly video conference sessions were the same service that the general education students were receiving. Current SPED Teacher provided office hours for Student and noted that Current SPED Teacher was available to assist Student if Student needed help with Student's assigned work. Testimony of Parent, P-Ex.P34, p.2319; Testimony of Current SPED Teacher, Tr.V5, 868:13-869:12, 909:4-911:3; *see also* R-Ex.35, p.116-118; R-Ex.36, p. 119-121; R-Ex.38, p.123-124; R-Ex.39, p.125-127; R-Ex.43, p.133-134; R-Ex.44, p.135-137.
57. In May 2020, SPED Teacher reached out to Parents to schedule an annual IEP meeting to review and/or revise Student's IEP and develop a new IEP for the 2021-2022 school year. Parent declined a meeting to update Student's IEP at that time and requested that the IEP team meet when school schedules stabilized. Parent suggested keeping the IEP-04/18/2019 in place until the team can get a better understanding of Student's present levels of educational performance. A PWN was developed to reiterate the decision to wait on an annual IEP meeting for Student and to extend the implementation of the IEP-04/18/2019. Testimony of Parent, P-Ex.P34, p.2319-2320; Testimony of SSC, Tr.V3, 447:3-448:9; R-Ex.18, p.056, R-Ex.46, p.142.
58. For the extended school year (hereinafter "ESY") session in the summer of 2020, Student was considered a "vulnerable student" and was brought on campus to attend ESY classes. Student attended ESY sessions from June 8, 2020, through July 24, 2020. *See* R-Ex.47, p.143-144; R-Ex.168, p.632.

School year 2020-2021

59. The 2020-2021 school year began in August 2020. At the time school began the COVID-19 restrictions imposed by the State of Hawai'i prevented DOE public schools from fully reopening to the general student population. General education students were not allowed on campus for in-person classes until November 2020. Testimony of SSC, Tr.V4, 649:5-24.
60. Student did not attend in-person instruction for the first quarter of the 2020-2021 school year and participated via distance learning through a videoconference platform, receiving four (4) one-hour weekly sessions with the general education class. Testimony of Parent, P-Ex.P34, p. 2321-2323; Testimony of SSC, Tr.V4, 650:2-15; Testimony of Current SPED Teacher, Tr.V6, 1089:9-18; R-Ex.169, p.635.
61. Student continued to receive weekly occupational therapy sessions virtually during this time. Testimony of Parent, P-Ex.P34, p.2322.
62. On September 23, 2020, Parent emailed a letter to Former Principal requesting an evaluation of Student for purposes of developing Student's IEP. Parent noted that Student's last evaluation was done in 2018 and that Student's difficulties with written expression had a greater impact on Student's ability to access the general education curriculum. Testimony of Parent, P-Ex.P34, p.2323-2325; P-Ex.P19, p.0766-0767.
63. On October 2, 2020, SSC was preparing to schedule a student-focused meeting in response to Parent's letter and to determine the reevaluation to be done with Student. Before SSC could attempt to schedule the meeting, SSC got a call from Prior District Educational Specialist (hereinafter "Prior DES"), who instructed SSC to approve a reevaluation for Student to assess Student in the areas of written expression and written language. SSC's understanding was that Prior DES spoke with Parent and

- approved the assessments that were being requested by Parent. Testimony of SSC, Tr.V2, 262:1-263:25, Tr.V4, 644:19-645:10, 647:1-13; P-Ex.P1, p.0006; R-Ex.1, p.001.
64. SSC did not schedule a student-focused meeting and PWN dated October 2, 2020, was developed and sent to Parents (hereinafter “PWN-10/02/2020”). Student’s team did not meet to review the existing data for Student or determine what, if any, assessments would be necessary for Student’s reevaluation. SSC understood Prior DES’ instruction to be to just do the reevaluation without a meeting. Testimony of SSC, Tr.V2, 431:1-434:18, 437:22-438:8, Tr.V3, 451:1-7, Tr.V4, 645:21-646:8, Tr.V5, 858:17-859:4; P-Ex.P1, p.0006; R-Ex.1, p.001; *see also* Testimony of Parent, P-Ex.P34, p.2325.
65. The October 2, 2020 PWN explained that a reevaluation of Student regarding Student’s performance in written language and written expression would be conducted. While the PWN did not specify what specific assessments would be used, a speech-language assessment and academic assessments were determined by the assessors to be the best evaluators of Student’s performance in those areas. Testimony of SSC, Tr.V1, 97:9-99:16.
66. SSC testified that in October 2020, SSC sent the procedural safeguards to Parents when Parents requested Student’s reevaluation. Testimony of SSC, Tr.V1, 119:7-120:9.
67. In November 2020, Home School was allowed to bring small groups of the general education students back onto campus for in-person classes. To accomplish this, Home School organized general education students into groups, [REDACTED]

and a third group. The [REDACTED] group came onto campus two (2) set days a week, while the [REDACTED] group stayed at home and participated in distance learning for those same days. The [REDACTED] group came onto campus two (2) different days a week, while [REDACTED] group stayed at home and participated in distance learning on those days when [REDACTED] group was on campus. The last school day of the week was reserved for distance learning for all the groups. The last group of students attended school virtually all days of the week. Testimony of SSC, Tr.V3, 451:8-24, Tr.V5, 855:13-25, 860:20-862:5; Testimony of Current SPED Teacher, Tr.V5, 913:10-19, Tr.V6, 1079:7-1081:13; R-Ex.60, p.167-168.

68. Student was in the [REDACTED] group and attended classes in-person with Student's general education peers and also attended school in-person on the [REDACTED] group days but was assigned to the special education classroom for those days due to social distancing mandates. While in school, Student received instruction on a videoconference platform, along with all the general education students in Student's classes. Testimony of Parent, P-Ex.P34, p.2326, Tr.V9, 1440:8-1441:17; Testimony of SSC, Tr.V5, 856:1-858:8.

69. Home School's in-person attendance procedure as described above continued throughout the 2020-2021 school year. Testimony of SSC, Tr.V4, 649:25-650:19; Tr.V5, 857:11-20.

70. Student continued to receive occupational therapy throughout the 2020-2021 school year. Testimony of Parent, P-Ex.P34, p.2322.

71. A speech-language assessment was conducted in November 2020 as part of the October 2020 reevaluation. A copy of the assessment report was provided to Parents

- on December 15, 2020. Testimony of Parent, P-Ex.P34, p.2327; P-Ex.2, p.0080-0084; R-Ex.21, p.080-085.
72. An academic assessment was conducted by SSC in December 2020 as part of Student's October 2020 reevaluation. A copy of the academic assessment report was provided to Parents. P-Ex.P2, p.0075-0079; R-Ex.22, p.086-090.
73. An IEP team meeting was held on December 18, 2020 to determine Student's eligibility based on the October 2020 reevaluation. At the meeting, a concern was raised regarding Student possibly having [REDACTED], and no determination of eligibility was made at the meeting. No PWN was issued for this meeting. Testimony of Parent, P-Ex.P34, p.2329.
74. On December 20, 2020, Parent emailed SSC and Vice Principal and reiterated concerns regarding the need for additional information on Student's possible [REDACTED]. Parent also requested that additional information be included in Student's PLEPs regarding what specially designed instruction would be provided to Student. Testimony of Parent, P-Ex.P34, p.2329-2330; P-Ex.P19, p.768-769.
75. The IEP team held another meeting on January 4, 2021 to review the assessments and determine Student's eligibility pursuant to the reevaluation but no conclusion was made regarding Student's eligibility. No PWN was issued for this meeting. Testimony of Parent, P-Ex.P34, p.2331.
76. Between January 4, 2021 and January 15, 2021, Parent sent emails to Home School regarding grade level standards for writing and again requesting further information on the specially designed instruction to be provided to Student, as well as providing information from Student's pediatrician. Testimony of Parent, P-Ex.P34, p.2331-

- 2332; P-Ex.P19, p.0775-0818.
77. On January 15, 2021, the IEP team agreed to conduct another cognitive assessment of Student. A PWN was issued for the decision of the IEP team to proceed with a cognitive and a fine motor assessment for Student. Testimony of Parent, P-Ex.P34, p.2332; Testimony of SPED, Tr.V4, 653:2-654:21; P-Ex.P19, p.0819; R-Ex.3, p.003.
78. A cognitive assessment was done by Psychologist in March 2021 and a fine motor assessment was also conducted with Student in March 2021. The cognitive assessment and fine motor assessment reports were provided to Parents in April 2021. Testimony of Parent, P-Ex.P34, p.2333-2334; P-Ex.P2, p.0086-0089; P-Ex.P2, p.0090-0092; R-Ex.23, p.091-094; R-Ex.24, p.095-098.
79. In May 2021, the IEP team met to review Student's reevaluation with the additional assessments completed in March 2021. Parent expressed a desire for Student to undergo additional testing but agreed that Student could be found eligible based on the assessments that were already completed. The IEP team determined that Student continued to be eligible for services special education and related services under the IDEA under the category of [REDACTED]. A PWN was issued for Student's eligibility meeting on May 21, 2021. Testimony of Parent, P-Ex.P34, p.2336; Testimony of SSC, Tr.V4, 659:1-10; P-Ex.P3, p.0119-0143; R-Ex.5, p.005-013; R-Ex.6, p.014-015.
80. Parent expressed concerns to Principal and SSC regarding information that Parent wanted from the evaluation summary report, specifically a more thorough analysis of specifically designed instruction that Student has and would be receiving as part of Student's special education. Testimony of Parent, P-Ex.P34, p.2335-2337; P-Ex.P19,

- p.0830, 0845-0849.
81. Student was eligible for ESY for the summer of 2021 and attended the summer ESY programs at Home School. Student's progress reports from summer ESY 2021 sessions showed that Student completed work and made progress on writing and math, worked cooperatively with peers, and checked Student's work before completion. Testimony of SSC, Tr.V5, 803:18-804:10; R-Ex.73, p.194-195; R-Ex.171, p.640.
82. A draft IEP was sent to Parents on June 3, 2021, for a meeting originally scheduled for June 4, 2021, however the meeting was rescheduled due to Parents wanting additional time to review the draft IEP. Testimony of Parent, P-Ex.P34, p.2338; Testimony of SSC, Tr.V5, 809:20-810:3; R-Ex.81, p.216-218.
83. IEP meetings were held in June and July 2021 to develop a new IEP for Student, however the IEP team determined that Student's behavioral support plan needed to be revised based, in part, on the DOE's new policies regarding behavioral support plans and other behavioral interventions. During this time, Parent had also sent two requests to Principal for an FBA and an EBA for Student. Testimony of Parent, P-Ex.P34, 2338- 2342; Testimony of SSC, Tr.V3, 505:12-513:8, 521:16-21, Tr.V4, 659:22-660:10, 661:5-662:4; Testimony of Current SPED Teacher, Tr.V6, 1030:12-1031:14; P-Ex.P19, p.0850-0854; R-Ex.8, p.018; R-Ex.30, p.110; R-Ex.32, p.112-113; *see also* P-Ex.P10, p.0428-0465.
84. In early June 2021, the IEP team held a student-focused meeting to discuss Parents' request for an FBA for Student. During this meeting, a district representative came in to explain to Parents the process of determining the need for an FBA. At the meeting,

no determination was made as to whether an FBA would be conducted with Student.

Testimony of SSC, Tr.V4, 679:17-682:2.

85. On July 21, 2021, Parent requested a PWN be issued for a meeting held on July 20, 2021, noting that “it was not clear at the end of the meeting what its decision was or if it needed a moment to consult with the district office.” Testimony of Parent, P-Ex.P34, p.2342; P-Ex.P19, p.0931.

86. On July 22, 2021, Parent sent an email to Home School requesting to review Student’s educational records. On July 26, 2021, SSC responded to both of Parent’s emails and noted that “I, too, left our last meeting feeling a little confused on what we were deciding, or not deciding to. ... I wanted to readdress the requests at our next meeting to officially be able to close that conversation as well as present our draft of [Student’s] IEP.” SSC also asked Parent to provide dates when Parent wanted to review Student’s records. Testimony of Parent, P-Ex.P34, p.2342; Testimony of SSC, Tr.V2, 354:1-15, 361:7-12, 363:13-18, Tr.V3, 524:10-21; P-Ex.P19, p.0932-0933.

87. Parent went to Home School and reviewed Student’s records that were made available to Parent for review. Parent requested a copy of the records and SSC agreed to scan and email a copy of the records for Parent. The records were emailed to Parent on August 4 and 5, 2022. Testimony of Parent, P-Ex.P34, p.2342, 2344; Testimony of SSC, Tr.V4, 752:9-23.

2021-2022 School Year

88. Home School began the 2021-2022 school year on August 3, 2021. Testimony of Parent, P-Ex.P34, p.2343; Testimony of SSC, Tr.V3, 526:22-25; P-Ex.P27, p.2111.

89. Home School had full in-person school attendance at the start of the 2021-2022 school year, although the COVID-19 pandemic was still ongoing. Parents requested that Student be placed in a smaller setting to ensure social distancing and safety for Student, who had not been able to receive the COVID-19 vaccination. Testimony of SSC, Tr.V2, 279:8-280:7; Testimony of Parent, Tr.V9, 1349:2-22.
90. Based on Parent's request, Student was placed in the special education classroom for the time Student was on campus since the special education classroom had less students. While that setting was not Student's least restrictive environment, Home School decided that it was the best way to accommodate Parents' concern for Student's health and safety. Testimony of SSC, Tr.V2, 280:25-282:18, Tr.V4, 650:16-651:16; Testimony of Current SPED Teacher, Tr.V5, 913:21-3, Tr.V6, 1000:6-16.
91. While in the special education classroom, Student still participated with the general education classes via videoconference and received instruction from the general education teachers. Testimony of SSC, Tr.V2, 281:14-282:7, Tr.V4, 651:17-24.
92. A draft IEP was provided to Parent on August 4, 2021. While schools are not required to provide draft IEPs to parents, the normal practice of Home School is to provide a draft of the proposed IEP to parents shortly before the scheduled meeting. Testimony of Parent, P-Ex.P34, p.2343; Testimony of SSC, Tr.V3, 503:23-504:3.
93. On August 6, 2021, Parent emailed the IEP team a letter with questions concerning Student's draft IEP and BSP. Testimony of Parent, P-Ex.P34, p.2343; P-Ex.P19, p.0934-0935.
94. On August 6, 2021, an IEP team meeting was held, and a written IEP offer was

- developed (hereinafter “IEP-08/06/2021”). Present at the IEP meeting were Parent, Parent 2, Principal, SSC, Current SPED Teacher, a general education teacher, a speech-language pathologist, and an occupational therapist. P-Ex.P5, p.0266-0287; R-Ex.19, p,057-078.
95. Parents continued to request that either an EBA, a functional behavior assessment (hereinafter “FBA”), or both, be conducted with Student, but the IEP team decided at the August 6, 2021 meeting, that since Student had a behavioral support plan in place, an EBA or an FBA were not warranted for the team to determine and/or address Student’s needs. The team did express to Parents that data would be collected on Student and the team could revisit the need for either an EBA or FBA if a need arose. Testimony of SSC, Tr.V1, 80:5-22, 333:25-334:19; R-Ex.9, p.019.
96. On August 8, 2021, final copies of Student’s IEP-08/06/2021, the PWNs from the August 6, 2021 meetings (IEP and regarding Parent’s request for assessments) were sent to Parents, along with the procedural safeguards and the DOE memorandums from December 2018 regarding FBAs and behavior support plans. Testimony of Parent, P-Ex.P34, p.2344; Testimony of SSC, Tr.V3, 530:4-19, 536:11-19; P-Ex.P19, p.0945.
97. On August 11 and 17, 2021 Parent sent concerns to SSC regarding concerns with Student’s IEP-08/06/2021 and also requested DOE criteria for evaluating requests for emotional behavior assessments. Testimony of Parent, P-Ex.P34, p.2344-2346; P-Ex.P19, p.0943-0945.
98. Parent also sent emails in August and September requesting behavioral data including Student’s most current behavioral checklist, data, and the updated BSP. Testimony of

Parent, P-Ex.P34, p.2346; P-Ex.P19, p.0946, 0948, 0950-0952.

99. On September 9, 2021, Parent requested an IEP meeting to review the implementation of Student's IEP-08/06/2021 and to review Student's behavioral data in conjunction with Parents' request for an FBA and EBA. Parent did not receive a response to that the September 9, 2021 email requesting an IEP meeting. Testimony of Parent, P-Ex.P34, p.2347; Testimony of SSC, Tr.V3,544:2-11; P-Ex.P19, p.0947.
100. On September 20, 2021, Current SPED Teacher provided Parents with behavioral data for Student. Testimony of Parent, P-Ex.P34, p.2347; *see also* P-Ex.P19, p.0953-0957.
101. On September 28, 2021 and October 5, 2021, Parent emailed Current Principal regarding Parent's request for an IEP meeting and concerns regarding the implementation of Student's IEP-08/06/2021. Parent also requested a full-time one-to-one aide for Student and an extended school day. Testimony of Parent, P-Ex.P34, p.2348, Tr.V9, 1466:2-14; Testimony of SSC, Tr.V3, 544:21-545:7; P-Ex.P19, p.0969-0974.
102. At around this time, Parent noted that Parent was missing IEP progress reports from Student's records that Parent reviewed. Parent informed SSC, who responded and provided the missing progress reports to Parent. SSC also asked Parent for dates when Parent would be available for an IEP meeting. Testimony of Parent, P-Ex.P34, p.2348-2349; Testimony of SSC, Tr.V2, 357:5-8; P-Ex.P19, p.0975-0977.
103. An IEP meeting was scheduled for November 10, 2021, after a series of emails were sent between SSC and Parents. Testimony of Parent, P-Ex.P34, p.2349; P-Ex.P19, p.0978-1004.

104. On November 10, 2021 an IEP meeting was held but no updates to Student's IEP-08/06/2021 or other determinations were made and the meeting was continued to December 7, 2021. No PWNs were developed for the November 10, 2021 meeting. Testimony of SSC, Tr.V3, 564:9-565:15.
105. On November 11, 2021, Parent notified Home School that Student had received a full COVID-19 vaccination and requested that Student begin attending classes in-person with the general education classes. Upon receiving the notification from Parents, Student resumed attending classes in the general education classroom at Home School. Testimony of Parent, P-Ex.P34, p.2350-2353; Testimony of SSC, Tr.V4, 651:25-652:13; Testimony of Current SPED Teacher, Tr.V5, 914:10-13.
106. On December 5, 2021, Parent emailed SSC and other IEP team members to renew Parent's request for additional assessments and requested a PWN be developed to respond to Parent's request. Testimony of Parent, P-Ex.P34, p.2351-2352; P-Ex.P19, p.1031.
107. Parent also sent a request on December 5, 2021, to SSC and Current SPED Teacher regarding Student's BSP. Testimony of Parent, P-Ex.P34, p.2352; P-Ex.P19, p.1042.
108. On December 7, 2021, Parent and SSC had email correspondence regarding Parent's continued concerns about Student and an updated PLEPs section for Student's IEP for Parent to consider. Parent again noted that Parent wanted further explanation as to the specially designed instruction that Student would be receiving as special education and related services. Testimony of Parent, P-Ex.P34, p.2352-2353; P-Ex.P19, p.1043-1062.
109. The December 7, 2021 meeting did not result in an update to Student's IEP and no

- PWN was issued for the meeting. The meeting was continued to January 7, 2022. A separate “parent meeting” was scheduled for December 14, 2021 with just SSC, and Current SPED Teacher to talk through some of Parent’s concerns before the full IEP team meeting. Testimony of Parent, P-Ex.P34, p.2354; P-Ex.P19, p.1085-1094.
110. On December 14, 2021, Parent met with SSC, Current SPED Teacher, and a district resource teacher to discuss Parent’s concerns regarding Student’s IEP-08/06/2021 and performance in school. Testimony of Parent, P-Ex.P34, p.2354-2355; Testimony of SSC, Tr.V5, 817:16-818:11; P-Ex.P19, p.1109.
111. On January 7, 2022, an IEP team meeting was held. Prior to the meeting, Parent sent several emails to the IEP team regarding Student’s schoolwork, and SSC provided Parent with a draft IEP for the IEP meeting. No updates to Student’s IEP was made at the meeting on January 7, 2022, and the meeting was to be continued to another date. Testimony of Parent, P-Ex.P34, 2355-2356.
112. At the time of the filing of the Request for IDEA Impartial Due Process Hearing on March 28, 2022, no further date for the continuation of the January 7, 2022 meeting had been set. SSC had attempted to schedule a meeting but Parent suggested waiting until the Due Process Hearing in this case was completed before having a meeting. Testimony of Parent, P-Ex.P34, p.2356; Testimony of SSC, Tr.V4, 784:7-785:1.

Student’s evaluation summary report 2020-2021

113. An evaluation summary report is a summary of the various assessments, findings, and recommendations of the various assessors that participate in the evaluation of a student. Based on the evaluation summary report, the IEP team should be able to determine if a student is or continues to be eligible for IDEA special education and

- related services. The evaluation summary report can also provide information to the team about the student's needs. Testimony of SSC, Tr.V1, 41:25-42:8; P-Ex.
114. In reviewing an evaluation summary report, an IEP team does not make decisions on a student's eligibility solely on any diagnoses that may result from an assessment or that have been made by a medical professional. The determination of eligibility depends on a student's need for special education and related services to access the general education curriculum regardless of any diagnoses. Testimony of SSC, Tr.V1, 101:22-103:6, Tr.V3, 577:10-578:25; Testimony of OT, Tr.V7, 1119:3-24.
115. While assessments are a useful tool in determining a student's levels of performance at the time the assessments are conducted, they do not always reflect the entirety of a student's capabilities at the time the assessment is given. Assessors often note that the assessment results depend on a student's performance only on the dates of the assessments and provide a 'snapshot' of the student's performance on the dates of the assessments. Testimony of SSC, Tr.V1, 149:5-11.
116. An evaluation summary report was developed from the reevaluation of Student from October 2020 through March 2021 (hereinafter "ESR-05/12/2021"). The ESR-05/12/2020 contained summaries of the speech-language assessment, academic assessment, cognitive assessment, and fine motor assessments that were done between November 2020 and March 2021. P-Ex.P3, 0119-0127; R-Ex.5, p.005-013.
117. Included in the ESR-05/12/2021 were the list of recommendations or "implications for learning" sections of each assessment done during the October 2020 reevaluation. P-Ex.P3, 0119-0127; R-Ex.5, p.005-013.
118. The ESR-05/12/2021 was provided to Parents on May 12, 2021. P-Ex.P19, p.830-

832.

119. Student's speech-language assessment was conducted over the course of three days in November and December 2020. The assessor noted that Student's attention to task appeared significantly better than when the assessor evaluated Student two (2) years prior. Student attended to tasks and worked to completion and had no notable behavioral concerns. P-Ex.P2, p.0080-0085; R-Ex.21, p.080-085.
120. The speech-language assessment contained the following recommendations to assist Student in school: 1) provide Student with short tasks and gradually increase duration; 2) continue to provide direct instruction in establishing connections with targeted vocabulary through structured language activities, key information should be highlighted, and new vocabulary should be pre-taught, new vocabulary should be connected to real experiences or events, integrated concepts with targeted spelling and reading activities so Student is offered repeated practice across all areas; 3) continue to strengthen narrative discourse skills, provide visuals/graphic organizers, check lists, etc., to help organize information, and 4) provide systemic instruction in knowledge and application of grade-level phonics and work analysis skills in decoding and spelling words. P-Ex.P2, p.0080-0085; R-Ex.21, p.080-085.
121. No speech-language services were recommended, as Student displayed appropriate skills in hearing, speech sounds/articulation/phonetics, oral structures, and voice/fluency. Student's primary area of concern was written expression. P-Ex.P2, p.0080-0085; R-Ex.21, p.080-085.
122. Student's academic assessment was conducted by SSC in December 2020, who had conducted Student's previous academic assessments. The results of Student's

academic assessment showed that Student had made gains since Student's last academic assessment but still scored low in the range of written expression.

Testimony of SSC, Tr.V4, 761:9-762:4; P-Ex.P2, p.0075-0079; R-Ex.22, p.086-090.

123. Student's behaviors during the academic assessment were noted as being polite and friendly, with adequate attention to tasks and the completion of prompts as requested. P-Ex.P2, p.0075-0079; R-Ex.22, p.086-090.
124. The needs for Student based on the academic assessment were: writing a story with limited detail and left out many necessary items, such as characters, plot and prose; difficulty with text structure, where Student would often say a sentence correctly but write it incorrectly, difficulty with remembering punctuation and capitalization; not being able to edit sentences; missing parts of sentences; lacking of detail; and spelling concerns with vowel blends. P-Ex.P2, p.0075-0079; R-Ex.22, p.086-090.
125. The academic assessment recommended providing Student with multi-sensory language instruction; expanding creative writing skills through focusing on writing areas of high interest; working on mechanics of writing (i.e., punctuation, capitalization, etc.); providing directions that are short, clear, and concise; give directions auditorily and visually; repeating step-by-step directions; and having Student repeat directions or demonstrate them to demonstrate understanding. P-Ex.P2, p.0075-0079; R-Ex.22, p.086-090.
126. Student's cognitive assessment report was prepared by Psychologist on March 19, 2021. Student's behavior noted in the cognitive assessment was cooperative with the assessment and engaged in the activities. Student did not appear to be struggling with understanding of what was being asked of Student even with the use of personal

- protection equipment due to COVID-19 safety guidelines. P-Ex.P2, p.0086-0089; R-Ex.23, p.091-094.
127. Student's scores on the March 2021 cognitive assessment suggested some improvement on Student's cognitive skills, since the last assessment in January 2019. The assessor noted that this may be due to Student's current medication regimen. P-Ex.P2, p.0086-0089; R-Ex.23, p.091-094.
128. Student was observed to prefer to use of manipulatives for some of the tests and needed reminders of what Student was required to do. Psychologist noted that Student may benefit from immediate feedback as to the correct responses until it is determined that Student has incorporated that skill/lesson into long-term memory storage. P-Ex.P2, p.0086-0089; R-Ex.23, p.091-094.
129. Student's fine motor assessment report was prepared by an occupational therapist on March 31, 2021. Student's behavior during the assessment was noted to be without concern, as Student remained seated throughout the assessment of one (1) hour of testing without restlessness. P-Ex.P2, p.0090-0092; R-Ex.24, p.095-098.
130. The occupational therapist determined that Student appears to be a multi-sensory learner, who performed better when verbal cues, visual demonstrations, and tactile demonstrations are provided. The occupational therapist recommended repetition and modeling during classroom instruction, a desk top letter model Aa-Zz for reference, reminders for spacing between words, and visual sentence models to self-correct for sizing and placement. Student's handwriting sample was observed to be legible and improved within one (1) session. P-Ex.P2, p.0090-0092; R-Ex.24, p.095-098.
131. After the conclusion of the October 2020 reevaluation with the March 2021

assessments included, SSC and Current SPED Teacher believed that the IEP team had enough data to develop an IEP for Student. Testimony of Current SPED Teacher, Tr.V6, 1022:16-1023:2.

Student's IEP-08/06/2021

132. Student's IEP-08/06/2021 does not include dates of the prior meetings in June and July 2021 when the IEP team discussed Student's IEP but did not complete it because the system that Home School uses to document the IEPs does not include the additional meeting dates and only prints the meeting date of the final meeting. Testimony of SSC, Tr.V1, 143:25-144:19.
133. Student's IEP-08/06/2021 uses a form that begins with considerations that the IEP team must take into consideration when developing the IEP for Student and moves on to a section where the IEP drafter includes information on Student's PLEPs. While the PLEPs is no longer the accurate terminology used under the IDEA for this section, which is "present levels of academic achievement and functional performance," the information included in Student's IEP-08/06/2021 accurately addresses the present levels (as of August 6, 2021) of Student's academic achievement and functional performance. *See* P-Ex.P5, p.0266-0275; R-Ex.19, p.057-066.
134. The PLEPs section of Student's IEP-08/06/2021 includes information regarding Student's eligibility for IDEA special education and services; relevant background information of Student, including medical diagnoses provided by Student's Physician; Student's academic achievement (with examples) from the 2020-2021 school year with references to the standards-based grade level goals; test scores from a variety of

- testing sources; a list of strengths and needs, if applicable, in the areas of language arts (listening, speaking, reading, and writing), math, and functional performance; grade-level based tests completed by Student since [REDACTED]; and a summary of Student's performances on the reevaluation assessments that were conducted between November 2020 and March 2021. P-Ex.P5, p.0266-0275; R-Ex.19, p.057-066.
135. The PLEPs also includes a list of the supplementary aids and supports that had been available for and/or used with Student based on previous IEP(s) and information regarding each supplementary aid and support, including whether Student used it, how Student used it, whether Student prefers or does not prefer the aid or support, and whether it would be beneficial for Student to have in the IEP-08/06/2021. P-Ex.P5, p.0266-0275; R-Ex.19, p.057-066.
136. Student's IEP-08/06/2021 PLEPs section does not contain any indication that Student would need post-high school transition services, and that section of Student's IEP-08/06/2021 is noted as being "not applicable at this time." P-Ex.P5, p.0276; R-Ex.19, p.067.
137. The IEP team did not believe at the time of the IEP meeting that Student would need alternatives to a high school diploma, so transition services were not necessary at the time of the IEP meeting on August 6, 2021. Testimony of SSC, Tr.V1, 171:14-176:4.
138. Student's IEP-08/06/2021 contains seven (7) annual goals and objectives with five (5) language arts goals, a health goal, and a physical education goal. Each of the goals and included objectives addresses a need raised in Student's PLEPs. Testimony of Current SPED Teacher, Tr.V5, 959:23-964:13; *see e.g.* P-Ex.P5, p.0277-0283; R-Ex.19, p.068-074.

139. For example, the IEP-08/06/2021 lists the following comparable data/needs in the PLEPs section: “[reading] students should be able to describe the overall structure of a story, including describing how the beginning introduces the story and the ending concludes the action; [reading needs] figurative language and answering inferential questions” “students should be able to write informative/explanatory texts in which they introduce a topic, use facts and definitions to develop points, and provide a concluding statement or section. They should also be able to use linking words to form cohesive writing; [writing needs] to support [Student’s] writing with text evidence, write three paragraphs on any prompt with an introduction, middle and conclusion, [and] to be able to write complete meaningful sentences.” P-Ex.P5, p.0269; R-Ex.19, p.060. Student’s first language arts goal works toward Student reading an informational text and stating the central idea of the text, listing supporting details, and explain how the details support the central idea. P-Ex.P5, p.0277; R-Ex.19, p.068. Student’s next language arts goal addresses when Student is given informational texts and a writing prompt, Student will write an essay with an introduction, body paragraphs with supporting facts, and a conclusion. P-Ex.P5, p.0278; R-Ex.19, p.069. Student’s third language arts goal has Student composing a narrative piece that includes an organized event sequence using transition words and phrases to manage the sequence of events. P-Ex.P5, p.0279; R-Ex.19, p.070.
140. Each of Student’s IEP-08/06/2021 goals has objectives that measures Student’s progress on a rating scale that examined how often Student was able to accomplish the objective in so many attempts out of a total number of attempts. Testimony of Current SPED Teacher, Tr.V6, 1023:7-1030:11.

141. For example, one of Student's IEP-08/06/2021 annual goals measures "within one year, when given [REDACTED] level, informational texts on a topic and a writing prompt with a specified topic, [Student] will write a 4 paragraph essay: includes an introductory paragraph, 2 body paragraphs with supporting facts, and a concluding statement in order in 3 out of 4 essays." The first objective reads "by the end of the 1st grading period, given 1 independent level informational text, a writing prompt with a specified topic, an outline, and essay organizer with sentence starters, and a shared writing of the introduction, [Student] will write 1 body paragraph and a concluding statement in 3 out of 4 essays." The second objective reads "by the end of the 2nd grading period, given 2 independent level informational text, a writing prompt with a specified topic, an outline, and essay organizer with sentence starters, and a writer's checklist, [Student] will write an essay: includes an introductory paragraph, 2 body paragraphs with supporting facts, and a concluding statement in 3 out of 4 essays." The third objective reads "by the end of the 3rd grading period, given 2 independent level informational text on a topic, a writing prompt with a specified topic, and essay organizer and a writer's checklist, [Student] will write an essay: includes an introductory paragraph, 2 body paragraphs, and a concluding statement in 3 out of 4 essays." P-Ex.P5, p.0278; R-Ex.19, p.069.

142. Scaffolding is a structure of curriculum relating to how curriculum is introduced to students. Scaffolding allows the curriculum to go up and down, so that students may revisit skills that were previously taught and then introduced to new skills.

Testimony of SSC, Tr.V1, 179:8-19.

143. The next section of Student's IEP-08/06/2021 addresses Student's eligibility for ESY

and notes that Student has been deemed eligible for ESY services for breaks from school longer than twenty (20) calendar days. The ESY section does not explain the criteria used to qualify Student for ESY nor does it explain how Student's ESY services would be delivered. P-Ex.P5, p.0284; R-Ex.19, p.075.

144. Student's special education and related services are listed next in Student's IEP-08/06/2021, which provide Student with one hundred thirty-five (135) minutes per quarter of occupational therapy services to be provided in the general and/or special education settings and seven hundred fifty (750) minutes per week of special education in the general and/or special education setting. Student's special education is also included for Student's ESY, but occupational therapy services are not. P-Ex.P5, p.0284; R-Ex.19, p.075.

145. Student's IEP-08/06/2021 provides Student with the following supplementary aids and supports to be provided in the general and/or special education setting: preferential seating or in close proximity to the speaker; checking for understanding frequently by having Student explain the directions; explicit and repeated instructions; use of mechanical aids (erasable pens, mechanical pencils); small group testing; copies of textbooks to stay at home; PDF copies of books, if available, to work with assistive technology programs; text-to-speech on assignments and assessments; structured learning environment; behavioral supports including walk-in counseling; visual supports; assistive technology devices; notetaking skills; modifying the number of tasks while ensuring that the assignments given demonstrate knowledge of the content; and modifying the type of assignments while ensuring that they demonstrate knowledge of content. P-Ex.P5, p.0284; R-Ex.19, p.075.

146. The supplemental aids and supports are further explained in the IEP-08/06/2021 for clarification and examples of specific types of supports or how they are provided are included in the section below the list of supplemental aids and supports. The clarifications provide the reader of the IEP-08/06/2021 information on how the supports may be implemented for Student's benefit. P-Ex.P5, p.0284-0285; R-Ex.19, p.075-076.
147. The next section of Student's IEP-08/06/2021 addresses accommodations for Student taking state-wide assessments and indicates that Student will receive the accommodation of "Text-to-speech – embedded," which means that the test questions and any multiple choice answers will be converted to speech for Student to answer, but not the text passages for reading comprehension assessments. Testimony of SSC, Tr.V4, 737:6-738:13; Testimony of Current SPED Teacher, Tr.V5, 935:19-24; P-Ex.P5, p.0286; R-Ex.19, p.077.
148. The text-to-speech option for the reading passages for state-wide assessments is designed for children who are unable to read and are not going to be able to read and are not necessary for Student since Student can read and comprehend material that Student reads. Testimony of SSC, Tr.V1, 213:21-216:19, Tr.V4, 737:6-738:13; Testimony of Current SPED Teacher, Tr.V5, 935:1-24.
149. The determination of whether the text passages are converted to speech as an accommodation is made by higher-level administrators and must be separately requested by the schools to get approval for that accommodation. Testimony of SSC, Tr.V1, 201:12-213:10, Tr.V4, 736:17-738:5.
150. Student's educational placement, otherwise known as the "Least Restrictive

- Environment” or “LRE,” is the next section of the IEP-08/06/2021. Student’s educational placement in the IEP-08/06/2021 is described as “[Student] will receive all instruction in the general education classroom with [Student’s] non-disabled peers in an inclusionary setting. [Student] will receive behavioral and academic support from Special Education staff for 750 minutes per week in the general education classroom on a public school campus.” P-Ex.P5, p.0286; R-Ex.19, p.077.
151. The academic benefit Student receives from being in the general education classroom is the general education curriculum that Student currently is assigned. Student also receives non-academic benefits from being in the general education classroom, such as working on social skills, having good role models, participating in group projects and class presentations. Student does not have any negative impacts on the teacher or the other general education students in the classrooms. Testimony of SSC, Tr.V4, 747:4-748:23; Testimony of Current SPED Teacher, Tr.V6, 1056:20-1060:16.
152. Following the IEP meeting on August 6, 2021, a PWN for the IEP-08/06/2021 was developed on August 8, 2021. The PWN noted that the IEP team also considered speech therapy services for Student but that after consultation with a speech-language pathologist, it was determined that Student’s oral language is age-appropriate but that Student had trouble transferring oral language into written form because of Student’s inattentive behaviors. P-Ex.P4, p.0153; R-Ex.20, p.079.
153. The IEP team in this case described Student’s specially designed instruction in Student’s IEP-08/06/2021 in Student’s PLEPs, goals and objectives and supplementary aids, program modifications, and supports for school personnel. *See* Testimony of SSC, Tr.V1, 43:1-53:6, Tr.V3,584:5-9, 592:22-593:4, 598:16-606:19.

Tr.V4, 629:13-631:4, Tr.V4, 732:12-16, 734:6-765:18; Testimony of OT, Tr.V7, 1160:16-22.

154. Student's IEP teachers and support personnel could not include an exhaustive list or a specific description for every one of Student's assignments how Student would receive specially designed instruction, due, in part, to the variability of Student's behavior, attitude, motivation, and/or performance on each assignment or type of assignment. *See e.g.* Testimony of Current SPED Teacher, Tr.V5, 928:10-19, 976:11-20, 979:15-981:7, 996:12-997:2, 1036:25-1037:9; 1039:21-23; Testimony of OT, Tr.V7, 1165:3-9, 1195:13-21, 1197:23-13, 1216:1-13, Testimony of EA, Tr.V8, 1340:3-1341:11, 1350:22-24.
155. Instead, the PLEPs, goals and objectives, supplementary aids, program modifications, and supports for school personnel contained understandable references to the ways that Student would receive specially designed instruction. For example, Student would receive extended time to complete assignments; Student could be assigned less paragraphs or sentences to complete an assignment; Student could work on or complete the assignment using different tools or media; and Student could work individually on assignments with Current SPED Teacher if Student wanted additional help. These are all examples of specially designed instruction to be delivered to Student. *See* Testimony of Current SPED Teacher, Tr.V6, 1072:10-1074:2; Testimony of OT, Tr.V7, 1170:3-1171:9, 1222:19-25.
156. It would be difficult and overly restrictive for the IEP team to designate the number of minutes that would be allocated to each subject or to designate a number of minutes for Student to receive services in general education versus special education

classrooms. If the IEP had a designated number of minutes per subject or per setting, it could affect Student's progress on Student's goals and objectives. *See* Testimony of SSC, Tr.V1, 56:10-24, 64:5-65:20; Testimony of Current SPED Teacher, Tr.V6, 1050:15-1052:9, 1053:2-1054:15.

157. Many of Student's supplementary aids and supports in the IEP-08/06/2021 were similar in nature to the recommendations provided to the IEP team to address Student's fine motor difficulties by Student's physician in the form of the "M.A.T.C.H." strategy. The M.A.T.C.H. strategy recommends "Modify the task," "Alter expectations," "Teaching strategies," "Change the environment," and "Help by understanding." Testimony of OT, Tr.V7, 1132:1-17; P-Ex.P19, 0809-0818.
158. Examples of "M.A.T.C.H." recommendations that are included in Student's IEP-08/06/2021 include reducing amount of writing required; allowing draft and final copies of written work to be done on the computer; allow more time to complete in-class assignments; find a balance between oral, written, and demonstrative tests; teach and review with all children how to organize their desks; use verbal and/or visual cues to stay on task; use consistent instructions for similar tasks; break activities into smaller parts and provide encouragement; be available to assist/intervene when the child has difficulty; and allow extra time for teaching and practice. Testimony of OT, Tr.V7, 1132:15-1153:25; P-Ex.P19, 0815-0817.

Behavior Assessments and Behavior Support Plans

159. An EBA is a tool used by the DOE to assess students whose behavior plans or programs are not working and behaviors are increasing. The behavior support plan looks to possible underlying reasons (i.e., unidentified disabilities) for the lack of

- success in the students' behavior plans. Testimony of SSC, Tr.V4, 779:17-780:5.
160. An FBA is an assessment that can only be done by a licensed behavior analyst in Hawai'i, which examines the function of a student's behavior to determine ways to decrease or increase a student's behavior. Testimony of SSC, Tr.V4, 662:19-664:6; *see also* P-Ex.P10, 0428-0465.
161. In November 2016, a draft behavior support plan (hereinafter "BSP") was developed to address Student's behaviors in school. Testimony of SSC, Tr.V, 29:16-22; P-Ex.P8, p.0416-0420; P-Ex.P19, p.1235-1237.
162. At the time the November 2016 BSP was drafted, the DOE's policy regarding the use of FBAs and BSPs was that it could be used for any child exhibiting behavior problems, from pre-referral to the more intensive levels of need. Testimony of SSC, Tr.V2, 311:1-312:5, Tr.V4, 665:22-666:13; P-Ex.P7, p.0391-0408.
163. While it is not clear from the documentation presented by either Petitioners or Respondents when the November 2016 BSP was 'finalized,' it is clear that the November 2016 BSP was the document used to guide Student's behavior plan associated with Student's IEPs from 2016 through 2021. *See* Testimony of SSC, Tr.V1, 29:21-33, 321:12-16, Tr.V5, 837:7-838:19, 847:12-16; Testimony of Current SPED Teacher, Tr.V5, 900:6-10; P-Ex.P22, p.1248-1266.
164. The November 2016 BSP was reviewed between 2016 through 2021, although a new plan was not drafted or distributed with a different date/title until 2021. Testimony of SSC, Tr.V1, 29:23-13.
165. The November 2016 BSP was discussed as part of Student's annual IEP meetings between 2017-2019. Testimony of SSC, Tr.V1, 31:4-33:8.

166. The November 2016 BSP was distributed with Student's annual IEPs in 2017, 2018, 2019, 2020, and 2021 by SSC to all of Student's teachers. Testimony of SSC, Tr.V1, 34:2-13.
167. On December 31, 2018, the Superintendent of the Hawai'i Public Schools sent out two (2) memoranda regarding FBAs, behavior intervention plans, and student support process in a multi-tiered system of support. These memos were based on a change in statutory law regarding the practice of providing applied behavior analysis for diagnosis and treatment for [REDACTED]. P-Ex.P10, p.0428-0465; *see also* Haw. Rev. Stat. § 465D-1 (2015).
168. The memoranda set forth the guidelines for use of FBAs only for students whose behaviors impede their learning or the learning of others and cannot be managed using a school-level multi-tiered system of support. Examples of these behaviors included: behaviors that are dangerous to the student or others; causes significant property damage; impedes the student's learning or the learning of others and when less intensive/restrictive interventions have not been or are not expected to be successful; leads to a possible move to a more restrictive educational setting; and results in disciplinary considerations including a violation of the student conduct code that is determined to be a manifestation of the child's disability. Testimony of SSC, Tr.V4, 662:19-664:6; P-Ex.P10, p.0428-0465.
169. While the memoranda were sent to the administrators of the school districts in Hawai'i on December 31, 2018, most schools did not make changes in their approach to students' behavior plans until further guidance was provided by the state-wide administrators. Testimony of SSC, Tr.V2, 322:9-324:11, 328:13-21.

170. The behaviors of concern in Student's November 2016 FBA/BSP included

inappropriate behaviors – [REDACTED]

[REDACTED]; physical movement – [REDACTED]

[REDACTED]; inattention – [REDACTED]

[REDACTED]; vocalizations – [REDACTED]

[REDACTED]. P-Ex.P8, p.0416-0417.

171. The supports included in the November 2016 to address the behaviors listed above

included: preparing Student for difficult tasks; breaking down tasks; providing adult

assistance at the beginning of the task; preparing Student for changes at home and at

school; daily communication between home and school; frequent checks for

understanding; allowing Student to take breaks; asking Student if help is needed;

redirecting Student; practicing classroom routines; teaching Student to determine how

and when to ask for help, when Student needs a break and how to ask for one;

teaching Student school and classroom rules; and providing positive reinforcements

for desired behaviors. P-Ex.P8, p.0417-0418.

172. Many of these supports were also included in the supplementary aids and supports

sections of Student's IEP-04/18/2019, as well as previous IEPs for Student. *See P-*

Ex.P5, p.0262; R-Ex.13, p.036 (e.g. repeat & chunk assignments, check for

understanding frequently, structured learning environment, behavioral supports

including walk-in counseling).

173. At the time of the August 6, 2021 IEP meeting, the IEP team did not have any data to

indicate that Student had demonstrated any behaviors that would warrant an FBA and

noted that Student's behaviors were being well managed by the supports that were

currently in place in Student's IEPs. Testimony of SSC, Tr.V2, 335:5-336:5, Tr.V4, 687:16-688:8; *see also* Testimony of EA, Tr.V8, 1340:3-1342:9;

174. Sometimes when Student appears to be distracted and is doing something like [REDACTED], Student can still be paying attention to the teachers' instruction and understanding the assignment, so some of Student's behaviors are not actually affecting Student's ability to access general education, but it varies greatly day to day. Testimony of Current SPED Teacher, Tr.V6, 1063:15-1064:2; Testimony of EA, Tr.V8, 1344:9-13.

175. Student's teachers and educational assistant are able to manage Student's behaviors using guidance from the BSP, which mostly includes redirection or reminders to stay on task, individual instruction or assistance to Student when requested, and occasional removal to the resource room or a different area of the class for additional help or to get away from distractions. Testimony of EA, Tr.V8, 1340:3-1342:9, 1343:5-1347:6.

176. The IEP-08/06/2021 requires that Student's BSP be reviewed every six (6) weeks by the teachers and BHS or other behavioral school personnel. These reviews did not necessarily require meetings or Parent's attendance, nor was there any documentation regarding any of these reviews. Testimony of SSC, Tr.V2, 236:9-238:2, Tr.V4, 691:3-692:16.

Student's educational needs and performance at school

177. Student has been diagnosed with [REDACTED] (hereinafter "[REDACTED]"), [REDACTED], [REDACTED], [REDACTED], and [REDACTED] with Impairment in Reading

- by Physician.
178. Physician appeared to use information from 2018 assessments of Student and Student's 2019 IEP in developing recommendations for Student's learning in the information Physician sent in 2021. Testimony of SSC, Tr.V3, 475:13-23.
179. Student currently qualifies for IDEA special education and related services under the category of [REDACTED]. Testimony of SSC, Tr.V1, 107:22-108:1.
180. Prior to the 2021-2022 school year, Student was behind Student's grade level in reading and reading comprehension, however Student was able to catch up and is now reading at or near grade level. Testimony of SSC, Tr.V1, 214:5-10, 216:2-10; Testimony of Current SPED Teacher, Tr.V6, 1066:18-1067:3.
181. Student's regular and special education teachers for the 2021-2022 school year are considered highly qualified teachers under State of Hawai'i standards. Testimony of SSC, Tr.V2, 347:2-8.
182. Current SPED Teacher has a daily communication book in which Current SPED Teacher relays information about a student's day to the student's parents for Current SPED Teacher's special education students. Current SPED Teacher puts information about Student's day, any work that was done or needs to be done, any notes or modifications to assignments or deadlines for Student, information about Student's behavior (i.e., [REDACTED]), and reminders of upcoming events at school. Testimony of Current SPED Teacher, Tr.V5, 867:4-25; *see e.g.* R-Ex.91, p.258-259; R-Ex.93, p.262; R-Ex.103, p.312-318, R-Ex.105, p.320-324; R-Ex.112, p.363-384; R-Ex.116, p.389-393; R-Ex.118, p.395-401; R-Ex.125, p.437-440; R-Ex.135, p.461-479; R-Ex.141, p.490.

183. Student has difficulties accessing the general education curriculum due to difficulties with writing and with behaviors. Sometimes Student's writing difficulties are a combination of competency and behaviors, for example, Student will complete the minimal amount of work to complete a writing task because Student does not enjoy the tasks, which leads to Student receiving less practice at writing. Testimony of SSC, Tr.V3, 459:22-463:22; Testimony of OT, Tr.V7, 1111:18-1112:1.
184. During the 2021-2022 school year, Current SPED Teacher would work with Student either in the general education class setting or remove Student to the resource room setting. Current SPED Teacher's instruction to Student involved reviewing the directions for an assignment if Student was not understanding and pre-teaching new concepts to Student before they began working on them in the general education class. Testimony of Current SPED Teacher, Tr.V5, 880:1-881:2.
185. The amount of time that Current SPED Teacher worked with Student in the general education classroom versus the resource room or special education room varied greatly depending on the assignment that Student was working on. Testimony of Current SPED Teacher, Tr.V5, 881:3-20.
186. Some of the ways that Current SPED Teacher adapts or modifies Student's assignments is to have Student use a computer to complete an assignment, extend the deadline for Student to turn in assignments after the general education students are required to, allowing Student to do less than the required number of tasks on an assignment. Testimony of Current SPED Teacher, Tr.V5, 887:21-888:3, 951:1-953:15.
187. Current SPED Teacher believes that Student is capable of completing the general

- education [REDACTED] grade work that Student is being assigned in the general education classes. Testimony of Current SPED Teacher, Tr.V5, 892:9-893:11.
188. Current SPED Teacher was the person who provided the teacher notes that were included in Student's IEP-08/06/2021. Current SPED Teacher would take notes when Student was taking notes and then sending them home for Student to compare Student's notes with. Testimony of Current SPED Teacher, Tr.V5, 944:24-950:25, Tr.V6, 1037:22-1039:20.
189. Student is aware of Student's surroundings and classmates and occasionally declines the use of supplementary aids and supports offered to Student under Student's IEP-08/06/2021. Student is building independence skills based on making decisions about whether to use the offered supplementary supports and services. These include the use of mechanical pencils, extra time for assignments, or modification of assignments. Testimony of SSC, Tr.V2, 239:20-240:24; Testimony of Current SPED Teacher, Tr.V5, 932:19-25, 952:16-953:15, Tr.V6, 1040:5-1041:8, 1042:24-1044:25, 1084:7-21, 1091:19-1092:6; Testimony of OT, Tr.V7, 1198:14-1199:11; Testimony of EA, Tr.V8, 1392:18-1393:3.
190. During the school day, Student is allotted sufficient time and assistance to complete Student's assignments. Testimony of Current SPED Teacher, Tr.V6, 1042:24-1044:25, Tr.V6, 1083:9-1084:6.
191. Occasionally, Student will decline to work on assignments in school and would ask to take it home to work with Parents. During these occasions, Current SPED Teacher would still work on practicing or teaching Student the skills that Student would need to complete the assignment at home. Testimony of Current SPED Teacher, Tr.V5,

- 954:8-15.
192. Student can communicate with others, including non-disabled peers, and works on group projects with non-disabled peers in the general education classroom. On projects involving writing, the groups often designate Student with a task that does not involve Student writing and Student contributes to the group projects in other ways. Testimony of Current SPED Teacher, Tr.V6, 1045:15-1046:21.
193. Home School teachers do not force Student to use the supplementary aids and supports that are offered to Student unless Student is being disruptive in class enough to disturb other students. Examples of this would be when a teacher or aide asks Student to go to the resource room to complete assignments if Student is being disruptive in class. Testimony of Current SPED Teacher, Tr.V5, 931:12-19, 932:19-25.
194. Student's [REDACTED] grade schedule consisted of Student having different teachers for different academic subjects to prepare students for transitioning to [REDACTED] school. Student's schedule consisted of daily classes in mathematics, English/language arts, social studies, science, and alternating classes in art, physical education, music, and technology. Testimony of Current SPED Teacher, Tr.V6, 1049:13-25, 1052:10-1053:1, 1081:15-1083:8; Testimony of EA, Tr.V8, 1353:6-1364:2.
195. One of the supplementary aids and services that was offered to Student pursuant to the IEP-08/06/2021 was a laptop computer on which Student could complete assignments. This computer access allowed Student to type out the assignments instead of completing it by handwriting. Testimony of Current SPED Teacher, Tr.V6, 1036:15-21, 1073:6-1074:3.

196. Home School has a resource room for students who need additional supports that may not be able to be accommodated in the general education classroom. Student had access to the resource room for use if Student needed additional help. Testimony of SSC, Tr.V1, 221:4-24.
197. Student has made progress in Student's handwriting in smaller settings, such as during occupational therapy in the resource room on in the special education classroom. Student's handwriting becomes worse as the setting gets larger with more distractions. Testimony of OT, Tr.V7, 1112:2-22, 1121:23-1122:25.
198. Some other skills that OT worked with Student on during OT sessions in the 2021-2022 school year are organization skills. OT would help Student with general strategies in starting the organization process in working on assignments. Examples of a goal that also focuses on Student's organizational skills is the language arts assignment that provides a 'writer's checklist' and 'essay organizer' to Student during some of the short-term objectives.⁸ Testimony of OT, Tr.V7, 1162:16-1165:2.
199. Student is not more disruptive in the general education class than any of the other students in the class, including the non-disabled students in the class. Testimony of EA, Tr.V8, 1352:17-1353:5, 1364:23-1365:7.
200. Between May 2020 and May 2021, Student was able to master 3 of Student's IEP-04/18/2019 goals and made significant progress in reading and understanding concepts such as main idea, supporting paragraphs to the main idea, and identifying and defining new vocabulary words. While a couple of Student's IEP-04/18/2019 were not worked on during that time, Student still progressed over the course of the

⁸ This example is the Language Arts goal described in Findings of Fact paragraph 141.

2020-2021 school year. *See* P-Ex.P6, p.0342-0362; R-Ex.143-147, p.498-518.

201. Student's general education report card for the 2020-2021 school year showed that Student either maintained or increased Student's proficiency⁹ in the various general education subjects and increased Student's ratings for "General Learner Outcomes" or "GLOs" over the course of the school year after students began attending Home School in person.¹⁰ P-Ex.P17, p.0685-0690; R-Ex.169, p.633-635.
202. Student's IEP-08/06/2021 progress reports showed that Student made progress on each of Student's goals and objectives. Included in the progress reports are teacher comments to show the substance of Student's progress, such as reading test scores, increased difficulty of assignments that Student is completing, and progress on specific tasks that Student was completing for each objective. P-Ex.P6, p.0363-0390; R-Ex.148, p.519-532.
203. Student's general education report card for the 2021-2022 school year showed that

⁹ Hawai'i DOE public school report cards use a rating scale of ME=meets with excellence; MP=meets with proficiency; DP=developing proficiency; WB= well below proficiency; S=satisfactory; U=unsatisfactory; NA=not applicable at this time; and SC=see teacher comments. Student's report card grading consisted of DP and MP marks, without any U or WB grades in any subject area.

¹⁰ Student's general education report card for the first (1st) quarter of the 2020-2021 school year reflects that Student usually demonstrates "General Learner Outcomes" or "GLOs" in four (4) of six (6) areas: being a self-directed learner, being a quality producer, communicating effectively, and using technology effectively and ethically. Student's was rated as sometimes for demonstrating GLOs for being a community contributor and complex thinker. In the second (2nd) quarter, Student was rated as usually demonstrating being a self-directed learner and an effective and ethical user of technology. Student was rated as sometimes demonstrating being a community contributor, a complex thinker, a quality producer, and an effective communicator. In the third (3rd) quarter, Student increased Student's rating for community contributor to usually, along with a self-directed learning and effective and ethical user of technology. In the other GLOs, Student was rated as sometimes. In the fourth (4th) quarter, Student's ratings in the areas of self-directed learning, community contributor, effective communicator, and effective and ethical user of technology was rated as usually, with the other two (2) GLOs being sometimes.

- Student maintained or increased proficiency in nearly all applicable subject areas for the first three (3) quarters of the school year.¹¹ Student earned “ME” grades in several subject areas for the 2021-2022 school year. P-Ex.P17, p.0691-0693; R-Ex.172, p.641-643.
204. Student’s GLO ratings also increased where Student was rated as consistently demonstrating GLOs in the areas of self-directed learner and effective and ethical user of technology. P-Ex.P17, p.0691-0693; R-Ex.172, p.641-643.
205. Student’s [REDACTED] grade general education teachers provided weekly progress reports in each of Student’s main subjects, specifically Language Arts (ELA, vocabulary), math, social studies, art, science, and health. Student’s progress reports showed Student’s weekly scores on general education tests, homework, and classwork, and demonstrated the score’s relation to the grade markings (ME, MP, DP, etc.). A review of the weekly progress reports demonstrates that Student was able to access and make progress in the general education curriculum. P-Ex.P18, p.0694-0760.
206. Student’s IEP-04/18/2019 and IEP-08/06/2021 both included a supplementary aid and support of behavioral supports including walk-in counseling. BHS provided Student with walk-in counseling at least once a month from August 2021 through March 2022. Based on the logs, it appears that the walk-in counseling did not occur during the 2020-2021 school year. R-Ex.150, p. 536; R-Ex.151, p.537-542; R-Ex.154, p.561-566, R-Ex.156, p.580-582; R-Ex.158, p.592-594; R-Ex.160, p.608-612; R-

¹¹ The only areas where Student’s grade went from [REDACTED] to [REDACTED] was in writing between the second and third quarter, and in the number system between the first and second quarter.

Ex.162, p.616; R-Ex.164, p.619-620; R-Ex.166, p.623-628.

207. Current SPED Teacher and EA maintained data sheets on Student's behavior and began collecting data regarding antecedents, behaviors, and consequences for Student from August 2021. Current SPED Teacher provided the data sheets to Parent when requested. *See* P-Ex.P11, 0470-0487; P-Ex.P12, p.0488-0525; P-Ex.P13, p.0526-0532; P-Ex.P31, p.2269-2270; P-Ex.P32, p.2271-2273; R-Ex.153, p.547-560; R-Ex.155, p.567-579; R-Ex.157, p.583-591; R-Ex.159, p.595-607; R-Ex.161, p.613-615; R-Ex.163, p.617-618; R-Ex.165, p.621-622.

Request for independent educational evaluation, educational records, procedural safeguards, prior written notices

208. Home School typically sends parents copies of the procedural safeguards with annual meetings and initial evaluations, as well as when parents request them. At a minimum, parents are sent a copy of the IDEA procedural safeguards every year. Testimony of SSC, Tr.V1, 119:10-12.
209. It is unclear from any of the emails sent from SSC to Parents containing various PWNs, evaluation summary reports, draft IEPs, etc., whether the procedural safeguards were included as attachments together with the documents. *See e.g.*, P-Ex.P19, p.0830-0832, ; R-Ex.76, p.199-209; R-Ex.85, p.245-249; R-Ex.124, p.414-436.
210. SSC is in charge of housing Student's educational record, as defined by the IDEA. SSC's sections of Student's educational record include evaluation, eligibility, IEPs, and miscellaneous. Testimony of SSC, Tr.V2, 356:4-25, 359:1-5.
211. SSC did not develop or send out PWNs for IEP meetings held on January 4, 2021, May 7, 2021, January 7, 2022, or other meetings where the meeting was continued

and nothing was completed or decided at the meeting. *See e.g.* Testimony of SSC, Tr.V3, 469:10-21, 493:18-494:1, Tr.V4, 636:10-15, Tr.V5, 827:6-16.

V. CONCLUSIONS OF LAW

Burden of Proof

Petitioners have the burden of producing evidence to demonstrate that the violation resulted in the denial of FAPE. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 819-820 (9th Cir. 2007).

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.” *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)). 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.

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).

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures set forth in IDEA; and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051. “A state must meet both requirements to comply with the obligations of the IDEA.” *Doug C. v. Hawai‘i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013); *see also, Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

Procedural violations do not necessarily constitute a denial of FAPE. *Amanda J.*, 267 F.3d at 892. If procedural violations are found, a further inquiry must be made to determine whether the violations: 1) resulted in a loss of educational opportunity for Student; 2) significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or 3) caused Student a deprivation of educational benefits. *Id.*

Statutory limitation of time to present issues

The IDEA provides a time limitation on when a party may file a complaint alleging a denial of FAPE by a school district must be brought to preserve such a claim and allows a state to impose their own time limitations on such a complaint. The State of Hawai'i, which follows the IDEA time limitation, provides that "[a] due process complaint shall allege a violation that occurred not more than two years before the date the parent or the department knew or should have known of the alleged action that forms the basis of the due process complaint, or within the timeframe specified in state statute for a unilateral special education placement, where the request is for the costs of the placement, including special education and related services. The unilateral special education placement timeframe begins on the student's first day of attendance." H.A.R. §8-60-61(a)(2); 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. §300.507(a)(2).

In their Complaint, Petitioners' alleged denials of FAPE against Student beginning from Student's start at Home School, from the 2014-2015 school year. Based on the evidence presented in this case, this Hearings Officer finds that Petitioners' have not demonstrated that they did not know or could not have known about the alleged denials of FAPE more than two years prior to the filing of the Complaint on May 28, 2022. At least one of Student's parents have been present at every team meeting held with Home School and Parents have received

copies of Student's IEPs, PWNs, evaluation summary reports, assessment reports, IEP progress reports, and Student's report cards from Student's start at Home School until 2020. *See Finding of Fact paragraphs 10-48 (hereinafter referenced as "FOF 10-48")*. Parent has been in constant communication with SSC and Student's teachers regarding Student's performance at school and has been involved with Student's education at Home School. Therefore, the decision rendered on the issues in this case will focus on the alleged denials of FAPE in the time frame dating back to May 28, 2020.

A. Petitioners have failed to prove that Respondents denied Student a FAPE failing to address requests for evaluations in a timely manner

Petitioners' first issue alleges numerous grounds for finding that Respondents failed to address requests for evaluations in a timely manner. Petitioners argue that Respondents inappropriately denied requests for evaluations or did not provide a proper PWN to explain their decision-making progress, failed to provide the standards and applicable criteria for evaluating requests for evaluations, failed to request an evaluation to ensure Student's FAPE, failed to determine the sufficiency of its data and/or failed to obtain additional data, failed to discuss the relevance of conducting a social/emotional behavior assessment, failed to have a BSP in place for multiple years, failed to adequately document the adverse effect of Student's involvement and progress in the general education curriculum, failed to follow procedures associated with an independent educational evaluation, and failed to convene IEP meetings regarding evaluations in a timely manner. The alleged violations of IDEA procedure raise in this issue must be reviewed pursuant to the determination of a denial of FAPE based on procedural violations. This means that in order to demonstrate that Respondents denied Student a FAPE, Petitioners must prove 1) that a procedural violation did occur, and 2) that the violation either resulted in a loss of educational opportunity for Student, significantly infringed on parental participation, or deprived

Student of an educational benefit. *Doug C.*, 720 F.3d at 1043, *Amanda J.*, 267 F.3d at 892.

Based on the facts of this case set forth above and the discussion below, this Hearings Officer finds that Petitioners failed to meet their burden of proving a denial of FAPE.

1. IEP meetings, prior written notices, and criteria for evaluating requests for evaluations¹²

Petitioners argue that Respondents denied Student a FAPE by not convening IEP meetings regarding evaluations in a timely manner, failing to provide proper PWNs to explain their decision-making process to Parents, and failing to provide Parents with the standards and applicable criteria for evaluating requests for evaluations. Reevaluations of students under the IDEA is codified in the H.A.R. under Section 8-60-35, which adopts the language in 20 U.S.C. §1414(a)(2) and 34 C.F.R. §300.303. A reevaluation may be requested by a parent or a teacher or if the department believes one is warranted and may be completed not more than once per year unless the parent(s) and the DOE agree otherwise, and not less than every three (3) years unless the parent(s) and DOE agree that a reevaluation is unnecessary. H.A.R. §8-60-35; 20 U.S.C. §1414(2); 34 C.F.R. §300.303.

In September 2020, Parent requested a reevaluation be done with Student to gain information to develop Student's annual IEP. *FOF 62*. Before SSC could convene a meeting for the IEP team to gather and determine what assessments would be part of Student's reevaluation, SSC was instructed to go ahead and proceed with the reevaluation of Student in the areas of written language and written expression. *FOF 63*. PWN-10/2/2020 was issued to explain that Student would be assessed in the areas of written language and written expression. *FOF 64*. While it would have been preferable and likely more efficient to convene the student-focused

¹² This discussion references Issues 1(a), 1(b), and 1(i) in the Prehearing Order.

team meeting to discuss the possible areas of need for the reevaluation, it was a harmless procedural violation not to do so. Parent's areas of concern for Student's reevaluation were explored as part of the reevaluation and it did not appear that Home School opposed the areas of expressed need or noted other areas in which Student needed to be assessed. Student did not lose an educational opportunity or was not deprived of any educational benefit due to the failure to have the team meeting to further explore possible assessments that could be given. Parent participation was not infringed upon, as the reevaluation was authorized to assess the specific areas of need in which Parent expressed concern.

Petitioners argue that Respondents failed to provide Parents with the standards and applicable criteria for evaluating requests for evaluations, but do not provide any legal authority that mandates the DOE to provide such information. Prior written notices issued when the DOE proposes or refuses to initiate or change the identification, evaluation, educational placement, or provision of a FAPE to the student must contain:

- 1) A description of the action proposed or refused by the department;
- 2) An explanation of why the department proposes or refuses to take the action;
- 3) A description of each evaluation procedure, assessment, record, or report the department used as a basis for the proposed or refused action;
- 4) A statement that the parents of a student with a disability have protection under the procedural safeguards of this chapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- 5) Sources for parents to contact to obtain assistance in understanding the provisions of this chapter;
- 6) A description of other options that the IEP team considered and the reasons why those options were rejected; and
- 7) A description of other factors that are relevant to the department's proposal or refusal.

H.A.R. §8-60-58; 20 U.S.C. §§1415(b)(3) & (c); 34 C.F.R. §300.503. Prior written notices relating to Student's October 2020 reevaluation adequately contained the required information to explain the DOE's reasons for initiating or refusing the actions by the team. *See FOF 65.*

The IDEA does not require the DOE to provide standards and applicable criteria to parents for evaluating requests for evaluations, especially internal administrative documents and memoranda distributed to school personnel. Petitioners appear to argue that the DOE was required to produce the memoranda regarding the evaluation of students for functional behavior assessments from December 2018 in response to Parent's request for Student to have an EBA and an FBA. The memoranda issued by the former DOE Superintendent in December 2018 was in response to a statutory change,¹³ which mandated that only licensed individuals within the State of Hawai'i provide applied behavioral analysis services. *FOF 167-168.* The IEP team's evaluation of how to manage Student's behaviors in the classroom was still made based on the information that the IEP team had at the time of the IEP-08/06/2021 development. *FOF 170-173.* Petitioners have failed to demonstrate that the DOE violated an IDEA procedure in not providing the internal memoranda or applicable criteria used by the DOE for the provision of specific assessments. Even if the failure of the IEP team to provide the memorandum to Parents were a procedural violation, Petitioners have not proven how the failure to do so resulted in a loss of educational opportunity, significant infringement on parental participation, or a deprivation of educational benefit. Throughout the time Student attended school under the

¹³ The Hawai'i Legislature enacted statutes relating to the provision of services to individuals with [REDACTED] or other similar healthcare needs. Among the statutes were regulations requiring individuals providing applied behavior analysis be licensed in the State of Hawai'i. Assessments determining the functional relations between behavior and environmental factors, known as a functional assessment and analysis, could now only be conducted by licensed individuals. See Haw. Rev. Stat. §465D (2018).

November 2016 BSP and the July 2021 BSP, Student's behaviors were managed sufficiently to allow Student to attend general education classes with Student's non-disabled peers. *FOF 173-175*. Student was not disciplined, suspended, or taken out of school due to unmanageable behaviors that affected Student or the other students in the classroom.

2. Determination of sufficiency of data, DOE not requesting an evaluation of Student, non-documentation of adverse effect of the general education curriculum on Student

Petitioners next argument is that the DOE failed to determine the sufficiency of its data under Appendix B of H.A.R. Chapter 60 and/or failed to obtain additional data. Petitioners also assert that the DOE failed to request an evaluation to ensure Student's FAPE and failed to document the adverse effect of the general education curriculum on Student.¹⁴

In this case, the IEP team did not convene a meeting to determine the sufficiency of its data before conducting Student's reevaluation in October 2020. *FOF 64*. Home School followed instructions of Prior DES to authorize the reevaluation of Student instead of convening a student support meeting to determine as a group what additional data would be needed to develop Student's IEP. *FOF 63*. A meeting of the entire team would have allowed the team members to discuss what data they had and what assessments would have been most useful to evaluate Student's levels of performance, needs, goals, and supplemental supports would be needed for Student's IEP development. However, SSC and Current SPED Teacher did have data from Student's performance in classes and enrichment activities from Student's participation in the 2019-2020 school year and the summer 2020 ESY session. *FOF 199-200*.

The DOE initiated the reevaluation of Student in October 2020 and the IEP team reviewed the reevaluation results in May 2021. *FOF 64, 71-72, 78-79*. The length of time that

¹⁴ This section covers Issues 1(c), 1(d), and 1(g).

the reevaluation took from start to the eligibility meeting was longer than usual, but it was due to additional assessments being conducted at the request of Parents.

At the eligibility meeting in May 2021, the team reviewed the data and the information contained in the evaluation summary report and determined that Student continued to be eligible for special education and related services. *FOF 79*. At the time of the eligibility meeting, the IEP team had sufficient data to determine the present levels of academic achievement and functional performance of Student, the specially designed instruction that Student needed, and the necessary modifications or additions to the special education and related services that would be necessary for Student to achieve goals and objectives in an IEP. *FOF 119-131; see also* H.A.R. Chapter 60, Appendix B; P-Ex.P25, p.1841. Petitioners have not proven that the DOE did not have sufficient data to determine Student's eligibility based on Student's October 2020 reevaluation or need to convene another reevaluation for Student.

Petitioners also argue that the IEP team did not describe the specially designed instruction in Student's IEP-08/06/2021 or Student's evaluation summary report. Throughout the Hearing, Petitioners alluded to a description of specially designed instruction being the equivalent of teachers indicating for each type of assignment or lesson exactly in what way the assignment would be adapted or modified for Student. This requirement under the IDEA to describe or identify Student's specially designed instruction does not require an IEP team or specific teachers to go through each assignment provided to Student and indicate how the assignment is being modified. Educators are given deference to their professional experience and understanding of how to do their jobs and it is not for courts or judicial bodies to impose or restrict the school's ability to make their professional determinations in teaching students. *Rowley*, 458 U.S. at 207, 102 S.Ct. at 3034; *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631

F.3d 1117, 1122 (9th Cir. 2011); *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 952 (9th Cir. 2010); *S.M. v. Hawai‘i Dept. of Educ.* 808 F.Supp.2d 1269, 1278 (D. Hawai‘i 2011).

Student’s IEP-08/06/2021 identifies the specially designed instruction that would be provided to Student. *FOF 155*. For example, Student’s IEP-08/06/2021 includes supplementary supports of modifying assignments to allow Student extended time to complete assignments, using different modalities of completing the assignments (i.e. using a computer or mechanical pencils), and modifying assignments to allow Student to complete less than the general education students (i.e. writing three (3) paragraphs instead of five (5) paragraphs in an essay assignment). The IDEA does not require the IEP teams or students’ teachers to list every modification made to each of the students’ assignments to comply with the requirement of identifying specially designed instruction. *FOF 154*. Petitioners have failed to prove that the DOE needed to request an evaluation for Student to ensure that Student was being provided a FAPE.

Finally, Petitioners argue that the DOE failed to document the adverse effect of Student’s involvement and progress with the general education curriculum. Petitioners have not provided evidence to show any adverse effect that Student’s participation in the general education curriculum has had on Student during the course of the 2020-2021 or 2021-2022 school years. While Student has demonstrable difficulties in the area of written expression, that is the specific area of concern that most of Student’s IEP-08/06/2021 goals and objectives focus on. Student otherwise participates in class activities with Student’s peers, has been able to keep up with grade level standards in mathematics and reading, and has attained acceptable general report card and IEP progress report marks. *FOF 200-205*. Petitioners have failed to prove that Student has suffered adverse effect based on Student’s involvement and progress with the general education curriculum.

3. Social/Emotional Behavior Assessment

Petitioners argue that the DOE failed to discuss the relevance of conducting a EBA at Parent's request, as the last EBA conducted with Student was done in 2016. Petitioners note that Parents' concerns with Student's change in circumstances, including additional diagnoses or concerns, justified the assessment. Petitioners do not specify what specific change in circumstances would justify the EBA, but in this case, the DOE did acknowledge Parents' request for an EBA and discussed whether one was necessary at a meeting on August 6, 2021. *FOF 95*. During the meeting, the IEP team looked at Student's behaviors in school and determined that they were currently being managed by the behavior support plan that Student had in place to allow Student to participate in the general education classroom. *FOF 173*.

In 2013 when Student was referred for an EBA, Student was referred due to inattention, limited interaction with peers, difficulty following simple direction, and physical aggression towards peers, as well as self-stimulating behaviors and an obsession with [REDACTED]. *See FOF 13*. In 2016, when Student was evaluated through another EBA, Student was still exhibiting difficulties with attentive listening and focusing, responding appropriately to adult directives, following classroom instructions, complying with rules consistently, and exhibiting undesirable behaviors when attempting to avoid work or tasks. *See FOF 170*. In Student's 2020 reevaluation assessments, Student displayed attention to tasks and was able to complete prompts as requested; demonstrated appropriate functional communication skills; attended to tasks and worked to completion; was cooperative with the assessment and engaged in the activities; experienced minimal distractions due to noise and accommodations due to COVID-19; and remained seated without restlessness for one (1) hour of testing. *FOF 119, 123, 126, 129*.

At the time Parents requested an EBA for Student in August 2021, Student had also attended summer ESY 2021 session and had experienced modified school attendance due to COVID-19. Student's summer 2021 ESY progress report indicated that Student completed work and made progress on writing and math, worked cooperatively with peers, and checked Student's work before completion. Nothing in the assessments, progress reports, or observations of Student in school indicated to the team that Student had demonstrated concerning behaviors that would warrant an EBA. Petitioners have not proven that the DOE denied Student a FAPE by failing to conduct an EBA.

4. Behavior Support Plan

Petitioners argue that the DOE failed to have a BSP in place for Student for multiple years, noting that Student's last formulated BSP was dated November 2016. Petitioners have demonstrated that Home School had not formally reviewed and updated Student's November 2016 BSP until 2021, when a new BSP was drafted and adopted in July 2021. *FOF 163-166*. This is a procedural violation by Respondents since a behavioral plan that is included within Student's IEP should be updated along with the IEP annually to ensure that the plan is still addressing Student's behavioral needs. However, Petitioners must also prove that the violation resulted in a loss of educational opportunity, significant infringement of parental participation, or a deprivation of educational benefits.

Student's November 2016 BSP contained several accommodations and modifications that were also included in Student's IEP-04/18/2020 and IEP-08/06/2021. *FOF 145, 171-172*. For example, the November 2016 BSP included supports to prevent Student's behavioral triggers, such as breaking down tasks, adult assistance at beginning of task, and frequent checks for understanding, redirection, consistent and firm boundaries to be enforced, and practiced

classroom routines. Student's IEP-04/18/2020 included supplementary aids and services of repeating and chunking directions, checking for understanding frequently, structured learning environment with rules and routines followed consistently in classroom and in school, and behavioral support to be provided throughout the day. *FOF 44*. The November 2016 BSP was noted to serve as a guide for the adult support to use in conjunction with best practices in the classroom. The November 2016 BSP also included behaviors that the team wanted to teach Student, such as determining when Student needs a break and how to request one and continued learning of classroom and school rules. *FOF 171*. The IEP-08/06/2021 included a specific goal for Student to work on-task and ask relevant questions and additional supplementary supports including a behavioral checklist, pre-planning for future assignments, and additional structure to the learning environment. *FOF 145*.

While the November 2016 BSP was not formally reviewed and updated until July 2021, Student continued to have the behavioral supports and supplementary aids in Student's IEP-04/18/2019 and IEP-08/06/2021, which allowed Student to continue to make progress on Student's behaviors in school. As discussed in Section A(3) above, Student's behaviors reported in earlier behavioral assessments were minimal or non-existent in Student's assessments during the October 2020 reevaluation. Student also continued to make appropriate progress on Student's IEP goals and objectives and earned appropriate marks on Student's general education report cards throughout the 2020-2021 and 2021-2022 school years. *FOF 200-205*. Most importantly, Student's behaviors were managed by the supports put in place by Home School to allow Student to continue participating in the general education classes with non-disabled peers. Petitioners have not raised any concerns or produced any evidence of behaviors that increased or appeared during the time when the November 2016 BSP was in place that warranted a change in

placement, suspension of Student, or significant lack of progress in Student's academics. Petitioners have also not produced any evidence that Student's unaddressed behaviors prevented Student from accessing any activities or benefits while being at Home School. Finally, Petitioners were at all the IEP meetings during which the BSP and other behavioral supports were discussed as part of Student's IEP-04/18/2019 and IEP-08/06/2021 and acknowledged that the only copies of the behavioral support plan for Student that they had were the November 2016 BSP and subsequently, the July 2021 BSP. *FOF 28, 47, 152.*

While Home School committed a procedural violation by not formally reviewing and updating Student's behavioral support plan annually with Student's IEPs, this Hearings Officer concludes that the violation did not rise to the level of a denial of FAPE, as Petitioners have not proven that the violation resulted in a loss of educational opportunity for Student, a significant infringement of parental participation, or a deprivation of educational benefits for Student.

5. Independent Educational Evaluation

Petitioners allege that the DOE failed to follow procedures associated with an IEE, specifically arguing that the Petitioners disagreed with the IEP team's decision not to conduct an FBA or an EBA for Student.

The IDEA provides the parent(s) of a student with a disability the right to obtain an IEE of the student, subject to certain requirements and limitations. H.A.R. §8-60-57(a)(1); 20 U.S.C. §1415(b)(1); 34 C.F.R. §300.502(a)(2). Upon a request for an IEE, the DOE must provide parents with information about where an IEE may be obtained and the DOE criteria applicable for IEEs. H.A.R. §8-60-57(a)(2); 20 U.S.C. §1415(b)(1); 34 C.F.R. §300.502(a)(1). Parents have a right to an IEE at public expense if the parents disagree with an evaluation done by the DOE or

may obtain an IEE at private expense and share it with the DOE for consideration in a student's IEP. H.A.R. §8-60-57(b) & (c); 20 U.S.C. §1415(b)(1); 34 C.F.R. §300.502(b) & (c).

The record in this case is devoid of any evidence that Parents made any request for an IEE for Student based on any of the reevaluations that were completed for Student. Parents were present at the May 21, 2021 and August 6, 2021 meetings wherein the reevaluation results were discussed and Student was determined to be eligible for continued special education and related services. *FOF 79, 94*. Parents received a copy of the May 21, 2021 evaluation summary report, as well as copies of the November/December 2020 speech-language assessment report, the December 2020 Academic Assessment report, the March 2021 cognitive assessment report, and the March 2021 fine motor assessment report. *FOF 71-72, 78-80, 117*. At no time did Parents inform the IEP team that they disagreed with the results of the assessments that were completed or the evaluation. Additionally, no evidence in this case exists that Parents obtained a privately funded evaluation between May 2020 and March 2022 (when the instant Complaint was filed) and presented it to the IEP team for consideration.

Parents did indicate to the IEP team that Parents wanted further testing in the form of an EBA or an FBA, and the IEP team determined that data would be collected to examine the need for either of the assessments for Student. Even if Parent's request that the IEP team order an EBA or an FBA for Student was considered a request for an IEE, Petitioners must demonstrate that the failure of the DOE to follow the procedures resulted in a loss of educational opportunity, significant infringement on parental participation, or a deprivation of educational benefits.

Upon receiving a request for an IEE from a parent, the DOE must either provide an IEE or file a due process complaint to request a hearing to determine that the evaluation that was completed is appropriate. H.A.R. §8-60-57(b)(2); 20 U.S.C. §1415(b)(1); 34 C.F.R.

§300.502(b)(2). In this case, the DOE completed four (4) assessments as part of Student's reevaluation in the areas of speech-language, academic, cognitive, and fine motor. *FOF 116*. The evidence presented supports the determination that Student has needs related to accessing Student's education are in the areas of written expression, written language, behaviors such as inattention or off-task behaviors, and confidence issues that can be associated with being aware that Student has a disability. *FOF 119-130*. The assessments that were completed as part of the October 2020 reevaluation addressed all the appropriate areas of concern and provided the IEP team with valuable information that was used to develop Student's IEP-08/06/2021. *FOF 131*.

While Parent's apparent concern about the reason Student has such difficulty with writing and focusing on tasks is understandable, the IEP team's focus is not diagnosing any specific cause for Student's disability but rather to determine ways to allow Student to make progress in light of Student's disability. Petitioners have not demonstrated that an EBA is necessary to address Student's difficulties with writing or paying attention and staying on task, and based on previous EBAs conducted with Student, would not likely provide the answers that Parent is seeking. *See FOF 13, 20*.

Based on the data collected as part of Student's behavior support plan from May 2020 to the 2021-2022 school year, none of Student's behaviors in this case rise to the level as described in the December 31, 2018 Superintendent memorandum, which limited the use of an FBA to behaviors that are dangerous to the student or others; causes significant property damage; impedes the student's learning or the learning of others and when less intensive/restrictive interventions have not been or are not expected to be successful; leads to a possible move to a more restrictive educational setting; and results in disciplinary considerations including a

violation of the student conduct code that is determined to be a manifestation of the child's disability.

Petitioners have failed to prove that the DOE failed to follow procedures associated with an IEE request since the record does not reflect that an IEE was requested by Parents in this case. Even if Parent's request for an FBA/EBA were considered an IEE request, the DOE did not deny Student a FAPE because Student's October 2020 reevaluation was appropriate and no IEE is warranted.

B. Petitioners have not proven that the DOE denied Student a FAPE by failing to develop appropriate IEPs for Student

Petitioners next issue raises the question of whether the DOE denied Student a FAPE by failing to develop appropriate IEPs for Student. Petitioners argue that the DOE failed to perform an annual review and/or have an IEP in place at the start of the 2020-2021 and 2021-2022 school years; failed to properly consider and document Student's PLEPs and note that the DOE uses old terminology that does not address the current standard of "present levels of academic achievement and functional performance;" that Student's PLEPs do not reflect significant discussion regarding Student's diagnoses of [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] with Impairment in Reading; failed to consider transition services for Student prior to Student reaching the age of fourteen (14); failed to create appropriate goals and objectives for Student; failed to document one-to-one goals and objectives with the PLEPs for Student; failed to ensure that Student's goals are measurable; failed to define the standard for ESY and failed to authorize Student for ESY services; failed to provide sufficient special education, related services, supplemental aids and program supports for Student; failed to consider accommodations for Student in statewide

assessments; failed to properly state an appropriate LRE for Student; and failed to ensure necessary attendees at the IEP meetings for Student.

As this Hearings Officer has already concluded that Petitioners have not proven any exception to the two (2) year time limitation for claims filed in a due process complaint, this analysis will focus solely on Student's IEP-08/06/2021, except for the issue regarding the failure to review and/or develop an IEP for Student during the 2020-2021 and 2021-2022 school years.

In determining whether an IEP is substantively appropriate, or reasonably calculated to enable the student to make progress in light of the student's unique needs, a reviewing body is to apply a "snapshot rule," meaning that the IEP must be considered based on information that was available to the IEP team at the time of the IEP development. *See L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1004 (9th Cir. 2017); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). Based on a thorough review of Student's IEP-08/06/2021, along with the analysis set forth below, this Hearings Officer finds that Student's IEP-08/06/2021 was reasonably calculated to enable Student to make progress in light of Student's unique needs and enabled Student to access Student's education to the maximum extent possible with Student's non-disabled peers.

1. Petitioners have not proven that the DOE denied Student a FAPE by failing to perform an annual review and/or have an IEP in place at the start of the 2020-2021 and 2021-2022 school years

Petitioners first argument is that the DOE denied Student a FAPE by failing to have an annual review of Student's IEP or an IEP for Student in place prior to the start of the 2020-2021 school years. A determination of whether the DOE commits a denial of FAPE by not annually reviewing a student's IEP or not having an IEP in place at the start of the school year is based on an analysis of a procedural violation. The IDEA provides that "each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP team: (i) reviews the child's

IEP periodically, but not less than annually, to determine whether the annual goals of the child are being achieved...” 34 C.F.R. §300.324(b)(1)(i), 20 U.S.C. §1414(d)(4)(A)(i), H.A.R. §8-60-48(b)(1)(A).

“The core of the IDEA is the cooperative process that it establishes between parents and schools...The central vehicle for this collaboration is the IEP process.” *Doug C.*, 720 F.3d at 1044 (quoting *Schaffer v. Weast*, 546 U.S. 49, 53, 126 S.Ct.528, 163 L.Ed.2d 387 (2005)).

Reviewing courts have determined that procedural violations that conflict with each other, such as the review of an annual IEP before the expiration of the IEP or the parent’s ability to participate in the meeting much be decided in favor of having parents participate in the process. *Id.*

In March 2020, the COVID-19 global pandemic affected the State of Hawai‘i, shutting down businesses, schools, and nearly all public places. *See FOF 52; see also* Governor of the State of Hawaii’s Third Supplementary Proclamation Related to the COVID-19 Emergency, effective March 23, 2020. At the time of Student’s annual IEP review in April 2020, Home School personnel were not equipped to conduct IEP meetings in person or through virtual meetings and sent out a notice to Parents indicating that the annual IEP meeting would be postponed due to the COVID-19 pandemic. *FOF 53.* As early as May 2020, Current SPED Teacher attempted to schedule a meeting through videoconference with Parents to review Student’s IEP. Parent informed Current SPED Teacher that Parent wanted to wait until Student was back in school to conduct the IEP meeting to accurately determine Student’s needs. *FOF 57.* Parent indicated that Parent wanted Student’s IEP-04/18/2019 to remain in place until Student could be evaluated for development of Student’s IEP.

In September 2020, Parent requested a reevaluation of Student and Home School proceeded with the evaluation process for Student while continuing to implement Student's IEP-04/18/2019 as agreed upon by Parent. *FOF 62*. Student's reevaluation took additional time due to additional assessments requested by Parent and Student's eligibility for IDEA special education and related services was confirmed in May 2021. *See FOF 63, 71-79*. Student's IEP was not developed until August 2021, due to the need for continued meetings on Student's IEP and scheduling. *FOF 82-85, 92-95*. Student's IEP was finalized on August 6, 2021, a few days after the 2021-2022 school year began on August 3, 2021. *FOF 88, 94*. Parent acknowledged to the IEP team upon receipt of the IEP-08/06/2021 that Parent wanted to make sure the services and supports provided could be implemented as soon as possible since the school year began. *FOF 97*.

Based on the agreement with Parent to continue the IEP-04/18/2019 until Student could be reevaluated, the DOE had an IEP in place for the 2020-2021 school year and the summer 2021 ESY session. The DOE committed a procedural violation by not completing Student's IEP prior to the start of the 2021-2022 school year, since the reevaluation of Student had been completed. However, Petitioners have the burden of proving that the procedural violation resulted in a loss of educational benefits, significant infringement on parental participation, or a deprivation of educational benefits.

Petitioners have not produced any evidence to show that Student's did not receive special education and related services as provided in Student's IEP-04/18/2019 at the start of the school year or that the three (3) day delay in the finalized IEP-08/06/2021 resulted in Student missing any educational opportunities or educational benefits. While it would have been prudent for Home School to schedule the IEP meetings for Student prior to the school year began or obtained

another agreement from Parents to continue the IEP-04/18/2019 until the new IEP was completed, Petitioners have not proven that failing to have an IEP in place prior to the start of the 2021-2022 school year rose to the level of a denial of FAPE to Student.

2. Petitioners have not proven that the DOE denied Student a FAPE by failing to properly consider and document Student's PLEPs in the IEP-08/06/2021 and Student's PLEPs appropriately document discussion regarding Student's diagnoses

Petitioners argue in Issues 2(b) and 2(c) that the DOE failed to properly consider and develop Student's PLEPs and that the PLEPs do not reflect significant discussion of Student's diagnoses of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] with Impairment in Reading. Petitioners further argue that due to the DOE using outdated terminology of "PLEPs" the IEP team did not consider the accurate standards of evaluation of Student's present levels of academic achievement and functional performance.

The IDEA requires that an IEP contains "a statement of the child's present levels of academic achievement and functional performance including- (aa) how the child's disability affects the child's involvement and progress in the general education curriculum." 20 U.S.C. §1414(d)(A)(i)(I); H.A.R. §8-60-44. While the IDEA's emphasis on identifying a disabled child's specific needs and addressing them indicates that the IDEA intends that IEPs contain accurate information about a child's diagnosis, a failure to include a specific diagnosis does not necessarily result in a denial of FAPE. *Fort Osage R-1 School Dist. v. Sims ex rel. BS*, 641 F.3d 996, 1004 (8th Cir. 2011). In this case, Student's diagnoses of [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] were included in Student's IEP-08/06/2021 as identified by Student's personal physician. *FOF 134*. A discussion of a possible diagnosis of [REDACTED] was considered by the IEP team and documented

in Student's PLEPs. Student's eligibility category of [REDACTED] due to reading and writing was also listed on Student's IEP under educationally relevant information.

As noted above, the importance of determining Student's diagnosis is to develop an educational program that addresses Student's unique needs in light or alongside Student's diagnoses. The IEP-08/06/2021 PLEPs also contained information from Student's performance in school during the 2020-2021 school year, scores for various subject matter assessments from the 2020-2021 school year, a list of Student's strengths and needs for each subject matter (both self-reported and reported by the teachers), a list of supports that Student was provided during the 2020-2021 school year and their effectiveness, and information from Student's evaluation summary report from the October 2020 reevaluation. *FOF 134-135*. The nine (9) pages of PLEPs contained sufficient information from which the IEP team could determine an appropriate educational program for Student for the 2021-2022 school year.

While specific discussions regarding Student's diagnoses were not documented in Student's PLEPs, Student's in-school performance based on the supports provided to Student during the 2020-2021 school year are a more significant measure of what Student would need in Student's IEP for the upcoming school year. Petitioners have not proven that the DOE failed to properly consider and document Student's PLEPs or have a significant discussion regarding the diagnoses given by Student's physician in determining Student's educational program for the 2021-2022 school year.

3. Petitioners have not proven that the DOE denied Student a FAPE by failing to consider transition services for Student prior to Student reaching the age of fourteen (14)

Petitioners argue that the DOE failed to consider transition services for Student [REDACTED]

[REDACTED]. The IDEA requires that

[B]eginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter-

- (aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;
- (bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and
- (cc) beginning not later than one year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

20 U.S.C. §1414(d)(1)(A)(VIII). The H.A.R. provides an additional support of having the IEP team "include a statement of the transition service needs of the student under applicable components of the Student's IEP that focuses on the student's courses of study" beginning at age 14 or younger if determined appropriate by the IEP team. H.A.R. §8-60-44(b)(1).

In this case Petitioners have not provided any legal or evidentiary support to indicate that Student requires or would be appropriate for transition services prior to Student turning fourteen (14) years old. SSC testified that Student is capable of working at or near grade level in most subjects and functional areas for ██████████ school children, with the exception of writing. *FOF 136-137*. It does not appear from review of Student's assessments, progress reports, and other data produced at this Hearing that Student would be appropriate for transition services ██████████
██████████ Petitioners have not proven that Student's IEP-08/06/2021 is not appropriate because it does not discuss transition services for Student, who has not yet ██████████
██████████.

4. Petitioners have not proven that the DOE denied Student a FAPE by failing to create appropriate goals and objectives for Student or failing to document one-to-one goals and objectives with the PLEPs for Student

Petitioners next issue alleges that the DOE did not create appropriate goals and objectives for Student and/or failed to document one-to-one goals and objectives with the PLEPs for

Student. The IDEA requires that an IEP include “a statement of measurable annual goals, including academic and functional goals, designed to – (aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and (bb) meet each of the child’s other educational needs that result from the child’s disability.” 20 U.S.C. §1414(d)(1)(A)(II); H.A.R. §8-60-44(2).

Student’s IEP-08/06/2021 identifies Student’s main needs in the area of reading, writing, and behavior, which is consistent with the information obtained by the reevaluation and Student’s performance in the 2020-2021 school year. *FOF 138*. Student performs at or near grade level in areas of speaking, listening, math, and functional performance. The goals and objectives in Student’s IEP-08/06/2021 directly address Student’s needs in the areas of reading, writing, and behavior. While the goals may not be labeled as one-to-one goals for each need that is listed, it is clear from the formulation of the goals and objectives that they are designed to address the specific needs identified in the PLEPs. *FOF 139*.

Petitioners have not presented evidence that Student has additional needs that were not identified by the IEP team or addressed with the goals and objectives in the IEP-08/06/2021. Based on Student’s IEP progress reports and grade-level report cards, Student has been making progress on the goals and objectives in the IEP-08/06/2021. *FOF 201-205*. Petitioners have failed to prove that the DOE failed to create appropriate goals and objectives for Student or failed to document a one-to-one goal and objectives with the PLEPs for Student.

5. Petitioners have not proven that the DOE denied Student a FAPE by failing to ensure that Student’s goals are measurable

Petitioners allege that the DOE failed to create goals and objectives that are measurable in Student’s IEP. The IDEA does not provide a definition of what constitutes a “measurable goal and objective,” but the long-standing review of IDEA cases is that courts or reviewing bodies

should not “substitute their own notions of sound educational policy for those of the school authorities which they review.” *Rowley*, 458 U.S. 206; 102 S.Ct. at 3051, 73 L.Ed.2d 690. The U.S. Supreme Court in *Rowley* noted that the IDEA’s strict imposition of procedural safeguards and standards with which the states must comply do not intend that courts can impose substantive standards of review that cannot be derived from the statutory language of the IDEA. *Id.*

Student’s IEP-08/06/2021 contains goals and objectives that require Student to complete enumerated tasks at a consistency rate that increases over the course of the school year. *FOF 140-141*. Student’s objectives have a specific level of increased difficulty that would need to be completed during each reporting period, which leads up to the completion of the annual goal. While the determination of whether Student accomplishes each goal in the assigned tasks is dependent upon the teacher’s or service provider’s evaluation or grading of Student’s work, nothing in the IDEA requires that goals or objectives be measured by a different standard. Since Student’s goals and objectives relate primarily to reading comprehension, written language, and written expression, a standardized measurement for proficiency is not as accessible as it would be for a subject like mathematics. Additionally, Student’s teachers and service provider were able to measure and rate Student’s progress on Student’s goals over the course of the 2021-2022 school year, which would suggest that in their professional expertise, the goals and objectives were measurable. *FOF 202*. Petitioners have not presented any evidence to prove otherwise or demonstrated that Student’s IEP-08/06/2021 goals and objectives were not measurable.

6. Petitioners have not proven that the DOE denied Student a FAPE by failing to define the standard for ESY or by not authorizing Student for ESY services

Petitioners raise the question of whether the DOE failed to define the standard for ESY or failing to authorize Student for ESY services. A school must provide ESY services only if the

child’s IEP team determines that the services are necessary ‘for the provision of FAPE to the child.’ *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008). To qualify for extended school year services, “a claimant seeking an ESY must satisfy an even stricter test, because ‘providing an ESY is an exception and not the rule under the regulatory scheme.’” *Hellgate*, 541 F.3d at 1211, quoting *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6th Cir.) quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), cert. denied, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); see also *Dep’t of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 *7 (holding that ESY is “educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information during a break in regularly scheduled classes, such as during the summer.”). The standard for ESY is higher than the standard for the provision of special education and related services due to the requirement to show that the benefits the student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during school breaks. *Id.*, quoting *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002); see also *K.K. ex rel. K.S.K. v. Hawaii*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6th Cir. 2004) (confirming that “it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.”). Schools are not required to provide a student with all services in the student’s IEP; ESY services may be limited to the goals necessary to prevent skills or benefits already accrued from the prior year from facing significant jeopardy due to regression or lack of retention. *McQueen v. Colorado Springs Sch. Dist. No. 11*, 45 IDELR 157 (2006). Questions regarding eligibility criteria for ESY and methodology are “classic examples of technical questions of educational policy.” *Virginia S. ex*

rel. Rachael M v. Dep't of Educ., Haw., 2007 WL 80814 *12 (D. Hawai'i 2007).

Student's IEP-08/06/2021 qualifies Student for ESY services for breaks longer than twenty (20) days in length to maintain behavioral and fine motor skills that are taught to Student during the school year. *FOF 143*. Petitioners question whether a significant discussion regarding regression or recoupment occurred during Student's ESY discussion, however, do not raise any specific examples, concerns, or questions regarding Student's ability to maintain academic progress made during the school year. On the contrary, Student's ability to progress during the school year after returning from regular school breaks during the year (fall, winter, spring breaks) suggests that Student does not need ESY services during the shorter breaks. *FOF 202*.

While it would have been helpful for the IEP-08/06/2021 to document the discussion regarding why Student does qualify for ESY over a longer break and to what extent the services provided during ESY would be directed toward preventing regression in Student's behavior and fine motor skills, failure to do so does not render the IEP-08/06/2021 a denial of FAPE. Unlike school year special education and related services, for ESY services Petitioners must prove the necessity of the service due to regression during breaks or extended periods of recoupment of skills lost. Petitioners have not done so in this case and Student has still been qualified for ESY services. Petitioners have failed to prove that the DOE denied Student a FAPE by failing to define the standard for ESY services or failed to authorize Student for ESY services.

7. Petitioners have not proven that the DOE denied Student a FAPE by failing to provide sufficient special education, related services, supplementary aids, and program supports for Student

Petitioners next argue that the DOE failed to provide sufficient special education, related services, supplementary aids, and program supports for Student in the IEP-08/06/2021.

Petitioners focused extensively during the hearing on the lack of specificity “as to the nature of the specially designed instruction” that was to be provided to Student or the breakdown of special education minutes that would be allotted to specific goals and objectives for Student. Petitioners do not point to any statutory or case law requirements that a student’s IEP must specifically describe the specially designed instruction that would be provided to the student in school.

The history of the IDEA’s enactment does not demonstrate an intent of Congress to impose upon States a greater substantive educational standard than would be necessary to make access for disabled children meaningful. Courts have consistently noted that the intent of the IDEA was “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *M.L. by Leiman v. Smith*, 867 F.3d 487, 495 (4th Cir. 2017) (*quoting Rowley*, 458 U.S. at 192, 102 S.Ct. at 3034, 73 L.Ed.2d 690). A school district is the final arbiter of the educational program to allow students access to the general education curriculum and “parents, no matter how well-motivated, do not have the right under the IDEA to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their [disabled] child.” *Forest Grove School Dist. v. Student*, 2014 WL 2592654, *25 (D. Oregon 2014) (*quoting Lachman v. Illinois St. Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988)).

Petitioners made many attempts during the Hearing to have SSC point to specific areas in the IEP-08/06/2021 where Student’s specially designed instruction is described in particularity, and SSC pointed to modifications and supports in the IEP-08/06/2021 that would inform a reader of how Student’s assignments would be modified. SSC also explained that most of the supports that are provided in Student’s IEP-08/06/2021 constitute ways that instruction would be modified

to meet Student's needs. As explained by SSC, anything that altered the way that Student completed or learned the assignment that was different from the general education students would constitute a modification or adaptation to the content, methodology, or delivery of instruction. Having a cogent explanation of the way Student's education would be modified through the supplementary aids and supports in the IEP-08/06/2021 provides a basis for this Hearings Officer to accept the sound educational policy of the school authorities in this case and find that Student's IEP-08/06/2021 provides sufficient special education, related services, supplemental aids and program supports for Student. *See FOF 153-155.* Petitioners have not proven that any more explanation in the IEP-08/06/2021 is required, or that any additional special education, related services, supplementary supports, or program modifications are necessary for Student to receive a FAPE.

8. Petitioners have not proven that the DOE denied Student a FAPE by failing to consider accommodations for Student in statewide assessments

Petitioners raise the concern of whether the DOE failed to consider accommodations for Student in statewide assessments. Student's IEP-08/06/2021 contains accommodations for Student to receive text-to-speech – embedded, and notes that “the [IEP] team will continue to gather data to present to the state office to determine the appropriateness of the accommodations on the statewide Smarter Balance Assessment.” *FOF 148.* It is clear that the IEP team not only considered accommodations for Student for statewide assessments, but also put additional efforts into securing such accommodations for Student. While the determination of whether certain accommodations would be provided to Student at the assessment is outside the scope of the IEP team, Petitioners have not proven that the IEP team failed to consider accommodations for Student in statewide assessments.

9. Petitioners have not proven that the DOE denied Student a FAPE by failing to appropriately state an LRE for Student

Petitioners allege that the DOE failed to appropriately state a least restrictive environment for Student in the IEP-08/06/2021. As the IDEA's purpose is to allow disabled students to be educated with non-disabled students to the maximum extent possible, a student's IEP must contain a statement to describe the extent to which a student will participate with non-disabled students in the school setting. 34 C.F.R. §300.114(a)(2); *see also Rowley*, 458 U.S. at 202-203, 102 S.Ct. at 3039, 73 L.Ed.2d 690; 20 U.S.C. §1412(a)(5); 34 C.F.R. §300.550; H.A.R. §8-60-44.

The Ninth Circuit Court of Appeals in *Sacramento City Unified School District, Board of Education v. Rachel H.*, adopted a four (4) factor test for reviewing bodies to determine whether a student's placement was in the least restrictive environment appropriate for the student. 14 F.3d 1398, 1404 (9th Cir. 1994). The analysis of an LRE reviews: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect a student has on the teacher and children in the regular class; and 4) the costs of mainstreaming the student. *Id.*

The record before this Hearings Officer provides sufficient evidence to conduct the analysis of Student's least restrictive environment. The educational benefits of Student being placed in the [REDACTED] regular education classroom full time allows Student to work alongside Student's peers and maintain academic progress in subjects in which Student performs at or near grade level. *FOF 151*. Student is provided instruction by the regular education teachers while the general education students are receiving the same instruction, and the modifications are made to Student's assignments or instruction when necessary to focus on Student's areas of difficulty. *FOF 184-186, 188*. Student works on group projects with general education students in the

classroom and is able to contribute effectively to the group's research and presentation. *FOF 189, 192.* The non-academic benefits of Student's placement in the general education classroom are that Student is able to form friendships with non-disabled peers, play with those peers and converse with them; Student follows school rules and expectations; Student learns to understand Student's feelings and those of others, as well as consequences of Student's actions, such as recognizing when Student is not following rules. *FOF 151, 189.*

The effect that Student has on the teachers and other students in the regular education classroom appears to be minimal, as Student is able to work with fellow students and does not create or initiate excessive disruptions to other students or the teacher during instructional time. *FOF 199.* Student's teachers and aides have been able to use Student's behavior support plan to manage Student's behaviors so they do not impact the instruction or education of other students in the general education classroom. Finally, while the costs of mainstreaming Student is a factor to be considered, neither Petitioners nor Respondents have raised the costs associated with Student as an issue for placement. Indeed, since Student is provided support by teachers and educational aides that are already in the classroom for other students and since Student's supplementary aids and supports are not excessively costly, the cost of mainstreaming Student does not weigh against Student being placed in the general education classroom full time.

Student's IEP-08/06/2021 does provide that Student's placement is in the general education classroom inclusion setting at Home School, which is a setting in which the regular education classes are housed in a large classroom with different areas for different subjects and the educational assistants are available for all students to access. Student's IEP-08/06/2021 LRE does not include a statement that Student may be pulled out to receive special education or occupational therapy in a resource room or other setting, however the testimony in this case is

that if necessary, Student may be pulled from the general education classroom for those services. The omission of the pull-out service notation in the LRE statement of Student's IEP-08/06/2021 is akin to the failure of the DOE to specify the criteria for Student's eligibility for ESY. While it would have been helpful and appropriate, it does not necessarily render Student's IEP-08/06/2021 a denial of FAPE. Petitioners have not demonstrated that the omission of such language has put Student at a disadvantage or that Student has not been appropriately education alongside non-disabled peers in the manner provided in Student's IEP-08/06/2021. Petitioners have not proven that Student's IEP-08/06/2021 failed to state an appropriate least restrictive environment for Student.

10. Petitioners have not proven that the DOE denied Student a FAPE by failing to ensure necessary attendees at the IEP meeting on August 6, 2021 for Student

Petitioners' final argument regarding Student's IEP development is that the DOE denied Student a FAPE by failing to have the necessary attendees at the IEP meetings for Student. As this Hearings Officer has already concluded that Petitioners have not proven any exception to the two (2) year time limitation for claims filed in a due process complaint, this Hearings Officer will focus on the attendees at the IEP-08/06/2021 development meeting.

To the extent that Petitioners claim that the DOE misled Petitioners by failing to note that SSC acted as an administrator-designee during some of the meetings in the past, this Hearings Officer points out that Petitioners received all Student's IEPs from 2013 through 2019. Included as the last page on each IEP is the list of attendees at the meeting and their positions. *See* P-Ex.P5, p.0174-0175, 0188-0189, 0199, 0211, 0220, 0228, 0239, 0251, 0265. The statute of limitations under the IDEA begins from the date that the parents knew of the complained action, not from the date the parents knew the action was wrong. *Bell v. Bd. of Educ. of the Albuquerque Pub. Schs.*, 2008 WL 4104070 *17 (D.N.M. 2008); *Lauren G. v. West Chester Area*

Sch. Dist., 906 F.Supp.2d 375, 386 (E.D.Penn. 2012). Petitioners had knowledge of the presence of SSC at meetings where either a principal or vice principal was absent at the meeting. Whether Petitioners knew that an administrator should have been at the meeting has no bearing on the time limitations under the IDEA.

Petitioners also argue that Petitioners were misled because SSC did not have administrative powers under the IDEA to approve or authorize the services or supplementary aids and supports provided in the IEP. This is a mischaracterization of what SSC's testimony regarding the ability of an administrator or an administrator-designee is authorized to do at an IEP meeting and this Hearings Officer concludes that it does not provide an exception to the two (2) year limitation on time for Petitioners' claims to be made. *FOF 3*.

At the August 6, 2021 meeting, necessary participants for the IEP were present to complete the IEP. While it appears that OT was not present at the meeting on August 6, 2021, testimony in the record supports that OT was present at one of the meetings leading up to August 6, 2021 and provided OT's information regarding the PLEPs and proposed services to be provided to Student in the IEP-08/06/2021. Finally, even if the necessary participants were not present at the IEP meeting on August 6, 2021, Petitioners have not demonstrated that the failure to have all team members present resulted in a loss of educational opportunity, significant infringement on parental participation, or a deprivation of educational benefits.

C. Petitioners have not proven that the DOE denied Student a FAPE by failing to implement Student's IEPs

Petitioners argue that the DOE denied Student a FAPE by failing to implement Student's IEPs throughout Student's years at Home School. As this Hearings Officer has already concluded that Petitioners have not proven any exception to the two (2) year time limitation for

claims filed in a due process complaint, this analysis will focus solely on the implementation of Student's IEP-04/18/2019 (as implemented from May 2020) and IEP-08/06/2021.

Questions of implementation of a student's IEP are procedural in nature and a minor or slight omission of implementation of an IEP will not result in a denial of FAPE. The Ninth Circuit Court of Appeals has reviewed IDEA cases in relation to implementation failures alleged against school districts. In *Van Duyn ex rel. Van Duyn v. Baker School Dist.*, the Court reviewed the IDEA's definition of a free appropriate public education as "special education and related services that ... are provided in conformity with the [child's] individualized education program," and determined that "[t]here is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." 502 F.3d 811, 821 (9th Cir. 2007) .The Ninth Circuit also explored the analysis done by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), and recognized the court's conclusion that implementation failures did not violate the IDEA because "the significant provisions of [the child's] IEP were followed, and, as a result, he received an educational benefit." *Van Duyn*, 502 F.3d at 821.

In the month of March 2020, the global pandemic COVID-19 entered into the State of Hawaii, resulting in numerous closures of businesses, government offices, public places and both public and private schools under emergency orders issued by the Governor of the State of Hawaii, Mayors of the Hawaii Counties, and the Superintendent of the Hawaii Public Schools. See Governor of the State of Hawaii's First through Thirteenth Proclamations Related to the COVID-19 Emergency; and Hawaii Department of Education Press Releases. Student's school was included in the closures, which prevented teachers, students and staff from entering onto the school grounds. During the period of school closures, general education students in Student's

grade level at Home School were offered enrichment learning through online applications or hard-copy packets if requested due to lack of internet or devices. *FOF 55*.

Upon the outbreak of COVID-19 in the United States, the United States Department of Education (hereinafter “USDOE”) provided some guidance to the school districts in how to address providing IDEA services during school closures. In the *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, the USDOE noted that “the IDEA, Section 504 and Title II of the American Disabilities Act do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time because of exceptional circumstances, such as an outbreak of a particular disease.” 76 IDELR 77 (EDU 2020). However, the USDOE went on to say

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

Id.

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

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

services provided through distance instruction provided virtually, online or telephonically.

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

During the initial period of school closure from March 2020 through May 2020, Home School provided enrichment opportunities to the general education students. *FOF 55*. Student was also provided the same enrichment packets that were being provided to general education peers, along with additional information for Student's special education and related services. *FOF 55-56*. Student was provided ESY at Home School in the summer of 2020 and continued to receive occupational therapy virtually throughout the school closures. *FOF 56, 58*.

When Home School reopened to general education students in groups in November 2020, Student was welcomed back to the school and given the option of attending more often than general education students due to Student's special needs. *FOF 67-68*. Student continued to receive special education and related services in the 2020-2021 school year and the summer 2021 ESY session and made progress on Student's goals and objectives in the IEP-04/18/2019. *See FOF 67-68, 70, 81*.

At the start of the 2021-2022 school year, general education classes were all welcomed back to school despite ongoing concerns with the COVID-19 pandemic. At that time, due to concerns of health and safety, Parents requested that Student be placed in a smaller classroom environment that would allow for more distancing between Student and Student's peers. *FOF 89*. Despite Student's LRE placement being in the general education classroom, Student was placed in the special education classroom, which had a smaller number of students so distancing could be better maintained with the students. *FOF 90*. While this was a technical failure to keep

Student in Student's LRE, it is understandable under the circumstances that Home School would want to comply with Parents' wishes to keep Student on campus, rather than opting for distance learning from home. While in the special education classroom, Student still received instruction via virtual videoconference with Student's general education peers and continued working on the general education curriculum with necessary modifications. *FOF 91*. Petitioners have failed to prove that Home School's decision to keep Student in the special education at Parents' request was a material failure to implement Student's IEP-08/06/2021 resulting in a denial of FAPE.

Upon being notified by Parents that Student was vaccinated and could return to the general education classroom setting, Student was returned to the setting in around November 2021. *FOF 105*. Since that time, Student continued to receive Student's special education and related services pursuant to the IEP-08/06/2021, which is reflected in Student's IEP-08/06/2021 progress reports and Student's general education report cards for the 2021-2022 school year. *FOF 202-205*. Student continued to access the general education curriculum and attend classes alongside Student's non-disabled peers. "The grading and advancement system thus constitute an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been 'educated' at least to the grade level they have completed, and access to an 'education' for handicapped children is precisely what Congress sought to provide in the Act." *Rowley*, 458 U.S. at 203, 102 S.Ct. at 3049, 73 L.Ed.2d 690. In this case, the evidence supports the determination the Student's IEP-08/06/2021 was materially implemented and resulted in Student's advancing along with Student's non-disabled peers from the [REDACTED] grade.

Petitioners argue that the main point of contention is that Home School has not implemented Student's behavioral support plan from 2016 to the present. Petitioners have not

presented any evidence to show that Student's behaviors have increased to the point of being unmanaged by Student's current supports. The IEP team has not considered a change to a more restrictive environment due to Student's behaviors having a greater effect on the teacher or other students in the classroom. Petitioners have not demonstrated that the IEP-08/06/2021 was not materially implemented or that failures to implement certain portions of Student's IEP-08/06/2021 resulted in a denial of FAPE to Student.

D. Petitioners have not proven that the DOE denied Student a FAPE by failing to provide procedural safeguards to Parents for the 2020-2021 school year

Petitioners next issue is an allegation of a procedural violation in that Petitioners claim that the DOE failed to provide Parents with procedural safeguards for the 2020-2021 school year. The IDEA requires school districts to provide notice of procedural safeguards that are available to the parents of a student with a disability at least once every school year and upon initial referral or parental request for evaluation, upon receipt of the first state complaint in the school year, upon receipt of the first due process complaint in the school year, in accordance with disciplinary procedures, or upon parental request. 34 C.F.R. §300.504; 20 U.S.C. §1415(d)(1)(A); H.A.R. §8-60-59(a)(1). In this case, the record is absent of any clear evidence that Parents were provided the procedural safeguards for the 2020-2021 school year,¹⁵ so it appears that the DOE may have committed a procedural violation of failing to provide the procedural safeguards to Parents at least one time during the 2020-2021 school year. *FOF 209*.

¹⁵ While SSC testified that SSC provided the procedural safeguards to Parent with the October 2020 reevaluation, no evidence has been presented to establish that SSC provided the procedural safeguards as an attachment with the PWNs. For example, each of the PWNs between July 2020 and June 2021 state that a copy of the procedural safeguards is being provided with the PWN, the emails sent to Parents do not appear to contain any attachments labeled "Procedural Safeguards." Additionally, no evidence was presented that the DOE had records of any copies of the procedural safeguards being emailed, mailed, or delivered to Parents during the 2020-2021 school year.

However, as with all procedural violations under the IDEA, Petitioners must also prove that the violation resulted in a loss of educational opportunity, significant infringement of parental participation, or a deprivation of educational benefits.

Failure to provide appropriate notice of procedural safeguards to parents are akin to failing to provide proper written notice of department action, which do not necessarily result in a denial of FAPE. See *Marcus I. v. Department of Educ., State of Hawaii*, 63 IDELR 245 (9th Cir 2014 *unpublished*) (holding that even though a PWN was not a sufficient formal placement offer, the procedural error did not significantly restrict the parent's ability to participate in the development of the student's educational program); *Los Angeles Unified School District*, 115 LRP 53683 (2015) (holding that even though the district failed to respond in writing to a parent's request about the IEP for a student with autistic-like behaviors, the mistakes were procedural in nature and did not deny the student a FAPE where the parent was still able to participate in the decision-making process).

The record in this case demonstrates that Parent was an active participant in the development in Student's evaluation process, eligibility determination, and resulting educational program. Parent was at the many meetings involving the IEP team, as well as other meetings involving SSC and Current SPED teacher. Parent actively sent updates, inquiries, and lists of concerns to the IEP team for discussion at upcoming meetings. Finally, this Hearings Officer notes that Parent is an experienced attorney who previously worked for the Department [REDACTED] [REDACTED] and represented the DOE in cases in which parents alleged denials of FAPE. Petitioners have failed to prove that DOE's error in not providing the procedural safeguards to Parents during the 2020-2021 school year resulted in a denial of FAPE to Student.

E. Petitioners have not proven that the DOE denied Student a FAPE by failing to provide records or provide an opportunity for Parents to examine Student's records in a timely manner

Petitioners argue that the DOE denied Student a FAPE by failing to provide records or provide an opportunity for Parents to examine Student's records in a timely manner. The record from this Hearing establishes that Home School appropriately responded to Parent's request for records in a timely manner. Parent requested a review of Student's records on July 22, 2021. *FOF 86.* SSC conferred with the administration and notified Parent that the records would be available for Parent's review. Parent reviewed the records and SSC offered to scan and email a copy of the records to Parent, which Home School is not required to do.¹⁶ *FOF 87.* SSC scanned and emailed the records of Student to Parent on August 4-5, 2021, however some records were missing, since SSC had to scan them in batches. Upon being notified that Parent was missing records, SSC immediately reviewed and provided the records to Parent. *FOF 102.*

Petitioners argue that SSC testified at some point that someone had instructed SSC not to send "records" that SSC had prepared for Petitioners, however Petitioners' argument is misplaced. SSC's testimony was that SSC had prepared internal DOE documents to provide to Parent in response to a specific request for Parent for the criteria for FBA determinations. *See* Testimony of SSC, Tr.V1, 81:3-84:2. These documents do not constitute educational records for Student that Home School was required to make available for Parents to review. *FOF 210.*

The IDEA provides that the school districts shall establish procedural safeguards that shall include the "opportunity for the parents of a child with a disability to examine all records

¹⁶ The IDEA only requires that schools provide an opportunity for parents of a child with a disability to examine their student's records, not to provide copies of such records unless failure to provide copies would effectively prevent the parents from exercising their right to inspect and review records. *See* 20 U.S.C. §1415(b)(1), 34 C.F.R. §§300.501, 300.613; H.A.R. §8-60-56.

relating to such child.” The IDEA specifies that an “education record” is the type of record defined in the regulations implementing the Family Educational Rights and Privacy Act (hereinafter “FERPA”). *S.A. ex rel. L.A. v. Tulare County Office of Educ.*, 2009 WL 2136322, *4 (E.D. Ca. 2009); 34 C.F.R. §300.611(b). FERPA provides:

- (A) For purposes of this section, the term “education records” means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which –
 - (i) Contain information directly related to a student; and
 - (ii) Are maintained by an educational agency or institution or by a person acting for such agency or institution.
- (B) The term “education records” does not include –
 - (i) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

20 U.S.C. §1232g(a)(4)(A), 34 C.F.R. §300.611(b).

SSC testified that the education records that Home School maintained that related to Student was provided to Parents through both an opportunity to review and a scanned, electronic copy emailed to Parent. The only documents that SSC was told not to send to Parents after they were prepared were the administrative memoranda that related to the general provision of FBAs or behavior plans to all students in the DOE. These types of documents do not relate directly to Student and are not part of Student’s education records.

F. Petitioners have not proven that the DOE denied Student a FAPE by failing to provide prior written notices to Parents

Petitioners final issue alleges that the DOE failed to provide prior written notices to Parents. H.A.R. §8-60-58(a) provides that “[w]ritten notice that meets the requirements of subsection (b) shall be given to the parents of a student with a disability a reasonable time before the department: (1) proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student; or (2) refuses to initiate or

change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student.” H.A.R. §8-60-58(a); *see also* 20 U.S.C. §1415(b)(3); 34 C.F.R. §300.503. Petitioners argue that the PWNs that were issued by Home School in this case were either insufficient or were not properly issued. The issue of the content and sufficiency of the PWNs was previously discussed in section (A)(1) of this Decision, so this Hearings Officer will now turn to the issue of whether the DOE failed to properly produce PWNs to Parents when they were required.

The record produced in this Hearing demonstrates that while there were numerous meetings held with IEP team members and Parents, only a limited number of the meetings resulted in a decision by the IEP team to initiate or refuse a change in the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student. PWNs were properly issued on October 2, 2020, January 15, 2021, May 21, 2021, June 14, 2021, and August 8, 2021, regarding decisions made involving the reevaluation of Student and any additional assessments that were requested by Parents. *See FOF 64, 77, 79, 96; see also* R-Ex.8, p.018. Each of the PWNs informed Parents of the IEP team’s decisions about the assessments that would be conducted with Student or the reasons why an assessment would not be done at that time. PWNs were also properly provided to Parents regarding the development of the IEP-04/18/2019, the delay of the annual review meeting for Student’s IEP in April 2020 due to the COVID-19 shutdown in the State of Hawai‘i, the delay of the annual IEP meeting in May 2020 at Parent’s request, and the development of the IEP-08/06/2021. *FOF 46, 53, 57, 96.*

While there were numerous meetings that occurred between the various dates and events noted above that were presented at the Hearing, the testimony regarding the meetings all established that no final IEP team decisions were made at the meeting and that the meetings were

continued for further discussion. *See e.g. FOF 74-75, 83.* PWNs are not required for these continued meetings since they do not result in a decision to initiate or refuse a change in identification, evaluation, or educational placement of the student or the provision of a FAPE to the student.

Although technically not a violation of any procedures under the IDEA, this Hearings Officer notes that Home School did not provide PWNs for the interim meetings, nor did they provide all meeting dates on the completed IEPs. Such actions would be helpful for future meetings with parents of students with disabilities to allow parents and other team members to understand or recap the events of a prior meeting to prepare for the future meeting and allow IEP teams and, if necessary, other administrative bodies to see or recall the events that took place at meetings in the past. For example, since none of the meetings in Student's case were recorded, this Hearings Officer had to rely on the sporadic recollection of witnesses to determine what conversations took place at the meetings. Without the PWNs or the recordings of the IEP meetings, the witnesses had difficult recalling specific dates that the meetings took place or conversations that occurred at the meetings involving the development of Student's IEP.

Notwithstanding the usefulness of PWNs or other types of documentation or recording of any IEP team or student support team meetings, Petitioners have failed to prove that such documentation is required under the IDEA or that the DOE failed to provide PWNs as appropriate under the requirements of the IDEA.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have failed to prove the issues in the instant Complaint by a preponderance of evidence. While the DOE may have committed procedural violations

regarding convening an IEP team meeting to discuss Student's reevaluation, in failing to formally review and updated Student's BSP from November 2016, and not having an updated IEP in place prior to the start of the 2021-2022 school year, Petitioners have not proven that these violations resulted in a loss of educational opportunity, significant infringement on parental participation, or a deprivation of educational benefits. Petitioners have failed to prove that Student's IEP-08/06/2021 is inappropriate or not reasonably calculated to meet Student's unique needs and provide Student with access to the general education curriculum.

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, June 27, 2022.

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