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

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

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE  
OF HAWAI'I, and KEITH T. HAYASHI,  
Superintendent of the Hawai'i Public  
Schools,

Respondents.

DOE-SY2223-038

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing:  
June 14, 2023

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On May 1, 2023, the Department of Education, State of Hawai'i and Keith T. Hayashi, Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE") received a Complaint and Resolution Proposal (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act,

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<sup>1</sup> Personal identifiable information is contained in the Legend.

from Student, by and through Parent (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on May 11, 2023.

A prehearing conference was held on May 26, 2023, before Hearings Officer Chastity T. Imamura; with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners; and Stuart N. Fujioka, Esq. (hereinafter “Mr. Fujioka”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for June 14, 15, and 16, 2023.

An Order Regarding Video Conference Due Process Hearing was issued on May 30, 2023, which set forth the parameters for the video conference hearing. These parameters included: 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.

The Due Process Hearing began on June 14, 2023. Present at the Hearing were Parent and Mr. Peck, on behalf of Petitioners; District Educational Specialist (hereinafter “DES”) and Mr. Fujioka, on behalf of Respondents; this Hearings Officer; and the assigned court reporter. Petitioners called Parent to testify and rested their case-in-chief. Respondents called Principal to testify and rested their case. Petitioners did not have any rebuttal witnesses to present, so the Hearing concluded on the same date.

Each party submitted their exhibits for the Hearing by the disclosure deadline of June 6, 2023. The parties met and conferred regarding the proposed exhibits by June 9, 2023 and had no objections to the exhibits submitted by the opposing party. 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 June 15, 2023, 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 23, 2023. Any objections to the proposed exhibits were due on June 27, 2023.

Petitioners did not submit any corrections or additional exhibits for consideration in the Decision, as all of Petitioners' exhibits were received during the Hearing.

Respondents did not have any corrections to the updated exhibit lists sent to the parties by this Hearings Officer. Respondents requested the following of Respondents' exhibits be admitted into evidence: Exhibit 23, page 079; Exhibit 52, pages 462-483; Exhibit 53, page 484; and Exhibit 57, pages 533-534. Respondents' Exhibit 23, page 079, and Exhibit 57, pages 533-558 were already received at the Hearing, and Petitioners did not object to the admission of these exhibits into evidence, therefore, the additional exhibits requested by Respondents are being received into the record for consideration as part of the Decision in this case.

On July 3, 2023, a List of Exhibits Received at Due Process Hearing was filed with the final list of exhibits submitted and received by the parties for consideration in this Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-045; Exhibit 2, pages 046-047; Exhibit 3, pages 048-070; Exhibit 4, pages 071-096, and one (1) video recording dated April 25, 2023.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 11, pages 021-022; Exhibits 14-21, pages 026-077; Exhibits 23-31, pages 079-

229; Exhibit 35, pages 236-241; Exhibit 38, pages 342-346; Exhibits 44-45, pages 407-447; Exhibit 50, page 457; Exhibits 52-54, pages 462-506; Exhibits 56-57, pages 531-558; Exhibit 60, page 652; and Exhibits 62-64, pages 654-753.

Both parties wanted the opportunity to submit written closing briefs regarding the legal issues with the use of the transcripts of the Hearing to this Hearings Officer for review. Based on the request by the parties for written closing briefs with the use of the transcripts, Petitioners requested an extension of the deadline from July 15, 2023 to August 29, 2023. Based on the anticipated timeline for the transcripts to be prepared and to provide the parties ample time to write their closing briefs, Petitioners' request to extend the deadline was granted and the Order Granting Respondents' Request to Extend the 45-Day Decision Deadline was issued on June 21, 2023. The current decision deadline is now August 29, 2023. The deadline for the written closing briefs was set for July 17, 2023, and Respondents timely submitted their written closing brief. Petitioners did not submit a written closing brief.

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 two (2) issues in the Complaint to be addressed at the Hearing that

involve the individualized education program (hereinafter “IEP”) meeting on April 25, 2023.

**Issue 1** – Whether the April 25, 2023 IEP meeting discussions about Student’s access to non-disabled peers and/or other peers during extended school year (hereinafter “ESY”) service were appropriate.

**Issue 2** – Whether the April 25, 2023 IEP meeting discussions about the frequency and/or duration of Student’s ESY services were appropriate.

Petitioners request the following remedies to address the alleged violations above:

**Remedy 1** – Find that the DOE denied Student a free appropriate public education (hereinafter “FAPE”) for the violations asserted.

**Remedy 2** – Order the DOE to reimburse Parent for any privately funded programs and/or services related to a denial of FAPE.

**Remedy 3** – Find that the DOE has violated Student’s rights and order that the IEP meeting address these violations.

#### **IV. FINDINGS OF FACT**

##### Background information

1. Student is [REDACTED] years old and currently attends Home School. Testimony of Parent, Transcript of Proceedings, page 15, line 3, through line 4 (hereinafter referenced as “Tr.15:3-4”), Tr.36:12-13; Testimony of Principal, Tr.84:15-85:8.
2. Student has been eligible for special education and related services under the IDEA since Student was about [REDACTED] years old. Student received services in the states of [REDACTED] and [REDACTED] before attending school in [REDACTED]. Testimony of Parent, Tr.15:7-24; Petitioners’ Exhibit 1, page 002 (hereinafter referenced as “P-Ex.1, p.002”).
3. In November and December 2022, Home School conducted a reevaluation of Student, which included a functional behavior assessment, an academic assessment, a psychoeducational assessment, a speech-language assessment, and an occupational therapy assessment. Testimony of Parent, Tr.15:25-16:3, 21:20-22:2; Testimony of Principal, Tr.91:3-94:5; Respondents’ Exhibits 25-29, pages 101-137 (hereinafter

referenced as “R-Ex.25-29, p.101-137”).

4. Based on the reevaluation, the IEP team developed an IEP for Student dated December 14, 2022 (hereinafter “IEP-12/14/2022”). Testimony of Principal, Tr.94:6-7; *see* R-Ex.16, p.029-049.

#### Student’s IEP-12/14/2022

5. The offer of FAPE by Home School written in the IEP-12/14/2022 was documented in a prior written notice (hereinafter “PWN”) dated December 16, 2022 (hereinafter “PWN-12/16/2022”), which was sent to Parent with the IEP-12/14/2022. *See* R-Ex.15, p.027-028.
6. Student’s IEP-12/14/2022 included a section labeled “present levels of educational performance” (hereinafter “PLEPs”), which included a summary of Student’s educational background; assessment information; learning implications; instructional recommendations; and baseline strengths and needs for reading, writing, math, fine motor/sensory/regulation, behavior/social/emotional, communication, and functional performance. R-Ex.16, p.030-034.
7. Instructional recommendations included a note that Student may benefit from a program of supplemental reading interventions that should be explicit, intensive, delivered in small groups of two (2) to seven (7) students when possible, and should employ scaffolding learning principles along with emotional/behavioral support. R-Ex.16, p.031.
8. Student’s needs in the areas of behavior/social/emotional and from the behavioral health specialist note that Student needs to increase interactions with same-aged peers; attend to small group instruction; wait for access to items that are not available;

and learn social skills such as taking turns, participating in conversations, sharing, and responding appropriately to others. R-Ex.16, p.033.

9. Student's IEP-12/14/2022 has [REDACTED] goals and objectives designed to address Student's needs identified in the PLEPs section of the IEP-12/14/2022. R-Ex.16, p.036-045.
10. Student has [REDACTED] "non-core health" goals and objectives that specifically include Student's working with peers. R-Ex.16, p.037, 044.
11. The [REDACTED] goal is "[b]y the end of the IEP year, [Student] will learn coping and self-regulation strategies at the first sign of precursor behavior (i.e., counting 1-10, deep breathing, squeezes) as well as learning how to express [Student's] feelings [when] certain situations occur requiring no more than 1"<sup>2</sup> R-Ex.16, p.037.
12. The [REDACTED] goal is "[b]y the end of this IEP, [Student] will participate in a small group setting to increase [Student's] social skills, practice appropriate social behavior, and have the opportunity to successfully interact with [Student's] peers successfully in 50% of opportunities." R-Ex.16, p.044.

#### IEP meeting on April 25, 2023

13. The IEP team decided to meet to discuss Student's IEP on April 25, 2023. The purpose of the meeting was to discuss transportation and ESY for Student. Testimony of Parent, Tr.17:7-14.
14. Parent had requested the meeting to discuss ESY due to Parent's concerns about the ESY services that had been provided to Student in the previous summer. Testimony

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<sup>2</sup> It appears in the IEP document itself that the goal language was incomplete, however, in the objectives it indicates "requiring no more than 1 prompt."

of Parent, Tr.17:11-18:1.

15. Parent noted that during prior ESY sessions, Student was the only student on campus during the ESY program and there were no opportunities for Student to interact with peers during the program. Testimony of Parent, Tr.16:21-17:6.
16. Present at the IEP meeting on April 25, 2023 were Parent, Principal, a DOE occupational therapist, a special education teacher, a social worker, a DOE speech-language pathologist, and a DOE behavior analyst. R-Ex.18, p.052.
17. At the IEP meeting, the team first discussed transportation for Student and determined that Student no longer needed the services of a registered behavior technician (hereinafter “RBT”) on the bus because Student was able to ride the bus safely to and from school with minimal prompting by the bus aide. *See* P-Ex.4, video recording of April 25, 2023 IEP meeting, approximate time stamp [03:57-09:58] (hereinafter referenced as “P-Ex.4, video 4/25/2023 [03:57-09:58]”).
18. Parent expressed satisfaction with Student’s progress in behaviors on the bus and agreed with the team that an RBT was no longer necessary for Student on the bus after Principal had reassured Parent that there was [REDACTED] on the bus with Student and [REDACTED] present on the bus [REDACTED]. P-Ex.4, video 4/25/2023 [3:57-9:58].
19. The team moved onto the ESY discussion, where Principal reviewed the data from before and after winter break and Student’s behavior charts. Based on the data and behavior charts, Principal noted that Student had minimal regression during the breaks and was able to recoup any skills lost within a reasonable amount of time after returning to school. Principal suggested that the school was prepared to offer the



- same ESY program as the year before. Testimony of Principal, Tr.109:1-18; P-Ex.4, video 4/25/2023 [10:00-13:13].
20. Parent questioned why the ESY offer from the school was less time than the regular school year and Principal explained that ESY was simply to maintain skills and not to learn new skills. Principal added that ESY does not include extra-curricular activities that occurs during the school year, such as lunch, recess, etc. P-Ex.4, video 4/25/2023 [13:13-14:49].
21. Principal further explained to Parent that the ESY teacher and staff only work on Student's IEP goals and objectives to maintain Student's skills and is not a summer school program to increase or build upon Student's current skill level. P-Ex.4, video 4/25/2023 [15:00-17:23].
22. Parent asked the team about the presence of non-disabled peers on the campus during the ESY program and was informed that there would not be any non-disabled peers on campus. Parent requested that the team look into other programs with non-disabled peers so Student could work on having the same schedule and ultimately informed the team that Parent also wanted longer ESY sessions. P-Ex.4, video 4/25/2023 [18:17-20:05].
23. Principal told Parent that the school's offer was going to be similar to the ESY program in the past and that Parent could contact the district to see if there were additional programs available [REDACTED] that Student may be able to participate in. P-Ex.4, video 4/25/2023 [20:05-20:43].
24. Parent expressed that Parent wanted Student to have more interaction with peers but still needs the supports provided in Student's IEP. P-Ex.4, video 4/25/2023 [20:43-

22:12].

Student's IEP-04/25/2023

25. The IEP team developed an amended written IEP, dated April 25, 2023 (hereinafter "IEP-04/25/2023"), based on the discussions at the April 25, 2023 IEP meeting. P-Ex.1, p.022-042; R-Ex.20, p.056-076.
26. A PWN dated April 28, 2023 (hereinafter "PWN-04/28/2023"), was also prepared to explain the actions that the IEP team took for Student's IEP-04/25/2023. P-Ex.1, p.043-045; R-Ex.19, p.053-055.
27. The relevant portions of Student's IEP-04/25/2023 offer, which was contained in the PWN-04/28/2023. The PWN-04/28/2023 noted the goals and objectives for which Student was being provided ESY, including math, reading, writing, speech, counseling/social skills/ABA goals, and OT. P-Ex.1, p.044; R-Ex.19, p.054.
28. While each section in the PWN-04/28/2023 provided information about the data for Student's progress before and after breaks, the counseling/social skills/ABA goals section did not. P-Ex.1, p.044; R-Ex.19, p.054.
29. In the PWN-04/28/2023, one (1) of the reasons for the ESY being provided at Home School was "[Student] will access math, reading, and writing in a familiar setting and peer(s) and other staff will be available for social skills training." P-Ex.1, p.044; R-Ex.19, p.054.
30. The PWN-04/28/2023 provided that another public school setting was an option to address Parent's concern about Student being the only student participating in Home School's ESY program. P-Ex.1, p.044; R-Ex.19, p.054.

Other relevant events

31. In January 2023, the student services coordinator from Home School sent Parent Student's progress reports and behavior charts to show Student's status in progress reports and behavior prior to and after the winter break for the 2022-2023 school year. R-Ex.44, p.407-439.
32. The behavior charts and progress report for Student did not show any significant regression or delayed recoupment for Student before and after the fall and winter breaks for the 2022-2023 first semester. *See* R-Ex.44, p.408-439.
33. Prior to the IEP meeting on April 25, 2023, Parent reached out to other (non-DOE) programs to see if they would be able to take Student for the summer session. Parent was not able to find a program that would provide the necessary supports (such as a one-to-one aide) to take Student for the summer. P-Ex.2, p.060-067.
34. Parent also reached out to Home School to see if Home School would be having a summer enrichment program or summer fun-type program for students. Parent was informed by Principal that Home School would not be having any summer enrichment or summer fun-type program for the 2023 summer. P-Ex.2, p.068-070.
35. On April 24, 2023, Principal sent an email to Parent with information that the team would be reviewing for the ESY eligibility determination. This included Student's behavior data, a copy of Student's progress report, and a copy of the draft IEP. R-Ex.54, p.485-506.
36. The behavior data and progress reports showed Student had minimal regression and recoupment issues when returning from a break after the previous ESY sessions had been provided to Student. Information from Student's communication logs and teacher-parent email logs also do not reflect any significant concerns expressed by

Parent or Student's teachers or aides regarding Student experiencing significant regression or delayed recoupment of skills after school breaks when Student received [REDACTED] days of ESY services for [REDACTED] hours per day. Testimony of Principal, Tr.101:16-106:8, 123:21-127:10; *see also* R-Ex.30, p.158-159, 187-188, 203-204; R-Ex.54, p.487-506; R-Ex.63, p.669-674, 677-678.

37. On April 28, 2023, Principal sent an email to Parent with the IEP-04/25/2023 and PWN-04/28/2023 attached. Within the email, Principal also offered Parent the option to have Student attend a different public school for the ESY session instead of at Home School. P-Ex.2, p.053-056.

38. Parent filed the instant Complaint on May 1, 2023. Testimony of Parent, Tr.61:14-62:3.

39. Parent sent Student to the DOE ESY program at the alternate school that was offered by Principal. Transportation and arrangements for Student to attend the other school's ESY program were arranged by the DOE. Other students were at the ESY program at the other school. Testimony of Parent, Tr.75:9-20; Testimony of Principal, Tr.85:9-15.

## **V. CONCLUSIONS OF LAW**

### IDEA framework

The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.” *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.*

#### Burden of Proof

Pursuant to H.A.R. Section 8-60-66(a)(2)(A), "the party initiating the due process complaint has the burden of proof." The H.A.R. also states that "[t]he burden of proof is the responsibility of the party initiating and seeking relief in an administrative hearing under the IDEA or this chapter to prove, by a preponderance of the evidence, the allegations of the complaint. H.A.R. §8-60-66(a)(2)(B).

This burden was confirmed in *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58, 126 S.Ct. 528, 535, 163, L.Ed.2d 387 (2005), where the Court concluded that the burden of

persuasion in an IDEA case lies “where it usually falls, upon the party seeking relief.”

- A. The April 25, 2023 IEP team did not discuss Student’s access to non-disabled and/or other peers during Student’s ESY offer, however Petitioners have not proven that this lack of discussion rose to the level of a denial of FAPE

Petitioners raise the issue of whether the IEP team appropriately discussed Parent’s concerns about Student having access to non-disabled or other peers during ESY during the meeting on April 25, 2023. Based on the record, the IEP team did not have meaningful discussions about Student’s access to peers during the meeting, which is arguably a procedural violation under the IDEA. However, in order for a denial of FAPE to occur, the procedural violation must give rise to either a loss of educational opportunity, an infringement on parental participation, or a deprivation of educational benefits. Petitioners have not proven that the failure to discuss Student’s access to peers during the IEP meeting led to any of those results.

Parent was present at the meeting and had previously informed the IEP team that Parent was concerned about Student’s social skills during the summer ESY, particularly because Student does have social skills goals in Student’s IEP-12/14/2022, and because Student regresses with social skills during the summer. *FOF 13-15*. The IEP team could have provided Parent with more information about how “peers and other staff will be available for Student to practice those skills” as written in the PWN-04/28/2023 or had further discussion about the opportunities that could be created at the ESY program at Home School to address Parent’s concerns. *See FOF 22, 24, 29*.

While the team may not have discussed the possibilities at the meeting itself, the IEP team did show concern for the concern that Parent raised and did discuss and also provided an opportunity for Student to attend another DOE public school to get more interaction with peers during ESY. *FOF 23, 30, 37*. As a result, Student was able to attend ESY at a school with more

peers attending the ESY program and did not lose out on any educational opportunity. *FOF 39*. Additionally, Parent's concerns were heard by the IEP team and addressed, albeit subsequent to the meeting, so Parent did have meaningful participation in the IEP development process itself.

This Hearings Officer concludes that while the IEP team probably should have taken the time during the IEP team meeting to discuss the ways that Student's program to maintain skills would be provided during ESY (as it was written in the PWN-04/28/2023), the fact that further discussion was not had during the meeting itself did not lead to a loss of educational opportunity, a deprivation of educational benefits, or a significant infringement on parental participation.

B. The discussions about the frequency and duration of Student's ESY program were appropriate at the April 25, 2023 IEP meeting and the DOE did not deny Student a FAPE

Petitioners argue that the discussions during the April 25, 2023 IEP meeting about the frequency and duration of Student's ESY program were inappropriate and denied Student a FAPE. Petitioners take the position that Student should have a longer school day due to Student's regular school year IEP being implemented during longer hours of the day and more days of the week.

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 (9<sup>th</sup> 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.'" *N.B.*, 541 F.3d at 1211, quoting *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6<sup>th</sup> Cir. 2007) quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6<sup>th</sup> 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 (D. Hawai‘i 2019) (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 (4<sup>th</sup> Cir. 2002); see also *K.K. ex rel. K.S.K. v. Hawai‘i*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6<sup>th</sup> 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.”).

The significant history of providing ESY services as part of a student’s IEP program is clear that ESY is not required unless it is demonstrated that the student would suffer from significant regression during an extended break from school and not be able to recoup the skills lost over the break in a reasonable amount of time. Here, the IEP team did provide Parent with Student’s progress report, behavior charts, and data from before and after other school breaks to show Parent that while Student did need ESY to maintain skills, the amount of ESY provided in the past was appropriate to allow Student to retain those skills over school breaks. *FOF 35-36.*

Petitioners' only contention is that Parent wants Student to be in school longer because the regular school year is longer. Principal explained extensively the standard for providing ESY services to students under the IDEA during the meeting and took the time to show Parent the data to support the school’s position. *FOF 20-21.* The arguments made by Petitioners, that

Student is overall behind Student's grade level in academic skills, is not an appropriate argument for ESY.

The data provided by Respondents does support the IEP team's position that Student only had minimal regression before and after the previous school breaks and that the previous offer of ESY services was appropriate for Student to maintain Student's skills learned during the school year. *FOF 36*. These results were also discussed and reviewed by the IEP team during the April 25, 2023 IEP meeting.

Petitioners have not met their burden of proving that the discussions by the IEP team at the April 25, 2023 meeting were not appropriate to determine the frequency and duration of Student's ESY services in Student's IEP-04/25/2023.

## **VI. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the allegations in the Complaint by a preponderance of the evidence.

## **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, August 11, 2023.



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