



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, and CHRISTINA
KISHIMOTO, Superintendent of the Hawai'i
Public Schools,

Respondents.

DOE-SY2021-037

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: September 9, 10, 13,
17, 20, 28, & 30, 2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On April 12, 2021, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE") received a Request for IDEA Impartial 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 15, 2021. On April 23, 2021, Samuel P. Shnider, Esq. (hereinafter “Mr. Shnider”) submitted a notice of appearance of counsel for Petitioners and requested leave to file an amended Request for IDEA Impartial Due Process Hearing, which was granted and Petitioners’ First Amended Request for IDEA Impartial Due Process Hearing (hereinafter “First Amended Complaint”) was filed on April 23, 2021. Respondents, through their counsel, Kris S. Murakami, Esq. (hereinafter “Ms. Murakami”), filed their Response to Petitioners’ First Amended Complaint, dated April 27, 2021, but submitted to the Office of Dispute Resolution on May 24, 2021.

On May 7, 2021, Petitioners filed their Motion to Enforce Stay Put and for Reimbursement (hereinafter “Motion”). Respondents filed their Memorandum in Opposition to Petitioners’ Motion on May 18, 2021. Petitioners filed their Reply Memorandum in Support of Motion on May 20, 2021, and a hearing Petitioners’ Motion was scheduled for May 21, 2021. After reviewing the written briefs and exhibits submitted, as well as arguments of counsel, this Hearings Officer filed the Order Denying Petitioners’ Motion to Enforce Stay-Put and for Reimbursement on June 2, 2021.

A prehearing conference was also held on May 21, 2021, before Hearings Officer Chastity T. Imamura, with Mr. Shnider representing Petitioners, and Ms. Murakami representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for June 22-25, 2021.

On June 14, 2021, Mr. Shnider emailed the Office of Dispute Resolution and opposing counsel with a request for leave to file another amended complaint to add on an additional issue to be addressed at the Hearing. Petitioners’ request was based on information that Petitioners

received after the prehearing conference on May 21, 2021. This Hearings Officer granted Petitioners' request for leave to file an amended complaint, and Petitioners submitted their Second Amended Request for IDEA Impartial Due Process Hearing (hereinafter "Second Amended Complaint") on June 16, 2021. Based on the filing of the Second Amended Complaint, the Hearing dates of June 22-25, 2021 were removed from the calendar. Respondents submitted their Response to Petitioners' Second Amended Complaint on June 29, 2021.

A second prehearing conference was held on July 15, 2021 with this Hearings Officer, Mr. Shnider on behalf of Petitioners, and Ms. Murakami on behalf of Respondents. At the second prehearing conference, the Hearing dates were scheduled for September 2-3 and 9-10, 2021. On July 22, 2021, a status conference was held due to a scheduling conflict with some of the Hearing dates. By agreement, the Hearing was rescheduled to September 9-10, 13, and 17, 2021. An amended prehearing order setting forth the dates of the Hearing and various deadlines was filed on July 22, 2021.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure safety for all the participants in the Hearing. An Order Regarding Video Conference Due Process Hearing was issued on August 6, 2021, which set forth the parameters for the video conference hearing. These parameters included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

The Due Process Hearing began on September 9, 2021. Petitioners called DOE District Educational Specialist (hereinafter “DOE DES”) and Parent to testify. The Hearing continued to September 10, 2021, where Petitioners called Treating Psychologist and Private Registered Behavior Technician 1 (hereinafter “Private RBT1”). On September 13, 2021, Petitioners called Private English Tutor to testify and concluded their presentation of witnesses. Respondents thereafter called Special Education Teacher 1 (hereinafter “SPED Teacher1”). On September 17, 2021, the testimony of SPED Teacher1 continued and then Respondents called DOE Psychologist to testify.

Respondents still had additional witnesses to call after DOE Psychologist, so additional Hearing dates of September 20, 28, and 30, 2021 were added. Petitioners objected to the additional dates of September 28 and 30, 2021, claiming that they had gone over their anticipated two (2) days of hearing by only a half day, so Respondents should only be given one half day on September 20, 2021 to complete the presentation of their case. This Hearings Officer noted Petitioners’ objection but declined to limit the presentation of either party’s case and the two (2) additional dates were added.

On September 20, 2021, due to a scheduling conflict, only a half day of testimony was taken, and Respondents called Public Separate Facility Teacher (hereinafter “PSF Teacher”) and DOE-Contracted Board-Certified Behavior Analyst (hereinafter “DOE BCBA”) to testify. The Hearing continued to September 28, 2021, where DOE BCBA’s testimony continued, and Respondents also called DOE Behavior Health Specialist (hereinafter “DOE BHS”) and DOE DES to testify. The Hearing continued to September 30, 2021, where DOE DES’ testimony was completed, and Respondents concluded their presentation of witnesses. Petitioners did not call any rebuttal witnesses.

At the conclusion of the witness testimony, the parties were asked whether they would like to submit written closing briefs or present oral closing arguments. Petitioners requested oral closing argument and Respondents requested written closing briefs. Taking both parties' request into consideration, this Hearings Officer allowed both parties to present oral closing argument on the facts of the case that were presented during the Hearing and written legal briefs to highlight the relevant statutes and caselaw that this Hearings Officer should consider as part of the decision in this case. The written legal briefs were to be no longer than fifteen (15) pages and would be done by counsel without the transcripts, as the transcripts would not be completed by the deadline of October 20, 2021. Petitioners chose to present an oral closing argument at the end of the Hearing. Respondents chose not to present an oral closing argument at the Hearing.

On October 1, 2021, Petitioners submitted a request to add an issue for consideration by this Hearings Officer in the Decision of this case. Petitioners did not want to re-open the Hearing for witnesses or exhibits and just wanted the ability to argue the additional issue in the legal briefs. Respondents objected to adding an additional issue but over Respondents' objection, this Hearings Officer issued an Order Granting Petitioners' Request to Amend the Pleadings to Add One Additional Issue on October 4, 2021. The page limit for the written legal briefs based on the additional issue being raised was extended from fifteen (15) pages to eighteen (18) pages, but the deadline of October 20, 2021 remained the same.

Based on the initial setting of the Hearing on September 9-10, 13, and 17, 2021, Respondents submitted a request for an extension of the deadline from the original deadline of August 30, 2021 to October 14, 2021. Petitioners did not have any objection to the request for extension and Respondents' request for extension was granted and the deadline was extended to October 14, 2021. Based on the additional days of testimony presented during the Hearing,

Respondents orally requested an extension of the deadline of October 14, 2021. Petitioners objected to an extension of the Deadline, requesting that the Hearing itself be expedited and the deadline remain on October 14, 2021. After consultation with the court reporter, discussing with counsel the length of the Hearing, and considering the breadth of testimony presented by the number of witnesses for both sides and the number of exhibits that were anticipated to be received at the Hearing, this Hearings Officer granted Respondents' request for extension over Petitioners' objection. In taking Petitioners' objection into consideration, Respondents' request for extension was only granted for the length of time required to obtain the final transcripts of the seven (7) day Hearing and prepare a thorough decision. An Order Granting Respondents' Oral Request to Extend the 45-Day Timeline was issued on September 30, 2021 and the deadline by which the decision in this case must be filed was set for Monday, November 1, 2021.

Each party submitted their exhibits for the Hearing by the disclosure deadline of September 1, 2021. The parties met and conferred regarding the proposed exhibits by September 7, 2021 and did not have any objections to either the witnesses or 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 September 30, 2021, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on October 8, 2021. Any objections to the proposed exhibits were due on October 13, 2021. This Hearings Officer issued a List of Exhibits Received at Hearing on October 18, 2021, wherein the additional exhibits submitted by

Petitioners and Respondents were listed, as well as the objections by the parties to the additional exhibits.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1.3, pages 37-58; Exhibits 1.20-1.23, pages 212-285; Exhibits 2.1-2.4, pages 287-327; Exhibits 2.6-2.7, pages 334-361; Exhibits 2.9-2.13, pages 365-374, 378-387; Exhibit 2.15, pages 358-361; Exhibits 2.16-2.17, pages 388-412; Exhibits 2.19-2.21, pages 417-423; Exhibits 4.8-4.12, pages 490-497; Exhibits 4.14-4.16, pages 500-505; Exhibits 4.18-4.25, pages 508-546; Exhibit 4.27, page 549; Exhibit 4.29, pages 552-553; Exhibit 4.31, pages 558-560; Exhibits 4.38-4.39, pages 580-582; Exhibits 4.43-4.45, pages 590-596; Exhibits 5.1-5.3, pages 598-666; Exhibit 6.1, pages 668-671; Exhibit 6.3, pages 674-678; Exhibits 7.1-7.5, audio recordings; Exhibits 8.1-8.2, pages 680-690; and Petitioners' Time Log of Recordings submitted on September 1, 2021, pages 1-37.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 6, pages 0035-0045; Exhibit 7, pages 0048-0053; Exhibit 8, pages 0054-0055, 0060-0079; Exhibit 9, pages 0084-0085, 0087-0122; Exhibit 12, pages 0132-0147; Exhibits 14-15, pages 0156-0173; Exhibit 17, page 0175; Exhibit 19, pages 0179-0202; Exhibits 20-21, pages 0203-0204; Exhibit 25, pages 0210-0211; Exhibit 27, page 0213; Exhibits 29-32, pages 0216-0221; Exhibit 36, pages 0226-0229; Exhibit 40, pages 0233-0234; Exhibits 41-45, pages 0237-00250; Exhibits 47-51, pages 0252-0260; Exhibits 53-54, pages 0263-0266; Exhibit 57, page 0273; Exhibit 58, page 0277; Exhibit 59, page 0280; Exhibit 60, pages 0283-0284; Exhibits 66-67, pages 0291-0292; Exhibits 71-73, pages 0297-0299; Exhibit 78, pages 0317-0323; Exhibit 80, pages 0338-0344; Exhibit 82, pages 0348-0379; Exhibit 85, pages 0386-0402; Exhibit 91, pages 0427-0433; Exhibits 93-96, pages 0504-0572; Exhibits 98-102, pages 0574-

0604; Exhibit 105, pages 0612-0614; Exhibits 116-123, pages 0662-0679; Exhibits 126-127, pages 0684-0687; Exhibit 131, pages 0697-0721; Exhibits 134-139, pages 0781-0798; Exhibits 143-144, pages 0877-0925; Exhibits 146-147, pages 0927-0932; Exhibits 149-153, pages 0961-0994; Exhibit 156, pages 0999-1000; Exhibit 159, page 1010; Exhibits 170-171, pages 1059-1093; Exhibits 174-176, pages 1098-1110; Exhibits 179-180, pages 1113-1117; Exhibits 183-185, pages 1123-1140; Exhibits 188-194, pages 1153-1586; and Exhibits 195-199, audio recordings.

Both parties timely submitted their written legal briefs by the deadline of October 20, 2021.

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

Pursuant to the eight (8) issues in the Second Amended Complaint and the one (1) issue in the Order Granting Petitioners’ Request to Amend the Pleadings to Add One Additional Issue, filed on October 4, 2021, the following issues are to be addressed in this Decision:

1. Whether Respondents denied Student a free appropriate public education (hereinafter “FAPE”) when the Individualized Education Program (hereinafter “IEP”) team predetermined Student’s placement.

2. Whether Respondents denied Student a FAPE when the IEP team ignored the recommendations of Student's treating psychologist, the functional behavior assessment, and other evaluation data.
3. Whether Respondents denied Student a FAPE when the IEP team determined Student's placement without having Student's triennial evaluations in place.
4. Whether Respondents denied Student a FAPE because the change from "Individual Instructional Support" to "Close Adult Supervision" is a reduction in services that is detrimental to Student's health and safety and to Student's ability to receive a meaningful educational benefit.
5. Whether Respondents denied Student a FAPE because Student's placement in the 2021 IEP is not the appropriate least restrictive environment for Student.
6. Whether Respondents denied Student a FAPE by failing to provide an appropriate transition plan for Student to transition into Student's new placement.
7. Whether Respondents denied Student a FAPE by significantly infringing upon Parent's ability to participate in the development of Student's IEP.
8. Whether Respondents denied Student a FAPE when the program in which Student was placed through the 2021 IEP was closed for the summer and Student would not have been provided the extended school year services as required by the 2021 IEP.
9. Whether Respondents failed to provide Petitioners with an appropriate prior written notice that complies with 34 C.F.R. §300.503 by failing to provide a proper description of the action and explanation to Parent.

IV. FINDINGS OF FACT

Witness information

1. Treating Psychologist is a clinical psychologist and a forensic examiner in psychology. Treating Psychologist has a Doctor of Philosophy (hereinafter "Ph.D.") in Family Relations and Human Development/Developmental (Clinical Child) Psychology and has been licensed to practice as a psychologist in the State of Hawai'i since [REDACTED]. Treating Psychologist works primarily with persons with developmental dysfunctions, and marriage and family issues. Testimony of Treating Psychologist, Transcript Volume 2, page 178, line 8 through page 179, line 5 (hereinafter

referenced as “Treating Psychologist, Tr.V2, 178:8-179:5”); Petitioners’ Exhibit 6.3, pages 674-678 (hereinafter referenced as “P-Ex.6.3, p.674-678”).

2. Treating Psychologist is qualified to testify as an expert in the area of clinical psychology with special experience in developmental disorders and autism spectrum disorder (hereinafter “ASD”). Treating Psychologist, Tr.V2, 180:2-183:19.
3. Private RBT1 is a registered behavior technician in the State of Hawai‘i and is currently a candidate to become a board-certified behavior analyst (hereinafter “BCBA”). Private RBT1 has a bachelor’s degree in marine science and biology. Private RBT1 does not have any teaching degrees or certifications but has been tutoring and teaching students for over [REDACTED] years. Private RBT1, Tr.V2, 265:6-10, 301:6-13, 306:5-13.
4. Private English Tutor is a licensed elementary education and special education teacher in the State of Hawai‘i under a provisional license. Private English Tutor has been teaching for over [REDACTED] years in special education and has also been an administrator of a [REDACTED] school. Private English Tutor has a master’s degree in education. Private English Tutor, Tr.V3, 333:16-334:18; P-Ex.6.1, p.668-670.
5. Private English Tutor is qualified to testify as an expert in the area of special education for teaching special education students. Private English Tutor, Tr.V3, 334:22-338:16.
6. SPED Teacher1 is a special education teacher at Home School as well as the care coordinator for Student. SPED Teacher1 holds a master’s degree in special education with an emphasis in ASD, a post baccalaureate certificate in special education (severe/ASD), and is currently a BCBA candidate, but has not completed the required

- hours to obtain a BCBA certificate. SPED Teacher1 was also a skills trainer who worked one-to-one with a special education student prior to becoming a special education teacher. SPED Teacher1, Tr.V3, 376:19-383:25; R-Ex.171, p.1092-1093.
7. Through SPED Teacher1's testimony, SPED Teacher1 has demonstrated an extensive knowledge of applied behavior analysis (hereinafter "ABA"); different techniques in implementing ABA strategies; conducting ABA related assessments, such as a functional behavior assessment (hereinafter "FBA"); as well as developing and implementing behavior intervention plans. SPED Teacher1, Tr.V3, 379:2-385:17, 430:10-23, 431:15-434:5, 443:11-446:24, 465:13-22, 549:13-24.
 8. SPED Teacher1 is qualified to testify as an expert witness in the area of special education teaching, with a specialty in severe/ASD and in the principles of ABA. SPED Teacher1, Tr.V3, 386:7-388:15.
 9. DOE Psychologist is a clinical psychologist for the DOE who is also a licensed clinical psychologist in the State of Hawai'i who can also work in private practice. DOE Psychologist has a bachelor's degree and master's degree in psychology and has a Ph.D. in clinical psychology. DOE Psychologist, Tr.V4, 562:5-566:1; R-Ex.175, p.1101-1108.
 10. Included in DOE Psychologist's duties for the DOE, DOE Psychologist consults with school teams, including attending IEP meetings; supervising master's degree level behavior health specialists or therapists at schools; and conducting psychological assessments on students. These assessments include FBAs and emotional behavior assessments (hereinafter "EBA"). DOE Psychologist, Tr.V4, 562:8-16, 566:10-570:17.

11. DOE Psychologist is qualified to testify as an expert witness in the area of clinical psychology. DOE Psychologist, Tr.V4, 570:18-576:10.
12. PSF Teacher is a special education teacher for the DOE who currently is the lead teacher at the DOE's Public Separate Facility. PSF Teacher has a bachelor's degree in general and special education, and a master's degree in special education. PSF Teacher has been teaching students with ASD for about [REDACTED] years for the DOE. PSF Teacher has also served as a DOE district ASD consultant since [REDACTED]. PSF Teacher, Tr.V5, 681:19-685:3; R-Ex.179, p.1113.
13. PSF Teacher is qualified to testify as an expert witness in the area of special education with an emphasis on ASD. PSF Teacher, Tr.V5, 684:14-686:13.
14. DOE BCBA is licensed in the State of Hawai'i as a doctorate level board-certified behavior analyst (hereinafter "BCBA-D"), and who also is licensed in [REDACTED] [REDACTED] as a clinical psychologist. DOE BCBA has a bachelor's degree in philosophy and psychology, a master's degree in psychology, a master's of philosophy in medical and social psychology, and a Ph.D. in psychology. DOE BCBA worked as a BCBA-D in the State of Hawai'i from [REDACTED] to [REDACTED]. DOE BCBA, Tr.V5, p.729:17-732:14; R-Ex.180, p.1114-1117.
15. One of DOE BCBA's areas of specialty is working with students with ASD and worked with students with ASD in Hawai'i and [REDACTED]. In [REDACTED], DOE BCBA served as a minister in special education for [REDACTED] years. DOE BCBA, Tr.V5, 734:21-739:3.
16. DOE BCBA has done extensive research and has published numerous studies on students with ASD in the school settings. These studies include high functioning

- students with ASD who exhibited other mental health issues such as anxiety or depression. DOE BCBA, 734:24-735:6, 790:1-793:22; R-Ex.180, p.1114-1117.
17. DOE BCBA is qualified to testify as an expert in the areas of ABA, ASD, special education, and clinical psychology. DOE BCBA, Tr.V5, 739:4-743:11.
18. DOE BHS is a behavioral health specialist for the DOE whose primary duties are to provide behavior counseling services to students that may have difficulty learning in school or have difficulties managing their disabilities in school. DOE BHS has a bachelor's degree in sociology, with an emphasis in children and family in society, a master's degree in counseling psychology, and is a marriage and family therapist, licensed in the State of Hawai'i since [REDACTED]. DOE BHS, Tr.V6, 876:12-877:21, 880:2-882:17; R-Ex.176, p.1109-1110.
19. DOE BHS also provides psychotherapy services to clients in private practice: working with clients who have mood disorders, anxiety, and/or depression. DOE BHS has had training in understanding different mental health disorders, particularly anxiety, depression, and trauma. DOE BHS, Tr.V6, 877:22-879:6.
20. DOE BHS is qualified to testify as an expert in the areas of counseling psychology, and marriage and family therapy, with a specialization in anxiety and trauma. DOE BHS, Tr.V6, 884:12-892:9.
21. DOE DES is a district educational specialist for the DOE. As a district educational specialist, DOE DES is responsible for advising principals of schools of procedures and special education; assisting with obtaining assessments and contractors for services; and training special education teachers and student services coordinators on the procedures for special education. DOE DES has also attended and assisted with

facilitating IEP meetings. DOE DES has a bachelor's degree in education and a master's degree in education administration and holds a Hawai'i School Administrator certificate. DOE DES, Tr.V6, 929:11-930:12, ; R-Ex.174, p.1098-1100.

22. DOE DES is qualified to testify as an expert in the area of educational administration, teaching, and special education. DOE DES, Tr.V6, 941:22-942:8.

Other background information

23. ABA is a scientific approach to conditioning behaviors that takes a behavior that needs to be extinguished or enhanced and uses reinforcers to shape the behavior toward something positive or not positive. Treating Psychologist, Tr.V2, 204:1-9. ABA does not involve the mind or the unconscious, it only refers to certain behavior and uses analysis to determine the "why" behind a particular problem behavior by looking at the variables surrounding the behaviors and how they impact the behavior. DOE BCBA, Tr.V5, 732:15-733:15.

24. ABA intervention should not be used to address psychological or medical issues with students. SPED Teacher1, Tr.V4, 537:9-538:1; *see also* Hawai'i Revised Statutes (hereinafter "H.R.S.") section 465D-2 ("Practice of applied behavior analysis expressly excludes psychological testing, diagnosis of mental or physical disorder, neuropsychology, psychotherapy, cognitive therapy, sex therapy, psychoanalysis, hypnotherapy, and long-term counseling as treatment modalities").

25. The best practice in developing an FBA is to examine the "ABCs" of behavior, which stands for the antecedents, behaviors, and consequences of the behaviors. To do this, BCBA's go through months of training to understand how to identify the antecedents

and consequences of behaviors. When preparing an FBA, it is important to collect data from various sources, interview family members, teachers, and also the student themselves; as well as collect information by directly observing the student in the setting where the problem behaviors occur. Noting information such as time and date of the observations is important to understand what else may be occurring at the time of the observations. DOE BCBA, Tr.V5, 743:15-752:19.

26. For programs under ABA to increase or decrease specific behaviors, the ABA professional creating the behavior plan for students must observe the student, take data, go over historical data, gather information to determine the possible cause of the behavior, identify the behavior itself, and then decide what type of intervention could be used to either improve, increase, or decrease the behavior. A behavior plan should also contain a clear outline of how the intervention(s) will be implemented and exit criteria, or a plan for how the interventions will be faded away or ended. SPED Teacher1, Tr.V3, 380:21-381:21, 534:19-535:23.

27. Behavior intervention plans developed based on recommendations from an FBA often contain information on environmental factors that may contribute to the problem behaviors; setting event manipulations, which include ways to modify the environment to lessen the likelihood of problem behaviors occurring; replacement behaviors, which are behaviors to take the place of problem behaviors; reinforcement procedures, which are specific ways to positively or negatively reinforce behaviors; teaching interventions, which are ways to provide instructors with modifications to assist with minimizing problem behaviors; and termination criteria for ending the behavior intervention plan. DOE BCBA, Tr.V5, 753:10-760:18.

28. The primary role of a registered behavior technician is to implement a behavior intervention plan and assist teachers with implementing strategies for learning. In the State of Hawai‘i, all registered behavior technicians are required to be supervised by a board-certified behavior analyst. SPED Teacher1, Tr.V3, 430:2-9; PSF Teacher, Tr.V5, 707:7-15; DOE BCBA, Tr.V5, 782:15-22, DOE DES, Tr.V5, 1029:21-1031;6.
29. The DOE has adopted a policy pursuant to Hawai‘i Revised Statutes Chapter 465D, which separately defines the service of “individual instructional support” as the service provided by a registered behavior technician pursuant to the recommendations of a completed FBA and in accordance with a behavior intervention plan. The DOE’s policy instructs schools in the supplementary aids and supports section of IEPs to write individual instructional support only when the services will be provided by a registered behavior technician pursuant to an FBA and behavior intervention plan. Other adult support provided to students as a supplementary aid and support in their IEPs are labeled as “close adult supervision.” SPED Teacher1, Tr.V3, 425:8-13, 429:16-430:9, 472:1-6, 494:18-24; PSF Teacher, Tr.V5, 710:23-712:14.
30. To pass a general educational development exam and qualify for a “GED” diploma (hereinafter “GED”), a student must pass a test that covers mathematics, language arts, social studies, and science. Certain courses taken in preparation for the general educational development exam could be put toward a diploma credit in the State of Hawai‘i. SPED Teacher1, Tr.V4, 541:9-542:15.
31. A certificate track student in the State of Hawai‘i DOE typically focuses on taking courses for functional living, such as math money skills and scheduling appointments, and these classes normally do not count as credits toward earning a high school

diploma. SPED Teacher1, Tr.V4, 506:1-507:22.

Student's background

32. Student is [REDACTED] years old and has been diagnosed with [REDACTED] [REDACTED]. Treating Psychologist, Tr.V2, 185:7-186:9; DOE Psychologist, Tr.V4, 603:7-18; P-Ex.2.7, p.361; R-Ex.14, p.0165.
33. Student is a [REDACTED]. Student is verbal and has a good vocabulary, but Student's verbal capacity is limited to concrete thinking. Treating Psychologist, Tr.V2, 184:7-16. This means that while Student has functional living skills and can recall facts, Student has trouble with fluid thinking, understanding use of language cues like metaphors, and trouble with interpersonal relationships. Treating Psychologist, Tr.V2, 188:11-191:13.
34. Student is sensitive to [REDACTED] and has trouble managing Student's feelings [REDACTED] [REDACTED]. Student gets distracted and anxious from the [REDACTED]. Parent, Tr.V1, 121:15-122:10; Private RBT1, Tr.V2, 271:24-272:16.
35. Student can complete daily living tasks, such as showering, washing up, getting dressed, and making meals. Student also does chores around the house independently, such as washing the dishes, taking out the trash, washing Student's own laundry, cleaning Student's room, and vacuuming. Student assisted with additional chores [REDACTED]. Parent, Tr.V1, 147:20-149:7.
36. Student usually goes for walks alone to the convenience store near Student's home. Student is able to purchase items from the convenience store without incident and reasonably manage pocket money given to Student for such purchases. Parent, Tr.V1, 151:21-152:21.

37. Student has been attending Private Center for about [REDACTED] years. Parent, Tr.V1, 118:1-3.
38. Private Center is not a school and credits in classes taken at Private Center do not transfer as recognized diploma-track credits under the State of Hawai'i DOE guidelines. SPED Teacher1, Tr.V3, 419:7-420:2.
39. Student first began attending Private Center when an incident happened to Student [REDACTED] and Parent did not want Student to continue attending public school. After speaking with another student involved in the incident [REDACTED], Parent met Private Center Administrator and was able to enroll Student at Private Center. Parent, Tr.V1, 118:4-119:10.
40. At Private Center, Student receives services from Private RBT1 daily, meaning that Private RBT1 accompanies Student throughout the entire day that Student attends Private Center. Parent, Tr.V1, 120:23-121:14; Private RBT, Tr.V2, 269:16-271:14.
41. Private RBT1 works with Student on a one-to-one basis at Private Center but does not provide registered behavioral technician services to Student, even though Private RBT1 is certified as a registered behavior technician. SPED Teacher1, Tr.V3, 422:2-423:13, 428:14-19, 492:21-493:8; DOE DES, Tr.V5, 978:12-20.
42. Private RBT1 has been working with Student for about [REDACTED] years and Private RBT1 has built a great rapport with Student. Private RBT1, Tr.V2, 278:9-15. Private RBT1 helps assist Student with organization, planning, and prioritizing Student's work. Private RBT1 assists with Student's education by breaking down the work given in Student's online classes to make it accessible for Student. Private RBT1, Tr.V2, 265:23-267:7. Occasionally, Private RBT1 has to break down and completely

reteach Student the materials that was taught in online classes that Student was taking. SPED Teacher1, Tr.V4, 517:23-519:1; P-Ex.7.1, audio recording at approximate time stamp 00:22:50-00:23:20 (hereinafter referenced as “P-Ex.7.1 [22:50-23:20]”); ² P-Ex.7.3 [1:13:05-1:14:04] (Private Center Executive Director informed the IEP team that Student needs to be retaught materials that was taught in Student’s online classes and an example of this was Private RBT1 needing to spend hours reteaching Student algebra).

43. Student receives tutoring and instruction in math from Private Math Tutor and in English from Private English Tutor. Private RBT1 provides Student with tutoring and instruction in all other subject areas and if necessary, provides secondary tutoring or instruction for Student in English and math as well. Private RBT1, Tr.V2, 268:14-269:15.

44. Private RBT1 assists Student [REDACTED] by watching Student’s body cues and by understanding things in the past that have triggered [REDACTED] with Student. Private RBT1 then asks Student if Student is okay or if there are things bothering Student. Private RBT1 allows Student to take a break or change locations if Student chooses to do so. Private RBT1, Tr.V2, 272:17-274:25, 318:8-19; P-Ex.7.4 [48:53-50:29].

45. Private RBT1 also takes data on Student, in the form of partial interval data, for instances when Student [REDACTED], or when Student [REDACTED]

² Because there were separate recordings of each of the meetings submitted by the parties, this Hearings Officer reviewed all recordings, however, for purposes of referencing any particular audio portions of the meetings, this Hearings Officer will use the time stamps exclusively from the recordings submitted by Petitioners, Exhibits 7.1-7.5.

- [REDACTED]. Private RBT1, Tr.V2, 275:1-276:1.
46. Private Center has provided Parent and the DOE with quarterly reports on Student's academic, emotional, and behavioral progress at Private Center, as well as certificates of completion. Private RBT1, Tr.V2, 284:1-285:20; P-Ex.2.1, p.287-294; P-Ex.2.2, p.295-296; P-Ex.2.3, p.297-310; P-Ex.2.4, p.311-327; P-Ex.2.6, p.334-357; P-Ex.2.9, p.365-366.
47. Private RBT1 has spoken with Student about attending school on a public-school campus and Student has expressed no interest in going, although Student has not provided any reasons why besides Student wanting to stay at Private Center. Private RBT1 does not believe that Student would do well at a public-school campus. Private RBT1, Tr.V2, 286:20-287:11.
48. Private English Tutor has been working with Student since [REDACTED] and designs and provides Student's English/Language Arts curriculum at Private Center. Private English Tutor, Tr.V3, 338:19-339:24; P-Ex.7.1 [23:23-23:50].
49. Since Private English Tutor has been working with Student, Student has been making slow and steady progress in understanding nuances in the meaning of words and phrases. Student works on paraphrasing reading passages and poems, learning new words and their meanings, and writing informative, narrative, and opinion papers. P-Ex.2.13, p.377.
50. Student has expressed to Private English Tutor that Student would like to get a GED diploma-equivalent and Private English Tutor currently provides Student with instruction designed to assist Student in preparing for the GED test. Private English

Tutor, Tr.V3, 339:25-340:9, 346:12-24, 354:17-22.

51. Private English Tutor works with Student on a one-to-one basis for English/Language Arts instruction and Private RBT1 is present during their sessions and sometimes participates in activities, such as book club-type discussions. Private English Tutor, Tr.V3, 340:18-344:15, 357:12-23.

52. Private English Tutor is not familiar with Student's behavioral program, its background, or all the supports that Student has at Private Center. Private English Tutor is not familiar with Student's triggers [REDACTED]. Private English Tutor, Tr.V3, 344:16-22, 369:5-18.

53. Private English Tutor was hired by Private Center just to be an English/Language Arts tutor for Student. Private English Tutor, Tr.V3, 355:8-12, 363:1-4; P-Ex.6.1, p.671.

54. Private English Tutor has observed at least two incidents of [REDACTED] [REDACTED]. Private English Tutor was not responsible for addressing or redirecting Student's behavior [REDACTED], as another staff member was the lead. Private English Tutor was aware that Student had some difficulties [REDACTED] [REDACTED]. Private English Tutor, Tr.V3, 365:1-367:5, 368:16-369:4.

55. Private English Tutor is familiar with Home School, having taught there for a short period of time, and does not believe that Student would do well at Home School. Private English Tutor, Tr.V3, 337:11-15, 345:17-346:9, 347:2-22, 350:8-18.

56. One of the reasons that Parent, Private RBT1, and Private English Tutor does not believe that Student would do well on a public-school campus is because the setting

of a public-school campus is noisy and chaotic [REDACTED]
[REDACTED]. Parent, Tr.V1, 127:16-130:2; Private RBT1, Tr.V2, 285:21-286:24. Private English Tutor, Tr.V3, 345:17-346:2, 346:25-21.. All believe that since Student is currently doing well at Private Center and because Student wants to stay at Private Center, there is no need to move Student to a public school, since Private Center is adequately addressing Student's needs. Parent, Tr.V1, 126:15-127:8; Private RBT1, Tr.V2, 286:25-287:6; Private English Tutor, Tr.V3, 346:3-24.

57. Since Student has been attending Private Center for around [REDACTED] years, Student is familiar with the staff and other students that attend Private Center. Student's classes at Private Center include around [REDACTED] students on average, but Student often receives individual instruction at Private Center. Parent, Tr.V1, 119:11-120:22.

58. At Private Center, Student currently studying to obtain a GED diploma equivalent. Parent, Tr.V1, 130:14-24.

59. Through Private Center, prior to the COVID-19 pandemic, Student went to the gym, the community pool, and community exercise classes, and would go on excursions with other students from Private Center around the island where Student lives.

Private RBT1 has also been taking Student to different locations for Student to explore possibilities for obtaining a job. Private RBT1, Tr.V2, 287:12-290:22; Private English Tutor, Tr.V3, 348:1-349:8.

60. At Private Center, Student has occasional opportunities to interact with neurotypical peers or general education peers, but not daily. Private RBT1, Tr.V2, 291:8-20, 317:13-20.

61. Parent is against the idea of Student attending a public school or any other place besides Private Center. DOE DES, Tr.V1, 65:4-13; Treating Psychologist, Tr.V2, 211:2-8; SPED Teacher1, Tr.V3, 420:18-21; *see also e.g.* P-Ex.7.3 [53:06-53:27] (Parent raised the concern about Student being in a “public classroom” despite no one mentioning or raising the issue about placement and Parent asked Private Center Administrator and Treating Psychologist’s thoughts on the issue); P-Ex.7.3 [1:31:28-1:31:42] (“I really think [Student]’s better off where [Student] is ... [Student]’s done so well ... and I know [Student]’s safe”); P-Ex.7.4 [1:42:52-1:43:09] (“I think you all know my stance on public school ... I don’t think it’s a good situation for [Student] mentally or emotionally. I don’t think [Student] would do well at all especially in larger groups of kids.”); P-Ex.7.4 [2:10:12-2:11:37].
62. Private Center Administrator and the rest of the Private Center IEP team are also against the idea of Student returning to any public school. DOE DES, Tr.V1, 65:4-13; DOE Psychologist, Tr.V4, 642:22-643:6; SPED Teacher1, Tr.V3, 438:8-440:11, 484:4-8; *see generally* P-Ex.7.4; P-Ex.7.5.
63. Private Center Administrator and Private Center Executive Director have known Student since Student was [REDACTED] years old and have participated in Student’s IEP team meeting throughout the years since Student began attending Private Center. P-Ex.7.1 [01:49-02:08].
64. Parent and Private Center Administrator repeatedly raise an incident [REDACTED] that allegedly happened to Student at a public [REDACTED] school when Student was [REDACTED] years old as a reason for why Student should never return to a public school intimating that a return to a public school or any setting other than Private Center

could lead to another [REDACTED] incident. Both Parent and Private School Administrator claim that the incident is something that still affects Student to this day. P-Ex.7.3 [1:29:40-1:31:34]; P-Ex.7.3 [1:35:03-1:35:15]; P-Ex.7.4 [55:00-56:06] (Private Center Administrator described an incident when Student was [REDACTED] where Student [REDACTED] [REDACTED] 'history of [REDACTED]' with Student at a public-school); P-Ex.7.4 [1:43:13-1:43:35] [1:44:04-1:44:20] (Private Center Administrator tried to provide additional information to the team about Student's history at public school and Parent asked the IEP team if they did not know about the incident that happened to Student when Student was in [REDACTED] grade); P-Ex.7.5 [11:54-12:26]. (raising Student's [REDACTED] incident in school).

65. Neither Parent nor Private Center had ever gotten Student psychological, psychiatric, or any other kind of mental health service to deal with Student's alleged trauma from this [REDACTED] incident until Treating Psychologist did the psychological evaluation in January 2020, despite Student having allegedly suffered from this incident the entire time Student was at Private Center. Treating Psychologist, Tr.V2, 240:15-21.

March 2018 psychological evaluation

66. On March 7, 2018, DOE Psychologist prepared a report of a psychological evaluation conducted with Student. The psychological evaluation was prepared after a referral from Student's school team as part of a comprehensive special education reevaluation. DOE Psychologist, Tr.V4, 576:15-577:25; R-Ex.14, p.0156-0166.

67. For the psychological evaluation, DOE Psychologist gathered information from interviews with Parent, Private RBT1, Private Center Administrator, and a DOE

student services coordinator. DOE Psychologist also reviewed Student's educational file and cumulative folder, which included grades, attendance, early report cards, and progress reports from Private Center; as well as other assessments conducted with Student for the 2018 reevaluation, including intellectual, adaptive, speech/language, occupational therapy, and academic assessments. DOE Psychologist also used four other assessments to assess Student's psychological functioning. DOE Psychologist, Tr.V4, 580:24-592:16; R-Ex.14, p.0157.

68. DOE Psychologist conducted a clinical interview of Student on two occasions as part of the psychological evaluation. DOE Psychologist's report summarizes Student's appearance, demeanor, and presentation at the interviews, as well as parts of the discussions that DOE Psychologist had with Student and the mental status assessment conducted with Student. DOE Psychologist, Tr.V4, 592:17-597:17, 600:23-603:6; R-Ex.14, p.0161-0165.

69. Based on the psychological evaluation, DOE Psychologist determined that Student met the diagnostic criteria for [REDACTED]. DOE Psychologist also found that Student met the diagnostic criteria for [REDACTED]. DOE Psychologist, Tr.V4, 603:7-607:14; R-Ex.14, p.0165.

70. DOE Psychologist made the following recommendations for Student for the psychological evaluation:

[Student's] school team should discuss continued eligibility for supports under Special Education.

[Student's] school team should discuss post-high school transitional and long-term goals as part of an IEP discussion.

Continue to work on functional skills, such as navigating [Student's] environment, being safe, learning what to do in an emergency, shopping, etc. Encourage independence and fading of prompts, when appropriate.

Regularly scheduled counseling with a behavior health specialist. A positive

behavior support plan should be developed. When possible, behavior targets should be framed in terms of the behaviors staff wants increased instead of counting (and focusing on) negative behaviors. Counseling goals and corresponding objectives should address social skills, coping/stress/anger management, and the development of executive functioning skills.

[Student's] teacher noted that [Student] exhibits [REDACTED]. The family should also consult their pediatrician rule out any medical factors that may be contributing to [REDACTED] and to see advice regarding treatment.

[Student] would benefit from a (*sic*) more structure at home, including a consistent sleep schedule over the course of the week, including less variability in schedule during the weekends. If possible, it is recommended that the family access a home-based therapist, either through the Department of Health or privately. The behavioral health specialist should interface with any outside therapist(s) who are utilized in order to coordinate their approach. It is important that home and school align to provide a consistency in approach to [Student]. Both therapists can work on common goals, and the home-based therapist could work on issues pertaining to [REDACTED].

Use classroom accommodations to increase efficiency and decrease anxiety, such as cuing for transitions and providing visual cues together with auditory cues, when possible.

Given [Student's] [REDACTED], I believe that [Student] would benefit from a psychiatric evaluation in order to clarify the diagnosis and ascertain whether medication management of symptoms may be of benefit.

To the extent possible, [Student] should be involved in prosocial extracurricular activities in areas of interest.³ DOE Psychologist, Tr.V4, 607:15-617:25; R-Ex.14, p.0165-0166.

71. DOE Psychologist did not have any further relation or contact with Student after the psychological evaluation in March 2018 until earlier in 2021 when DOE Psychologist was asked by the DOE to conduct another psychological evaluation of Student and then told to stop doing evaluation by Parent and Private Center. DOE Psychologist,

³ This Hearings Officer notes that the 2018 psychological evaluation conducted by DOE Psychologist appears to be thorough in that many sources of information were reviewed to gather background information on Student and Student's difficulties, including current (at the time) assessments that had also been conducted with Student at or near the time of the evaluation, interviews were conducted with several people knowledgeable with Student, and most importantly, the recommendations by DOE Psychologist were specific and appear to be intended to assist with addressing the psychological issues occurring with Student, and is not simply a conclusory statement of where Student should be placed.

Tr.V4, 621:23-622:12, 636:24-637:1.

January 2020 psychological report and Student's current psychological treatment

72. In January 2020, Treating Psychologist did a psychological evaluation with Student as a referral from Private Center. Treating Psychologist prepared a four (4) page report, in which Treating Psychologist diagnosed Student with [REDACTED]. Treating Psychologist, Tr.V2, 188:14-16; P-Ex.2.7, p.358-361. Prior to the psychological evaluation of Student in 2020, Treating Psychologist was not familiar with Student and had not met Student. P-Ex.7.2 [09:37-09:41].

73. As part of the psychological evaluation, Treating Psychologist interviewed Private Center Administrator for information about Student's "collateral information." Private Center Administrator told Treating Psychologist that Private Center Administrator believes that Student is [REDACTED], and Treating Psychologist trusted Private Center Administrator's assessment based on Treating Psychologist's familiarity with Private Center Administrator. While Treating Psychologist testified that Treating Psychologist conducted "the usual interviews and what have you," no other interviews with Student's teachers, peers, or family members were reported in Treating Psychologist's report. Treating Psychologist, Tr.V2, 188:17-25, 201:3-11, 235:1-10; P-Ex.2.7, p.358-361.

74. Treating Psychologist did not review any previous assessments, evaluations, or educational or cumulative records at the time of the psychological evaluation, including the 2018 psychological evaluation conducted by DOE Psychologist. Treating Psychologist, Tr.V2, 234:7-25; 235:11-17, 236:24-237:2.

75. Treating Psychologist noted that "[Student] reportedly has never had professional

help from a mental health provider. Yet, the psychological conditions described have been chronic.” Treating Psychologist also noted that “Reportedly, [Student] is physically healthy and on no medications.” P-Ex.2.7, p.358.

76. Treating Psychologist conducted three assessments with Student and interviewed Student once as part of the psychological evaluation. Treating Psychologist noted that Student was cooperative, responsive and had normal levels of eye contact. Student was not observed to have much anxiety during the interview, nor did Student show signs of significant emotional disturbances. Student was able to tell Treating Psychologist about Student’s academics, favorite subjects in school and Student’s aspiration to become a [REDACTED]. P-Ex.2.7, p.358-361.
77. Treating Psychologist did conduct one assessment with Parent for Student’s psychological evaluation. The results of the assessments with Student and Parent were included in the psychological evaluation. Treating Psychologist, Tr.V2, 235:1-3; P-Ex.2.7, p.359-361.
78. Treating Psychologist concluded that Student is a likeable person that was “already described to be [REDACTED], but no standardize (*sic*) measures were provided.” Treating Psychologist also noted that Student’s “functioning level is high enough to recognize personal limitations. Thus, [Student] is likely feeling vulnerable and somewhat dependent. Also, limitations in social skills may suggest [Student] is living in a world that is difficult to predict, again predisposing [Student] to anxiety. At this stage in [Student’s] life, anxiety may have become generalized.” P-Ex.2.7, p.361.
79. Treating Psychologist made the following recommendation as part of the psychological evaluation: “[Student] is in a good educational environment presently,

and my primary recommendation is to simply stay the course. Also, [Student] is surrounded with caring people who can counteract the effects of past traumas. With the proper assistance, [Student] can begin to learn how to navigate life distinguishing the good from the bad people.” P-Ex.2.7, p.361.

80. Treating Psychologist made this recommendation based on conversations with Private Center Administrator, Parent, and Student, and at the time had not observed Student in Student’s educational environment at Private Center. Treating Psychologist cannot provide any information about Student’s friends or current school schedule. Treating Psychologist, Tr.V2, 254:1-255:4, 257:18-258:1.

81. Since the psychological evaluations, Treating Psychologist has been working with Student outside of Private Center. Treating Psychologist is the first therapist that Student has ever had, so Student’s cognitive problems have been stewing for a long time. Treating Psychologist works with Student at most once a week. Treating Psychologist, Tr.V2, 183:22-184:6, 188:9-13, 191:14-192:4, 212:15-17, 240:15-21; Private RBT1, Tr.V2, 311:6-20; DOE DES, Tr.V5, 986:6-9.

82. Treating Psychologist has attempted to increase the amount of time between visits with Student, but Student has demonstrated behaviors during those times necessitating a more frequent visit schedule. Treating Psychologist, Tr.V2, 191:14-192:4; P-Ex.7.1 [1:34:24-1:35:16]; P-Ex.7.3 [1:38:08-1:38:26].

83. Treating Psychologist noted that while Student has been diagnosed with [REDACTED], Student’s [REDACTED] diagnosis [REDACTED], [REDACTED], it makes it difficult for Student to navigate issues, such as triggers, as Student goes through life. Treating Psychologist, Tr.V2, 184:7-24.

84. Treating Psychologist has been working with Student on being able to recognize triggers in Student's life that might cause Student to have problems. Treating Psychologist has also "tried to intervene[] as much as possible with the school system, not DOE, but [Private Center] to help navigate through things so that [Student] doesn't escalate and doesn't do harm to [Student's self] or others." Treating Psychologist, Tr.V2,184:25-185:6.

85. One of the significant cognitive concerns Student has is the tendency to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Treating Psychologist, Tr.V2, 186:25-187:14, 192:5-23; P-Ex.7.1 [1:11:05-1:11:25]; P-Ex.7.2 [30:30-31:10].

86. Treating Psychologist has never witnessed Student [REDACTED]
[REDACTED] but has heard Student make statements of [REDACTED]
[REDACTED] during sessions with Treating Psychologist. Treating Psychologist has never determined that Student presented an imminent danger to Student's self or others. Treating Psychologist, Tr.V2, 241:12-244:22.

87. It is very hard to predict when Student will be triggered emotionally and some of the work that Treating Psychologist is doing with Student is to help Student recognize what causes Student to be triggered and how to remedy the emotions before they escalate. Treating Psychologist also believes that the one-on-one assistance that Student receives at Private Center helps because that person can recognize occasions when Student may not be in a good place mentally and try to keep Student from

- behaviors that could result from [REDACTED]. Treating Psychologist, Tr.V2, 192:24-196:6.
88. One benefit that Private Center provides to Student is consistency, which is very helpful for students with [REDACTED], since Student is familiar with Private Center's setting, staff, and routine. Treating Psychologist, Tr.V2, 201:12-23, 214:7-9, 230:19-231:4,
89. Because of Student's [REDACTED] diagnosis of [REDACTED], ABA is helpful but not sufficient to deal with Student's behaviors. Most of Student's problems has to do with Student's thinking and the link between Student's thoughts and the behaviors that are displayed. These types of issues are not covered with a behavioral system like ABA. Treating Psychologist, Tr.V2, 202:3-20, 205:20-206:5, 206:24-207:10; P-Ex.7.1 [1:09:43-1:12:43].
90. Student having one-to-one support is helpful at Private Center since the support person would be there to encourage Student to express Student's feelings and being comfortable doing so, as well as to listen to Student when Student is expressing feelings and help activate an intervention that would direct Student away from the feelings or thoughts that would cause Student to escalate. Treating Psychologist, Tr.V2, 206:6-23.
91. Treating Psychologist's main concern with Student attending public school is why would they change Student's placement at this late stage when Student has attended Private Center for around [REDACTED] years. Treating Psychologist also does not like Home School because Treating Psychologist is familiar with Home School [REDACTED]. Treating Psychologist characterized Home School as a place that Student "perceives as a place

of evil.” Treating Psychologist also believes that the DOE does not have the resources to provide sufficient programs for all children. Treating Psychologist Tr.V2, 196:7-197:22, 212:4-14, 214:13-215:4, 219:4-220:25, 258:9-260:4; P-Ex.7.5 [19:18-20:21].

92. Treating Psychologist believes that the IEP team members from Private Center has attempted to get Student to go back to the public-school campus programs in the past, but that it was rejected by the DOE IEP team members. Treating Psychologist, Tr.V2, 246:17-250:4.

93. While it is undisputed that the single alleged [REDACTED] incident⁴ happened while Student was at a different public school from Home School, and Student has been at Private Center since that time, Treating Psychologist speculates that Student’s attendance at Home School could likely result in Student being [REDACTED] again or ending up causing harm [REDACTED] to others. Treating Psychologist, Tr.V2, 197:23-198:15, 199:16-200:2.

Litigation and other background leading up the IEP meetings in 2020-2021

94. Student was due for an annual IEP in or around March 2020, according to Student’s prior annual IEP, which was developed on March 4 and 29, 2019. DOE DES, Tr.V5, 1035:5-6; R-Ex.8, p.060.

95. On or about August 21, 2019, Petitioners filed a request for an impartial due process hearing in DOE-SY1819-044. On November 1, 2019, Petitioners and Respondents

⁴ This Hearings Officer notes that no evidence was presented regarding the facts of the “[REDACTED] incident” by Petitioners, and DOE DES testified that there were some inconsistencies with the facts as presented by Parent regarding the “[REDACTED] incident” but that the DOE simply took what Parent said to be true. DOE DES, Tr.V1, 99:6-12.

reached a Compromise and Settlement Agreement, which included following terms:

1. The DOE will pay for Student's tuition (Service Package A) at the [Private Center] for a period of eighteen (18) months from May 1, 2019 thru October 31, 2020. The payments will be made payable to [Private Center].
2. The DOE agrees to pay reasonable attorney's fees and costs from April 25, 2019 to the present.
3. Petitioners agree to withdraw the Second Amended Due Process Complaint, designated DOE-SY1819-044, submitted on or about August 21, 2019, with prejudice including any and all claims arising out of, resulting from, or connected with any and all issues relating to the Student's education up to, through and including the date of the execution of this Agreement. The terms of this settlement, compromise, and release are not mere recitals;" P-Ex.5.1, p.598-602.

96. The DOE continued paying for Student's tuition and related services at Private Center during the time that Parent and the Private Center IEP team was still working with the DOE IEP team to develop a current IEP for Student. The DOE stopped making payments for Private Center upon an offer of FAPE being extended to Parent, which would have been the date the proposed services were to begin in April 2021. DOE DES, Tr.V1, 52:14-54:16, 72:7-24.

97. When the DOE proposed meeting dates to develop Student's IEP, Parent did not want to meet with the DOE for an IEP meeting until October 2020. DOE DES, Tr.V6, 942:25-943:15. Several of the meeting dates were rescheduled to accommodate many of the team members from both the DOE and Private Center and Treating Psychologist. DOE DES, Tr.V6, 943:24-944:11, 944:25-945:11. The IEP team did meet on October 20, 2020, November 12, 2020, December 3, 2020, February 25, 2021, and March 18, 2021. See P-Ex.7.1-7.5; R-Ex.195-199.

98. Prior to the October 20, 2020 IEP meeting, the Home School prepared a draft IEP that was sent to all the IEP team members. After each meeting, the draft IEP was updated and sent to all the IEP team members prior to the next meeting. DOE DES, Tr.V6,

945:16-946:22. At the time of the October 20, 2020 IEP meeting, the IEP team had DOE Psychologist's report, Student's reevaluation assessments from 2018, Treating Psychologist's report, and progress, quarterly, and other reports provided by Private Center. *See generally* P-Ex.7.1.

IEP meeting on October 20, 2020

99. On October 20, 2020, an IEP meeting was held via virtual videoconference. During the course of the meeting, the host of the meeting would share the screen with the participants so that they could see whatever document was being shown or reviewed. The meeting started at 2:00 p.m. and was scheduled to last two (2) hours. P-Ex.7.1; R-Ex.195.
100. Present at the October 20, 2020 meeting from the DOE were DOE DES, Student Services Coordinator (hereinafter "SSC"), District Psychologist, SPED Teacher1, Principal, Special Education Teacher 2 (hereinafter "SPED Teacher2"), District Teacher, DOE BHS, Vice Principal, and General Education Teacher. Parent and Treating Psychologist were also present at the October 20, 2020 meeting along with the following people from Private Center: Private RBT1, Private RBT2, Private BCBA1, Private Center Administrator, Private Center Executive Director, Private BCBA2, and Private RBT3. P-Ex.7.1 [00:37-04:05].
101. Prior to the October 20, 2020 IEP meeting, a draft IEP was sent to the participants of the meeting. During the meeting, it was noted that one edit was made to the draft that had been sent out to include the results of an assessment that Private Center had given to Student. This change was made to page 2 of the IEP. P-Ex.7.1 [13:21-14:11], [38:10-38:25].

102. In the October 20, 2020 meeting, the team began to go through the draft IEP, reading and reviewing all of the different sections on the IEP. During the beginning of the discussion of Student's present levels of educational performance (hereinafter "PLEPs"),⁵ Private Center Administrator asked Treating Psychologist to provide the IEP team insight into Student's current academic situation, including Student's recent intelligence tests that was included in Treating Psychologist's report. This part of the discussion centered around whether Student would be on a diploma track or a certificate track. P-Ex.7.1 [16:50-20:29].
103. At the meeting, the Private Center Administrator told the IEP team that they recommended that Student work toward a "general education degree" to minimize undue stress to Student but would let the rest of the team know if there are any changes. P-Ex.7.1 [24:10-25:21].
104. The IEP team reviewed the PLEPs as they were written in the draft IEP, with SPED Teacher2 reading aloud from the draft IEP while it was also being displayed on the shared screen. After reading each section of the PLEPs, SPED Teacher2 stopped and asked if anyone had anything to add, any changes to be made, or any other input that any team members wanted to provide. IEP team members from Private Center, as well as Treating Psychologist provided input after several of the sections. *See generally* P-Ex.7.1.
105. DOE DES also stopped during the PLEPs section noting that since Private Center personnel were at the October 20, 2020 IEP meeting to ask if Private Center team

⁵ This Hearings Officer notes that the correct terminology for this section of the IEP is present levels of academic achievement and functional performance (PLAAFPs), however both the IEP document in this case and the IEP team members use the term PLEPs.

members had any information that they would like to provide to the IEP team or any additional needs should be added to the IEP, since Student was attending Private Center at the time of the meeting. Private BCBA1 and Private Center Administrator provided input at that time. P-Ex.7.1, [49:47-50:51]. DOE DES also requested more information and clarification from Private Center IEP team members several other times during the IEP meeting to gather more information about Student's current performance. *See generally* P-Ex.7.1.

106. Throughout the October 20, 2020 meeting, Treating Psychologist often conveyed to the IEP team Treating Psychologist's concerns regarding Student's and Student's mental and behavior issues that could affect Student's performance in school and later in life. *See e.g.*, P-Ex.7.1 [32:15-34:42], [1:09:48-1:12:43], [1:30:20-1:34:04], [1:39:40-1:43:30].

107. At the October 20, 2020 meeting, DOE DES asked Treating Psychologist and Private Center for additional information regarding Student's behavioral needs, specifically whether Private Center had an FBA for Student, since the DOE was not provided with that information from Private Center prior to the meeting. Private BCBA1 told the IEP team that Private Center did not have an FBA for Student but had a crisis plan for Student. Private BCBA1 also told the IEP team that Student technically did not receive ABA services, as it was not written in Student's previous IEPs. P-Ex.7.1 [1:03:06-1:06:03].

108. During that discussion, Private BCBA1 informed the IEP team that Private Center had been taking baseline data on Student's behaviors for just over one month to determine if an FBA would be necessary. DOE DES inquired whether the team was

requesting an FBA and Treating Psychologist stated that Treating Psychologist did not oppose the FBA but did not think that it would be efficient to get a good handle on what is going on with Student. Treating Psychologist noted that Student has cognitive issues that cannot be addressed by just looking at Student's behaviors themselves. Private Center Administrator agreed that Student's issues were more cognitive or related to Student's self-esteem so that an FBA was necessary. The team ultimately agreed to schedule a separate meeting to determine the need for an FBA. P-Ex.7.1 [1:07:00-1:15:46].

109. The IEP team did not complete the IEP discussions on October 20, 2020 and another meeting was scheduled. The IEP team was still in the process of discussing Student's PLEP's just before the area of functional assessments at the conclusion of the October 20, 2020 meeting. P-Ex.7.1 [1:45:00-1:46:54].

IEP meeting on November 12, 2020

110. Prior to the November 12, 2020 IEP meeting, the IEP team members were provided an updated draft of the IEP with changes from the October 20, 2020 meeting. Team members were asked if there were any additions or corrections to be made to the draft and Private BCBA1 provided input. P-Ex.7.2 [06:10-06:20], [08:20-09:01], [15:00-15:10].
111. The IEP team reconvened on November 12, 2020 to resume the development of Student's IEP. Present at the November 12, 2020 meeting from the DOE were Principal, SSC, SPED Teacher2, District Teacher, SPED Teacher1, Vice Principal, and DOE DES. Parent, Treating Psychologist, and the following team members from Private Center were present at the November 12, 2020 IEP meeting: Private Center

- Administrator, Private Center Executive Director, Private BCBA1, Private BCBA2, and Private RBT2. P-Ex.7.2 [03:53-05:50].
112. Private Center Administrator asked the team to allow Treating Psychologist to review Treating Psychologist's report that had been provided to the team after the October 20, 2020 meeting. P-Ex.7.2 [07:40-07:49]. Treating Psychologist went over the report that Treating Psychologist prepared and provided to the IEP team. P-Ex.2.7, p.358-361; P-Ex.7.2 [09:30-14:06].
113. In the November 12, 2020 IEP meeting, the team continued to review the updated draft IEP, beginning with the section of functional life skills, with SPED Teacher2 reading each section of the draft IEP and then asking for input from other team members at the end of each section. Parent and IEP team members from Private Center provided input at various points of the discussion of Student's PLEPs. *See generally* P-Ex.7.2 [15:13-39:20].
114. The IEP team reviewed Student's impact statement for Student's IEP after the discussion of the PLEPs. P-Ex.7.2 [39:25-41:16]. The IEP team then discussed transition services, post-high school needs and goals for Student, Student's interests, and the transfer of rights to Student upon reaching the age of majority. During this conversation the team reviewed a RIASEC test to determine Student's areas of strengths and interests and discussed Student's hopes for going to college and getting a job. P-Ex.7.2 [41:20-1:00:46].
115. The IEP moved onto discussing goals and objectives for Student's IEP based on the needs of Student identified in the PLEPs. P-Ex.7.2 [1:00:57-1:26:06]. Private BCBA1 and Private Center Administrator provided substantial input for this portion

- of the discussion and Private BCBA1 offered to send SPED Teacher2 an email with further input on the goals and objectives. *See e.g.* P-Ex.7.2 [1:02:27-1:09:01], [1:24:34-1:24:57], [1:25:10-1:25:50].
116. After discussing the proposed goals and objectives for Student’s IEP, the team began discussion regarding extended school year (hereinafter “ESY”) services. During this discussion, DOE DES requested information from Private Center regarding Student’s regression over extended breaks, particularly information about how Student adjusted to being out of school during the COVID-19 pandemic lockdown. P-Ex.7.2 [1:26:07-1:56:40].
117. The team had a lengthy discussion about the number of days after which Student would be eligible for ESY services. Private Center Administrator, Private BCBA1, and Treating Psychologist provided their input that they did not believe that Student should have a ten (10) day break before services, but no data was provided to the IEP team at the time of the meeting. After further discussion, the team decided that since the first ESY session would be winter break, a ten (10) day break would be acceptable since a seven (7) day break, as suggested by Private Center Administrator, would bring Student back on a holiday. The team also agreed that data would be taken for two (2) weeks after Student returns from the break and they could further discuss the length of the break after the data is collected. Treating Psychologist also provided suggestions for how to prepare Student for the extended break during the winter break. P-Ex.7.2 [1:37:00-1:56:40].
118. The IEP team did not complete Student’s IEP on November 12, 2020 and the team rescheduled the meeting. P-Ex.7.2 [1:56:45-2:03:13].

IEP Meeting on December 3, 2020

119. A continued IEP meeting was held on December 3, 2021. Present at the meeting from the DOE were Principal, SSC, SPED Teacher1, SPED Teacher2, DOE DES, District Psychologist, General Education Teacher, District Teacher, PSF Teacher, DOE BCBA, DOE BHS, and Vice Principal. Parent and Treating Psychologist were also at the meeting on December 3, 2020 along with the following team members from Private Center: Private Center Administrator, Private Center Executive Director, Private RBT2, Private BCBA1, and Private BCBA2. P-Ex.7.3 [02:17-04:11].
120. At the start of the IEP meeting, Treating Psychologist had some corrections to make to the updated draft IEP that was provided to the IEP team members prior to the December 3, 2020 meeting. Treating Psychologist provided information from Treating Psychologist's report that should be corrected or included in the draft IEP. P-Ex.7.3 [06:13-08:40], [09:23-15:20].
121. Private BCBA1 requested some clarifications and provided input about some additional behavioral goals that Private Center wanted to add to Student's IEP. The team reviewed the goals that Private Center proposed and discussed the goals and the best way to write the goals. During this discussion, DOE DES asked for more specific details and data that Private Center was collecting and behaviors that Private Center was targeting to write the goals with specificity. P-Ex.7.3 [15:30-38:19].
122. The first goal proposed by Private Center team members related to Student's behaviors [REDACTED]. [REDACTED]. Both Private BCBA2 and Parent provided examples of the [REDACTED] that Student [REDACTED].

[REDACTED]

[REDACTED]. P-Ex.7.3 [34:33-35:35]. Parent gave examples of the [REDACTED] and noted that Student's work with Treating Psychologist had helped with reducing this behavior. P-Ex.7.3 [35:44-36:17].

123. During this time, DOE DES prompted Parent and Private Center to provide the IEP team more information about Student's behaviors and how the team can create a goal that would properly address Student's needs. While the team continued to discuss other goals, SPED Teacher1 drafted a written goal and objectives for the team to review during the IEP meeting. P-Ex.7.3 [15:30-38:19].

124. A second goal proposed by Private Center related to [REDACTED] behaviors that Private Center had observed and wanted to target as a behavior to decrease. During this discussion, Parent informed the IEP team that Student did not have any [REDACTED] behaviors at home and Private BCBA1 informed the team that Student was no longer engaging in [REDACTED] behaviors, but Student was exhibiting more of the [REDACTED]. P-Ex.7.3 [38:20-39:32]. Private BCBA1 and Parent agreed that the proposed goal should be changed to [REDACTED] instead of [REDACTED] behavior. P-Ex.7.3 [39:33-40:36]. Treating Psychologist also provided input to the team regarding this proposed goal; noting that Student's [REDACTED] behaviors is not completely extinguished and adding a coping mechanism of teaching Student to communicate with someone when Student is [REDACTED]. P-Ex.7.3 [41:09-42:45]. Private Center Administrator also provided input on this topic, saying that

Student has a long history of [REDACTED] behaviors and the tendency to [REDACTED].⁶
P-Ex.7.3 [44:27-47:04].

125. The IEP team then reviewed the written goal that SPED Teacher1 prepared based on the goals proposed by Private BCBA1 and the discussion had at the meeting. The team discussed the proposed specific times and number of opportunities and Private BCBA1 provided input in this goal, as it was based on the goal that Private BCBA1 proposed. P-Ex.7.3 [47:30-50:04].

126. Treating Psychologist interjected and noted that the goal did not seem attainable for Student and expressed a concern about why the goal would require Student to [REDACTED]
[REDACTED]. P-Ex.7.3 [50:04-51:35].

127. After some discussion, it was clarified that Student's behavior did not involve Student [REDACTED] or not completing the tasks that were required of Student, and DOE DES expressed confusion as to why the Private Center team had even raised the goal to be included in Student's IEP. P-Ex.7.3 [51:35-53:06].

128. Private BCBA2 then suggested that the team have more time to draft the goal and perhaps do an FBA to work on desensitizing Student to tolerate [REDACTED]. The IEP

⁶ While Private Center Administrator claimed to be providing information on Student's history, none of the statements that Private Center Administrator made about Student's "long history of [REDACTED] behaviors" were included or corroborated in any of the assessments, quarterly reports, or progress reports prepared by either DOE Psychologist, Treating Psychologist, Private RBT1, or Private BCBA1. Private Center Administrator also provided an example of an occasion when Student [REDACTED] just a couple months ago' even though Parent, Treating Psychologist, Private BCBA1, and Private BCBA2 had all just indicated to the team that they had not seen any [REDACTED] behaviors from Student in a long time. Private Center Administrator then followed up with an example of an incident when Student was [REDACTED] years old to impress upon the team that Student was "a very sensitive and complex individual that I believe needs a lot of individualized care."

team then agreed to write the goal as proposed, which was for Student to increase tolerance to [REDACTED] during tasks, but to revisit the goal if necessary.

P-Ex.7.3 [53:45-56:02].

129. Treating Psychologist also asked information about baseline information relating to Student's level of tolerance from the IEP team and Private Center Administrator indicated that there were many variables⁷ that affected Student's level of tolerance, which are unpredictable, often unknown, and not consistent, and Private Center Administrator uses cues such as Student's breathing patterns to determine that Student may start to escalate. P-Ex.7.3 [57:36-59:50]. Treating Psychologist again reiterated the suggestion that Student be encouraged to talk to someone about [REDACTED] that are bothering Student so that Student can communicate with someone, so it does not escalate. P-Ex.7.3 [59:51-1:01:56]. Treating Psychologist also again informed the team that some of the triggers that Student has are [REDACTED] [REDACTED] P-Ex.7.3 [1:03:10-1:03:30].

130. The team continued to review the goals proposed by Private BCBA1 and agreed to add those goals to Student's IEP. P-Ex.7.3 [1:03:39-1:05:28].

131. The IEP team moved on to the proposed services and supplementary aids and supports for Student's IEP. The team agreed that Student needed special education services and counseling. Private BCBA1 suggested occupational therapy, but DOE DES informed Private BCBA1 that they would need to have an assessment for Student to determine a baseline and the services that are necessary for occupational

⁷ Private Center Administrator provided an example of "[REDACTED]" as one of the unknown, inconsistent variables that triggered Student.

therapy. P-Ex.7.3 [1:05:44-1:09:06].

132. The IEP team also discussed the number of services minutes for both special education and counseling that would be required for Student to achieve Student's IEP goals and objectives. Private Center BCBA1 and Private Center Executive Director informed the IEP team that Student requires special education instruction all day throughout Student's school day. The IEP team adopted the number of minutes that Student receives at Private Center during the week, which was thirty (30) hours per week. DOE DES, Tr.V7, 1048:24-1049:9; P-Ex.7.3 [1:09:54-1:23:40].
133. During this conversation, DOE DES clarified with Private Center Executive Director about the people providing the instruction to Student at Private Center. DOE DES noted that they if they write that Student would get the entire thirty (30) hours per week of special education services, that would require that it be provided by a special education teacher. Private Center Executive Director clarified that while Student does get instruction from a special education teacher, the remainder of the instruction is provided by Private RBT1, who is not a special education teacher. DOE DES tried to explain to Private Center that writing this many minutes into the IEP for special education would make it difficult for Student to get the services at Private Center, since Private Center did not have a special education teacher working with Student for the entire school day. Private Center Executive Director informed the IEP team that Private BCBA1 is also a special education teacher so and insisted that Private Center had never previously been required to have a certified special education teacher by the courts.⁸ Private Center Administrator also insisted that the team adopt

⁸ This Hearings Officer notes that while Private Center is not required to have a special education

the thirty (30) hours a week of special education service to Student and then Private Center Administrator told the team that Student needed to stay where Student is (at Private Center) and accused DOE DES of trying to change Student's placement.⁹ P-Ex.7.3 [1:14:10-1:23:40].

134. The IEP team moved on to discussing the number of counseling minutes that Student would receive through the IEP from a counselor. These counseling minutes include individual counseling sessions, similar to the sessions that Treating Psychologist is having with Student, and also includes in-class support, group, and crisis support. P-Ex.7.3 [1:32:34-1:34:52].

135. Treating Psychologist interjected during this discussion as well and informed the IEP team about how Student's treatment sessions were with Treating Psychologist so that the team could understand how often Treating Psychologist works with Student. P-Ex.7.3 [1:36:14-1:38:38].

136. Private Center Administrator indicated that Private Center personnel is working with Treating Psychologist to provide services to Student and that Private Center did not want another counselor to work with Student because "[Treating Psychologist] is doing a great job with [Student] and [Student] doesn't need to be getting conflicting

teacher to provide their programs at Private Center, the requirements of what is written in the IEP requires that the DOE provide the services as written in the IEP—meaning that if the special education minutes were written for the entire school day, it requires that whatever location or program is implementing the IEP must provide the special education through a special education teacher.

⁹ It was clear to this Hearings Officer during this portion of the discussion that Private Center and Parent believed that DOE DES was trying to change Student's placement or take away Student's support. What DOE DES was trying to tell the team was that if they wrote that Student required thirty (30) hours a week of special education teacher in the IEP, then the minutes would need to be provided by a special education teacher, which is different from what Student was actually getting at Private Center at the time. .

- advice.” P-Ex.7.3 [1:41:03-1:41:41].
137. Again, DOE DES attempted to explain to the Private Center team that what is written in the IEP must be provided by the DOE by the necessary qualified personnel, no matter where a student is placed by the IEP team and that the IEP team was not trying to change Student’s placement. P-Ex.7.3 [1:42:17-1:44:22].
138. After the team discussed the special education and counseling services that would be provided to Student, the team began the discussion on supplementary aids and services, program modifications, and supports for school personnel. Private Center Administrator and Private Center Executive Director were asked to provide the IEP team information on what was being provided to Student at Private Center. P-Ex.7.3 [1:46:20-1:47:14].
139. Treating Psychologist suggested consultation services from outside therapists, but DOE DES and District Psychologist explained that the school counselor would consult with any outside therapists once a parent provided consent for the school counselor to communicate directly with the therapist to coordinate the student’s therapy. P-Ex.7.3 [1:47:15-1:48:42].
140. Private BCBA1 suggested that Student have access to [REDACTED] and access to a quiet workspace if Student needs it, as well as a laptop for Student to use to do work, as Student prefers to type assignments rather than write them by hand. Private Center Executive Director suggested a raised desk that Student can adjust as Student prefers, access to the outdoors, and frequent walks. P-Ex.7.3 [1:48:48-1:49:17]. Other input from Private BCBA1 included movement breaks, a communication method between school and Parent, confirm Student’s understanding

- of assignments, and frequent checks with Student during assignments. P-Ex.7.3 [1:52:32-1:55:13].
141. Private BCBA1 noted that Parent felt strongly about Student receiving one-to-one services and that Private Center was in the process of doing an FBA. P-Ex.7.3 [1:50:12-1:50:41]. DOE DES suggested that the team write “close adult supervision” in Student’s IEP until an FBA is completed and a behavior intervention plan is completed for Student that recommends the services of a registered behavior technician. P-Ex.7.3 [1:50:42-1:50:57].
142. Parent was consulted during this part of the discussion and had nothing to add to the discussion. P-Ex.7.3 [1:55:30-1:55:40].
143. Private BCBA1 asked for an explanation of the difference between close adult supervision and individualized instructional support. DOE DES explained that the IEP team can write the definition of close adult supervision to meet Student’s needs, and that the IEP team needed more information from Private Center to understand what Student would need. P-Ex.7.3 [1:55:40-1:56:51].
144. Private BCBA1 informed the IEP team that Private Center would attempt to complete an FBA for Student and provide it to the IEP team a few days before the next IEP meeting so the team could further discuss the option of Student receiving individualized instructional support in the IEP. P-Ex.7.3 [1:58:41-1:59:05].
145. The IEP team did not complete Student’s IEP on December 12, 2020 and another IEP team meeting was scheduled. Treating Psychologist and Parent informed the team that they will likely be unavailable until January. P-Ex.7.3 [1:59:06-2:01:00].
146. At the end of the meeting Private Center Executive Director and Private Center

Administrator inquired whether the DOE would continue to pay for Student's education until an offer of FAPE was made, and Private Center Administrator stated that if the DOE was not willing to continue payment, "we'll have to file a due process complaint after this meeting." P-Ex.7.3 [2:01:02-2:02:18].

147. While Parent agreed to attempt to schedule a short meeting the week after December 12, 2020, Private Center Administrator insisted that Treating Psychologist be present at the meeting and all future meetings, noting that if the team tries to move Student to a school then the case will end up in the courts. Private Center Administrator stated that while Parent could file a due process case at any time it "substantially weakens [Parent's] case, that's why [Treating Psychologist] is at these meetings." Private Center Administrator also noted that "as was noted in the meeting, there is a lot of distrust on our part and unfortunately it's well deserved. So, we're just protecting [Student's] rights and we're going to do everything we can to protect [Student's] rights." Private Center Administrator concluded by saying "Well, the reality is [Student] is receiving a fine education in the meantime and if you decide to leave [Student] where [Student] is then the Department of Education will be obligated to pay either way, so the delay is the delay." P-Ex.7.3 [2:03:00-2:07:40].

December 2020 FBA, Behavior Treatment Plan, and Crisis Plan

148. Private BCBA1 prepared an FBA report for Student dated December 10, 2020 and sent it to the DOE on December 11, 2020 for review at the next IEP meeting. Private BCBA1 did not testify at the Hearing, nor did anyone about Private BCBA1's credentials, experience, and/or ability to prepare such an assessment, nor was any testimony presented regarding the validity of the FBA. P-Ex.4.16, p.505; P-Ex.4.18,

p.508-531.

149. While the FBA report indicated that two (2) assessments were conducted as part of the FBA, interviews were done with Parent and Student, and two (2) direct observations were done of Student at Private Center, it is notable that neither the dates of the assessments and interviews, nor the dates of the observations were provided.¹⁰ P-Ex.2.17, p.389-412; P-Ex.4.18, p.508-531.

150. The FBA listed the following “target behaviors:”

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

¹⁰ While there is no statutory standard form for preparing an FBA under the IDEA or Hawai‘i law, this Hearings Officer questions the professionalism and credibility of an assessor who prepares what purports to be a formal evaluation or assessment report without any reference to dates or times related to data collected or information gathered as part of the formal assessment of Student.

151. The FBA does not define or identify antecedents or consequences for any of the maladaptive behaviors listed above. P-Ex.2.17, p.389-412; P-Ex.4.18, p.508-531.

152. In the assessments, “[REDACTED]” also included times when Student [REDACTED] [REDACTED] [REDACTED]. P-Ex.2.17, p.389-412; P-Ex.4.18, p.516-517. It is unclear why this was designated as a target behavior since the FBA does not indicate why it was inappropriate for Student to [REDACTED]

153. The FBA also did not indicate why “[REDACTED]” was a target behavior, especially since both Parent and Private RBT1 indicated that Student is [REDACTED] [REDACTED]. Parent, Tr.V1, 121:15-122:10; Private RBT1, Tr.V2, 271:24-272:16.

154. According to the summary of direct observations of Student on unknown dates or times, none of the maladaptive behaviors listed in the FBA were observed besides “[REDACTED],” as Student did [REDACTED] for the entirety of one of the observation sessions which involved Student taking a [REDACTED] group class. P-Ex.2.17, p.395-396; P-Ex.4.18, p.514-515.

155. Private BCBA1 did not include any data charts, graphs, or other information of any incidents of target behaviors being observed in either of the two (2) direct observations made of Student in the FBA. All of the charts and graphical information included in the FBA were based on the two (2) assessments conducted. P-Ex.2.17, p.389-412; P-Ex.4.18, p.508-531.

156. During one of the observations, Private BCBA1 did note that Student expressed and explained some frustration and [REDACTED] that Student was having, but it is unclear

whether these were expressed to the instructor or to Private BCBA1 at the time of the observations or later. P-Ex.2.17, p.395-396; P-Ex.4.18, p.514-515.

157. Private BCBA1's treatment recommendations in the FBA were as follows:

4. A behavior support plan should be developed and implemented, and training should be provided for those with frequent contact with [Student].
5. [Student's] crisis plan should be revised, with the input of [Student's] therapist to deal with [REDACTED].
6. [Student] *should continue to have noncontingent access to* [REDACTED].
7. A data collection system should be implemented that is sensitive to [Student's] behaviors, as well as a differential reinforcement schedule of alternate/appropriate behaviors.
8. [Student] requires daily access to support by a registered behavior technician (RBT) for the entirety of [Student's] school days, to allow for implementation of the BIP as well as data collection.
9. [Student] should have access to a board-certified behavior analyst/licensed behavior analyst (BCBA/LBA) to create, support, and supervise programming for the RBT and [Student], as well as to perform analysis of data and to adjust the programs as needed.
10. Consultation times between the overseeing BCBA and [Student's] therapist should be scheduled in order to ensure continuity and fidelity of treatment and behavioral expectations, as well as to assist with psychological aspects outside of the BCBA's scope of practice.
11. An emphasis should be placed on teaching functional communication skills for [Student] to self-advocate when [Student] is frustrated or [REDACTED]."
12. [Student] should have access to self-management strategies (i.e. planners, visual aids, etc.) in order to stay organized and minimize stress.
13. [Student] should have access to a variety of coping strategies (including but not limited to computer access, headphones, music, meditations, etc.) and time allotted to participate in them.
14. [Student] should continue to have access to a quiet room in which [Student] can request to go as to avoid escalation.
15. [Student] should have continued access to the community in order to work through frustrations and behaviors in a naturally occurring environment. P-Ex.2.17, p.411-412; P-Ex.4.18, p.530-531.

158. Private BCBA1 also prepared an undated behavior treatment plan and provided it to the IEP team on February 24, 2021. P-Ex.2.19, p.417-419; P-Ex.4.20, p.535; P-Ex.4.22, p.537-539.

159. The behavior treatment plan prepared by Private BCBA1 targeted the same list of behaviors that were targeted in the FBA, including [REDACTED]. All definitions for the targeted behaviors in the behavior treatment plan were the same as the FBA. P-Ex.2.19, p.417-419; P-Ex.4.22, p.537-539.
160. The behavior treatment plan did not list separate antecedents, consequences, or treatments for each of the behaviors that were targeted. No directions were provided specifically as to how to address Student if or when Student displayed the behaviors or would likely be triggered to display the behaviors. P-Ex.2.19, p.417-419; P-Ex.4.22, p.537-539.
161. The behavior treatment plan was essentially a regurgitation of the FBA and is not an appropriate guide for providing the RBT on how to implement specific strategies and interventions to avoid or increase Student's targeted behaviors.¹¹ See P-Ex.2.19, p.417-419; P-Ex.4.22, p.537-539.
162. Private Center does have a "Crisis Plan" for Student that purportedly has been implemented with Student since September 2020. P-Ex.2.20, p.420; P-Ex.4.21, p.536; P-Ex.4.23, p.0541.

¹¹ While there is no standard for preparing a behavior plan under the IDEA, this Hearings Officer notes that the behavior treatment plan does not break down each behavior that is targeted and the strategies for the RBT to implement for decreasing or increasing the behavior and does not provide information of appropriate replacement behaviors nor any suggested redirection strategies for the RBT to implement when they believe Student may engage in an inappropriate behavior. Additionally, it is notable that while two (2) of the 'targeted behaviors' in the FBA and behavior treatment plan were [REDACTED], two (2) of the strategies in the behavior treatment plan provided that Student be able to access [REDACTED] and access to a room where Student may go when Student requests. Based on this behavior treatment plan, it is impossible to determine the supports, strategies, or redirection that an RBT should take to address Student's 'target behaviors.' See P-Ex.2.19, p.417-419; P-Ex.4.22, p.537-539.

163. The Crisis Plan is one page and does list behaviors of concern; setting events; potential precursors; antecedent strategies; de-escalation and intervention strategies; reactive strategies; injury (responses); and follow-up (guidelines). P-Ex.2.20, p.420; P-Ex.4.21, p.536.
164. No evidence has been provided as to how the crisis plan was created, what data or information was used to form or develop the crisis plan, or why the crisis plan was necessitated originally.
165. When DOE DES requested data that had been collected related to the Crisis Plan and the frequency of the plan being utilized as well as the data surrounding the incident, Private BCBA provided a one-page chart. The chart included the date; frequency of █, ¹² a yes/no answer as to whether physical restraint was required; and a yes/no answer as to whether any injuries were reported that required medical assistance. Based on the data from the chart, Student had one (1) incident of █ on the █ on the following dates: October 7, 2020, January 7, 2021, January 11, 2021, January 29, 2021, February 1, 2021, February 2, 2021, February 8, 2021, February 12, 2021, and February 17, 2021. No other information was provided on the chart and no explanation of what constituted █ was included in any of the information provided by Private BCBA to DOE DES. P-Ex.4.24, p.543-545; P-Ex.4.25, p.546.

IEP meeting on February 25, 2021

166. The IEP team reconvened on February 25, 2021. Present at the meeting from the DOE were DOE DES, SPED Teacher1, SPED Teacher2, Principal, DOE BHS, SSC,

¹² █.

DOE BCBA, District Psychologist, District Teacher2, General Education Teacher, and Vice Principal. Parent and Treating Psychologist were also present at the meeting along with Private Center Administrator, Private Center Executive Director, Private RBT1, Private RBT2, Private BCBA1, and Private BCBA2. P-Ex.7.4 [13:47-15:35].

167. The team noted that Private Center had sent the IEP team members an FBA and a behavior plan, but that the behavior plan was not being implemented, and then reviewed the data provided by Private BCBA1 regarding the use of Student's crisis plan. This data included the one-page chart with the frequency of [REDACTED] behavior and Private BCBA1 did not have any further information to provide to the team but would work on getting that information to the team after the meeting. P-Ex. 7.4 [17:50-22:53]; *see also* P-Ex.4.23, p.540-542.
168. The team discussed clarifications of supplementary supports and services, specifically involving the close adult supervision. The team also had a lengthy discussion about the constraints that the DOE has with providing a registered behavior technician or individualized instructional service only if an FBA is completed and recommends the services of a registered behavior technician. P-Ex.7.4 [25:40-58:59].
169. DOE DES informed the team that the school needed to finish Student's IEP first and then they could immediately hold a separate meeting to begin Student's reevaluation. P-Ex.7.4 [24:26-25:01] Private Center Administrator suggested that the team hold off on the IEP until the reevaluation is completed and DOE DES again explained that the team needed to finish the IEP since they were already in the process of developing it instead of holding off to wait for the reevaluation. P-Ex.7.4 [25:01-25:40].

170. Private Center Administrator again informed the IEP team that Student's behaviors do not have antecedents and they come out of nowhere because Student's issues are internal. P-Ex.7.4 [39:22-39:50].
171. DOE DES noted that Student had not previously had individualized instructional support or a registered behavior technician in Student's previous IEPs and the IEP team needed to have time to review Private Center's data, determine if they needed to collect their own data, and then determine how to proceed, but that in the meantime, the IEP team is still agreeing to provide Student with adult support in the form of close adult supervision to address Student's needs. DOE DES also explained that they needed to finish the IEP so that the offer of FAPE could be made and then the team could immediately reconvene to work on reviewing Private Center's FBA and data and determine if they would do their own assessments. P-Ex.7.4 [40:58-42:23].
172. DOE DES then asked Private Center to provide information for the clarification of the support of close adult supervision, which the IEP team then adopted and wrote into Student's IEP. P-Ex.7.4 [43:18-45:17]
173. Private BCBA1 and Private RBT1 also provided the IEP team more information about Student's recent [REDACTED] behaviors and [REDACTED] at Private Center, which included [REDACTED]
[REDACTED]
[REDACTED]. P-Ex.7.4 [45:18-48:30].
174. Treating Psychologist also provided input to the IEP team regarding Student's [REDACTED] and [REDACTED] behaviors, noting that Student has been having

██████████ and has been working with Student to communicate with people when Student is having ██████████. Treating Psychologist noted that it would be difficult to use facial cues and expressions to determine when Student is having these ██████████ unless a person knows Student very well. Treating Psychologist noted that it is more important to work with Student on Student's coping skills and communication when Student is having ██████████. Treating Psychologist opined that it is better if Student has people around Student that is familiar with to get Student to activate the coping skills that Student has already learned. P-Ex.7.4 [51:31-54:58]. Treating Psychologist suggested that the people that work with Student need to be 'in tune' with Student to be able to tell when Student is ██████████ ██████████ and that a classroom setting would likely be too distracting for Student. P-Ex.7.4 [57:30-58:59].

175. After the discussion of the supplementary support and services, the team returned to the ESY discussion to determine what services, supplementary aids and supports Student would need to sustain progress that Student makes during the school year. P-Ex.7.4 [59:57-1:26:30].

176. After discussing state-wide assessments, the IEP team then moved onto discussing the least restrictive environment for Student's IEP to be implemented. The discussion started by DOE DES showing the IEP team a worksheet on the continuum of least restrictive environments. P-Ex.7.4 [1:34:55-1:35:57].

177. The IEP team discussed the educational benefits, the non-academic educational benefits, and the effect of Student on the teacher and children in the regular class for each setting separately, starting with the general education setting, moving to general

and special education setting, special education setting, public separate facility, private separate facility, residential placement, and homebound/hospital placement.

P-Ex.7.4 [1:36:00-2:23:31].

178. Educational benefits and non-academic benefits of the general education setting that the team discussed included the opportunity to be with same-age peers, access to content teachers, social interactions, extracurricular activities, post-secondary experiences, the possibility of Student attaining a diploma, field trips to the college, good preparation for the GED, and the availability of job fairs. The effects of Student on the teacher and other students included Student possibly being [REDACTED]. See P-Ex.7.4 [1:36:00-1:45:10]

179. The educational benefits and non-academic benefits of the general and special education setting included access to general content teacher and specialized instruction by a special education teacher, and most of the other benefits as the general education setting, with a smaller class size and fewer distractions. The effects of Student on the teacher and other students were also the same as the general education setting. P-Ex.7.4 [1:45:08-1:47:47]

180. Student participated in the IEP meeting on February 25, 2021 during this portion of the discussion. After Parent had told Student about the general education classroom, Student joined the meeting to express Student's feelings to the IEP team. P-Ex.7.4 [1:47:48-1:56:19].

181. Student told the team that Student did not want to be in a general education class. Student acknowledged that Student did not know what a general education class is

like because Student had not been to one recently. Parent then told Student to tell the team whether Student liked where Student was currently attending and Student stated that Student was used to the class setting that Student was in now. Private Center Administrator told Student to tell the team why Student did not want to be in a regular school, and Student noted that there were [REDACTED] that triggered Student, and “lots of different factors” like [REDACTED] that would trigger Student. Student was asked if Student would like to try and Student stated “nah, no, no thank you” and that Student was still concerned with [REDACTED]. Student did express an interest in seeing Home School and maybe seeing what Home School had to offer.¹³ P-Ex.7.4 [1:47:48-1:56:19].

182. The educational and non-education benefits of a special education setting for Student include some of the same benefits as the previous two settings; smaller class size and more one-on-one attention with the special education teacher for academics; more of a set schedule with less switching classes; the schedule can be more modified and customized to meet Student’s needs; access to more life skills curriculum; a slower pace of curriculum as needed; potential for Student to receive a diploma; and access

¹³ DOE DES noted during DOE DES’ testimony that Student sounded coached, and this Hearings Officer agrees that Student’s statement to the team appeared to be at prompting by both Parent and Private Center Administrator. For example, when Student was asked about how Student manages [REDACTED] when Student goes to stores, Student told the team that [REDACTED] do not actually bother Student at the stores or other big places. Parent then interjected and tried to tell Student that it was because Student [REDACTED], but Student tried to continue to tell the team that [REDACTED] do not trigger Student. Private Center Administrator then interjected and told Student to tell the team why Student might be triggered at school instead and provided a hypothetical of Student going into a classroom with [REDACTED] people. Student was trying to explain something else to the team, but Private Center Administrator interrupted Student to redirect Student’s statement to the team by telling Student to tell the team about going to a school where Student did not know anyone with potentially [REDACTED] people. P-Ex.7.4 [1:52:35-1:53:55].

to the other programs described, such as community based instruction and special programs that Home School offers in the special education department. The effect of Student on the teacher and other students in the class for the special education setting include distractions or interruptions even though Student was in a smaller setting, and the possibility of [REDACTED]. P-Ex.7.4 [1:58:31-2:09:25].

183. The educational benefits and non-academic benefits of a public separate facility include individualized curriculum, small setting with trained staff specific to [REDACTED], potential to obtain a diploma, easy access to the public school's programs and students to provide social interaction opportunities for Student. P-Ex.7.4 [2:09:26-2:15:27]
184. The IEP team did not complete the discussion regarding least restrictive environments on February 25, 2021 so another meeting was scheduled to complete Student's IEP. P-Ex.7.4 [2:23:31-2:26:35].

IEP meeting March 18, 2021

185. On March 18, 2021, the IEP team reconvened again to continue working on developing Student's IEP. Present at the meeting from the DOE were Principal, DOE DES, SPED Teacher2, DOE BCBA, SSC, District Psychologist, Vice Principal, General Education Teacher, and DOE BHS. Parent and Treating Psychologist were also present along with Private Center Administrator, Private Center Executive Director, Private RBT1, Private RBT2, and Private BCBA1. P-Ex.7.5 [01:18-03:18].
186. At the start of the meeting, Private Center Administrator and Private Center Executive Director proposed that the IEP team hold off on deciding the placement for Student and keep Student in the current placement (Private Center) until after

- Student's triennial evaluation, which was due in April 2021. P-Ex.7.5 [05:04-6:06].
- DOE DES informed the team that they needed to finish the IEP first and would move right into meeting to discuss Student's triennial evaluation. P-Ex.7.5 [06:07-06:15].
187. The IEP team continued the discussion regarding the least restrictive environment for Student, starting with the public separate facility since the team had left off on that setting at the end of the previous meeting. P-Ex.7.5 [04:15-44:28].
188. The educational and non-academic benefits discussed at the public separate facility included that it was tailored to students with [REDACTED], individualized curriculum, a very small setting, trained staff in [REDACTED], GED and diploma opportunities, partnerships with DOE campuses. Disadvantages raised included that the public separate facility is on a large public campus that and that would affect Student, increased pressure and stressors on Student. P-Ex.7.5 [04:15-26:11].
189. The educational and non-academic benefits for Student at a private separate facility included Student being in a smaller setting, have individualized attention from familiar staff, established relationships with the staff at the private separate facility, access to special education teachers and curriculum, access to group activities including field trips and physical activities, the environment can be adapted to meet Student's needs, community outings for Student, ability to earn a GED, maintaining friendships already made at the private separate facility. Some of the impacts on the teachers and other student include Student having difficulty or increased behaviors with transitions. P-Ex.7.5 [26:11-40:25].
190. The educational and non-academic benefits of a private residential facility include a quiet, very structured environment, individualized instruction tailored to Student's

needs, and clinical treatment. The IEP team ended the discussion after rejecting the setting of private residential facility and then rejected the homebound/hospital setting. P-Ex.7.5 [40:27-44:28].

191. The IEP team then discussed whether the team members accepted or rejected each of the settings including general education, general and special education, special education, public separate facility, and private separate facility. The entire IEP team unanimously agreed to reject the general education setting and the general and special education setting. The DOE team members, including District Psychologist, Vice Principal, Principal, SPED Teacher2, DOE DES, and DOE BCBA, accepted the special education setting, but Parent, Treating Psychologist, and the Private Center IEP team members, including Private Center Administrator, Private Center Executive Director, rejected the special education setting. P-Ex.7.5 [44:30-52:24].

192. During the discussion, DOE DES asked DOE BCBA to provide input about research that DOE BCBA was aware of that looked at having students placed into different settings to increase the student's ability to generalize their skills. District Psychologist agreed with DOE BCBA that it was appropriate to take the opportunity to expose Student to different environments while Student was still eligible for the supports under the IDEA. P-Ex.7.5 [52:40-54:42], [58:18-59:28] [1:19:37-1:21:11].

193. Treating Psychologist agreed that the research DOE BCBA noted was true, however Treating Psychologist believed that it was too late for Student at this point to transition into different setting since Student has already settled into Private Center. Treating Psychologist expressed belief that it was the DOE that had not attempted to get Student into a different setting earlier in Student's school career. Parent agreed

- with Treating Psychologist and expressed concern with getting Student to attend a different placement from Private Center. P-Ex.7.5 [54:50-55:52], [1:00:15-1:00:32].
194. The discussed whether the team members accepted or rejected the setting of a public separate facility. Similar to the special education setting, most of the DOE team accepted the public separate facility, but Principal, Parent, Treating Psychologist, and the Private Center team rejected the public separate facility setting. P-Ex.7.5 [1:03:01-1:12:44].
195. The team continued to get the opinions of the team members for the private separate facility. DOE DES, DOE BCBA, District Psychologist, SPED Teacher2, Vice Principal, and Principal rejected the private separate facility. Parent, Treating Psychologist, and the Private Center team accepted the private separate facility as Student's placement. Private Center Administrator suggested that the IEP should label Private Center as Student's placement and then change it later if Student is able to go to the special education placement and the team later decides that Student should move. P-Ex.7.5 [1:12:45-1:22:27].
196. Since the IEP team was not unanimous, as the administrator of the IEP meeting, Principal made the offer of FAPE to Parent for Student to be placed in the special education setting with Home School overseeing the transition of Student from Private Center. Principal noted that Home School would love to see Student as part of Home School's special work program for special education students. P-Ex.7.5 [1:22:50-1:23:19].
197. After the offer of FAPE was made to Parent, the team reviewed ESY again to discuss the least restrictive environment for ESY services for Student based on the

- discussions about least restrictive environment for Student during the school year. P-Ex.7.5 [1:25:25-1:28:17].
198. Principal concluded by reviewing all the services, supplementary aids and supports, ESY, and educational placement for Student which comprised the offer of FAPE by the DOE. P-Ex.7.5 [1:28:37-1:30:35].
199. Private Center Administrator requested a visit for Treating Psychologist, Parent, and Private Center Executive Director, and Private Center Administrator to see Home School and the special education program that the DOE team had mentioned during the IEP meetings, to which DOE DES and Principal agreed. P-Ex.7.5 [1:31:37-1:31:54].
200. After the IEP meeting was completed, the IEP team agreed that the following assessments would be requested for Student's reevaluation: an FBA, an occupational therapy, adaptive assessment, and an emotional behavior assessment, would be conducted for Student's reevaluation, and Parent was informed that a consent form would be sent for approval in order to start the FBA. P-Ex.7.5 [1:32:00-1:45:55]. The team began to discuss some possible dates for a visit to the school and a transition meeting, but the team ultimately decided to schedule the meeting offline when everyone had a chance to look at their schedule. P-Ex.7.5 [1:41:48-1:45:37].
201. During the IEP meetings Parent would occasionally defer to Treating Psychologist and Private Center team members to provide the IEP team with information or input. DOE DES, Tr.V6, 945:12-15; *see e.g.* P-Ex.7.2 [1:12:50-1:13:03]; P-Ex.7.4 [1:28:13-1:31:46]; P-Ex.7.4 [2:04:28-2:04:30]. Treating Psychologist and IEP team members from Private Center also freely participated and provided input to the team members

during all the IEP meetings on October 20, 2020, November 12, 2020, December 3, 2020, February 25, 2021, and March 18, 2021. DOE DES, Treating Psychologist, Private Center Administrator, and Private BCBA1 provided the majority of input to the IEP team throughout the meetings. *See generally* P-Ex.7.1, P-Ex.7.2, P-Ex.7.3, P-Ex.7.4, P-Ex.7.5.

Student's IEP-03/18/2021

202. A written IEP document from the meetings on October 20, 2020, November 12, 2020, December 3, 2020, February 25, 2021, and March 18, 2020 (hereinafter "IEP-03/18/2021") was finalized and sent to Parent on April 1, 2021. P-Ex.1.22, p.258-281; R-Ex.9, p.0095-0118; R-Ex.149, p.0961.
203. The IEP-03/18/2021 included the PLEPs that the IEP team discussed during the IEP meetings. These included the information and updates provided by Treating Psychologist and Private Center. The PLEPs also included the results of the cognitive and adaptive assessments from Student's 2018 evaluation, as well as the assessments given to Student in Treating Psychologist's 2020 assessment. The PLEPs also included information and data from progress and other reports provided by Private Center. P-Ex.1.22, p.259-264; R-Ex.9, p.0096-0101; P-Ex.2.12, p.371-372.
204. The IEP-03/18/2021 listed Student's transition services, interests, and post-secondary needs that were discussed in the meetings. P-Ex.1.22, p.265-266; R-Ex.9, p.0102-0103.
205. The IEP-03/18/2021 contained nine (9) goals and objectives discussed at the IEP meetings, with input from the proposed behavioral goals added by Private BCBA1. P-Ex.1.22, p.267-275; R-Ex.9, p.0104-0112; P-Ex.2.12, p.374.

206. Student's ESY services were listed in the IEP-03/18/2021 as follows:

“Due to the extent of regression, [Student's] rate of recoupment, and the nature and severity of [Student's] disability, [Student] requires special education services to maintain [Student's] critical skills related to behavior, reading, and writing, for ESY after a 10-DAY BREAK in educational programming. [Student] will receive 4 hours a day of Special Education Services in an educational setting. [Student] will receive: 1200 Minutes of Special Education Services per week
45 minutes of Counseling Services per week
All Supplementary Aides and Services provided during the school year will be provided during ESY.

The IEP team agreed that the student DOES qualify for an Extended School Year. [Student] requires special education services to maintain [Student's] critical skills related to behavior and math for ESY after a 10 day break in educational programming. [Student] will receive 4 hours a day of special education services in an education setting. [Student] will receive: 1200 Minutes of Special Education per week; 45 minutes of counseling services per week; All supplementary aids and services provided during the school year will be provided during ESY.” P-Ex.1.22, p.276; R-Ex.9, p.0113.

207. Student's IEP-03/18/2021 provided special education services of one thousand eight hundred sixty (1860) minutes per week, and nine hundred forty-five (945) minutes of counseling services per week. P-Ex.1.22, p.276; R-Ex.9, p.0113.

208. The supplementary aids and services, program modifications and supports for school personnel listed in the IEP-03/18/2021 included:

Extra time to complete projects/reports up to 3 days
Chance to re-do assignments and exams below 60%
Preferential seating ([Student's] preference)
Set clear expectations/procedures and have them visual
Pair written directions with oral and visual directions
Use of technology for writing/participating in class assignments
Frequent checks for understanding-Make sure attention gained before instruction provided
Close Adult Supervision
Access to [REDACTED]
Access to Quiet Workspace
Raised desk
Access to outside, walks, movement breaks
Behavior Support Plan (BSP)
Crisis Plan
Communication log/method between school and parent/therapist weekly

P-Ex.1.22, p.276-277; R-Ex.9, p.0113-0114.

209. The clarification of services and supports in the IEP-03/18/2021 provided the following information: “CLOSE ADULT SUPERVISION: Staff implements breaks, engages [Student] in conversation, redirects [Student] back to tasks, prompts [Student] to get back to the task at hand, checks-in. For safety reasons, CAS needs to help [Student] from engaging in [REDACTED] by attending to [Student’s] subtle cues to redirect [Student] before [Student] engages in [REDACTED].” P-Ex.1.22, p.277; R-Ex.9, p.0114.
210. The educational placement, or the explanation of the extent that Student will participate with non-disabled peers in the general education class, extracurricular activities and other non-academic activities was written as follows: “[Student] will participate with non-disabled peers at meal times and recess, school assemblies, special events, and appropriate electives and work-related activities. [Student] will not participate with non-disabled peers for all other school subjects.” P-Ex.1.22, p.278; R-Ex.9, p.0115.
211. The IEP-03/18/2021 did not include a list of all the participants in the IEP meetings on October 20, 2020, November 12, 2020, and December 3, 2020. The list of participants of the February 25, 2021 and March 18, 2021 IEP meetings was included in the IEP-03/18/2021. P-Ex.1.22, p.279-281; R-Ex.9, p.0116-0118.

Student’s PWN-03/30/2021

212. A prior written notice (hereinafter “PWN”) was also prepared on March 30, 2021 (hereinafter “PWN-03/30/2021”) by the DOE and emailed to Parent along with the IEP-03/18/2021. P-Ex.1.23, p.282-285; R-Ex.9, p.0119-0122; R-Ex.149, p.0961.

213. The PWN-03/30/2021 contained a summary of the offer of FAPE stated at the IEP meeting on March 18, 2021 and the services offered that were included in the IEP-03/18/2021. This included Student's special education and counseling services, supplementary aids and supports, ESY services, Student's participation in statewide assessments, the educational placement description, and a statement that "the student will receive [Student's] free and appropriate public education at [Student's] home school." DOE DES, Tr.V7, 983:14-23; P-Ex.1.23, p.282; R-Ex.9, p.0119.
214. The PWN-03/30/2021 also included an explanation of the offer of FAPE and other options that were considered, as well as explanations as to why other options that were considered were not accepted or included in the offer of FAPE. Part of the explanation included a summary of the discussions the IEP team surrounding the educational placement for Student and each setting on the least restrictive environment continuum. P-Ex.1.23, p.283-285; R-Ex.9, p.0119-0122.
215. The PWN-03/30/2021 concluded with the statement "[Principal] informed the [Parent] that a Transition meeting will be scheduled and offered a visit to the [Home School] programs prior to the transition meeting." P-Ex.1.23, p.285, R-Ex.9, p.0122.

Post-IEP information

216. From March 19, 2021 through March 25, 2021, SPED Teacher2 worked with the schedules of Parent, Treating Psychologist and Private Center to schedule a visit to one of the special education programs at Home School. R-Ex.144, p.0925; R-Ex.146, p.0927-0931.
217. On April 5, 2021, Parent sent Principal an email outlining Parent's concerns with Student's IEP-03/18/2021. These concerns included: the reduction of services for

- Student from an RBT to close adult supervision; that the IEP team failed to consider the information provided by Private Center in the form of the FBA by Private BCBA; and that the IEP was completed prior to completing Student's triennial evaluation; that the IEP team failed to consider the concerns of Treating Psychologist. Parent informed Principal that Parent rejected the IEP-03/18/2021 and requested that Principal reconsider Student's placement decision to place Student at Private Center. Parent also informed Principal that Parent was filing a due process complaint to preserve Student's right to a FAPE. P-Ex.4.29, p.552-553; R-Ex.150, p.0963-0969.
218. On April 7, 2021, Principal responded to Parent's email after conferring with DOE DES and others, responding to the concerns that Parent had noted in the email on April 5, 2021. R-Ex.152, p.0979-0983.
219. On April 9, 2021, Parent emailed SPED Teacher2 to set up a visit to Home School's special education program; however, at the time the visit was requested, the island on which Student resided was in another COVID-19 lockdown and the program was not accepting visitors on campus while school was in session. DOE DES, Tr.V7, 1078:6-1080:19. Parent was offered a visit to the program after hours and sent information about the program through video links. R-Ex.153, p.0984-0994; *see also* P-Ex.8.1, p.680-689; P-Ex.8.2, p.0690.
220. On April 12, 2021, Parent filed the initial Request for IDEA Impartial Due Process Hearing in this case.
221. On May 31, 2021, Parent revoked the consent that was previously granted to the DOE to conduct the FBA and other assessments with Student for Student's reevaluation. R-Ex.159, p.1010. After Parent revoked the consent that was granted for the

assessments for Student's reevaluation, Parent stopped communicating with the DOE.
DOE DES, Tr.V7, 979:1-980:19.

Private Center

222. In the [REDACTED] years of working with Student at Private Center, Private RBT has seen Student make progress in Student's adaptability and being much more flexible, as well as being able to assess the situation and adjust accordingly. Student has become more adventurous in eating, has become more open-minded and interested in other people. Student has also developed more self-confidence. Private RBT, Tr.V2, 276:6-277:11.
223. At Private Center, Student takes online classes through the Well-Trained Mind Academy. In May and December 2019 and May 2020, Student received certificates of completion for pre-algebra, biology lab, biology, and pre-algebra. Student received grades of B+ to B- in these classes. P-Ex.2.13, p.378-387; R-Ex.82, p.0361-0366.
224. Student receives occupational therapy at Private Center and has been working on proper ergonomics, self-regulation, gross motor coordination, typing and increasing fine motor coordination for academic and pre-vocational work. Student made progress at Private Center during the 2019-2020 school year, meeting goals in the area of typing, gross motor exercises. P-Ex.2.10, p.367-369; R-Ex.82, p.0367-0369.
225. In the fall of 2020, Student transitioned back to attending Private Center in person but had developed increasing sensitivity to the [REDACTED] in the environment there. Student began taking algebra 1 and chemistry through the Well-Trained Minds Academy. Student also participates in language arts, history, and a wellness/physical education

class offered by Private Center. P-Ex.2.9, p.365-366; R-Ex.82, p.0374-0375.

226. Student receives specialized instruction for English and language arts from Private Center English Tutor and has been making slow and steady progress in reading passages and poems, works diligently on learning new words and their meanings, and continues to work on writing. P-Ex.2.13, p.377; R-Ex.82, p.379.

Home School

227. Home School is a public [REDACTED] school in the State of Hawai'i run by the DOE. Principal is the principal and head administrator of Home School and is the offeror of FAPE for all special education matters for Home School. P-Ex.1.23, p.282-285; R-Ex.9, p.119-122.
228. Home School has several special education programs, including a specific program that is tailored to assist special education students with gaining work skills for future employment after the students age out of the DOE. DOE DES, Tr.V1, 56:1-57:7; Tr.V7, 999:16-20, 1059:1-1063:6.
229. At Home School, special education students have many opportunities to interact with neurotypical students on a daily basis. Home School has a leadership class that includes general education students and special education students. The general education students are able to teach special education students the activities for the day and the teacher in the class acts more as a facilitator. Home School also has a peer buddy program, where general education and special education peers do activities outside of school around once a month. SPED Teacher1, Tr.V3, 446:25-448:8; DOE DES, Tr.V7, 1001:3-17.
230. Home School also has programs that focus on job training, as well as programs to

assist students in getting apprenticeships with companies outside of school. SPED Teacher1, Tr.V3, 454:2-25.

231. Home School has several special education classes that include students on the certificate track or the diploma track. Certificate track students learn functional life skills, whereas diploma track students take educational classes that can count toward diploma credits. Students can also get assistance in preparing for the GED test at Home School. SPED Teacher1, Tr.V4, 506:5-510:10.

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.*, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *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.*

A. Petitioners failed to prove that Respondents denied Student a FAPE by predetermining Student's placement

Petitioners' first issue asks whether Respondents denied Student a FAPE when the IEP team predetermined Student's placement. Petitioners argue that the DOE determined that Student would no longer receive one-to-one support pursuant to a DOE policy, which resulted in predetermination of Student's services. Petitioners also point to other areas of the IEP development that point to the IEP team's predetermination of Student's placement.

"A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement." *K.D. ex rel. C.L. v. Department of Educ., Hawaii*, 665 F.3d 1110, 1123 (9th Cir. 2011) (citing *W.G. v. Bd. of Tr. of Target Range Sch. Dist. No.23*, 960 F.2d 1479, 1484 (9th Cir. 1992), and *Spielberg v. Henrico Cnty. Pub. Schs.*, 853 F.2d 256, 258-259 (4th Cir. 1988)). Predetermination violates the IDEA because the educational placement of a student should be based on the IEP and not the other way around. *Id.* The general progression of developing an IEP requires the IEP team to determine the student's needed program and services, discuss placement options, and only then make its decision on the placement decision in light of the information and discussions. *J.G. by and through Greenberg v. Hawaii, Department of Education*, 2018 WL 3744015 *12 (D. Hawai'i 2018).

The evidence presented at the Hearing shows that the DOE did not predetermine any of Student's services, nor did they predetermine Student's placement. The IEP team used a substantial amount of data from Private Center and Treating Psychologist to formulate the PLEPs in Student's IEP-03/18/2021. Discussions at the IEP meetings involved requests for information and clarifications from Parent and Private Center about the programs in which Student was involved, the services Student was receiving, and the daily activities. Treating Psychologist repeatedly was asked for or interjected information or opinions related to Student's issues, tendencies, and current treatment plan to address Student's more concerning issues, such as [REDACTED].

1. The IEP team did not predetermine Student's services and supplementary aids and supports

During the discussion on the special education and counseling services, the IEP team ultimately determined that the special education minutes would be based on the number of minutes that Student was receiving at Private Center and decided on the counseling minutes for Student with consent of Treating Psychologist, since Student was not receiving counseling services at Private Center. Finding of Fact (hereinafter "FOF") 132-136. The supplementary aids and supports that were included in the IEP-03/18/2021 included many of the supports that Student was already receiving at Private Center, as described by both Private BCBA1 and Private Center Executive Director. FOF 138-142.

Petitioners focus their argument on the fact that the IEP team did not include the services of a registered behavior technician in Student's IEP-03/18/2021. The evidence from the Hearing shows that this was not a predetermination of services for several reasons. First, the DOE's policy pursuant to Hawai'i law that a registered behavior technician only be provided to students after an FBA and a behavior intervention plan does not act as a predetermination of services.

FOF 29. As noted by the DOE memorandums regarding this issue, the concern of the legislature was to “ensure that the needs of students whose behavior impedes their learning, or the learning of others are being met by qualified service providers.” R-Ex.170, p.1061 (citations omitted). The DOE policy did not prevent IEP teams from providing other adult support to meet the needs of students, it only prevented the IEP teams from assigning students with a registered behavior technician without the necessary assessments and plans to guide the services provided by the registered behavior technician. R-Ex.170, p.1059-1091.

In this case, the information that the IEP team had at the time of the IEP meetings was that Student was receiving services from someone who was a registered behavior technician but was not providing ABA services to Student through a behavior intervention plan. FOF 41-42, 44-45, 107-108, 167. As of the IEP meetings in 2020, no FBA had been conducted by Private Center, despite Student receiving services from Private Center for approximately [REDACTED] years. FOF 107-108. Private BCBA1 did prepare what purported to be an FBA for Student prior to the IEP meeting in February 2021, but this document was not helpful to the team in determining the need for a registered behavior technician to be assigned to Student in the IEP-03/18/2021. FOF 148-161. Further, even after the FBA and purported behavior intervention plan had been created, Private Center informed the IEP team that Student’s behavior intervention plan had not been implemented and that Private Center was using Student’s crisis plan as a guide for Private RBT1’s services. FOF 162-165.

Second, Treating Psychologist’s testimony at the Hearing and statements made during the IEP meetings confirm that Student does not need ABA services provided by a registered behavioral technician. FOF 87, 89. Treating Psychologist, Private Center Administrator, and Private RBT1 all indicate that the support Private RBT1 provides primarily regarding Student’s

behaviors is to read subtle cues from Student to determine if Student needs a break or needs to be engaged in conversation to prevent Student from escalating into [REDACTED] behaviors. *See* FOF 44, 87, 129. Private RBT1 also provides the support of redirecting Student back to tasks and offering Student breaks or options if necessary. FOF 42. This is the service that was provided in Student's IEP-03/18/2021 in the form of close adult supervision. FOF 207. The close adult supervision was clarified to include all the services provided by Private RBT1 in terms of Student's behavior as a support for Student in the IEP-03/18/2021. FOF 208.

The determinations as to Student's services and supplementary aids and supports were made after lengthy discussions and hours of input by Parent, Treating Psychologist, Private Center Administrator, and other members of the Private Center IEP team during the IEP meetings. Petitioners have not proven that Respondents denied Student a FAPE by predetermining Student's services or supplementary aids and supports.

2. The IEP team did not predetermine Student's educational placement

While Petitioners do not specifically argue that the DOE predetermined Student's educational placement, the evidence at the Hearing also demonstrates that Student's educational placement was determined only after consideration by the IEP team of all Student's needs and discussion of the different educational settings available on the least restrictive environment continuum.

The IDEA provides that each state must establish "procedures to assure that, to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and that special education classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and

services cannot be achieved satisfactorily...” *Sacramento City Unified School Dist., Bd. of Educ. v. Rachel H. by and through Holland*, 14 F.3d 1398, 1403 (9th Cir. 1994) (quoting 20 U.S.C. §1412(5)(B)). The Ninth Circuit Court of Appeals set forth the standard for reviewing bodies to determine compliance with 20 U.S.C. §1412(5)(B) which involved an examination of four (4) factors, including the educational benefits for the student in a particular setting, the non-educational or non-academic benefits for the student in a particular setting, the effect of the student on the teacher and other students in the regular class, and the cost of mainstreaming the student. *Id.* at 1404. While this analysis has been promulgated for use by reviewing bodies to determine whether a school district has complied with the requirements under the IDEA for least restrictive environment, the DOE used that same analysis to determine Student’s educational placement in this case.

During the last two IEP meetings on February 25, 2021 and March 18, 2021, the IEP team went through a thorough discussion of each educational placement for Student available on the least restrictive environment curriculum. *See* FOF 176-183, 187-190. This discussion included reviewing the educational and non-academics for each setting, the effect of Student on the teachers and other students in the class, as well as consideration of the effect of the classroom on Student and Student’s behaviors.¹⁴ The discussion occurred only after all the previous sections of Student’s IEP had been discussed and completed. The DOE IEP team members, Parent, Treating Psychologist and Private Center were all encouraged to provide input into the

¹⁴ While this Hearings Officer notes that the team did not discuss the cost of mainstreaming Student, this has been recognized by courts as a procedural defect, which requires Petitioners to demonstrate how this failure resulted in a loss of educational opportunity or serious infringement on parental participation. *K.K. ex rel. K.S.K. v. Hawaii*, 2015 WL 4611947 *20 (D. Hawai‘i 2015). Petitioners do not argue and have not presented any evidence on the failure of the DOE team to discuss the cost of mainstreaming Student as a procedural defect that resulted in a denial of FAPE.

different settings during the discussion. Additionally, Parent, Treating Psychologist, and Private Center Administrator had been heard at previous meetings expressing their opinion as to Student's appropriate placement remaining at Private Center.

Petitioners cite to *M.S. v. L.A. Unified Sch. Dist.*, 913 F.3d 1119 (9th Cir. 2019), to support their argument that the DOE predetermined Student's educational placement. In *M.S.*, the school district did not have any discussion about possible educational placement because the student had already been placed at a mental health facility for other reasons. The Ninth Circuit in that case adopted the District Court's decision, in which the court determined that by refusing to consider any educational placements for the student, the school district predetermined the student's placement. The *M.S.* case has no bearing on the analysis in this case. Here, the DOE recognized that they were responsible for making a determination as to the educational placement for Student. Contrary to Petitioners' assertions, the DOE IEP team members did consider and review Treating Psychologist's, Parent, and even Student's positions that Student did not belong in a public school. Petitioners have failed to prove that Respondents denied Student a FAPE by predetermining Student's educational placement.

B. Petitioners have failed to prove that Respondents denied Student a FAPE when the IEP team ignored the recommendations of Student's treating psychologist, the functional behavior assessment, and other evaluation data

Petitioners argue that Respondents failed to consider the recommendations of Treating Psychologist, the FBA prepared by Private BCBA1, and other evaluation data in developing Student's IEP. Petitioners point primarily to the recommendations that Student receive a one-to-one support through a registered behavior technician, and that Student had been [REDACTED] at a public-school campus and was likely to be [REDACTED] again as the recommendations that were

provided by Treating Psychologist, the FBA and the evaluation data. *See* Petitioners' Closing Argument and Citation Brief, filed on October 20, 2021, pages 6-7.

1. Recommendations of Treating Psychologist

As an initial matter, this Hearings Officer does not find the conclusions of Treating Psychologist in the psychological evaluation of Student to be accurate, useful, or informative, particularly regarding the recommendation that Student “stay the course” and be kept in Student’s current educational environment. This is based on the mediocrity of report itself, such as the failure to review or examine any records, medical, educational, or otherwise, as part of the evaluations, failure to interview anyone besides Private Center Administrator, Parent, and Student, and only conducting a clinical interview of Student on one occasion. Additionally, according to the testimony and report of Treating Psychologist, the primary basis for the conclusions reached by Treating Psychologist in the evaluation was the discussion that Treating Psychologist had with Private Center Administrator, with whom Treating Psychologist appears to have a personal relationship.¹⁵ This is compounded with the fact that Treating Psychologist did not try to obtain, was not provided with, and did not review the comprehensive psychological report completed by DOE Psychologist in 2018 or any of Student’s educational or other records for review in the evaluation.¹⁶ Finally, this Hearings Officer notes that Treating Psychologist did

¹⁵ *See* Treating Psychologist, Tr.V2, 201:6-11 (“First of all, I’m pretty impressed with [Private School Administrator] and what [Private School Administrator] can do. [Private School Administrator] has a child [] that’s [REDACTED]. And I think [Private School Administrator] grew up in a household where [Private School Administrator’s parent] was a teacher. So [Private School Administrator] has insights, [Private School Administrator] has plenty of insights. And [Private School Administrator’s] very, very supportive of [Private School Administrator’s] staff; Tr.V2, 229:23-25 (“Well, specifically I’m on the [REDACTED] as a representative [REDACTED], and [Private School Administrator] has been invited to participate.”); P-Ex.2.7, p.358 (“I know of [Private School Administrator’s] extensive knowledge of [REDACTED] and have come to trust [Private School Administrator’s] assessments to be valid).

¹⁶ *See* Treating Psychologist, Tr.V2, 240:22-241:2 (regarding DOE Psychologist - “you triggered

not have any opportunity to observe Student in Student's educational environment at the time the psychological evaluation was done. Treating Psychologist, Tr.V2, 254:1-255:4.

Nonetheless, the IEP team continued to listen to the suggestions and recommendations provided to the team by Treating Psychologist during all the IEP meetings. Treating Psychologist did acknowledge that Treating Psychologist was not familiar with any of the special education programs that were offered by Home School and whether they would be appropriate to address Student's needs, but repeatedly told the IEP team that it was basically too late to move Student [REDACTED]. FOF 192. Treating Psychologist further noted that had the IEP team tried to provide Student with these opportunities [REDACTED], then that would have been ideal. The only reasoning behind Treating Psychologist's recommendation to keep Student at Private Center was because it would be too dangerous to change Student's setting at this time.

The IEP team did consider what Treating Psychologist had to say but also offered a differing opinion through both District Psychologist and DOE BCBA. FOF 193. Both District Psychologist and DOE BCBA pointed out that Student was and would still be eligible for services from the DOE for a while and it was a good opportunity for Student to learn to deal with people in real world situations while Student still had ample support through IEP services. The IEP team also acknowledged that Student required counseling to address the many issues that Treating Psychologist stated that Student was working on with Treating Psychologist, so the IEP team included counseling as a service in Student's IEP. FOF 134-137, 173-174. Treating Psychologist and Parent told the team that Student is potentially a danger to others and Student's

my memory that eventually [DOE Psychologist] must have been involved in some kind of evaluation"), 249:1-4 ("[DOE Psychologist], I do remember that [DOE Psychologist] was involved with this. And offhand I do remember that [DOE Psychologist] had involvement with the DOE with a psychological evaluation, which was related to an earlier IEP").

self, so the IEP adopted the supplementary aid of a crisis plan to implement for Student's safety in the IEP. FOF 208.

While Treating Psychologist did raise the concern that Student would be [REDACTED] at a public school campus due to Student's previous incident [REDACTED] that allegedly occurred around [REDACTED] years ago and that Student's previous incident was still affecting Student at this time, Petitioners' have not proven that the IEP team did not consider this information. The team discussed it at length throughout the IEP meetings, as it was repeatedly raised by Treating Psychologist, Parent, and Private School Administrator. FOF 64. The IEP team did provide close adult supervision as a support for Student along with a behavior support plan and crisis plan to the IEP to address those concerns. FOF 168-172. Simply because the IEP team ultimately disagreed with Treating Psychologist's recommendation to "stay the course" and keep Student at Private Center does not prove that the IEP team failed to consider Treating Psychologist's recommendations.

2. Recommendations in the FBA and other evaluation data

Petitioners also assert that the IEP team failed to consider the FBA provided by Private BCBA1 after the third IEP on December 3, 2020. While it is unclear what the "other evaluation data" Petitioners refer to in this issue, this Hearings Officer notes that Private Center provided a data chart regarding Student's [REDACTED] behaviors and a graphical data chart of the behaviors that Private Center was tracking of Student for the February 25, 2021 IEP meeting. See P-Ex.2.16, p.388; P-Ex.4.24-4.25, p.543-546. The IEP team acknowledge receiving the data and Private BCBA1 was asked for more information of the data at the meeting, which Private BCBA1 could not provide at the time. The behavioral chart indicated that no [REDACTED]

██████████ had occurred between September 17, 2020 and November 24, 2020, and one (1) incident of ██████████ behavior had occurred.¹⁷ See P-Ex.2.16, p.388.

Petitioners argue that since the IEP team declined to add the services of a registered behavior technician after Private BCBA1's FBA had been presented to the IEP team, they failed to consider the FBA. The discussions from the IEP meeting show that this is not true. The IEP team recognized that the FBA was completed, and a behavioral intervention plan was prepared but was not being implemented by Private Center. The IEP team also acknowledged Private BCBA1's statement that the crisis plan was being implemented primarily for Student at that time. Because of the information in those two plans and the other information provided to the IEP team in the behavioral data shared with the IEP team, these were included in Student's IEP as a behavior support plan and a crisis plan. FOF 208. The IEP team also included the supplementary aid of close adult supervision to provide the services that Private RBT1 was providing at Private Center at the time of the IEP meetings. FOF 208. Simply because the IEP team wanted to wait until the DOE had an opportunity to conduct their own formal FBA and behavior intervention plan to comply with the DOE's policy, it does not prove that the IEP team failed to consider the FBA and the other behavioral data.

3. Other evaluation data

Finally, the IEP team also had other evaluation data available to them at the time of the IEP meetings. The IEP team had Student's reevaluation data from 2018, which included DOE Psychologist's psychological evaluation. DOE Psychologist's evaluation had several

¹⁷ This Hearings Officer notes that the data on the graphical data chart in P-Ex.2.16, p.388 does not match the data on the ██████████ chart, P-Ex.4.25, p.546, since the ██████████ chart indicates a ██████████ on October 7, 2020, but the graphical data chart indicates a ██████████ behavior on October 2, 2020, making this Hearings Officer question the reliability of the data collection methods used for these charts.

recommendations that were followed by the IEP team, including talking about Student's post-high school plans, providing counseling through a behavioral health specialist, making [REDACTED] or other accommodations available to Student to alleviate the stress on Student from [REDACTED] in the school setting, and having Student be involved in pro-social extracurricular activities. FOF 66-70.

The IEP team also reviewed and included the data and information from progress reports, certificates, and other reports provided by Private Center regarding Student's progress at Private Center and acknowledged that Student has done very well there.

Petitioners have failed to prove that the IEP team ignored the recommendations of Treating Psychologist, the FBA, and other evaluation data and that it denied Student a FAPE.

C. Petitioners have failed to prove that the IEP team denied Student a FAPE without having Student's triennial evaluations in place

Petitioners argue that Respondents should have delayed or paused the IEP meetings to conduct Student's triennial evaluations and awaited the results of the evaluation to complete the IEP. Petitioners' argument focuses on the IEP team's decision to wait until the IEP was completed to conduct a DOE FBA before providing Student with the service of a registered behavior technician. This Hearings Officer has determined, *supra*, the sufficiency of the IEP team's decision to provide Student "close adult supervision" until the DOE conducted an FBA and behavior intervention plan in accordance with Hawai'i law, and the significant amount of information that the IEP team had in developing Student's IEP-03/18/2021.

Petitioners cite to *L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, to support their position that the IEP team should have delayed the development of Student's IEP until the triennial evaluation was completed. In *L.J.*, the issue before the Court was whether the school district failed in its duty to conduct a "full and initial evaluation" before completing the student's

IEP when the school district refused to conduct a health assessment on the student since the student's medication was not administered by the school. The Court found that the health assessment would have been pertinent information for the IEP team to have more seriously considered alternative services that could have been provided to the student in light of the student's health and medication issues.

Here, the IEP team started the development of Student's IEP in October 2020, knowing that Student's previous IEP was past its annual review date, but wanting to accommodate Parent's schedule, as well as the schedule of the people that Parent wanted present at the IEP meetings, including Treating Psychologist. FOF 94, 97-98. The IEP team had information from Student's prior reevaluation conducted in March 2018, including DOE Psychologist's psychological evaluation and a comprehensive evaluation. *See* R-Ex.12, p.0132-0147; R-Ex.14, p.0156-0166. The IEP team also had the psychological report from Treating Psychologist, as well as the presence of Treating Psychologist. The team had also requested and received data, progress reports, and other information from Private Center, along with the presence of many of Student's service providers at the IEP meetings. FOF 98.

Petitioners do not suggest that there was any information or assessment that the IEP team should have done as part of the reevaluation that would have provided information that the IEP team did not already have. Petitioners focus on the requirement of the FBA for a registered behavior technician to be assigned to Student. Based on the information provided by Private Center and Treating Psychologist, discussed *supra*, that Student did not need ABA services through a registered behavior technician to address the problems that Student was experiencing with internal thoughts, the IEP team provided the best alternative support to provide the service that Student was already receiving. Additionally, based on Treating Psychologist's analysis that

Student's behaviors cannot entirely be addressed by ABA services, it is unlikely that an FBA conducted as part of a reevaluation of Student would have recommended the services of a registered behavior technician. FOF 89.

Petitioners have failed to prove that the Respondents denied Student a FAPE when the IEP team determined Student's placement without having Student's triennial evaluations done.

D. Petitioners have failed to prove that Respondents denied Student a FAPE because the change from "Individual Instructional Support" to "Close Adult Supervision" is a reduction in services that is detrimental to Student's health and safety and to Student's ability to receive a meaningful educational benefit

Petitioners argue that the provision of close adult supervision to Student rather than individualized instructional support in Student's IEP-03/18/2021 was a reduction of services that resulted in a denial of FAPE. As this issue regarding DOE's policy for assigning individualized instructional support has been addressed in Section A.1., *supra*, this Hearings Officer incorporates by reference the analysis provided. Petitioners argue that because 'close adult supervision' itself does not have any requirements and is not the same as individual instructional support, it fails to meet the needs of Student.

The evidence presented at the Hearing of the services provided by Private RBT1 confirm that Student does not currently receive the services of an individualized instructional support at Private Center. While Private RBT1 is a registered behavior technician, the provision of services in an IEP by the DOE must comply with the DOE guidelines since the DOE is responsible for providing the service. Under the DOE guidelines, individualized instructional support must be outlined in a behavior intervention plan and provided by a qualified staff member under the supervision of an ABA professional. "Individualized instructional support should only be provided when a student is in need of full-time uniquely designed *behavioral interventions* to access academic and non-academic activities throughout the day." R-Ex.170, p.1059.

The evidence in this case is that Private RBT1 provides instruction, tutoring, and support for Student in the form of watching for Student's body cues, asking Student if Student needs a break, and redirecting Student from engaging in [REDACTED]. FOF 41-44. Private RBT1 also takes data on the behaviors that Private Center is monitoring. FOF 45. Private Center is not implementing the behavior plan that Private BCBA1 provided to the IEP team, and no FBA or behavior plan had been done at Private Center, despite Private RBT1 providing services to Student at Private Center for around [REDACTED] years. FOF 107-108, 141. Most importantly, the services and support provided by Private RBT1 to Student are not uniquely designed behavior interventions that Student requires to access Student's academic and non-academic activities throughout the day. This is evidenced by the fact that Private English Tutor is able to provide Student with instruction without having any knowledge of Student's behavior needs or interventions. FOF 52, 54.

While Petitioners argue that close adult supervision is a reduction in support that is necessary for Student to access Student's education, Student's IEP-03/18/2021 provides the clarification that the close adult supervision will be provided to engage in nearly all of Private RBT1's responsibilities, such as implementing breaks, engages Student in conversations, redirects Student back to tasks, prompts Student to get back to the task at hand, checks-in, and keeps Student from engaging in [REDACTED] behavior by attending to Student's subtle cues to redirect Student before Student engages in the [REDACTED] behavior. FOF 209. The IEP-03/18/2021 also provides additional support for Student in the form of counseling, to assist Student in developing or practicing coping skills to enhance the treatment that Student gets from Treating Psychologist. FOF 207.

Petitioners have failed to prove that the provision of close adult supervision is a reduction in services that resulted in a denial of FAPE for Student.

E. Student's placement in the IEP-03/18/2021 is Student's least restrictive environment

Petitioners next argument is that Respondents denied Student a FAPE because the educational placement in Student's IEP-03/18/2021 is not the appropriate least restrictive environment for Student.

The laws behind IDEA and its predecessor were promulgated in response to "Congress' perception that majority of handicapped children in the United States were either totally excluded from schools or were sitting idly in regular classrooms awaiting the time when they were old enough to drop out." *Rowley*, 458 U.S. at 179, 102 S.Ct. at 3037, 73 L.Ed.2d 690 (1982). One of the primary requirements of any educational agency to comply with the IDEA is to education children with disabilities with children who do not have disabilities to the maximum extent appropriate. *Id.* at 181, 201 S.Ct. at 3038, 73 L.Ed.2d 690; 20 U.S.C. §1412(5)(A); 34 C.F.R. §300.114; H.A.R. §8-60-15. The Ninth Circuit Court of Appeals set forth a four-factor balancing test in determining the least restrictive environment for students with disabilities in *Holland*; which includes an analysis of: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect the student had on the teacher and the other students in the classroom; and 4) the cost of mainstreaming the student. 14 F.3d at 1404. While the facts of this case are different because Student is not in a regular classroom with supports, the IEP team in this case did review each of the educational settings in determining Student's educational placement.

The evidence in this case is that Student is intelligent and verbal, diligent and hardworking, and able to manage some stressors caused by external sources, such as [REDACTED].

Student suffers from psychological issues including [REDACTED], and has difficulty with social skills and interpersonal relationships. FOF 33. Student does need assistance in breaking down assignments and modifications to relieve stressors that would trigger Student's [REDACTED] and benefits from adult support. FOF 42. Some examples of Student's intellectual ability are Student's success at taking online classes with the assistance of Private RBT1 and making progress in Student's occupational therapy goals and English/language arts work. FOF 224-226. Student can manage some stressors that can lead to distractions for Student in an educational environment, such as using [REDACTED] or requesting to work in a quiet area to remove Student's self from the distractions. FOF 222. While Student's [REDACTED] are unpredictable, Student is learning to communicate them to support staff and support staff can look for cues in Student's body and demeanor to attempt to engage Student in some coping techniques when this occurs. FOF 84-87.

1. General Education class for over 80% of the day

The IEP team discussed the educational benefits that Student could receive in each educational setting with the supports and modifications in place as described in the services and supplementary aids section of the IEP. The educational benefits for the general education class included the opportunity to be with same-age, non-disabled peers; access to credits to put toward receiving a high school diploma or GED preparation subjects, such as algebra, English/language arts, and science; access to specific content teachers for the different subjects that Student would be learning; and access to college preparation and exposure. The non-academic benefits for Student in a general education class would allow Student to have daily interaction with general education students for Student to work on social skills; extracurricular activities; post-secondary

counseling; experiences to navigate social norms and expectations; and a job fair. The effect that Student would have on the teacher and other students in the class are likely negative for the general education class, as it has been established that Student is highly distracted or stressed by [REDACTED], which could lead to the teacher or other students being interrupted or distracted by Student getting agitated, [REDACTED], or leaving the room. Student may also get physically agitated due to the stress of the environment in the general education class. FOF 178.

2. General and Special Education class

The general and special education class have similar academic benefits as the general education setting. The non-academic benefits would also be similar to the general education class setting. The effect of Student on the teacher and other students in the class are also the same as in the general education setting, although the class size would be smaller so there would be fewer distractions. FOF 179.

3. Special Education class

In the special education class, the academic benefits for Student would include a smaller class size, so more individual instruction by the special education teacher; a set schedule and routines; more opportunity to interact with the teacher; Student's schedule could be modified to meet Student's needs; access to life skills curriculum; access to community-based instruction; access special programs; and a broader range of modifications and accommodations. The non-academic benefits are similar to the general education setting. The effect of Student on the teacher and other student would be the same as the general and special education setting except that the class size would be smaller and include more individual interaction with the teacher. FOF 182.

4. Public Separate Facility

The educational benefits for the public separate facility include education in a school that is tailored to students with [REDACTED], individualized curriculum, very small class size, staff specially trained in [REDACTED], as well as general education benefits like earning credits toward a diploma or preparing for the GED test. The public separate facility also has partnerships with DOE campuses. The non-academic benefits will be that the environment that can be adapted to the needs of Student and same age peers in attendance. The effect of Student on the teacher and other students would be similar to the other settings in that the public separate facility is located on a public-school campus so there may still be [REDACTED] and other distractions, but there would be less distraction to other students since there are less students in the setting. FOF 183, 188.

5. Private Separate Facility

The educational benefits at Private Center include individualized instruction, access to special education teachers, no break in direct services, GED preparation curriculum, dynamic learning maps, online classes, and the essential elements program that aligns with the DOE common core standards. The non-academic benefits to Student include a small setting with familiar staff, established relationships, the environment can be adapted to meet Student's needs, community outings, friendships that Student has established over the years, extracurricular activities such as going to the theater, gym, and martial arts classes, and vocational skills training. The effect of Student on the teacher and other students would be minimal since Student has been attending Private Center for [REDACTED] years and there is a smaller likelihood of maladaptive behaviors. FOF 189, *see also* P-Ex.7.5 [1:14:06].

The IEP team unanimously rejected the more restrictive placements of private residential facility and homebound/hospital setting, so those are not at issue. FOF 190. As noted above, the

IEP team did discuss each of the necessary *Holland* factors¹⁸ in determining Student's educational placement. It is the duty of the school district to attempt "to the maximum extent possible" to educate Student with non-disabled students. The IEP team discussed each setting and many of the DOE team members accepted the special education setting for Student as the least restrictive environment where Student would be able to access Student's education with the supports and services provided in the IEP. As the offeror of FAPE, Principal made the decision when the team was in disagreement that the least restrictive environment would be the special education setting on a public-school campus. FOF 196. Petitioners have not proven that the special education setting is not the appropriate least restrictive environment under the IDEA for Student to access Student's education.

While Petitioners primary argument is that Student should not return to any public school because Student might be [REDACTED], they have presented no support to their contention that this would happen. Indeed, Respondents have presented evidence that Home School has a number of programs for special education students to be paired with general education students to learn socialization, as well as [REDACTED] programs in place. FOF 227-231. Petitioners' claim that Student's return to a public-school campus would immediately result in [REDACTED] is not supported by any facts presented at the Hearing.

Petitioners also point to Treating Psychologist's recommendation that Student stay at Private Center because it is too late to move Student at this stage. However, Treating Psychologist's recommendation has questionable credibility. First, Treating Psychologist agreed

¹⁸ This Hearings Officer notes that the IEP team did not discuss costs but concludes that was not a necessary part of the analysis, since the reason for the inquiry in the *Holland* case was because the school district was raising the issue of cost as a reason that the student should not be mainstreamed. Here, there is no such factor being raised by either of the parties for the determination of Student's least restrictive environment. *See Holland*, 14 F.3d at 1401-1402.

with DOE BCBA that the research shows that students should be placed in public school settings to learn to adjust to the real world in a controlled setting with supports. FOF 193. Treating Psychologist's only disagreement is that it is too late in the game to do this with Student. Treating Psychologist offered no valid reasoning behind this logic, nor any magic cut off date that prevents Student from learning in this new environment. Treating Psychologist's position was also refuted by both DOE BCBA and District Psychologist. DOE BCBA has extensive knowledge and experience working with students with [REDACTED] and has done extensive research on assisting students mainstream into the general education population. FOF 15-16. Additionally, as noted by Private Center Administrator, Treating Psychologist was present at all the IEP meetings to prepare for any litigation in case the IEP team attempts to change Student's placement and Parent needs to file a due process complaint, so it is clear that Treating Psychologist has particular motivations in this case. FOF 147. Finally, Treating Psychologist's theory that Student cannot adjust to new conditions this late in life essentially supports the idea that Student needs to be mainstreamed as soon as possible. Student is only eligible for IDEA services until age twenty-two (22). If Student is unable to adjust while Student is [REDACTED] in a controlled school environment on a public-school campus, it is unconscionable to think about how Student would survive in the general public after Student ages out of the school system. Treating Psychologist's recommendation that is too late to transition Student to a new environment is illogical and unsupported by the facts of this case.

F. Respondents did not deny Student a FAPE by failing to provide an appropriate transition plan for Student to transition into Student's new placement

Petitioners argue that Respondents denied Student a FAPE by failing to provide an appropriate transition plan for Student to transition into Student's new placement. Petitioners cite to two (2) different types of transition plans mentioned under the IDEA. The first, which is a

requirement that the IEP contain a statement of measurable post-secondary goals, transition services, and a statement that the student's rights will transfer to the student upon reaching the age of majority. 20 U.S.C. §1414(d)(1)(A)(VIII); H.A.R. §8-60-44(b). The second type of transition plan is from a student's current placement to a new placement.

1. Transition services under the IDEA

Petitioners have not presented any evidence that the post-secondary goals or transition services needed for Student to attain those goals are insufficient to meet Student's needs. The IEP team discussed Student's post-high school interests, which included the possibility of attending college, getting a job, and living at home until Student is self-sufficient enough to live alone. FOF 114. The IEP team also reviewed the RIASEC test that Student completed in September 2020 and included those results in Student's IEP-03/18/2021. FOF 114. Finally, Student's IEP-03/18/2021 contained a number of transition services needed to meet each of the desired post-high school outcomes for Student. Petitioners have not proven that transition plan that was included in the IEP-03/18/2021 was insufficient.

2. Transition plan for Student's new placement

Petitioners' primary argument under this issue is the IEP team's failure to prepare a transition plan for Student to move from Student's current placement at Private Center to Home School's special education setting. Petitioners cite to *B.B. ex rel. J.B. v. Hawaii, Dept. of Educ.*, 483 F.Supp.2d 1042, 1056 (D. Hawai'i 2006), to suggest that while "the IDEA does not mandate the creation of a transition plan when a student moves from a private placement to a public school, [] in some cases, the knowledgeable education experts agree that a particular student would benefit from such a plan. In that case, the parties agreed that a transition plan would be beneficial for the student and indication that a "transfer plan" was included in the student's IEP.

While it was not written in the IEP, the testimony of the transfer plan, which was later upheld by the administrative hearings officer and the U.S. District Court, was that parents were invited to visit the school, a counselor would be assigned, and a plan for the student to join a buddy group.

In this case, the IEP team attempted to schedule a transition meeting at the end of the March 18, 2021 IEP meeting. FOF 201. Principal offered visits to Student, Parent, Private School Administrator, Treating Psychologist and anyone else that wanted to accompany them. FOF 199. SPED Teacher2, scheduled visits with Parent, Treating Psychologist and Private Center Administrator to visit one of the special education programs that Home School had to offer. FOF 216. DOE DES testified that if Parent had accepted the offer of FAPE and a transition meeting had occurred, the school would have worked with Private Center on payment for some services for Student through the transition of Student from Private Center to Home School. Tr.V1, 72:25-73:16. No plan in this case was ever created since Parent ceased contact with Home School and filed a due process complaint. FOF 221. Parent and Private Center Administrator made it clear throughout the IEP meetings that if Student's placement was changed from Private Center, Student would not attend Home School. FOF 61-62, 147. Petitioners have failed to prove that Respondents denied Student a FAPE by failing to create a transition plan for Student when Parent ceased communication and refused to work with Respondents to create such a transition plan.

G. Petitioners have failed to prove that Respondents denied Student a FAPE by significantly infringing upon Parent's ability to participate in the development of Student's IEP

Petitioners argue that Respondents denied Student a FAPE by significantly infringing upon Parent's ability to participate in the development of Student's IEP. Petitioners' argument essentially reiterates all the previous arguments made in the Second Amended Complaint and

argues that the decisions made by the IEP team infringed on Parent's ability to participate since they did not conform with the position that Parent was taking.

The evidence in this case demonstrates that Parent had ample ability to participate in the development of Student's IEP both through Parent's input and the input of Treating Psychologist and the Private Center IEP team members, particularly Private Center Administrator. As pointed out by Private Center Administrator, Private Center Administrator and Private Center Executive Director have been involved in all Student's IEP meetings since Student began attending Private Center. FOF 63. Private Center Administrator at various times during the IEP meetings took the lead on having people from Private Center, Parent, or Treating Psychologist provide information and input to the IEP team to convey Parent's position. FOF 102-103, 108, 112, 117, 124, 129, 133, 136, 146, 147, 169, 186. Parent often deferred to Private Center Administrator and Treating Psychologist when asked Parent's position and they were given many opportunities to provide information. FOF 201. Parent, Treating Psychologist, and the Private Center team members were all provided with updated draft IEPs for review before each of the IEP meetings, and Private BCBA1 and Treating Psychologist were able to make corrections or changes that they deemed necessary to the draft IEP. The IEP team relied heavily on the data provided by Private Center and Treating Psychologist for the development of Student's PLEPs, goals and objectives, services, and supplementary aids and supports. *See generally* FOF 99-147, 166-201. While there were a few things that the IEP team explained that could not be written in the IEP and there were several areas of disagreements between the DOE IEP team members and the Private Center IEP team members, both sides had ample opportunity to express their position on Student's IEP terms. Petitioners have not proven that Respondents infringed upon Parent's ability to participate in the development of Student's IEP.

H. Respondents did not deny Student a FAPE when the program in which Student was placed through the 2021 IEP was closed for the summer

Petitioners argue that Student was denied a FAPE because the program in which Student was placed through the IEP-03/18/2021 was closed for the summer. Petitioners' position is that Student's educational placement in the IEP-03/18/2021 was in one of the special programs at Home School and because it was closed for the summer, Student would not have been able to attend even though Student was eligible for ESY services. Petitioners based their position on the verbal offer of FAPE that was given to Parent at the end of the March 18, 2021 IEP meeting, however, the recording of the IEP meeting does not support their position.

At the end of the March 18, 2021 IEP meeting, Principal informed the IEP team that the offer for placement for Student in the IEP-03/18/2021 would be that Student was to be placed in a special education setting at Home School with Home School overseeing the transition from Private Center. FOF 196. Principal stated that they would love to have Student participate in the special program that Home School had to offer, but that was not stated to be Student's placement. FOF 196. Student's IEP-03/18/2021 also includes the statement that "[Student] will participate with non-disabled peers at meal times and recess, school assemblies, special events, and appropriate electives and work-related activities. [Student] will not participate with non-disabled peers for all other school subjects." FOF 210. The PWN-03/30/2021 included the same statement regarding Student's participation with non-disabled students and also included the statement "The student will received [Student's] free and appropriate public education at [Student's] home school. FOF 213.

As discussed *supra*, the educational placement of a student determines how much the student will be educated in the regular education classroom. The IDEA does not require an IEP team to describe a specific school or location where the student's IEP will be implemented.

Petitioners' argument that Principal's mention of one of the special education programs at Home School meant that Student would receive all Student's services there is unsupported by the record. Further, DOE DES testified that the intention of the IEP team was to work with Student, Parent, Treating Psychologist, and Private Center to create a transition plan to see what programs at Home School suited Student's needs best and have Student participate in one or more than one of the programs. DOE DES, Tr.V7, 1076:1-17. Since Student was new to the school, this was a reasonable attempt for the IEP team to get Student acclimated to a setting at Home School where Student felt most comfortable and then determining what classrooms or programs Student would receive Student's services. Petitioners have failed to prove that Student's placement was in the particular program at Home School and that Respondents denied Student a FAPE since that particular program was closed for the summer.

- I. Petitioners failed to prove that Respondents denied Student a FAPE by failing to provide Petitioners with an appropriate PWN that complies with 34 C.F.R. §300.503 by failing to provide a proper description of the action and explanation to Parent

Petitioners' final argument was added after the Hearing based on Petitioners' Request to Amend the Pleadings to Add One Additional Issue, submitted on October 1, 2021. Although the Hearing had concluded, this Hearings Officer granted Petitioners' Request over Respondents' objection. Petitioners argue that the PWN-03/30/2021 did not comply with 34 C.F.R. §300.503 by failing to provide a proper description of the action and explanation to Parent.

The IDEA provides that written notice must be provided to parents of a child with a disability "within a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." 20 U.S.C. §1415(b)(3); 34 C.F.R. §300.503, H.A.R. §8-60-58. This written notice must contain the following:

- A description of the action proposed or refused by the agency;
- An explanation of why the agency proposes or refuses to take the action;
- A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- A statement that the parents of a child with a disability have protection under the procedural safeguards [of this section] 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;
- Sources for parents to contact to obtain assistance in understanding the provisions of [this section];
- A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- A description of other factors that are relevant to the agency's proposal or refusal. 34 C.F.R. §300.503(b); 20 U.S.C. §1415(c); H.A.R. §8-60-58(b).

Petitioners cite to *K.D. ex rel. C.L. v. Department of Educ., Hawaii*, 665 F.3d 1110, 1127 (9th Cir. 2011), to argue that the PWN in this case left Parent confused about Student's placement, which resulted in a denial of FAPE. However, the facts in *K.D.* are similar to the present case where the PWN-03/30/2021 provided Parent with the information that Student would receive IEP services at Student's home school. In *K.D.*, the Court found that since the notice provided by the school district specified the school in which the student would be receiving services, that was sufficient to satisfy the formal requirement of an offer of placement. The *K.D.* court also specified that the placement offer need not specify the exact room where the student would receive services. The case cited to by the *K.D.* court, *A.K. ex rel. J.K. v. Alexandria City School Board*, 484 F.3d 672, 681 (4th Cir. 2007) was factually distinguishable from *K.D.* as well as the facts in this case. In *A.K.* the offer of FAPE only contained a general statement that the student would be placed in a private day school in their area, of which there were to be several for the school district to choose from. *Id.* The parents in that case had not found any day programs in the area that would be sufficient to their child's needs, and there was no discussion during the IEP meetings of which day programs the school district was considering, leaving the parents in the dark as to whether the program the school district

ultimately chose would be suitable for the student. *Id.* In that case, the Fourth Circuit found that the offer of FAPE was incomplete since the parents would need to research on their own to determine which of the possible options the school district would choose to implement the services. *Id.* Here, it was clear throughout the discussions in IEP meetings, the IEP-03/18/2021, and the PWN-03/30/2021 that the choices for Student's placement would be either Home School or Private Center.¹⁹ The verbal offer of FAPE made by Principal at the March 18, 2021 IEP meeting specified that the placement for Student would be in the special education setting at Home School and the PWN specified that Student would receive services at Home School. FOF 196, 213. Petitioners' argument that the PWN-03/30/2021 was not sufficient notice to provide a valid offer of FAPE because the PWN-03/30/2021 did not contain a specific special education program or a specific classroom in which Student would receive services is exactly what the Ninth Circuit found is not necessary to provide an offer of FAPE. Finally, Parent was invited, and attempts were made to arrange for Student, Parent, Treating Psychologist, and Private Center Administrator to visit Home School and see all the programs that Home School had to offer Student, and a transition plan was to be created to determine which setting at Home School would be the best fit for Student to access Student's education. FOF 199, 200. Petitioners have failed to prove that the PWN-03/30/2021 did not comply with the requirements under 34 C.F.R. §300.503.

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 listed

¹⁹ There was also talk specifically about a particular public separate facility by name, but since that placement was rejected, it is not relevant to this discussion.

in the Second Amended Complaint and the additional issue added to this Decision in the Order Granting Petitioners' Request to Add One Additional Issue. As Petitioners have failed to prove that Respondents denied Student a FAPE, Petitioners' request for the IEP team to develop a new IEP for Student with placement at Private Center and for tuition reimbursement is denied.²⁰

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, November 1, 2021.

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²⁰ This Hearings Officer noted that Petitioners also requested as a remedy in the Second Amended Complaint that this Hearings Officer place Student at Private Center until Student's graduation or until age 21, whichever comes first. At both the prehearing conference in this matter and during the Hearing itself, this Hearings Officer informed the parties that this Hearings Officer would not be ordering a relief of this fashion, as it is not an appropriate resolution to this case.