



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-SY2021-042

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: August 17-19 & 26,
2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On May 24, 2021, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE") received a request for a due process hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities

Education Act, from Student, by and through Parent (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on June 2, 2021.

A prehearing conference was held on June 21, 2021, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Ryan W. Roylo, Esq. (hereinafter “Mr. Roylo”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for August 17-19, 2021.

Petitioners requested leave to file a pre-hearing motion for an order regarding Student’s stay-put placement during the pendency of this proceeding, and a deadline was given of June 29, 2021. Petitioners timely filed their Motion for ‘Stay-Put’ on June 29, 2021. Respondents timely filed their Memorandum in Opposition to Petitioners’ Motion for ‘Stay-Put’ by the deadline of July 6, 2021. Petitioners timely filed their Reply Memorandum in Support of Motion by the deadline of July 8, 2021. A hearing on Petitioners’ Motion for ‘Stay-Put’ was held on July 9, 2021 at 9:30 a.m. After review of the arguments by counsel and the facts of the previous case, and pursuant to existing caselaw, an Order Granting Petitioners’ Motion for ‘Stay-Put’ was issued on July 12, 2021.

The parties were also provided a deadline of July 30, 2021, for any additional substantive motions to be filed prior to the Hearing. No additional substantive pre-hearing motions were filed, and a telephone status conference was held with Hearings Officer Chastity Imamura, Mr. Peck, and Mr. Roylo to confirm that the parties anticipated being ready to proceed with the Hearing scheduled for August 17-19, 2021.

The Due Process Hearing began on August 17, 2021. Petitioners called Private School Director to testify. The Hearing continued to August 18, 2021 for completion of Private School

Director's testimony and the start of Parent's testimony. Parent's testimony was continued to August 19, 2021 and was completed on that date. An additional Hearing date was added on August 26, 2021, and Respondents called Speech Language Pathologist (hereinafter "SLP"), DOE Board-Certified Behavior Analyst (hereinafter "DOE BCBA"), Special Education Teacher (hereinafter "SPED Teacher"), and Student Services Coordinator (hereinafter "SSC") to testify and rested their case. Petitioners did not have any rebuttal witnesses to present.

Based on the initial setting of the Hearing on August 17-19, 2021, Petitioners submitted a request for an extension of the deadline from the original deadline of August 7, 2021 to September 21, 2021. Respondents did not have any objection to the request for extension and Petitioners' request for extension was granted to September 21, 2021. Due to the need for an additional Hearing date and information by the court reporter's office that the transcripts would be delayed by an unforeseen shortage of court reporters due to illness, Respondents requested another extension of the deadline from September 21, 2021 to November 5, 2021. Petitioners did not object to the extension, as both parties agreed that they wanted this Hearings Officer to have the benefit of using the transcripts in making the decision. Respondents' request for an extension was granted and the new deadline by which a decision in this case must be rendered is November 5, 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 July 16, 2021, which set forth the parameters for the video conference hearing. These parameters included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the

proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

Each party submitted their exhibits for the Hearing by the disclosure deadline of August 10, 2021. The parties met and conferred regarding the proposed exhibits by August 13, 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 complete. On August 26, 2021, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on September 3, 2021. Any objections to the proposed exhibits were due on September 8, 2021.

Petitioners submitted a list of additional exhibits for consideration in the decision of this case and Respondents submitted objections to Petitioners' proposed additional exhibits. Over Respondents' objection, the additional exhibits proposed by Petitioners were received. Respondents submitted a list of omitted exhibits to the lists provided by this Hearings Officer, and Petitioners did not state any objection to the corrections. The omitted exhibits were also received for consideration in this matter.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-072; Exhibit 2, pages 073-082, 084-085, 088-091; Exhibit 3, pages 92-95, 100-101, 104-106; Exhibit 4, pages 109-153; Exhibit 5, pages 154-155, 157-215; and

Exhibit 6, which were four (4) audio files of meeting recordings dated September 4, 2020 (parts 1 & 2), January 14, 2021, and January 25, 2021.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 5-9, pages 008-031; Exhibits 11-19, pages 034-064; Exhibits 21-25, pages 067-075; Exhibits 28-29, pages 078-079; Exhibit 31, pages 085-086; Exhibits 33-66, pages 088-128.

Both parties wanted the opportunity to submit closing briefs regarding the legal issues and the relevant facts supporting those issues to this Hearings Officer for review. The deadline by which the briefs were to be submitted was Tuesday, September 21, 2021. Both parties timely submitted their closing briefs on that date.

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

II. JURISDICTION

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

III. ISSUES PRESENTED

Petitioners assert five (5) issues in the Complaint to be addressed at the Hearing:

1. Whether the Individualized Education Program (hereinafter "IEP") dated January 25, 2021 and January 14, 2021 (hereinafter "IEP-01/25/2021") is appropriate where the extended school year (hereinafter "ESY") portion of Student's IEP:
 - a. Provides a special education-only placement with no non-disabled peers, and no discussion of Student's least restrictive environment (hereinafter "LRE") occurred during the ESY section of the IEP, but Student was provided a less restrictive placement for the school year program.
 - b. There was no discussion of the frequency (length of day) of ESY to

- individualize Student's program for this period of time.
- c. Where during the ESY section of the IEP the team should have discussed Student's needs for one-to-one aide supports, speech/language therapy, and/or occupational therapy during the IEP discussions and whether the IEP should have described these services if they were determined needs of Student.
2. Whether the IEP-01/25/2021 is appropriate where there were insufficient discussions of Student's behavioral needs during the Supplementary Aids section of the IEP development process and/or whether there are sufficient behavioral interventions described in the IEP to address Student's needs in the Supplementary Aids section of the IEP.
 3. Whether the IEP-01/25/2021 is appropriate where the current (privately-provided) classroom supports/accommodations were not discussed where Parent repeatedly stated that these supports were essential to Student's success in Student's current program and if Student were to change from the current private program to a public program; a new environment and distinct supports (program). Also, whether the supplementary supports are insufficient, substantively, for Student to succeed where no assistive technology and other important supports are not described in the IEP offer.
 4. Whether the IEP-01/25/2021 is appropriate where there was insufficient participation of Student's current providers and/or insufficient efforts to gain attendance of those providers at the IEP development meetings, resulting in a lost educational opportunity.
 5. Whether during the meetings on January 14, 2021 and January 25, 2021, Parent was promised a registered behavior technician for 2055 minutes per week but the written IEP-01/25/2021 and prior written notice provides contradictory statements that Parent cited as issues needing clarity when Parent received the written IEP but Parent's concerns went unaddressed. These included:
 - a. Clarification of Services and Supports: "Placement will be in a classroom with at least 1 personnel trained in ABA strategies."
 - b. "BCBA to provide consultation, Applied Behavior Analysis (ABA) intervention, placement in a classroom with at least 1 personnel trained in ABA strategies, Program RBT."
 6. Whether the IEP-01/25/2021 is appropriate where there was no discussion of transportation as a potentially needed related service.

IV. FINDINGS OF FACT

Witness information

1. Private School Director is a licensed board-certified behavior analyst (hereinafter

“BCBA”) and licensed and certified speech-language pathologist in the State of Hawai‘i. Private School Director has a master’s degree in communication sciences and disorders and has been working as both a BCBA and a speech-language pathologist for over [REDACTED] years. Private School Director has experience in developing, guiding, and implementing programs using applied behavior analysis (hereinafter “ABA”), with an emphasis on verbal behavior (hereinafter “VB”) programs.²

2. Private School Director was qualified to testify as an expert witness in communication disorders and the development of ABA and VB programs.³
3. SLP is a licensed speech pathologist in the State of Hawai‘i, who holds a master’s of science degree in communicative disorders. SLP has been working for the Hawai‘i DOE for [REDACTED] years as a speech language pathologist, who performs speech and language therapy for children with communication needs.⁴
4. DOE BCBA is a licensed board-certified behavior analyst in the State of Hawai‘i who holds a PhD in psychology and a master’s degree in behavior analysis. DOE BCBA is employed by a company that is contracted with the Hawai‘i DOE and has been working with the DOE since [REDACTED].⁵
5. SPED Teacher has been working as a special education teacher for over [REDACTED] years in various states and has been teaching in the State of Hawai‘i for

² Testimony of Private School Director, Transcript Volume 1, page 15, line 4 to page 18, line 6 (hereinafter referenced as “Tr.V1, 15:4-18:6”); Petitioners’ Exhibit 5, page 170 (hereinafter referenced as “P-Ex.5, p.170”).

³ Testimony of Private School Director, Tr.V1, 21:6-22:3.

⁴ Testimony of SLP, Tr.V4, 504:8-505:8.

⁵ Testimony of DOE BCBA, Tr.V4, 538:6-22.

approximately [REDACTED] years in both the capacity of a resource teacher and a fully self-contained classroom teacher. SPED Teacher has bachelor's and master's degrees in special education.⁶

6. SSC is licensed in the State of Hawai'i as a special education teacher for grades kindergarten through twelfth grade and a general education teacher for grades kindergarten through sixth grade. SSC has a bachelor's degree in elementary education and a master's degree in special education. SSC has been working for the Hawai'i DOE for [REDACTED] years and currently holds the position of a student services coordinator.⁷
7. Parent was a licensed elementary school teacher at [REDACTED] for grades [REDACTED] from approximately [REDACTED]. Parent has a master's in curriculum and instruction and a degree in teaching. Parent has not been a teacher since [REDACTED].⁸

Background information

8. Student is [REDACTED] years old and was diagnosed with [REDACTED] [REDACTED] in July 2019.⁹
9. Student attended Home School's [REDACTED] program for the 2018-2019 school year and was a part of the designated VB program at Home School since January 2018.¹⁰

⁶ Testimony of SPED Teacher, Tr.V4, 572:10-24.

⁷ Testimony of SSC, Tr.V4, 608:10-609:14.

⁸ Testimony of Parent, Tr.V2, 313:7-14, Tr.V3, 395:20-397:10.

⁹ Testimony of Parent, Tr.V2, 312:23-313:4; P-Ex.1, p.002; Respondents' Exhibit 15, page 044 (hereinafter referenced as "R-Ex.15, p.44").

¹⁰ P-Ex.1, p.052.

10. An IEP was prepared for Student during an IEP meeting on May 29, 2019 (hereinafter referred to as “IEP-05/29/2019”). The annual review date for Student’s IEP-05/29/2019 was May 29, 2020.¹¹
11. In July 2019, Student attended a summer camp that was run by Private School Director outside of the DOE.¹² For the 2019-2020 school year, Parent enrolled Student at Pilot Program, which was a non-profit private school program run by Private School Director as a pilot program for running a school based on an ABA VB program.¹³
12. In June 2020, the principal of Home School sent Parent a letter indicating that Student was still eligible for special education and related services, but that Parent must contact the school to prepare an IEP for Student. Parent did not contact Home School or respond to the letter.¹⁴
13. Parent filed a Complaint and Resolution Proposal in DOE-SY2021-002 on July 10, 2020. One of the issues alleged in the Complaint and Resolution Proposal in DOE-SY2021-002 was that the DOE denied Student a free appropriate public education (hereinafter “FAPE”) by failing to review, revise, or replace Student’s IEP-05/29/2019 prior to its expiration and/or prior to the start of the 2020-2021 school year.¹⁵
14. Parent enrolled Student in Private Program for the 2020-2021 school year and as part of the Complaint and Resolution Proposal in DOE-SY2021-002, requested tuition

¹¹ P-Ex.1, p.051-066.

¹² Testimony of Private School Director, Tr.V1, 25:8-27:13; *see also* P-Ex.4, p.125.

¹³ Testimony of Private School Director, Tr.V1, 25:8-28:21; *see also* P-Ex.4, p.127-132.

¹⁴ *See* P-Ex.4, p.126.

¹⁵ *See* P-Ex.4, p.113-114.

- reimbursement for Student's enrollment in Private Program.¹⁶
15. Between August 27, 2020 through December 3, 2020, SSC made several requests to Private School for Student's educational records and information to assist the IEP team with the development of Student's IEP.¹⁷
16. Private School Director informed SSC that the verbal behavior milestones assessment and placement program (hereinafter "VB-MAPP") results from the 2020-2021 school year was Student's most recent assessment. Private School Director also sent SSC a copy of Student's Individualized Applied Behavior Analysis Education Program (hereinafter "IAEP-7/15/2020") that was being implemented for Student at Private School.¹⁸
17. Private School Director did not provide a list of supplementary aids and supports that were being provided to Student at Private School for the 2020-2021 school year.¹⁹
18. On September 4, 2020, the IEP team held an annual IEP meeting for Student to review and/or revise Student's IEP-05/29/2019. From the IEP meeting, an IEP was developed for Student (hereinafter "IEP-9/4/2020"). The annual review date for Student's IEP-9/4/2020 is September 4, 2021, and a reevaluation date for Student was listed as January 19, 2021.²⁰
19. Prior to the September 4, 2020 IEP team meeting, Parent sent an email to SSC outlining Parent's concerns for Student's IEP development. This email was blind-

¹⁶ See P.Ex.4, p.126-132, 144-148.

¹⁷ R-Ex.21, p.067; R-Ex.22, p.068; R-Ex.23, p.069; R-Ex.24, p.070; R-Ex.24, p.071-073; R-Ex.25, p.075; R-Ex.31, p.085-086.

¹⁸ R-Ex.28, p.078; R-Ex.31, p.086.

¹⁹ Testimony of SPED Teacher, Tr.V4, 595:6-596:7.

²⁰ P-Ex.1, p.034.

copied to Mr. Peck. Parent noted that Parent was hoping that the IEP team would send Student to Private School as part of Student's IEP with DOE's funding Student's tuition. Parent noted that while Parent was not familiar with Student's programs at Private School specifically, Parent knew they were working. Other concerns noted by Parent was the distance learning that was taking place at that time due to COVID-19; Student's regression during breaks; Student being placed in a special education class without non-disabled peers; and Student's behaviors. Parent did not list transportation services for Student as a concern.²¹

20. The IEP-9/4/2020 was not implemented due to Student attending Private School under Private School's program for Student.²²

21. On January 29, 2021, this Hearings Officer filed Findings of Fact, Conclusions of Law and Decision in DOE-SY2021-002 (hereinafter "AHO Decision"), wherein this Hearings Officer found that Petitioners had proven that the DOE denied Student a FAPE by failing to review, revise, or replace Student's IEP-05/29/2019 prior to its expiration and/or prior to the start of the 2020-2021 school year.²³

22. Based on Petitioners' request, the AHO Decision also granted tuition reimbursement for Student's enrollment at Private School for the 2020-2021 school year.²⁴

Student's reevaluation

23. On October 15, 2020, a Student Focused Team meeting was held for Student based on Student being due for a reevaluation. During the meeting, the team ordered a

²¹ P-Ex.2, p.088-089.

²² See Testimony of Private School Director, Tr.V1, 136:13-137:22.

²³ See P-Ex.4, p.141-144.

²⁴ See P-Ex.4, p.147-151.

cognitive assessment, an adaptive assessment, a behavior assessment, an academic assessment, an occupational therapy (fine motor and sensory) assessment, a speech-language assessment, and an observation of Student. On that date, the IEP team also met to review Student's IEP-9/4/2020 based on the information the team received from Private School after the IEP meeting.²⁵

24. In November and December 2020, the assessments for Student's reevaluation were completed.²⁶

25. Speech-language assessment was conducted with Student by SLP on December 3, 2020. SLP observed Student at Home School during a joint testing session with SSC. Based on the assessment, SLP determined that Student had age-appropriate overall speech skills but had significantly delayed receptive and expressive language skills.²⁷ Based on SLP's assessment of Student, SLP determined that Student did not require the use of assistive technology for communication because Student was able to communicate verbally.²⁸

26. An occupational therapy assessment was conducted by Occupational Therapist on December 2, 2020 in a quiet room with little distractions. Student presented with poor attention and listening skills throughout the evaluation. Occupational Therapist determined that Student is slightly more sensitive to and aware of sensory input than other children, especially oral stimuli. Occupational Therapist also determined that Student displayed difficulty in the area of fine motor skills and Student's difficulty

²⁵ R-Ex.28, p.078; R-Ex.30, p.082-083.

²⁶ R-Ex.5, p.008-009; R-Ex.7, p.013-021; R-Ex.8, p.022-025; R-Ex.9, p.026-031; R-Ex.11, p.034-036; R-Ex.12, p.037-040.

²⁷ R-Ex.5, p.008-009.

²⁸ Testimony of SLP, Tr.V4, 511:25-17, 513:1-5, 515:15-19, 527:24-528:9.

with processing and accepting oral stimuli can manifest Student into being a picky eater.²⁹

27. School Psychologist conducted a psychoeducational evaluation report for Student on December 1, 2020, which focused on four questions: 1) How does Student's developmental and educational history affect Student's academic achievement; 2) What are Student's cognitive processing strengths and weaknesses; 3) What are Student's current adaptive skills; and 4) How do Student's communication, social skills, and behavior affect Student's school performance? Student's cognitive abilities were estimated to be in the delayed range, and Student appeared to be much less independent than same-aged peers.³⁰
28. The following recommendations were made by School Psychologist to the IEP team regarding supports for Student in school: "Use clear, concise language; gain [Student's] attention before speaking; Break complex tasks or procedures into smaller parts. After [Student] masters one part, move onto the next; [Student] would benefit from a visual schedule. A visual schedule will help [Student] develop a routine and allow [Student] to see what is going to happen throughout the day. As much as possible give forewarning to any changes to [Student's] routine up to one day in advance; Use social stories to support and facilitate social interaction among peers; encourage additional prompting to engage in social interactions with peers; Provide immediate verbal praise when a desired behavior occurs; Be specific when delivering instructions and behavioral redirections; and Allow [Student] to attempt to complete

²⁹ R-Ex.8, p.022-025.

³⁰ R-Ex.9, p.026-031.

tasks independently before providing assistance.”³¹

29. SSC conducted an academic assessment of Student on November 13, 2020. SSC summarized that Student has some pre-academic skills, although most of those skills tended to be more rote in nature, and it appeared that for Student, writing was the least preferred activity. Student was determined to be low compared to same-aged peers. SSC also stated that no behavior problems were noted, but Student’s ability to sustain effort through non-preferred activities was limited.³²
30. On December 14, 2020, an eligibility meeting was held for Student, and Student was determined to be eligible for services under the category of autism spectrum disorder.³³
31. An IEP meeting was also scheduled for December 17, 2020; however, Parent canceled the meeting on December 14, 2020, saying that Parent’s attorney did not want Parent to attend the December 17, 2020 meeting without Parent’s attorney’s presence.³⁴

January IEP meetings

32. On January 14, 2021, an IEP meeting was held following Student’s reevaluation. The IEP meeting was held via videoconference due to the COVID-19 pandemic. Present virtually at the meeting were Parent, SPED Teacher, DOE BCBA, Principal, Vice Principal, SSC, SLP, General Education Teacher and Occupational Therapist.³⁵

³¹ R-Ex.9, p.031.

³² R-Ex.11, p.034-036.

³³ R-Ex.34, p.089.

³⁴ R-Ex.35-36, p.090-091.

³⁵ P-Ex.1, p.016, R-Ex.15, p.058; P-Ex.6, Audio recording from 1/14/2021 IEP meeting, approximate time stamp [0:01-0:50] (hereinafter referenced as “P-Ex.6, 1/14/2021 IEP [0:01-0:50]”).

33. Private School Director was not invited to the IEP meetings in January 2021. Private School Director testified that if asked for insights for the IEP team, Private School's insight into Student's program and IEP development would have been all of the information that was contained in Student's VB-MAPP scores, as that is the most detailed information that Private School Director could provide to the IEP team.³⁶
34. Prior to the January 14, 2021 IEP meeting, Parent sent SPED Teacher an email outlining Parent's concerns for Student's IEP development. Some of Parent's concerns included Student's needs in communication, socialization, and regression of Student's behaviors during breaks in school. Parent indicated that Parent hoped the IEP team could place Student at Private School. Parent did not mention any need for transportation services for Student.³⁷
35. At the January 14, 2021 IEP meeting, the IEP team members, including Parent, had all the assessments from Student's reevaluation and a reevaluation summary report available to them for review. The IEP team members also had a copy of Student's Verbal Behaviors Milestones Assessment and Placement Program (hereinafter "VB-MAPP") scores, dated August 10, 2020, and Student's Individualized Applied Behavior Analysis Educational Program (hereinafter "IAEP") dated August 14, 2020, both prepared by Private School for the 2020-2021 school year.³⁸
36. The VB-MAPP scores and IAEP were the only documents that Home School received prior to the January 14, 2021 IEP meetings from their requests for information from Private School. Specifically, the IEP team members did not have a

³⁶ Testimony of Private School Director, Tr.V1, 147:3-148:21.

³⁷ P-Ex.2, p.085.

³⁸ Testimony of SPED Teacher, Tr.V4, 574:10-578:18.

list of the supplemental aids and services that were provided to Student at Private School for the 2020-2021 school year.³⁹

37. At the IEP meeting, SPED Teacher was able to share a draft IEP with the participants of the meeting using a shared-screen feature of the videoconferencing application. Parent was also provided a copy of the draft IEP that the team was reviewing during the meeting on January 11, 2021.⁴⁰

38. During the January 14, 2021 meeting the team discussed Student's present levels of educational performance (hereinafter "PLEPs")⁴¹ in the areas of reading, fine motor, math, behavior and social skills, communication, and functional self-help skills. Many of the PLEPs were based on the assessments done in Student's reevaluation and on the information provided by Private School. During each portion of the discussion of Student's PLEPs, Parent was asked for input or concerns that Parent had regarding the information that was provided.⁴²

39. During the discussion of Student's PLEPs for communication skills, Parent expressed to the IEP team that Student was getting a VB program at Private School and inquired as to when they would be discussing the methodology of teaching Student using the VB program in the IEP meeting. Principal explained that all the teachers that would work with Student are trained in behavior management skills and that the VB methodology has more to do with behavior than communication. Principal also

³⁹ Testimony of SPED Teacher, Tr.V4, 578:19-23, 582:13-21, 595:6-596:8; *see also* P-Ex.5, p.192.

⁴⁰ P-Ex.6, 1/14/2021 IEP [2:07-3:10]; R-Ex.40, p.096.

⁴¹ This Hearings Officer notes that the updated terminology for this section of the IEP is present levels of academic and functional performance, however the terminology used by the IEP team at the meeting and Student's IEP is listed as the PLEPs.

⁴² P-Ex.6, 1/14/2021 IEP [4:42-29:15].

assured Parent that SLP had been doing this service for a long time and knows how to deal with Student's behaviors.⁴³

40. After discussion of the PLEPs, the team discussed the goals and objectives for Student in each area of Student's needs based on the PLEPs. Parent was asked to provide input or raise any concerns that Parent had regarding any of the goals. While Parent had many questions for the team during this portion of the meeting, the various members of the Home School team, such as SPED Teacher, Principal, SLP and Occupational Therapist, provided answers and additional information for Parent in response to Parent's questions or concerns.⁴⁴
41. The IEP team then moved on to discuss Student's eligibility for ESY. The team reviewed data that had previously been reviewed at Student's September 4, 2020 IEP meeting, which included information for Student's absence from Private School during the COVID-19 shutdown in the spring of 2020. The team noted that while Student did show some regression and additional behaviors upon Student's return to Private School, Student was able to recoup Student's skills and make progress.⁴⁵
42. Parent expressed concern for the team's initial recommendation that Student be eligible for ESY services after a break of twenty (20) days. Principal suggested that the team consider a shorter period of approximately nine (9) days before Student is eligible for ESY services, noting that the team could determine that Student is eligible due to the nature and severity of Student's disability. A discussion was held among the team regarding the length of the break before Student was eligible for ESY

⁴³ P-Ex.6, 1/14/2021 IEP [22:58-25:15].

⁴⁴ P-Ex.6, 1/14/2021 IEP [31:34-53:02].

⁴⁵ P-Ex.6, 1/14/2021 IEP [53:06-54:28].

services, and ultimately it was determined that Student would be eligible after a break of nine (9) days.⁴⁶

43. The discussion of the number of days for Student's break before getting ESY services used the rest of the time allotted for the IEP meeting on January 14, 2021. No other aspects of Student's services such as special education, occupational or speech-language therapy; frequency or length of day of ESY; or least restrictive environment for ESY were discussed at the January 14, 2021 IEP meeting.⁴⁷
44. The IEP team did not complete Student's IEP at the January 14, 2021 meeting and a continued IEP meeting was scheduled for January 25, 2021. The January 25, 2021 IEP meeting was also held via videoconference. Present virtually at the January 25, 2021 IEP meeting were Parent, SPED Teacher, DOE BCBA, Principal, Vice Principal, SSC, SLP, General Education Teacher, and Occupational Therapist.⁴⁸
45. At the January 25, 2021 IEP meeting, the team again reviewed a draft IEP that was shared via the videoconferencing application. The discussions began with the services to be provided to Student in the IEP. The IEP team used the IEP-9/4/2020 as a guide for determining Student's service minutes for special education, which was the whole school week, or one thousand eight hundred thirty (1830) minutes.⁴⁹
46. SLP and Occupational Therapist then provided their recommended number of minutes, which was three hundred sixty (360) minutes per quarter and one hundred thirty-five (135) minutes per quarter, respectively. During the discussion, Parent had

⁴⁶ P-Ex.6, 1/14/2021 IEP [54:28-1:01:35].

⁴⁷ See P-Ex.6, 1/14/2021 IEP [53:06-1:01:35].

⁴⁸ P-Ex.1, p.17, R-Ex.15, p.059; P-Ex.6, Audio recording of 1/25/2021 IEP meeting, approximate time stamp [00:11-00:49] (hereinafter referenced as "P-Ex.6, 1/25/2021 IEP [00:11-00:49]").

⁴⁹ P-Ex.6, 1/25/2021 IEP [2:06-3:35].

questions that were answered by SLP, OT, and Principal.⁵⁰

47. The IEP team then moved to a discussion of Student's supplementary aids and services to be included in Student's IEP to support Student. The IEP team discussed Student receiving "ABA services – daily," which explained by SPED Teacher as an RBT built into Student's program who will use ABA with Student and will be by Student's side throughout the day.⁵¹ The team also explained that the term "Individual Instructional Support" referred to the RBT that would be providing the ABA services throughout the day to Student. A discussion was also held about the BCBA support supplemental aid, which was for the BCBA to come in to work with both Student's teacher and RBT to ensure the program is guided appropriately. The BCBA minutes were determined as four hundred twenty (420) minutes per month.⁵²
48. Additional supplemental aids and supports proposed included an emergency action plan for Student's [REDACTED] and a daily sensory diet provided by Occupational Therapist. The daily sensory diet was described by Occupational Therapist as a plan to address Student's sensory needs, including access to a sensory room; access to sensory items in the classroom; and times to rest, walk, or have quiet time.⁵³
49. Parent raised some concerns about the IEP team's mentioning that they may have to change the supplementary aids and services for Student if it appears that they are not working, since the team had not worked with Student. Principal explained to Parent that the team was trying to provide the services that were appropriate for Student

⁵⁰ P-Ex.6, 1/25/2021 IEP [3:37-7:49].

⁵¹ Testimony of SPED Teacher, Tr.V4, 583:11-584:20;

⁵² P-Ex.6, 1/25/2021 IEP [7:54-10:38].

⁵³ P-Ex.6, 1/25/2021 IEP [10:40-12:00].

based on the information that the team had, but that they needed to work with Student to see what best meets Student's needs. Principal also pointed out to Parent that they are "making sure that there is a person there to support the teacher every day that is primarily focusing on [Student]. Of course, [the aide] is going to be looking at the interaction with other kids and whatnot, but it's really for [Student]." Principal also noted that the team "will also be crafting and perfecting what we do and sharing it with [Parent]" and that Principal "believes [Parent] will be satisfied with the result but if not, [Parent] can tell them and they can try to change and whatnot."⁵⁴

50. Parent continued to express concerns that Parent was not asking for anything and might regret not asking for certain things and not realize it until later. Parent also emphasized that Student needed the services of a one-to-one aide to support Student in school and that Student currently has that support at Private School.⁵⁵

51. Parent also expressed concern to the team that when Student previously attended Home School, Student was assigned to the VB program [REDACTED] there, but that Parent later discovered that the teacher to which Student was assigned had no training in the VB program. The IEP team told Parent that while they were not familiar with the specific problems that had happened in the past, they should focus on the future and that because they have a "good team in place now" Parent should not have to worry about things being written in the IEP.⁵⁶

52. Parent did not provide information to the IEP team at the January 25, 2021 meeting about any specific supplemental aids and supports Student was receiving at Private Program, nor did the

⁵⁴ P-Ex.6, 1/25/2021 IEP [102:00-14:47].

⁵⁵ P-Ex.6, 1/25/2021 IEP [14:50-15:34].

⁵⁶ P-Ex.6, 1/25/2021 IEP [21:39-26:18].

- team ask Parent specifically for any examples of aids and supports Student was receiving.⁵⁷
53. After some discussion regarding Parent's concerns, the team moved on to discussion the clarifications of services and supports for Student's IEP. The individual instructional support was clarified to be support from an RBT and a further explanation that Student would be placed in a classroom staffed with at least one (1) personnel trained in ABA strategies was also discussed. No clarifications of what kind of program or interventions the RBT would be providing to Student was discussed at the IEP meeting.⁵⁸
54. The team then moved onto a discussion of Student's least restrictive environment (LRE). The discussion began by going over each of the different placement options on the continuum, beginning with the general education setting. The team also discussed an inclusion setting of general education and special education, as well as a fully self-contained special education classroom. The team then discussed public separate facility, private separate facility, hospital, and homebound settings.⁵⁹
55. After some discussion about each placement, Parent asked the team if they had to 'pick' one placement now. SPED Teacher and SSC explained to Parent that the team was not allowed to just 'pick' a setting, but that the IEP team was obligated to place Student in the environment that is the least restrictive where Student can access Student's education.⁶⁰
56. Parent expressed feelings that Student has been at Private School for several years and has made gains and is torn about picking a placement and having it being 'set in

⁵⁷ See P-Ex.6, 1/14/2021 IEP; P-Ex.6, 1/25/2021 IEP.

⁵⁸ P-Ex.6, 1/25/2021 IEP [26:35-27:09].

⁵⁹ P-Ex.6, 1/25/2021 IEP [27:44-36:50].

⁶⁰ P-Ex.6, 1/25/2021 IEP [36:50-39:27].

stone.’ During this time, SPED Teacher and SSC attempted to explain the requirement for schools to place students in the environments that are least restricted where the student’s needs can be met through the IEPs created by the IEP teams. SPED Teacher and SSC both expressed to Parent that Home School could meet Student’s needs with the program that the IEP team had developed in the January 2021 meetings.⁶¹

57. The team again discussed each team member’s thoughts on the different placements on the LRE continuum and based on the discussion, the IEP team, including Parent, determined that the least restrictive environment for Student was the fully self-contained special education class on a DOE public school campus. Parent did note to the team that Parent may want to re-open the discussion regarding placement at a later time.⁶²

58. The team then moved onto the language of the LRE placement for Student during the different parts of Student’s school day. Parent expressed an interest in Student being placed with non-disabled peers during recess and lunch as soon as school starts and not just when Student is ready for it. The IEP team members from Home School expressed concern about Student coming from a small, private school with only disabled classmates to a large public-school setting and having recess and lunch with approximately two hundred (200) other students. After a further discussion, the team agreed that the best plan for Student would be to start Student in a small group and build a consistent routine and once Student becomes accustomed to the routine, they

⁶¹ P-Ex.6, 1/25/2021 IEP [39:28-43:28].

⁶² P-Ex.6, 1/25/2021 IEP [46:07-49:48].

can begin bringing in additional students to interact with Student.⁶³

59. Throughout the IEP meetings in January 2021, Parent expressed concerns about wanting to be able to review the IEP and make changes if it was determined that different or additional services were needed for Student. Parent also expressed that Parent wanted to be able to revisit the placement decision made by the team. SPED Teacher also noted that the IEP would be sent to Parent in draft form and once Parent gives approval, it will be activated and would constitute Student's new IEP.⁶⁴

Student's IEP-1/25/2021

60. A written IEP was developed for Student based on the discussions at the January 14 and 25, 2021 IEP meetings (hereinafter "IEP-1/25/2021"). Parent was provided a copy of the IEP-1/25/2021 on January 26, 2021.⁶⁵

61. Student's PLEPs in the IEP-1/25/2021 noted that in the area of behavior/social skills, Student has strong aversions to any changes in routine and also has a preferred item that Student likes to keep with Student that provides comfort to Student. It went onto say that when Student does not have the item, Student may become upset or distracted. Parent also reported that Student has trouble talking to other children and will play alongside them versus playing with them. The needs for behavior/social skills for Student were written as follows: "[Student] needs to continue to expand [Student's] meaningful and purposeful peer interactions by staying engaged for longer periods in reciprocal type play exchanges; [Student] needs to continue to increase [Student's] ability to sustain work on age-appropriate, interesting tasks, and

⁶³ P-Ex.6, 1/25/2021 IEP [49:49-1:01:11].

⁶⁴ See generally P-Ex.6, 1/14/2021 IEP; P-Ex.6, 1/25/2021 IEP.

⁶⁵ R-Ex.44, p.100.

ignore most distractions and interruptions, and choose to re-engage without significant adult facilitation when distracted or otherwise disconnected from a task or activity.”⁶⁶

62. Student’s IEP-1/25/2021 indicated that “[Student] will attend ESY after a 9 day break from school. The dates for ESY services during the 2020-2021 school year will be as follows: June 6, 2021-July 23, 2021 and December 27, 2021-December 31.” The special education service box on the IEP-1/25/2021 indicated that Student would get special education for ESY, but not occupational therapy or speech-language therapy. No other information was written into either the ESY section on the IEP-1/25/2021 or in the clarifications of supports and services.⁶⁷

63. Student’s IEP-1/25/2021 provided Student with one thousand eight hundred thirty (1830) minutes of special education per week; three hundred sixty (360) minutes per quarter of speech/language therapy; one hundred thirty-five (135) minutes per quarter of occupational therapy services. These services were all noted to be provided in the general education and special education locations.⁶⁸

64. Student’s IEP-1/25/2021 also provided the following supplementary aids and services, program modifications, and supports for school personnel: “ABA Services” at the frequency of “Daily;” “BCBA support” at the frequency of “420 mins per month;” “Individual Instructional Support” at the frequency of “2055 mins per week;” “Emergency Medical Action Plan [REDACTED]” at the frequency of “Daily;” and “Daily Sensory Diet” at the frequency of “Daily.” These services were also all to

⁶⁶ P-Ex.1, p.003, R-Ex.15, p.046.

⁶⁷ P-Ex.1, p.014, R-Ex.15, p.056.

⁶⁸ P-Ex.1, p.014, R-Ex.15, p.056.

- be noted in the general education and special education locations.⁶⁹
65. The Individual Instructional Support service of two thousand fifty-five (2055) minutes per week was to allow for RBT services from an early drop-off time of Student at 7:30 a.m. until the end of the school day.⁷⁰
66. The clarifications of services and supports stated: “[Student] will receive Individual Instructional Support from a Registered Behavior Technician (RBT). Placement will be in a classroom with at least 1 personnel trained in ABA strategies.”⁷¹
67. The purpose of the clarifications was to make clear that the person providing the Individual Instructional Support would be an RBT and that the RBT providing Student with the Individual Instructional Support would be trained in ABA strategies.⁷²
68. Student’s IEP-1/25/2021 indicated that “[Student] will not participate with [Student’s] non-disabled peers during mealtimes, recess and academic instructional times. [Student] will participate with [Student’s] non-disabled peers during morning announcements/circle time and specials (ie: library, art, music, Hawaiian studies, computer, etc.). Once a consistent routine has been in place for [Student], and [Student] is feeling more comfortable in the school setting, [Student] can try to participate with [Student’s] non-disabled peers for recess and lunch as appropriate.”⁷³
69. A prior written notice from the IEP meeting, dated January 26, 2021 (hereinafter

⁶⁹ P-Ex.1, p.014, R-Ex.15, p.056.

⁷⁰ Testimony of SPED Teacher, Tr.V4, 584:7-585:16.

⁷¹ P-Ex.1, p.014, R-Ex.15, p.056.

⁷² Testimony of SPED Teacher, Tr.V4, 585:25-24.

⁷³ P-Ex.1, p.015, R-Ex.15, p.057.

“PWN-1/26/2021”) was also developed.⁷⁴ Parent was provided a copy of the PWN-1/26/2021 on January 26, 2021.⁷⁵

70. The PWN-1/26/2021 indicated that Student’s placement was “in a Special Education Self Contained Classroom on a Public School campus.”⁷⁶

Events after the January 25, 2021 IEP meeting

71. On February 3, 2021, Parent emailed SSC concerns regarding the IEP-1/25/2021.

These concerns included, *inter alia*, that Parent believed Parent would receive a draft IEP and not a final IEP offer, Parent’s belief that Private Program was less restrictive than what the DOE offered, that Parent wanted Student in a general education program part-time, and whether Student would receive an RBT all day assigned just to Student. This email had been previously sent by Parent to Mr. Peck on January 27, 2021.⁷⁷

72. On February 4, 2021, SSC spoke to Parent and then later sent a summary of their discussion in a reply to Parent’s email, which addressed each of Parent’s concerns noted in the February 3, 2021 email and asked Parent whether Parent wanted to reconvene the IEP team to discuss Parent’s concerns.⁷⁸

73. Between February 12, 2021 and February 26, 2021, SSC sent several emails and made several telephone calls to Parent to follow up regarding Parent’s concerns in the February 3, 2021 email and to see if Parent wanted to reconvene an IEP team

⁷⁴ P-Ex.1, p.067-068, R-Ex.16, p.060-061.

⁷⁵ R-Ex.44, p.100.

⁷⁶ P-Ex.1, p.067-068, R-Ex.16, p.060-061.

⁷⁷ P-Ex.2, p.082, 084.

⁷⁸ P-Ex.2, p.080-081; R-Ex.45, p.101.

- meeting.⁷⁹
74. Prior to February 26, 2021, Parent indicated to SSC that Parent intended to keep Student at Private School for the remainder of the school year.⁸⁰
75. On March 2, 2021, Parent expressed to SSC that Parent still had concerns about Student's IEP and had not made a decision about where Student would attend school for the 2021-2022 school year. On March 3, 2021, SSC responded to Parent's email to address Parent's concerns and again asked Parent if Parent wanted to reconvene an IEP team meeting.⁸¹
76. Parent did not respond to SSC's inquiry about reconvening an IEP meeting at that time.⁸²
77. In April 2021, SSC reached out again to Parent to schedule an IEP meeting to address Parent's concerns and possibly plan Student's transition to Home School under the IEP-1/25/2021. SSC needed to send several emails to get a response from Parent.⁸³
78. An IEP meeting was scheduled for May 24, 2021. Private School Director was invited to the May 24, 2021 meeting on May 6, 2021 and indicated that Private School Director was previously scheduled for another appointment but would try to attend the meeting.⁸⁴
79. On May 8, 2021, Parent emailed SSC to cancel the meeting, indicating that Parent wanted an advocate at the meeting, who was unable to attend on May 24, 2021.⁸⁵

⁷⁹ R-Ex.46, p.102; R-Ex.48, p.105; R-Ex.50, p.107; R-Ex.51, p.108.

⁸⁰ R-Ex.51, p.108.

⁸¹ R-Ex.52, p.109.

⁸² Testimony of Parent, Tr.V3, 461:3-462:6.

⁸³ P-Ex.2, p.075-079; R-Ex.56-60, p.115-120;

⁸⁴ R-Ex.60-61, p.120-122.

⁸⁵ R-Ex.62, p.123.

80. No follow-up IEP meetings had been held prior to the filing of the Due Process Complaint to address or resolve Parent's concerns as stated in the email to SSC.

While the DOE had attempted to schedule several meetings, Parent canceled all of the meetings that had been scheduled.⁸⁶

81. The Due Process Complaint in this case was filed on May 24, 2021.

82. Parent testified that as late as June 2021, Parent was still on the fence about whether to send Student to Private School or Home School, but ultimately decided to enroll Student at Private School because "we were having so many meetings, and it was – things were not getting resolved, things were not – we weren't moving forward. The whole RBT thing, then other things came up, you know, that I found out. To be honest with you, one, [DOE BCBA] not being here ... just all these different things that I was like, you know what, [Student's] doing so good at [Private School], I'm getting bogged down with all of these meetings, I'm getting anxiety, this is like – I feel like [Student] would benefit from just being there."⁸⁷

83. Later during Parent's testimony, Parent also testified that other reasons Parent signed the enrollment contract at Private School because "so we're still having that discussion about the RBT. We're still having a discussion about maybe ES—is it ESY? Transportation wasn't included. We're still having a discussion about a lot of things where it just seems like it's not completed yet. ... And I think there was an issue about what kind of aids – what kind of aids were given, [Student's] using over there versus over here, where is [Student] going to be placed at, like how is [Student]

⁸⁶ See R-Ex.45, p.101; R-Ex.51, p.108; R-Ex.52, p.109; R-Ex.56, p.115; R-Ex.57, p.116, R-Ex.58, p.117; R-Ex.59, p.118-119; R-Ex.60, p.120; R-Ex.62, p.123, R-Ex.64, p.125.

⁸⁷ Testimony of Parent, Tr.V2, 357:2-12.

going to get socialization with [Student's] non-disabled peers, just it seems like we've got so many things still floating up in the air that have not been final, I guess, you would say finalized."⁸⁸

84. On June 30, 2021, Parent signed an enrollment contract to send Student to Private School for the 2021-2022 school year. The enrollment contract obligated Parent to pay the costs of Student's education and related services up to a maximum of Two Hundred Forty-Six Thousand Three Hundred Seventy-Three Dollars and Sixty Cents (\$246,373.60).⁸⁹

85. Parent paid a Two Hundred Fifty Dollar (\$250) deposit to Private School as part of the enrollment process. Parent has not paid any other costs toward Student's tuition at Private School due to the school year starting on August 17, 2021.⁹⁰

86. Parent was informed and understood that as long as Parent had filed a Due Process Complaint, Student's tuition would be paid by the DOE throughout the duration of the litigation pursuant to 'stay-put' from the last AHO Decision.⁹¹

87. Parent was also informed and understands that if Parent loses in this Due Process Hearing, Parent may appeal to higher courts to extend the stay-put funding for Student's tuition and related services at Private School. Parent has also authorized Mr. Peck to file an appeal to extend stay-put funding if Parent does not prevail in this Hearing.⁹²

88. Parent currently drives Student [REDACTED] to school daily. When Parent's

⁸⁸ Testimony of Parent, Tr.V3, 460:5-22.

⁸⁹ P-Ex.5, p.155.

⁹⁰ Testimony of Private School Director, Tr.V2, 300:3-18; P-Ex.5, p.154.

⁹¹ Testimony of Parent, Tr.V3, 375:24-376:9.

⁹² Testimony of Parent, Tr.V3, 376:10-13; 390:14-391:16.

work or other schedule interferes with the pick-up and drop-offs, Parent is able to get friends and family to drive Student [REDACTED] to school.⁹³

Private School

89. Pilot Program was a non-profit program run by Private School Director to determine the costs of running a private school for children with special needs using ABA teachings based on VB-MAPP results.⁹⁴

90. Private School is a for-profit private school where Student has attended since 2020-2021 whose program is based on ABA teaching and utilizes the VB-MAPP as the primary basis for creating programming for Student.⁹⁵

91. Private School is licensed by the Hawai'i Association of Independent Schools from January 2021-January 2022, and the renewal application for Private School is currently pending for the upcoming school year.⁹⁶

92. On or about September 12, 2019, June 29, 2020, and April 15, 2021, Private School Director conducted VB-MAPP assessments with Student. Student's score on the VB-MAPP milestones assessment was eighty-seven (87), eighty-seven and a half (87.5), and one hundred forty-one and a half (141.5), respectively for the dates of the assessments. The increase in scores on the milestones assessments shows that Student is gaining skills and increasing Student's levels of abilities relative to non-disabled peers.⁹⁷

93. In assessments given at around the same time as the milestones assessments,

⁹³ Testimony of Parent, Tr.V2,351:23-352:17; Tr.V3, 492:1-16.

⁹⁴ Testimony of Private School Director, Tr.V1, 24:21-25:10.

⁹⁵ Testimony of Private School Director, Tr.V1, 27:6-21.

⁹⁶ Testimony of Private School Director, Tr.V1, 151:11-154:20; P-Ex.5, p.171.

⁹⁷ Testimony of Private School Director, Tr.V1, 190:3-192:10; P-Ex.5, p.178.

Student's scores on the VB-MAPP barriers assessments decreased, meaning that Student's barriers to learning had decreased.⁹⁸

94. An Individualized Applied Behavior Analysis Education Plan dated July 15, 2021 (hereinafter "IAEP-7/15/21") was created for Student for the 2020-2021/2021-2022 school year.⁹⁹

95. Student's IAEP-7/15/21 is based mostly on Student's IAEP from the previous year since Private School had not completed Student's assessments prior to the start of the school year. The IAEP-7/15/21 includes results of a VB-MAPP assessment conducted with Student in or around June 2021, and it also includes updated goals and objectives for Student based on the VB-MAPP results.¹⁰⁰

96. Student's program at Private School is based on Student's IAEP-8/24/21 but is constantly modified based on data collection taking place throughout the school day. While the goals and objectives for Student remain the same, some items, like highly preferred items, are modified based on Student's needs.¹⁰¹

97. Student's program at Private School is based on ABA and ABA services are provided to Student through Student's RBT at Private School throughout the school day. Data is also collected by the RBT and used to determine if modifications are necessary for Student's program.¹⁰²

98. The costs for Student's program for the 2021-2022 school year are itemized and are

⁹⁸ P-Ex.5, p.179.

⁹⁹ Testimony of Private School Director, Tr.V1, 35:1-15, 110:11-111:16, 193:10-17; P-Ex.5, p.172-179.

¹⁰⁰ Testimony of Private School Director, Tr.V1, 37:2-43:6; P-Ex.5, p.172-179.

¹⁰¹ Testimony of Private School Director, Tr.V1, 28:10-31:23, 33:2-34:22, 37:8-39:20.

¹⁰² Testimony of Private School Director, Tr.V1, 51:2-6; 74:3-21.

- based on prevailing rates for similar services in the area where Student resides.¹⁰³
99. For the 2021-2022 school year cost analysis, Student is anticipated to receive the following services at Private School: Speech Language Therapy; BCBA Consultation; RBT services; Special Education Teacher Consultation; Mandatory RBT Supervision; Reverse Inclusion Program; Distance Bridge Program Assessment; and a Functional Behavior Assessment.¹⁰⁴
100. Student will receive up to one thousand three hundred twenty (1,320) minutes of speech language therapy for the school year from August 16, 2021 to July 29, 2022.¹⁰⁵
101. Student will receive up to five thousand forty (5,040) minutes of BCBA consultation for Student's IEP-7/15/21.¹⁰⁶ Student's program also includes separate mandatory RBT supervision by a BCBA, which is equal to five (5) percent of the ABA hours that the RBT engages in. This mandatory RBT supervision is required by the professional board.¹⁰⁷
102. Currently, Private School Director is the sole licensed BCBA that is employed by Private School; however Private School also has several employees that are in the process of becoming BCBA's or board-certified assistant behavior analysts.¹⁰⁸
103. The cost analysis estimates that Private School will provide Student with RBT supervision for six and a half (6.5) hours per day, which includes the entire school

¹⁰³ Testimony of Private School Director, Tr.V1, 108:7-2, 224:10-229:25; P-Ex.5, p.157-169.

¹⁰⁴ P-Ex.5, p.155.

¹⁰⁵ Testimony of Private School Director, Tr.V2, 262:18-24, 298:21-299:22; P-Ex.5, p.154-155.

¹⁰⁶ P-Ex.5, p.155.

¹⁰⁷ Testimony of Private School Director, Tr.V2, 240:21-241:11; P-Ex.5, p.155.

¹⁰⁸ Testimony of Private School Director, Tr.V2, 247:2-25.

day from 8:15 a.m. to 2:15 p.m. and an additional thirty (30) minutes per day to account for Student being picked up late from school. ¹⁰⁹

104. Student's IAEP-7/15/21 includes consultation from a special education teacher for Student's programming for up to seven hundred twenty (720) minutes per year.

Currently, Private School employs a special education teacher as a consultant that [REDACTED] [REDACTED] provides consultation virtually [REDACTED]. The special education consultant does not provide direct services to Student. ¹¹⁰

105. The Reverse Inclusion Program at Private School is a program where non-disabled students that are home schooled or otherwise available during the school day, come to Private School to interact with the students at Private School. Student's cost analysis includes up to ten thousand eight hundred (10,800) minutes of reverse inclusion per year. ¹¹¹

106. Private School does not start their reverse inclusion program until around October, or two months after the start of the school year, in order to acclimate the students to school, collect data, and teach new skills for the students to develop. The reverse inclusion interaction with non-disabled peers is only provided when students have learned skills sufficiently to be able to generalize it, first with Private School staff, then other Private School students, and then with non-disabled peers through the program. ¹¹²

107. The Distance Bridge Program Assessment at Private School is an assessment to

¹⁰⁹ Testimony of Private School Director, 239:14-20, 241:16-24; P-Ex.5, p.155.

¹¹⁰ Testimony of Private School Director, Tr.V1, 171:4-173:1; P-Ex.5, p.155.

¹¹¹ Testimony of Private School Director, Tr.V1, 75:24-79:10; P-Ex.5, p.155.

¹¹² Testimony of Private School Director, Tr.V1, 173:13-23.

- determine each Private School student's needs in the event of another school closure, similar to what happened from March 2020-August 2020. The assessment cost of Five Hundred Seventy-Eight Dollars (\$578) is based on the hourly rate for the staff member(s) who would be conducting the assessment.¹¹³
108. While Private School has listed an FBA for Student in the cost-analysis, Private School has not conducted an FBA for Student since Student does not have behaviors at Private School to warrant an FBA. Private School staff deliver behavior modifications to Student pursuant to ABA strategies.¹¹⁴
109. Private School also charges a fifteen (15) percent administrative fee.¹¹⁵
110. The billing rate of the costs for Student's individualized services, such as tuition, speech-language therapy, board-certified behavior analyst rates, RBT and behavior technician rates, and the administrative fee are comparable to other similar centers located on the island in which Student attends school.¹¹⁶
111. Private School maintains logs for each of the service providers for Student, which are regularly maintained and can be used to produce an invoice for all service minutes provided to Student. Private School only bills for services and assessments actually provided to Student and the costs are billed monthly.¹¹⁷
112. Private School does not provide transportation for Student as a service.¹¹⁸
113. Private School Director noted that while Private School does have a list of supports

¹¹³ Testimony of Private School Director, Tr.V2, 249:14-250:22; P-Ex.5, p.155.

¹¹⁴ Testimony of Private School Director, Tr.V1, 161:22-163:19.

¹¹⁵ Testimony of Private School Director, Tr.V4,; P-Ex.5, p.155.

¹¹⁶ Testimony of Private School Director, Tr.V1,; *see* P-Ex.3, p.157-169.

¹¹⁷ Testimony of Private School Director, Tr.V2, 221:11-223:15, 236:6-18.

¹¹⁸ Testimony of Private School Director, Tr.V2, 232:14-16.

and services that are provided to Student at Private School, the services and supports that are given to Student varies depending on the Student's needs, so that any supports that would be useful in a transition from Student to a different location would be dependent upon what Student is getting at the time of the transition.¹¹⁹

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.”¹²⁰ A FAPE includes both special education and related services.¹²¹

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.¹²² 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.”¹²³

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”¹²⁴ 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.¹²⁵ The

¹¹⁹ Testimony of Private School Director, Tr.V1, 155:5-20, 164:25-18; P-Ex.5, p.180.

¹²⁰ *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)).

¹²¹ H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

¹²² *Id.*

¹²³ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

¹²⁴ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

¹²⁵ H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

IEP is a collaborative education plan created by parents and educators who carefully consider the child's unique circumstances and needs.¹²⁶

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.”¹²⁷ However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,¹²⁸ 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.”¹²⁹

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.¹³⁰ “A state must meet both requirements to comply with the obligations of the IDEA.”¹³¹

Procedural violations do not necessarily constitute a denial of FAPE.¹³² 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

¹²⁶ H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

¹²⁷ *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

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

¹²⁹ *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).

¹³⁰ *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

¹³¹ *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).

¹³² *Amanda J.*, 267 F.3d at 892.

Student; or 3) caused Student a deprivation of educational benefits.¹³³

A. Respondents denied Student a FAPE by failing to discuss Student's placement, frequency or length of day, and services and supports Student would receive for ESY services and by failing to include that information in Student's IEP-1/25/2021

Petitioners' first issue asks whether Student's IEP-1/25/2021 was appropriate where the ESY portion of Student's IEP-1/25/2021: 1) provided a special education-only placement with no non-disabled peers and no discussion regarding Student's LRE for ESY was held during the IEP meeting; 2) the IEP team did not discuss the frequency or length of day for Student's ESY services; and 3) the IEP team should have discussed Student's needs for a one-to-one aide, speech/language therapy, and occupational therapy and failed to put such services into the IEP-1/25/2021.

A school must provide ESY services only if the child's IEP team determines that the services are necessary 'for the provision of FAPE to the child.'¹³⁴ To qualify for extended school year services, "a claimant seeking an ESY must satisfy an even stricter test, because 'providing an ESY is an exception and not the rule under the regulatory scheme.'"¹³⁵ The standard for ESY is higher than the standard for the provision of special education and related services due to the requirement to show that the benefits the student gains during the regular school year will be

¹³³ *Id.*

¹³⁴ *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008).

¹³⁵ *N.B.*, 541 F.3d at 1211, quoting *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6th Cir.) quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), cert. denied, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); see also *Dep't of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 *7 (holding that ESY is "educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information during a break in regularly scheduled classes, such as during the summer.").

significantly jeopardized if he or she is not provided with an educational program during school breaks.¹³⁶

Here, the IEP team determined that Student was eligible for ESY services.¹³⁷ Although it was unclear from the discussions at the IEP meetings in January 2021 whether Student also qualified for ESY services based on regression or recoupment, it was clear that the team had agreed to a shortened break prior to ESY services based on the nature and severity of Student's disability.¹³⁸ The IEP team originally based their information on Student's previous IEP-9/4/2020 and Principal suggested that the team make Student eligible for services after a shorter break, nine (9) days instead of twenty (20) days, based on a consideration of Student's disability.¹³⁹ The team did discuss the appropriateness of the length of the break before Student would be eligible for ESY and that discussion took up the entire time that the IEP team discussed Student's ESY services.¹⁴⁰ The team did not have any discussions in the January 2021 IEP meetings regarding the length of Student's ESY day; services, supports, and aids to be provided during ESY; or least restrictive environment placement for Student during ESY.¹⁴¹

While failure to discuss the provisions for Student's ESY services is a procedural violation, Student's IEP-1/25/2021 also failed to address the provision of services for Student's ESY. Student's IEP-1/25/2021 simply stated that Student "will attend ESY after a 9 day break

¹³⁶ *Id.*, quoting *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002); see also *K.K. ex rel. K.S.K. v. Hawaii*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6th Cir. 2004) (confirming that "it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.").

¹³⁷ FOF 42.

¹³⁸ FOF 41-42.

¹³⁹ FOF 42.

¹⁴⁰ FOF 43.

¹⁴¹ FOF 43.

from school. The dates for ESY services during the 2020-2021 school year will be as follows: June 6, 2021-July 23, 2021 and December 27, 2021-December 31.” No additional information was provided in the IEP regarding Student’s ESY services or schedule. While arguably, the IEP-1/25/2021 did state that Student would receive special education for ESY, it is unclear from the IEP-1/25/2021 whether Student would receive the full amount of service minutes that Student is also provided during the regular school year. According to the IEP-1/25/2021, Student would not receive occupational therapy or speech-language therapy services during ESY. The IEP-1/25/2021 did not provide any information regarding whether Student would receive any supplementary aids or supports during ESY, including an Individual Instructional Support.¹⁴²

No discussion regarding these services, such as speech-language and occupational therapy, took place during the IEP meeting; nor did the team discuss supplementary aids that would be provided to Student during ESY took place during the IEP meetings in January 2021.¹⁴³ While Respondents point out that Parent did not raise the issue of ESY services during the January 2021 IEP meetings, Parent did repeatedly share with the IEP team that Student needed the services of a one-to-one aide while Student was at school.¹⁴⁴ Home School members of the IEP team also explained to Parent that the Individual Instructional Support in the form of an RBT that would be provided to Student would allow the school and the other service providers to work best with Student to determine Student’s needs and address them in the school setting.¹⁴⁵ The IEP-1/25/2021 fails to address this need for Student as determined by the IEP team for ESY services, and no discussion was had by the team on this service.

¹⁴² FOF 62.

¹⁴³ FOF 43.

¹⁴⁴ FOF 50.

¹⁴⁵ FOF 47.

Respondents also point out that Parent did not enroll Student in the ESY summer session in 2021 and that after the IEP-1/25/2021 was completed, Parent was the one who failed to meet with the team to further discuss the concerns Parent had about the IEP-1/25/2021. While Respondents' argument may be relevant in determining the equities of the case, the fact is that the IEP team at the January 2021 meetings and the IEP-1/25/2021 failed to address basic services to be provided to Student for ESY once Student was determined to be eligible for them. Petitioners have proven that Respondents denied Student a FAPE by failing to appropriately address Student's needs in the ESY services portion of the IEP-1/25/2021.

B. Respondents denied Student a FAPE by failing to discuss and address Student's behavioral needs in the January 2021 IEP meetings and in the IEP-1/25/2021

Petitioners' next argument questions whether the discussions at the January 2021 IEP meetings were sufficient to determine Student's needs for supplementary aids and services and also questions whether the IEP-1/25/2021 has sufficient behavioral interventions to address Student's needs. In Student's IEP-1/25/2021, Student's behavior/social assessments and information noted that Student having a strong aversion to any changes in routine, Student having a preferred item that Student likes to have to comfort Student, that Student has trouble talking to other children and will play along side them rather than with them.¹⁴⁶ Needs identified for Student included expanding meaningful and purposeful peer interaction; increase ability to sustain work on age-appropriate and interesting tasks; and choosing to reengage without significant adult facilitation when distracted or otherwise disconnected from a task or activity.¹⁴⁷

¹⁴⁶ FOF 61.

¹⁴⁷ FOF 61.

“The standard for evaluating IEPs, commonly called ‘the snapshot rule,’ is not retrospective.”¹⁴⁸ An IEP is to be judged by looking at whether the IEP goals and goal achieving methods were objectively reasonably calculated to confer Student with a meaningful benefit based on the information available to the IEP team at the time the IEP was created.¹⁴⁹ In determining appropriateness, “an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was drafted.”¹⁵⁰

At the time of the January 2021 IEP meetings, the team had all Student’s reevaluation assessments and Student’s IAEP-7/15/20 from Private School to consider in determining what supplementary aids and services should be provided to Student.¹⁵¹ Despite many requests for information from Private School, Private School had not provided any list of supplementary aids or services that Student was receiving at Private School and Parent could not provide that information to the IEP team.¹⁵² Parent did attempt to discuss with the IEP team that Student was receiving a VB program at Private School and that it seemed to be working for Student.¹⁵³ Parent raised the question about how the ABA services that Student would be provided involve a VB program in Student’s IEP, since Parent had previously experienced Student being promised a VB program at the public school but the teacher in the classroom not being trained in VB. The Home School IEP team members basically told Parent that they did not know what happened

¹⁴⁸ *K.K. ex rel. K.S.K. v. Hawaii*, 2015 WL 4611947 *16 (D. Hawai‘i 2015) (quoting *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010)).

¹⁴⁹ *K.K.*, 2015 WL 4611947 *16 (quoting *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)).

¹⁵⁰ *J.W.*, 626 F.3d at 439 (quoting *Adams v. Oregon*, 195 F.3d at 1149).

¹⁵¹ FOF 35.

¹⁵² FOF 15, 17, 19, 52.

¹⁵³ FOF 39, 51.

before but that it would be better this time, yet still failed to discuss with Parent the details of the proposed ABA services that Student would be provided in the IEP-1/25/2021.¹⁵⁴

At the January 2021 IEP meetings, the team also had a psychoeducational assessment prepared by School Psychologist that was prepared as a part of Student's reevaluation, in which Student's behaviors and social skills needs were assessed to determine how they would affect Student's education.¹⁵⁵ School Psychologist provided recommendations for Student's IEP team to discuss during the IEP meeting for considerations in Student's IEP.¹⁵⁶ None of these recommendations were reviewed or raised by any of the IEP team members, even though all team members had the information available to them. The recommendations by School Psychologist included "use clear, concise language; gain [Student's] attention before speaking; Break complex tasks or procedures into smaller parts...; [Student] would benefit from a visual schedule ... As much as possible give forewarning to any changes to [Student's] routine up to one day in advance; use social stories to support and facilitate social interaction among peers; encourage additional prompting to engage in social interactions with peers; provide immediate verbal praise when a desired behavior occurs; be specific when delivering instructions and behavioral redirections; and allow [Student] to attempt to complete tasks independently before providing assistance." None of these recommendations were discussed during the IEP meeting or included in the IEP-1/25/2021.¹⁵⁷

While it was made clear to Parent during the January 25, 2021 meeting that Student would receive the services of a one-to-one aide in the form of an RBT, no information was

¹⁵⁴ FOF 51.

¹⁵⁵ FOF 27.

¹⁵⁶ FOF 28.

¹⁵⁷ FOF 49-50.

provided to Parent about what program, prompts, or guidance would be provided by the RBT to Student.¹⁵⁸ Even if the IEP team had intended to create a behavior plan when Student arrived at Home School, or in transition planning for Student, none of that was discussed in any detail to Parent during the IEP meetings in January 2021. Parent did raise concerns about why the team was not being more specific in the IEP about the services that Student would get at Home School and was told that the team could not put everything in the IEP but are agreeing to a partnership to work with Parent to ensure that Student gets the services that Student needs.¹⁵⁹ This is the equivalent to the IEP team saying ‘just trust us’ and see what happens.

Perhaps more importantly, the IEP-1/25/2021 does not specify whether Student would receive an FBA, or any kind of behavior plan as part of Student’s supplemental aids and services.¹⁶⁰ While the clarifications of support do specify that Student will get the services of an RBT, nothing in the IEP outlines the behavior modifications or plan that the RBT will follow to provide these ABA services to Student.¹⁶¹ Parent raised the questions to the IEP team about how Student’s behaviors and social skill needs would be addressed in Student’s IEP-1/25/2021, saying that Parent would like the IEP to be more specific. Some of the recommendations made by School Psychologist in the psychoeducational evaluation of Student could have easily been included in the IEP document if the team believed that they would have been helpful in supporting Student to reaching Student’s goals and objectives or accessing Student’s education. Recommendations like use clear, concise language; use a visual schedule for Student and give forewarning of any changes in routine to Student in advance; use social stories to support and

¹⁵⁸ FOF 53.

¹⁵⁹ FOF 49-51.

¹⁶⁰ FOF 64.

¹⁶¹ FOF 66-67.

facilitate social interactions with peers; provide immediate verbal praise when a desired behavior occurs; and be specific when delivering instructions and behavior modifications are examples of behavioral supports and interventions that could be added to Student's IEP-1/25/2021 to give Parent an idea of what the RBT would be doing to with Student to support Student in school, even without the need for doing a specific behavior support or behavior intervention plan. The only supplementary supports provided in Student's IEP are ABA services, an RBT, BCBA consult, an emergency plan [REDACTED], and a daily sensory diet.¹⁶²

An IEP is supposed to be tailored to each student and specific enough so that if the student were to move to a different school, the new school would be able to implement the IEP upon the student's arrival at the school.¹⁶³ While in this case, Student's behaviors did not rise to the level of needed a behavior support plan to be included in the IEP, no behavioral interventions or supports were discussed during the IEP meeting or put into the IEP to address Student's needs in the behavior/social areas, despite the recommendations by School Psychologist. The IEP team was also aware of Student's behavioral and social skills needs and were willing to give Student a one-to-one aide in the form of an RBT but did not have any further discussions or interventions planned for Student's IEP to provide Parent with a clear understanding of what types of interventions or aids would be used for Student while Student was at Home School. Even without the information from Private School, these types of basic interventions and supports could have been discussed by the team and put into the IEP-1/25/2021.

¹⁶² FOF 64.

¹⁶³ *Rachel H. v. Department of Education Hawaii*, 868 F.3d 1085, 1090-1091 (9th Cir. 2017); *see also* 20 U.S.C. §1414(d)(2)(i)(I) (allowing for new school districts to adopt an old IEP until the team develops, adopts, and implements a new IEP consistent with Federal and State law).

Petitioners have proven that the IEP team failed to discuss appropriate behavioral interventions, supplementary aids, and supports to address Student's needs and the IEP-1/25/2021 does not include any such interventions, supplemental aids, and supports. This Hearings Officer finds that the DOE denied Student a FAPE by failing to discuss these interventions during the January 2021 IEP meetings denied Parent meaningful participation in the development of Student's IEP-1/25/2021 and by failing to include such interventions, supplemental aids, and supports in Student's IEP to enable Student to make appropriate progress.

- C. Petitioners have failed to prove that the IEP-1/25/2021 is inappropriate where the current classroom supports and accommodations were not discussed where Parent stated that these supports were essential to Student's success and that the supplementary aids were insufficient because no assistive technology or other supports are described in the IEP-1/25/2021

Petitioners next argue that Respondents failed to discuss classroom supports and accommodations that were currently provided at Private School. Petitioners claim that Parent repeatedly informed the team that these supports were essential to Student's success in Student's current program and if Student were to change from Private School to a public program. Petitioners also argue that the supplementary aids and supports in Student's IEP-1/25/2021 is insufficient where no assistive technology and other important supports are not included in the IEP-1/25/2021.

At the time of both the September 2020 and January 2021 IEP meetings, the IEP team had sent multiple requests to Private School Director for information about Student's program, progress reports, data, and other information for the development of Student's IEP.¹⁶⁴ The only information provided to Home School was the VB-MAPP results and the IAEP-7/15/2020.¹⁶⁵

¹⁶⁴ FOF 15.

¹⁶⁵ FOF 16.

The list of Supplemental Supports Including Assistive Technologies was not included in the information provided to the IEP team.¹⁶⁶ Parent could not provide the IEP team with any information about the supports and aids being provided to Student at Private School.¹⁶⁷ The IEP team had done a reevaluation of Student and had assessments by qualified individuals who made recommendations to the IEP team.¹⁶⁸ Petitioners have failed to prove that the IEP team had any information from which they could discuss any ‘current’ (privately provided) classroom supports/accommodations or assistive technology supports.

Petitioners argue that the IEP team should have had notice of the list of supports provided to Student at Private Program through the due process hearing in DOE-SY2021-002. This Hearing Officer does not consider that information to have been imputed to the IEP team at Home School as it is unclear whether the documents were or even could have been provided to the IEP team for use in the IEP development.

Petitioners raise the issue of whether the team discussed the supports and accommodations that would be necessary if Student were to transition from Private School to Home School. While no discussion about any transition was made at the IEP meeting, it was due, at least in part, to Parent’s indecision about the services, supports, and placement for Student in the IEP-1/25/2021. Throughout the meeting, Parent told the team that Parent was not sure about what was being discussed and wanted the opportunity to make changes if necessary, to the IEP.¹⁶⁹ Even at the end of the IEP meeting, Parent was told that Parent would receive the IEP in draft form, and it would only be activated once Parent accepted the offer, meaning that

¹⁶⁶ FOF 17.

¹⁶⁷ FOF 52.

¹⁶⁸ FOF 23-24.

¹⁶⁹ FOF 59.

changes could be made to the document until Parent formally accepted the offer.¹⁷⁰ At the time of the IEP meeting, the team had no need to discuss transition of Student from Private School to Home School since it was not clear whether Parent would even consider transferring Student to Home School. Indeed, Parent had requested at least two times prior to the IEP meeting that Student be placed at Private School as part of the IEP.¹⁷¹

Finally, even if the team had discussed transition supports for Student at the January 2021 IEP meetings, it is unclear whether those supports and accommodations would even have been relevant at the time when Student would have transitioned to Home School. Private School Director testified that the supports and accommodations that Student should have for a transition would depend on the specific services and supports that Student was receiving at the time of the transition.¹⁷² Discussion of these types of supports and accommodations, even if the IEP team had been provided information about them, would have been unnecessary since they would need to be discussed again at a later time when Student would actually be transitioning.

Petitioners have failed to prove that the IEP team failed to discuss current classroom supports/accommodations for Student, assistive technology, or possible transition services for Student resulting in a denial of FAPE.

D. Petitioners have failed to prove that Student's IEP-1/25/2021 was not appropriate because there was insufficient participation of Student's current providers

Petitioners next allege that the IEP-1/25/2021 was not appropriate because there was insufficient participation of Student's current providers and/or insufficient efforts to gain attendance of those providers at the IEP meetings, resulting in a lost educational opportunity.

¹⁷⁰ FOF 59.

¹⁷¹ FOF 19, 34.

¹⁷² FOF 113.

At the time of the IEP meetings in January 2021, the IEP team had a copy of Student's most recent VB-MAPP scores and Student's IAEP-7/15/2020. These were the most useful pieces of information from Private School for the team, as they displayed in printed form Student's progress and areas of need. The IEP team also had recent assessments from Student's reevaluation in the fall of 2020. These assessments were more current and relevant to Student's performance than the information that Private School Director had, as Private School had not had a chance to conduct an updated VB-MAPP assessment for Student.¹⁷³

While Private School Director did believe it was important for Private School Director to be at the IEP meetings, Petitioners have failed to prove how the IEP-1/25/2021 was inappropriate based on the failure of the IEP team to secure Private School Director's or any other person's presence or that it resulted in a lost educational opportunity.

E. Petitioners failed to prove that Respondents denied Student a FAPE regarding the provision of RBT services to Student in the IEP-1/25/2021

Petitioners next argument is that during the IEP meetings in January 2021, Parent was promised an RBT for Student for two thousand fifty-five (2055) minutes per week but the written IEP and PWN provides contradictory statements. Petitioners also claim that Parent's concerns regarding that issue went unaddressed.

The evidence presented in this case is that under the IEP-1/25/2021, Student was to receive a one-to-one RBT for the entire school day, from early drop-off at 7:30 a.m. to 2:15 p.m.¹⁷⁴ This amounted to the number of minutes provided in the written IEP-1/25/2021. Petitioners argue that the use of the term "Program RBT" resulted in a different offer being provided in the PWN-1/26/2021. While it is clear that the term "Program RBT" was not the

¹⁷³ FOF 95.

¹⁷⁴ FOF 65.

appropriate term to describe Student's service of a one-to-one RBT, Petitioners have not proven that this error rose to a denial of FAPE for Student. It was explained clearly at the January 2021 IEP meetings that Student would be receiving an individual instructional support through the services of an RBT as part of Student's program.¹⁷⁵ SSC's inquiries to Parent about reconvening an IEP meeting to address the issue went unanswered. While there was some testimony about a new PWN being written to correct the issue, Petitioners have not proven that the error in terms used in the PWN resulted in a loss of educational opportunity for Student, significant infringement on parental participation, or a deprivation of an educational benefit.

F. Petitioners have failed to prove that the IEP-1/25/2021 is inappropriate where there was no discussion of transportation as a service during the IEP meetings

Petitioners' final issue is whether the IEP-1/25/2021 is appropriate when the IEP team did not discuss transportation as a potentially needed related service. Petitioners have not provided any evidence to support a claim that transportation is a necessary service that is required for Student, in light of Student's unique circumstances, to meet Student's needs. Petitioners have not demonstrated that due to Student's disability, Student is unable to access Student's education without transportation. Indeed, Private School currently does not provide transportation for Student as a related service and Parent did not raise that as a concern at any point prior to the due process complaint being filed.¹⁷⁶ Parent does the transporting of [REDACTED] Student [REDACTED] to school every day. Occasionally when Parent's schedule prohibits it, Parent is able to call on family or friends to take [REDACTED] Student [REDACTED] to school.¹⁷⁷ Petitioners have not presented evidence of any behavioral problems, ambulatory

¹⁷⁵ FOF 47.

¹⁷⁶ FOF 19, 34, 112.

¹⁷⁷ FOF 88.

concerns, or any other concerns related to Student's disability that would give rise to a need for transportation to be included in Student's IEP.

While Petitioners intimate that since Parent occasionally has trouble scheduling drop-offs and pick-ups of Student, this inconvenience is not one that is unique to students with disabilities. Both general and special education students who do not demonstrate a need for special transportation services are eligible to catch the school bus. Petitioners have not demonstrated that the IEP team would have any reason to believe that transportation would be a necessary service for Student based on the information that the IEP team had at the time of the meetings in January 2021. Petitioners have failed to prove that the failure of the IEP team to discuss transportation services during the IEP meetings in January 2021 was a procedural violation of the IDEA that rose to the level of a denial of FAPE.

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

Petitioners are seeking tuition reimbursement for Student's tuition at Private School as a remedy for any denials of FAPE by Respondents. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in private school and request reimbursement for tuition at said private school from the local educational agency.¹⁷⁸ However, parents are entitled to reimbursement for placement at a private school only if a court concludes both that the public placement violated the IDEA and the private school placement was proper under the Act.¹⁷⁹ The

¹⁷⁸ *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 364-365, 126 L. Ed.2d 284 (1993), citing *School Comm. of Burlington v. Department of Ed. Of Mass.*, 471 U.S. 359, 369-370, 105 S.Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985), see also 20 U.S.C. §1415(b)(6), (f)(1)(A).

¹⁷⁹ *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in *Frank G. v. Bd. of Educ.*,¹⁸⁰ where “to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.”¹⁸¹

Petitioners seek tuition reimbursement for Student’s tuition based on the enrollment contract signed by Parent for the 2021-2022 school year. As the AHO Decision only extended the award of tuition reimbursement to the end of the 2020-2021 school year, Parent’s decision to enroll Student at Private School for the 2021-2022 school year would be considered a unilateral placement for purposes of tuition reimbursement, and a new determination of appropriateness would need to be made by this Hearings Officer.¹⁸² Petitioners in this case have proven that Respondents denied Student a FAPE by not discussing or addressing Student’s needs with respect to ESY services and behavioral interventions and supports during the IEP meetings and failed to include sufficient descriptions of such supports in the IEP-1/25/2021.

The second requirement for tuition reimbursement to be ordered is a determination that Private School is an appropriate placement for Student. Private School Director has completed three (3) formal VB-MAPP assessments of Students in September 2019, June 2020, and April

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

¹⁸¹ *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011), citing *Frank G. v. Bd. of Educ.*, 459 F.3d at 365.

¹⁸² This Hearings Officer notes that the determination of unilateral placement for purposes of tuition reimbursement differs from the standard under stay-put, whereas in this case, the failure of Respondents to appeal the prior AHO decision transformed the placement of Student at Private School for the 2020-2021 school year a bilateral placement and stay-put applies.

2021.¹⁸³ Based on the results of the assessments, Student has made overall progress in the milestones and has decreased the number of barriers to Student's learning in the VB-MAPP.¹⁸⁴ Private School has created an educational program with specific goals and objectives for Student for the 2021-2022 school year.¹⁸⁵ Private School will provide Student with speech-language therapy; ABA services, including a one-to-one RBT for Student throughout the school day; consultation from a special education teacher for Student's programming; and a reverse inclusion program, which allows Student to interact with non-disabled peers of the same age.¹⁸⁶ Private School has also planned for a distance learning program if confronted with another government mandated shut-down due to a pandemic.¹⁸⁷ Private School has created a specific and detailed educational program for Student that addresses Student's individual needs. This Hearings Officer concludes that Private School is an appropriate placement for Student for purposes of tuition reimbursement.

1. Equitable considerations

The IDEA provides reviewing authorities with the power to consider equity in determining whether and in what amount tuition reimbursement is to be awarded to a parent that unilaterally places a child at a private program.¹⁸⁸ In *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, the district court determined that while the private placement where student was placed delivered many, but not all, of the special education services that the student needed,

¹⁸³ FOF 92.

¹⁸⁴ FOF 93.

¹⁸⁵ FOF 94-95.

¹⁸⁶ FOF 99-101, 103-105.

¹⁸⁷ FOF 107.

¹⁸⁸ *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011) (holding that if both criteria are met for reimbursement for unilateral placement at a private school, "the district court must exercise its 'broad discretion' and weigh 'equitable considerations' to determine whether, and how much, reimbursement is appropriate.")

the full amount of tuition was appropriate for the because everything that the placement provided was “proper, reasonably priced, and appropriate, and the program benefitted [the student] educationally.”¹⁸⁹ The Ninth Circuit Court of Appeals affirmed the district court’s decision, adopting the standard set forth in *Frank G.* as discussed *supra*.¹⁹⁰

Regarding the reimbursement request for services for Student at Private School, this Hearings Officer finds that Private School’s tuition and hourly rates for services, while on the higher end of the scale, to be reasonable and comparable to other rates for similar services in the area where Student resides.¹⁹¹ The programs covered under the tuition and related services provided also appear to be appropriate and justified for Student based on Private School Director’s testimony that the services are based on Student’s assessments and are only billed based on services actually provided to Student.¹⁹²

This Hearings Officer does find, however, that the extra thirty (30) minutes per day of RBT services provided in the cost analysis is not a reimbursable charge to the DOE. When parents are late to picking up their children from school or after-school services, parents are responsible for any excess charges accrued due to their tardiness. Similarly, Parent’s late pick up of Student from Private School should not be an expense charged to the DOE.¹⁹³ Therefore, this Hearings Officer reduces the maximum amount of charge applicable for RBT services under the cost analysis six (6) hours per day for Student. This is equal to Ninety-Eight Thousand Five Hundred Ninety-Two Dollars (\$98,592).¹⁹⁴

¹⁸⁹ *Id.* at 1160.

¹⁹⁰ *Id.*

¹⁹¹ FOF 98, 110.

¹⁹² FOF 111.

¹⁹³ FOF 103.

¹⁹⁴ To clarify the calculations done by this Hearings Officer: \$106,808 (total yearly cost estimate) divided by the \$79 (RBT rate) equals 1,352 (hours) paid for at the RBT rate. 1,352

This Hearings Officer agrees with Respondents' argument that this Hearings Officer consider Parent's conduct in the determination of equities for an award of tuition reimbursement. While Petitioners have proven that Respondents denied Student a FAPE in failing to discuss and provide sufficient ESY services, behavioral interventions, supports and aids to Student, it is clear from the record that Home School made numerous attempts to schedule meeting to resolve problems that Parent had with the IEP.¹⁹⁵ As early as February 2021, upon receiving information from Parent that Parent was unhappy with Student's IEP-1/25/2021, SSC tried repeatedly to contact Parent to see if Parent wanted to reconvene a meeting to address Parent's concerns.¹⁹⁶ Parent delayed responding to SSC, delayed confirmation of meeting dates for meetings in April, and then canceled confirmed meeting dates in May, just before filing the due process complaint in this case.¹⁹⁷ Parent was also thoroughly counseled on the issue of stay-put and signed the enrollment contract under the belief that Student's Private School tuition would be fully paid for during the Due Process Hearing and any appeals taken after the Hearing, if Parent received an unfavorable result.¹⁹⁸ This behavior is antithetical to the spirit of the IDEA, which envisions parents and school districts to work together to resolve issues and work toward what is in the best interests of students.

This Hearings Officer believes that Parent's behavior impeded the DOE's ability to try to address the concerns that Parent had with Student's IEP-1/25/2021. However, had the IEP team addressed the issues raised by Parent during the IEP meetings or discussed the appropriate ESY

hours divided by 6.5 hours per day (total hours estimated per day of RBT service) equals 208 days of service for the school year in the cost estimate; 208 days of service for 6 hours per day equals 1,248 hours of RBT services for the school year at \$79/hour equals \$98,592.

¹⁹⁵ FOF 80.

¹⁹⁶ FOF 72.

¹⁹⁷ FOF 73-79.

¹⁹⁸ FOF 86-87.

services and the necessary behavior interventions, supports, and aids during the meetings, these concerns would not have needed to be addressed in a separate IEP meeting. While this Hearings Officer does not condone the behavior of Parent subsequent to the IEP meetings in January 2021, this Hearings Officer declines to reduce the award of tuition to Parent on that basis.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have proven that Respondents denied Student a FAPE by failing to discuss details of ESY services for Student and appropriate behavior interventions, supports, and aids during the IEP meetings in January 2021 and failed to put such details and/or necessary supports into Student's IEP-1/25/2021. Petitioners have further proven that Private School is an appropriate placement for Student and that Parent is entitled to tuition reimbursement to Private School for the 2020-2021 school year. This Hearings Officer finds that the equitable considerations in this case allow for Parent to receive full tuition reimbursement or direct tuition payments to Private School for the 2020-2021 school year.

For the reasons stated above, IT IS HEREBY ORDERED –

1. That Parent shall be reimbursed for the deposit payment made to Private School for Student's enrollment for the 2020-2021 school year in the amount of Two Hundred Fifty Dollars (\$250). Parent shall also be reimbursed for any additional payments made to Private School upon Respondents' receipt of itemized invoices with payment verification from Private School.
2. That upon receipt of itemized invoice(s) which reflect the actual amount of service minutes/hours and/or assessments and/or supplies provided to Student, Respondents shall make payments for Student's tuition for the 2021-2022 school year to Private

School in accordance with Hawai'i Revised Statutes Section 302A-443(f)-(j). These itemized invoices shall reflect the Two Hundred Fifty Dollar (\$250) deposit made by Parent and any additional payments made by Parent to Private School as noted in item #1 above.

3. In no event should the total payment (including the Two Hundred Fifty Dollar (\$250) deposit and any other payments made by Parent) to Private School exceed Two Hundred Thirty-Six Thousand Five Hundred Forty-Seven Dollars and Twenty-Seven Cents (\$236,547.27).¹⁹⁹

¹⁹⁹ This calculation is based upon the reduction of reimbursement for RBT services to six (6) hours a day, totaling \$98,592. The new subtotal with that line expense is \$197,782.00; the new administrative fee is \$29,667.30; the new GE tax amount is \$9097.97, which equals to \$236,547.27.

RIGHT TO APPEAL

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

DATED: Honolulu, Hawai‘i, October 6, 2021.

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