



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-SY2021-044

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: August 24-25, 2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On June 1, 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 9, 2021.

A prehearing conference was held on June 30, 2021, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Kunio Kuwabe, Esq. (hereinafter “Mr. Kuwabe”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for August 24-25, 2021.

Based on the initial setting of the Hearing on August 24-25, 2021, Petitioners submitted a request for an extension of the deadline from the original deadline of August 15, 2021 to September 29, 2021. Respondents did not have any objection to the request for extension and Petitioners’ request for extension was granted. The deadline by which a decision in this case must be rendered is September 29, 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 July 2, 2021. Petitioners timely filed their Motion for ‘Stay-Put’ and their First Amended Motion for ‘Stay-Put’ on July 2, 2021. Respondents timely filed their Memorandum in Opposition to Petitioners’ First Amended Motion for ‘Stay-Put’ by the deadline of July 8, 2021. Petitioners timely filed their Reply Memorandum in Support of Motion by the deadline of July 12, 2021. A hearing on Petitioners’ Motion for ‘Stay-Put’ was held on July 13, 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 14, 2021.

The parties were also provided a deadline of August 2, 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. Kuwabe to confirm that the parties anticipated being ready to proceed with the Hearing scheduled for August 24-25, 2021.

The Due Process Hearing began on August 24, 2021. Petitioners called Parent to testify. The Hearing continued to August 25, 2021, when Petitioners called Private School Director as their final witness. Respondents began their case and called Principal to testify as their sole witness. Respondents requested a number of exhibits to be received into evidence and rested their case. Petitioners did not have any rebuttal witnesses to present.

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 22, 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 16, 2021. The parties met and conferred regarding the proposed exhibits by August 23, 2021 and did not have any objections to either the witnesses or exhibits submitted by the opposing party. Both parties were informed that any exhibits that were discussed or mentioned during the proceeding would be received for consideration in the Decision in this case, but that this Hearings Officer would allow the parties to propose additional exhibits after the Hearing was

completed. On 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 from their previously disclosed documents that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on September 2, 2021. Any objections to the proposed exhibits were due on September 7, 2021. On August 28, 2021, this Hearings Officer notified counsel that while it was not listed in Petitioners' Exhibit List, an audio recording of a meeting on July 15, 2021 was received by this Hearings Officer as part of Petitioners' disclosures. Since the audio recording was provided by the disclosure deadline, this Hearings Officer notified counsel that the recording would be received into evidence, because one of the witnesses discussed the contents of the recording. Respondents had no objection to the audio recording being received into evidence. Petitioners were requested to submit an amended exhibit list, which they did on September 3, 2021. Neither Petitioners nor Respondents submitted any corrections or additional proposed exhibits to be received as evidence for consideration in the Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-037; Exhibit 2, pages 063-087, Exhibit 3, pages 90-148; Exhibit 4, pages 149-185; and Exhibit 5, pages 186-211, and two (2) audio recordings of IEP meetings, dated May 28, 2021 and July 15, 2021. Petitioners' Exhibit 3, pages 129-139 were submitted and received as a group of pages including various emails. Upon further review, it was discovered that page number 131 was repeated three (3) times and page numbers 130 and 132 were repeated twice. For purposes of clarity, this Hearings Officer has renumbered the pages consecutively as follows: Petitioners' Exhibit 3, pages 129-132, 131A, 130B-132B, and 133-139. The renumbered pages will be marked as indicated for the record.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 3-4, pages 0036-0038; Exhibits 8-10, pages 0049-0055; Exhibits 14-15, pages 0060-0062; Exhibits 18-20, pages 0066-0071; Exhibits 22-23, pages 0073-0076; Exhibits 26-28, pages 0095-0119; Exhibits 29-33, pages 0121-0153; Exhibit 35, page 0156; Exhibits 37-52, pages 0260-0488; Exhibits 55-57, pages 0493-0592; Exhibits 59-61, pages 0601-0691; Exhibits 64-66, pages 0709-0777; Exhibits 68-84, pages 0779-0940; Exhibits 85-97, pages 0942-1029.

Due to a shortage of court reporters caused by unexpected illness at the court reporting company, the videoconference was recorded for the court reporter to review later to create the record of the proceeding. Both parties agreed to this procedure and were informed that upon completion of the transcripts, the recording of the proceeding would be destroyed. The transcripts were completed on September 2, 2021 and the recording of the proceeding was destroyed on September 3, 2021 to ensure confidentiality of the proceedings.

Both parties wanted the opportunity to submit written closing briefs regarding the legal issues to this Hearings Officer for review. To meet the 45-day deadline, both parties were allowed to provide written legal briefs without the use of the transcripts in this case. Both parties were informed that they may highlight facts based on their notes and recollection of the testimony, but that the transcripts would not be released by the court reporter to either side prior to the deadline for the written legal briefs. The deadline by which the briefs were to be submitted was Wednesday, September 15, 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 two (2) issues in the Complaint to be addressed at the Hearing:

1. Whether Student was denied a timely offer of a free appropriate public education (hereinafter “FAPE”) because the May 29, 2019 Individualized Education Program (hereinafter “IEP”) has been ruled a denial of FAPE and no subsequent offer has been developed.
2. Whether the DOE complied with the Findings of Fact, Conclusions of Law and Decision issued in DOE-SY2021-005 on January 27, 2021 and proceeded according to certain time and task directions affecting the development of a subsequent IEP.

IV. FINDINGS OF FACT

Background information

1. Private School Director is a licensed board-certified behavior analyst (hereinafter “BCBA”) and licensed and certified speech-language pathologist. 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 Testimony of Private School Director, Transcript Volume 2, page 99, line 14 to line 25 (hereinafter referenced as “Tr.V2, 99:14-25”); Petitioners’ Exhibit 5, page 192 (hereinafter referenced as “P-Ex.3, p.192”).

2. Private School Director was qualified as an expert witness in the development and maintenance of ABA programs specifically the VB program.³
3. Student is [REDACTED] years old and was diagnosed with [REDACTED] [REDACTED] in July 2018.⁴
4. Student has been determined eligible for special education and related services under the category of [REDACTED].⁵
5. Student had an IEP that was developed on September 5, 2018 (hereinafter “IEP-9/5-2018”) with an annual review date of September 5, 2019.⁶ A subsequent IEP was developed for Student, dated May 29, 2019 (hereinafter “IEP-05/29/2019”), but the annual review date remained at September 5, 2019.⁷
6. For the 2019-2020 school year, Parent enrolled Student at Private School Director’s new pilot program, Pilot Program. For the 2019-2020 school year, Parent paid One Hundred Dollars (\$100) a month from August 2019 through February 2020 for Student’s tuition at Pilot Program. Due to closure of Pilot Program in March 2020, Parent paid Fifty Dollars (\$50) for March 2020 and nothing for April and May 2020 for Student’s tuition at Pilot Program.⁸
7. Although the IEP-9/5/2018’s annual review date was September 5, 2019, Home School did not attempt to schedule an IEP meeting with Parent to review Student’s IEP for both the 2019-2020 and 2020-2021 school years. Home School Principal sent

³ Testimony of Private School Director, Tr.V2, 117:1-5.

⁴ Testimony of Parent, Tr.V1, 20:14-18; P-Ex.1, p.17.

⁵ See Respondents’ Exhibit 88, page 962 (hereinafter referenced as “R-Ex.88, p.962”).

⁶ See R-Ex.88, p.962.

⁷ See R-Ex.88, p.971.

⁸ See R-Ex.88, p.974.

- a letter to Parent on August 9, 2019, indicating that if Parent wished to have an IEP developed, Parent should contact Home School. The letter also noted that if no response was heard from Parent by August 23, 2019, no IEP would be developed for Student, and the DOE would not be responsible for developing any subsequent IEPs until Parent contacted Home School.⁹
8. On July 15, 2020, Parent filed a Request for IDEA Impartial Due Process Hearing under case number DOE-SY2021-005. In that case, Parent alleged, *inter alia*, that the DOE denied Student a FAPE by failing to review Student's IEP-05/29/2019 by the annual review date, or by the start of the 2020-2021 school year.¹⁰
9. A Due Process Hearing was held with Administrative Hearings Officer Charlene Murata (hereinafter "AHO Murata") on December 2-3, 2020. On Wednesday, January 27, 2021 at 2:55 p.m., AHO Murata issued Findings of Fact, Conclusions of Law, and Decision (hereinafter "AHO Decision") wherein AHO Murata found that the DOE denied Student a FAPE by failing to review Student's IEP-05/29/2019 by the annual review deadline, to have in effect an IEP for Student at the beginning of the 2020-2021 school year, and to provide sufficient Supplementary Aids and Services for Student, which resulted in a loss of educational opportunity and significantly impeded Parent's participation rights.¹¹
10. As part of the AHO Decision, AHO Murata ordered that Parent receive tuition reimbursement for Student's tuition and related expenses at Private School for the 2020-2021 school year. AHO Murata ordered tuition reimbursement reduced by a

⁹ See R-Ex.88, p.974.

¹⁰ P-Ex.4, p.178-185, R-Ex.87, p.948-954.

¹¹ P-Ex.4, p.175, R-Ex.88, p.1017

total of Forty Thousand Four Hundred Ninety-Five Dollars (\$40,495.00) after denying reimbursement for a fifteen percent (15%) administrative fee (totaling Twenty-Seven Thousand Four Hundred Ninety-Five Dollars (\$27,495.00)); One Thousand Dollars (\$1000) for a Distance Learning Program Assessment; Two Thousand Dollars (\$2000) for a Distance Learning Program and Supplies; and Ten Thousand Dollars (\$10,000) for a special education consultant.¹²

11. AHO Murata also ordered the following:

- The IEP team shall, within ten (10) school days of this Order, decide if any additional data or information or assessments are needed to determine Student's current needs. Respondents shall make reasonable effort to obtain any additional data or information that is needed. Any assessments are to be scheduled and completed within forty (40) calendar days of this Order.
- An IEP team meeting shall be held within ten (10) school days of obtaining any additional data or information and the completion of all aforementioned assessments. If, however, the IEP team determines that no additional data or information or assessments are needed to determine Student's current needs, the IEP team meeting shall be held within ten (10) school days of that determination.
- Any delay in meeting any of the deadlines in this Order because of an act or acts of Petitioners and/or their representatives and/or their private providers, will extend the deadlines set herein by the number of days attributable to Petitioners and/or their representatives and/or their private providers. Respondents shall document in writing any delays caused by Petitioners and/or their representatives and/or their private providers.¹³

Correspondence and Student's IEP team meetings through May 7, 2021

12. Parent informed Home School that Parent's preferred form of communication was through Parent's personal email address.¹⁴ Parent checks Parent's personal email

¹² P-Ex.4, p.171-174, R-Ex.88, p.1013-1016.

¹³ P-Ex.4, p.175-176, R-Ex.88, p.1017-1018.

¹⁴ To preserve Parent's confidentiality, Parent's personal email address is listed in the Legend but will be omitted in this Decision.

- regularly and not less than once a week.¹⁵
13. Beginning on December 18, 2020 through January 27, 2021, Home School's Student Services Coordinator (hereinafter "SSC") corresponded with Parent via email to attempt to schedule an IEP meeting for Student.¹⁶
 14. On January 4, 2021, Special Education Teacher (hereinafter "SPED Teacher") emailed Parent to ask for Parent's input on Student's present levels of performance and Parent's thoughts on Student's goals and objectives. SPED Teacher provided Parent with Student's IEP-05/29/2019 and Student's progress reports for the reporting period of May 31, 2019.¹⁷
 15. On January 21, 2021, SSC emailed Parent a DOE Consent for Release of Information form for the DOE to obtain records, including "all educational records including, but not limited to assessments, treatment plans and progress monitoring data" from Private School.¹⁸
 16. On January 22, 2021, Parent returned the signed DOE Consent for Release of Information form to SSC via email and also informed SSC that Parent would be proceeding without requiring the presence of Parent's attorney at the IEP meeting.¹⁹
 17. On January 25, 2021, SSC emailed Private School Director the signed DOE Consent for Release of Information form to request Student's information from Private School. On January 27, 2021, Private School Director provided Student's educational

¹⁵ Testimony of Parent, Tr.V1, 82:8-23.

¹⁶ P-Ex.3, p.131B-132B, 133-134, R-Ex.37, p.260-271.

¹⁷ R-Ex.38, p.326-358.

¹⁸ R-Ex.39, p.359-360.

¹⁹ P-Ex.3, p.146-148.

- plan for the 2020-2021 school year.²⁰ On February 8, 2021, Private School Director provided additional information requested by SSC relating to Student's progress on Student's objectives in Private School's educational plan.²¹
18. On January 27, 2021, after twenty-seven (27) emails between Parent and SSC, an IEP meeting was confirmed for February 11, 2021 at 2:15 p.m. On multiple occasions, SSC had to send a follow up email to Parent before a response was received.²²
19. Due to the AHO Decision being filed shortly before Parent confirmed availability for the IEP meeting scheduled for February 11, 2021 at 2:15 p.m., the IEP team changed the conference announcement to indicate that instead of an IEP team meeting, the team would meet to determine what additional data, if any, is needed to define the needs of Student and to determine if a reevaluation is warranted.²³
20. February 10, 2021, was not a school day for Home School, therefore the February 11, 2021 team meeting was within the ten (10) school day period provided in the AHO Decision for the team to meet and determine whether any additional data, information and/or assessments were needed to determine Student's needs.²⁴
21. On February 11, 2021 at 2:14 p.m. (one (1) minute before the meeting was supposed to start), Parent emailed SSC a list of five (5) concerns that Parent had regarding Student's IEP.²⁵
22. On February 11, 2021, the IEP team met and determined that a reevaluation for

²⁰ R-Ex.40, p.361-375.

²¹ R-Ex.41, p.376-379.

²² P-Ex.3, p.131B-132B, 133-134, R-Ex.37, p.260-265.

²³ R-Ex.4, p.37.

²⁴ R-Ex.37, p.263.

²⁵ P-Ex.3, p.130B, 142, R-Ex.37, p.266-267.

- Student was necessary and that Student would be assessed in the areas of: basic psychological processes (to include cognitive functioning and ability), adaptive skills, academic, communication (speech/language), fine motor, sensory profile, and functional behavior as part of the reevaluation.²⁶
23. On February 12, 2021, SSC emailed Parent the Prior Written Notice for the IEP team meeting held on February 11, 2021 (hereinafter “PWN-2/11/2021”) and the DOE’s Consent for Assessment as Part of a Reevaluation. The Consent for Assessment as Part of a Reevaluation form included consents for review of Student’s records and indicated the position of the reviewers: school psychologist, academic assessor, speech/language pathologist, occupational therapist, and board-certified behavior analyst. SSC informed Parent that they would not complete any assessments until the consent form was signed by Parent.²⁷
24. SSC sent three (3) follow up emails to Parent regarding the consent form between February 16-18, 2021. On February 19, 2021, Parent emailed the signed DOE Consent for Assessment as Part of a Reevaluation form to SSC.²⁸
25. Student’s speech/language assessment was completed on February 24, 2021.²⁹
26. Student’s occupational therapy assessment was completed on March 3, 2021.³⁰
27. Student’s psychoeducational evaluation was completed on March 5, 2021.³¹
28. Between February 22, 2021 and March 4, 2021, SSC attempted to schedule Student’s

²⁶ R-Ex.8, p.49.

²⁷ R-Ex.37, p.267, 322-323.

²⁸ P-Ex.3, 130B, R-Ex.37, p.268, 324.

²⁹ R-Ex.29, p.121-126.

³⁰ R-Ex.30, p.127-130.

³¹ R-Ex.31, p.131-138.

- academic assessment with Parent. Parent did not respond to several of SSC's emails during this time and the assessment was only confirmed after when SSC called Parent on March 4, 2021.³²
29. Student's academic assessment was scheduled for March 11, 2021.³³ Student's academic assessment report was completed on March 11, 2021.³⁴
30. On February 22, 2021, DOE Board-Certified Behavior Analyst (hereinafter "DOE BCBA") contacted Private School Director to do indirect assessments with a staff member that works with Student, as well as an observation for Student's functional behavior assessment (hereinafter "FBA"). DOE BCBA did not reside in the State of Hawai'i at the time of the request and noted that the observation must be done through a virtual platform approved by the DOE.³⁵
31. Private School Director attempted to negotiate with DOE BCBA regarding the blocks of time requested for DOE BCBA's indirect assessment but noted that Private School was unable to accommodate a virtual observation of Student for an out-of-state observer at that time.³⁶
32. DOE BCBA determined that the indirect assessments would be done with Parent instead of a Private School staff member. DOE BCBA had a miscommunication with Parent, where DOE BCBA called Parent at the scheduled time for the interview, but Parent did not respond. DOE BCBA had to reschedule several times with Parent to

³² P-Ex.2, p.132-131, 131A; R-Ex.37, 268-271.

³³ R-Ex.37, p.271.

³⁴ R-Ex.32, p.139-142.

³⁵ R-Ex.43, p.382.

³⁶ R-Ex.43, p.382-386.

complete the indirect assessment interview with Parent.³⁷

33. On April 7, 2021, the IEP team met to discuss Student's reevaluation assessments and determine Student's continued eligibility for special education and related services.

The eligibility meeting was not completed on April 7, 2021 because Parent wanted additional time to review the FBA completed by DOE BCBA.³⁸

34. Student's FBA was completed in April 2021.³⁹

35. On May 7, 2021, the IEP team met and determined that Student remained eligible for special education and related services under the primary category of [REDACTED]. Student was also determined to be eligible under the categories of [REDACTED] and [REDACTED].⁴⁰

36. At the time of the May 7, 2021 IEP meeting, the IEP team had all of Student's assessments from Student's reevaluation, including the FBA prepared by DOE BCBA.⁴¹

Correspondence and Student's IEP meetings after May 7, 2021

37. An IEP meeting was scheduled for May 19, 2021. On May 10, 2021, SPED Teacher emailed Parent the conference announcement and procedural safeguards for the IEP meeting on May 19, 2021. On May 13, 2021, Parent acknowledged receipt of the documents and confirmed that Parent would be at the May 19, 2021 meeting.⁴²

38. On May 14, 2021, SPED Teacher provided an update to Parent that the draft IEP

³⁷ P-Ex.3, p.138-141.

³⁸ R-Ex.49, p.469-470.

³⁹ R-Ex.33, p.143-153.

⁴⁰ R-Ex.22, p.73.

⁴¹ R-Ex.50, p.471-482.

⁴² R-Ex.56, p.541-587.

would be completed by Monday, May 17, 2021 for Parent to review prior to the IEP team meeting. Parent responded to SPED Teacher and requested that they reschedule the IEP team meeting to allow Parent more time to review the draft IEP prior to the meeting.⁴³

39. On May 17, 2021, SPED Teacher emailed Parent regarding possibly rescheduling the IEP team meeting to May 28, 2021 from 8:00 a.m. to 12:00 noon. After sending six (6) follow-up emails between May 18, 2021 to May 21, 2021, to Parent regarding rescheduling the meeting to May 28, 2021, Parent confirmed Parent's availability for an IEP meeting on May 28, 2021 from 8:30 a.m. to 10:30 a.m.⁴⁴

40. SPED Teacher sent Parent a copy of the draft IEP on May 18, 2021.⁴⁵

41. On May 28, 2021, an IEP meeting was held. Present at the meeting were SPED Teacher, a DOE district [REDACTED] resource teacher, DOE BCBA, SSC, a special education [REDACTED] teacher, Speech-Language Pathologist, a district speech-language pathologist, an occupational therapist, a general education teacher, Parent, and Principal.⁴⁶

42. The IEP meeting on May 28, 2021 was held via videoconferencing and during the meeting, SPED Teacher was able to use the share screen function to display the draft IEP to the team members during the meeting so that everyone was able to see the draft IEP as they went through it.⁴⁷

⁴³ P-Ex.3, p.117, R-Ex.59, p.601-602; R-Ex.60, p.622.

⁴⁴ P-Ex.3, p.117-120, R-Ex.59, p.602-615.

⁴⁵ R-Ex.59, p.605-607.

⁴⁶ P-Ex.5, Audio file of IEP meeting on May 28, 2021, approximate time stamp [00:16-01:20] (hereinafter referred to as 5/28/2021 IEP [00:16-01:21]).

⁴⁷ See generally P-Ex.5, 5/28/2021 IEP.

43. At the IEP meeting, Parent requested that the IEP team orally read through the entire draft IEP. The IEP team agreed to do so, and each section of the draft IEP was read verbatim, even though it was also being displayed on the screen to the team members including Parent.⁴⁸
44. About thirty-five (35) minutes into the IEP meeting, Parent observed that the draft IEP that SPED Teacher emailed to Parent was different from the draft IEP that was displayed on the screen and being orally read by Speech-Language Pathologist.⁴⁹
45. Speech-Language Pathologist informed Parent that a recent observation was made of Student at Private School on May 21, 2021 and may not have been included in the draft IEP provided to Parent.⁵⁰
46. After that time, Parent expressed frustration at not having the most updated draft IEP and the IEP team attempted to send the most current draft IEP to Parent. For around fifteen (15) minutes, two (2) draft IEPs were sent to Parent, one of which was the most current copy, and Parent attempted to print out the document. After sensing some frustration on Parent's part, Principal stopped the meeting to allow Parent time to print the document and review without rushing. The IEP team was informed that the IEP team meeting will be rescheduled to afford Parent time to review the most current draft IEP.⁵¹
47. Between June 2, 2021 and June 22, 2021, SSC emailed Parent almost every business day to attempt to schedule the continued IEP team meeting with Parent for June 8,

⁴⁸ P-Ex.5, 5/28/2021 IEP [2:36-3:10].

⁴⁹ P-Ex.5, 5/28/2021 IEP [35:51-36:07].

⁵⁰ P-Ex.5, 5/28/2021 IEP [36:08-36:21, 36:43-37:19].

⁵¹ P-Ex.5, 5/28/2021 IEP [37:20-52:23].

- 2021 and June 23, 2021. SSC also attempted to call Parent to schedule Student's continued IEP team meeting three (3) times but was unable to leave a voicemail.⁵²
48. SSC sent all the emails to Parent to Parent's confirmed personal email address.⁵³
49. Parent received SSC's emails regarding rescheduling of Student's IEP meeting as early as June 2, 2021. On June 2, 2021, Parent forwarded SSC's email to Mr. Peck regarding the rescheduling of Student's IEP meeting and asked Mr. Peck for his recommendation on how to proceed. Parent sent a follow up email to Mr. Peck on June 18, 2021 regarding the DOE trying to reschedule Student's IEP meeting and requesting his recommendation on how to proceed.⁵⁴
50. Parent did not respond to SSC until June 22, 2021, when Parent indicated that Parent would not be able to attend the IEP meeting on June 23, 2021. Parent did not provide any of Parent's available dates to SSC at that time.⁵⁵
51. On June 23, 2021, SSC provided Parent with four (4) dates and times for scheduling the IEP team meeting. SSC requested that Parent try to set aside two and a half to three (2.5-3) hours for the completion of the IEP meeting. Two of the dates provided by SSC were July 15, 2021 at 12:00 noon and July 16, 2021 at 9:00 a.m. or 11:00 a.m.⁵⁶
52. On June 24, 2021, Parent emailed SSC and claimed that Parent did not see any emails regarding a proposed IEP meeting date of June 8, 2021, even though Parent saw and forwarded the June 2, 2021 email from SSC, which included the proposed June 8,

⁵² P-Ex.3, p.96-103; R-Ex.66, p.772-774.

⁵³ R-Ex.66, p.772-777.

⁵⁴ P-Ex.3, p.108-109.

⁵⁵ P-Ex.3, p.110, R-Ex.66, p.775.

⁵⁶ R-Ex.66, p.775.

- 2021 IEP meeting date, to Mr. Peck.⁵⁷
53. Parent did not respond directly to SSC regarding the dates provided by SSC, but on June 29, 2021, Parent provided a list of dates that may work with Parent's schedule for the IEP team meeting. Two of the dates included in Parent's list were July 15 and July 16, 2021.⁵⁸
54. SSC emailed Parent on June 30, 2021 and confirmed that the IEP team meeting will be held on July 15, 2021 at 12:00 noon and that the team will hold July 16, 2021 from 9:00 a.m. and 11:00 a.m. if additional time is needed to complete Student's IEP.⁵⁹
55. On July 2, 2021, Parent forwarded SSC's email to Mr. Peck regarding the July 15 and July 16, 2021 proposed dates and noted that Parent was available on July 16, 2021 at 9:00 a.m.⁶⁰
56. SSC sent Parent an email on July 6, 2021 that confirmed the meeting dates of July 15 and 16, 2021, and included Student's draft crisis plan and draft behavior intervention plan for Parent's review.⁶¹
57. On July 13, 2021, Parent confirmed that Parent would see SSC on July 15th at the IEP team meeting.⁶²
58. On July 15, 2021 at 12:00 noon (the time the IEP meeting was supposed to start), Parent sent a lengthy email to SSC relating Parent's concerns for Student's IEP to discuss at the meeting. Near the end of the email, Parent indicated for the first time

⁵⁷ P-Ex.3, p.108-112.

⁵⁸ R-Ex.66, p.776.

⁵⁹ R-Ex.69, p.782.

⁶⁰ P-Ex.5, p.106.

⁶¹ R-Ex.71, p.784.

⁶² R-Ex.71, p.784.

that Parent was only available for three (3) hours for the July 15, 2021 meeting and was not available on July 16, 2021.⁶³

59. At no time prior to July 15, 2021 at 12:00 noon did Parent inform SSC or anyone from Home School that Parent was unavailable for the IEP team meeting time reserved by the IEP team on July 16, 2021.⁶⁴

60. On July 15, 2021, the IEP team meeting was held. Present at the meeting were SPED Teacher, DOE BCBA, a [REDACTED] special education teacher, an occupational therapist, a DOE district [REDACTED] resource teacher, a district speech-language pathologist, SSC, a general education teacher, Parent, and Principal.⁶⁵

61. The July 15, 2021 IEP team meeting was held via videoconferencing and during the meeting, SPED Teacher was able to use the share screen function to display the draft IEP to the team members during the meeting so that everyone was able to see the draft IEP as they went through it.⁶⁶

62. Parent initially requested that the IEP team orally re-read the entire draft of the IEP that was already reviewed at the May 28, 2021 meeting. After some discussion,

⁶³ P-Ex.3, p.90-91, 113-114, R-Ex.75, p.840.

⁶⁴ See P-Ex.3, p.92-96; R-Ex.69, p.782; R-Ex.71, p.784. While Parent tried to claim that Parent did not intend to commit to both July 15 and 16 and somehow expressed the same to the IEP team, the meeting dates had been confirmed as early as June 30, 2021 by SSC. Testimony of Parent, Tr.V1, 36:6-15. It is concerning to this Hearings Officer that Parent did not appear to make an effort to preserve the times set aside by the IEP team well in advance of the meeting to ensure that Student's IEP would be completed. Instead, it appears to this Hearings Officer that Parent offered vague non-responses to SSC's emails in order to avoid confirming both meeting dates so Parent could then later claim that Parent was unavailable for the continued meeting on July 16, 2021 to complete Student's IEP. This Hearings Officer does note that Parent was clearly seeking advice from counsel during the scheduling of the IEP meetings at least as early as June 2021. See P-Ex.3, p.108-109.

⁶⁵ P-Ex.5, Audio File of IEP Meeting on July 15, 2021, approximate time stamp [2:30-3:26] (hereinafter referenced as "7/15/2021 IEP [2:30-3:26]").

⁶⁶ See generally P-Ex.5, 7/15/2021 IEP.

Parent agreed to continue reading the draft verbatim from the point where the team left off on May 28, 2021.⁶⁷

63. The IEP team meeting on July 15, 2021 lasted nearly four (4) hours. The IEP team was able to review all of Student's present levels of educational performance, goals and objectives, extended school year, special education services, supplementary aids and supports, and the continuum for the least restrictive environment (hereinafter "LRE") for Student's IEP.⁶⁸ Parent appeared to be sincere in Parent's participation in the July 15, 2021 IEP meeting.⁶⁹

64. After an approximately twenty (20) minute discussion about Student's LRE, one of the Home School IEP team members asked Parent what Parent's recommendation is for Student's LRE and placement. At that time, Parent notified the team that Parent needed to stop in ten (10) minutes and requested that they resume again "tomorrow" at 9:00 a.m. The team went through an LRE worksheet with Parent and asked for Parent's input. Parent told the team that Parent would like to resume "tomorrow" because Parent believed that Parent would like to have more discussion on the LRE for Student. Principal adjourned the meeting and told everyone to return at 9:00 a.m. on July 16. Parent agreed and requested that they send Parent the new link for the videoconference.⁷⁰

65. Throughout the course of both IEP meetings on May 28, 2021 and July 15, 2021, Parent insisted that the IEP team be "more specific" in various aspects of Student's

⁶⁷ P-Ex.5, 7/15/2021 IEP [4:27-8:43].

⁶⁸ P-Ex.5, 7/15/2021 IEP.

⁶⁹ Testimony of Principal, Tr.V2, 246:16-247:15; *see also* P-Ex.5, 7/15/2021 IEP.

⁷⁰ Testimony of Principal, Tr.V2, 232:12-233:10; P-Ex.5, 7/15/2021 IEP [3:11:52-3:52:57].

- program, while conversely not being able to provide the IEP team with any information about Student's program at Private School.⁷¹
66. On July 15, 2021 at 5:17 p.m., Parent emailed SSC to inform SSC that Parent cannot make it to the meeting on July 16, 2021.⁷²
67. The IEP team attempted to hold the meeting on July 16, 2021 at 9:00 a.m. and attempted to contact Parent for the meeting. Parent did not attend the meeting and the Home School IEP team members did not proceed with the meeting in Parent's absence.⁷³
68. On July 16, 2021, SSC emailed Parent and provided three (3) additional dates and times for the continued IEP meeting for Student, which included July 23, 2021 at 2:00 p.m., July 28, 2021 at 9:00 a.m., and July 29, 2021 at 9:00 a.m. SSC informed Parent that if Parent does not respond, the remainder of the IEP team would proceed without Parent being present.⁷⁴ A letter from Principal was also sent to Parent indicating that this would be the last chance for Parent to cooperate with the meeting dates or the meeting would be held in Parent's absence.⁷⁵
69. On July 19, 2021, Parent sent a lengthy email to SSC in response to SSC's email of July 16, 2021 and Principal's letter. In the email, Parent claimed that Parent told SSC that Parent was not available on July 16, 2021. Parent also adamantly objected to the IEP team holding a meeting without Parent. Parent accused the DOE of trying to "pull the wool over [Parent's] eyes" regarding the change in the draft IEP that was

⁷¹ See generally P-Ex.5, 7/15/2021 IEP.

⁷² P-Ex.3, p.90, R-Ex.77, p.842.

⁷³ Testimony of Principal, Tr.V2, 234:5-235:7.

⁷⁴ R-Ex.79, p.890.

⁷⁵ P-Ex.2, p.87, R-Ex.80, p.936.

reviewed during the May 28, 2021 meeting. Parent also claimed to have been very patient with the DOE and blamed the DOE for the delay in Student not having a current IEP. Parent stated that Parent was unavailable for the dates provided by the DOE and demanded that the final IEP team meeting for Student be on July 20, 2021 from 2:00 p.m. to 3:00 p.m.⁷⁶

70. On July 19, 2021, SPED Teacher emailed Parent and indicated that the rest of the IEP team was not available to meet on July 20, 2021, however the dates previously provided to Parent are still available for the continued IEP team meeting.⁷⁷

71. On July 21, 2021, Parent emailed the DOE and indicated that Parent was not available for the dates that SSC had provided. Parent also informed SSC that Parent would be seeking reimbursement for Student's placement at Private School. Parent stated, "I have to enroll [Student] now anyway due to the delays you have caused in the completion of the IEP."⁷⁸

72. On July 22, 2021, SSC emailed Parent and provided an additional proposed meeting date of August 5, 2021 at 9:00 a.m. and 12:00 noon.⁷⁹ SSC followed up with Parent on July 27, 2021 regarding the August 5, 2021 proposed IEP meeting.⁸⁰

73. On July 30, 2021, Parent emailed SSC asking whether Private School Director was contacted about the IEP date. Parent did not indicate in Parent's email whether Parent was available for the August 5, 2021 proposed meeting date.⁸¹

⁷⁶ P-Ex.2, p.86, R-Ex.81, p.937.

⁷⁷ R-Ex.82, p.938.

⁷⁸ P-Ex.2, p.85, R-Ex.83, p.939.

⁷⁹ R-Ex.84, p.940.

⁸⁰ R-Ex.89, p.1020-1021.

⁸¹ R-Ex.90, p.1022.

74. On July 31, 2021, SSC notified Parent that the meeting would be held on August 5, 2021 at 12:00 noon. SSC provided Parent with the conference announcement and procedural safeguards.⁸²
75. On July 30, 2021, SSC emailed Private School Director to inquire about Private School Director's availability to attend Student's IEP team meeting on August 5, 2021. On August 1, 2021, Private School Director responded to SSC and indicated that Private School Director was not available on August 5, 2021, and proposed the dates of August 19, 25, and 27, 2021 after noon for Private School Director's attendance at the meeting.⁸³
76. On August 3, 2021, Parent requested that Parent's attorney, Mr. Peck, be invited to the IEP meeting on August 5, 2021.⁸⁴
77. On August 4, 2021, SSC notified Parent that Private School Director was unable to attend the meeting on August 5, 2021, but that Private School Director had proposed dates that Private School Director was available. SSC asked about Parent and Mr. Peck's availability on August 19, 2021.⁸⁵
78. On August 5, 2021, Parent emailed SSC and stated that Parent was unavailable for August 19, 2021.⁸⁶ On the same date, SSC requested that Parent provide available dates and times for the team to consider.⁸⁷ SSC followed up with Parent in another email on August 9, 2021 requesting dates and times that Parent was available.⁸⁸

⁸² R-Ex.91, p.1023.

⁸³ P-Ex.2, p.83-84.

⁸⁴ P-Ex.2, p.82, R-Ex.92, p.1024.

⁸⁵ P-Ex.2, p.65-66, 79, R-Ex.93, p.1025.

⁸⁶ R-Ex.94, p.1026.

⁸⁷ R-Ex.95, p.1027.

⁸⁸ R-Ex.96, p.1028.

79. On August 9, 2021, Parent emailed SSC and stated that both Parent and Private School Director were available on August 27, 2021 after 12:00 noon.⁸⁹
80. On August 11, 2021, SSC sent an email to Parent to inform Parent that the team was unable to meet on August 27, 2021 and requested that Parent provide additional dates and times that Parent would be available.⁹⁰
81. On August 15, 2021, Parent sent SSC an email regarding Parent's concerns for Student's IEP and also to request a copy of the draft IEP prior to the next IEP meeting.⁹¹
82. As of the date of the Due Process Hearing, the IEP team has not met to complete Student's IEP.⁹²

Other background information

83. The Due Process Hearing in DOE-SY2021-005 was held in December 2020. Mr. Peck represented Parent as Parent's attorney in the hearing.⁹³
84. As early as January 2021, Parent was requesting that Parent's attorney be involved with the IEP meetings that were being scheduled with the DOE. Upon further discussion with Parent's attorney, Parent later decided to proceed without Parent's attorney presence at the meetings.⁹⁴
85. Parent is the owner/operator of a [REDACTED].
Parent's company is a small business, which employs less than [REDACTED] people.

⁸⁹ R-Ex.97, p.1029.

⁹⁰ P-Ex.2, p.78.

⁹¹ P-Ex.2, p.78.

⁹² Testimony of Principal, Tr.V2, 235:8-237:9.

⁹³ P-Ex.5, p.178-183, R-Ex. 87, p.948-954; R-Ex.88, p.959.

⁹⁴ P-Ex.3, p.147.

Parent's company employs an office manager that works full-time, does scheduling and has many responsibilities at the company. Parent testified that Parent often does [REDACTED] and other duties for the company.⁹⁵

86. Parent is a single parent and lives with Parent's parent, who assists Parent with caring for Parent's [REDACTED] children. Parent's parent is able to drive and often assists with taking [REDACTED] Student, to school.⁹⁶

87. Parent is not familiar with Student's program at Private School and cannot provide any specific information about the services or supplementary aids that Student receives during Student's program at Private School.⁹⁷

88. Despite not being familiar with any specific aspects of Student's program or supplementary aids and services at Private School, Parent signed a contract obligating Parent to pay Two Hundred Forty-Six Thousand Four Hundred One Dollars and Thirty-Five Cents (\$246,401.35) for tuition for Student for the 2021-2022 school year.⁹⁸

89. Parent was aware that the DOE was ordered to pay for Student's tuition for the 2020-2021 school year. Private School Director was aware that Student would likely be entitled to continued payment by the DOE for tuition for the 2021-2022 school year pursuant to stay-put.⁹⁹

90. Parent signed the enrollment contract to send Student to Private School for the 2021-

⁹⁵ Testimony of Parent, Tr.V1, 17:14-19:12, 61:15-65:20.

⁹⁶ Testimony of Parent, Tr.V1, 19:10-21:22.

⁹⁷ Testimony of Parent, Tr.V1, 43:22-44:15; *see also generally* P-Ex.5, 5/28/2021 IEP, and P-Ex.5, 7/15/2021 IEP.

⁹⁸ P-Ex.5, p.191.

⁹⁹ Testimony of Parent, Tr.V1, 17:6-12; Testimony of Private School Director, Tr.V2, 133:23-134:21.

2022 school year on June 18, 2021.¹⁰⁰ This enrollment contract obligated Parent to pay the costs for services provided under the cost analysis for Student, but Private School Director knew that Parent believed that the DOE would pay for Student's tuition.¹⁰¹

91. Parent paid a Two Hundred Fifty Dollar (\$250) deposit to Private School by check on June 18, 2021.¹⁰²

92. The Complaint and Resolution Proposal in the instant case was filed on June 1, 2021 by Mr. Peck.

Private School

93. Private School is a for-profit private school for children with special needs whose program is based on ABA teaching and utilizes the Verbal Behavior Milestones Assessment & Placement Program (hereinafter "VB-MAPP") as the primary basis for creating programming for students.¹⁰³

94. Private School is licensed by the Hawai'i Council of Private Schools as a private school for grades [REDACTED] from January 21, 2021 to January 20, 2022.¹⁰⁴

95. Private School does not have any special education or general education teachers licensed in the State of Hawai'i to provide direct instruction to students at Private School. The students are taught by registered behavior technicians (hereinafter

¹⁰⁰ Testimony of Private School Director, Tr.V2, 129:16-19, 182:20-183:6; P-Ex.5, p.190-191.

¹⁰¹ Testimony of Private School Director, Tr.V2, 133:23-134:21.

¹⁰² P-Ex.5, p.194.

¹⁰³ Testimony of Private School Director, Tr.V2, 117:7-12.

¹⁰⁴ Testimony of Private School Director, Tr.V2, 135:2-12; P-Ex.5, p.193.

“RBTs”).¹⁰⁵

96. An Individualized Applied Behavior Analysis Education Plan dated July 2021 (hereinafter “IAEP-7/2021”) was created for Student for the 2021-2022 school year.¹⁰⁶

97. Student’s IAEP-7/2021 includes results of a VB-MAPP assessment conducted with Student on May 17, 2021, and it also includes updated goals and objectives for Student based on the VB-MAPP results.¹⁰⁷

98. In May 2021, Student’s VB-MAPP milestones score was [REDACTED], which was an improvement from Student’s previous VB-MAPP given in August 2020, where Student scored [REDACTED].¹⁰⁸

99. In May 2021, an FBA was also conducted with Student by Private School Director. The FBA focused on Student’s problem behaviors of [REDACTED]. The reason for the FBA was an increase in problem behaviors reported by Parent for Student while Student was out of school from around March 2020 to August 2020.¹⁰⁹

100. A list of supplementary aids and services that were being provided to Student for the 2020-2021 school year was not prepared for Student until Mr. Peck requested it from Private School Director in June or July 2021.¹¹⁰

101. For the 2021-2022 school year, Student will receive the following services at Private

¹⁰⁵ Testimony of Private School Director, Tr.V2, 164:11-165:15.

¹⁰⁶ Testimony of Private School Director, Tr.V2, 137:7-140:9; P-Ex.3, p.027-035.

¹⁰⁷ Testimony of Private School Director, Tr.V1, 57:16-69:15; P-Ex.3, p.034.

¹⁰⁸ P-Ex.5, p.197-204.

¹⁰⁹ P-Ex.5, p.205.

¹¹⁰ Testimony of Private School Director, Tr.V2, 135:13-136:7.

School: Speech Language Therapy; BCBA Consultation; RBT services; Special Education Teacher Consultation; Reverse Inclusion Program; Distance Bridge Assessment, and an FBA.¹¹¹

102. Student will receive two thousand four hundred (2,400) minutes of speech language therapy for the school year from August 16, 2021 to July 29, 2022.¹¹²
103. Student will receive five thousand forty (5,040) minutes of BCBA consultation for Student's IAEP-7/2021. 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.¹¹³
104. Private School will provide Student with RBT supervision for six (6) hours per day, which is the entire school day. Private School added an additional half hour to the cost estimate to account for occasions when Parent is late picking Student up from school and the RBT needs to stay with Student longer than the six (6) hours.¹¹⁴
105. Student's IAEP-7/2021 includes consultation from a special education teacher for Student's programming for a minimum of seven hundred twenty (720) minutes per year.¹¹⁵
106. The Reverse Inclusion Program at Private School is a program where non-disabled students that are distance learning, home schooled, or otherwise available during the

¹¹¹ P-Ex.5, p.191.

¹¹² Testimony of Private School Director, Tr.V2, 129:24-133:18; P-Ex.5, p.191.

¹¹³ Testimony of Private School Director, Tr.V2, 129:24-133:18, 132:17-22; P-Ex.5, p.191.

¹¹⁴ Testimony of Private School Director, Tr.V2, 132:5-23, 200:1-18.

¹¹⁵ P-Ex.5, p.191.

- school day, come to Private School to interact with the students at Private School.¹¹⁶
107. The Distance Bridge Program Assessment at Private School is an assessment to 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 rates of the service providers needed to conduct the assessment.¹¹⁷
108. Student's enrollment contract also includes an FBA, which is billed as a flat rate charge of Two Thousand One Hundred Dollars (\$2100).¹¹⁸
109. Private School also charges a fifteen percent (15%) administrative fee, which includes overhead charges associated with running Private School.¹¹⁹
110. Private School's tuition rate has increased from Four Thousand Dollars (\$4000) per month from the 2020-2021 school year to Four Thousand Two Hundred Dollars (\$4200) per month for the 2021-2022 school year. The tuition for the 2021-2022 school year no longer includes overhead but includes parent education and training.¹²⁰
111. 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 in Hawai'i.¹²¹
112. Private School's school year for the 2021-2022 school year runs from August 16,

¹¹⁶ Testimony of Private School Director, Tr.V2, 144:9-146:1; P-Ex.5, p.191.

¹¹⁷ Testimony of Private School Director, Tr.V2, 132:23-133:14; P-Ex.5, p.191.

¹¹⁸ Testimony of Private School Director, Tr.V2, 133:10-12; P-Ex.5, p.191.

¹¹⁹ Testimony of Private School Director, Tr.V2, 173:6-25; P-Ex.5, p.191.

¹²⁰ Testimony of Private School Director, Tr.V2, 172:12-173:18, 176:4-23; P-Ex.5, p.190.

¹²¹ Testimony of Private School Director, Tr.V2, 128:1-129:9, P-Ex.5, p.189, 190.

2021 to July 29, 2022.¹²²

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.”¹²³ A FAPE includes both special education and related services.¹²⁴

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.¹²⁵ 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.”¹²⁶

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”¹²⁷ 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.¹²⁸ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.¹²⁹

¹²² P-Ex.5, p.190.

¹²³ *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)).

¹²⁴ H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

¹²⁵ *Id.*

¹²⁶ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

¹²⁷ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

¹²⁸ H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

¹²⁹ H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.”¹³⁰ However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*,¹³¹ 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.”¹³²

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.¹³³ “A state must meet both requirements to comply with the obligations of the IDEA.”¹³⁴

Procedural violations do not necessarily constitute a denial of FAPE.¹³⁵ If procedural violations are found, a further inquiry must be made to determine whether the violations: 1) resulted in a loss of educational opportunity for Student; 2) significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or 3) caused Student a deprivation of educational benefits.¹³⁶

A. Petitioners have proven that Respondents failed to offer Student a free appropriate public education prior to the start of the 2021-2022 school year

¹³⁰ *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

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

¹³² *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).

¹³³ *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051.

¹³⁴ *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).

¹³⁵ *Amanda J.*, 267 F.3d at 892.

¹³⁶ *Id.*

Petitioners first issue is that Student's IEP-05/29/2019 was determined to be a denial of FAPE by AHO Murata in the AHO Decision and no new offer of FAPE was made to Student prior to the start of the 2021-2022 school year.

Petitioners were awarded tuition reimbursement in the AHO Decision for Student's attendance at Private School for the 2020-2021 school year, in part because the IEP-05/29/2019 was determined to be deficient and a denial of FAPE by AHO Murata.¹³⁷ Private School's school year ended in July 2021 and both the DOE and Private School's 2021-2022 school year started in August 2021.¹³⁸

It is undisputed that no new IEP was developed for Student and that the IEP team is still working on completing the development of the IEP, which began in May 2021. The IDEA provides that "each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP team: (i) reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals of the child are being achieved..."¹³⁹ The Ninth Circuit Court of Appeals has consistently held that educational agencies "cannot eschew its affirmative duties under the IDEA by blaming the parents."¹⁴⁰

The Ninth Circuit Court of Appeals has previously determined that failure of a school district to update an outdated IEP to address the unique needs of a student can rise to the level of a denial of FAPE if it is not reasonably calculated to ensure educational benefits to a student in the next year of school.¹⁴¹ In the *Anchorage School Dist. v. M.P.*, the court supported factual

¹³⁷ FOF 9.

¹³⁸ FOF 112.

¹³⁹ 34 C.F.R. §300.324(b)(1)(i), 20 U.S.C. §1414(d)(4)(A)(i), H.A.R. §8-60-48(b)(1)(A).

¹⁴⁰ *Doug C.*, 720 F.3d at 1045 (citing *Anchorage School Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir. 2012) and *W.G. v. Board of Trustees of Target Range School Dist. No. 23, Missoula, Mont.*, 960 F.2d 1479, 1485 (9th Cir. 1992)).

¹⁴¹ *Anchorage School Dist.*, 689 F.3d at 1058.

findings made by the hearings officer that a second grade IEP was not reviewed and revised appropriately to address the needs of the student who would be in third grade.¹⁴²

Petitioners have met their burden in proving that Respondents failed to offer Student a FAPE prior to the start of the 2021-2022 school year.

B. 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 denial 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.¹⁴³ 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.¹⁴⁴ The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in *Frank G. v. Bd. of Educ.*,¹⁴⁵ 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."¹⁴⁶

¹⁴² 689 F.3d at 1058.

¹⁴³ *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).

¹⁴⁴ *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009).

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

¹⁴⁶ *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir.

Petitioners have established that Parent signed an enrollment contract obligating Parent to pay tuition for Student for the 2021-2022 school year at Private School.¹⁴⁷ Petitioners have proven that Respondents failed to offer Student a FAPE prior to the start of the 2021-2022 school year. This Hearings Officer finds that Petitioners have proven a denial of FAPE for purposes of tuition reimbursement.

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 two formal VB-MAPP assessments of Students in August 2020 and May 2021.¹⁴⁸ Based on the results of the assessments, Student has made overall progress in the milestones in the VB-MAPP.¹⁴⁹ Private School has created an educational program with specific goals and objectives for Student for the 2021-2022 school year.¹⁵⁰ 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.¹⁵¹ Private School has also planned for a distance learning program if confronted with another government mandated shut-down due to a pandemic.¹⁵² 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.

2011), *citing Frank G. v. Bd. of Educ*, 459 F.3d at 365.

¹⁴⁷ FOF 88, 90.

¹⁴⁸ FOF 97.

¹⁴⁹ FOF 98.

¹⁵⁰ FOF 96.

¹⁵¹ FOF 101-106.

¹⁵² FOF 107.

This Hearings Officer does note that Private School included an extra half hour (30 minutes) per day for RBT services that are to account for the extra time that the RBT must stay with Student if Parent is late to picking Student up from Private School.¹⁵³ This is not an expense that this Hearings Officer believes should be included in the reimbursement for Student. Generally, if parents are late picking up their children from school, it is the parents' responsibility to bear the extra costs for the delay. Therefore, the amount of reimbursement for Private School's RBT services to Student is limited to six (6) hours per day maximum. The total dollar amount of the cost expense listed for RBT services at six and a half (6.5) hours per day is One Hundred Six Thousand Eight Hundred Eight Dollars (\$106,808)¹⁵⁴ which adds up to two hundred eight (208) school days (based on the RBT hourly rate of Seventy-Nine Dollars (\$79) per hour). The total amount that will be reimbursable for RBT services is Ninety-Eight Thousand Five Hundred Ninety-Two Dollars (\$98,592).¹⁵⁵

C. 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.¹⁵⁶ Petitioners argue in their closing brief that Issue #2 in the Complaint relates to the determination of equities, and this Hearings Officer

¹⁵³ FOF 104.

¹⁵⁴ See P-Ex.5, p.191.

¹⁵⁵ 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 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.

¹⁵⁶ *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.")

agrees. While this Hearings Officer does not have jurisdiction to determine that a failure of Respondents to comply with AHO Murata's January 2021 Decision results in a denial of FAPE, the efforts of Respondents to comply with the specific orders provided weighs heavily on the amount of tuition reimbursement that should be awarded. Likewise, the cooperation or lack thereof, of Parent with the DOE to effectively develop Student's new IEP prior to the start of the school year is a significant factor in the award of tuition reimbursement.

1. Respondents reasonably attempted to comply with the AHO Decision with the exception of the FBA performed by DOE BCBA

AHO Murata's decision outlined several deadlines by which the IEP team was required to have meetings and conduct assessments.¹⁵⁷ The first deadline required the IEP team to meet to determine whether any additional information, data, or assessments were needed of Student to determine Student's needs in developing an IEP. This deadline was ten (10) school days.¹⁵⁸ As February 10, 2021 was not a school day for Home School, it appears that the date that had been scheduled prior to the issuance of the AHO Decision of January 27, 2021 was met by having the meeting on February 11, 2021.¹⁵⁹

The second deadline in the AHO Decision provided that any additional information, data, or assessments must be gathered within forty (40) calendar days of the AHO Decision issuance date, which was March 8, 2021.¹⁶⁰ All the assessments that were agreed upon by the IEP team to be part of Student's reevaluation were completed by March 8, 2021, except the academic assessment and the FBA.¹⁶¹ This Hearings Officer notes that SSC did make multiple attempts to

¹⁵⁷ FOF 11.

¹⁵⁸ FOF 11.

¹⁵⁹ FOF 20, 22.

¹⁶⁰ FOF 11.

¹⁶¹ FOF 25-27, 29.

schedule Student's academic assessment by the given deadline, and that the delay in the compliance with SSC's academic assessment was due to Parent's failure to respond to SSC and due to scheduling decisions made to accommodate Parent's schedule.¹⁶² The academic assessment, therefore, was completed by the given deadline with delays in compliance being attributed to Parent.

The FBA, however, was not completed until April 2021.¹⁶³ While it is clear that there were some difficulties presented to DOE BCBA by Private School Director in arranging for the indirect assessment with Private School staff, one of the primary difficulties appeared to be caused by DOE BCBA's residence on the mainland.¹⁶⁴ DOE BCBA ultimately decided to proceed with Parent for the indirect assessment, and had at least one instance of a miscommunication with Parent about the differences in time zones for DOE BCBA to conduct the interview of Parent for the assessment.¹⁶⁵ DOE BCBA also had difficulty with scheduling an observation of Student at Private School because Private School was not yet equipped to conduct virtual observations with someone out of state.¹⁶⁶ As noted, while Private School Director may have been less-than-cooperative with DOE BCBA, Respondents have not provided any reasonable explanation why Student's FBA could not have been conducted by someone who resides in the State of Hawai'i. This Hearings Officer cannot attribute the delay in the FBA to Parent or Private School Director, so it appears that the FBA was not completed by the deadline

¹⁶² FOF 28.

¹⁶³ FOF 34.

¹⁶⁴ FOF 33-32.

¹⁶⁵ FOF 32.

¹⁶⁶ FOF 31.

given in the AHO Decision. The FBA was prepared prior to the first IEP meeting being held and was provided to Parents before the May 28, 2021 IEP meeting.¹⁶⁷

2. Parent's contribution to the delay in developing a new IEP for Student warrants a significant reduction in the tuition reimbursement award

Respondents argue that Parent's actions in this case warrant a reduction in the tuition reimbursement to Parent. After a thorough examination of Parent's actions in this case, this Hearings Officer agrees. Parent's actions in this case forced the DOE into the proverbial rock and hard place, where Respondents were faced with the choice of delaying the IEP meetings to accommodate Parent's schedule or developing an IEP without Parent's participation.

The Ninth Circuit Court, in *Doug C. v. Hawaii Dept. of Educ.*, emphasized the importance of a parent's participation in the development of an IEP for their child.¹⁶⁸ The Court noted that a close review of the facts of the case was important in determining whether there was a denial of FAPE. In that case, the IEP team was faced with the deadline to conduct the annual review of Student's IEP.¹⁶⁹ In September 2010, the IEP team and father discussed a meeting date in October 2010. Father testified that he did not know that the meeting was confirmed for that date and was not available on that date. The meeting was rescheduled to November 4 or 5, 2010 and the father informed the team that he was only available on November 9, 2010. On November 9, 2010, father informed the team he was sick and asked to reschedule the meeting to November 16 or 17. The student's annual IEP review deadline was November 13, 2010. The team decided to go ahead with the meeting on November 9, 2010 and developed an IEP.¹⁷⁰ In the IEP, the IEP team "decided to change [the student's] educational placement for the first time in

¹⁶⁷ FOF 36.

¹⁶⁸ 720 F.3d at 1043.

¹⁶⁹ *Id.* at 1041.

¹⁷⁰ *Id.* at 1041-1042.

six years.” The Court in *Doug C.* noted that the father “did not affirmatively refuse to attend the meeting, nor could the department prove that they could not convince him to attend.”¹⁷¹

Ultimately, the Court found that the school district denied the student a FAPE by infringing on the ability to participate meaningfully in the IEP development process.¹⁷²

The Court in *Doug C.*, however, did hold that “[w]hen confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of FAPE.”¹⁷³ The Court also noted that there may be “circumstances in which accommodating a parent’s schedule would do more harm to the student’s interest than proceeding without the parent’s presence at the IEP.”¹⁷⁴

The ruling in *Doug C.* provided Parent with an opportunity to use the system to Parent’s advantage, by constantly delaying meeting dates and forcing the DOE into non-compliance with the procedural requirements of the IDEA. In this case, Parent placed the DOE in a position of having to decide between failing to meet the most basic and important procedures of the IDEA, which is to have an IEP in place for Student at the start of the school year or conducting the IEP meeting in the absence of Parent who is an active participant in the IEP process.

This case presents an interesting question of what the DOE should have done to prepare Student’s IEP prior to the start of the 2021-2022 school year. Even if the DOE had developed the IEP in Parent’s absence over Parent’s strong objection to the team meeting without Parent, a due process hearing would have been filed regardless.¹⁷⁵ Parent in this case cooperated enough

¹⁷¹ *Id.* at 1044.

¹⁷² *Id.* at 1047.

¹⁷³ *Id.* at 1046.

¹⁷⁴ *Id.*

¹⁷⁵ FOF 69.

with the DOE to prevent them from holding the meeting without Parent. Similar to *Doug C.*, it would be easy for a reviewing body to note that Parent was an active participant in the process, so Parent's presence was necessary at the meeting.

Parent presented a multitude of difficulties for Respondents in this case, and while it is unclear whether they were for illegitimate reasons, they were certainly the basis for most of the delays in the scheduling of the IEP meetings and the completion of the IEP. While nothing in the IDEA requires the IEP team to send Parent a copy of the draft IEP prior to the meeting, Home School did so in this case.¹⁷⁶ Parent then requested a week to look over the draft IEP and cancelled the meeting scheduled for May 19, 2021.¹⁷⁷ At the IEP meeting that was held on May 28, 2021, Parent delayed the meeting for twenty (20) minutes due to Parent's insistence that the revised draft IEP be sent to Parent, and the printing problems that ensued.¹⁷⁸ It is important to note that the draft IEP was being displayed to all participants of the videoconference meeting.¹⁷⁹ Rather than continue the meeting, Principal then adjourned the meeting to allow Parent time to review the draft IEP.¹⁸⁰

In June 2021, after the instant Complaint was filed, Parent did not respond to the many emails sent by SSC from June 2, 2021 to June 22, 2021.¹⁸¹ While Parent claimed that Parent was extremely busy at work, Parent also testified that Parent does not go longer than a week without checking Parent's personal email address.¹⁸² More importantly, Parent did receive the initial email from SSC for the proposed June 8, 2021 IEP meeting and forwarded that email to Mr.

¹⁷⁶ FOF 38, 40.

¹⁷⁷ FOF 38.

¹⁷⁸ FOF 46.

¹⁷⁹ FOF 42.

¹⁸⁰ FOF 46.

¹⁸¹ FOF 47.

¹⁸² FOF 48.

Peck.¹⁸³ Parent again forwarded another set of emails that SSC had sent to try to reschedule the meeting to Mr. Peck, still without responding to SSC.¹⁸⁴ This Hearings Officer also notes that the enrollment contract that Parent signed with Private School was signed during the extended period of Parent's not responding to SSC regarding the scheduling of the continued IEP meeting.¹⁸⁵ After that significant delay during the summer of 2021, the meeting was rescheduled to July 2021.

SSC sent several emails to Parent regarding the IEP team reserving July 15 and July 16, 2021 for further meeting dates so the team could attempt to complete the IEP.¹⁸⁶ Parent did not indicate at *any time* prior to the start time of the July 15, 2021 IEP meeting that Parent was not available for the July 16, 2021 date.¹⁸⁷ During the IEP meeting itself, Parent again requested that the IEP team orally read the draft IEP verbatim, despite the draft IEP being displayed on the videoconference screen.¹⁸⁸ At the end of the meeting on July 15, 2021, it was Parent that suggested that the team continue the meeting to "tomorrow" because Parent had to leave and wanted further discussion regarding Student's least restrictive environment.¹⁸⁹

While Parent claimed that Parent previously informed the IEP team that Parent was unable to make it to the July 16, 2021 meeting, this is not true. While Parent was careful in not confirming the July 16, 2021 IEP meeting with SSC, Parent never indicated to SSC that the July 16, 2021 date was no longer available.¹⁹⁰ These dates were chosen based on a list of available

¹⁸³ FOF 49.

¹⁸⁴ FOF 49.

¹⁸⁵ FOF 90.

¹⁸⁶ FOF 54, 56.

¹⁸⁷ FOF 59.

¹⁸⁸ FOF 62.

¹⁸⁹ FOF 64.

¹⁹⁰ FOF 57, 59.

dates provided by Parent and were confirmed by SSC as early as June 30, 2021.¹⁹¹ On July 2, 2021, Parent sent Mr. Peck an email noting that Parent was available on July 16, 2021 at 9 a.m.¹⁹² Parent's claim that the date became 'no longer available' draws questions about Parent's veracity and/or the purpose of Parent's claim that Parent was not available.

Finally, the DOE presented Parent with three (3) available dates and times for the IEP team to meet and informed Parent that if Parent could not attend on those dates, then the meeting would be held without Parent.¹⁹³ It is important to note that the dates provided by the IEP team were in late July, which was very shortly before the 2021-2022 school year began for the DOE. At that time Parent told the team that Parent was an active participant, objected to the IEP team meeting without Parent, blamed the DOE for the delays in the development in Student's IEP, and informed the team that Parent would be enrolling Student in Private School.¹⁹⁴ Parent's claim at that point was disingenuous, as Parent had signed the enrollment contract on June 13, 2021 with the understanding that Student's tuition for Private School would be paid by the DOE due to 'stay-put.'¹⁹⁵

While there were other questionable actions by Parent during the IEP meetings themselves, Principal noted that Parent seemed to be genuine in Parent's desire to have an appropriate program prepared for Student. Therefore, this Hearings Officer will not include those considerations in this determination.

Based on a review of Parent's contributions to the delay in the development of Student's IEP, this Hearings Officer will reduce Parent's tuition reimbursement award by forty percent

¹⁹¹ FOF 53-54.

¹⁹² FOF 55.

¹⁹³ FOF 68.

¹⁹⁴ FOF 69.

¹⁹⁵ FOF 89-90.

(40%). While this Hearings Officer believes that Parent was *at least* equally responsible for the failure of the DOE to develop an IEP for Student in a timely manner, Student was still in need of an IEP at the start of the school year and the DOE is ultimately responsible for providing Student an offer of FAPE.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have proven the allegation that Respondents failed to offer Student a FAPE prior to the 2021-2022 school year. 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 2021-2022 school year. This Hearings Officer finds that the equitable considerations in this case warrant a significant reduction in Parent's tuition reimbursement award.

For the reasons stated above, IT IS HEREBY ORDERED –

1. That upon receipt of itemized invoice(s) and proof of payment receipt(s) from Parent, which reflect the actual amount of service minutes/hours and/or assessments and/or supplies paid to Private School for Student's attendance at Private School, Respondents shall reimburse Parent for sixty percent (60%) of the amounts paid by Parent to Private School.
2. Respondents are not responsible for reimbursing Parent for the Two Hundred Fifty Dollar (\$250) deposit that Parent paid to Private School in June 2021.

3. In no event should the total reimbursement payment to Parent exceed One Hundred Forty-One Thousand Nine Hundred Forty-Five Dollars and One Cent.

(\$141,945.01).¹⁹⁶

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, September 24, 2021.

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¹⁹⁶ For clarity, the subtotal on P-Ex.5, p. 191 of \$206,021.20 was reduced by \$8,216 for the extra half hour of RBT services that was excluded from the reimbursement amount. The new subtotal is \$197,805.20, and the new administrative fee of fifteen percent (15%) is \$29,670.78, making the subtotal before tax \$227,475.98. The new total with the four percent (4%) excise tax is equal to \$236,575.02 and forty percent (40%) of that amount is \$94,630.01.