



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

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

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE  
OF HAWAI'I, and CHRISTINA  
KISHIMOTO, Superintendent of the Hawai'i  
Public Schools,

Respondents.

DOE-SY2021-046

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing: August 30-31, 2021  
September 7, 2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On June 3, 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 10, 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 Stuart N. Fujioka, Esq. (hereinafter “Mr. Fujioka”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for August 30-31, 2021. Mr. Peck indicated at the prehearing conference that Petitioners would likely be filing a Motion for Stay-Put, due to the parties not coming to an agreement on Student’s stay-put placement.

Petitioners filed their Motion for Stay-Put (hereinafter “Motion”) on July 2, 2021. Respondents filed their opposition to Petitioners’ Motion on July 8, 2021. Petitioners filed their reply brief in support of Petitioners’ Motion on July 12, 2021. The Hearing on Petitioners’ Motion was held on July 13, 2021. After hearing arguments by counsel and considering the Motion, opposition, and reply briefs, and any exhibits attached to the documents, this Hearings Officer issued an Order Granting Petitioners’ Motion for Stay-Put on July 16, 2021.

Due to the first available Hearing date being after the original 45-day deadline of August 17, 2021, Petitioners filed Petitioners’ Request for an Extension on July 19, 2021. This Hearings Officer granted Petitioners’ request for extension and extended the 45-day deadline from August 17, 2021 to October 1, 2021.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure compliance with government mandated social distancing. An Order Regarding Video Conference Due Process Hearing was issued on August 2, 2021, which set forth the parameters for the video conference hearing. These parameters

included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

The Hearing commenced on August 30, 2021, using the Zoom video conferencing platform. Each attendee to the Hearing was sent a link through email to access the Hearing by the Office of Dispute Resolution. Present in the video conference Hearing were Hearings Officer Chastity T. Imamura; Parent and Mr. Peck, on behalf of Petitioners; DOE District Educational Specialist and Mr. Fujioka on behalf of Respondents; as well as the assigned court reporter. Petitioners called Parent and Private School Director as their witnesses during their case-in-chief and rested. The Hearing continued to August 31, 2021, where Respondents called Private Board-Certified Behavior Analyst (hereinafter “Private BCBA”) and DOE Board-Certified Behavior Analyst (hereinafter “DOE BCBA”). Respondents’ last witness was not able to attend the Hearing on August 31, 2021 due to illness, so the Hearing was continued to September 7, 2021. On September 7, 2021, Principal testified, and Respondents rested their case-in-chief. Petitioners did not present any rebuttal evidence.

Each party submitted their exhibits for the Hearing by the disclosure deadline of August 23, 2021. On September 7, 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 16, 2021. Any objections to the proposed exhibits were due on September 20, 2021.

This Hearings Officer notified counsel that the usual practice of this Hearings Officer is to accept both audio recordings from Petitioners and Respondents if they relate to the same meeting because sometimes the audio recording is taken from different parties, making it easier to determine what is being said and by whom. This Hearings Officer noted that since Respondents' recordings are being received, Petitioners' corresponding recordings will also be received.

Respondents requested that Respondents' Exhibit 229, which is an audio recording of a meeting on May 19, 2021 be received as evidence in consideration for the Decision in this matter. Petitioners did not object to the submission of the additional audio recording by Respondents. Petitioners did not submit any additional exhibits from the disclosures for consideration for the Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 065-070; Exhibit 2, pages 075-076, 081-084, 087-093, 095-104, 109; Exhibit 3, pages 123-125, 127-156; and Exhibit 4, three (3) audio recordings, dated February 4, 2021, May 12, 2021, and May 19, 2021. Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 11, pages 026-029; Exhibits 26-27, pages 057-087; Exhibits 30-31, pages 091-121; Exhibits 40-41, pages 137-169; Exhibit 43, pages 172-178; Exhibits 45-49, pages 186-234; Exhibit 62, pages 387-405; Exhibit 79, pages 444-446; Exhibit 89, pages 569-573; Exhibits 100-101, pages 616-619; Exhibit 121, pages 660-668; Exhibit 137, pages 724-727; Exhibit 157, pages 764-775; Exhibit 159, page 778; Exhibit 162, page 782; Exhibit 164, pages 784-787; Exhibit 168, page 793; Exhibit 198, pages 865-867; Exhibit 216, pages 909-918; Exhibits 224-225, pages 949-952; Exhibit 230, page 953; Exhibits 226-229, four (4) video recordings, dated January 20, 2021, February 4, 2021, May 12, 2021,

and May 19, 2021. This Hearings Officer reviewed both the three (3) audio and three (3) video recordings submitted by Petitioners and Respondents for the February 4, 2021, May 12, 2021, and May 19, 2021 meetings, and they are accurate recordings of the same meetings except that Respondents' video recordings allow this Hearings Officer to identify the person speaking more easily since all the participants are visible in the recording. Therefore, any reference to made to the recordings will be made to Respondents' exhibits for ease of reference.

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. Due to the delay in the proceedings and the wishes of the parties to obtain transcripts and prepare written closing briefs for consideration in this Decision, Respondents requested an extension of the 45-day deadline from October 1, 2021. Respondents' request was granted and the new Decision deadline in this case is set for November 15, 2021. The deadline by which the written closing briefs were to be submitted was Friday, October 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 "H.A.R.") § 8-60-1, *et seq.*

## **III. ISSUES PRESENTED**

Petitioners assert seven (7) issues in the Complaint to be addressed at the Hearing:

1. Whether the Individualized Education Program (hereinafter “IEP”) developed on May 12, 2021 (hereinafter IEP-05/12/2021”) is appropriate where the Extended School Year (hereinafter “ESY”) portion of the Student’s IEP:
  - a. Involved no discussion of the appropriateness of Student’s access to non-disabled peers.
  - b. There was no discussion of the frequency (length of day) of ESY to individualize Student’s program.<sup>2</sup>
2. Whether the IEP-05/12/2021 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-05/12/2021 to address Student’s needs in the Supplementary Aids section of the IEP-05/12/2021.
3. Whether the IEP-05/12/2021 is appropriate where the current (privately-provided) classroom supports/accommodations were not discussed. Whether the supplementary supports are insufficient substantively for Student to succeed where no assistive technology and other important supports are not described in the written IEP-05/12/2021 offer that Student now relies upon at Student’s private program.
4. Whether the IEP-05/12/2021 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 lost educational opportunity for Student and an impairment to parental participation.
5. Whether during the IEP-05/12/2021 meeting, Parent was told that a Registered Behavior Technician (hereinafter “RBT”) would be provided for the entire school-day during the IEP meeting but the description in the written IEP-05/12/2021 and Prior Written Notice (hereinafter “PWN”) provides contradictory statements that only guarantees that an RBT will be provided for thirty (30) hours per month.

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<sup>2</sup> While Petitioners asserted seven (7) issues in the Complaint, after the presentation of Petitioners’ case-in-chief, Respondents moved to dismiss several of the counts in the Complaint for failure to prosecute. After consideration of the facts presented by Parent and Private School Director’s testimony, this Hearings Officer granted Respondents’ Motion as to Issue #1, which was dismissed with prejudice. *See* Order Granting in Part Respondents’ Oral Motion to Dismiss, filed September 8, 2021. In their closing brief, Petitioners provided their argument based on the exhibits submitted in the Hearing, specifically the recording of the IEP meetings, to preserve the issue for appellate purposes. Based on this Hearings Officer’s review of the recordings, this Hearings Officer reconsidered Petitioners’ opposition to Respondents’ Motion to Dismiss, and will address Issue #1 in this Decision, based on the evidence received in the Hearing. While this Hearings Officer recognizes that Issue #1 has been dismissed with prejudice in this matter, addressing Petitioners’ arguments in the closing brief would also be for appellate purposes.

6. Whether the IEP-05/12/2021 is appropriate where there was no discussion of transportation as a potentially needed related service and no actual related services offered and/or described in the IEP-05/12/2021 for transportation.
7. Whether the IEP-05/12/2021 is appropriate where Student needs to successfully change from Student's private program to the public program is unaddressed in the IEP-05/12/2021 document. Additionally, whether the transfer plan relies upon the participation of the private program while that program has not been asked to participate for free or otherwise and does not agree to provide free services where those services will be at further expense to the private program.

In Petitioners' Closing Brief, filed on October 15, 2021, Petitioners withdrew Issues 5 and 6, as listed above. Those two issues will not be addressed in this Decision based on the withdrawal from Petitioners.

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

##### Witness background

1. Private School Director is the head of Private School and functions as its program director, board-certified behavior analyst (hereinafter "BCBA"), and speech-language pathologist (hereinafter "SLP"). Testimony of Private School Director, Transcript Volume 1, page 61, line 16 through page 62, line 1 (hereinafter referenced as "Private School Director, Tr.V1, 61:16-62:1").
2. Private School Director has a bachelor's and master's degree in communication sciences and disorders. Private School Director, Tr.V1, 62:13-17, 65:14-17, 69:11-16.
3. Private School Director has worked in both private and public schools in the United States and in other countries to provided applied behavior analysis (hereinafter "ABA") services to students. The type of ABA services that Private School Director specializes in is verbal behaviors (hereinafter "VB"). Tr.V1, 68:10-70:11; 80:7-82:15, 85:3-13; Petitioners' Exhibit 3, page 123 (hereinafter referenced as "P-Ex.3,

- p.123”).
4. Private School Director is qualified to testify as an expert in the development and maintenance of ABA programs for children in academic environments, specifically regarding VB ABA programs.
  5. Private BCBA is a doctorate-level BCBA, who works for a private company that is contracted to provide services to the DOE. Tr.V2, 155:16-25, 156:17-157:16, 201:21-202:5.
  6. Private BCBA has been certified as a BCBA since [REDACTED] and has conducted over two hundred (200) functional behavior assessments (hereinafter “FBA”). Private BCBA, Tr.V2, 156:24-157:7; Respondents’ Exhibit 225, pages 951-952 (hereinafter referenced as “R-Ex.225, p.951-952”). Private BCBA has worked in the field of ABA since [REDACTED] and has co-authored one (1) publication and presented at twelve (12) conferences and seminars related to the practice of ABA or psychology. R-Ex.225, p.951-952.
  7. DOE BCBA has been employed by the DOE as a BCBA since [REDACTED]. Prior to that, DOE BCBA was a special education [REDACTED] teacher for the DOE. DOE BCBA, Tr.V2, 214:18-215:5.
  8. Principal was employed as the principal of Home School from [REDACTED] until [REDACTED], when Principal became a principal of [REDACTED] school in Hawai‘i. Principal, Tr.V2, 250:8-18.

Other background information

9. ABA is the study of behavior, which is usually thought of as behavior manipulation, but it generally involves the manipulation of the environment to change behavior.



Private School Director, Tr.V1, 70:6-9.

10. One prominent assessment used in VB ABA programs is the verbal behaviors milestones assessment and placement program (hereinafter “VB-MAPP”). This assessment also acts as a program guide for VB programs, and it assesses a child’s development of skills across different language and learning areas compared to neurotypical children. Based on the VB-MAPP, an ABA professional can determine what skills a child with special needs is lacking, compared to neurotypical children and develop an ABA program to address the student’s needs in the skill areas.

Private School Director, Tr.V1, 71:9-74:21.

11. In the State of Hawai‘i DOE, to provide a student with the services of a registered behavior technician (hereinafter “RBT”), an FBA must be completed, and the FBA must recommend that a behavior intervention plan (hereinafter “BIP”) be implemented by a certified RBT. Private BCBA, Tr.V2 184:24-185:19.
12. An FBA requires an ABA professional, usually a BCBA, to gather information about the target student, such as the reinforcements that motivate the student and behavioral issues that the student is having; define those behaviors; take data about the behaviors; and develop some parameters about the behavior problems themselves. The BCBA then hypothesizes functions of the problem behaviors and looks at environmental factors that would increase the likelihood of the behaviors. Sometimes standardized assessments or tools are completed with the students as part of the FBA as well. Private BCBA, Tr.V2, 172:18-174:17.
13. BIPs are individualized plans that are used to train RBTs with specific strategies to address the target behaviors that the student is displaying. These strategies could

- include the manipulation of the environment or what occurs before the behavior, any consequences to the behaviors, and replacement behaviors for the student to use in place of the problem behaviors. Private BCBA, Tr.V2, 176:6-23, 188:9-191:19.
14. In accordance with the Behavior Analyst Certification Board, RBTs must be supervised by a BCBA in implementing ABA programs for at least five percent (5%) of the number of hours that the RBTs provide direct services to the individual. Private School Director, Tr.V1, 112:7-12; Private BCBA, Tr.V2, 208:22-210:23.
  15. A behavior support plan is a school-level plan that is not completed by a BCBA and can be done by a school behavior health specialist. A behavior support plan does not need to be implemented by an RBT. Private BCBA, Tr.V2, 181:5-12.

Student's background

16. Student is [REDACTED] years old and has been determined to be eligible for IDEA special education and related services under the diagnosis [REDACTED]. Student was also previously diagnosed with [REDACTED], but those are no longer concerns for Student. Respondents' Exhibit 226, January 20, 2021 IEP meeting recording at approximate time stamp 12:58-15:10 (hereinafter referenced as "R-Ex.226, 1/20/2021 IEP [12:58-15:10]");<sup>3</sup> R-Ex.30, p.092; R-Ex.40, p.138.
17. On November 19, 2020, this Hearings Officer filed a Findings of Fact, Conclusions of Law, and Decision in DOE-SY1920-053 after an IDEA impartial due process hearing involving Student. As a part of the Decision, Parent was awarded tuition

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<sup>3</sup> As mentioned previously, for clarity and ease of reference, all references to the audio/video recordings of the IEP meetings will be to Respondents' exhibits, even though Petitioners' submitted audio copies of the same meetings.

- reimbursement at Private School for the 2020-2021 school year.<sup>4</sup> See Findings of Fact, Conclusions of Law, and Decision filed in DOE-SY1920-053 on November 19, 2020.
18. As part of the decision in DOE-SY1920-053, this Hearings Officer required Private School to provide itemized billing to reflect the services and number of service minutes being provided for Student at Private School for the 2020-2021 school year for payment. Findings of Fact, Conclusions of Law, and Decision filed in DOE-SY1920-053 on November 19, 2020, page 44.
  19. In December 2020, Student's IEP team began a reevaluation for Student, which included assessments with Student in speech-language, occupational therapy, psycho-educational, and a VB-MAPP. Principal, Tr.V3, 255:3-257:8; R-Ex.11, p.026-029.
  20. The speech-language, occupational therapy, and psycho-educational assessments were completed in December 2020. R-Ex.43, p.172-178; R-Ex.45, p.186-192; R-Ex.46, p.193-210. The VB-MAPP assessment was completed on January 5, 2021. R-Ex.47, p.211-219.
  21. The IEP team also requested an FBA, which was completed by Private BCBA in April 2021. R-Ex.48, p.220-229.

#### Student's Reevaluation

22. On December 9, 2020, DOE Speech-Language Pathologist (hereinafter "DOE SLP") conducted a direct speech-language assessment and observation of Student as part of Student's speech and language assessment for the reevaluation. DOE SLP also conducted an interview with Parent and an interview with Student's private speech-

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<sup>4</sup> This Hearings Officer is taking judicial notice of the records and files in DOE-SY1920-053.

- language pathologist. DOE SLP also reviewed records from Private School and a report from the private speech-language pathologist. R-Ex.43, p.172-173.
23. As part of the speech and language assessment, DOE SLP also conducted several assessments including a speech assessment, language assessment, literacy and language connections assessment, and supplemental standardized assessments. Based on DOE SLP's speech and language assessment, DOE SLP was able to identify Student's baseline levels, needs, and potential goals, objectives, supports, and services needed to support Student in school. R-Ex.43, p.172-178; R-Ex.226, 1/20/2021 IEP [1:13:20-1:18:50]; R-Ex.227, 2/4/2021 IEP [07:18-10:30], [47:53-52:04].
24. DOE SLP's assessment indicated that Student uses verbal language and was no longer using any assistive communication devices, such as a picture exchange system, voice outputs, or sign language. R-Ex.43, p.172-173.
25. On December 17 and 18, 2020, DOE Occupational Therapist (hereinafter "DOE OT") conducted an occupational therapy assessment with Student. DOE OT's assessment included clinical observation of Student at Private School, standardized assessments directly with Student, a sensory profile assessment with Student's teachers at Private School, and a sensory and self-help checklist with Parent. R-Ex.45, p.186.
26. DOE OT noted that Student was not receiving occupational therapy at Private School at the time of the assessment, although Student had previously received occupational therapy from ages [REDACTED]. R-Ex.45, p.186.
27. Based on DOE OT's occupational therapy assessment, DOE OT noted that Student demonstrates moderate difficulties with participation in visual motor integration,

- visual perception/visual spatial, and motor coordination activities for a child of Student's age. Student also misses sensory input at a higher rate than others, especially with movement and touch. DOE OT was able to identify Student's baseline levels, needs, and potential goals, objectives, supports, and services to support Student in School. R-Ex.45, p.186-192; R-Ex.226 1/20/2021 IEP [46:24-1:00:22], [1:12:00-1:13:13]; R-Ex.227, 2/4/2021 IEP [10:32-19:17], [52:11-55:43].
28. On December 18, 2020, DOE Psychologist prepared a psycho-educational report on Student as part of the reevaluation. DOE Psychologist conducted an interview with Parent, a records review, an intelligence test, an adaptive behavior assessment with Parent, an ASD rating scale with Parent and Student's teacher, and a developmental profile with Parent. DOE Psychologist met Student in person to conduct the standardized test. R-Ex.46, p.193-195.
29. DOE Psychologist provided numerous recommendations for support and direction for Student's learning to address Student's general development in physical, adaptive behavior, social-emotional, cognition, and communication domains. R-Ex.46, p.205-207.
30. On January 5, 2021, DOE BCBA prepared a report for a VB-MAPP assessment that was conducted with Student. The VB-MAPP assessment tool used by DOE BCBA was the same tool as the VB-MAPP assessment used by Private School Director in Private School's VB-MAPP assessment of Student in June 2019, August 2020, and May 2021.<sup>5</sup> R-Ex.47, p.211; *compare* P-Ex.3, p.127.

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<sup>5</sup> The VB-MAPP reports indicate that the assessment tool used was the "Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) (Sundberg, 2008).

31. The VB-MAPP assessment conducted by DOE BCBA showed that Student had reached all milestones in level 1, around half the milestones in level 2, and some milestones in level 3. Student's overall score was [REDACTED] in the milestone's assessment. R-Ex.47, p.212-215.
32. Student's VB-MAPP barriers score showed that Student showed mostly low-level barriers in many of the domains, and the highest barriers in the impaired intraverbal domain. Student's overall score was [REDACTED] on the barrier's assessment. R-Ex.47, p.216-217.
33. DOE BCBA's VB-MAPP assessment of Student also included a transition scoring form, which was not included in Private School's VB-MAPP assessments. The transition assessment consists of three (3) categories of measurement: the student's primary issues in transition, consisting of the child's language, social, and academic levels; the student's patterns of learning, such as the rate of acquisition, generalization, retention and learning from the natural environment; and measures of self-help, adaptability to changes in routines, and self-direction everyday activities. R-Ex.47, p.219.
34. Student's scores on the transition assessment showed that programming interventions to support Student's needs would help increase Student's ability to access learning in the classroom; that Student needed assistance and support to acquire new skills; and that Student has strong self-help skills. R-Ex.47, p.218-219.
35. Student's scores on DOE BCBA's VB-MAPP were consistent with the results in Private School's VB-MAPP assessments in August 2020 and May 2021. *See* R-Ex.47, p.212-217, P-Ex.3, p.128-135.

36. As part of Student's reevaluation, Private BCBA was requested to do an FBA with Student. Due to some logistical issues with access to Student and Student's teachers at Private School, Private BCBA's FBA was not completed until April 2021. Private BCBA, Tr.V2, 157:17-172:20; P-Ex.2, p.87-104.
37. In conducting Student's FBA, Private BCBA conducted a review of Student's records, developed a reinforcement inventory, conducted an indirect assessment of Student with Parent, and reviewed notes from a direct observation of Student by DOE Resource Teacher. Private BCBA, Tr.V2, 172:6-174:17; R-Ex.48, p.220-224.
38. Based on the FBA, Private BCBA determined that "[REDACTED]" was the problem behavior that would need to be addressed for Student to access Student's education in the classroom environment. From the FBA, Private BCBA was able to make a recommendation that Student's IEP include ABA services and a BIP to be implemented by an RBT. Private BCBA, Tr.V2, 175:8-14, 185:20-188:8; R-Ex.48, p.226-229.
39. Private BCBA created a BIP for Student based on the FBA. The BIP included a list of contextual events which lead to Student displaying the problem behavior, a list of environmental modifications to decrease the likelihood of problem behavior, antecedent manipulations to avoid the problem behavior from occurring, replacement behaviors, and a fading of the prompts or need for the BIP intervention. The BIP also included a crisis plan, goals and objectives for Student, and teaching methods for the RBT to be trained upon for assisting Student. The BIP included the method of data collection for the RBTs to monitor Student's progress, and criteria for termination of the BIP. Private BCBA included references to scientific studies to reinforce the

different methods included in the BIP. Private BCBA, Tr.V2, 176:6-23, 188:9-193:18; R-Ex.49, p.230-234.

IEP meetings on January 20, 2021 and February 4, 2021

40. Student's IEP team met on January 20, 2021 and February 4, 2021 to develop a written IEP for Student (hereinafter "IEP-02/04/2021"). R-Ex.26, p.057-083; R-Ex.30, p.091-117.<sup>6</sup>
41. Prior to the IEP meeting, the IEP team members were sent a copy of a draft IEP and during the meeting, Principal or SPED Teacher would refer the IEP team members to the specific page of the document that was being discussed. The draft IEP had many of the reevaluation results, baseline levels, proposed needs, and goals and objectives completed. Changes were made to the draft IEP during the meeting as they were discussed by the IEP team. R-Ex.226, 1/20/2021 IEP [08:12-09:33]; *see also generally* R-Ex.226.
42. The IEP meetings were held over a videoconferencing platform. Present at both meetings were Parent, Principal, Private BCBA, DOE BCBA, DOE SLP, DOE OT, Special Education Teacher (hereinafter "SPED Teacher"), General Education Teacher, and ██████████ Specialist. R-Ex.26, p.082-083; R-Ex.226, 1/20/2021 IEP [00:00-00:40]; R-Ex.227, 2/4/2021 IEP [00:28-01:18].
43. At the January 20, 2021 meeting, the team reviewed some background information for Student, the disability and impact statement for Student's IEP, the special factors to be considered in developing the IEP, statewide assessments, the sources of

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<sup>6</sup> This Hearings Officer notes that these documents submitted by Respondent are identical, so for clarity and ease of reference, all further references made to this document will be made to R-Ex.26, p.057-083.



information that the IEP team has reviewed in preparation for developing Student's IEP, and Student's preferences, interests, and strengths. The sources of information that the IEP noted having included the results from the reevaluation, data reports from Private School including Student's VB-MAPP scores, data from team member observations of Student at Private School, and observations and input from the team members, including Parent. R-Ex.226, 1/20/2021 IEP [00:45-17:58].

44. The IEP team discussed Parent's concerns and asked Parent about areas that Parent wants to see Student improve and the progress that Student has made since last being at Home School. R-Ex.226, 1/20/2021 IEP [17:58-19:34].
45. The IEP team then discussed Student's present levels of educational performance (hereinafter "PLEPs")<sup>7</sup> in the areas of academic achievement, specifically reading, writing, and math; functional performance, specifically social and behavioral skills; occupational therapy, specifically fine motor, sensory regulation, and gross motor; adaptive skills; and communication. R-Ex.226, 1/20/2021 IEP [19:39-1:20:47].
46. For each section, either SPED Teacher or the professional that conducted the particular assessment would review the information that was provided in the draft IEP and the team would discuss Student's baseline levels, needs, and any input provided or requested from Parent regarding what Parent sees at home. *See* R-Ex.226, 1/20/2021 IEP [19:49-23:20] (reading), [23:24-25:00] (writing), [26:04-29:16] (math), [29:20-46:18] (social/behavioral), [46:24-53:01] (fine motor), [53:02-1:00:22]

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<sup>7</sup> This Hearings Officer notes that the current terminology for this section of the IEP is present levels of academic achievement and functional performance ("PLAAFP"), however the DOE forms and Student's IEP team used the term PLEPs, so it will be referred to as PLEPs in this Decision.

(sensory regulation), [1:00:28-1:11:30] (adaptive skills), [1:13:20-1:20:47]  
(communication).

47. At the conclusion of the review of the PLEPs, Parent told the IEP team that Parent was happy with the PLEPs and the information included in the PLEPs. R-Ex.226, 1/20/2021 IEP [1:22:21-1:30:29].
48. The IEP team then began to discuss proposed goals and objectives that addressed Student's needs as listed in the PLEPs, beginning with reading goals. The IEP team was not able to complete Student's IEP during the January 20, 2021 meeting and the IEP team had previously agreed to meet on January 21, 2021. R-Ex.226, 1/20/2021 IEP [1:32:59-1:43:16].
49. On February 4, 2021, the IEP team reconvened Student's IEP development meeting via virtual videoconference. Prior to the February 4, 2021 IEP meeting, a revised draft IEP had been sent to the IEP team members. R-Ex.227, 2/4/2021 [00:28-02:09].
50. The IEP team began by briefly summarizing what the IEP team had accomplished at the previous meeting and moved onto discuss Student's goals and objectives beginning with goals for writing and math. During this discussion, Parent was asked for input or concerns. Principal also provided input and suggested that one consideration for the team to discuss later was frequent meetings by the IEP team to work toward getting Student up to grade level on academics. R-Ex.227, 2/4/2021 IEP [02:58-07:10].
51. DOE SLP discussed two (2) proposed speech-language goals for Student's IEP and DOE OT discussed three (3) proposed occupational therapy goals for Student's IEP. Parent was asked for input or concerns for these goals as well. R-Ex.227, 2/4/2021

- IEP [07:18-19:17].
52. Goals and objectives for Student's social skills and behaviors were discussed at length by the team, and during this time Parent became emotional and expressed Parent's additional concerns for Student's social skills. At the end of the discussion, Parent was asked if Parent had any questions and Principal explained or answered Parent's questions at that time. R-Ex.227, 2/4/2021 IEP [19:22-34:14].
53. The IEP team moved onto discussing Student's eligibility for ESY services. The team discussed information from Private School, the VB-MAPP assessments from DOE BCBA and Private School, and requested information from Parent regarding Student's behaviors during longer breaks from school, such as winter break. At the end of the ESY discussion, the IEP team determined that Student qualified for ESY services after a ten (10) calendar-day break and noted that they would continue to take data on Student before and after other breaks from school. R-Ex.227, 2/4/2021 IEP [34:41-44:59].
54. Principal explained that the IEP team would discuss the special education and other related services and supplementary supports that Student would receive during the regular school year and would then discuss how it would apply to Student's ESY. R-Ex.227, 2/4/2021 IEP [45:10-45:32].
55. SPED Teacher suggested that based on the goals and objectives that were developed for Student in the IEP, six hundred (600) minutes of special education per week would be appropriate for Student to achieve those goals and objectives. The six hundred (600) minutes per week were broken down into thirty (30) minutes per day for each area of concern: reading, writing, math, and social/behavioral, which would

- allow Student to receive instruction with general education peers and an additional thirty (30) minutes per day of special education instruction in each area to get Student caught up to the general education curriculum. R-Ex.227, 2/4/2021 IEP [45:21-47:07].
56. For ESY services, Principal explained that students only need to attend the ESY program for as long as the students need to get their services. Principal did suggest that Student could benefit from staying the entire length of the ESY school program that Home School offered, which was from 8:00 a.m. to 12:00 noon. Principal explained that Student would receive special services to maintain the skills that Student needs to maintain during regular school breaks, which would be embedded in the ESY program. Parent was asked if Parent was in agreement with the proposal by Principal for ESY and Parent stated that Parent agreed. R-Ex.227, 2/4/2021 IEP [47:09-47:46].
57. DOE SLP suggested that Student receive four hundred eighty (480) minutes per quarter of direct speech-language therapy services from the speech-language pathologist, which breaks down to around eight (8) weeks of sixty (60) minutes broken up into two (2) to three (3) sessions. DOE SLP also suggested that Student receive thirty (30) minutes per week of direct speech-language therapy services during ESY. The IEP team discussed the amount of direct speech-language therapy sessions Student was receiving at Private School, which was roughly the same amount recommended by DOE SLP. Parent expressed questions and concerns to DOE SLP and inquired about how additional minutes may be added if necessary. DOE SLP provided answers to Parent's concerns and questions. R-Ex.227, 2/4/2021

IEP [47:53-52:04].

58. DOE OT recommended two hundred forty (240) minutes per quarter of occupational therapy services, broken down into one hundred eighty (180) minutes of direct services to Student by an occupational therapist and sixty (60) minutes of consultative time for Student's teacher to address sensory needs and strategies for Student. DOE OT also recommended that the occupational therapy minutes for Student for winter or spring break would just be consultative, and for summer break would be consultation with the teacher once before and twice during the ESY, and ninety (90) minutes of direct services with Student. Parent had no concerns regarding DOE OT's recommended service minutes. R-Ex.227, 2/4/2021 [52:11-55:43].
59. Principal inquired whether Parent was interested or requesting transportation services and Parent declined, saying that Parent lived only a few minutes away from Home School and could drop Student off. R-Ex.227, 2/4/2021 [55:45-56:12].
60. The IEP team began discussing supplementary aids and supports for Student's IEP. The team discussed having BCBA consultation once every two (2) weeks for sixty (60) minutes and Parent requested RBT services for Student, as Student was currently getting that at Private School and Parent believed it was important for Student. Principal explained that the DOE required the IEP team to provide an RBT to a student only if it was recommended by a BCBA after an FBA and a BIP was created for the RBT to implement. Principal suggested that while the IEP team was waiting for Private BCBA to complete the FBA, the team could provide the support of "close adult supervision" to Student, which would be a paraprofessional to accompany Student at school. Principal also explained that if the IEP team decided that Home

- School was an appropriate placement for Student, then a transition plan would need to be developed and Private BCBA should be able to complete the FBA by then and the team could revise the IEP as appropriate. R-Ex.227, 2/4/2021 [59:47-1:12:26].
61. Other supplementary aids and supports that the IEP team discussed included visual supports, sensory supports, first/then supports, transition supports such as priming, a token economy, a behavior support plan to be developed by a behavioral health specialist while the IEP team waits for the FBA to be completed, a daily communication log with Parent, parent education with the BCBA, and quarterly meetings with the IEP team to check on Student's progress and address any concerns by any team members. R-Ex.227, 2/4/2021 IEP [1:13:00-1:37:37].
  62. Parent asked the IEP team about whether Student would have a VB-MAPP program as part of Student's IEP, and DOE BCBA explained that Student's IEP PLEPs, goals, and objectives were all based on the results of the VB-MAPP assessment that was done by DOE BCBA. DOE BCBA noted that information from the VB-MAPP results were taken and embedded into Student's IEP and would be a part of Student's daily programming, and data would be collected to monitor Student's progress on the VB-MAPP. R-Ex.227, 2/4/2021 IEP [1:37:40-1:45:03].
  63. After the discussion regarding supplementary aids and supports was completed, the IEP team moved onto discussing the least restrictive environment for Student's IEP to be implemented. The discussion began by Principal explaining that the team needed to discuss each setting on the continuum, specifically addressing the academic and non-academic benefits of each setting and the effect Student would have on the teacher and other students in the regular classroom. R-Ex.227, 2/4/2021 IEP

[1:45:22-1:46:44].

64. The IEP team discussed each setting on the continuum, beginning with the general education setting for more than eighty percent (80%) of the day, general and special education setting, special education setting all day, a public separate facility, a private separate facility, hospital or residential treatment facility, and homebound. All IEP team members were given the opportunity to provide input into the considerations for each setting. R-Ex.227, 2/4/2021 IEP [1:46:44-2:08:32].
65. The IEP team then considered Parent's preference for Private School, a private separate facility, but discussed the DOE's responsibility to provide Student's education in the least restrictive environment that the IEP team believes can implement Student's IEP. After the discussion, the team agreed that the best setting for Student would be in the general education for more than eighty percent (80%) of the day. This consideration was made with Home School's set up of a two (2) teacher classroom general education setting where the general and special education co-teach the inclusion classroom. R-Ex.227, 2/4/2021 [2:08:41-2:21:22].
66. Parent raised questions and expressed concerns for the large number of students that would be in the classroom with Student, as Parent was concerned with safety considerations for Student. Principal assured Parent that the close adult supervision would be assigned to watch Student to prevent any safety issues. Principal also explained to Parent what Student's day would look like under this setting and reiterated that the IEP team intends to create a transition plan to ease Student from Private School's small setting into Home School's larger general education classroom. R-Ex.227, 2/4/2021 IEP [2:21:22-2:29:01].

67. Principal made Parent the DOE's offer of a free appropriate public education (hereinafter "FAPE") by briefly reviewing the IEP that was discussed over the January 20, 2021 and February 4, 2021 IEP meetings. Principal also noted that the team was still waiting on the FBA to be completed and would need to meet again to develop a transition plan for Student. R-Ex.227, 2/4/2021 IEP [2:29:03-2:32:00].

Student's IEP-02/04/2021

68. Student's IEP-02/04/2021 contained the following relevant information:

a. ESY services:

"Based on the nature and severity of [Student's] disabling condition and the observed regression of critical skills, [Student] does meet the eligibility criteria for extended school year services. [Student] requires ESY services in the areas of communication, social/behavioral development, fine motor and motor coordination skills, sensory-motor integration skills, and adaptive behavior skills after a break of no more than 10 days.

Based on [Student's] needs, [Student] requires ESY services Monday-Friday for 4 hours each day, excluding any holidays.

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Speech/Language Therapy: Direct speech therapy services will be provided for 30 min/week during ESY.

Occupational Therapy: OT consultation will be conducted with the ESY teacher/staff prior to each qualifying ESY period for the winter term. For the summer ESY term, OT consultation will be provided one-time before and two-times during the session. If the teacher is not known/available prior to ESY session, the occupational therapy consult will be conducted during the ESY term. [Student] will receive direct occupational therapy for 60 minutes over the summer ESY session." R-Ex.26, p.079.

b. Supplementary Aids and Services, Program Modifications and Supports for School Personnel:

"[Student] will receive BCBA consultation services/Freq: 60 / 2 / MONTH

[Student] will be given daily sensory supports/Freq: Daily

[Student] will receive daily visual supports/Freq: Daily

[Student] will be given close adult supervision/Freq: Daily

A communication log will be used daily/Freq: Daily

Parent Education by BCBA/Freq: 60 / 2 / MONTH

The team will have meetings on a quarterly basis/Freq: 60 / 1 / QRTR

[Student] will receive priming before transitions and non-preferred



activities/Freq: Daily

Teachers will use first/then language with [Student]/Freq: Daily

Teachers will use a token economy with [Student]/Freq: Daily

A Behavior Support Plan will be developed and implemented.” R-Ex.26, p.079.

c. Clarification of Services and Supports:

“Occupational Therapy will be a total of 240 minutes per quarter (180 direct and 60 consult).

Transportation services were discussed. Parent prefers to bring [Student] to and from school.

BCBA consultation services with team members will support programming, data collection, prompting, reinforcement, and environmental arrangements to help support [Student’s] ability to develop critical skills and build independence.

[Student] will be given daily sensory supports which will include strategies for sensory/movement breaks needed throughout [the] day and will be provided in consultation with the Occupational Therapist.

[Student] will receive daily visual supports such as pictures, writing, drawings, visual schedules, social stories, first/then boards, token boards, etc., which will be used to support [Student’s] understanding of directions, positive behaviors and build independence in the classrooms.

[Student] will be given Close Adult Supervision throughout [the] school day by a paraprofessional. This support is necessary to assist [Student] with transitions from location to location (navigating the school campus) and from one activity to another to minimize behavioral issues associated with transitions. [Student] also requires paraprofessional support and support [Student’s] engagement in [Student’s] learning activities and instruction.

A communication log will be used daily in order to assist with the home-school connection.

Parent education services will be provided by a BCBA in order to facilitate the generalization of learned behaviors and concepts at home, as well as assisting parent(s) with learning strategies and techniques to support [Student] at home.

The team will have meetings on a quarterly basis so that the team can monitor and discuss progress on a more frequent basis. Meetings can happen more often than quarterly if needed.

[Student] has difficulty with transitions. Therefore priming or previewing what is coming next prior to a transition or beginning a non-preferred activity, will help [Student] to know what to expect and demonstrate less resistance to the change.

First/then prompts will be utilized throughout [Student’s] day to help [Student] complete tasks, attend to [Student’s] instructional activities and transition to and from activities and places. (e.g. “first work, then drawing.)

[Student] will benefit from the use of a token economy which will reinforce positive and on-task behaviors.

A Behavior Support Plan will be developed and implemented. This plan will

help build positive behaviors and replace or reduce challenging behaviors. The Projected Start Date is 02/16/2021, as this is one week after the parent received a copy of the IEP and PWN (02/09/2021). This one-week time period is given to allow the parent reasonable time to review the PWN and accept the offer.” R-Ex.26, p.080.

d. Least Restrictive Environment statement:

“[Student] qualifies for IDEA services under the eligibility category of [REDACTED]. [Student’s] disability impacts [Student’s] ability to develop and access academic skills, expressive, receptive and social communication skills, social skills, fine motor skills, visual-motor integration and motor coordination skills, sensory motor integration skills, and adaptive behaviors. [Student] requires individualized and specially-designed instruction, supports and services to address these areas of need and to make progress toward educational standards. [Student] will participate with [Student’s] general education peers for academic and non-academic activities. [Student] will receive 600 minutes of special education services per week to address [Student’s] areas of need in the general education setting for 80% or more of the day. [Student] will not participate with [Student’s] general education peers while [Student] receives Occupational Therapy and Speech/Language Therapy services.” R-Ex.26, p.081.

Events after the February 4, 2021 IEP meeting

69. On February 9, 2021, a prior written notice (hereinafter “PWN”) was developed for Student that reviewed the discussions at the January 20, 2021 and February 4, 2021 IEP meetings and the offer of FAPE to Student (hereinafter “PWN-02/09/2021”). R-Ex.27, p.084-087; R-Ex.31, p.118-121.<sup>8</sup>
70. The PWN-02/09/2021 summarized all the discussions the IEP team had regarding the services offered to Student in the IEP-02/04/2021. Other requests or options considered were also summarized, as well as the reasons that the team did not agree to the requests or options. The PWN-02/09/2021 also contained the following

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<sup>8</sup> Similar to the IEPs, Respondents have submitted identical documents as two (2) different exhibits. For clarity and ease of reference, this Hearings Officer will hereafter refer only to R-Ex.27, p.084-087.

statements:

“The team discussed meeting to develop a comprehensive transition plan to address [Student] moving from [Student’s] current educational setting ([Private School]) to [Home School]. This transition planning would include all team members, including [Student’s] parent(s).

[Student] is currently in the process of having a Functional Behavior Assessment conducted. The team will be meeting again upon completion of this assessment.” R-Ex.27, p.086.

71. On February 9, 2021, Principal sent the IEP-02/04/2021 and the PWN-02/09/2021 to Parent via email. Principal reiterated in the email that the Projected Start Date for the IEP-02/04/2021 was February 16, 2021 and that the IEP team was eager to develop a comprehensive transition plan to support Student’s move to Home School if Parent accepted the offer of FAPE. R-Ex.157, p.764.
72. On February 11, 2021, Parent responded to Principal’s email and informed Principal that Parent wanted to wait until the FBA was completed before deciding on accepting the offer of FAPE. R-Ex.157, p.764.
73. On May 10, 2021, Parent sent Principal an email listing concerns that Parent had and questions about Student’s IEP-02/04/2021. In the email, Parent expressed an interest in the DOE paying for Student’s placement at Private School if the IEP cannot be implemented “to the T.” Principal responded to Parent’s email on May 11, 2021 and provided responses to each inquiry posed by Parent. R-Ex.198, p.865-867.

IEP team meetings on May 12, 2021

74. On May 12, 2021, the IEP team reconvened a meeting to revise Student’s IEP to include the results of the FBA conducted by Private BCBA. The meeting was held via videoconference and present at the meeting were Parent, Principal, Private BCBA, DOE BCBA, SPED Teacher, General Education Teacher, DOE SLP, DOE OT,

██████████ Specialist, and DOE Behavior Health Specialist. R-Ex.40, p.164-165; R-Ex.228, 5/12/2021 IEP [00:07-01:15].

75. The IEP team began the meeting by briefly reviewing the PLEPs for reading, writing, and math that were written in the IEP-02/04/2021 and checking with Parent to see if the baseline levels and/or needs were the same for Student or if there were any changes. Parent was able to provide input regarding Student's current levels and needs. R-Ex.228, 5/12/2021 IEP [02:55-12:12].
76. During the discussion of the social/behavior PLEP, information from the FBA was included and an additional need was added for Student relating to decreasing the frustration behavior in the FBA. Parent again provided input about Student's current levels of need for behaviors. Parent noted that Student has been home sick from school and has been showing more ██████████ behavior, especially when a preferred item was taken away. R-Ex.228, 5/12/2021 IEP [12:13-15:53].
77. The IEP team continued to review the PLEPs for fine motor, sensory regulation, adaptive skills, gross motor development, and communication. Parent was able to provide the team with any updates to Student's baseline levels and needs. R-Ex.228, 5/12/2021 IEP [15:54-29:18].
78. A brief review of the impact statement, parent concerns, reevaluation summary, post-high school transition services, and Student's interest was completed by the IEP team and then the IEP team moved onto reviewing Student's goals and objectives. Since there were no changes to the goals and objectives from the IEP-02/04/2021, the IEP team skipped ahead to discussing the behavior goals to be added based on the FBA. R-Ex.228, 5/12/2021 IEP [29:19-31:53].

79. Private BCBA explained the two (2) behavior goals for Student: one (1) to reduce [REDACTED] behaviors and one (1) to increase Student's ability to choose between activities to reduce [REDACTED]. Parent asked questions from Private BCBA and Private BCBA was able to answer Parent's questions and explain the goals and objectives. R-Ex.228, 5/12/2021 IEP [31:54-35:24].
80. A brief review of the ESY services from the IEP-02/04/2021 was done before the team moved on to the services and supplementary aids discussion. Principal explained that they would discuss the services and supplementary aids and come back to what will be provided during ESY, however Student's eligibility for ESY services after ten (10) calendar days remained the same as in the IEP-02/04/2021. R-Ex.228, 5/12/2021 IEP [35:24-36:53].
81. The IEP team discussed the addition of the RBT services that were recommended in the FBA to Student's supplementary aids and services. ABA services were added, and it was explained as the BCBA services that would include supervision of the RBT based on the mandatory requirements. The IEP team explained to Parent that the provision of "Individual Instructional Support" or "IIS" would be the provision of the RBT to Student throughout the school day. The IEP team also explained that the BIP developed by Private BCBA would also be included in Student's IEP and that the team was going to further discuss the BIP after the IEP meeting. Parent was asked about the scheduling of the parent education services, and Parent requested less time and more flexible language due to Parent's schedule, so the parent education minutes were reduced but Parent was told that additional minutes could always be added later if Parent's schedule clears up. R-Ex.228, 5/12/2021 IEP [36:53-53:00].

82. The IEP team then returned to the ESY services and determined that the IIS would also be provided for the entire ESY day, as well as ABA services for supervision of the RBT. R-Ex.228, 5/12/2021 IEP [54:40-55:55].
83. The IEP team reviewed the remainder of the IEP-02/04/2021 to see if anyone from the team had any changes to make. This discussion included a revisiting of the least restrictive environment discussion. During the discussion, Parent told the team that Parent felt better about the general education setting knowing that Student would have services of an RBT all day with the BCBA supervision. Parent also expressed to the IEP team that Parent believed that the transition is very important and that is one of Parent's biggest concerns. R-Ex.228, 5/12/2021 IEP [56:00-1:03:22].
84. Principal then concluded the IEP meeting and called a new meeting to order with the same participants. This second meeting was called for Private BCBA to further explain the details of the BIP that was prepared for Student. During this meeting Private BCBA displayed the BIP on the shared screen format so that all team members could view it. R-Ex.228, 5/12/2021 IEP [1:05:05-1:07:30].
85. Private BCBA then explained to the IEP team the contents of the BIP that were based on Private BCBA's FBA, as well as based on research on studies done in the field of ABA, references for which Private BCBA included in the BIP. R-Ex.228, 5/12/2021 IEP [1:07:30-1:18:50].
86. At the conclusion of the BIP review, Parent requested a copy of the BIP from Private BCBA, which Private BCBA agreed to provide for Parent to review. R-Ex.228, 5/12/2021 IEP [1:18:50-1:19:54].
87. At the conclusion of the meeting, the IEP team again discussed the planning of a

transition meeting and requested updates from Parent to begin scheduling the meeting. R-Ex.228, 5/12/2021 IEP [1:20:30-1:22:35].

Student's IEP-05/12/2021 and PWN-05/14/2021

88. A written IEP offer of FAPE was prepared based on the revisions made to the IEP at the May 12, 2021 IEP meeting (hereinafter "IEP-05/12/2021"). R-Ex.40, p.137-165. A PWN dated May 14, 2021 was also prepared to summarize the decisions made and the reasons for the decisions in the IEP, as well as to reiterate the offer of FAPE by Home School and the other considerations that were discussed at the May 12, 2021 IEP meeting (hereinafter "PWN-05/14/2021"). R-Ex.41, p.166-169.
89. Student's IEP-05/12/2021 contained the same information for Student's background and PLEPs sections, with the addition of new information that was discussed at the May 12, 2021 IEP meeting. Those changes were noted by the date (5/12/2021) and included in the IEP-05/12/2021. *See e.g.* R-Ex.40, p.138-145.
90. Two (2) IEP goals and included objectives were added to the IEP-05/12/2021 under the category of "health." These IEP goals and objectives were related to the FBA and BIP completed by Private BCBA that were discussed during the May 12, 2021 IEP meeting. R-Ex.40, p.158-159.
91. The ESY section of Student's IEP contained the same language as the IEP-02/04/2021 and included a new paragraph, which reads as follows: "As of 05/12/2021: ABA services will occur during ESY for 1 hour/week. The IIS services during ESY will be provided by an RBT. The IIS services and BIP implementation will happen daily during ESY." R-Ex.40, p.160.
92. The supplementary aids and services, program modifications and supports for school

personnel section reads as follows:

“[Student] will be given daily sensory supports/Freq: Daily  
[Student] will receive daily visual supports/Freq: Daily  
A communication log will be used daily/Freq: Daily  
Parent Education by BCBA/Freq: 120 mins per QRTR  
The team will have meetings on a quarterly basis/Freq: 60 / 1 / QRTR  
[Student] will receive priming before transitions and non-preferred activities/Freq:  
Daily  
Teachers will use first/then language with [Student]/Freq: Daily  
Teachers will use a token economy with [Student]/Freq: Daily  
ABA services/Freq: 360 mins per MONTH  
Individual Instructional Support/Freq: Daily  
Behavior Intervention Plan (BIP)/Freq: Daily.” R-Ex.40, p.160-161 (changes  
underlined).

93. The clarifications of services and supports section reads as follows:

“Occupational Therapy will be a total of 240 minutes per quarter (180 direct and 60 consult).

Transportation services were discussed. Parent prefers to bring [Student] to and from school.

[Student] will be given daily sensory supports which will include strategies for sensory/movement breaks needed throughout [the] day and will be provided in consultation with the Occupational Therapist.

[Student] will receive daily visual supports such as pictures, writing, drawings, visual schedules, social stories, first/then boards, token boards, etc., which will be used to support [Student’s] understanding of directions, positive behaviors and build independence in the classrooms.

A communication log will be used daily in order to assist with the home-school connection.

Parent education services will be provided by a BCBA in order to facilitate the generalization of learned behaviors and concepts at home, as well as assisting parent(s) with learning strategies and techniques to support [Student] at home.

05/21/21: Parent requested a decrease in the time for Parent Education to one session per month (60 min/month) to better accommodate [Parent’s] schedule. The team also agreed to document the time by the quarter (120m/quarter) in order to provide greater flexibility based on [Student’s] needs.

The team will have meetings on a quarterly basis so that the team can monitor and discuss progress on a more frequent basis. Meetings can happen more often than quarterly if needed.

[Student] has difficulty with transitions. Therefore priming or previewing what is coming next prior to a transition or beginning a non-preferred activity, will help [Student] to know what to expect and demonstrate less resistance to the change. First/then prompts will be utilized throughout [Student’s] day to help [Student] complete tasks, attend to [Student’s] instructional activities and transition to and



from activities and places. (e.g. “first work, then drawing.)

[Student] will benefit from the use of a token economy which will reinforce positive and on-task behaviors.

The Projected Start Date is 02/16/2021, as this is one week after the parent received a copy of the IEP and PWN (02/09/2021). This one-week time period is given to allow the parent reasonable time to review the PWN and accept the offer.

Updates as of 05/12/21:

ABA services will be provided and will include supervision of the Registered Behavior Technician (RBT) according to BACB standards, collection and analysis of data, programming support for skill acquisition programs and reinforcement, consultation with IEP team members, and training in the implementation of the Behavior Intervention Plan (BIP) and related teaching protocols.

Individual Instructional Support (IIS) will be provided by a Registered Behavior Technician (RBT) throughout [Student’s] school day.

Behavior Intervention Plan (BIP) has been developed based on the data gathered from the Functional Behavior Assessment. [Student’s] BIP will be implemented throughout [Student’s] school day.

The Projected Start Date is 05/21/2021 for the newly added supplementary aids and services, as this allows 5 days after the parent received a copy of the IEP and PWN (05/14/2021). This time period is given to allow the parent reasonable time to review the PWN and determine if they accept the offer of FAPE.” R-Ex.40, p.161-162. (changes underlined).

94. No changes were made to the Student’s least restrictive environment placement language. R-Ex.40, p.163.
95. The PWN-05/14/2021 summarized the updates and changes made to the IEP-05/12/2021 and included the reasons for any changes that were made to the services and supports for Student. The PWN-05/14/2021 also included the following statement: “The IEP team will schedule a meeting to develop a transition plan to enable [Student] to successfully transition to [Student’s] neighborhood school in order to access [Student’s] least restrictive environment.” R-Ex.41, p.166-169.
96. The IEP-05/12/2021 and the PWN-05/14/2021 were emailed to Parent on May 14, 2021 by Principal. R-Ex.216, p.909.

#### May 19, 2021 transition meeting

97. On May 19, 2021, the IEP team met via videoconference to discuss a transition plan

for Student's transition from Private School to Home School. Present at the meeting were Parent, Principal, Private BCBA, DOE BCBA, DOE SLP, DOE OT, SPED Teacher, General Education Teacher, DOE Behavior Health Specialist. R-Ex.229, 5/19/21 Transition [00:56-02:31].

98. During the transition meeting, the team discussed the initial steps for Student's transition, which would include pairing of DOE staff and Home School with Student's preferred items so that Student would associate Home School and the DOE staff with things that Student enjoys. The DOE staff would also attempt to make contact with Private School staff to observe some of the teaching techniques that they use with Student. R-Ex.229, 5/19/21 Transition [5:24-12:33].
99. Parent raised a question about having the DOE staff try to pair with Private School staff, but acknowledged that due to health and safety protocols, it may not be possible for the DOE staff to access Private School staff or Student at Private School. Parent noted that Parent is not able to enter the school and have direct access to Student at that time as well. Parent suggested that if the DOE staff cannot access Student at Private School, Parent would be willing to bring Student to a neutral place to have DOE staff meet with Student and work on pairing with Student. R-Ex.229, 5/19/21 Transition [12:45-16:20].
100. The IEP team asked Parent to share with them information about Student's favorite items or activities for them to start using for pairing. Parent was asked if it would be possible to provide DOE staff with some of Student's favorite items for them to use for pairing and Parent agreed that Parent could provide some items to the DOE staff to use. R-Ex.229, 5/19/21 Transition [17:52-28:49].

101. The IEP team also discussed possible priming methods to get Student ready to transition to Home School's larger environment, such as having Student start in a smaller class at Home School and gradually introducing Student to larger classes, using social stories to prepare Student with what to expect at Home School, and starting with a gradual schedule of having Student come to school for one (1) day and then two (2) days and then moving slowly up to a full week. The team also discussed plans for collecting data and checking in with Parent to see how Student is doing and adjusting the plan as needed to address Student's progress or lack thereof. R-Ex.229, 5/19/21 Transition [29:57-56:30].

102. After the conclusion of the May 19, 2021 transition meeting, Principal asked Parent to stay on the videoconference to see if Parent had any questions or concerns. Parent asked Principal about masking and in-person instruction and Principal was able to explain what the current protocol at Home School was. Parent was satisfied with Principal's explanations to all Parent's questions. Parent informed Principal that Parent was meeting with Parent's attorney and would be able to get Principal a decision about the offer of FAPE after that time. Principal let Parent know that Parent could take the time that Parent needed, that if there were any additional questions, that Parent could contact Principal, and that if Parent wanted to bring Student over during the summer to begin acclimating Student to Home School, that Home School would be open during the summer and they were welcomed to come. R-Ex.229, 5/19/2021 Transition [56:41-1:09:06].

103. On May 25, 2021, Parent requested a copy of the recording from the IEP meeting on May 12, 2021, which Principal provided on that same date. Principal also provided

Parent with the draft transition plan that the team discussed at the May 19, 2021 meeting. R-Ex.216, p.910-913.

104. A draft transition plan was developed based on the team's conversations at the May 19, 2021 Transition meeting. The draft transition plan identified areas of needs and required skills for Student to transition from Private School to Home School. The plan also included steps that would be taken to get Student acclimated to the DOE staff and the DOE school, as well as pairing with Student's peers and opportunities for Student to play preferred games and activities with peers. The draft plan included ongoing team meetings, ESY considerations, and steps needed to build for Student's transition. R-Ex.224, p.949-950.

#### Post Transition Meeting events

105. After Student's IEP-05/12/2021 had been revised to include RBT services based on the FBA by Private BCBA and the transition meeting had been held, Parent was satisfied with the IEP-05/12/2021 but was concerned about the DOE being able to implement it or making changes to it. Parent, Tr.V1, 53:25-54:4, 55:25-56:13.
106. After receiving the IEP-05/12/2021 and PWN-05/14/2021, Parent met with Parent's attorney, who told Parent that Student's IEP is "a bait and switch in all likelihood, that they're going to provide you these services now and then assess your child in accordance with their policies and remove the one-on-one." Parent, Tr.V1, 26:18-27:12.
107. Parent also spoke with Private School Director, who told Parent that the IEP program was not a VB program and used different ABA methodology. Parent, Tr.V1, 27:13-19.

108. After conversations with Private School Director and Parent's attorney, Parent decided not to accept the offer of FAPE from the DOE in the IEP-05/12/2021. Parent. Tr.V1, 27:20-28:5, 47:9-21.
109. Parent was also counseled by Parent's attorney that due to the prior decision in DOE-SY1920-053, Student would be able to stay at Private School at the DOE's expense under 'stay-put' during the pendency of this due process proceeding and any appeals that were filed on Parent's behalf. Parent used that as a big reason that Parent signed the enrollment contract with Private School on June 22, 2021. Parent has also authorized Parent's attorney to file appeals for as long as necessary. Parent, Tr.V1, 29:22-30:9, 44:6-20, 48:11-49:12; P-Ex.3, p.124-125.

#### Private School

110. Private School is a for-profit private school for children with special needs whose program is based on ABA teaching and utilizes the VB-MAPP as the primary basis for creating programming for students. Private School Director, Tr.V1, 71:9-77:19, 88:2-20.
111. Private School Director currently acts as the sole speech-language pathologist and BCBA and provides the minutes in Private School's cost analysis for both speech-language, BCBA consult, and Mandatory RBT supervision. Private School Director, Tr.V1, 112:7-14, 114:2-16; P-Ex.3, p.125.
112. Private School developed an Individualized ABA Education Program for Student for the 2020-2021 and 2021-2022 school years, dated June 2, 2021 (hereinafter "IAEP-06/02/2021"). P-Ex.3, p.127-135.
113. The results of Student's VB-MAPP are embedded in the IAEP-06/02/2021. Private



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]).

116. Student does not receive occupational therapy at Private School, nor is any occupational therapy included in Student's cost analysis for the 2021-2022 school year. P-Ex.3, p.124-125; R-Ex.45, p.186.
117. Private School provides supplementary aids and supports to Student, however, does not include a list of these supplementary aids and supports in Student's IAEP-06/02/2021. The list of supplementary aids and supports produced as evidence in this case is a free-standing document and was prepared only at the request of Mr. Peck and possibly others for Student's prior due process hearing. Private School Director, Tr.V1, 104:6-105:7, 130:21-131:3, 131:20-132:14, 133:1-6; P-Ex.3, p.136.
118. The list of supplemental supports including assistive technology prepared for litigation by Private School Director includes the following:
- RBT daily/weekly rotation for generalization
  - Reverse inclusion opportunities
  - Parent communication books
  - Timers
  - Extra time
  - Prepare student for upcoming transitions
  - Preferential seating
  - Table divider for center learning
  - Visual Aides (*sic*)
  - Visual schedule
  - Math Manipulatives
  - Access to preferred sensory items and activities
  - Token system
  - First-then system
- P-Ex.3, p.136.

119. Private School Director is under the belief that Parent's ability to pay the cost of the enrollment contract is dependent upon 'stay-put' and the potential outcome of this due process case. Private School Director did not explore any of Parent's ability to pay the costs of the enrollment contract. Private School Director, Tr.V1, 115:21-118:8.
120. Parent signed the enrollment contract for Private School for the 2021-2022 school year on June 22, 2021. The total estimated cost for Student's education and related expenses under the cost analysis for the 2021-2022 school year is Two Hundred Fifty Thousand Five Hundred Thirty-Three Dollars and Seventy-Seven Cents (\$250,533.77). P-Ex.3, p.125.
121. Private School's school year for 2021-2022 runs from August 16, 2021 to July 29, 2022. P-Ex.3, p.124.
122. Parent did not pay the Two Hundred Fifty Dollar (\$250) deposit that is typically due at the time the enrollment contract is signed. Parent asked for it to be deferred. Private School Director, Tr.V1, 116:18-23; P-Ex.3, p.124.

## V. CONCLUSIONS OF LAW

### IDEA framework

The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91, 102 S.Ct. 3034, 3037-3043 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F.Supp.2d 89, 98 (D. D.C. 2008) (*citing* 20 U.S.C. §1400(d)(1)(A)). A FAPE includes both special education and related services. H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.



Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education. *Id.* To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.” *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988). It is “a written statement for each child with a disability that is developed, reviewed, and revised” according to specific detailed procedures contained in the statute. H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22. The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs. H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048. However, the United States Supreme Court, in *Andrew F. v. Douglas County School Dist.*, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335; *see also, Blake C. ex rel. Tina F. v. Hawai’i Dept. of Educ.*, 593 F.Supp.2d 1199, 1206 (D.

Hawai`i 2009).

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

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

A. Petitioners failed to prove that the IEP-05/12/2021 is not appropriate when the IEP team failed to discuss portions of Student's ESY services

Petitioners' first issue was dismissed after the presentation of Petitioners' case-in-chief, however Petitioners argue in their closing brief that the issue should not have been dismissed due to the admission of the audio/video recordings of the IEP meetings being sufficient to establish the evidence necessary for Petitioners' to overcome the motion to dismiss. This Hearings Officer agrees and reconsiders the dismissal of Issue #1 in the Complaint and Prehearing Order.

As Petitioners' have presented argument for appellate purposes, this Hearings Officer will also provide the necessary analysis for this issue in the event an appeal is taken.<sup>9</sup>

A school must provide ESY services only if the child's IEP team determines that the services are necessary 'for the provision of FAPE to the child.' *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9<sup>th</sup> Cir. 2008). To qualify for extended school year services, "a claimant seeking an ESY must satisfy an even stricter test, because 'providing an ESY is an exception and not the rule under the regulatory scheme.'" *N.B.*, 541 F.3d at 1211, *quoting Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6<sup>th</sup> Cir. 2007) *quoting Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6<sup>th</sup> Cir. 1990), *cert. denied*, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); *see also Dep't of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 \*7 (D. Hawai'i 2019) (holding that ESY is "educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information during a break in regularly scheduled classes, such as during the summer."). The standard for ESY is higher than the standard for the provision of special education and related services due to the requirement to show that the benefits the student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during school breaks. *Id.*, *quoting MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4<sup>th</sup> Cir. 2002); *see also K.K. ex rel. K.S.K. v. Hawai'i*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279

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<sup>9</sup> This Hearings Officer notes that based on the Order filed in this case that dismissed Issue #1 with prejudice, Petitioners may not have presented a full argument on this issue in their closing brief. Additionally, Respondents did not argue Issue #1 in their closing brief based on the dismissal, so therefore the analysis rendered in this section would be for appellate review purposes as to Issue #1.

(6<sup>th</sup> Cir. 2004) (confirming that “it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.”).

In this case, Student was determined to be eligible for ESY services and Petitioners’ argument centers around the discussion as to the appropriateness of Student’s access to non-disabled peers during the ESY session and the frequency of ESY to individualize Student’s program.

1. Discussion regarding access to non-disabled peers

The IDEA provides that “procedures to assure that, to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...” *Sacramento City Unified School Dist., Bd. of Educ. v. Rachel H. by and through Holland*, 14 F.3d 1398, 1403 (9<sup>th</sup> Cir. 1994) (citing 20 U.S.C. §1412(5)(b)); see also H.A.R §8-60-15. The issue of whether a discussion regarding the education of disabled students with their non-disabled peers has been reviewed in the context of whether this discussion must occur regarding ESY service. As noted above, ESY is an exception to the rule of providing services to disabled children, as it is only required to ensure that students maintain the skills that they learn throughout the regular school year. Other circuits have determined that if a school district does not operate a mainstream educational program during the summer, they are not obligated to create one simply to satisfy the least restrictive environment requirements of the IDEA. *T.M. ex rel. A.M. v. Cornwall Central School District*, 900 F.Supp.2d 344, 352-353

(S.D.N.Y. 2012) (*citing T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 579 (3<sup>rd</sup> Cir. 2000) and *Travis G. v. New Home-Solebury Sch. Dist.*, 544 F.Supp.2d 435, 443 (E.D.Pa. 2008)).

In *Department of Educ., Hawaii v. Z.Y. ex rel. R.Y.*, the Hawai'i District Court determined that a lack of discussion regarding whether a student would receive inclusion opportunities during ESY when a district did not know of the existence of such programs, did not amount to a procedural violation of the IDEA. 2013 WL 6210637 \*14 (D.Hawai'i 2013). Even if the failure of the IEP team to discuss inclusion opportunities or the least restrictive environment placement for Student at the IEP meetings on January 20, 2021, February 4, 2021, and May 12, 2021 amounted to a procedural violation of the IDEA, Petitioners must still prove that any such violation resulted in a lost educational opportunity for Student, significant infringement of parental participation, or a deprivation of educational benefits.

The record in this case reflects that the IEP team discussed with Parent the move for Student from Private School's private separate facility setting to Home School's general education. Parent was aware that Student's IEP proposed Student entering the general education program at Home School. Parent was given many opportunities to ask questions throughout the IEP meetings, during the transition meeting, and after the transition meeting when Parent met with Principal. During these discussions, Parent did not raise a concern that Student would not have access to non-disabled peers at Home School's ESY program. *See e.g.* FOF 53-58, 63-66, 80, 82-83, 102.

Although the IEP-05/12/2021 presented to Parent by Home School in this case indicated a start date during the 2020-2021 school year, the record is that Student was awarded tuition reimbursement for the 2020-2021 school year at Private School. FOF 17, 93. Even if the IEP team's failure to initiate the discussion of the least restrictive environment for ESY with Parent

at the IEP meetings, Petitioners cannot prove that it resulted in any lost opportunity for Student. Parent was not forced to enroll Student in another program due to the failure of the team to discuss mainstreaming Student, as Student was already secured in Private School for the summer 2021.

2. Discussion of the frequency of ESY to individualize Student's ESY program

Petitioners also argue that the IEP team did not discuss the frequency, or length of day, of Student's ESY program to individualize the ESY program to Student's unique needs. Petitioners claim that since Principal simply told Parent that Home School's ESY program was four (4) hours a day, Monday through Friday, that it was not tailored to meet Student's unique needs. This is not supported by the record in this case.

At the IEP meetings on February 4, 2021 and May 12, 2021, the IEP team discussed Student's ESY eligibility and then returned to further discuss the services to be provided to Student during ESY after the IEP team had discussed the services that would be provided to Student during the regular school year. FOF 53-58, 80, 82. It was agreed by the IEP team that Student would receive thirty (30) minutes of special education each in the areas of reading, writing, math, and social/behavioral. FOF 55. This totaled six hundred (600) minutes per week of special education services to focus on Student's needs in those areas, which was equal to about two (2) hours per day of special education services. Student was also to receive thirty (30) minutes per week of speech-language therapy and sixty (60) minutes of occupational therapy for the entire ESY summer session. FOF 57-58. Principal's explanation that students only needed to attend ESY to receive their services but Student could attend the four (4) hours a day program, was to clarify to Parent that while Student needed less than four (4) hours a day for Student's ESY services of special education, speech-language, and occupational therapy, Student could

attend for the entire ESY school day. FOF 56. The IEP team specifically addressed the frequency of Student's ESY services to provide Parent with an explanation as to how many minutes of services that Student would receive for ESY to meet Student's needs. The additional time for Student to attend ESY was optional for Parent to have Student attend, but the team explained that it would be beneficial for Student to attend for the full session.

Petitioners' have failed to prove that the IEP-05/12/2021 is inappropriate due to the insufficient discussion by the IEP team of Student's ESY services and educational placement.

B. Petitioners have failed to prove that the IEP-05/12/2021 was not appropriate where there were insufficient discussions of Student's behavioral needs during the supplementary aids section of the IEP development process and/or where there are insufficient behavioral interventions described in the IEP-05/12/2021

Petitioners second issue asks whether Respondents denied Student a FAPE where the IEP team did not sufficiently discuss Student's behavioral needs during the supplementary aids section of the IEP development process. Petitioners also argue that the IEP-05/12/2021 fails to list sufficient behavioral interventions for Student in the supplementary aids section of the IEP-05/12/2021. Petitioners' argument centers largely around the failure of the IEP team to include the specific language of the BIP into the IEP-05/12/2021 based on a Hawai'i District Court ruling in *Department of Education, Hawai'i v. L.S. ex rel. C.S.*, 2019 WL 1421752 (D. Hawai'i 2019).

In *L.S.* the U.S. District Court Judge found that the IEP team's failure to address the student's behaviors in the student's IEP was a denial of FAPE. The student in that case had major behavioral problems, including leaving class and refusing to return, making verbal threats to staff and peers, and refusing to obey the teacher's instructions, which affected the student's ability to access her education. *Id.* at \*12. In that case, the IEP team did not provide a draft IEP nor a draft behavioral support plan to the parent prior to the IEP meeting. *Id.* Components of the

behavioral support plan was not included in the student's IEP and the Court found that the school district could amend or curtail the behavior support plan at any time without parent's knowledge or input, and therefore it infringed on the parent's ability to meaningfully participate in the development of the student's IEP. *Id.* at \*11-12.

This case is distinguishable from the facts of the *L.S.* case. First, Student's behaviors, while determined to be a need for which goals and objectives were created, were not preventing Student from making appropriate educational progress, unlike what the Court found in the *L.S.* decision. *Id.* at \*12; FOF 38. Second, in this case, Student's IEP-05/12/2021 did include a number of behavioral supports and interventions in the supplementary aids and supports section of the IEP-05/12/2021, which were based upon Student's needs. FOF 92-93. For example, Student's supplementary aids and supports included daily sensory supports, visual supports, priming before transitions and non-preferred activities, the use of first/then language, and the use of a token economy. FOF 92. Notably, these supplementary aids and supports are nearly identical to several of the supports provided to Student at Private School. FOF 118.

This Hearings Officer also notes that while the IEP-05/12/2021 does include a supplementary aid and support of a "Behavioral Intervention Plan (BIP)," this is also distinguishable from the behavioral support plan discussed in the *L.S.* case. A BIP is a document developed by a BCBA, an ABA professional licensed in the State of Hawai'i pursuant to Hawai'i Revised Statutes Section 465D-4, pursuant to the completion of an FBA. FOF 11-13. The BIP must be implemented by an RBT, another certified ABA professional who is supervised by the BCBA to assure that the BIP is being implemented properly to the student's benefit. FOF 11. Unlike a behavioral support plan, the BIP cannot be amended or curtailed without the Parent's



knowledge and input, since the FBA required to change the BIP must be consented to by Parent. *See* H.A.R. §8-60-31(c)(1).

Finally, while Petitioners argue that the DOE committed a procedural violation by having a separate meeting during which the BIP was discussed thoroughly with Parent, Petitioners have failed to prove that this procedural violation rose to the level of a denial of FAPE. Parent was provided the BIP, each component of the BIP was explained by Private BCBA to Parent, and an RBT was assigned to Student in the IEP-05/12/2021 to implement the IEP throughout Student's school day. FOF 84, 92-93. Petitioners have failed to prove that the IEP-05/12/2021 failed to include sufficient behavioral interventions or that the IEP-05/12/2021 because the discussions for behavioral interventions for Student was insufficient.

- C. Petitioners have failed to prove that the IEP-05/12/2021 was not appropriate where the currently provided classroom supports/accommodations were not discussed and where the supplementary supports were insufficient where no assistive technology or other important supports were not described in the IEP-05/12/2021

Petitioners argue that Student's IEP-05/12/2021 did not include supports or accommodations that were being provided by Private School and that the IEP team failed to discuss these supports that Private School was providing to Student.

As an initial matter, based on Private School Director's testimony, it does not appear that the list of supplemental supports including assistive technologies was provided to Home School as part of Student's IAEP-06/02/2021. *See* FOF 117. Therefore, knowledge of such supports purportedly provided at Private School cannot be imputed to the IEP team at the time of the IEP meetings in January, February and May 2021. However, the IEP team did discuss supports that were being provided at Private School, nonetheless. Several of the IEP team members did go to Private School to observe Student as part of the reevaluation process. FOF 22, 25, 37. DOE SLP noted that no assistive technology was being used with Student for communication, as

Student could communicate verbally. FOF 24. DOE OT noted that Student used kinetic sand box for sensory input, used pencils, markers, and crayons with Student's right hand, and required breaks for movement to continue activities. *See* R-Ex.45, p.186-192. DOE BCBA also discussed during the IEP meetings that Private School used visual aids and a token economy with Student. *See* R-Ex.226, 1/20/21 IEP [29:39-39:55].

As noted *supra*, Student's IEP-05/12/2021 also includes a list of supplemental aids and supports that are also included on the list of supplemental supports developed by Private School Director. FOF 118. Each of the supplemental aids and supports in the IEP-05/12/2021 is also further defined with examples in the clarifications of supports and services in the IEP-05/12/2021. FOF 93.

Petitioners fail to suggest any additional supplementary supports that would be necessary for Student to access Student's education under the IEP-05/12/2021. Petitioners have the burden of proving each issue by a preponderance of the evidence, and Petitioners have failed to do so. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537 (2005); *Van Duyn ex rel. Van Duyn v. Baker School Dist.* 5J, 502 F.3d 811, 820 (9<sup>th</sup> Cir. 2007).

D. Petitioners have failed to prove that the IEP-05/12/2021 is inappropriate 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 lost educational opportunity for Student and an impairment of parental participation

Petitioners next allege that Respondents denied Student a FAPE by failing to include Student's current providers from Private School in the IEP development meetings. While Petitioners claim that "[t]here is a legal requirement that the school seek the participation of a private provider" in Hawai'i,<sup>10</sup> Petitioners have not cited to any statute or legal precedent to

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<sup>10</sup> *See* Petitioners' Closing Brief, filed October 15, 2021, page 10.

support this claim. Indeed, the IDEA and the Hawai'i codification of the IDEA requires that the IEP team include: 1) the parent(s) of the student; 2) not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment); 3) not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student; 4) a representative of the department, who is qualified to provide the specially designed instruction to meet the student's needs, is knowledgeable about the general education curriculum and the available of the resources of the department; 5) an individual that can interpret the instructional implications of evaluation results; 6) at the discretion of the parent or the department, other individuals who have knowledge or special expertise regarding the student, and 7) whenever appropriate, the student. H.A.R. §8-60-45(a); 20 U.S.C. §1414(d)(1)(B). Only if the DOE determines that a student will be placed at a private school or facility, the department shall ensure that a representative of the private program attends the meeting. H.A.R. §8-60-49(a).

While Petitioners cite to *Doug C.*, 720 F.3d at 1047, to support their contention that Private School representatives were required to be at Student's IEP development meetings, the Court in *Doug C.* focused on the school district's failure to include *the parent* or a representative from the private agency as participants in the IEP meetings and the failure for the team to consider placement of the student at the private program in which that the student was enrolled. *Id.*

The facts of this case are distinguishable from the facts in *Doug C.* Here, Parent was present at the IEP meetings and was able to provide information to the IEP team about the services that Student was receiving at Private School. FOF 42, 74. Several of the IEP team members were able to observe Student at Private School to see what supports and services that

Student was receiving at Private School. FOF 22-27, 37. The IEP team also had Student's VB-MAPP from Private School and the results of the reevaluation conducted with Student to determine Student's baseline levels and needs for Student's IEPs. FOF 43. Respondents were also familiar with the services offered to Student at Private School based on the Decision in DOE-SY1920-053 and the itemized billing to Private School for Student's education for the 2020-2021 school year. FOF 18. Finally, the IEP team did discuss the academics and non-academic benefits of Private School, as well as the effect that Student would have on the teachers and other students as part of the least restrictive environment continuum. FOF 63-66, 83. After a thorough discussion, the IEP team determined that despite the benefits that Student was receiving at Private School, the least restrictive environment in which Student could receive services was the general education setting. After the conclusion of the IEP meetings and the transition meeting by the IEP team, Parent was satisfied with the offer of FAPE made by Home School. FOF 105. It was not until speaking with Parent's attorney and Private School Director that Parent decided that the IEP-05/12/2021 was supposedly insufficient.<sup>11</sup> FOF 106-108.

Petitioners have not suggested what additional information Private School personnel would have been able to provide to the IEP team that the IEP team did not already possess. Petitioners have failed to meet their burden of proving that the IEP-05/12/2021 was not appropriate where Private School personnel were not at the IEP development meetings. Petitioners have further failed to prove any lost educational opportunity that resulted from Private School personnel not being present at the meeting.

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<sup>11</sup> This Hearings Officer notes that Parent also indicated that Parent's main concern was not the IEP itself, but whether the school would be able to implement the IEP. As Parent rejected the IEP before Home School could even attempt to implement the IEP, this is not an issue relevant to this proceeding.

- E. Petitioners have failed to prove that the IEP-05/12/2021 is inappropriate where Student needs to successfully change from Student's current private program is unaddressed in Student's IEP document and where the transfer plan relies upon Private School's participation

Petitioners' final issue is that Student's IEP-05/12/2021 is inappropriate because Student's needs to successfully move from Private School to Home School is unaddressed in the IEP-05/12/2021. Petitioners also allege that the transition plan prepared by the IEP team requires the participation of Private School and Private School is not willing to provide the assistance for free.

1. Student's transition needs

The IDEA does not require a transfer plan from a private setting to a public setting to be included in a student's IEP. *See James M. ex rel. Sherry M. v. Hawai'i*, 803 F.Supp.2d 1150, 1164 (D. Hawai'i 2011) (holding that the school district was under no obligation to provide transition services for a student moving from a private school to a public school); *B.B. v. Hawai'i Department of Education*, 486 F.Supp.2d, 1042, 1056-1057 (D. Hawai'i 2006) (holding that the IDEA requires an IEP to have a statement of needed transition services in some circumstances, but does not mandate such services when a transition from private to public school takes place); 20 U.S.C. §1414(d)(1)(A).

Nonetheless, the record in this case demonstrates that the IEP team did work with Parent to develop a transition plan to successfully transfer Student from Private School to Home School. The IEP team had an entire meeting to discuss the issues and plan involved to move Student and address Student's needs during the transition. FOF 97-101. The team asked Parent about possible items or activities of preference of Student for pairing the DOE personnel and Home School itself, a plan for easing Student into Home School based on less demands at the beginning and then gradually increasing demands on Student as Student became more

comfortable with the new setting, and possibly working with Student's providers at Private School to determine what strategies work for Student to ease transitions.

Further, Student's IEP-05/12/2021 did provide some supplementary aids and supports to assist with Student's transition into Home School from Private School. The IEP-05/12/2021 included frequent meetings of the IEP team to check on Student's status, ABA services for Student by a BCBA, an RBT assigned to Student to address any needs or issues that may arise. FOF 92-93. Simply because the actual transition plan itself was not included in the IEP-05/12/2021 does not make the IEP-05/12/2021 inappropriate, since it is not required under the IDEA.

## 2. Participation by Private School

Petitioners argue that any transition of Student from Private School to Home School would necessitate the participation of Private School providers at a cost to Private School, which Private School was not willing to bear. Petitioners have not presented any evidence or legal authority to support their position.

While the IEP team did discuss at the transition meeting that it would be helpful for DOE providers to meet with Private School providers to work on 'pairing' with Student, the team also noted that if it does not happen, there are alternative methods that the team can use to work on Student's transition. FOF 98. In fact, Parent suggested that since Private School was limiting access to Student and Private School personnel due to health and safety concerns, Parent offered to bring Student to a location where the DOE staff can use Student's preferred items or activities to work on pairing. FOF 99. Parent also agreed to provide the DOE personnel with some highly reinforcing items for Student to conduct the transition process. FOF 100.

While it is a fair assumption that Private School has a vested interest in trying to bill the DOE for additional services to assist with Student's transition services, Petitioners have also not provided any evidence that Private School was unwilling to assist with Student's transition to Home School. During Private School Director's testimony regarding a possible transition for Student from Private School to Home School, Private School Director never provided testimony that Private School was unwilling to work with the DOE to accomplish Student's transition. *See* Private School Director, Tr.V1, 102:2-104:1, 122:14-123:19. Finally, as Student's IEP-05/12/2021 was completed on May 12, 2021 and the transition plan was discussed as early as May 19, 2021, the DOE could have initiated the transition of Student during the time when Private School was still being paid for by the DOE under the tuition reimbursement order from the Decision in DOE-SY1920-053. FOF 17. Since the tuition reimbursement was for Private School's school year that ran from August 2020 to July 2021, Respondents could have accomplished at least the start of Student's transition prior to the payment of services for Private School being completed.

Petitioners have failed to prove that the IEP-05/12/2021 is inappropriate based on Student's needs for transition not being addressed or the alleged failure to agree to participate in such a transition by Student's private providers.

## **VI. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the allegations in the Complaint by a preponderance of the evidence. The IEP-05/12/2021 is an educational program reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. Respondents have not committed any procedural violations that resulted in a lost

educational opportunity for Student, a significant infringement on parental participation, or a deprivation of educational benefits. As Petitioners have failed to prove that Respondents denied Student a FAPE, Petitioners' requests for the IEP team to revise Student's IEP and for tuition reimbursement to Private School for the 2021-2022 school year are denied.

### **RIGHT TO APPEAL**

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

DATED: Honolulu, Hawai'i, November 9, 2021.

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