



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

In the Matter of STUDENT, by and through
PARENT,¹

Petitioner(s),

vs.

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

Respondents.

DOE-SY2021-048

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION

Due Process Hearing: September 14-15, 2021
September 23, 2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On June 8, 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 17, 2021.

A prehearing conference was held on July 7, 2021, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Ryan W. Roylo, Esq. (hereinafter “Mr. Roylo”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for September 14-15, 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 12, 2021. Respondents filed their opposition to Petitioners’ Motion on July 15, 2021. Petitioners filed their reply brief in support of Petitioners’ Motion on July 16, 2021. The Hearing on Petitioners’ Motion was held on July 19, 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 22, 2021.

Due to the first available Hearing date being after the original 45-day deadline of August 21, 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 21, 2021 to October 5, 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 13, 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 September 14, 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. Roylo on behalf of Respondents; as well as the assigned court reporter. Petitioners called Parent and Private School Director as their witnesses. Private School Director's testimony was not completed on September 14, 2021, so Private School Director's testimony was resumed and completed on September 15, 2021 and Petitioners also called Principal to testify during their case-in-chief and rested. Due to the late hour of Principal's testimony being completed, Respondents were given the option of starting with their witnesses on the next Hearing date. The parties agreed on the additional Hearing date of September 23, 2021, where Respondents called Student Services Coordinator (hereinafter "SSC") and Special Education Teacher (hereinafter "SPED Teacher") to testify and 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 September 7, 2021. During the Hearing, Respondents objected to any evidence presented by Petitioners that involved communications and meetings related to an August 2021 meeting. Arguments were made on the record and this Hearings Officer refused admission of any

evidence relating to meetings and communications related to the August 2021 meeting. On September 23, 2021, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on October 1, 2021. Any objections to the proposed exhibits were due on October 6, 2021. Neither Petitioners nor Respondents submitted any additional exhibits for consideration in the Decision in this matter.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-019; Exhibit 4, pages 084-085, 091-135, 139-147, 151; and Exhibit 5, page 218, and one (1) audio recording, dated February 23, 2021. Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 005-021; Exhibit 5, pages 027-028; Exhibit 9, page 032; Exhibits 12-14, pages 035-037; Exhibits 16-17, pages 039-042; Exhibits 19-21, pages 044-050; Exhibits 23-28, pages 052-069; Exhibits 30-34, pages 071-076; Exhibit 36, page 078; Exhibits 38-40, pages 080-082; Exhibit 42, pages 084-085; Exhibits 45-46, pages 089-090; Exhibit 52, page 096; Exhibit 54, page 098; Exhibit 57, page 101; Exhibits 61-66, pages 105-119; Exhibit 68, page 121; Exhibit 69, pages 122-157; Exhibit 71, page 159; Exhibit 74, page 162; Exhibit 76, page 164; Exhibit 78, page 166; and Exhibit 88, pages 215-282.

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 5, 2021. Respondents' request was granted and the new Decision

deadline in this case is set for November 19, 2021. The deadline by which the written closing briefs were to be submitted was Thursday, October 21, 2021. Both parties timely submitted their closing briefs on that date.

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

II. JURISDICTION

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

III. ISSUES PRESENTED

Petitioners assert eight (8) issues in the Complaint to be addressed at the Hearing:

1. Whether the DOE assessed Student sufficiently to be able to develop an appropriate Individualized Education Program (hereinafter “IEP”).
2. Whether the IEP developed on February 23, 2021 (hereinafter IEP-02/23/2021”) 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 or an inclusion setting.
 - b. Student could have benefitted from an inclusion setting and/or some exposure to non-disabled peers.
 - c. There was no discussion of the frequency (length of day) of ESY to individualize Student’s program.
3. Whether the IEP-02/23/2021 is appropriate where there were insufficient discussions of Student’s behavioral needs during IEP development process and/or whether there are sufficient behavioral interventions described in the IEP-02/23/2021 to address Student’s needs.
4. Whether the IEP-02/23/2021 is appropriate where the current (privately-provided) classroom supports/accommodations were not discussed. Whether the supplementary

supports are sufficient for Student to succeed in an inclusion setting, where no assistive technology and other important supports are not described.

5. Whether the IEP-02/23/2021 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.
6. Whether the IEP-02/23/2021 is appropriate where there was insufficient discussion of transportation as a potentially needed related service and/or provision/description of transportation in Student's IEP.
7. Whether the IEP-02/23/2021 is appropriate where Student's needs to successfully change from Student's private program to the public program is unaddressed in the IEP-02/23/2021 document. Additionally, where a means to successfully transfer between the private program and the publicly-offered program has not been addressed as part of the IEP-02/23/2021.
8. Whether the Least Restrictive Environment (hereinafter "LRE") as described in Student's IEP-02/23/2021 is vague and impacts Parent's ability to enforce and/or monitor its implementation.

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"). Petitioners' Exhibit 4, page 151 (hereinafter referenced as "P-Ex.4, p.151").
2. Private School Director has a bachelor's and master's degree in communication sciences and disorders. Testimony of Private School Director, Transcript Volume 1, page 80, line 18 through page 81, line 3 (hereinafter referenced as "Private School Director, Tr.V1, 80:18-81:3"); 86:1-18.
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, 87:2-90:6, 92:20-93:1.
4. Private School Director was contracted by the DOE to develop and guide an ABA VB program at Home School from [REDACTED]. As part of this program, Private School Director worked with the teachers and staff, provided training for the ABA VB program, and provided registered behavior technicians (hereinafter “RBTs”) for the program at Home School. Private School Director, Tr.V1, 93:3-95:4.
 5. Private School Director is qualified to testify as an expert in the provision of services for students [REDACTED] and the services that they should receive. Private School Director, Tr.V1, 107:21-109:8.
 6. SSC is the student services coordinator for Home School and has been employed by the DOE since [REDACTED]. SSC has a bachelor’s degree in elementary education and a master’s degree in special education and is licensed in the State of Hawai’i as a general education teacher for grades kindergarten through sixth grade and as a special education for grades kindergarten through twelfth grade. SSC, Tr.V3, 328:10-329:13.
 7. SPED Teacher is a licensed special education teacher in the State of Hawai’i employed by the DOE since [REDACTED]. SPED Teacher has a bachelor’s and a master’s degree in education. SPED Teacher is also licensed as a BCBA in the State of Hawai’i. SPED Teacher, Tr.V3, 364:9-365:7.

Student’s background

8. Student is [REDACTED] years old and has been determined to be eligible for IDEA special education and related services under the eligibility category of [REDACTED]. Student was also diagnosed with [REDACTED] by Student’s pediatric neurologist. P-Ex.1,

- p.002; R-Ex.1, p.006.
9. Student entered Home School's VB program that was created and guided by Private School Director in the 2018-2019 school year. Private School Director, Tr.V1, 93:15-95:12.
 10. Home School had qualified Student for IDEA services in 2018 and created an IEP for Student dated September 28, 2018 (hereinafter "IEP-9/28/2018"). In the IEP-9/28/2018, Student was determined to be eligible under the category of [REDACTED], and had noted needs in the areas of self-help, behavior/social, approaches to learning, cognition and general knowledge, reading, and communication. P-Ex.4, p.092-094.
 11. In the IEP-9/28/2018 Student received the following services, supplemental aids and supports: special education at the frequency of one thousand eight hundred thirty (1830) minutes per week; speech/language therapy at the frequency of three hundred fifty (350) minutes per quarter; BCBA consultation at the frequency of one hundred twenty (120) minutes per month; a program RBT or staff enrolled in the RBT training program at the frequency of daily; a sensory room break at the frequency of daily; a visual aid schedule at the frequency of daily; and a communication log at the frequency of daily. P-Ex.4, p.101.
 12. A revised IEP dated November 9, 2018 was completed for Student after assessments had been completed with Student. The only change in the services and supplemental aids and supports were a reduction in BCBA consult minutes from one hundred twenty (120) to sixty (60) minutes per month due to Student's progress. P-Ex.4, p.104-117; R-Ex.88, p.232.
 13. For the 2019-2020 school year, Parent enrolled Student at Pilot Program, which was a

- non-profit program owned and operated by Private School Director. Private School Director, Tr.V1, 95:9-12, 140:1-10; R-Ex.88, p.236.
14. For the 2020-2021 school year, Student was enrolled at Private School, which is a for-profit program owned and operated by Private School Director. Private School Director, Tr.V1, 95:13-16, 140:11-24.
 15. Since Student's enrollment at Home School's [REDACTED] VB program, which was directed by Private School Director, through Student's attendance at Private School for the 2020-2021 school year, Student's education has been based on the ABA VB programs developed by Private School Director. Private School Director, Tr.V1, 93:21-95:21, 102:8-103:22.
 16. To individualize Student's ABA VB programs, Private School Director uses a tool called the Verbal Behavior Milestones Assessment and Placement Program (hereinafter "VB-MAPP") to determine the development of Student's skills compared to typically-developing children. The VB-MAPP shows areas of skills that Student lacks which are necessary to build upon, and Private School Director uses that assessment to determine what specific skills Student must be taught before moving onto higher learning skills. Private School Director, Tr.V1, 97:17-102:7, 141:20-142:13.
 17. At both Pilot Program and Private School, Student has had one-to-one support from RBTs, who were supervised in delivering Student's ABA VB program by Private School Director. Private School Director, Tr.V1, 107:8-17, 109:10-22, 119:4-20.
 18. Between October 2020 and December 2020, Student did not attend Private School. Private School Director, Tr.V2, 184:5-185:13.

Prior Due Process Hearing and Decision

19. On June 15, 2020, Petitioners filed a Complaint and Resolution Proposal (hereinafter “2020 Complaint”) under DOE-SY1920-055. In the 2020 Complaint, Petitioners alleged various issues regarding the September and November 2018 IEPs, as well as alleging that Respondents denied Student a FAPE by failing to review or revise Student’s IEP annually or prior to the start of the school year. R-Ex.88, p.217-282.
20. A due process hearing was held with Administrative Hearings Officer Charlene Murata (hereinafter “AHO Murata”) in September and November 2020. On February 8, 2021, AHO Murata issued a Findings of Fact, Conclusions of Law, and Decision (hereinafter “Decision-2/8/2021”) addressing the issues in the 2020 Complaint. R-Ex.88, p.215-271.
21. In the Decision-2/8/2021, AHO Murata found that Petitioners failed to prove any allegations regarding Student’s IEP-9/28/2018 and IEP-11/9/2018. AHO Murata did find Respondents denied Student a FAPE by not reviewing or revising Student’s IEP-11/9/2018 by the annual review date or before the start of the 2020-2021 school year. R-Ex.88, p.266-271.
22. As a remedy for the denial of FAPE by Respondents, AHO Murata ordered that the DOE reimburse Parent for Student’s tuition and related expenses for Private School for the 2020-2021 school year. AHO Murata also allowed for direct payments to Private School for Student’s tuition and related expenses. The total amount of reimbursement was not to exceed One Hundred Seventy-Nine Thousand Seven Hundred Thirty-One Dollars and Eighty Cents (\$179,731.80). R-Ex.88, p.280-281.
23. In the Decision-2/8/2021, AHO Murata ordered Student’s IEP team to decide whether

the team needed additional data, information, or assessments to determine Student's current needs. If no additional data, information, or assessments were not deemed necessary, the IEP team was ordered to have an IEP team meeting. R-Ex.88, p.280-281.

Events leading up to the February 23, 2021 IEP meeting

24. As early as August 27, 2020, SSC requested educational records and information from Private School Director regarding Student's educational program, assessments, and other relevant information. Private School Director, Tr.V1, 142:14-144:20; R-Ex.5, p.027.
25. For the requests from Private School, SSC sent Parent consent forms for Parent's signature to provide to Private School for the release of Student's records and information. Parent signed and emailed these documents back to SSC within a few days. R-Ex.17, p.040-042; R-Ex.19, p.044-045; R-Ex.19, p.046-047.
26. On September 22, 2020, Private School Director provided SSC Student's Private School educational program for the 2020-2021 school year and the results of current Student's VB-MAPP assessments from June 18, 2019 and November 1, 2019. Private School Director, Tr.V1, 146:16-152:10; R-Ex.23, p.052-063.
27. SSC acknowledged receiving the documents provided by Private School Director but requested additional information from Private School Director regarding Student's current levels of performance. SSC also requested to do an observation of Student at Private School and speak with one of Student's teachers at Private School. Private School Director, Tr.V1, 152:15-154:7; R-Ex.24, p.064; R-Ex.25, p.065-066; R-Ex.27, p.068.

28. Prior to the February 23, 2021 IEP meeting, several other meeting dates were scheduled, but no meetings were held on those dates. SSC, Tr.V3, 335:9-337:13; *see also e.g.* P-Ex.4, p.120-121; R-Ex.13, p.036; R-Ex.27, p.068; R-Ex.32, p.073-074; R-Ex.33, p.075; R-Ex.38, p.080; R-Ex.39, p.081; R-Ex.42, p.084-085; R-Ex.45, p.089; R-Ex.46, p.090.
29. Between September 2020 and February 2021, SSC continued to request information from Private School regarding Student's current levels of performance to develop an appropriate IEP for Student. *See e.g.* R-Ex.32, p.073-074; R-Ex.34, p.076; R-Ex.46, p.090.
30. On February 9, 2021, SSC did an observation of Student at Private School over a live-feed video system. The view of Student during the live feed did not allow SSC to see others in the room with Student and SSC had difficulty hearing what Student was saying during the observation. R-Ex.62, p.106.
31. On February 10, 2021, Private School Director emailed Student's most recent VB-MAPP assessment results to SSC. Private School Director, Tr.V2, 190:23-194:20; R-Ex.64, p.108-117.
32. On February 11, 2021, SSC emailed Private School Director and requested additional information from Private School Director to develop Student's IEP. This information included Student's schedule; Student's attendance logs; Student's service providers' names; all plans that Private School had for Student; Student's progress reports; behavior data, both raw and charted; data/evidence of inclusion with non-disabled peers; assessments including VB-MAPP, academic, cognitive, speech/language, fine motor/sensory, and gross motor; work samples; data on other services being provided;

- and “any other relevant data.” Private School Director, Tr.V2, 199:3-14; R-Ex.65, p.118.
33. On February 12, 2021, Private School Director provided the requested documents that Private School had and informed SSC that Private School does not keep or obtain the records or documents that were not provided. Private School Director, Tr.V2, 201:3-19; R-Ex.68, p.121; R-Ex.69, p.122-157; R-Ex.71, p.159.
34. On February 19, 2021, SSC was able to speak with one of Student’s teachers at Private School. The telephone conversation that SSC had with Student’s teacher was approximately fifteen (15) minutes. SSC, Tr.V3. 337:21-339:20.
35. SSC documented the following notes from SSC’s conversation with Student’s teacher:
- “Math: [Student] can rote count to 20, is able to identify numerals 1-10, and can give 1-5 upon request. They did not know if [Student] could sort by one-attribute or not, nor if [Student] could compare amounts (eg: 1 vs 3, which one is larger?)
Reading: [Student] can sit and listen to a story. [Student] can interact with the story by pointing and verbalizing. [Student] will answer basic questions about the story. [Student] can recite [the] ABC’s, [Student] can recognize all of the letters in random order (upper and lower case).
Writing: Writing sounds like [Student’s] weakest areas. On [Student’s] own, [Student] tends to use a fist grip, but will use a more regular grip with modeling (they are working on this). [Student] can copy a line and a circle, but is not tracing letters, copying letters or independently writing any letters at this time.
Communication: [Student] speaks in sentences and has at least 100 vocabulary words. [Student] makes eye contact when speaking. [Student] will label things (nouns) as well as actions (such as jumping, sitting). [Student] can ask and answer who, what, and where questions (3 of 5 wh?’s).
Social/behavior: [Student] follows daily routines, as well as directions in class. [Student] plays with peers appropriately, not just parallel play. There are no behavior issues reported.
Other: [Student] knows [Student’s] basic body parts and colors. [Student] is also potty trained.
Regression/Recoupment: I asked how [Student] did following [Student’s] long absence. If the instruction stuck [Student] forgot things while absent. Per [Private School] personnel, there was no regression or loss and [Student] was absent [REDACTED].

Services: I asked what services [Student] had and the names of the provider. Note: This part was odd, as I asked about what specific services [Student] had, the RBT had to go, [the RBT] didn't want to talk about it. Speech was 1st and [the RBT] hesitantly told me that [Private School Director] was the provider, so it appears that [Student] is provided speech services, but [the RBT] said no to OT, PT, or anything else other than the RBT support. R-Ex.76, p.164.

36. No evidence was presented during this Hearing of any documented IEP team meetings at any time between the Decision-2/8/2021 was issued and the February 23, 2021 IEP meeting to discuss any additional assessments, information, or data that the IEP team needed to develop an appropriate IEP for Student, as instructed by AHO Murata.
37. Private School Director was invited to the scheduled IEP meetings between November 2020 and February 23, 2021 but did not attend the meetings for various reasons. Private School Director, Tr.VI, 180:21-182:4, 185:17-187:19, 215:16-216:9, 217:2-8, 222:4-223:9.

IEP meeting on February 23, 2021

38. Student's IEP team met on February 23, 2021 to develop a written IEP for Student (hereinafter "IEP-02/23/2021"). P-Ex.1, p.001-017; R-Ex.1, p.005-021.
39. The IEP team meeting was held via videoconference and during the meeting a draft IEP was displayed through a shared screen with the IEP meeting participants. *See e.g.* P-Ex.5, 2/23/2021 IEP audio recording, approximate time stamp [00:00-02:16] (hereinafter referenced as P-Ex.5, 2/23/2021 IEP [00:00-02:16]").
40. During the IEP meeting, Parent had a number of distractions in the background, including noise coming from a television, other children and people in the home, and Parent having to do different things while the meeting was taking place. Parent, Tr.VI, 21:14-24:25.

41. Parent did provide answers to the IEP team members when asked, which included verifying Student's background and medical information; Student's reading ability; information on Student's behaviors at home; Student's social behavior in playing with Student's siblings and peers; and Student's behaviors during the COVID-19 shutdown period. *See e.g.* P-Ex.5, 2/23/2021 IEP [07:30-08:10], [12:18-13:40], [17:20-19:40], [23:17-26:47], 1:20:50-1:24:45]. Parent would often agree to the proposals made by the IEP team members. *See generally* P-Ex.5, 2/23/2021 IEP.
42. Present at the February 23, 2021 IEP meeting were Parent, Principal, SSC, SPED Teacher, DOE Board-Certified Behavior Analyst (hereinafter "DOE BCBA"), DOE Speech-Language Pathologist (hereinafter "DOE SLP"), and General Education Teacher. P-Ex.5, IEP 2/23/2021 [00:00-01:08]; P-Ex.1, p.017; R-Ex.1, p.021.
43. The agenda for the IEP team meeting on February 23, 2021 did not include a discussion regarding any additional information, data, or assessments that the IEP team would need to develop Student's IEP. P-Ex.5, 2/23/2021 IEP [01:55-02:30].
44. SPED Teacher informed Parent that the IEP team would be discussing all the data that the IEP team had from Private School, interviews, Parent, and other assessments that they had and would tie it all together to evaluate Student's present levels of educational performance (hereinafter "PLEPs").² P-Ex.5, 2/23/2021 IEP [02:31-03:50].
45. The IEP team asked Parent about Student receiving insurance-based ABA services

² 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.

- and Parent told the team that they declined the services for Student the way it was presented to Parent. P-Ex.5, 2/23/2021 IEP [09:17-09:23].
46. The IEP team discussed Student's PLEPs for reading, writing, math, behavior, social skills, communication, and functional skills. During the discussions for Student's behavior and social skills, Parent provided the team with input about Student's behavior. P-Ex.5, 2/23/2021 IEP [10:46-43:40].
47. Parent told the IEP team that Student can maintain Student's behavior in the setting where Student is in now (Private School), with a guide/skills trainer with Student throughout the school day. Parent told the team that at home, Student demonstrates more resistance and Parent has to be more consistent with reminders to get Student to comply. P-Ex.5, 2/23/2021 IEP [17:20-19:45].
48. For social skills, Parent noted that Student does not engage in parallel play at home and that instead Student just wants whatever Student's siblings have. Parent noted that Private School allows for Student to engage in more parallel play. P-Ex.5, 2/23/2021 IEP [23:17-26:47], [33:55-36:33].
49. SSC also provided information to the IEP team about the observation SSC had of Student at Private School for social skills. SSC told the team that at Private School, Student would first interact with other students, but then return to Student's own play, but then would be prompted to reengage with other students by Student's one-to-one aide. P-Ex.5, 2/23/2021 IEP [26:50-29:19].
50. After discussing Student's PLEPs, the IEP team reviewed Parent's concerns and discussed Student's interests. Parent told the team that Student enjoyed music [REDACTED]. P-Ex.5, 2/23/2021 IEP [43:42-50:50].

Principal interjected and told Parent that Principal highly encouraged the further development of this skill set for Student. P-Ex.5, 2/23/2021 IEP [50:50-51:18]. SPED Teacher suggested that this could be a good approach to teach Student and reinforce learning. P-Ex.5, 2/23/2021 IEP [51:38-52:02].

51. At that point in the meeting, DOE BCBA told the IEP team that DOE BCBA needed to leave and asked if the team had any questions related to Student's behaviors. The IEP team raised the proposal of parent education and DOE BCBA addressed that proposal and then left the meeting. P-Ex.5, 2/23/2021 IEP [52:02-53:40].
52. The IEP team then discussed Student's goals and objectives to address Student's areas of need as identified in Student's PLEPs. P-Ex.5, 2/23/2021 IEP [55:06-1:20:32].
53. After the goals and objectives were discussed, the IEP team then discussed Student's eligibility for ESY. Parent told the team that Student had regressed a lot with Student's behaviors, including [REDACTED] [REDACTED] during the COVID-19 shutdown where Student was at home and not receiving services. P-Ex.5, 2/23/2021 IEP [1:21:40-1:23:42].
54. During this discussion, Principal interjected and suggested that the IEP team consider the nature and severity of Student's disability to determine Student's eligibility for ESY. P-Ex.5, 2/23/2021 IEP [1:24:46-1:25:00].
55. The IEP team further discussed Student's needs based on Student's VB-MAPP, which indicated that Student had greatest needs in the social skills, intraverbal skills, and group skills. The IEP team then agreed that Student would be eligible for ESY services based on the nature and severity of Student's disability and the resulting

- needs shown in Student's VB-MAPP assessment. P-Ex.5, 2/23/2021 IEP [1:25:00-1:28:08].
56. The IEP team then had a lengthy discussion regarding the number of days that Student would be on break from school before starting ESY services. The team ultimately decided that a break of nine (9) days was appropriate before Student began ESY services. SPED Teacher told Parent that the school would continue to collect data to see if there are any changes that needed to be made for the number of days before Student began ESY services. P-Ex.5, 2/23/2021 IEP [1:28:18-1:36:02].
57. At a later time during the IEP meeting, Principal informed Parent that Home School's ESY program was not all day, that it is just a morning program. Parent stated that Parent was okay with that. P-Ex.5, 2/23/2021 IEP [1:38:05-1:38:24].
58. The IEP team moved onto discussing the services that Student would receive in Student's IEP, which were explained to Parent as the amount of time needed to accomplish Student's IEP goals and objectives. P-Ex.5, 2/23/2021 IEP [1:37:20-1:38:01].
59. The number of minutes for Student's special education services was proposed for six hundred (600) minutes per week which translated into around two (2) hours per day. SSC suggested nine (900) minutes per week, but Principal and SPED Teacher agreed that the six hundred (600) minutes per week were appropriate to start with. P-Ex.5, 2/23/2021 IEP [1:38:30-1:39:16].
60. When asked by the IEP team at this time in the meeting, Parent confirmed that Student was still attending Private School. P-Ex.5, 2/23/2021 IEP [1:39:45-1:40:01].
61. The IEP team then discussed where Student would receive the special education

- services and the IEP team decided that Student would benefit from receiving the services in the general education environment due to factors such as peer modeling, and interaction with peers. The team noted that the team would further discuss Student's least restrictive environment in more detail later during the meeting. P-Ex.5, 2/23/2021 IEP [1:40:43-1:42:31].
62. DOE SLP proposed that Student receive three hundred sixty (360) minutes of speech-language therapy per quarter, which equated to around two (2) sessions per week. DOE SLP also stated that there was no need for speech-language services during ESY since all the adults in the ESY program would be communicating with Student throughout the day to work on Student's skills. Parent was asked if Parent agreed with what DOE SLP had suggested, and Parent agreed. P-Ex.5, 2/23/2021 IEP [1:42:32-1:43:41].
63. Parent was asked by the IEP team if Student needed transportation as service and Parent told the IEP team that Parent takes Student and picks Student up from school, so it was not necessary at this time but could be addressed later if Student eventually caught the school bus. P-Ex.5, 2/23/2021 IEP [1:43:48-1:44:40].
64. The IEP team then moved on to discussing Student's supplementary aids and supports. The IEP team decided that Parent education would be useful at a frequency of sixty (60) minutes per month. P-Ex.5, 2/23/2021 IEP [1:44:45-1:46:39].
65. The supplementary aid of visual aids was discussed, and SSC informed the IEP team that SSC did not notice if there were any particular visual supports provided at Private School. Parent told the IEP team that Private School uses visual supports. P-Ex.5, 2/23/2021 IEP [1:46:40-1:48:10].

66. Parent was asked if Private School used a token economy and Parent did not know. The IEP team decided not to add token economy as a supplementary aid and support for Student based on that information from Parent. P-Ex.5, 2/23/2021 IEP [1:48:15-1:48:30].
67. SPED Teacher suggested that Student receive timed warnings before transitions or changes in Student's routine as a supplementary support, so that was added. P-Ex.5, 2/23/2021 IEP [1:48:33-1:48:48].
68. General Education Teacher suggested that Student receive a supplementary aid of math manipulatives, and the team agreed to add that to Student's IEP. P-Ex.5, 2/23/2021 IEP [1:51:09-1:52:07].
69. The IEP team then moved onto the discussion of Student's LRE. SPED Teacher explained the continuum to Parent as the most access to general education curriculum alongside Student's peers and still be able to access Student's education. P-Ex.5, 2/23/2021 IEP [1:54:22-1:55:50].
70. The IEP team discussed the general education setting for over eighty percent (80%) of the school day. General Education Teacher explained what the general education inclusion class setting would look like for Student and Parent told the team that the setting sounded good. Both SPED Teacher and Principal emphasized that the more Student is in the general education setting, the smaller the gap gets between Student and Student's general education peers. Principal suggested that the general education setting was the most appropriate for Student. P-Ex.5, 2/23/2021 IEP [1:55:53-1:59:30].
71. SPED Teacher then explained the other settings on the least restrictive environment

continuum briefly but the IEP team did not further discuss any of the other LRE settings on the continuum. P-Ex.5, 2/23/2021 IEP [1:59:30-2:00:31].

72. Parent agreed with the IEP team and said “yes, that’s fine.” P-Ex.5, 2/23/2021 IEP [2:00:32-2:00:38].
73. SPED Teacher suggested that the IEP team meet at a different time to discuss a transition plan for Student because the DOE would “never ever, ever, ever expect someone to go from a private separate facility to a general education class in one day.” SPED Teacher explained Parent what a transition plan would entail for Student and what information the team would consider for discussion for Student’s transition plan. P-Ex.5, 2/23/2021 IEP [2:00:47-2:01:56].
74. At this time in the IEP meeting recording, Parent gets into a car and tells the team, “yeah, that’s fine, that sounds like a plan,” and the IEP meeting ends shortly after that. P-Ex.5, 2/23/2021 IEP [2:01:56-2:02:18].

Student’s IEP-02/23/2021 and PWN-02/26/2021

75. The written IEP-02/23/2021 document was finalized, and a prior written notice (hereinafter “PWN”), dated February 26, 2021 was created (hereinafter “PWN-02/26/2021”). P-Ex.1, p.001-017; P-Ex.1, p.018-019; R-Ex.1, p.005-021.
76. Student’s IEP-02/23/2021 contains Student’s PLEPs information as discussed in the IEP meeting and a summary of Parent concerns that were expressed during the meeting. P-Ex.1, p.002-004; R-Ex.1, p.006-008.
77. Student’s IEP-02/23/2021 contains nine (9) goals and objectives in the areas of language arts (four (4) goals); physical well-being, health, and motor development; mathematics; social and emotional development (two (2) goals); and approaches to

learning. P-Ex.1, p.006-014; R-Ex.1, p.010-018.

78. The ESY portion of Student's IEP-02/23/2021 reads as follows:

"Due to the nature and severity of [Student's] disabling condition, [Student] will access ESY services after a break of no more than 9 school days, and will continue until the end of the scheduled school break excluding holidays and teacher work days." P-Ex.1, p.015; R-Ex.1, p.019.

79. Student's special education and related services included speech/language therapy for three hundred sixty (360) minutes per quarter and special education for six hundred (600) minutes per week. The location of these services was noted as "General Ed./SPED," and special education was included for ESY. P-Ex.1, p.015; R-Ex.1, p.019.

80. The supplementary aids and services, program modifications and supports for school personnel are listed in the IEP-02/23/2021 as follows:

"Parent Education and Training/frequency: 60 min per MONTH

Visual supports/frequency: daily

Timed warnings before transitions or changes in routine/frequency: daily

Use of manipulatives for math activities/frequency: daily" P-Ex.1, p.015; R-Ex.1,

p.019.

81. The IEP-02/23/2021 clarification of services and supports notes that "Visual supports may include visual schedule, first/then, token economy, pictures in stories, pictures of actions in play." P-Ex.1, p.015; R-Ex.1, p.019.

82. The description of Student's LRE in the IEP-02/23/2021 reads as follows:

[Student's] placement is in a general education setting in which [Student] will access

- non-disabled peers throughout [Student's] school day, except when being pulled to work 1-to-1 or in small groups to receive specially designed instruction or speech services." P-Ex.1, p.016; R-Ex.1, p.020.
83. The PWN-02/26/2021 includes a summary of the offer of FAPE in the IEP-02/23/2021. P-Ex.1, p.018.
84. The PWN-02/26/2021 also includes the following statement "[t]he team discussed the entire LRE continuum, including more restrictive environments such as fully-self contained classroom or a private separate facility." P-Ex.1, p.018.
85. Nowhere in the IEP-02/23/2021 nor the PWN-02/26/2021 is there any indication that the IEP team would be meeting to develop a transition plan for Student's move from Private School to Home School. Principal, Tr.V2, 300:2-301:25, 304:2-306:21; P-Ex.1, p.001-017; P-Ex.1, p.018-019; R-Ex.1, p.005-021.

Private School

86. Private School uses an ABA VB based educational program for Student based on Student's VB-MAPP assessment results. Private School Director, Tr.V1, 95:17-21, 102:18-103:22.
87. Student's VB-MAPP assessment results for both the milestones assessment and the barriers assessment show that Student has made progress while at Private School during the 2019-2020 and 2020-2021 school years. P-Ex.4, p.139-146.
88. Student's VB-MAPP milestones assessment score increased from [REDACTED] in June 2019, to [REDACTED] in November 2019, to [REDACTED] in January 2021. An increase in the milestones scores shows that Student has mastered previously missing skills on the VB-MAPP. Private School Director, Tr.V2, 194:9-195:10. P-Ex.4, p.140, 145; R-Ex.64, p.116.

89. Student's VB-MAPP barriers assessment score decreased from ■ in June 2019 to ■ in January 2021.³ The lower score on the barriers assessment shows progress on the VB-MAPP. Private School Director, Tr.V2, 197:8-198:6; P-Ex.4, p.141, 146; R-Ex.64, p.117.
90. 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.4, p.134-135.
91. Private School provides supplementary aids and supports to Student. These supplementary aids and supports include giving Student extra time; reinforcing Student in between so many demands to Student is not likely to try to escape the demands; and using a token economy system. Private School Director, Tr.V1, 111:9-113:13; P-Ex.4, p.147.
92. Private School does a cost analysis for each student's educational program and related services for the school year, which runs from August to July. The estimated costs for Student's tuition and related services at Private School for the 2021-2022 school year is Two Hundred Forty-Six Thousand Eight Hundred Thirty Dollars (\$246,830.00). P-Ex.4, p.134-135.
93. Parent enrolled Student at Private School under the belief that Student's tuition and related services will be paid by Respondents pursuant to a stay-put order for this Hearing and any subsequent appeals that may result. Parent, Tr.V1, 41:15-42:19.
94. Private School's school year for 2021-2022 runs from August 16, 2021 to July 29,

³ Private School Director noted that there was a score result from the November 2019 assessment but Private School Director did not know why the barriers assessment score showed up on the document as a zero (0). Private School Director, Tr.V2, 197:25-198:12.

2022. P-Ex.4, p.134.

95. At Private School, Student will receive the following services for these estimate

costs:

“Tuition – Monthly - \$50,400.00

Speech-Language Therapy Services – 1,320 minutes per school year - \$3,476.00

BCBA Consultation – 5,040 minutes per school year - \$17,640.00

RBT – 6.5 hours per day - \$106,808.00

Special Education Consultation – 720 minutes - \$1,260.00

Mandatory RBT Supervision – Monthly - \$14,196.00

Reverse Inclusion Program – 11,232 minutes - \$9,921.60

Distance Bridge Program Assessment – Yearly - \$578.00

Functional Behavior Assessment – Yearly - \$2100.” P-Ex.4, p.135.

96. The cost analysis also includes an administrative fee of fifteen percent (15%) and the State of Hawai‘i general excise tax at four percent (4%). P-Ex.4, p.135.

97. The monthly tuition for Private School now includes parent education and training, which was determined to be a need for Student after the 2020-2021 school year.

Private School Director, Tr.V2, 231:9-232:2.

98. The administrative fee included in the cost analysis includes overhead expenses, such as rent and utilities, insurance, legal and accounting fees, administrative salaries, office supplies and materials, and other similar costs. Private School Director, Tr.V2, 232:8-236:5.

99. Student receives the services of the RBT for the entire school day at Private School, which is six (6) hours. The additional half hour (.5) is included in the cost analysis to account for Parent picking Student up late. Private School Director, Tr.V2, 276:11-277:1.

100. The BCBA consultation minutes was estimated based on Student’s 2020-2021 program and the number of minutes that the BCBA consulted for oversight of

- Student's program. Private School Director, Tr.V2, 238:23-241:20.
101. Reverse inclusion at Private school is a program where non-disabled peers from the community are brought into Private School to interact with Student, so allow Student to work on generalizing the skills that Student learns. Private School Director, Tr.V2, 205:1-10.
 102. The Distance Bridge Program Assessment involves Private School determining Student's ability to engage in a distance learning program. Private School Director, Tr.V2, 245:8-14.
 103. The Functional Behavior Assessment is based on data collected on problem behavior for Student, which is only conducted by Private School if the data they are collecting shows that it is necessary to deal with Student's problem behaviors. Currently, Student only displays minor problem behavior at Private School. Private School Director, Tr.V2, 246:13-247:14.
 104. Student's cost analysis includes special education consultation because Private School Director hopes that Student masters the VB-MAPP skills to begin special education in reading, writing, and math that is based on other researched-based curriculum. Private School Director, Tr.V2, 251:18-254:1.
 105. Parent did not pay the Two Hundred Fifty Dollar (\$250) deposit that is typically due at the time the enrollment contract is signed. P-Ex.4, p.134.
 106. For the 2021-2022 school year, Parent requested transportation services from Private School due to Parent's inability to transport Student to and from school daily. Parent, Tr.V1, 19:25-20:24.
 107. Parent applied for free transportation from a private company and was approved.

Private School will be providing RBT services for Student during the transport of Student to and from Private School daily. The cost for the RBT services for Student's transportation for the 2021-2022 school year is One Hundred Dollars (\$100) per day for a total cost of Eighteen Thousand Six Hundred Dollars (\$18,600). Private School Director, Tr.V2, 277:2-278:11; P-Ex.5, p.218.

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 *Endrew F. v. Douglas County School Dist.*, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335; *see also, Blake C. ex rel. Tina F. v. Hawai’i Dept. of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Hawai’i 2009).

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

“The standard for evaluating IEPs, commonly called ‘the snapshot rule,’ is not retrospective.” *K.K. ex rel. K.S.K. v. Hawaii*, 2015 WL 4611947 *16 (D. Hawai’i 2015) (*quoting*

J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist., 626 F.3d 431, 439 (9th Cir. 2010). An IEP is to be judged by looking at whether the IEP goals and goal achieving methods were objectively reasonably calculated to confer Student with a meaningful benefit based on the information available to the IEP team at the time the IEP was created. *K.K.*, 2015 WL 4611947 *16 (quoting *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)). In determining appropriateness, “an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was drafted.” *J.W.*, 626 F.3d at 439 (quoting *Adams v. Oregon*, 195 F.3d at 1149).

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. Respondents denied Student a FAPE by failing to assess Student and obtain sufficient information to develop an appropriate IEP

Petitioners first argument is that Respondents denied Student a FAPE by not assessing Student sufficiently to develop an appropriate IEP. Petitioners’ focus their argument on Student’s need for a one-to-one aide at Private School and the DOE’s policy for not assigning students with individualized instructional support (the term used by the DOE for a one-to-one aide) without first having an ABA professional conduct a functional behavior assessment and determine that the student needs a behavioral intervention plan to be implemented by a registered behavior technician. However, this Hearings Officer finds that based on the totality of the

record, Respondents failed to assess Student and obtain information that were necessary to develop an IEP for Student.

As an initial matter, AHO Murata in the Decision-2/08/2021 ordered the IEP team to determine whether any additional information, data, or assessments were necessary to develop Student's IEP. *FOF 23*. No evidence in the record supports that the IEP team complied with AHO Murata's order and even discussed whether the IEP team required or wanted additional information. The IEP meeting in this case was held on February 23, 2021, about ten (10) school days after the Decision-2/08/2021 was issued. At no time during the IEP meeting on February 23, 2021 did the team discuss whether any additional information, data, or assessments were necessary for the team to gather more information to develop Student's IEP. *See FOF 42-74*.

While this clear disregard for AHO Murata's order is not an automatic denial of FAPE, the record also shows that SSC was still attempting to gather information from Private School Director as late as February 9, 2021. SSC asked Private School Director to provide "Assessments (VBMAPP, *academic, cognitive, speech/language, fine motor/sensory, gross motor, etc.*);" assessments which are regularly conducted by the DOE for reevaluations. *FOF 32*. Prior to that, SSC also requested that Private School Director provide more information on the VB-MAPP results that were provided to SSC, because "providing the scores alone, without any narrative, is not particularly helpful." R-Ex.38, p.080.

Hawai'i Administrative Rules Section 8-60-35 requires that the DOE "shall ensure that a reevaluation of each student with a disability is conducted in accordance with sections 8-60-36 through 8-60-43: (1) If the DOE determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reevaluation; or (2) if the student's parent or teacher requests a reevaluation." The only

limitation on this section is that the reevaluation may not occur more than once per year but shall occur at least once every three (3) years. H.A.R. §8-60-35; *see also* 20 U.S.C. §1414(a)(2); 34 C.F.R. §300.303.

Student's last developed IEP was when Student was enrolled in the VB [REDACTED] program and was based on a report by Student's pediatric neurologist; an academic assessment of Student in the [REDACTED] classroom, where Student's speech was largely unintelligible; and a speech/language assessment, where a true speech sound inventory or measure of intelligibility could not be obtained. *See* R-Ex.88, p.225-227. No new IEP was developed for Student for the 2019-2020 school year, nor the 2020-2021 school year. *FOF 21*. Student's IEP-09/14/2021 also indicated that Student's reevaluation date was scheduled for September 14, 2021. P-Ex.4, p.092.

Rather than conducting Student's reevaluation in preparation for the development of Student's IEP and despite being ordered to conduct a meeting to determine whether a reevaluation would be necessary to gather information to develop Student's IEP, Home School in this case chose to proceed with the IEP development entirely based on data from Private School and verbal input from Parent during the IEP meeting. This is despite the IEP team seeing through the reports from Private School that Student had improved academic achievement and functional performance since Student's last IEP had been developed or evaluation had been done.

Additionally, Parent did inform the IEP team during the IEP meeting on February 23, 2021, that Student was in a 'clinical setting' and received assistance from a guide/skills trainer throughout the school day. *FOF 47*. While the IEP team noted that Parent reported that Student has no behavioral concerns, this information was taken out of context. Parent expressed to the team that Student did have behavioral problems at home and especially during the COVID-19

shutdown. *FOF 53*. SSC was informed by Student's teacher at Private School that Student receives RBT services all day. *FOF 35*. SSC observed that Student's social interactions at Private School was done with the use of prompting by the one-to-one aides present with Student and other students. *FOF 49*. DOE BCBA was present at the February 23, 2021 IEP meeting and SPED Teacher was about to be or was already certified as a BCBA and neither of them raised a concern to the team about the need to determine whether Student would require ABA services or the assistance of a one-to-one aide or paraprofessional as a supplementary aid or support in school. *FOF 7, 42*. The IEP team should have, at a very minimum, discussed whether a functional behavior assessment would be necessary for Student to transition to a less restrictive environment. This did not happen.

Petitioners have proven that Respondents committed a procedural violation by not determining the need for or obtaining additional assessments, data, or information to develop an appropriate IEP for Student. Petitioners have also proven that the failure of Respondents to appropriately obtain additional assessments, data, or information resulted in a lost educational opportunity for Student and significantly infringed upon Parent's participation in the IEP development process.

The Ninth Circuit Court of Appeals in *Doug C. v. Hawaii Dept. of Educ.*, found that "a procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" 720 F.3d 1038, 1047 (9th Cir. 2013) (quoting *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 657 (9th Cir. 2005)). In this case, Student had the services of a one-on-one aide a Private School provided by an RBT and other supports that were unknown by the IEP team. *FOF 35*. While an FBA conducted as part of Student's reevaluation may not have

resulted in an RBT being recommended for Student in school, a strong likelihood that alternative educational possibilities for Student would have been better considered by the IEP team in this case if the team had requested or even discussed requesting an FBA. Additionally, several other assessments that could have been done as part of a reevaluation for Student could have contributed to the provision of additional services or supplementary aids and supports for Student.

This Hearings Officer concludes that Respondents denied Student a FAPE by disregarding the order by AHO Murata in determining whether additional assessments, data, or information were necessary to properly develop an IEP for Student and failing to obtain any current information through such assessments or data collection on Student's levels of educational performance, besides Private School's information, which resulted in a lost educational opportunity for Student.

B. Petitioners have proven that Respondents denied Student a FAPE by failing to discuss Student's access to non-disabled peers during ESY and the frequency of ESY and services and supports to be provided to Student during ESY

Petitioners' next issue asks whether Student's IEP-02/23/2021 was appropriate where the ESY portion of Student's IEP-02/23/2021: 1) involved no discussion of the appropriateness of Student's access to non-disabled peers or an inclusion setting; 2) Student could have benefitted from an inclusion setting and/or some exposure to non-disabled peers; and 3) there was no discussion of the frequency (length of day) of ESY to individualize Student's program.

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 (9th 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 (6th Cir.) *quoting Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), *cert. denied*, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); *see also Dep’t of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 *7 (holding that ESY is “educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information during a break in regularly scheduled classes, such as during the summer.”). 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 (4th Cir. 2002); *see also K.K. ex rel. K.S.K. v. Hawaii*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6th Cir. 2004) (confirming that “it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.”).

In this case, Student was determined to be eligible for ESY services based primarily on the nature and severity of Student’s disability. *FOF 54-55*. During the February 23, 2021 IEP meeting, the team determined that Student would be eligible based on Student’s weaker VB-MAPP domains, including social skills and intraverbal skills. A discussion was held by the IEP team that while Student does not show signs of regression during long breaks from school, Student could benefit by working on Student’s conversational and group skills. During the LRE discussion for Student during the regular school year, both SPED Teacher and Principal suggested that Student would benefit from being in the general education setting due to having

peer models and having goals for Student that directly required access to peers. *FOF 70.*

Despite this heavy emphasis on Student's social skills, the IEP team did not address Student's environment for the ESY program that Student would be attending. *FOF 78.*

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 a morning program, that it was not tailored to meet Student's unique needs.

While the IEP team did have a lengthy discussion as to the number of days that Student would be on break before the ESY services would begin, the IEP team did not discuss the frequency of Student's services during the ESY sessions. *FOF 56-57.* The only discussion of the frequency of services for ESY that took place at the February 23, 2021 IEP meeting was when DOE SLP told Parent that Student would not need speech-language services during ESY since the adults in the program would be speaking with Student and working on Student's speech-language skills throughout the day. *FOF 62.* Otherwise, the IEP team simply informed Parent that special education would be included in ESY; and this information was all that was included in the IEP-02/23/2021. *FOF 78.*

Failure to discuss the provisions for Student's ESY services is a procedural violation, however Student's IEP-02/23/2021 also fails to address the provision of services for Student's ESY. Student's IEP-02/23/2021 does not include any information on Student's access to non-disabled peers for ESY, nor any services, supplemental aids, or supports Student would receive while in ESY. Student's IEP-02/23/2021 simply states that "[d]ue to the nature and severity of [Student's] disabling condition, [Student] will access ESY services after a break of no more than 9 school days, and will continue until the end of the scheduled school break excluding holidays

and teacher work days.” *FOF 78*. Arguably, Student’s IEP-02/23/2021 indicates that special education is included in ESY and speech-language therapy is not included in ESY, however this information is insufficient to determine what Student’s ESY program would entail to address the nature and severity of Student’s disabling condition. *FOF 79*.

Petitioners have proven that Respondents denied Student a FAPE for failing to discuss and include information in the IEP-02/23/2021 regarding the provision of services, supplemental aids, and supports for Student during ESY, along with the frequency of such services, the length of the ESY program for Student, and Student’s access to non-disabled peers during ESY to work on Student’s social and group skills.

C. Respondents denied Student a FAPE by failing to discuss and address Student’s behavioral needs in the February 23, 2021 IEP meeting and in the IEP-02/23/2021

Petitioners argue that the IEP-02/23/2021 is not appropriate because there were insufficient discussions of Student’s behavioral needs during the IEP development process and there are insufficient behavioral interventions described in the IEP to address Student’s needs. As discussed *supra*, the IEP team failed to properly obtain information and assessments regarding Student’s current levels of performance prior to developing the IEP-02/23/2021. Information regarding Student’s behavioral needs is an area in which Respondents should have sought to obtain additional information.

At the February 23, 2021 IEP meeting, DOE BCBA was present and SPED Teacher was in the process of becoming or was already a BCBA. While the IEP team knew from Parent and from SSC’s report that Student had one-to-one services from an RBT being provided in Student’s ABA program at Private School and had these services since Student was in Home School’s VB [REDACTED] program, no one from the IEP team suggested that the team further assess Student’s behaviors in a school setting. SSC obtained minimal information from the observation

SSC made of Student at Private School in February 2021 and it is unclear if that information was shared to the rest of the IEP team members prior to the February 23, 2021 meeting. *FOF 49.*

Yet, despite this lack of information and data on Student's behaviors and potential performance in a public-school setting, the IEP team did not provide Student with any ABA support, consultation, or other behavior interventions in the IEP-02/23/2021. The IEP team did not discuss at the February 23, 2021 IEP meeting whether Student would receive supplementary aids and supports in the general education classroom setting to allow Student to meet Student's goals and objectives as noted in the IEP. The only time this discussion took place was during a discussion of what might be included in a transition plan for Student. *FOF 73.*

An IEP is supposed to be tailored to each student and specific enough so that if the student were to move to a different school, the new school would be able to implement the IEP upon the student's arrival at the school. *Rachel H. v. Department of Education Hawaii*, 868 F.3d 1085, 1090-1091 (9th Cir. 2017); *see also* 20 U.S.C. §1414(d)(2)(i)(I) (allowing for new school districts to adopt an old IEP until the team develops, adopts, and implements a new IEP consistent with Federal and State law). Student's IEP-02/23/2021 places Student in the general education setting where Student would be educated with Student's non-disabled peers throughout the school day except when being pulled to work on one-to-one or small groups for specially designed instruction or speech services. *FOF 82.* In doing so, the IEP-02/23/2021 does not provide any adult supervision or assistance to Student, any ABA consultation or supports, or other behavioral supports or interventions for Student besides "visual supports" and "timed warnings before transitions or changes in routines." *FOF 80.* While the IEP team promised that they would never expect Student to go from a small private setting to a general

education without any kind of supports, that is exactly what Student would receive if the IEP-02/23/2021 were implemented as written. *FOF 73.*

Petitioners have proven that the IEP team failed to discuss appropriate behavioral interventions, supplementary aids, and supports to address Student's needs and the IEP-02/23/2021 fails to include any behavioral interventions and supports due to a lack of information, data, and assessments obtained by the IEP team prior to the development of the IEP-02/23/2021.

D. Petitioners have failed to prove that the IEP-02/23/2021 was not appropriate where the currently provided classroom supports/accommodations were not discussed

Petitioners argue that the IEP team did not discuss Student's current classroom supports or accommodations at the IEP meeting, resulting in Student's IEP-02/23/2021 being inappropriate. Petitioners further argue that the supplementary aids and supports in Student's IEP-02/23/2021 were insufficient for Student to succeed in an inclusion setting where no assistive technology and other important supports are described.

Based on the record, it does not appear that any information regarding the supplemental supports being provided to Student at Private School was provided to the IEP team. While Private School Director did provide all documents that Private School had for Student to SSC, a list of the supplemental supports was not included in any of those documents. *See R-Ex.23, p.52-63; R-Ex.64, p.108-117; R-Ex.69, p.122-157.* Parent also was unable to provide the IEP team with any information on the supports that Student received at Private School except for the one-to-one guide/skills trainer and visual supports. *FOF 65-66.* SSC was not able to see what supports were being provided to Student at Private School during the observation SSC made of Student on February 19, 2021 and Student's teacher at Private School did not provide SSC with much information about supports Student received besides the RBT services. *FOF 35, 65.*

Petitioners have failed to prove that the IEP-02/23/2021 is not appropriate due to the IEP team's failure to discuss Student's current classroom supports or accommodations.

- E. Petitioners have failed to prove that the IEP-02/23/2021 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

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,⁴ Petitioners have not cited to any statute or legal precedent to 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).

⁴ See Petitioners' Closing Brief, filed October 21, 2021, page 16.

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 meeting on February 23, 2021 and at least one of the IEP team members was able to observe Student at Private School. *FOF 30, 40-42.* The IEP team also had Student's educational program and VB-MAPP assessment results from Private School. *FOF 26, 31, 33.* SSC also had obtained information directly from Student's teacher at Private School. *FOF 34-35.* Finally, Private School Director was invited and encouraged to attend the IEP meetings for Student but, for various reasons, did not attend the meetings. *FOF 37.* Petitioners have failed to prove that Respondents denied Student a FAPE by failing to obtain sufficient information from or the attendance of Student's private providers at the IEP team meeting.

F. Petitioners have failed to prove that the IEP-02/23/2021 is inappropriate where there was no discussion of transportation as a service during the IEP meeting

Petitioners argue that Respondents denied Student a FAPE by failing to discuss Student's need for transportation at the February 23, 2021 IEP meeting. Petitioners have not provided any evidence that transportation was a needed service for Student at the time of the IEP meeting. As noted *supra*, an IEP is to be examined based on the information that the IEP team had at the time of the meeting. During the IEP meeting on February 23, 2021, Parent was asked about Student's need for transportation and Parent indicated to the team that Parent dropped Student off and picked Student up from school. *FOF 63.* SPED Teacher noted that it was not an issue that

needed to be addressed at that time due to Parent's providing Student's transportation but that it could be discussed later if Student was going to catch the school bus in the future. Based on the information the team had at the time of the IEP meeting, this was an appropriate discussion and decision by the IEP team.

Parent later required transportation for Student as a service for Student's attendance at Private School, but that was not an issue that was raised or needed to be addressed at the time of the development of Student's IEP-02/23/2021.

G. Respondents denied Student a FAPE by failing to address Student's need to successfully change from Student's private program to Home School's general education setting in the IEP-02/23/2021

Petitioners' next issue is that Student's IEP-02/23/2021 is inappropriate because Student's needs to successfully move from Private School to Home School is unaddressed in the IEP-02/23/2021.

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).

However, as discuss previously in this Decision, the IEP team failed to address appropriate supplementary aids and supports that Student would need to successfully access Student's education in the general education setting at Home School. The IEP team was aware

that Student was in a small private program, which is a far more restrictive placement than the general education setting or inclusion setting as described during the IEP meeting. Despite this knowledge, the IEP team chose not to address any additional supports that Student could benefit from and did not have the benefit of additional assessments of Student's needs in the development of the IEP-02/23/2021. As such, Respondents denied Student a FAPE by failing to address Student's needs in the general education setting in the IEP-02/23/2021. This Hearings Officer notes that this is *not* a finding that a transition plan needed to be included in Student's IEP-02/23/2021. The denial of FAPE in this issue centers on the failure of Respondents to properly assess and address Student's needs, and especially in light of the general education setting in which the IEP team placed Student.

H. Petitioners have failed to prove that Respondents denied Student a FAPE due to the language describing Student's placement

Petitioners' final argument questions whether the language of Student's LRE placement is vague and impacts Parent's ability to enforce and/or monitor its implementation. Student's IEP-02/23/2021 describes Student's LRE placement as "[Student's] placement is in a general education setting in which [Student] will access non-disabled peers throughout [Student's] school day, except when being pulled to work 1-to-1 or in small groups to receive specially designed instruction or speech services." *FOF 82*.

The IDEA requires that an IEP must include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class." 34 C.F.R. §300.320(a)(5). This is consistent with the IDEA's purpose of maximizing the ability of students with disabilities to be educated with children who are not disabled. The description of Student's LRE in the IEP-02/23/2021 clearly explains the extent to which Student would not participate with nondisabled children. The IEP-02/23/2021 also includes information that Student will

receive six hundred (600) minutes of special education per week and three hundred fifty (350) minutes per quarter of speech-language services. *FOF 79*. These are the only minutes that would be applicable in the LRE statement of Student being pulled to work on specially designed instruction or speech services. Petitioners have failed to prove that the language of the IEP-02/23/2021 is vague and impacts Parent's ability to enforce and/or monitor its implementation.

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

Petitioners are seeking tuition reimbursement for Student's tuition at Private School as a remedy for any denials of FAPE by Respondents. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in private school and request reimbursement for tuition at said private school from the local educational agency. *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 364-365, 126 L. Ed.2d 284 (1993), citing *School Comm. of Burlington v. Department of Ed. Of Mass.*, 471 U.S. 359, 369-370, 105 S.Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985), see also 20 U.S.C. §1415(b)(6), (f)(1)(A). However, parents are entitled to reimbursement for placement at a private school only if a court concludes both that the public placement violated the IDEA and the private school placement was proper under the Act. *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484, 2496, 174 L.Ed.2d 168 (2009). The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2nd Cir. 2006), where "to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from

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

Petitioners seek tuition reimbursement for Student’s tuition based on the enrollment contract signed by Parent for the 2021-2022 school year. As AHO Murata’s Decision-2/8/2021 only extended the award of tuition reimbursement to the end of the 2020-2021 school year, Parent’s decision to enroll Student at Private School for the 2021-2022 school year would be considered a unilateral placement for purposes of tuition reimbursement, and a new determination of appropriateness would need to be made by this Hearings Officer.⁵ *FOF 22*. Petitioners in this case have proven that Respondents denied Student a FAPE by failing to discuss whether additional information, data, or assessments Student of were necessary and/or by failing to obtain additional information, data, and assessments for the development of Student’s IEP, not discussing or addressing Student’s needs with respect to ESY services and behavioral interventions and supports during the IEP meetings and failed to include sufficient descriptions of such supports in the IEP-02/23/2021.

The second requirement for tuition reimbursement to be ordered is a determination that Private School is an appropriate placement for Student. Private School Director has completed three (3) formal VB-MAPP assessments of Student in June 2019, November 2019, and January 2021. *FOF 88*. Based on the results of the assessments, Student has made overall progress in the milestones and has decreased the number of barriers to Student’s learning in the VB-MAPP. Private School will provide Student with speech-language therapy; ABA services, including a

⁵ This Hearings Officer notes that the determination of unilateral placement for purposes of tuition reimbursement differs from the standard under stay-put, whereas in this case, the failure of Respondents to appeal the prior AHO decision transformed the placement of Student at Private School for the 2020-2021 school year a bilateral placement and stay-put applies.

one-to-one RBT for Student throughout the school day; consultation from a special education teacher for Student's programming; and a reverse inclusion program, which allows Student to interact with non-disabled peers of the same age. *FOF 95, 99-104*. Private School has also helped Parent obtain free transportation to and from Private School and will provide an RBT for Student to use this transportation daily. *FOF 106-107*. This Hearings Officer concludes that Private School is an appropriate placement for Student for purposes of tuition reimbursement.

1. Equitable considerations

The IDEA provides reviewing authorities with the power to consider equity in determining whether and in what amount tuition reimbursement is to be awarded to a parent that unilaterally places a child at a private program. *C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011) (holding that if both criteria are met for reimbursement for unilateral placement at a private school, "the district court must exercise its 'broad discretion' and weigh 'equitable considerations' to determine whether, and how much, reimbursement is appropriate."). In *C.B.*, the district court determined that while the private placement where student was placed delivered many, but not all, of the special education services that the student needed, the full amount of tuition was appropriate for the because everything that the placement provided was "proper, reasonably priced, and appropriate, and the program benefitted [the student] educationally." *Id.* at 1160. The Ninth Circuit Court of Appeals affirmed the district court's decision, adopting the standard set forth in *Frank G.* as discussed *supra. Id.*

While the rates for tuition and hourly services provided by Private School appear to be on the higher scale, they are comparable to the rates that were previously determined by AHO Murata to be reasonable based on other schools in the area where Student resides. While AHO

Murata reduced various services for reimbursement in the Decision-2/08/2021, this Hearings Officer declines to do so. This Hearings Officer notes that the reimbursement award in this case will require Private School to provide itemized billing statements based on the total amount of services actually provided to Student for reimbursement. The rate charge for the RBT services for Student's transportation also appears to be reasonable based on the testimony that Student lives approximately twenty (20) from Private School and based on the hourly rate for RBTs at Private School. *See* Private School Director, Tr.V2, 290:6-16.

This Hearings Officer does find, however, that the extra thirty (30) minutes per day of RBT services provided in the cost analysis is not a reimbursable charge to the DOE. When parents are late to picking up their children from school or after-school services, parents are responsible for any excess charges accrued due to their tardiness. Additionally, Student is being provided RBT services for transportation as a separate charge in the cost analysis, so there is no reason that the RBT would have to provide an extra half hour of services that are not already included in the transportation costs. Therefore, this Hearings Officer reduces the maximum amount of charge applicable for RBT services under the cost analysis six (6) hours per day for Student. This is equal to Ninety-Eight Thousand Five Hundred Ninety-Two Dollars (\$98,592).⁶

Respondents argue that the tuition reimbursement award in this case should be reduced based on Parent's failure to allow Respondents to address Parent's concerns about the IEP-02/23/2021. As Respondents objection to any evidence after the February 23, 2021 IEP meeting from being admitted by Petitioners was sustained, no evidence exists in this record to allow this

⁶ To clarify the calculations done by this Hearings Officer: \$106,808 (total yearly cost estimate) divided by the \$79 (RBT rate) equals 1,352 (hours) paid for at the RBT rate. 1,352 hours divided by 6.5 hours per day (total hours estimated per day of RBT service) equals 208 days of service for the school year in the cost estimate; 208 days of service for 6 hours per day equals 1,248 hours of RBT services for the school year at \$79/hour equals \$98,592.

Hearings Officer to examine this issue. The only record that exists is that Petitioners filed their Complaint and Resolution Proposal on June 8, 2021. It is unclear whether Parent informed the DOE that Parent was unhappy with the IEP or otherwise between February 23, 2021 and June 8, 2021. Parent did inform the IEP team at the February 23, 2021 meeting that Parent intended to keep Student at Private School for the remainder of the 2020-2021 school year. Student began attending Private School in August 2021 for the 2021-2022 school year.

Petitioners filed their Complaint within one hundred eighty (180) days of a unilateral special education placement, which also constituted written notice to the IEP team that Petitioners were rejecting the IEP and seeking for their child to receive private education at public expense. Petitioners have complied with the legal requirements to receive tuition reimbursement. *See* Hawai‘i Revised Statutes §302A-443(a)(2); 20 U.S.C. §1412(a)(10)(C)(iii)(aa); H.A.R. §8-60-27(d)(1)(a); 20 U.S.C. §1412(a)(10)(C)(iii)(bb); H.A.R. §8-60-27(d)(1)(b).

While Parent was admittedly distracted during the IEP meeting on February 23, 2021, Parent still provided information as was requested by the IEP team and answered questions posed by the IEP team. *FOF 40-41*. Parent did not engage in much of the discussions regarding Student’s goals and objectives, services, supplemental aids and supports, or the LRE for Student; however, this Hearings Officer notes that most of those discussions were dominated by suggestions and explanations by SPED Teacher and Principal, rather than an open-ended discussion involving all team members.⁷ Prior to the IEP meeting, Parent signed and returned all

⁷ For example, during the LRE discussion, no other IEP team members contributed to the discussion besides General Education Teacher explaining what Student’s class would look like, and SPED Teacher and Principal’s suggestions that they place Student in the general education inclusion classroom. No discussion of the educational and non-academic benefits of each setting on the continuum or the effect Student would have on the teacher or other students took place at

forms and to SSC in a timely fashion and no evidence was presented that Parent attempted to evade Respondents' attempts to schedule the February 23, 2021 IEP meeting. *FOF 25, 42.*

Respondents have not pointed to any obstructionist behavior by Parent in this case that would warrant a reduction in tuition reimbursement.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have proven that Respondents denied Student a FAPE by failing to discuss whether additional information, data, or assessments Student of were necessary and/or by failing to obtain additional information, data, and assessments for the development of Student's IEP, and by failing to discussing or addressing Student's needs with respect to ESY services and behavioral interventions and supports during the IEP meetings and failing to include sufficient supports and descriptions of such supports in the IEP-02/23/2021. Petitioners have further proven that Private School is an appropriate placement for Student and that Parent is entitled to tuition reimbursement to Private School for the 2021-2022 school year. This Hearings Officer finds that the equitable considerations in this case allow for Parent to receive full tuition reimbursement or direct tuition payments to Private School for the 2021-2022 school year.

For the reasons stated above, IT IS HEREBY ORDERED –

1. Upon receipt of itemized invoice(s) which reflect the actual amount of service minutes/hours and/or assessments and/or supplies provided to Student, Respondents shall make payments for Student's tuition and related expenses, including RBT transportation services, for the 2021-2022 school year to Private School.

the IEP meeting. No input was requested from Parent about where Parent believed Student should be placed or if and/or why Parent believed that Student should be at Private School. *See P-Ex.5, 2/23/2021 IEP [1:55:55-2:00:40].*

2. Respondents shall reimburse Parent any out-of-pocket costs paid to Private School for the 2021-2022 school year pursuant to the cost analysis/enrollment contract upon receipt of itemized invoices with payment verification from Private School.
3. In no event should the reimbursement for tuition and related services for Private School exceed Two Hundred Fifty-Nine Thousand Two Hundred Forty-Nine Dollars and Twenty-Seven Cents (\$259,249.27).⁸

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 15, 2021.

CHASTITY T. IMAMURA
Hearings Officer
Richards Building
707 Richards Street, Suite 520
Honolulu, Hawai‘i 96813
Phone: (808) 587-7680
Fax: (808) 587-7682
atg.odr@hawaii.gov

⁸ This calculation is based upon the reduction of reimbursement for RBT services to six (6) hours a day, totaling \$98,592; as well as the addition of the RBT transportation services of \$18,600 included in the addendum. The new subtotal is \$216,763.60; the new administrative fee is \$32,514.54; the new GE tax amount is \$9,971.13, which equals to \$259,249.27.