



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,² Superintendent of the
Hawai'i Public Schools,

Respondents.

DOE-SY2122-015

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: November 17-18, 2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On September 30, 2021, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE")

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² Christina Kishimoto was no longer the superintendent of the Hawai'i public schools as of August 1, 2021. Keith Hayashi is the interim superintendent, but documents filed by the Office of Dispute Resolution will reflect the caption as listed by Petitioners in the Complaint and Resolution Proposal, filed on September 30, 2021.

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 October 7, 2021.

A prehearing conference was held on October 27, 2021, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Kunio Kuwabe, Esq. (hereinafter “Mr. Kuwabe”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for November 17-18, 2021.

On November 1, 2021, a status conference was held with this Hearings Officer, Mr. Peck, and Mr. Kuwabe. During the status conference, this Hearings Officer informed Mr. Peck and Mr. Kuwabe that based on the prior Findings of Fact, Conclusions of Law, and Decision issued by this Hearings Officer on September 24, 2021, in which Petitioners were awarded tuition reimbursement at a reduced rate for the 2021-2022 school year, this Hearings Officer would not consider any request for tuition reimbursement or compensatory education award for Petitioners if they should prevail. This Hearings Officer informed Mr. Peck and Mr. Kuwabe that stay-put is not an issue for the instant case based on the award of tuition reimbursement covering the 2021-2022 school year, which includes the date of the filing of the Complaint to the Hearing dates. Neither Mr. Peck nor Mr. Kuwabe objected to the statements by this Hearings Officer, and both were instructed that the Hearing would proceed in accordingly.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure safety for all the participants in the Hearing. An Order Regarding Video Conference Due Process Hearing was issued on November 16, 2021,

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

The Due Process Hearing began on November 17, 2021. Petitioners called Private School Director and Parent to testify and rested their case-in-chief. The Hearing continued to November 18, 2021, when Respondents called Principal and DOE Board Certified Behavior Analyst (hereinafter “DOE BCBA”) to testify, submitted a number of exhibits to be received into evidence, and rested their case. Petitioners did not have any rebuttal witnesses to present.

Each party submitted their exhibits for the Hearing by the disclosure deadline of November 9, 2021. The parties met and conferred regarding the proposed exhibits by November 15, 2021 and did not have any objections to either the witnesses or exhibits submitted by the opposing party. Both parties were informed that any exhibits that were discussed or mentioned during the proceeding would be received for consideration in the Decision in this case, but that this Hearings Officer would allow the parties to propose additional exhibits after the Hearing was completed. On November 18, 2021, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits from their previously disclosed documents that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on November 23, 2021. Any objections to the proposed exhibits were due on November 26, 2021.

On December 2, 2021, a List of Exhibits Received at Due Process Hearing was filed with the final list of exhibits submitted and received by the parties for consideration in this Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-033; Exhibit 2, pages 034-053, Exhibit 3, pages 054-069; Exhibit 4, pages 070, 171, and two (2) audio/video recordings dated September 20, 2021, and July 15, 2021; and Exhibit 5, pages 172-202.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 8, page 0033; Exhibits 32-33, pages 0111-0144;³ Exhibits 38-40, pages 0171-0191; Exhibits 78-116, pages 0756-1635; and Exhibit 117, four (4) audio/video recordings dated May 28, 2021, July 15, 2021, July 16, 2021, and September 20, 2021.⁴

Both parties wanted the opportunity to submit written closing briefs regarding the legal issues to this Hearings Officer for review. Based on the decision deadline of December 14, 2021, Respondents requested an extension of the deadline to January 28, 2022. Petitioners had no objection to the request for extension, so based on the number of exhibits, including lengthy audio/video files to be reviewed, and in order for the transcripts to be available to the parties, this Hearings Officer granted Respondents' request for extension. The deadline for the decision in this matter is January 28, 2022.

³ In the List of Exhibits Received at Due Process Hearing, filed December 2, 2021, Respondents' Exhibits appear to have missing page numbers between several of the exhibits. This missing page number accounts for the divider pages that were included in the exhibits to separate the exhibits. For purposes of this listing, the page numbers will include the pages missing from the List of Exhibits Received at Due Process Hearing.

⁴ The video recording dated September 20, 2021, submitted by both Petitioners and Respondents are identical. The audio recording dated July 15, 2021, submitted by Petitioners is a recording taken from Parent's perspective of the online meeting. The video recording dated July 15, 2021, submitted by Respondents is the video recording of the same meeting in the WebEx format in which the meeting was held. For clarity, all references in this Decision will be made to the July 15, 2021, and the September 20, 2021, video recordings submitted by Respondents.

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

II. JURISDICTION

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

III. ISSUES PRESENTED

Petitioners assert four⁵ (4) issues in the Complaint to be addressed at the Hearing:

1. Whether the Individualized Educational Program (hereinafter “IEP”) team meeting on September 20, 2021, denied parental participation where the IEP team completed the IEP when Parent did not refuse to participate in the IEP meeting but instead informed the DOE of Parent’s unavailability to do so on that particular day.
2. Whether failing to include the participation of Student’s private provider in the IEP development and/or failing to provide sufficient opportunity to do so was a denial of a free appropriate public education (hereinafter “FAPE”).
3. Whether the IEP dated September 20, 2021, describes the least restrictive environment for Student where the language is indefinite/vague and/or unenforceable.
4. Whether the discussion at the IEP meeting on September 20, 2021, denied Student a FAPE where no discussion of Student’s needed behavioral interventions and/or needs to transition from Student’s current private program to the proposed DOE program occurred during the IEP formulation process.

IV. FINDINGS OF FACT

Background information

⁵ As noted above, Petitioners raised the issue of stay-put as Issue #1 in the Complaint, but this issue will not be addressed in this Decision by agreement of the parties. *See Transcript of Proceedings, Volume 2, page 102, line 21, to page 103, line 20 (hereinafter referenced as “Tr. V2, 102:21-103:20”).*

1. Student is [REDACTED] years old and was diagnosed with [REDACTED] (hereinafter “[REDACTED]”) in July 2018. Testimony of Parent, Tr.V1, 35:11-18; *see also* Petitioners’ Exhibit 1, page 002 (hereinafter referenced as “P-Ex.1, p.002”); Respondents’ Exhibit 32, page 0112 (hereinafter referenced as “R-Ex.32, p.0112”).
2. Student has been determined eligible for special education and related services under the category of [REDACTED]. P-Ex.1, p.002; R-Ex.32, p.0112.
3. Private School Director is the owner of Private School. Testimony of Private School Director, Tr.V1, 17:4-6.
4. Student has been attending Private School since August 2020. *See* R-Ex.109, p.1242; R-Ex.111; p.1323.
5. On June 18, 2021, Parent enrolled Student in Private School for the 2021-2022 school year and Private School’s 2021-2022 school year began on August 18, 2021. Testimony of Private School Director, Tr.V1, 19:15-23; R-Ex.111, p.1341-1342.
6. Principal is the principal of Home School and Student Services Coordinator (hereinafter “SSC”) is the student services coordinator at Home School. SSC is primarily responsible for scheduling IEP meetings, requesting, receiving, and distributing information, such as records and assessments, for purposes of Student’s IEP development. Testimony of Principal, Tr.V2, 109:19-111:9; *see e.g.*, R-Ex.102, p.949-953; R-Ex.103, p.970-978.
7. DOE BCBA is a licensed board-certified behavior analyst in the State of Hawai‘i who holds a PhD in psychology and a master’s degree in behavior analysis. DOE BCBA is employed by a company that is contracted with the Hawai‘i DOE and has been working with the DOE since [REDACTED]. Testimony of DOE BCBA, Tr.V2, 156:2-

161:3; R-Ex.116, p.1634-1635.

8. DOE BCBA is qualified as an expert witness in the field of applied behavior analysis. Testimony of DOE BCBA, Tr.V2, 191:5-12.
9. The study of verbal behaviors is a sub-unit within the field of applied behavior analysis (hereinafter “ABA”) in which a tool called the Verbal Behaviors Milestones Assessment and Placement Program (hereinafter “VB-MAPP”) is used to guide the curriculum of a student with a learning disability, usually [REDACTED]. Testimony of DOE BCBA, Tr.V2, 172:17-22, 185:3-22.

Prior Due Process Hearing Decisions

10. On July 15, 2020, Parent filed a Complaint and Resolution Proposal under case number DOE-SY2021-005. In that case, Parent alleged, *inter alia*, that the DOE denied Student a FAPE by failing to review Student’s IEP-05/29/2019 by the annual review date, or by the start of the 2020-2021 school year. R-Ex.108, p.1210-1216.
11. A due process hearing was held with Administrative Hearings Officer Charlene Murata (hereinafter “AHO Murata”) on December 2-3, 2020. On Wednesday, January 27, 2021 at 2:55 p.m., AHO Murata issued Findings of Fact, Conclusions of Law, and Decision (hereinafter “DOE-SY2021-005 Decision”) wherein AHO Murata found that the DOE denied Student a FAPE by failing to review Student’s IEP-05/29/2019 by the annual review deadline, to have in effect an IEP for Student at the beginning of the 2020-2021 school year, and to provide sufficient Supplementary Aids and Services for Student, which resulted in a loss of educational opportunity and significantly impeded Parent’s participation rights. R-Ex.109, p.1218-1282.
12. As part of the DOE-SY2021-005 Decision, AHO Murata ordered that Parent receive

tuition reimbursement for Student's tuition and related expenses at Private School for the 2020-2021 school year. AHO Murata ordered tuition reimbursement reduced by a total of Forty Thousand Four Hundred Ninety-Five Dollars (\$40,495.00) after denying reimbursement for a fifteen percent (15%) administrative fee (totaling Twenty-Seven Thousand Four Hundred Ninety-Five Dollars (\$27,495.00)); One Thousand Dollars (\$1000) for a Distance Learning Program Assessment; Two Thousand Dollars (\$2000) for a Distance Learning Program and Supplies; and Ten Thousand Dollars (\$10,000) for a special education consultant. R-Ex.109, p.1276-1282.

13. AHO Murata also ordered the following:

- The IEP team shall, within ten (10) school days of this Order, decide if any additional data or information or assessments are needed to determine Student's current needs. Respondents shall make reasonable effort to obtain any additional data or information that is needed. Any assessments are to be scheduled and completed within forty (40) calendar days of this Order.
- An IEP team meeting shall be held within ten (10) school days of obtaining any additional data or information and the completion of all aforementioned assessments. If, however, the IEP team determines that no additional data or information or assessments are needed to determine Student's current needs, the IEP team meeting shall be held within ten (10) school days of that determination.
- Any delay in meeting any of the deadlines in this Order because of an act or acts of Petitioners and/or their representatives and/or their private providers, will extend the deadlines set herein by the number of days attributable to Petitioners and/or their representatives and/or their private providers. Respondents shall document in writing any delays caused by Petitioners and/or their representatives and/or their private providers. R-Ex.109, p.1280-1282.

14. On June 1, 2021, Petitioners filed a Complaint and Resolution Proposal under case number DOE-SY2021-044. In that case, Petitioners alleged, *inter alia*, that Student was denied a timely offer of FAPE because AHO Murata had ruled that Student's

- IEP-05/29/2019 did not appropriately address Student's needs and no subsequent offer was developed for Student. As a remedy for the denial of FAPE, Petitioners requested that the hearings officer order tuition reimbursement for Student at Private School for the 2021-2022 school year. R-Ex.110, p.1284-1289.
15. On August 24-25, 2021, a due process hearing was held before this Hearings Officer in DOE-SY2021-044 in which both Principal and Parent testified as witnesses. On September 24, 2021, this Hearings Officer issued Findings of Fact, Conclusions of Law, and Decision in DOE-SY2021-044 (hereinafter "DOE-SY2021-044 Decision"). R-Ex.111, p.1317.
16. After review of the testimony, exhibits, and arguments presented for the hearing, this Hearings Officer found that Respondents denied Student a FAPE by failing to review or revise Student's IEP prior to the expiration of the previous IEP and/or before the start of the school year. R-Ex.111, p.1347-1349, 1359.
17. Petitioners' proposed remedy of tuition reimbursement for Private School for the 2021-2022 school year was awarded to Petitioners, however, based on the equities, this Hearings Officer reduced Petitioners' award of tuition reimbursement by forty percent (40%). R-Ex.111, p.1358-1360.
18. Specifically, this Hearings Officer concluded that Parent was at least equally responsible for the delay in developing a timely annual IEP for Student prior to the start of the 2021-2022 school year due to Parent rescheduling, canceling, and not showing up for IEP meetings, as well as for not communicating with SSC regarding scheduling of the IEP meetings. However, this Hearings Officer concluded that Respondents were ultimately responsible for ensuring that Student has a valid IEP in

- place prior to the start of the school year. R-Ex.111, p.1359.
19. Both Parent and Home School received and are aware of the DOE-SY2021-044 Decision. Parent is also aware that tuition reimbursement was awarded for Student to attend Private School for the 2021-2022 school year at the reduced amount. Testimony of Parent, Tr.V1, 81:8-11; Testimony of Principal, Tr.V2, 148:9-24.
20. Parent intends to keep Student enrolled at Private School for the 2021-2022 school year, which ends in July 2022. Testimony of Parent, Tr.V1, 81:12-82:8.
21. Petitioners filed a notice of appeal in the United States District Court, District of Hawai‘i of the DOE-SY2021-044 Decision, however due to lack of an agreement regarding payment of attorneys’ fees for the appeal, the appeal had not proceeded as of the November 17-18, 2021, hearing dates. Testimony of Parent, Tr.V1, 86:6-91:4, 94:16-95:20.

Events leading up to September 20, 2021

22. Between the DOE-SY2021-005 Decision filing date of January 27, 2021, through May 2021, numerous attempts were made to schedule an IEP team meeting to develop Student’s IEP. See R-Ex.111, p.1325-1331.
23. As part of Student’s IEP development process, a reevaluation was done for Student that included, *inter alia*, a functional behavior assessment (hereinafter “FBA”) conducted by DOE BCBA in April 2021. Based on the results of the FBA, DOE BCBA developed a behavior intervention plan (hereinafter “BIP”) for Student to be included in Student’s IEP. R-Ex.8, p.0033; R-Ex.38, p.0171-0181.
24. On May 28, 2021, the IEP team met via videoconference to develop Student’s IEP. IEP team members present at the meeting included Parent, Principal, SSC, DOE

BCBA, Special Education Teacher (hereinafter “SPED”), Speech-Language Pathologist (hereinafter “SLP”), District Resource Teacher, and [REDACTED] Special Education Teacher. The IEP team began to review the draft IEP with the information from the reevaluation, however, the IEP team was not able to complete Student’s IEP on that date. After numerous communications, a further IEP meeting was scheduled for July 15 and 16, 2021. R-Ex.111, p.1332-1335; *see generally* R-Ex.117, May 28, 2021, IEP meeting video recording.

25. On July 15, 2021, at the time the meeting was supposed to start, Parent emailed SSC a list of concerns that Parent wanted to discuss at the IEP team meeting. R-Ex.82, p.0816; R-Ex.117, July 15, 2021, IEP meeting video recording, approximate time stamp [01:05-01:17] (hereinafter referenced as “R-Ex.117, 7/15/21 IEP [01:05-01:17]”)
26. On July 15, 2021, the IEP team met via videoconference to continue developing Student’s IEP. The IEP team members present at the meeting included Parent, Principal, SSC, DOE BCBA, SPED, SLP, Occupational Therapist (hereinafter “OT”), District Resource Teacher, [REDACTED] Special Education Teacher, and General Education Teacher. *See generally* R-Ex.117, 07/15/21 IEP.
27. The IEP meeting on July 15, 2021, lasted almost four (4) hours. During the meeting, SSC displayed Student’s draft IEP using the shared screen function to all participants of the meeting so they could read along while the different sections were being read and discussed. At Parent’s request, the IEP team verbally read line-by-line through the parts of the draft IEP that had been prepared by SPED based on the reevaluation and assessment reports. *See generally* R-Ex.117, 07/15/21 IEP.

28. At the time of the July 15, 2021, IEP meeting, the IEP team had information from Student's reevaluation and the included assessments, but the team did not have any information from Private School besides Student's VB-MAPP from August 2020. Private School Director had been invited to the IEP meeting but had declined to attend. R-Ex.117, 7/15/21 IEP [1:09:25-1:10:17].
29. The IEP team discussed Student's present levels of educational performance (hereinafter "PLEPs"),⁶ goals and objectives for Student, extended school year eligibility and services, supplementary aids and supports, and the continuum for the least restrictive environment (hereinafter "LRE") for Student. R-Ex.111, p.1336; *see generally* R-Ex.117, 7/15/21 IEP.
30. The PLEPs section of the IEP consisted of Student's performance in the areas of functional performance (including gross motor, fine motor, and sensory processing skills); social/emotional development; behavior; adaptive; communication; academic performance (including math, reading, and writing skills). After discussion for each section in the PLEPs, Parent was asked for and provided input to the IEP team regarding that section of the PLEPs. R-Ex.117, 7/15/21 IEP [06:25-43:25].
31. Based on Student's needs determined by the IEP team, ten (10) annual goals were developed for Student, with multiple objectives and benchmarks included in each goal to determine Student's progress. Parent also provided input during the discussion of Student's goals and objectives. R-Ex.117, 7/15/21 IEP [44:08-2:35:32].

⁶ 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.

32. After Student's goals and objectives were developed, the IEP team turned to the discussion of extended school year (hereinafter "ESY") for Student. The team ultimately determined that Student was eligible for ESY and would receive ESY services as part of Student's IEP. Parent was asked for and provided input during the ESY discussion. R-Ex.117, 7/15/21 [2:35:45-2:40:40].
33. Following the ESY discussion, the IEP team discussed the special education and related services that Student would receive as part of Student's IEP. This discussion included the number of special education minutes, occupational therapy minutes, and speech-language therapy minutes. Parent expressed concerns to the team members during this time and the IEP team members either explained the reason for the number of service minutes or addressed Parent's concerns in some other way. R-Ex.117, 7/15/21 [2:41:00-2:53:23].
34. The IEP team then discussed the supplementary aids and services, program modifications, and supports for school personnel that would be included in Student's IEP. During this discussion, Parent was asked about the specific supports and aids that Student received at Private School. Parent was unable to provide the IEP team with much information and noted that Private School Director would be able to provide more information to the team in this regard. R-Ex.117, 7/15/21 [2:53:57-3:15:25].
35. Finally, the IEP team discussed the least restrictive environment for Student where Student's IEP could be implemented. The team began by discussing the least restrictive environment of general education and moved on to discussing other settings in the continuum. The team discussed general education, special education,

- public separate facility, and private separate facility. The team did not discuss residential facility or homebound extensively. R-Ex.117, 7/15/21 IEP [3:16:00-3:22:48], [3:40:20-3:45:42] [3:47:01-3:53:58].
36. After the discussion for each setting, the IEP team members each expressed their opinion as to the appropriate placement for Student. Most team members expressed the opinion that the special education setting would be most appropriate for Student, with some general education opportunities, such as recess, lunch, and school-wide activities. Parent expressed concern to the team that Parent needed more information and more time to think about and discuss the possible settings for Student. Parent told the team that Parent believed that Student would benefit more from a general education setting with the proper supports. The IEP team members had excluded the public separate facility and the private separate facility options for Student's least restrictive environment. R-Ex.117, 7/15/21 IEP [3:22:50-3:34:20], [3:54:00-3:56:26].
37. Due to the length of the meeting, Parent told the team that Parent wanted to think more about the placement options for Student and wanted to continue the discussion at the meeting time set for the next day, July 16, 2021. The rest of the team agreed to continue the discussion further at the next meeting. R-Ex.117, 7/15/21 IEP [3:56:27-3:57:34].
38. DOE BCBA was supposed to review Student's BIP and safety crisis plan after the team finished the discussion of the least restrictive environment, but since the meeting was continued, the BIP and safety crisis plan were not discussed on July 15, 2021. Testimony of DOE BCBA, Tr.V2, 162:15-166:7; R-Ex.117, 7/15/21 IEP [3:34:30-3:34:35], [3:38:38-3:39:59].

39. On July 15, 2021, at 5:17 p.m., Parent emailed SSC to inform SSC that Parent could not make it to the meeting scheduled for July 16, 2021. R-Ex.84, p.0820.
40. On July 16, 2021, the Home School IEP team members logged onto the videoconference for the IEP team meeting at the scheduled start time of 9:00 a.m. IEP team members present at the meeting included Principal, SSC, DOE BCBA, SPED, SLP, OT, District Resource Teacher, and [REDACTED] Special Education Teacher. The team members waited for approximately ten (10) minutes and decided to cancel the meeting due to Parent's non-appearance. R-Ex.117, July 16, 2021 IEP meeting video recording, approximate time stamp [00:00-12:26] (hereinafter referenced as "R-Ex.117, 7/16/21 IEP [00:00-12:26]").
41. During the July 16, 2021 scheduled IEP meeting time, SSC attempted to contact Parent via telephone calls to Parent's cellular telephone and work telephone to see if Parent could attend the meeting. R-Ex.117, 7/16/21 IEP [11:25-11:45].
42. On July 16, 2021, SSC emailed Parent and provided three (3) additional dates and times for the continued IEP meeting for Student, which included July 23, 2021 at 2:00 p.m., July 28, 2021 at 9:00 a.m., and July 29, 2021 at 9:00 a.m. SSC informed Parent that if Parent does not respond, the remainder of the IEP team would proceed without Parent being present. R-Ex.86, p.0870-0871.
43. A letter from Principal was also sent to Parent indicating that this would be the last chance for Parent to cooperate with the meeting dates or the meeting would be held in Parent's absence. R-Ex.87, p.0917.
44. On July 19, 2021, Parent sent a lengthy email to SSC in response to SSC's email of July 16, 2021 and Principal's letter. In the email, Parent claimed that Parent told SSC

that Parent was not available on July 16, 2021. Parent also adamantly objected to the IEP team holding a meeting without Parent. Parent accused the DOE of trying to “pull the wool over [Parent’s] eyes” regarding the change in the draft IEP that was reviewed during the May 28, 2021 meeting. Parent also claimed to have been very patient with the DOE and blamed the DOE for the delay in Student not having a current IEP. Parent stated that Parent was unavailable for the dates provided by the DOE and demanded that the final IEP team meeting for Student be on July 20, 2021 from 2:00 p.m. to 3:00 p.m. R-Ex.88, p.0919.

45. On July 19, 2021, SSC emailed Parent and indicated that the rest of the IEP team was not available to meet on July 20, 2021, however the dates previously provided to Parent are still available for the continued IEP team meeting. R-Ex.89, p.0921.
46. On July 21, 2021, Parent emailed the DOE and indicated that Parent was not available for the dates that SSC had provided. Parent also informed SSC that Parent would be seeking reimbursement for Student’s placement at Private School. R-Ex.90, p.0923.
47. On July 22, 2021, SSC emailed Parent and provided an additional proposed meeting date of August 5, 2021 at 9:00 a.m. and 12:00 noon. R-Ex.91, p.925.
48. SSC followed up with Parent on July 27, 2021, regarding the IEP meeting proposed for August 5, 2021. SSC’s email included a letter from Principal indicating that if Parent did not respond or attend the meeting, the IEP team would proceed to complete Student’s IEP. R-Ex.92, p.0927-0928.
49. On July 30, 2021, Parent emailed SSC asking whether Private School Director was contacted about the IEP date. Parent did not indicate in Parent’s email whether Parent was available for the proposed meeting date of August 5, 2021. R-Ex.93,

p.0930.

50. On July 30, 2021, SSC emailed Private School Director to inquire about Private School Director's availability to attend Student's IEP team meeting on August 5, 2021. On August 1, 2021, Private School Director responded to SSC and indicated that Private School Director was not available on August 5, 2021, and proposed the dates of August 19, 25, and 27, 2021 after noon for Private School Director's attendance at the meeting. R-Ex.94, p.0932-0933.
51. On July 31, 2021, SSC notified Parent that the meeting would be held on August 5, 2021 at 12:00 noon. SSC provided Parent with the conference announcement and procedural safeguards. R-Ex.95, p.0935.
52. On August 3, 2021, Parent requested that Parent's attorney, Mr. Peck, be invited to the IEP meeting on August 5, 2021. R-Ex.96, p.0937.
53. On August 4, 2021, SSC notified Parent that Private School Director was unable to attend the meeting on August 5, 2021, but that Private School Director had proposed dates that Private School Director was available. SSC asked about Parent and Mr. Peck's availability on August 19, 2021. R-Ex.97, p.0939.
54. On August 5, 2021, Parent emailed SSC and stated that Parent was unavailable for August 19, 2021. R-Ex.98, p.0941. On the same date, SSC requested that Parent provide available dates and times for the team to consider. R-Ex.99, p.0943. SSC followed up with Parent in another email on August 9, 2021, requesting dates and times that Parent was available. R-Ex.100, p.0945.
55. On August 9, 2021, Parent emailed SSC and stated that both Parent and Private School Director were available on August 27, 2021 after 12:00 noon. R-Ex.101,

- p.0947.
56. In email exchanges between August 16, 2021, and September 10, 2021, SSC checked with Private School Director for availability for Student's IEP meeting. After many follow ups by SSC with Private School Director, SSC was able to confirm an IEP meeting date of September 20, 2021 at 10:00 a.m. SSC also emailed a draft IEP, the initial draft BIP, the updated draft BIP, and a draft crisis plan for Student to Private School Director. P-Ex.5, p.172-176; R-Ex.103, p.0970-1015.
57. Private School Director confirmed Private School Director's ability to attend the September 20, 2021 IEP meeting. Testimony of Private School Director, Tr.V1, 17:7-18:9, 21:12-15.
58. On August 16, 2021, Private School Director emailed Student's most recently completed FBA and individualized applied behavior analysis educational program (hereinafter "IAEP") that were done by Private School to SSC. On August 18, 2021, SSC emailed the documents from Private School Director to the rest of Student's IEP team, except Parent. R-Ex.102, p.0949-0968.
59. Nowhere in the FBA or IAEP from Private School was a list of supplemental aids and supports that Student was receiving in Student's program at Private School. See R-Ex.102, p.0954-0968.
60. In August 2021, DOE BCBA revised Student's BIP based on the information in the FBA and IAEP provided by Private School to the IEP team on August 18, 2021. Testimony of DOE BCBA, Tr.V2, 169:23-170:3, 191:21-23; P-Ex.2, p.036-041; R-Ex.39, p.0183-0188.
61. On September 17, 2021, SPED emailed Private School Director to remind Private

School Director about Student's IEP meeting on September 20, 2021 at 10:00 a.m.

R-Ex.104, p.1017-1023.

62. On Sunday, September 19, 2021, Parent determined that Parent was unable to attend the September 20, 2021 IEP meeting due to a work emergency⁷ and called Mr. Peck. Testimony of Parent, Tr.V1, 47:25-50:12, 64:6-15.

63. On Sunday, September 19, 2021 at 2:11 p.m., Parent emailed SPED and stated that Parent was unable to attend the September 20, 2021 IEP meeting due to staffing shortage at Parent's company. R-Ex.105, p.1025-1026.

64. On Sunday, September 19, 2021, Parent also informed Private School Director via text message that Parent was unable to attend the meeting on September 20, 2021, and would be asking the school to reschedule the meeting. Testimony of Private School Director, Tr.V1, 25:8-11, 27:25-28:17.

65. Without confirmation from either Parent or Home School, Private School Director immediately filled the IEP meeting time that Private School Director had reserved with another appointment. Testimony of Private School Director, Tr.V1, 24:24-25:21, 28:18-29:8.

IEP meeting on September 20, 2021

66. On Monday, September 20, 2021, at approximately 8:26 a.m., SPED forwarded the email from Parent to SSC regarding Parent's inability to attend the IEP meeting

⁷ This Hearings Officer notes that both attorneys questioned Parent extensively regarding Parent's inability to attend the September 20, 2021 IEP meeting, however, for purposes of this Decision, a justification as to why Parent did not attend does not need to be proven for determination of any of the issues raised in the Complaint. Additionally, since this Hearings Officer has dismissed any tuition reimbursement requests, a balancing of the equities is not necessary. Testimony of Parent, Tr.V1, 35:25-37:9, 47:25-51:17, 60:1-66:9, 78:18-80:25.

September 20, 2021 at 10:00 a.m. R-Ex.105, p.1025.

67. On Monday, September 20, 2021, at approximately 10:00 a.m., an IEP team meeting was held via videoconference. Present at the meeting were Principal, SSC, DOE BCBA, SPED, SLP, OT, District Resource Teacher, and [REDACTED] Special Education Teacher. Parent and Private School Director did not appear at the 10:00 a.m. start time, so the IEP team waited approximately fifteen (15) minutes before starting the meeting. R-Ex.117, September 20, 2021 IEP meeting video recording, approximate time stamp [00:00-13:34] (hereinafter referenced as “R-Ex.117, 9/20/21 IEP [00:00-13:34]”)
68. During the time the team waited, Principal noted that the team called and emailed Parent and Private School Director about their attendance at the IEP meeting but did not get into contact with either of them. P-Ex.2, p.55-56; R-Ex.103, p.976-977; R-Ex.117, 9/20/21 IEP [14:30-15:05].
69. At the September 20, 2021 IEP meeting, SSC displayed the FBA and IAEP received from Private School Director on the videoconference and reviewed each section of both documents with the team. DOE BCBA was able to answer any questions that the IEP team members had regarding the documents from Private School. R-Ex.117, 9/20/21 IEP [15:38-34:33].
70. The IEP team then reviewed the draft IEP that was developed at the July 15, 2021 meeting. The IEP team included all the information from the Private School FBA and IAEP in the discussions for every section of the draft IEP, including discussions for the PLEPs, goals and objectives for Student, extended school year, services, supplementary aids and supports, and LRE for the school year and for extended

school year. *See* R-Ex.117, 9/20/21 IEP [34:36-2:25:04].

71. The IEP team discussed how many of the goals and objectives for Student in the draft IEP that the team reviewed were aligned with several of the goals and objectives in the IAEP provided by Private School. R-Ex.117, 9/20/21 IEP [59:32-1:07:30].
72. During the September 20, 2021 IEP meeting, DOE BCBA also reviewed the behavior intervention plan and crisis plan that were created for Student based on the FBA completed by DOE BCBA with information from the FBA conducted by Private School. R-Ex.117, 9/20/21 IEP [1:21:19-1:29:52].
73. The IEP team also discussed many of the concerns that Parent had expressed regarding Student's IEP from the July 15, 2021 meeting. *See generally* R-Ex.117, 9/20/21 IEP.
74. For example, the IEP team discussed Parent's concern that Student should receive speech-language services for extended school year and added a speech-language consultation for the summer session of Student's extended school year program. R-Ex.117, 9/20/21 IEP [1:08:54-1:14:23].
75. The IEP team also considered and discussed Parent's desire for Student to be placed in the general education setting with the proper supports during the LRE discussion of the IEP meeting on September 20, 2021. R-Ex.117, 9/20/21 IEP [1:55:28-2:25:01].
76. During the LRE discussion at the September 20, 2021 IEP meeting, the IEP team had determined that the LRE for Student would be in the general and special education settings, where Student would have the assistance of a registered behavior technician throughout the day and would be placed into the general education classes unless Student became dysregulated and needed to be in the special education setting. R-

Ex.117, 9/20/21 IEP [2:15:50-2:25:01].

77. The IEP team determined that the best language to describe Student's setting being in the general education "to the greatest extent possible" to allow flexibility and allow for Student to leave the setting if it is necessary to meet Student's needs. R-Ex.117, 9/20/21 IEP [2:18:49-2:25:01].

Student's IEP-09/20/2021

78. Based on the IEP team meeting on September 20, 2021, a written IEP offer was developed (hereinafter "IEP-09/20/2021") along with a prior written notice dated September 27, 2021 (hereinafter "PWN-09/27/2021"). P-Ex.1, p.001-027; R-Ex.32, p.0112-0137.
79. The IEP-09/20/2021 contains Student's PLEPs in the areas of Functional Performance (including gross motor and fine motor/sensory processing); Social/Emotional Development; Behavior; Adaptive Skills; Communication; and Academic Performance (including mathematics, reading, and writing). P-Ex.1, p.002-009; R-Ex.32, p.0112-0119.
80. For all applicable sections, information the IEP team discussed from Private School's FBA and IAEP were included in Student's PLEPs.⁸ P-Ex.1, p.002-009; R-Ex.32,

⁸ See, e.g., P-Ex.1, p.003; R-Ex.32, p.113 ("Taste and Smell: ... The [IAEP] developed by [Private School] in 7/2021, includes a targeted behavior for feeding with an objective for expanding the variety of foods [Student] eats by adding 5 new target foods to [Student's] eating repertoire."); P-Ex.1, p.004; R-Ex.32, p.114 (C. BEHAVIOR/STRENGTHS.BASELINE: ...Results from the VB-MAPP Barriers Assessment conducted in 5/2021 by [Private School] indicate an elevated barrier score of 2.0 for Behavior Problems and an elevated score of 2.0 for Instructional Control Problems."); P-Ex.1, p.005; R-Ex.32, p.115 ("The [FBA] conducted by [Private School] in 5/2021 noted additional targeted behaviors including whining, crying, noncompliance, hitting objects, and hitting people. These concerns were not brought up during the DOE FBA parent interview. However, should those behaviors impact [Student's] learning in school, the Team may consider doing an additional FBA to address them. There are target

p.0112-0119.

81. The IEP-09/20/2021 contains eleven (11) goals with supporting short-term benchmarks/objectives to address Student's needs as outlined in the PLEPs. P-Ex.1, p.012-023; R-Ex.32, p.0122-0133.
82. The IEP-09/20/2021 also includes a statement regarding Student's extended school year services and lists for Student's regular school year special education and related services, and supplementary aids and services, program modification and supports for school personnel. The IEP-09/20/2021 also includes clarifications of the services and supports listed in the IEP. P-Ex.1, p.024-025; R-Ex.32, p.0134-0135.
83. Included in the IEP-09/20/2021's supplementary aids and services are "ABA services" at ninety (90) minutes per week and "Individual Instructional Support" at one thousand seven hundred eighty-five (1785) minutes per week. The IEP-09/20/2021 also includes the following daily supplementary aids and services: "Behavior Intervention Plan (BIP); Safety Crisis Plan; Visual Supports (i.e. schedule, timer, first-then); Positive Reinforcement Strategies (i.e. token economy, positive praise); Preferential Seating (i.e. flexible seating options, preferred location in classroom); and Transition Warnings (i.e. verbal, visual, auditory)." P-Ex.1, p.024; R-Ex.32, p.0134.
84. The clarification for ABA services reads as follows: "ABA Services include those of a BCBA to conduct the following activities, including but not limited to designing,

behaviors noted in the IAEP developed by [Private School] in 7/2021 that the HIDEOE is addressing in the Behavior Intervention Plan (BIP) including mand, tact, listener responding, VP-MTS, independent play, social behavior and play, motor imitation, classroom routines and group skills, and echoics.").

monitoring, and updating the BIP, supervising the individual(s) implementing the BIP, monitoring data collection and analyzing data, preparing reports and other documents, attending meetings, and collection and consultation with the special and general education teachers regarding the implementation of the BIP.” P-Ex.1, p.025; R-Ex.32, p.0135.

85. The clarification for Individual Instructional Support reads as follows: “Individual Instructional Support will be provided by an RBT for purposes of implementing the BIP.” P-Ex.1, p.025; R-Ex.32, p.0135.

86. The IEP-09/20/2021 statement regarding the extent to which Student will not participate with students without disabilities (also known as the LRE statement) reads as follows:

“[Student] will participate with non-disabled peers throughout the school day during all instructional (i.e. math, reading, writing, art, music, PE) and non-instructional (i.e. recess, lunch, school-wide events) activities, to the greatest extent possible in a General Education and Special Education classroom. If [Student] becomes dis-regulated, as determined by the SPED Teacher, OT, BCBA, and RBT, [Student] will work on self-regulation in an appropriate setting (i.e. general education classroom, resource room, sensory room, outdoors, playground). [Student] will receive ESY services in the General Education and Special Education Setting as detailed in the above paragraph.” P-Ex.1, p.026; R-Ex.32, p.0136.

87. Student’s IEP-09/20/2021 includes applied behavioral analysis verbal behavior principles, including the goals and objectives that are aligned with Private School’s goals and objectives in the IAEP, as well as the BIP prepared by DOE BCBA.

Testimony of DOE BCBA, Tr.V2, 184:2-186:17.

Post-September 20, 2021 Events

88. On September 28, 2021, a letter from Principal to Parent, along with Student’s IEP-09/20/2021 and PWN-09/27/2021, and the video recording of the September 20, 2021

- videoconference meeting was emailed to Parent by SSC. P-Ex.1, p.001-033; R-Ex.106, p.1028-1117; *see also* P-Ex.4, 9/20/2021 IEP recording; R-Ex.117, 9/20/21 IEP.
89. The letter from Principal to Parent informed Parent that the IEP team wanted to schedule a transition meeting with Parent and provided three (3) available dates and times with the option for Parent to provide additional times that would work instead. The letter also stated, “Please remember that we are more than willing to meet with you at any time to review the current completed IEP.” P-Ex.3, p.063; R-Ex.107, p.1119.
90. On September 30, 2021, Petitioners filed the instant Complaint.
91. Between September 28, 2021 and November 5, 2021, Parent and the Home School IEP team worked to schedule a transition plan meeting. *See* P-Ex.3, p.064-066; R-Ex.107, p.1206.
92. DOE BCBA prepared a draft transition plan for the IEP team to review at the transition meeting. Testimony of DOE BCBA, Tr.V2, 177:13-178:8, 193:23-12, 195:14-22.
93. On November 1, 2021, Private School Director was invited to the transition meeting but was unavailable to attend on the scheduled date. P-Ex.5, p.173.
94. On November 4, 2021, Parent sent an email to SSC with a list of concerns about Student’s IEP-09/20/2021. The concerns Parent listed are as follows:
- “1. From the IEP I understand that [Student] is to be in a general education class all day, but it also states that this will be when appropriate. So, this is something I don’t understand. At the IEP meeting before the IEP was complete, it seemed that you wanted me to agree to have [Student] in all special education only to go to general education very infrequently if [Student] was able. Who will decide when [Student] is able to stay with the general education students? What factors will they use to decide?”

I am very uncomfortable with [Student] being in a class with 25 or more other students all day when [Student] is coming from [Student's] current program. I need to understand where [Student] will be and how it will be decided if I am to talk about what [Student] will need to transition.

2. Even in a small group at [Private School], [Student] has many supports. That list that is in [Student's Private School] IEP for supplemental supports. [Private School Director] explained that the list is why [Student] is able to have demands placed on [Student] and without it, [Private School Director] would not be able to do so. [Student] needs those supports even more if put into a class of 25 students.

3. [Student] has begun using verbal behaviors now. [Student] is using a specific ABA methodology and can't just switch to a different program. It would negatively affect [Student's] transition.

4. I want the DOE RBT to shadow the RBT for 2 weeks to learn the interventions that are successful for [Student]. Then for the [Private School] RBT to shadow the DOE RBT. If not, [Student] would not be successful.

5. I had sent an email on October 26th but have not heard back regarding my request to invite [Private School Director] (if [Private School Director] can come) so [Private School Director] may be involved in the transition meeting. Having [Private School Director] at the transition meeting would be essential due to [Private School Director]'s knowledge of [Student's] program since I don't know [Student's] program like [Private School Director] does." Testimony of Parent, Tr.V1, 39:8-40:8; P-Ex.3, p.068.

95. Parent likely received assistance from Mr. Peck in drafting the email sent to SSC on November 4, 2021 with Parent's concerns. Testimony of Parent, Tr.V1, 40:9-19.

96. At no point after September 28, 2021, did either the IEP team schedule or did Parent request an IEP review meeting for the IEP team to review Student's IEP-09/20/2021 with Parent. Testimony of Parent, Tr.V1, 42:7-9, 72:14-76:10, 77:23-78:5.

V. CONCLUSIONS OF LAW

IDEA framework

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

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

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

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

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

335; see also, *Blake C. ex rel. Tina F. v. Hawai'i Dept. of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Hawai'i 2009).

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

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

A. Petitioners have failed to prove that Respondents denied Student a FAPE by completing the IEP at a meeting where Parent was unable to attend

Petitioners' first issue argues that Respondents denied parental participation when the IEP team completed the IEP when Parent did not refuse to participate in the IEP meeting but instead informed the DOE of Parent's inability to meet on the scheduled date. Petitioners cite heavily to *Doug C.* to support their argument.

The Ninth Circuit Court, in *Doug C. v. Hawaii Dept. of Educ.*, emphasized the importance of a parent's participation in the development of an IEP for their child. 720 F.3d at 1043. The Court noted that a close review of the facts of the case was important in determining

whether there was a denial of FAPE. In that case, the IEP team was faced with the deadline to conduct the annual review of Student's IEP. *Id.* at 1041. In September 2010, the IEP team and father discussed a meeting date in October 2010. Father testified that he did not know that the meeting was confirmed for that date and was not available on that date. The meeting was rescheduled to November 4 or 5, 2010 and the father informed the team that he was only available on November 9, 2010. On November 9, 2010, the father informed the team he was sick and asked to reschedule the meeting to November 16 or 17, 2010. The student's annual IEP review deadline was November 13, 2010. The team decided to go ahead with the meeting on November 9, 2010 and developed an IEP without Parent or a representative from Student's current provider. *Id.* at 1041-1042. In the IEP meeting, the IEP team "decided to change [the student's] educational placement for the first time in six years." The Court in *Doug C.* noted that the father "did not affirmatively refuse to attend the meeting, nor could the department prove that they could not convince him to attend." *Id.* at 1044. Ultimately, the Court found that the school district denied the student a FAPE by infringing on the ability to participate meaningfully in the IEP development process. *Id.* at 1047.

In doing so, the Court considered the reasons given by the school district in holding the IEP meeting without the father, which was the notion that the student's IEP would expire (due to the annual review deadline) and that the department's personnel was unable to reschedule the meeting to accommodate the dates that the father was requesting. The Court noted that "[w]hen confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of FAPE." *Id.* at 1046. The Court also noted that there may be "circumstances in which accommodating a

parent's schedule would do more harm to the student's interest than proceeding without the parent's presence at the IEP." *Id.* However, given the reasons provided by the school district in the *Doug C.* case, the Court found that the district should have prioritized the parent's participation in the meeting, especially in light of the father's willingness and insistence on being at the meeting.

In its holding, the Court in *Doug C.* also emphasized the contributions that the father could have made to the IEP development, particularly regarding information about the student's private program, where the student had been placed by previous IEPs. Since neither the father nor the private program representative had attended the IEP meeting, they were not able to provide information to the team about the student's current program and why the student could benefit from that program. *Id.* at 1047. The Court found that based on the lack of participation of the father during the meeting, the student was denied an educational opportunity that may have been afforded to the student had the father been present at the meeting. *Id.*

This case is distinguishable from *Doug C.* in many ways. First, the meeting that was held on September 20, 2021, was a continuation of a meeting that was held with Parent present on July 15, 2021. In the July 15, 2021, IEP team meeting the team reviewed Student's entire IEP, line-by-line at Parent's request, and got all the way through a preliminary discussion of the least restrictive environment for Student. *FOF 26-38.* Parent expressed concern with the IEP team's idea to place Student in a special education setting as opposed to placing Student in a general education setting with the proper supports. *FOF 36.* The meeting was only continued because Parent wanted to continue a discussion on the placement, even though the rest of the team had tentatively decided on the least restrictive setting for Student. *FOF 36-37.* Here, unlike in *Doug C.*, Parent did extensively participate with the IEP development for Student in a nearly four (4)

hour meeting on July 15, 2021. *FOF 27*. Parent expressed concerns during each section of the IEP and provided input. *FOF 30-37*.

Second, during the July 15, 2021, meeting Parent also indicated that Parent wanted the school to have more information from Private School so they would have a better idea of what Student's program was like at Private School. *FOF 34*. Parent was unable to provide the IEP team with that information directly and noted that Private School Director would have more information for Student's program. For the September 20, 2021, IEP team meeting, the IEP team had a number of documents from Private School related to Student's program there. *FOF 58*. The September 20, 2021, IEP team had Student's FBA and IAEP, which provided the team with all the information that Private School Director had provided to the team about Student's program. The IEP team used the documents provided by Private School Director to address many of the concerns that were raised by Parent in the July 15, 2021. For example, DOE BCBA used the information from Student's FBA and IAEP at Private School to enhance Student's BIP. *FOF 72*. The IEP team also compared Student's goals and objectives with the goals and objectives in the IAEP, noted that many of them aligned, and included other goals and objectives based on information received from Private School. *FOF 70-71*.

The Court in *Doug C.* also noted as a concern that the IEP team in that case had changed the student's placement for the first time in many years without the parent's participation. In this case, Parent was at the IEP team meeting on July 15, 2021, where the IEP team discussed Student's placement. Based on the discussion the team had for Student's least restrictive environment, the team had already excluded Private School as a least restrictive environment, finding that Private School was far more restrictive than the special education setting. *FOF 36*. The only significant concern raised by Parent in the meeting on July 15, 2021, was that Parent

believed Student should be in the general education setting. At the meeting on September 20, 2021, the IEP team discussed Parent's concern regarding having Student in the general education setting and based on Parent's concerns and the information from Private School, ultimately decided that Student would be in a combined general and special education setting with supports, including a one-to-one registered behavior technician assigned to Student. *FOF 75-77*. Unlike the facts of the *Doug C.* case, the IEP team here considered the input provided to the team by Parent at the meeting on July 15, 2021, and the information from Private School when making the decision on Student's least restrictive environment.

It is concerning, however, to this Hearings Officer that the IEP team chose to proceed with the IEP meeting on September 20, 2021, given that there were no longer any pressing deadlines that the team was facing. At the time when the IEP team continued with the September 20, 2021 meeting, Principal was aware that a due process hearing had already been completed regarding the DOE's failure to develop an IEP for Student by the start of the school year. *FOF 15*. Principal was also aware that Parent was asking for Private School tuition for the 2021-2022 school year as a remedy. While it was understandably frustrating to have IEP meetings with Parent with all the gamesmanship in which Parent engaged during the scheduling of the IEP meetings, the school no longer had a pressing deadline by which they needed to complete the IEP that would justify having the meeting without Parent. The IEP team was already long past the annual review date, the start of the school year, and even past the previous due process hearing. Even though the decision had not been filed at the time of the meeting, nothing justified the team proceeding with the IEP meeting without Parent's presence.

Nonetheless, Petitioners having the burden of proof in this case, must still show that the actions of Respondents denied Student a FAPE. Petitioners have not done so, and Petitioners'

Complaint in its entirety is simply an intellectual exercise, since Parent has no intention of withdrawing Student from Private School based on the tuition reimbursement ordered in the Decision in DOE-SY2021-044. *FOF 20*. Even if the IEP team had waited and developed a new IEP with Parent present at a date set soon after the September 20, 2021 date, Parent had already signed a binding contract with Private School for Student to attend Private School for the 2021-2022 school year and had been awarded sixty percent (60%) tuition reimbursement for Student's attendance there. *FOF 17*. The IEP team would still need to develop a new IEP for Student before the start of the 2022-2023 school year to ensure that Student's most accurate levels of academic achievement and performance are considered for Student's updated goals and objectives for the next grade level. Student has not lost out on any educational opportunities by the IEP team developing the IEP-09/20/2021 without Parent's presence, and even if the facts of this case were similar to *Doug C.*, it would not matter since the IEP would not be effective until after the end of the 2021-2022 school year at Private School.

Petitioners' attempt to argue that Parent may not be able to afford to continue to send Student to Private School at the reduced tuition reimbursement amount is not persuasive. As noted by extensive legal authorities, a parent's decision to unilaterally place their student at an expensive private school is undertaken at their own risk if they do not prevail in a tuition reimbursement award after a due process hearing. *Forest Grove School Dist. v. T.A.* 557 U.S. 230, 246-247, 129 S.Ct. 2484, 2496 (2009) (citing *Florence County School Dist. Four v. Carter by and through Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 366 (1993) and *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 373-374, 105 S.Ct. 1996, 2004-2005 (1985)). The IDEA does not require this Hearings Officer to consider whether

Parent can work out whatever arrangements are necessary for appeals to continue stay-put placements or partial payment programs.

Finally, if Parent were serious about withdrawing Student from Private School and re-enrolling Student at Home School, Parent could have easily requested that the IEP team meet to review the IEP with Parent after its completion in September 2021. Parent made no effort to request an IEP review meeting and simply filed a new, frivolous request for due process hearing. *FOF 90, 96*. This Hearings Officer concludes that Petitioners have not proven that Respondents denied Student a FAPE by completing Student's IEP-09/20/2021 without Parent's presence during the meeting. Based on the explanations above, Parent's participation in the IEP development process was not significantly infringed upon and Student did not lose any educational opportunities as a result of the IEP team completing the IEP-09/20/2021 without Parent. Based on Student's continued attendance at Private School for the 2021-2022 school year, the IEP team should meet to develop a new IEP for Student prior to the start of the DOE 2022-2023 school year.

B. Respondents did not deny Student a FAPE by failing to include Private School Director in the IEP development process

Petitioners' next argument is that Respondents denied Student a FAPE by failing to include participation of Student's private provider(s) in the IEP development process. This claim has no merit.

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 Director or other representatives were required to be at Student's IEP development meetings, as discussed, *supra*, 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.*

More importantly, in this case Private School Director was invited by the DOE to the IEP team meetings. The IEP meeting on September 20, 2021, was scheduled on that date based, in part, to Private School Director's availability for the meeting. *FOF 50, 53, 55-56.* Private School Director committed to the meeting and blocked off time to attend the meeting. *FOF 57.* It was Private School Director who chose not to attend the meeting based solely on Parent's text message notification that the meeting would be canceled. *FOF 64-65.* No one from the DOE contacted Private School Director to confirm that the meeting was canceled, and Private School Director filled the time slot saved for the meeting without confirming or checking with anyone to confirm that the meeting would be canceled.

Respondents diligently attempted to get Private School Director to the IEP development meeting, and it was due to the actions of Parent and Private School Director that Private School Director failed to attend. Petitioners have not proven that Respondents violated any provision of the IDEA for Private School Director's non-attendance at the September 20, 2021 IEP meeting.

C. Petitioners have not proven that the language in Student's IEP-09/20/2021 did not appropriately describe Student's least restrictive environment

Although this Hearings Officer has already found Petitioners' entire Complaint to be frivolous due to the previous Decision under DOE-SY2021-044 making the issues moot for the 2021-2022 school year, since the IEP team must meet and develop a new IEP for Student before the start of the 2022-2023 school year, this Hearings Officer will address the next two (2) issues for clarity.

Petitioners' next 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-09/20/2021 describes Student's LRE placement as

“[Student] will participate with non-disabled peers throughout the school day during all instructional (i.e. math, reading, writing, art, music, PE) and non-instructional (i.e. recess, lunch, school-wide events) activities, to the greatest extent possible in a General Education and Special Education classroom. If [Student] becomes dis-regulated, as determined by the SPED Teacher, OT, BCBA, and RBT, [Student] will work on self-regulation in an appropriate setting (i.e. general education classroom, resource room, sensory room, outdoors, playground). [Student] will receive ESY services in the General Education and Special Education Setting as detailed in the above paragraph.” *FOF 86.*

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-09/20/2021 clearly explains the extent to which Student would not participate

with nondisabled children. The IEP-09/20/2021 provides information about Student being removed from the setting if Student becomes dysregulated to work on self-regulation. At the recorded IEP meeting, the IEP team discussed what it would look like for Student to be in the general education setting to the greatest extent possible. *FOF 75-77*. The team discussed starting Student in the general education setting for shorter periods of time and working toward longer periods when Student was able to tolerate longer periods of time. The IEP team also noted that Student's one-to-one registered behavior technician would be with Student throughout the day to monitor Student's needs and assist the teachers in determining whether Student would benefit from being in the class or removed from the setting. Petitioners have failed to prove that the language of the IEP-09/20/2021 is vague and impacts Parent's ability to enforce and/or monitor its implementation.

- D. Petitioners have failed to prove that Respondents denied Student a FAPE where the team did not discuss needed behavioral interventions and/or needs to transition from Student's current program to the proposed DOE program during the IEP formulation process

Petitioners' final issue asks whether Respondents denied Student a FAPE where the IEP team did not sufficiently discuss Student's needed behavioral interventions and/or needs to transition from Private School to Home School. Petitioners' argument centers largely around the failure of the IEP team to include the specific language of the BIP into the IEP-09/20/2021 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. In this case, Student's IEP-09/20/2021 did include a number of behavioral supports and interventions in the supplementary aids and supports section of the IEP-09/20/2021, which were based upon Student's needs. *FOF* 83. For example, Student's supplementary aids and supports included access to visual supports, positive reinforcement strategies, preferential seating, and transition warnings. Student's IEP-09/20/2021 also included supplementary supports of ABA services, Individual Instructional Support provided by an RBT, a BIP, and a safety crisis plan, all of which were clarified in the IEP-09/20/2021 and addressed Student's behavioral needs.

This Hearings Officer also notes that while the IEP-09/20/2021 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* 23. The BIP in Student's IEP-09/20/2021 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 Student's benefit. *FOF* 84-85. Unlike a behavioral support plan, the BIP cannot be amended or

curtailed without 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).

Petitioners' second contention is that the transition needs of Student for the transfer from Private School to Home School were unaddressed in the IEP-09/20/2021. 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).

Nonetheless, the record in this case demonstrates that the IEP team did attempt to work with Parent to develop a transition plan to successfully transfer Student from Private School to Home School. Despite previous difficulties with scheduling meetings with Parent, Home School again set about trying to get a suitable date for the transition meeting to occur. *FOF 89, 91*. Home School even asked Parent to block off several hours for the meeting to ensure that the team could complete the transition plan. The IEP team reviewed Parent's last-minute comments and concerns for the transition of Student to Home school and ultimately after discussion at the transition meeting itself, the IEP team decided to reconvene to make changes to the proposed transition plan based on requests by Parent. *FOF 94*.

Finally, this Hearings Officer notes that Parent's participation in the transition planning process after receiving an award of tuition reimbursement for the 2021-2022 school year and

after determining that Student would not be withdrawn from Private School is misguided at best. Parent acknowledged that Parent wanted Student to stay at Private School and received an award of at least sixty percent (60%) of the tuition being paid for by the DOE. Parent coming to the transition meeting and making further requests from the IEP team for Student's transfer from Private School to Home School when Parent has no intention of sending Student to Home School again makes this Hearings Officer question the frivolity of the instant Complaint and the integrity of Parent's claims.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have failed to prove the allegation in the instant Complaint by a preponderance of evidence. While Respondents made a clearly imprudent decision to proceed on September 20, 2021, with the completion of Student's IEP without Parent's presence, Petitioners have failed to prove that it was a significant infringement on parental participation under the specific facts of this case. Petitioners have also failed to prove that the decision resulted in a loss of educational opportunity or a deprivation of educational benefits. Petitioners' request to have this Hearings Officer order the IEP team to review Student's IEP-09/20/2021 with Parent and develop a new or revised IEP for the 2021-2022 school year is denied.

Given Petitioners' previous award of tuition reimbursement from the Decision in DOE-SY2021-044, the IEP team would be best advised to develop a new IEP for Student prior to the start of the 2022-2023 school year. Parent has noted availability on March 1, 2, 3, April 5, 6, 7, and May 3, 4, 5, 2022, for IEP meetings as of the Hearing in November 2021. Private School

Director has noted that the best time for meetings for Private School Director's schedule is before 2:00 p.m.

Nothing in this Decision shall be construed to prevent any of the parties from convening an IEP meeting at an earlier date if desired by Home School or by Parent.

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, January 28, 2022.

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