



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,

Respondents.

DOE-SY2122-021

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: February 8-9, 2022

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On December 19, 2021, the Department of Education, State of Hawai'i (hereinafter "Respondents" or "DOE") received a Request for an IDEA Impartial 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 December 30, 2021.

A Prehearing Conference (“PHC”) was conducted on January 12, 2022. Participating in the conference were: Chastity T. Imamura, Hearings Officer, Parent for Petitioners; and District Educational Specialist (hereinafter “DES”), Vice Principal, and District Resource Teacher for Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for February 8-10, 2022.

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 January 12, 2022, 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 February 8, 2022. Petitioners called Student Services Coordinator (hereinafter “SSC”), Care Coordinator (hereinafter “CC”), Behavior Health Specialist (hereinafter “BHS”), Vice Principal (hereinafter “VP”), and DES to testify. The Hearing continued to February 9, 2022, where Respondents called Special Education Math Teacher (hereinafter “SPED Math Teacher”), General Education History Teacher (hereinafter “GE History Teacher”), Special Education History Teacher (hereinafter “SPED History Teacher”), and Special Education Language Arts Teacher (hereinafter “SPED LA Teacher”) to testify in their case-in-chief. Pursuant to a prehearing agreement, Petitioners and Respondents

agreed to have DOE Licensed Behavior Analyst (hereinafter “DOE LBA”) and Psychologist testify during Respondent’s case, but Petitioners would also be able to ask questions of those witnesses as part of their case-in-chief. Parent also testified on behalf of Petitioners after the Respondents’ rested their case-in-chief. Due to the completion of witness testimony on February 9, 2022, the Hearing date of February 10, 2022 was canceled.

Each party submitted their exhibits for the Hearing by the disclosure deadline of February 1, 2022. The parties met and conferred regarding the proposed exhibits by February 4, 2022. DES submitted Respondents’ objections to a few of Petitioners’ exhibits and to Petitioners’ request to call DES to testify. During the Hearing, this Hearings Officer addressed Respondents’ objections regarding the exhibits and allowed Petitioners to have DES testify as a witness. 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 February 10, 2022, a list of exhibits that were discussed during the hearing was provided to the parties 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 February 15, 2022. Any objections to the proposed exhibits were due on February 17, 2022. On February 18, 2022, 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 7, pages P53-P68; Exhibit 11, page P75, Exhibit 15, page P80; Exhibit 16, page P81; Exhibit 18, page P86; Exhibit 21, pages P90-P95; and Exhibit 26, page P105.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Section 1, pages 8-16; Section 2, pages 26-27; Section 3, pages 31-43, 57-72, 95-96, 116-131, 133-134; Section 4, pages 153-158; Section 6, pages 163-170, 251, 263, 266, 272, 275, 291-293; Section 8, pages 315-318; and Section 9, pages 330-332, 335-351.

Both parties wanted the opportunity to submit written closing arguments to this Hearings Officer for review. Based on the decision deadline of March 5, 2022, the deadline for the written closing arguments was February 24, 2022. Both parties timely submitted their written closing arguments.

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 three (3) issues in the Complaint to be addressed at the Hearing with the requested remedies:

Issue 1 – Parents request a) applied behavior analysis (hereinafter "ABA") services and b) an [REDACTED] teacher² to be integrated into Student's Individualized

² DES has indicated to this Hearings Officer and Parent that the DOE has a new title for the position that was previously known as the "[REDACTED] teacher." DES believes the title to be "behavior analyst teacher," but as that title has not been clarified, the language in the Complaint need not be changed. It is clear to both this Hearings Officer and the parties what Parents are seeking in this issue.

Education Program (hereinafter “IEP”) to address Student’s [REDACTED] special education needs.

Proposed resolution – Revise Student’s IEP dated December 1, 2021 (hereinafter “IEP-12/01/2021”) to integrate [REDACTED] services such as ABA to address Student’s needs.

Issue 2 – The school reported to Parent that ABA eligibility was approval of a functional behavior assessment (hereinafter “FBA”) and recommendation of a behavior intervention or improvement plan. Lack of parental participation impeded Parent’s contribution to the FBA/IEP process. No FBA was completed with Student at the recommendation of the DOE licensed behavior analyst (hereinafter “LBA”)/board-certified behavior analyst (hereinafter “BCBA”).

Proposed resolution – Parent requests that a private LBA/BCBA be able to conduct an evaluation as to the need for an FBA for Student.

Issue 3 – The FBA process used by the DOE failed to consider all Student’s behavior needs that affect Student’s learning. Parent disagrees with DOE’s policy and/or criteria for the determination of whether ABA services are provided to Student.

Proposed resolution – ABA services in the form of a program implemented by ABA professionals like a registered behavior technician and/or a BCBA.

IV. FINDINGS OF FACT

Witness background information

1. Parent is a [REDACTED] for [REDACTED], conducting [REDACTED] for [REDACTED] years. Parent has a master’s of science degree and serves as an [REDACTED] at [REDACTED], managing [REDACTED]. Testimony of Parent, Transcript of Proceedings, Volume 2, page 375, line 3 through line 13 (hereinafter referenced as “Tr.V2, 375:3-13”).
2. SSC is a student services coordinator at Home School. The duties of SSC include working with IEP teams to coordinate services that are provided to students through their IEPs, as well as coordinating the gathering of information for IEP teams to use

- in developing IEPs. SSC has been a student services coordinator for over [REDACTED] years and is also licensed as a general and special education teacher for grades kindergarten to twelfth (12th) grade. Testimony of SSC, Tr.V1, 54:16-3.
3. CC is currently an IEP writer for Home School's students with IEPs [REDACTED]. Prior to becoming exclusively an IEP writer for Home School, CC was a licensed special education teacher for [REDACTED] years and wrote IEPs throughout CC's time as a special education teacher. Testimony of CC, Tr, V2, 85:3-16.
 4. BHS has been a behavior health specialist for over [REDACTED] years with the Hawai'i DOE. BHS has a counseling undergraduate degree and a master's degree in counseling psychology. Prior to working for the DOE, BHS previously worked as an intensive in-home therapist through a private company. Testimony of BHS, Tr.V1, 113:17-114:11.
 5. VP has been a vice principal at Home School for over [REDACTED] years. VP has a undergraduate degree in English and psychology and has a master's of education degree in teaching. VP is certified as an administrator and has worked for the DOE for around [REDACTED] years. VP has been qualified as an expert witness in the area of [REDACTED] administration. Testimony of VP, Tr.V1, 154:11-155:1; Respondents' Exhibit, Section 9, pages 349-351 (hereinafter referred to as "R-Ex.9, p.349-351").
 6. DES is a district education specialist who previously worked as an attorney for the State of Hawai'i DOE. Testimony of DES, Tr.V1, 173:5-19. DES' primary responsibilities are with compliance with IDEA, Chapter 60, and instruction. While the DOE has district education specialists that have expertise in [REDACTED] and/or ABA services, DES is not one of those district education specialists.

See DOE's objections to Petitioners' Witness List, filed February 7, 2022.

7. SPED Math Teacher is a licensed special education teacher in the State of Hawai'i and has been teaching at Home School for [REDACTED] years. SPED Math Teacher has an undergraduate degree in communication and was certified in special education. Testimony of SPED Math Teacher, Tr.V2, 197:8-23.
8. GE History Teacher has been a world history teacher at Home School for [REDACTED] years. GE History Teacher has an undergraduate degree and a master's degree, as well as teaching credentials and is licensed to teach in the State of Hawai'i. Testimony of GE History Teacher, Tr.V2, 231:13-232:1.
9. SPED History Teacher has been teaching special education in world history for the past [REDACTED] years. SPED History teacher is licensed in the State of Hawai'i and has a undergraduate degree in social studies and a licensure in special education and specific learning disabilities. Testimony of SPED History Teacher, Tr.V2, 252:25-253:25.
10. SPED LA Teacher is a special education teacher that co-teaches an inclusion class for [REDACTED] grade English. SPED LA Teacher has an undergraduate degree in psychology and completed a licensing program in special education. SPED LA Teacher is licensed to teach special education in the State of Hawai'i. Testimony of SPED LA Teacher, Tr.V2, 273:16-274:4.
11. DOE LBA is a board-certified behavior analyst licensed in the State of Hawai'i, and currently works for a private company as an LBA. DOE LBA occasionally gets contracted to do work as an LBA for the Hawai'i DOE. DOE LBA has an undergraduate degree in elementary education with an emphasis in English and a

master's degree in applied behavior analysis. Prior to becoming an LBA, DOE LBA was an elementary school teacher licensed in the State of Hawai'i and taught elementary school for [REDACTED] years. DOE LBA has been qualified as an expert witness in the area of applied behavior analysis. Testimony of DOE LBA, Tr.V2, 295:24-299:23; R-Ex.9, p.348.

12. Psychologist has been a clinical psychologist for the DOE for around [REDACTED] years. Psychologist has a bachelor's degree in secondary education, master's degrees in school counseling and guidance and counseling psychology, and a doctorate degree in counseling psychology. Psychologist has also taught college level classes in psychology, participated in numerous research studies, presented at conferences, and conducted training related to behavioral issues in school-aged students. Psychologist has been qualified as an expert in the area of clinical psychology. Testimony of Psychologist, Tr.V2, 339:10-341:7.

Student's background information

13. Student is [REDACTED] years old and has been diagnosed with [REDACTED] [REDACTED] (hereinafter "[REDACTED]"), [REDACTED] (hereinafter "[REDACTED]"), [REDACTED] (hereinafter "[REDACTED]"), and sensory processing disorder. Testimony of Parent, Tr.V2, 374:23-375:2; Petitioners' Exhibit 7, page P56 (hereinafter referenced as "P-Ex.7, p.P56").

14. Student's current physician is Pediatrician, who conducted a telehealth session with Student on November 1, 2021. Due to restrictions based on COVID-19 government mandates, Pediatrician did not examine Student and spoke exclusively to Parent during the telehealth session. R-Ex.8, p.315-317.

15. In the telehealth progress notes, Pediatrician noted that “Intensive ABA with a licensed behavior analyst and a registered behavior technician would be appropriate for [Student’s] Individualized Education Program (IEP) because of [Student’s] [REDACTED], especially since [Student] has an [REDACTED]. This would help with [Student’s] socialization and language skills. This could also help [Student] to pay attention better.” No other information was provided in the progress notes summary regarding ABA. R-Ex.8, p.315-316.
16. No information was provided about Pediatrician, including Pediatrician’s general education and training, nor was any information provided as to Pediatrician’s familiarity with the science of ABA. Pediatrician did not testify at the Hearing in this matter.
17. Student had been receiving ABA services from Private Behavior Group (hereinafter “PBG”) since 2018. Private Board-Certified Behavior Analyst (hereinafter “Private BCBA”) wrote a letter on November 21, 2021, stating that “[a]ssessment indicated that [Student] would benefit from an intensive and comprehensive ABA program consisting of 40 treatment hours per week.” No information was provided about the assessment or what an “intensive and comprehensive ABA program” would entail. R-Ex.8, p.318.
18. Private BCBA did note that Student may not engage in what is perceived as the typical “challenging behaviors” but is still not effectively learning, and that Student’s disability affects Student’s ability to learn new skills and develop meaningful relationships with others. Private BCBA recommended that ABA strategies can be used with Student to promote effective learning environments and provide guidance

for learning and social and emotional health. R-Ex.8, p.318.

19. No information was provided about Private BCBA's training, education, and/or experience in ABA, nor did Private BCBA testify at the Hearing.

Student's background at Home School

20. Student began attending Home School during the 2020-2021 school year. Part of the 2020-2021 school year was affected by the government shutdown in March 2020 and Student did not attend school in person during that time but participated virtually. Testimony of SPED English Teacher, Tr.V2, 274:5-275:5.
21. Student earned [REDACTED] high school credits with a grade of [REDACTED] or higher in the 2020-2021 school year in the following courses: Language Arts, History, Math, Science, Physical Education, World Language, and two (2) elective classes. P-Ex.7, p.P58; R-Ex.9, p.330-331.
22. For the 2021-2022 school year, Student attends Home School in person. In the beginning of the 2021-2022 school year, Student missed a number of days of school due to medical treatment. Testimony of SPED Math Teacher, Tr.V2, 205:12-18.
23. Student is currently a [REDACTED] grader at Home School and on track to receive a high school diploma. Testimony of Parent, Tr.V2, 374:23-35, ; P-Ex.7, p.P58.
24. Student currently attends the following classes for the 2021-2022 school year: World History/Culture, English/Language Arts Grade [REDACTED], Geometry, Biology 1, Arts/Comm Path Core, Hawaiian 2, Health-Today/Tomorrow, and Advisory. R-Ex.9, p.330-331.

Events prior to the December 1, 2021 IEP meeting

25. On September 28, 2021, Parent sent an email to Home School requesting a meeting to discuss Student's IEP supplementary aids and services. In the email, Parent

informed the IEP team members that Student received privately funded ABA services after school and that any mandatory study hall that Student is required to attend would take away from Student's ABA services. Parent also made a request for ABA services for Student to assist Student in better accessing Student's education. P-Ex.15, p.P80.

26. On November 4, 2021, Parent sent an email to Home School to inquire whether Home School received a letter from Student's behaviorist and to let the school know that Student was released from Student's privately funded ABA services due to Student attending after school tutoring. Parent reiterated Parent's request for behavioral services as well as a cognitive behavioral intervention for [REDACTED] for Student's [REDACTED]. P-Ex.16, p.P81.

27. On November 15, 2021, a meeting was held with Parent, SCC, CC, VP, and BHS. This was not a formal IEP team meeting, but during the meeting the participants discussed initiating the process of getting an LBA to evaluate whether an FBA was warranted for Student. Testimony of SSC, Tr.V1, 37:23-38:5.

28. At some point between November 15, 2021 and December 1, 2021, DOE LBA was contacted by a district educational specialist to do observations of Student at Home School to determine whether an FBA was necessary. Prior to conducting the observations, DOE LBA spoke briefly with SSC and BHS to get some background information on the concerns of the IEP team. DOE LBA conducted observations of Student in Student's classes at Home School on December 1, 2, 3, and 6, 2021. Testimony of DOE LBA, Tr.V2, 300:18-302:4, 320:6-12.

Student's IEP-December 1, 2021

29. Student's IEP at issue in this case was developed at a meeting on December 1, 2021 (hereinafter referred to as "IEP-12/01/2021"). Present at the IEP meeting were Parent, SPED Math Teacher, SSC, CC, VP, BHS, and a general education teacher who is currently not one of Student's teachers. Testimony of CC, Tr.V1, 75:8-14; P-Ex.7, p.P68; R-Ex.3, p.131.
30. Prior to the IEP meeting, Student's teachers are required to complete a student status report or SSR, which gathers information regarding things like Student's behavioral concerns, academic strength, behavioral strengths, and any other needs that Student has. These SSRs are provided to the IEP writer, who takes the information and puts it into the present levels of educational performance³ (hereinafter "PLEPs") section of the IEP. Testimony of SPED Math Teacher, Tr.V2, 226:17-227:21.
31. The teacher summaries listed in the PLEPs read as follows:
- World History and Culture:
 - Behavioral Strengths: [Student] is polite, on time, always has a good attitude and works hard, [Student] comes to study hall to check in.
 - Behavioral Concerns: [Student] takes many pencils out in class. The behavior often occurs when [Student] is given an independent task to do.
 - Academic Strengths: [Student] is able to make statements and support it with evidence.
 - Academic Concerns: [Student] experiences some difficulty retaining some information and [] does not do well on tests (multiple choice). [Student] tends to do better with fewer selections (2 compared with 4).
 - English Grade ■:
 - Behavioral Strengths: [Student] comes to class on time and is respectful to the teachers and other students.
 - Academic Strengths: 1. With support and guidance, [Student] is able to recall plot elements and events surrounding a theme.
2. [Student] is able to form a five-paragraph essay.
 - Academic Concerns: 1. [Student] needs guidance and support throughout

³ 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.

[Student's] thought process and comprehension of a class text. Sometimes [Student] has difficulties retaining meanings of terms (justice and revenge), but insists on wanting to write about it. Breaking down and simplifying the content to support a better understanding is helpful.

2. [Student] has difficulty using textual evidence and making meaningful connections that relate to a claim.

3. [Student] needs guidance and support making sure [Student's] writing conventions are present (punctuation and capitalization).

-Arts/Comm Path Core:

None

-Geometry:

Behavioral Strengths: [Student] works independently and is polite to [Student's] teachers and peers.

Behavioral Concerns: Sometimes [Student] has a lack of focus. [Student] sometimes drops [Student's] pencils and pencil boxes which can be distracting.

Other times [Student] becomes off task and needs to be prompted.

Academic Strengths: [Student] has solid algebraic skills, solid foundational math skills, and is able to catch on quickly after being retaught.

Academic Concerns: When [Student] is off task, it can become an issue as [Student] misses out on key parts of the lesson.

-Biology:

Behavioral Strengths: [Student] has shown improvement in advocating for [Student's self] when the directions are unclear.

Behavioral Concerns: [Student] is easily distracted and has difficulty maintaining on task behavior.

Academic Strengths: [Student] has improved in the area of submitting assignments on time.

Academic Concerns: [Student] experiences difficulty with reading comprehension.

-Hawaiian:

Behavioral Strengths: [Student] is polite.

Academic Strengths: [Student] completes [Student's] work.

Academic Concerns: [Student] doesn't always pay attention in class.

-Career/Life Planning: None

-Advisory: None

-Input from BHS:

Behavioral strengths:

Respectful; polite

Friendly

Positive attitude

Participates in class & group discussions

Seeks out assistance from trusted adults

Works well with peers

Inquires about social outlets available on campus (interested in joining activities, sometimes may need assistance in bridging initial introductions).

Behavioral Challenges:

Difficulties with social communication – recognizing cues; inferencing; engaging in spontaneous conversations; recognizing others’ feelings; contributing to conversations on unfamiliar topics

Inattention – distracted; especially during low interest topics; at times needs reminders to refocus

Vocal / motor [REDACTED] – triggered by stressful situations; when [Student] is feeling overwhelmed or pressured

Organization / time management – assist with prioritizing when there are multiple tasks due; use of a visual planner / schedule to organize time.

P-Ex.7, p.P54-P56; R-Ex.3, p.117-119.

32. In Student’s IEP, Parent’s concerns were summarized by CC, rather than being written verbatim into the Parent Input section of the IEP. Student’s IEP-12/01/2021 did not contain an extensive summary of Parent’s concerns, but Parent’s email of concerns was placed into Student’s file. Testimony of CC, Tr.V1, 78:5-79:11.
33. The IEP goals and objectives for students are determined by the professional learning community members at Home School for each department based on their essential standards for the work within their courses. Based on teacher feedback for Student’s performance in class, Student’s goals and objectives are matched with the standards that the class is working on in each individual course. Testimony of CC, Tr.V1, 74:21-75:1; Testimony of SPED English Teacher, Tr.V2, 284:20-286:1.
34. Student’s IEP-12/01/2021 has five (5) goals with included objectives/benchmarks for each goal. The two (2) goals for language arts are: “by the end of the IEP year, [Student] will increase [Student’s] knowledge of Reading Literature as defined by [the] objectives, by one grade level;” and “by the end of the IEP year, [Student] will improve [Student’s] writing skills by one grade level.” The goal for mathematics reads “[Student] will demonstrate an understanding of grade level common core standards by performing with 70% proficiency or higher or formative and summative assessments in Math.” Student’s career and technical education goal is “while in high

school, [Student] will begin planning and preparing for post high school goals through Career Research Activities with 100% participation through [Student's] Advisory class." Student's final goal for health noted that "in one year's time, [Student] will identify and demonstrate self-management skills as evidence by an increase in use of interpersonal (i.e. verbal & non-verbal communication; problem solving; self-awareness skills; etc.) and intrapersonal skills (i.e. time management; organization; emotional regulation; etc.) to navigate the school day." P-Ex.7, p.P60-P64; R-Ex.3, p.123-127.

35. Student's IEP-12/01/2021 indicates that Student will receive special education for fifty (50) minutes, sixteen (16) times per week in the general education setting and counseling services for two hundred seventy (270) minutes per quarter. P-Ex.7, p.P65; R-Ex.3, p.128.

36. Student's IEP-12/01/2021 includes the following supplementary aids and services, program modifications, and supports for school personnel:

- Frequent checks for understanding in the form of open-ended questions to demonstrate comprehension.
 - Preferential seating to minimize distractions and help focus.
 - Frontload vocabulary, key terms, themes prior to introducing the lesson.
 - Tie new concepts to previously learned lessons and real-life experiences.
 - Provide step-by-step visual instructions to assist [Student] with independence.
 - Use of graphic organizers and thinking maps.
 - Option to type classwork, homework, assignments, projects, and assessments.
 - When doing a group activity, pair [Student] with a group of positive peers.
 - Use of planner for visual organization.
 - Chunking of assignments & larger tasks into smaller manageable parts.
 - If [Student] has missing assignments more than a week old, please notify [parent].
 - Please provide [Student] with hard copies of work.
- P-Ex.7, p.P65; R-Ex.3, p.128.

37. Several of these supplementary supports and modifications arise from ABA-type strategies that can be implemented without the oversight of a licensed ABA

professional, such as tying new concepts to previously learned lessons and real-life experiences, step-by-step visual instruction, using a planner for visual organization, and chunking of assignments. Testimony of DOE LBA, Tr.V2, 333:6-19.

38. The clarifications of services and supports also provides:

*Frontload vocabulary, key terms, themes prior to introducing the lesson so that [Student] has background knowledge and the material is familiar to [Student].

*Tie new concepts to previously learned lessons and real life experiences to assist [Student] with comprehension.

*Use of planner for visual organization, teachers will assist [Student] by reminding [Student] to use [the] planner.

*Please provide [Student] with hard copies of work – If not possible, please sit down with [Student] and explain the assignment orally.

*Counseling as a related service may include individual (skill bldg / rvw) &/or group (generalization), in-class support (practice), & crisis (de-escalation / skill rvw) based on identified needs. Counseling services may be delivered via a Web-based platform or in-person. Observation & team collaboration will be used to gather information related to progress monitoring.

P-Ex.7, p.P65-P66; R-Ex.3, p.128-129.

39. The least restrictive environment for Student as listed in Student’s IEP-12/01/2021 is described as “[Student] will receive specialized instruction in the general education setting for Language Arts, Math, Social Studies, and Science. [Student] will participate in the general education setting for all other courses, electives, and non-academic activities. [Student] will receive [the] specialized instruction in the public school setting.” P-Ex.7, p.P67; R-Ex.3, p.130.

40. In addition to the IEP-12/01/2021, a student support plan (hereinafter “SSP”) was developed by BHS for Student in November 2021. This SSP contains target behaviors of inattention, vocal/motor [REDACTED] (associated with Student’s [REDACTED]), social communication (including recognizing cues, inferencing, engaging in spontaneous conversation, recognizing others’ feelings, contributing to conversations on unfamiliar topics), and organization. The supports including in the SSP to address

these target behaviors are similar to many of the supports listed in Student's IEP-12/01/2021. These include check for understanding, visual checklists, chunking of materials into smaller tasks, supportive seating, assigning to groups with supportive peers, and use folder system to organize work. R-Ex.3, p.133-134.

Observations of Student by LBA

41. DOE LBA conducted observations of Student on December 1, 2, 3, and 6, 2021.

These observations lasted just under one (1) hour and were taken during one (1) class period per observation session. DOE LBA did not conduct observations during non-instructional time (i.e. recess, lunch, before or after school). Testimony of DOE LBA, Tr.V2, 302:15-310:14, 323:4-11, R-Ex.4, p.153-158.

42. DOE LBA took notes of what Student did in each class/observation period and also took down frequency data for four (4) specific behaviors: vocal stereotypy, where Student making a vocalization that is not considered conversation; being off-task, where Student was distracted from Student's work or not engaged in the current task that was given; teacher check-ins or redirections, where the teacher either checked-in with Student to see what Student was doing or gave Student a direction to focus on the task; and self-initiation/asking for help, where Student went to ask for help without any direction from the teacher. Testimony of DOE LBA, Tr.V2, 303:25-305:11.

43. The December 1, 2021, observation took place in Student's Hawaiian elective class, which was a general education class with no special education teacher. Student had displayed a higher number of stereotypy during the beginning of class before Student was given the assignment and occurred more infrequently once Student was given

something to work on. DOE LBA did not notice any significant behavioral issues and observed that Student was able to ask for help when needed, and was aware of social cues, such as asking an assistant a question when the teacher was busy.

Testimony of DOE LBA, Tr.V2, 305:12-307:1; R-Ex.4, p.153.

44. The second observation on December 2, 2021, took place in Student's Arts/Comm. Path Core elective class. Student had a higher number of vocal stereotypy occurrences as well as off-task behavior during this class, and DOE LBA concluded that it was due to Student having more independent work time. Student was able to work independently during that class on Student's project and had no teacher check-ins and redirections during that period. Testimony of DOE LBA, Tr.V2, 307:8-308:16; R-Ex.4, p.154.
45. On December 3, 2021, DOE LBA observed Student in Math class where Student had a general education and special education teacher instructing the class. During this period, Student had more frequent check-ins and redirections from the teachers and was able to ask for help when needed. DOE LBA noticed that during Math class, instruction was provided throughout most of the class period, so there was not much down time or independent work time during this class. Testimony of DOE LBA, Tr.V2, 308:17-309:18; R-Ex.4, p.155.
46. The last observation was done on December 6, 2021, in Student's English class. During this period, Student did benefit from one-to-one support from the teacher when Student was working on Student's assignment. Student did display appropriate behaviors in this class, such as working independently while waiting for another student to ask a question of the teacher before resuming a conversation with the

- teacher. Testimony of DOE LBA, Tr.V2, 309:19-310:14; R-Ex.4, p.156.
47. After conducting the observations, DOE LBA checked in with Student's teachers to make sure that Student did not have any additional behaviors of concern that were not observed during those class periods. The teachers did not raise any other behavioral concerns for Student besides what DOE LBA was monitoring. Testimony of DOE LBA, Tr.V2, 314:8-17, 323:12-20.
48. DOE LBA determined that based on the number of observations and the variety of classroom situations in which DOE LBA observed Student, DOE LBA had sufficient information to make a recommendation as to whether an FBA was necessary for Student. Based on DOE LBA's observations, DOE LBA did not recommend that an FBA be conducted with Student. DOE LBA noted that since Student did not display any behaviors that distracted from the learning of Student or others or presented any safety concerns. Testimony of DOE LBA, Tr.V2, 311:1-6, 315:11-15, 318:13-320:5, 324:17-325:4.
49. DOE LBA did not do any observations of Student outside of the school setting because FBAs are setting dependent and the behaviors of concern and any modifications necessary would be specific to that environment. Testimony of DOE LBA, Tr.V2, 333:23-8.

Student's performance in classes at Home School

50. For the 2021-2022 school year, Student attends all classes in general education classrooms. At least three (3) of Student's classes, Math, World History, and Language Arts, are inclusion classes, where two (2) teachers co-teach the class, providing instruction and assistance to the students. In those classes, one (1) of the

- teachers is a general education teacher and one (1) teacher is a special education teacher. Testimony of SPED Math Teacher, Tr.V2, 198:7-200:8; Testimony of GE History Teacher, Tr.V2, 232:7-17; Testimony of SPED History Teacher, Tr.V2, 254:1-14; Testimony of SPED English Teacher, Tr.V2, 275:14-22.
51. In Student's inclusion classes, Student is able to complete grade level assignments with modifications and supports. These modifications and supports include allowing Student to turn in late work; allowing Student to retake tests and assessments if Student receives an unsatisfactory grade; providing less choices (two instead of four) for multiple choice questions; chunking of assignments and exams; and allowing Student to have extra time to complete tests and assessments. Some of these modifications are also provided to the other students in the class as well. Testimony of SPED Math Teacher, Tr.V2, 206:16-207:25, 226:8-16; Testimony of GE History Teacher, Tr.V2, 233:1-14, 238:20-239:6, 240:14-241:13; Testimony of SPED History Teacher, Tr.V2, 254:24-256:10, 262:11-24, 267:1-268:10; Testimony of SPED English Teacher, Tr.V2,
52. Student is able to complete assignments independently and is able to self-advocate and independently ask teachers for assistance if Student does not understand or needs help on an assignment. Testimony of SPED Math Teacher, Tr.V2, 204:11-205:2, 208:2-8; Testimony of GE History Teacher, Tr.V2, 235:15-238:4, 239:7-12; Testimony of SPED History Teacher, Tr.V2, 259:20-260:5; P-Ex.7, p.P54-P55; R-Ex.3, p.117-118.
53. Student has vocalizations related to Student's ██████████ that has been occurring in class since the start of the 2021-2022 school year. None of these vocalizations

disrupt the class and none of Student's classmates have complained to Student's teachers that the noises were interfering with their learning. Student's vocalizations have also decreased over the course of the 2021-2022 school year. Testimony of SPED Math Teacher, Tr.V2, 200:13-201:18; Testimony of GE History Teacher, Tr.V2, 234:8-19; Testimony of SPED History Teacher, Tr.V2, 257:1-258:5; Testimony of SPED English Teacher, Tr.V2, 278:14-279:5.

54. Due to Student missing school during the beginning of the 2021-2022 school year, Student needed to complete make-up work to catch up with the rest of the material the class was learning. Student was able to make up the work that was missed and is currently at pace with the rest of the class. Testimony of SPED Math Teacher, Tr.V2, 205:12-22; Testimony of GE History Teacher, Tr.V2, 233:15-234:3; Testimony of SPED History Teacher, Tr.V2, 258:16-259:3; Testimony of SPED English Teacher, Tr.V2, 277:20-278:8.

55. The grades that Student earns in Student's classes are based on general education grading standards and while Student receives modifications and supports, Student's earned grades are equal to grades that general education students earn in Student's class. Testimony of SPED Math Teacher, Tr.V2, 224:7-226:7.

V. CONCLUSIONS OF LAW

Burden of Proof

The burden of proof in a request for IDEA impartial due process proceeding falls upon the party making the request. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537 (2005); *see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 820 (9th Cir. 2007). The standard of proof in such cases requires the requesting party to prove

the allegations by a preponderance of the evidence. Hawaii Administrative Rules (hereinafter “H.A.R.”) §8-60-66(a)(2)(B).

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 not met their burden of proof to show that Student was denied a FAPE by not including ABA services and/or an [REDACTED] teacher in Student's IEP

Petitioners' first argument notes that Student has been diagnosed with [REDACTED] and would benefit from the inclusion of ABA services and an [REDACTED] teacher as part of Student's supplemental services in Student's IEP. As discussed, *supra*, the IDEA does not require school districts to maximize the potential of students; it only requires them to provide an educational program for students to make reasonable progress in light of the student's unique circumstances. *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048; *Endrew*, 137 S.Ct. at 1001, 197 L.Ed.2d 335.

The facts of the *Rowley* case are similar to the present case involving Student. In *Rowley*, the student was deaf but was determined to be an excellent lip reader. 458 U.S. at 184, 102 S.Ct. at 3039. The student was able to finish kindergarten without the assistance of a sign language interpreter in her classes. *Id.* During the development of the student's next IEP, the parents of the student wanted a sign language interpreter assigned to the student, even though the teachers and staff at the school, as well as others with knowledge and background in the student's disability all noted that the student did not need a sign language interpreter to succeed in school. *Id.* at 184-185, 102 S.Ct. at 3040. The parents insisted that since the student was unable to understand as much as other students in the classroom, the student was not learning as much or performing as well as she could, and that was a denial of a free appropriate public education under the IDEA. *Id.* at 185, 102 S.Ct. at 3040. After analyzing the congressional intent of the IDEA, as well as the act itself, the United States Supreme Court determined that:

The Act requires participating States to educate [disabled] children with [nondisabled] children whenever possible. When that "mainstreaming" preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are

awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public-school systems are considered by our society to have been “educated” at least to the grade level they have completed, and access to an “education” for [disabled] children is precisely what Congress sought to provide in the Act. *Rowley*, 458 U.S. at 202-203, 102 S.Ct. at 3049.

While the U.S. Supreme Court later revisited and articulated the standard of appropriateness of an educational program in the *Endrew* case, the *Endrew* Court noted that the facts of the *Rowley* involved a curious situation in which a student who was performing better than many of her classmates was claiming a denial of FAPE. *Endrew*, 137 S.Ct. at 998, 197 L.Ed.2d at 335. In the *Endrew* case, the student had severe behavioral problems, including screaming in class, climbing on furniture and other students, and occasionally running away from school and the student’s academic and functional progress had essentially stalled, but the IEP team largely carried over the student’s same goals and objectives from one year to the next. *Id.* at 996, 197 L.Ed.2d at 335. The Court noted that the student was failing to make meaningful progress until the student was placed at a private school that specialized in [REDACTED] and created a behavior plan to address the student’s problematic behaviors. *Id.* at 999, 197 L.Ed.2d. at 335. The Court recognized that in *Rowley*, the facts of that case “shed[] light on what appropriate progress will look like in many cases. There, the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom ‘whenever possible’” and highlighted a goal for IEPs to be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* The Court set forth the standard for reviewing the sufficiency of IEPs to determine that “[i]t requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 1001, 197 L.Ed.2d at 335. Finally, the Court rejected the argument set forth by the parents of the

student that “a FAPE is an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities,” and cautioned that courts should not substitute their own notions of sound educational policy for those of school authorities and deference to school authorities should be given to the judgments made based on their expertise toward the education of a disabled child. *Id.*

The facts of this case are similar to the facts of the *Rowley* case. Here, Student is being educated with Student’s nondisabled peers in a general education setting in a public school. *FOF 39.* Student is being administered regular examinations and assessments and earning grades ranging from ██████ based on Student’s work in the different courses. *FOF 21.* Student is on track to receive a high school diploma within the four (4) years typically required for most high school students and has already earned ██████ credits toward that goal. *FOF 21.*

It is understandable that Parent wants more for Student to maximize Student’s potential to help Student upon graduation, but that is not what is required of school districts under the IDEA. The IDEA also vests school districts with the authority to make judgments regarding education so long as the educational programs created for students are demonstrated to be reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. Student’s IEP-12/01/2021 contains several annual goals and objectives that aim to have Student perform at grade level to advance to the next grade as well as working on Student’s functional skills, such as time management, interpersonal skills, organization, and emotional regulation. *FOF 34.* The special education and counseling minutes are equivalent to the number of minutes in the prior IEP that was implemented during the 2020-2021 school year, and new supplementary aids and supports have been added in Student’s IEP-12/01/2021 to assist

Student in achieving the goals and objectives in the IEP. *FOF35-35*. While the supplementary service of ABA services or an [REDACTED] teacher consultation was not included in Student's IEP-12/01/2021, Petitioners have not demonstrated that the IEP-12/01/2021 is not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Petitioners' have not proven the allegation in Issue #1 by a preponderance of the evidence, so Petitioners' requested remedy to have the IEP team revise Student's IEP-12/01/2021 to integrate [REDACTED] services, such as ABA services, is respectfully denied.

B. Respondents' procedures regarding the determination of whether Student needed an FBA was appropriate for the facts of this case

Petitioners' second issue questions the appropriateness of the FBA procedures conducted for Student in this case. Petitioners argue that Parent was told that Student could only receive ABA services upon the completion and recommendation of an FBA and that Parent was not involved in the determination of whether an FBA was warranted for Student.

In the State of Hawai'i, the legislature has codified the legal and ethical practice of ABA professionals under Hawai'i Revised Statutes Section 465D. While these statutes do not provide the guidelines under which an FBA must or should be completed, an assessment of the functions of behavior to determine the need for ABA services is a process that must be performed by someone qualified in the State of Hawai'i to do so. *See* Hawai'i Revised Statutes Section 465D-2 (2018). The Hawai'i DOE has adopted their own policies regarding whether an FBA is necessary for the development of a student's educational program. These policies include requiring that before an FBA is deemed necessary, it must be determined that the behaviors displayed by the student in the classroom impedes the student's learning or the learning of those around the student. *See* P-Ex.26, p.P105.

Home School had a meeting with Parent on November 15, 2021 and determined that an LBA would be retained to make observations of Student in the classroom to assess whether an FBA is necessary for Student's IEP development. *FOF 27*. The DOE obtained the services of DOE LBA to conduct observations of Student. *FOF 28*. DOE LBA is a licensed behavior analyst in the State of Hawai'i, who has [REDACTED] years of ABA experience working as a registered behavior technician and a behavior analyst and is qualified to conduct FBAs. *FOF 11*.

Prior to conducting the observations, DOE LBA testified that DOE LBA spoke with SSC to better understand that school's concerns for requesting the observations for Student. *FOF 28*. DOE LBA chose four (4) separate observation sessions for Student, each lasting just under one (1) hour, that spanned several different class subjects for Student, including two (2) general education classes and two (2) general education classes that were also co-taught by a special education teacher. *FOF 41-46*. DOE LBA took extensive notes from DOE LBA's observations and followed up with Student's teachers to see if there were any other behaviors that Student displayed that DOE LBA did not observe on the observation days. *FOF 47*.

During the observation sessions, DOE LBA focused on Student's vocal stereotypy, off-task behavior, teacher check-in and/or redirection, and self-initiation/asking for help, and noted the number of occurrences of these behaviors. DOE LBA also noted times where Student was distracted and was able to return to task and work independently. DOE LBA observed that Student had appropriate interactions with other students, which included having conversations with peers or waiting until a classmate was done speaking with a teacher before approaching the teacher to ask a question. DOE LBA did not note any behaviors during any of the four (4) observations that interfered with Student, Student's teachers' ability to teach, or other students' ability to learn. DOE LBA did not note any behaviors from other students that negatively

affected Student's ability to access Student's education (such as bullying, negative comments, etc.). *FOF 41-47.*

Based on DOE LBA's training, experience, and observations, DOE LBA determined that an FBA was not necessary for Student, as Student did not display any behaviors that impeded Student's or other students learning or presented any behaviors that were aggressive in nature or presented safety concerns. *FOF 48.* DOE LBA did recommend adding more details and supports into Student's SSP and having it followed with fidelity by all Student's teachers.

In this case, based on Parent's request for ABA services for Student, several members of Home School's IEP team met with Parent to discuss the retaining of an LBA to do the observations. *FOF 27.* Parent was involved with the determination that observations would be done by an LBA to determine if an FBA was warranted for Student, which was within the purview of the IEP team members and Parent. Once contracted, however, DOE LBA was the professional in charge of making decisions regarding how and when to do the observations necessary for the process. DOE LBA conducted the observations in conformance with the criteria used by the DOE to determine if an FBA was necessary and concluded that an FBA was not necessary for Student. While Parent argues that DOE LBA should have consulted with Parent to get a better understanding of Student's behaviors of concern, Petitioners have not proven that failing to do so was a denial of FAPE. Indeed, DOE LBA is licensed by the State of Hawai'i as a person who is qualified to make these determinations about the provision of ABA services and DOE LBA's qualifications to make such determinations has not been raised as an issue in this case. Finally, while Parent may have input into Student's behaviors outside of the school setting, an FBA is setting specific, meaning that the observations and behaviors observed in the school setting and the functions of those behaviors are specific to the location in which the

observations are conducted. *FOF 49*. Therefore, it is unlikely that Parent's input regarding Student's behaviors to DOE LBA's observations would have made a difference in DOE LBA's determination that an FBA was not necessary to address Student's behaviors in the school setting.

Finally, the determination of DOE LBA that an FBA was not warranted for Student is also supported by the testimony provided by Student's teachers. *FOF 50-53*. Student's teachers that testified stated that Student did not present any behavioral problems with teaching, did not present behavioral problems that interfered with Student's own or other students' work or classroom experience, and did not present any behavioral problems that would provoke any negative responses from other students in class. The information from Student's PLEPs from Student's other teachers also do not indicate that Student exhibits any behavioral problems that would impede Student's ability to access Student's education.

Petitioners have not proven the allegations in Issue #2, that the process of determining whether an FBA was warranted for Student failed to include parental participation, resulting in a recommendation that no FBA was necessary. Petitioners' proposed remedy for Issue #2, that a private LBA/BCBA be able to conduct an evaluation as to the need for an FBA for Student is respectfully denied.

C. Respondents process for determining the need for Student to receive ABA services is appropriate and the resulting determination that Student does not need ABA services is not a denial of FAPE

Petitioners' final argument in the Complaint is that the FBA process used by the DOE failed to consider all Student's behavior needs that affect Student's learning. Parent disagrees with the DOE's policy and/or criteria for the determination of whether ABA services are provided to Student.

As noted in Section A above, the IDEA does not require school districts to maximize the potential of each student to provide a free appropriate public education. As the same legal principle applies to this section, this Hearings Officer concludes that the process for determining Student's need for ABA services is appropriate and that Student's IEP-12/01/2021 is reasonably calculated to allow Student to make appropriate progress in light of Student's circumstances.

D. Other issues raised by Petitioners in opening statement and closing argument do not rise to the level of a denial of FAPE by Respondents

In addition to the issues in the Complaint addressed above, Petitioners presented the following issues during opening statement: 1) failure to develop a behavior service plan or intervention plan without parent involvement; 2) failure to modify goals and objectives in key areas of deficiency to meet Student's unique needs identified in the PLEPs; 3) failure to provide parent with meaningful participation in the development of certain areas of Student's IEP, such as the SSP and FBA process; 4) failure to have adequate teacher involvement in the December 1, 2021 IEP; and 5) failure to evaluate educational performance beyond academic performance. *See* Petitioners' Opening Statement, Tr.V1, 14:23-16:24; Petitioners' Closing Statement, filed February 24, 2022.

This Hearings Officer does not have the authority to address the additional issues raised by Petitioners that were not included in the original Complaint. *See* 20 U.S.C. §1415(f)(3)(B) ("The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed ... unless the other party agrees otherwise"); *see also Dept. of Educ., Hawaii v. C.B.*, 2012 WL 1537454 *8 (D. Hawai'i 2012); *County of San Diego v. California Special Education Hearing Office*, 93 F.3d 1458, 1464-1465 (9th Cir. 1996). However, this Hearings Officer does believe that this record contains sufficient

evidence to allow the following clarifications to be made about the additional issues raised by Petitioners.

1. Failure to development of a behavior service plan or an SSP

Petitioners argue that Respondents failed to develop a behavior service or intervention plan with parent involvement to help Student receive an educational benefit. Petitioners cite to *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) to support their argument that Student's IEP-12/01/2021 was deficient due to the failure of Respondents to develop a behavior service or intervention plan for Student. In *Neosho*, due to his diagnosis, the student was "prone to inappropriate behavior, which, when unmanaged, largely prevent[ed] him from interacting with his peers in an acceptable manner." *Id.* at 1024. Due in large part to these inappropriate behaviors, Student was placed in a fully-self contained special education class for all subjects except for music class. *Id.* at 1025. The IEP team failed to develop a behavior plan for student to manage these inappropriate behaviors and also was aware that these behaviors would reemerge whenever the student was advanced to next grade-level work. *Id.* at 1028. This resulted in the student's teacher adjusting the student's work down one (1) or two (2) grade levels to allow the student to make some measure of success, and the court noted that the student needed personalized assistance just to complete those assignments as well.

In *Department of Education, Hawai'i v. L.S. ex rel. C.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. 2019 WL 1421752 (D. Hawai'i 2019). 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.

The facts of the *Neosho* and *L.S.* case are clearly distinguishable from the facts of the instant case. Student does not display any behaviors that warrants a more restrictive environment without any kind of behavior plan. *FOF 50-53.* The record in this case shows that Student is able to work independently; self-advocate, such as asking for help from teachers; and engage in appropriate social interactions with peers, such as speaking to them or waiting for them to finish a conversation with the teacher before asking a question. Student's IEP-12/01/2021 also contains a number of ABA-type supports and modifications to address Student's primary behaviors of being off-task and distracted; for example, the IEP-12/01/2021 includes the following supports: preferential seating to minimize distractions and help focus, provide step-by-step visual instructions to assist Student with independence, use of graphic organizers and thinking maps, pairing Student with positive peers for group activities, and chunking of assignments into smaller tasks. *FOF 36-37.* Nothing in this record demonstrates the need for Student to have a behavior plan to address Student's behaviors in order for Student to remain in the general education environment.

While it would have been preferable to notify Parent of or include Parent in the development of the SSP for Student, based on Student's minimal behaviors of concern in school, the failure to do so is not likely to rise to the level of a significant infringement of parental participation. Parent's input was still taken into account for the goals and objectives, special

education and related services, and the supplementary aids and supports for Student, all of which address Student's primary behavioral and social concerns. The SSP in this case serves a guide for the teachers to use minimal techniques to get Student back on track, rather than a behavioral plan to address behaviors that are preventing Student from accessing Student's education.

2. Failure to modify goals and objectives to meet Student's needs in the PLEPs

In their opening statement, Petitioners also raised the issue of whether Respondents appropriately modified Student's goals and objectives in key areas of deficiency to meet Student's unique needs. Petitioners argue that while the DOE focuses their attention to Student's academic performance and progress, Parent would like the school to also focus on Student becoming an independent, self-directed learner after high school.

Student's IEP-12/01/2021 contains academic concerns based on the reports provided by Student's individual class teachers. The goals and objectives that are developed for Student's IEPs are determined by the subject matter department team, who sets the guidelines for what the acceptable standards are to meet common core guidelines in that subject. *FOF 33*. None of Student's teachers indicate a specific need for Student in any academic area that is outside of the grade level requirements and Student has been earning passing grades for Student's classes. *FOF 31*. No evidence has been presented to demonstrate that Student's goals and objectives are not suitable to address Student's academic and social needs.

3. Failure to provide meaningful participation in certain areas of Student's IEP, such as the SSP and the FBA

As discussed previously in this decision, the procedures followed by the IEP team for the determination of the necessity of an FBA was appropriate and did include Parent input. Parent was also present at all the IEP team meetings that were held and Parent's communications with Home School were considered and responded to in a timely fashion. *See, e.g. R-Ex.6, p.163-*

170. While there appeared to be some discrepancy as to the request for ABA services and the response, ultimately, the IEP team did address Parent's concerns by retaining the services of DOE LBA to do the observations of Student that were a prerequisite to an FBA determination. In a number of other instances, the IEP team gathered to address concerns raised by Parent in emails; for example, the IEP team members attended Student's parent/teacher conference, so an impromptu IEP team meeting convened after the conference to address Parent's concerns. R-Ex.6, p.165-166.

The record presented does not support Parent's contention that Parent was denied meaningful participation into Student's IEP development. While Parent did not agree with the DOE's assessment to not provide Student with ABA services, this does not necessarily demonstrate that Parent was denied participation. Educational policy is often left to the expertise school authorities and courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review." *Endrew*, 137 S.Ct. at 1001, 197 L.Ed.2d at 335.

4. Failure to have adequate teacher involvement in the December 1, 2021 IEP

Petitioners also raised the issue of failure of the DOE to have adequate teacher involvement at the December 12, 2021 IEP meeting. Petitioners argued that goals in Student's December 1, 2021 IEP were switched out without Parent involvement.

The IDEA requires that an IEP team involve not less than one (1) regular education teacher of the student, and not less than one (1) special education teacher of the student. *See* H.A.R. §8-60-45(a); 20 U.S.C. §1414(d)(1)(B). Petitioners did not present direct evidence related to this issue, however, there was testimony in the record of only two (2) teachers being present at Student's IEP meeting on December 1, 2021. These two (2) teachers were SPED

Math Teacher and a general education teacher that was not one (1) of Student's classroom teachers. The testimony of SPED Math Teacher also noted that each of Student's individual teachers submit a student status report to provide into for the IEP regarding Student's present levels of performance in each of Student's classes. *FOF 30*. This allows for teachers who are unable to attend the meeting to still update the team on Student's performance.

Student's IEP-12/01/2021 does contain updates from Student's teachers in all eight (8) of Student's classes for the 2021-2022 school year. *FOF 31*. A general education teacher was present at the meetings, and while the general education teacher may not have been one of Student's teacher's specifically, Petitioners have not demonstrated that this has negatively affected Student's IEP-12/01/2021.

Petitioners also argue that Student's goals and objectives were switched out without parent involvement, but as discussed, *supra*, these goals and objectives are drafted by Student's subject matter team to determine the requirements for Student to meet the common core grade level standards and are switched out at the completion of each course taken to account for the requirements of the next course that Student takes. Petitioners have not demonstrated that this has negatively affected Student's IEP-12/01/2021.

5. Failure to evaluate Student in educational performance beyond academic performance

Finally, Petitioners raised the issue of failure to evaluate educational performance of Student beyond academic performance. Petitioners argue that grades and grade point average (hereinafter "GPA") do not necessarily measure educational benefit in Student's academic and non-academic areas. Petitioners point to Student's iReady test scores reflecting Student being well below grade level, however the scores being given no weight in the IEP process.

Petitioners cite to *W.W., individually and on behalf of M.C. v. New York City Department of Education*, to support their contention that Student was not evaluated properly beyond academic and non-academic areas. 63 IDELR 66 (S.D.N.Y 2014). This case does not support Petitioners' contention and in fact, the court in the *W.W.* case focused on whether a school district could classify a student for IDEA purposes under the general category of learning disability than the category of dyslexia. The court also examined the goals and objectives in the student's IEP and determined that while they did not directly mention or address the student's dyslexia, the goals and objectives were adequately designed to address the student's learning challenges and were appropriate.

Further, the IDEA does not require school districts to measure a student, who is fully integrated into the general education classroom and being assessed on the general education grade level requirements, for areas other than academic performance. *See Rowley*, 458 U.S. at 202-203, 102 S.Ct. at 3049. While it is true that some students may be assessed in areas other than academic performance, typically this is reserved for students who are not able make academic progress and whose IEPs are focused on daily functional living skills, such as toileting, dressing, speaking or communication. Student in this case has demonstrated that Student is capable of making measurable academic progress alongside Student's general education peers based on the same assessments or requirements under the common core. Respondents are not obligated to evaluate Student beyond academic performance since Student's IEP allows Student to access Student's education in a general education setting.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have failed to prove Issues 1-3 in the instant Complaint by a preponderance of evidence. The corresponding remedies requested by Petitioners are respectfully denied.

RIGHT TO APPEAL

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

DATED: Honolulu, Hawai‘i, March 4, 2022.

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