



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

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

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE  
OF HAWAI'I, and KEITH T. HAYASHI,  
Interim Superintendent of the Hawai'i Public  
Schools,

Respondents.

DOE-SY2122-025

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing: April 20, 21 & 25, 2022

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On February 9, 2022, the Department of Education, State of Hawai'i and Keith T. Hayashi, Interim Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE") received a request for a due process hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with

Disabilities Education Act, from Student, by and through Parent (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on February 22, 2022.

A prehearing conference was held on March 9, 2022, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Catherine D. Piazza, Esq. (hereinafter “Ms. Piazza”) standing in for Michael R.S. Azuma, Esq. (hereinafter “Mr. Azuma”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for March 23, 2022, through April 1, 2022.

On March 16, 2022, a status conference was held with this Hearings Officer, Mr. Peck, and Mr. Azuma. During the status conference, Mr. Azuma informed Mr. Peck and this Hearings Officer that due to scheduling difficulties with the witnesses, Respondents were requesting a continuance of the Hearing. Petitioners did not object to a short continuance of the Hearing, and the Hearing was rescheduled to April 20-25, 2022. Due to the new Hearing dates scheduled, Respondents submitted a request for an extension of the Decision deadline, which was originally April 25, 2022, to June 9, 2022. The Order Granting Respondents’ Request to Extend the 45-Day Decision Deadline was filed on April 18, 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. Both parties agreed to the following: 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 witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

The Due Process Hearing began on April 20, 2022. Present at the Hearing were Parent and Mr. Peck, on behalf of Petitioners; District Educational Specialist, Mr. Azuma, and Ms. Piazza, on behalf of Respondents; this Hearings Officer; and the assigned court reporter. Petitioners called Parent to testify and rested their case-in-chief. Respondents called Special Education Teacher (hereinafter “SPED Teacher”) and Prior Board-Certified Behavior Analyst (hereinafter “Prior BCBA”) to testify. The Hearing continued to April 21, 2022, when Respondents called Current Board-Certified Behavior Analyst (hereinafter “Current BCBA”), Prior Speech-Language Pathologist (hereinafter “Prior SLP”), Current Speech-Language Pathologist (hereinafter “Current SLP”), and Principal to testify and rested their case. Petitioners expressed an interest in calling an expert in the field of behavior analysis as a rebuttal witness but did not have such an expert already scheduled and requested some time to retain one. Respondents objected to Petitioners being allowed to call any rebuttal witnesses and to Petitioners being granted extra time to secure a witness for rebuttal. This Hearings Officer noted that the Hearing was already scheduled to continue Monday, April 25, 2022, and granted Petitioners leave on Friday, April 22, 2022, and the weekend to attempt to secure a rebuttal witness to testify on Monday, April 25, 2022. Petitioners were unable to secure a rebuttal witness to testify on Monday, April 25, 2022, so the Hearing concluded on that date without additional witness testimony.

Each party submitted their exhibits for the Hearing by the disclosure deadline of April 12, 2022. The parties met and conferred regarding the proposed exhibits by April 15, 2022, 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 April 21, 2022, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Since no additional witnesses or exhibits were introduced during the April 25, 2022 session, no changes were made to the lists. 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 May 4, 2022. Any objections to the proposed exhibits were due on Friday, May 6, 2022. Neither party submitted any additional exhibits to be received and on May 5, 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 1, pages 001-056; and Exhibit 2, pages 057-114, and an audio recording dated April 11, 2022.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 0001-0008; Exhibit 10, pages 0024-0045; Exhibit 20, pages 0061-0088; Exhibits 24-25, pages 0095-0124; Exhibits 28-29, pages 0128-0153; Exhibits 39-40, pages 0628-0657; Exhibits 55-62, pages 0803-0931; Exhibit 69, pages 1006-1015; Exhibits 74-76, pages 1027-1037; and Exhibit 78, page 1040.

Both parties wanted the opportunity to submit written closing briefs regarding the legal issues to this Hearings Officer for review. The written closing briefs were timely submitted by both parties by the deadline of May 31, 2022. Based on the decision deadline of June 9, 2022, Petitioners requested an extension of the deadline to July 24, 2022. Petitioners had no objection to the request for extension, so based on the number of exhibits, including a lengthy audio file to

be reviewed, and for the transcripts to be available to the parties, this Hearings Officer granted Petitioners' request for extension. The deadline for the decision in this matter is July 24, 2022.

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

## **II. JURISDICTION**

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

## **III. ISSUES PRESENTED**

Petitioners assert two (2) issues in the Complaint to be addressed at the Hearing:

**Issue 1** – Whether the September 16, 2021, Individualized Education Program (hereinafter "IEP") was appropriately implemented regarding:

- a. Speech/language therapy, as remote therapy is insufficiently effective for Student.
- b. Use of assistive technology for communication; and quarterly parent/teacher consultations.

**Issue 2** – Whether the September 16, 2021 IEP provides Student with an appropriate program regarding:

- a. Transportation: Student needs either to be transported separately or have an aide provided to accompany Student for behavioral reasons.
- b. Behavioral interventions:
  - i. Reference is made to a behavioral intervention plan in the clarifications of services and supports of the IEP, which is a plan meant to be updated outside of the IEP development process and is not subject to implementation requirements of services.
  - ii. Implementation of structured breaks throughout the entire days, printed visual schedule, and access to regulation strategies as directed by occupational therapist are the only listed behavioral interventions for Student in the supplementary aids section of the IEP-09/16/2021, which is insufficient.

- c. ABA services – as described in Student’s clarification of services and supports i) fails to define the amount of supervision the RBTs will be provided and, ii) is insufficient in the number of minutes to meet Student’s needs.
- d. Provision of Parent Education and Training, to help coordination of behavioral interventions/expectations between home and school.
- e. Daily communication needs to be listed as a supplemental aid/support to help coordination of behavioral interventions/expectations between home and school.
- f. Define the particular assistive technology(ies) for communication Student will be using and not merely list it as accessible but include specific parameters for use.
- g. Sign language or sign approximations should be listed in Student’s IEP-09/16/2021 as this is one of Student’s means of communication.
- h. Quarterly parent/teacher consultations need to be listed in Student’s IEP-09/16/2021.
- i. Student needs greater access to peers.

In their written closing brief, dated May 31, 2022, Petitioners withdrew Issue #2(c) from consideration in this Decision. Therefore, Issue #2(c) will not be addressed in this Decision.

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

##### Witness background

1. SPED Teacher is currently the [REDACTED] special education teacher at Home School. SPED Teacher has been licensed to teach special education for grades kindergarten to twelfth grade in the State of Hawai’i for [REDACTED] years. Prior to becoming a special education teacher, SPED Teacher worked as a paraprofessional for [REDACTED] years with students with special needs. Testimony of SPED Teacher, Transcript of Proceedings, Volume 1, page 113, line 17, through page 114, line 5, and page 137, line 1 through 20 (hereinafter referenced as “Tr.V1, 113:17-114:5, 137:1-20”).
2. Prior BCBA was qualified as an expert witness in the field of behavior analysis with a focus on [REDACTED]. Prior BCBA has a bachelor’s degree in psychology; a master’s degree in special education, severe disabilities and [REDACTED]; and has credits toward a doctoral degree in special education.

Prior BCBA was board-certified in the field of behavior analysis in October 2009 and has been working as a board-certified behavior analyst since that time. Prior BCBA is licensed as a board-certified behavior analyst in the State of Hawai'i. Testimony of Prior BCBA, Tr.V1, 149:15-160:2; Respondents' Exhibit 76, pages 1036-1037 (hereinafter referenced as "R-Ex.76, p.1036-1037").

3. Current BCBA was qualified as an expert witness in the field of behavior analysis and as a board-certified behavior analyst. Current BCBA has a bachelor's degree and a master's degree in psychology and was certified as a board-certified behavior analyst in December 2020. Current BCBA previously worked as a school-based behavior health specialist providing counseling support to students with special needs, including [REDACTED], [REDACTED] [REDACTED]. Current BCBA is licensed as a board-certified behavior analyst in the State of Hawai'i. Testimony of Current BCBA, Tr.V2, 199:10-203:6; R-Ex.78, p.1040.
4. Prior SLP is a speech-language pathologist who is licensed in Hawai'i and Washington State who was qualified as an expert witness in the field of speech-language pathology. Prior SLP has a bachelor's degree in communication sciences and disorders and a master's degree in speech-language pathology. Prior SLP has worked in the school setting as a speech-language pathologist since [REDACTED]. Testimony of Prior SLP, Tr.V2, 274:3-277:3.
5. Current SLP is a speech-language pathologist who is licensed in Hawai'i, Michigan, Texas, New Mexico, and California, who was qualified as an expert witness as a speech-language pathologist and in the area of speech-language pathology. Current SLP has a bachelor's degree in communication sciences and disorders and a master's

degree in speech-language pathology. Current SLP has worked as a speech-language pathologist since around [REDACTED]. Testimony of Current SLP, Tr.V2, 300:4-303:18; R-Ex.75, p.1031-1035.

Student's background

6. Student is [REDACTED] years old and was diagnosed with [REDACTED] (hereinafter "[REDACTED]"), [REDACTED] delays when Student was around [REDACTED] years old. Testimony of Parent, Tr.V1, 11:4-16; *see also* Petitioners' Exhibit 1, page 039 (hereinafter referenced as "P-Ex.1, p.039"); R-Ex.28, p.0128.
7. Student is non-verbal and communicates through sign language approximations and with the assistance of technology, such as an iPad. Testimony of Parent. Tr.V1, 13:24-16:7.
8. Student has behavioral issues including [REDACTED], which sometimes leads to aggression and other behaviors. Student's other behavioral concerns include [REDACTED], [REDACTED]. Some of these behaviors, such as [REDACTED], have been demonstrated since Student's initial attendance at Home School, and other behaviors, such as the [REDACTED], began later, while Student attended Home School. *See generally* Testimony of Parent, Tr.V1, 11:1-107:20; Testimony of SPED Teacher, Tr.V1, 116:1-144:25; Testimony of Prior BCBA, Tr.V1, 160:7-190:5; P-Ex.1, p.033-056; P-Ex.2, p.057-113; R-Ex.28, p.0128-0145; R-Ex.29, p.0146-0153; R-Ex.40, p.0647-0657.



9. Home School is Student's home school and Student was an [REDACTED] grader for the 2021-2022 school year. Testimony of SPED Teacher, Tr.V1, 114:7-11.
10. Student has been determined to be eligible for special education and related services under the category of [REDACTED]. P-Ex.1, p.002; R-Ex.10, p.0025; R-Ex.20, p.0062; R-Ex. 24, p.0096.
11. Prior to [REDACTED], Student and Parent lived in [REDACTED], where Student received special education and related services at a private school for approximately two (2) years. Testimony of Parent, Tr.V1, 12:3-11; P-Ex.1, p.002; R-Ex.10, p.0025; R-Ex.20, p.0062; R-Ex.24, p.0096.
12. Student currently receives applied behavioral analysis (hereinafter "ABA") services through a private company at Student's home. Student's private ABA services usually takes place Monday through Thursday from approximately 4:30 – 7:30 p.m. Testimony of Parent, Tr.V1, 12:18-13:1, 49:18-51:5.
13. Student previously received ABA services at the private school Student attended in [REDACTED]. Testimony of Parent, Tr.V1, 12:5-17, 49:15-17.
14. When Student began attending Home School in 2020, Student was approximately [REDACTED] tall and [REDACTED] pounds.
15. In February 2021, Prior SLP began working with Student at Home School after shadowing and transitioning over Student's care from the speech-language pathologist before Prior SLP. Prior SLP worked with Student until around July 2021. Testimony of Prior SLP, Tr.V2, 277:6-23, 277:24-278:9.
16. Prior to the time that Prior SLP worked with Student, Student had begun using an iPad as a technology device for communication. Although Parent was initially

hesitant to use the iPad, Prior SLP worked with Parent during this time to provide training for Parent on Student's use of the iPad for communication and speech. The iPad that Student was using during this time included a program, "LAMP," that assisted with Student's use of the iPad. Testimony of Prior SLP, Tr.V2, 278:10-282:20.

17. Prior SLP also introduced other methods of communication to Student to work toward Student's IEP goals and objectives for speech and communication. These included approximated sign language, pictures, and the iPad. Prior SLP would allow Student to choose the method of communication to encourage Student to communicate in whatever format Student chose. Testimony of Prior SLP, Tr.V2, 283:11-286:13, 288:9-291:17.

18. Despite having Parent training on the LAMP-enabled iPad and the initial thoughts of having the iPad sent home for use with Parent, the use of the LAMP-enabled iPad stopped shortly after it was introduced. Testimony of Parent, Tr.V1, 15:2-16:18.

Student's June 1, 2021 IEP meeting and resulting IEP

19. IEP team meetings were held on May 18, 2021, and June 1, 2021, during which a written IEP was developed for Student (hereinafter "IEP-06/01/2021"). Present at the IEP meeting on May 18, 2021, from the DOE were SPED Teacher, Principal, Prior SLP, a board-certified behavior analyst, a general education teacher, and a counselor. Also present at the meeting were Parent, a friend of Parent, and a parent advocate. Everyone except the general education teacher was also present at the June 1, 2021 IEP meeting. R-Ex.20, p.0061-0088.

20. At the IEP meetings, Prior SLP presented Student's present levels for communication

and the proposed speech-language goals and objectives with the IEP team. Parent had some concerns and wanted to provide input regarding the proposed goals, which were discussed and addressed at the IEP meeting. Testimony of Prior SLP, Tr.V2, 278:4-279:11, 294:2-14.

21. The present levels of educational performance (hereinafter “PLEPs”)<sup>2</sup> section of Student’s IEP-06/01/2021 contained the following background information:

“While at [Home School] [Student] has been provided with a RBT and skills trainer to assist with [Student’s] behaviors of being non-compliant during transitions and to assist in keeping [Student] safe from hurting [Student’s self]. [Student] has a difficult time staying engaged with [ ] peers and will most of the day choose to be in a [redacted] room laying out or sitting on a trampoline. [Student] is able to be engaged in school work for no more than 10-15 minute at a time. [Student] require[s] frequent breaks in order to motivate [Student] to move onto another academic activity. For communication [Student] is provided with an iPad that [Student] uses to answer a question or pick an activity. [Student] is able to sign “stop, toilet, break, and water” with no prompts. On most days, [Student] will walk to the cafe to have lunch with [ ] peers. [Student] will not wear a mask if forced to use one [Student] will spit and become aggressive. When [Student] [redacted] [Student’s] behavior plan requires that [Student] be provided with a non-preferred activity to redirect [Student’s] thoughts to [redacted] [redacted]. [Student] will [redacted] anyone that try’s (*sic*) to redirect [Student] to something [Student] does not want to do. Due to [Student’s] size it is very difficult to get [Student] from one place to another, [Parent] has [ ] expressed about [Student’s] size, and not being able to get [Student] to follow [ ] directions. This has been a concern of [Parent] since bringing [Student] to [Home School]. Another concern is riding the bus, [Student] has been written up for not wearing [a] mask, not wearing [Student’s] seat belt, and for [redacted] the aide. All of these are concerns [Student’s] [Parent] has tried to address but with [Student’s] limited cognitive ability of understanding right from wrong it has been difficult finding a solution to these situations. Mostly because [Student’s] hitting on the bus and refusal to wear [the] seatbelt has only started within the past two weeks. Both [Parent] and the school has

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<sup>2</sup> This Hearings Officer notes that the current terminology for this section of the IEP is present levels of academic achievement and functional performance (“PLAAFP”), however the DOE forms and Student’s IEP team used the term PLEPs, so it will be referred to as PLEPs in this Decision.

worked on getting [Student] to wear a mask, follow rules, and not harming others. Most times [Student] is in compliance of rules, it is when something changes in [Student's] routine that [Student] becomes aggressive. [Parent] has a letter from [Student's] doctor to excuse [Student] from wearing a mask." R-Ex.20, p.0062.

22. The PLEPs section of Student's IEP-06/01/2021 highlighted Student's baseline skills, needs, and parental concerns in the areas of reading, writing, mathematics, life skills, behavior, fine motor and sensory processing, communication receptive language, and communication expressive language. R-Ex.20, p.0062-0065.

23. The behavioral needs in Student's IEP-06/01/2021 PLEPs note:

"[Student] has shown to have behavioral problems which consist of [redacted] on the floor or at [Student's] desk. When [Student] is tired or in a bad mood [Student] will [redacted] and refuse to move. When [Student] is asked to transition from a preferred activity to a non-preferred activity [Student] will lash out and grab whatever is closes (*sic*) to [Student]. [Student] takes lots of breaks to help [Student] transition from activities to another. When [Student] is in a good mood and not tired [Student] is able to follow [Student's] daily schedule with (*sic*) mirrors the [redacted] rotation bell schedule. This school year [Student] has participated in walking to [Student's] PE class and engaging with [Student's] teacher and peers. This can only be done when [Student] is regulated and willing to leave the sensory room." R-Ex.20, p.0063-0064.

24. Parental concerns noted regarding Student's behavior in the IEP-06/01/2021 PLEPs include "[Parent] is very concerned about the difficulties [Student] has with transitioning from one activity to another, from favored to non-favored activities. ... Parent would like to add self-regulation goals to address ([redacted] [redacted]) parent would like [Student] to know why these behaviors are happening and how to prevent them from happening." R-Ex.20, p.0064.

25. Student's IEP-06/01/2021 has an annual goal and short-term benchmarks/objectives

that address every need listed in the PLEPs section. *See* R-Ex.20, p.0062-0083.

26. The IEP-06/01/2021 includes the following special education and related services:

Special Education, two hundred twenty (220) minutes per day, five (5) days per week in the special education setting; Speech-Language Therapy, four hundred fifty (450) minutes per quarter in the general/special education setting; Occupational Therapy Services, two hundred forty (240) minutes per quarter in the general/special education setting; and Transportation, two (2) times per day in the general/special education setting. R-Ex.20, p.0084.

27. The IEP-06/01/2021 includes the following supplementary aids and services, program modifications and supports for school personnel (all to be provided in the general/special education setting):

- Individual Instructional Support, one thousand nine hundred five (1905) minutes per week
  - Adult supervision at all times, one thousand eight hundred ninety (1890) minutes per week
  - ABA services, thirty (30) hours per quarter
  - Speech Language Consultation, sixty (60) minutes per quarter
  - Occupational Therapy Consultation with the team, twenty (20) min per month
  - Access to assistive technology for communication, daily
  - Printed visual schedule, daily
  - Implementation of structured breaks throughout the day, daily
- R-Ex.20, p.0084.

28. The clarification of supports and services in the IEP-06/01/2021 includes the following:

- ABA services will include teacher consultation, creating and facilitate implementation of BIP (Behavior Intervention Plan) monitoring data collection and analyzing information, preparing reports, other documents, and supervising RBT.
- Due to the severity of [Student's] behaviors [Student] requires a two person team which includes an RBT and an adult supervision/skills trainer. Service hours for RBT includes preparation and data inputting. Adult supervision hours is only for the amount of time [Student] is on campus.

- FBA will be completed by the end of ESY which will include a Behavior Intervention Plan (BIP) and a Transportation Intervention Plan. Team agreed to have ABA do transportation observation to ensure a plan for riding the bus to and from school and home.
  - BIP will be added to IEP upon completion and approval of IEP team.
  - Quarterly parent teacher consultation.
  - Communication log to be used daily from school and home.
- R-Ex.20, p.0084-0085.

29. Student's educational placement statement (also known as the "least restrictive environment" or "LRE" statement) in the IEP-06/01/2021 stated: "Due to [Student's] needs of a specialized instruction setting [Student] will not participate with [ ] non disabled peers during ELA, Science, Social Studies, and Math classes. [Student] will participate with [ ] non disabled peers for elective classes of [Student's] choice, all school activities including; field trips, assemblies, recess, and lunch with the support of an RBT and adult supervision support staff." R-Ex.20, p.0086.

#### Functional Behavior Assessment and Behavior Intervention Plan

30. On August 3, 2021, Functional Behavior Assessment Board-Certified Behavior Analyst (hereinafter "FBA BCBA") prepared a report for a functional behavior assessment (hereinafter "FBA") conducted with Student (hereinafter "FBA-08/03/2021"). P-Ex.1, p.039-056; R-Ex.28, p.0128-0145.
31. The FBA-08/03/2021 was prepared by FBA BCBA, who did not testify at the hearing to explain the different parts of the FBA-08/03/2021 and the reasons FBA BCBA identified only a single behavior as the focus of the FBA-08/03/2021. *See* Testimony of Prior BCBA, Tr.V1, 167:1-169:3, 177:15-179:2.
32. Prior to the FBA-08/03/2021, Student was having trouble with [REDACTED], as well as while riding the bus to and from school and the IEP team had asked FBA BCBA to include a transportation observation in Student's assessment so the

- team could have a transportation intervention plan for Student's IEP. Testimony of Parent, Tr.V1, 32:1-15, 55:11-56:8; Testimony of SPED Teacher, Tr.V1, 116:1-118:9; *see* P-Ex.2, p.109, 112-113; R-Ex.20, p.0084-0085.
33. No observation of Student on the bus was done by any board-certified behavior analysts involved with Student and interventions for Student's behaviors during transportation on the bus were provided in the FBA-08/03/2021. Testimony of Parent, Tr.V1, 63:10-64:1, Testimony of Prior BCBA, Tr.V1, 185:23-186:20, 189:4-22.
34. The FBA-08/03/2021 focused on a single problem behavior of Student, defined as "staying seated when directed to stand and transition elsewhere." The FBA-08/03/2021 noted that the defined behavior had been occurring with Student in increasing durations over the few weeks prior to the FBA being done. P-Ex.1, p.040-054; R-Ex.28, p.0129-0143.
35. The FBA-08/03/2021 does not address or define behaviors of Student noted in the IEP-06/01/2021 as "[REDACTED]" or at [Student's] desk" or "when [Student] is asked to transition from a preferred activity to a non-preferred activity [Student] will lash out and grab whatever is closest (*sic*) to [Student]." *See* P-Ex.1, p.039-056; R-Ex.28, p.0128-0145; R-Ex.20, p.0063-0064.
36. The FBA-08/03/2021 did recommend that Student be provided two (2) registered behavior technicians (hereinafter "RBTs") and that a behavior intervention plan (hereinafter "BIP") be created for the RBTs to implement using ABA skills. P-Ex.1, p.055; R-Ex.28, p.0144.
37. The FBA-08/03/2021 also provided several goals and objectives and

recommendations for supplementary aids and supports for Student for Student's IEP. P-Ex.1, p.055; R-Ex.28, p.0144.

38. Prior BCBA used the information from the FBA-08/03/2021 to create the BIP for Student, dated August 27, 2021 (hereinafter "BIP-08/27/2021"). Testimony of Prior BCBA, Tr.V1, 160:7-162:1, 165:15-168:19; P-Ex.1, p.031-038; R-Ex.29, p.0146-0153.
39. Prior BCBA also spent time with Student's teachers and aides and observed Student in school to obtain more information to develop the BIP-08/27/2021. Testimony of Prior BCBA, Tr.V1, 162:2-12.
40. The BIP-08/27/2021 was limited only to the targeted behavior in the FBA-08/03/2021, which was defined as "[redacted], which is where [Student] would [redacted]." If Student was seated in a chair and refusing to move, it would not be considered "[redacted]" and would be considered a non-compliance or refusal behavior. Other behaviors, including behaviors indicating aggression, that were separate and discrete from the "[redacted]" behavior would not have been included in the BIP-08/27/2021. Testimony of Prior BCBA, Tr.V1, 167:12-168:14.
41. Prior BCBA was not familiar with Student at the time the BIP-08/27/2021 was developed, as Prior BCBA only worked with Student since sometime in August 2021. Testimony of Prior BCBA, Tr.V1, 151:13-15, 168:20-169:3.
42. During the approximately six (6) weeks that Prior BCBA worked with Student from August 2021, Prior BCBA did not observe Student engage in any behaviors that warranted a separate BIP from the BIP-08/27/2021. Testimony of Prior BCBA, Tr.V1, 168:20-169:17.



43. Student's behaviors outside of the BIP-08/27/2021, such as [REDACTED], were not witnessed by Prior BCBA until after the September 16, 2021 IEP meeting. At the time of the IEP meeting on September 16, 2021 Prior BCBA believed that the FBA-8/3/2021 and the BIP-08/27/2021 accurately addressed Student's maladaptive behaviors that were affecting Student's ability to access Student's education. Testimony of Prior BCBA, Tr.V1, 170:1-172:4, 178:3-12.
44. Prior BCBA was not asked or referred to address any of Student's behaviors on the bus but had heard some anecdotal information of Student refusing to get on or off the bus. Prior BCBA was not made aware of any incidents that took place with Student on the bus. Testimony of Prior BCBA, Tr.V1, 185:10-186:9.
45. Current BCBA has been working with Student since September 2021 and took over for Prior BCBA. Current BCBA has been implementing the BIP-08/27/2021 that Prior BCBA developed. Testimony of Current BCBA, Tr.V2, 203:13-205:6.
46. Current BCBA believes that the BIP-08/27/2021 is appropriate to manage Student's behaviors, specifically related to dropping. Testimony of Current BCBA, Tr.V2, 205:7-20.
47. Current BCBA stated that Student's [REDACTED] arise after Student's [REDACTED] behavior occurs, although no data is collected for incidents of Student engaging in those behaviors when Student has not [REDACTED]. Additionally, no specific definitions of [REDACTED] or [REDACTED] are included in either the FBA-08/03/2021 or BIP-08/27/2021. Testimony of Current BCBA, Tr.V2, 205:21-206:25, 252:18-258:4; *see* P-Ex.1, p.031-056; R-Ex.28, p.0128-0145; R-Ex.29, p.0146-0153.

48. Student's IEP developed at the meeting on September 16, 2021 (hereinafter "IEP-09/16/2021") includes goals and objectives that are based in Student's BIP-08/27/2021. Student has made progress on Student's IEP-09/16/2021 and BIP-08/27/2021 goals and objectives. Testimony of Current BCBA, Tr.V2, 205:10-213:14, 224:3-227:13; R-Ex.69, p.1006-1011.
49. Current BCBA used input from Parent in modifying Student's BIP-08/27/2021 and IEP-09/16/2021 to accommodate some of Parent's concerns. For example, Parent did not want Student to use a motorized cart or wheelchair to prevent Student from [REDACTED], so Student's RBTs use a regular chair to provide to Student as an alternative to the ground. Testimony of Current BCBA, Tr.V2, 227:14-228:6, 258:5-8.
50. The BIP-08/27/2021 was updated to include a crisis plan in April 2022 to address Student's need to be given space if Student is agitated. The crisis plan meeting was held after an incident in April 2022 involving Student, Student's special education teacher, and RBTs. Testimony of Current BCBA, Tr.V2, 232:15-236:9, 238:14-23.
51. No new written BIP was presented during the Hearing as the updated BIP for Student as modified by Current BCBA, so it does not appear that any formal written update was made to the document entitled BIP-08/27/2021.

Student's September 16, 2021 IEP meeting and resulting IEP

52. An IEP meeting was held to review and/or revise Student's IEP-06/01/2021 on September 16, 2021. Present at the meeting were Parent, SPED Teacher, Current SLP, Prior BCBA, Principal, a counselor, an occupational therapist, a regular education teacher, and Student's special education teacher. Testimony of Current

SLP, Tr.V2, 304:1-3; P-Ex.1, p.027, R-Ex.24, p.0121.

53. The purpose of the September 16, 2021 meeting was for the team to explore different options that were suggested by Parent due to Student's increased problematic behaviors. Parent suggested that Student be placed in a room alone with the RBTs and teacher due to new behaviors that Student was displaying. During the meeting, Parent participated in the discussions and actively expressed concerns or raised questions regarding Student's IEP. Testimony of SPED Teacher, Tr.V1, 141:20-142:20.
54. At the time of the September 16, 2021 IEP meeting, Current SLP believed that the goals, objectives, and supplementary aids and supports for Student that were discussed at the meeting were appropriate for Student to make progress on speech and communication. Testimony of Current SLP, Tr.V2,304:7-15, 305:12-17.
55. Student's IEP-09/16/2021 contains four (4) pages with summaries of Student's PLEPs including areas of reading, writing, math, life skills, behavior, fine motor, sensory processing, and communication. *See* P-Ex.1, p.002-005; R-Ex.24, p.0096-0099.
56. The PLEPs for Student outline the strengths, needs, and performance of Student for each subject, including what Student was currently working on in school, and past interventions that had worked for Student. *See* P-Ex.1, p.002-005; R-Ex.24, p.0096-0099.
57. While the proposed BIP-08/27/2021 was newly created at the time of the IEP meeting on September 16, 2021, Parent informed the team that Parent would accept the BIP-08/27/2021 but wanted to continue consulting with Student's board-certified behavior

- analyst to address Student's other behaviors. P-Ex.1, p.005, R-Ex.24, p.0099.
58. Student's IEP-09/16/2021 contains seventeen (17) annual goals and short-term objectives for Student in the areas of language arts, mathematics, health, and physical education. P-Ex.1, p.007-023; R-Ex.24, p.0101-0117.
59. Three (3) of the goals in the IEP-09/16/2021 were specifically noted as occupational therapy goals, at least eight (8) of the goals address Student's communication (both receptive and expressive) skills, and at least two (2) goals that were directed at Student's behavior concerns. *See* P-Ex.1, p.007-023; R-Ex.24, p.0101-0117.
60. Student is eligible for extended school year (hereinafter "ESY") services under the IEP-09/16/2021 after five (5) days of calendar break, excluding holidays. During ESY, Student receives four (4) hours of special education services per day with the support of two (2) RBTs, two (2) twenty (20) minute direct speech service sessions during the summer sessions, and two (2) thirty (30) minute teacher consultations for speech. Student also receives one (1) teacher consultation for fall, winter, and spring breaks for speech and one (1) occupational therapy teacher consultation during the summer session for occupational therapy services. Student also receives daily transportation for ESY. P-Ex.1, p.024; R-Ex. 24, p.0118.
61. Student's IEP-09/16/2021 provides Student with two hundred twenty (220) minutes per day, five (5) days per week of special education, four hundred fifty (450) minutes per quarter of speech-language therapy, two hundred forty (240) minutes per quarter of occupational therapy, and transportation twice a day. P-Ex.1, p.024; R-Ex.24, p.0118.
62. Student's IEP-09/16/2021 provides Student with individual instructional support from

two (2) RBTs assigned solely to Student for one thousand nine hundred five (1905) minutes per week and the following services from the BCBA: teacher consultation, creating and facilitating the implementation of a BIP, monitoring of data collection and analyzing information, and supervising RBTs for thirty (30) hours per quarter. P-Ex.1, p.024; R-Ex.24, p.0118.

63. Student's IEP-09/16/2021 also provides occupational therapy consultation with the team for twenty (20) minutes per month and speech-language therapy consultation for sixty (60) minutes per quarter. P-Ex.1, p.024; R-Ex.24, p.0118.

64. Student's IEP-09/16/2021 also lists the following supplementary aids and supports: access to assistive technology for communication, access to self-regulation strategies as directed by occupational therapist, printed visual schedule, and implementation of structured breaks throughout the entire day. P-Ex.1, p.024; R-Ex.24, p.0118.

65. While the following additional supplementary aids and supports are not included in the list of "Supplementary Aids and Services, Program Modifications, and Supports for School Personnel" section of the IEP-09/16/2021, they are listed in the "Clarifications of Services and Supports" section and are included in the offer of FAPE by the DOE:

"-ABA services will include teacher consultation, creating and facilitate implementation of BIP (Behavior Intervention Plan) monitoring of data collection and analyzing information, preparing reports, other documents, and supervising RBT's.

-Due to the severity of [Student's] behaviors [Student] requires a one to one teacher with two RBT's in a classroom setting with no other students. [Student] responds to a male figure that [Student] has built a relationship with and a female figure with a soft and gentle approach to situations. Preferably [Student] needs a male and female RBT team that respects [Student] and [Student] respects them.

-Service hours for RBT's will include preparation before school and after school for inputting data information.

-[Student] is placed in a [REDACTED] classroom with a one to one teacher, 2 RBT's and the support of a BCBA to implement the BIP with a crisis plan. Both plans will be updated regularly when behaviors continue in the areas of: bathroom, classroom, campus, bus, etc. (anywhere that is an unsafe environment).

-A sensory room is provided for [Student] with a swing, trampoline, area mats, and OT supportive tools to support [Student] whenever the need arises.

-Quarterly parent/teacher consultation on reviewing adding additional goals provided by FBA (at this time parent feels IEP is still new and would like to revisit FBA goals as new setting and placement matures). Parent request ability to monitor different goals and objectives with teacher to ensure [Student] is really able to complete goals with data to support [Student's] progress.

-Communication logs to be used daily from school and home to assist both parent and school on daily activities and schedule. School provides information to parent on every activity [Student] does from when [Student] gets off the bus till [Student] gets back on the bus. It includes amount of food [Student] eats, amount of time [Student] goes to the restroom, what [Student] eats, activities [Student] is engaged in, behaviors and duration of interventions. Parent provides concerns, information on sleep patterns and important things that happened the night before. Due to [Student's] difficulties with sleep patterns parent has gotten medical help from different doctors who use both school and home information in providing support to parent and [Student].

-Recommendation from medical staff is to limit the usage of iPad to no more than 30 minutes per setting/activity in a school day, along with large icons and print. Doctors feel [Student] will not use glasses.

-Due to [Student] irregular sleep patterns throughout the night [Student] tends to require a later start time in the school day, and may miss school due to the [REDACTED]. [Student] has shown break down during the fall months and beginning of summer months at this point. Parent has been working with school by getting [Student] to school no later than 8:30 when irregularity happens. Parent has been working with [Student] doctors (which has caused a few absents) to find a diagnoses and plan for the [REDACTED]. Due to doctors recommendations [Student] has been excused from being tardy and absent.

-[Student] has been excused from using a uniform for school due to the sensitivity of the different textures. [Student] will tend to take [Student's] uniform off.

-Team agreed that using sign language, iPad, and words & pictures works best for [Student]. RBT usages sign language with every command, request and question. [Student] will sign back or use the iPad as a yes and no response. [Student] has built a bank of signs [Student] understands and parent request continual usage of words, pictures, sign and the usage of iPad as means of communication. Parent uses signs at

home and has found that [Student] response to the commands, the school has found the same benefit of continuous usage of all means of communication. [Student] might not be able to make the sign completely but [Student] shows that [Student] understands what is being signed.

-[Student] needs to be provided with bus transportation solely for [Student's self], due to bus driver shortage we are not able to provide this service at this time. Another recommendation is to have an RBT placed on the bus to support [Student] with triggers of behavioral aggression while bus is in motion and while getting off the bus. For the time being school is placing [Student] on the bus last and bus company is dropping [Student] off first before other students so that [Student] has the least amount of wait time on the bus. [Student] has severe [redacted] and [redacted] when there is loud noises, or too long of a wait time. [Student] will [redacted] [Student's] arms and lashing out to bus aide, driver, students, or parent. -BIP was reviewed by team, parent would like a more detailed explanation from BCBA. Parent would like to have more time to review plan as it was presented only today. Parent and BCBA will meet before next parent/teacher quarterly consultation to revise BIP if needed.”  
P-Ex.1, p.024-025; R-Ex.24, p.0118-0119.

66. Student's IEP-09/16/2021 notes that Student is exempted from statewide assessments due to Student's aggressive behavior. P-Ex.1, p.024; R-Ex.24, p.0118.
67. Student's LRE placement in the IEP-09/16/2021 states: “Due to the needs of a specialized instruction setting, [Student] will be placed in a classroom with [redacted] students. [Student] will be provided with a one to one teacher, 2 RBT's and the support of a BCBA. [Student] will participate with [ ] non-disabled peers for electives classes of [Student's] choice when behaviors are controlled by the assistance of the 2 RBT's and teacher. [Student] will be included in all school activities including; field trips, assemblies, recess, and lunch only when behaviors are controlled by teacher and 2 RBT's. P-Ex.1, p.024; R-Ex.26, p.0120.
68. A prior written notice for the September 16, 2021 IEP meeting was issued on September 21, 2021 (hereinafter “PWN-09/21/2021”). P-Ex.1, p.028-030; R-Ex.25,

p.0122-0124.

69. The PWN-09/21/2021 notes all the above mentioned inclusions of the IEP-09/16/2021. The PWN-09/21/2021 also includes two (2) options that were rejected by the IEP team: Student having face-to-face speech-language sessions and the bus issue. P-Ex.1, p.028-030; R-Ex.25, p.0122-0124.
70. The PWN-09/21/2021 explained that the IEP team agreed to keep the speech-language session minutes the same and have the speech-language therapist try to complete as many hours as possible. P-Ex.1, p.028-030; R-Ex.25, p.0122-0124.
71. The PWN-09/21/2021 also explained that due to bus driver shortage and COVID-19 situations, the team agreed to have Student placed on the bus last and dropped off first until the bus issues can be solved. The PWN-09/21/2021 also noted that Parent agreed to wait until the bus company was able to provide a separate bus for Student or allow an RBT on the bus. P-Ex.1, p.028-030; R-Ex.25, p.0122-0124.
72. Home School did not seek out the services of a private transportation company to provide transportation to Student as required by the IEP-09/16/2021, nor did they follow up with any inquiries regarding watching the bus videos or providing transportation with the private ABA company that were providing the BCBA services for Student. Testimony of SPED Teacher, Tr.V1, 125:22-126:13, 140:1-21; Testimony of Prior BCBA, Tr.V1, 185:16-186:20,

School year 2021-2022

73. In September 2021, Current SLP began working with Student to provide speech-language services to Student. Testimony of Current SLP, Tr.V2, 303:20-25.
74. In October 2021, Current SLP had a consult with Parent regarding Student's speech-



- language services. During the consult, both Parent and Current SLP discussed concern with Student not being able to participate effectively in virtual therapy sessions. Current SLP noted that Student's behaviors prevented Student from participating and cooperating in the sessions and conveyed the concerns to other members of the IEP team. Testimony of Current SLP, Tr.V2, 304:16-305:11.
75. Because no in-person speech-language pathologist was available to provide services to Student at the start of the 2021-2022 school year, Current SLP continued providing virtual services to Student. In around November 2021, Student's support personnel appeared to change and Student behaviors in the virtual sessions were managed to the point where Student was able to cooperate and participate in the virtual speech-language sessions with Current SLP. Testimony of Current SLP, Tr.V2, 305:1-306:15; *see* R-Ex.58, p.0865-0923; R-Ex.62, p.0929-0931.
76. Student has made progress on all Student's goals and objectives in Student's IEP-09/16/2021 through the virtual speech-language sessions that Current SLP has provided to Student in the 2021-2022 school year. Testimony of Current SLP, Tr.V2, 306:3-307:23, R-Ex.69, p.1006-1007, 1009, 1012-1013.
77. Current SLP reached out to Parent in December 2021 as part of a parent/teacher consult to explain that due to Student's managed behaviors, the virtual speech-language sessions were productive and enabled Student to make progress in speech and language. Testimony of Current SLP, Tr.V2, 307:14-308:24.
78. During the 2021-2022 school year, Current SLP provided Student with multiple modes for Student to engage in communication, such as head gestures, sign approximations, picture vocabulary cards, and an iPad. Current SLP uses the iPad to

- have Student answer yes/no questions and uses picture cards to increase Student's vocabulary. Testimony of Current SLP, Tr.V2, 306:17-307:5, 308:25-310:5, 312:8-320:20.
79. SPED Teacher was in constant communication with Parent throughout the first half of the 2021-2022 school year in an effort to address new or persisting issues that arose with Student in school. Testimony of SPED Teacher, Tr.V1, 117:8-122:22.
80. Throughout the 2021-2022 school year, a daily communication log was sent home to Parent that included information of Student's day, such as any bathroom incidents or achievements, what Student ate for the day, and other activities that Student participated in. Parent also had communication with SPED Teacher via text message throughout the school year, even after Student was transferred from SPED Teacher to a different special education teacher. *See* P-Ex.2, p.057-080, P-Ex.2, p.087-0113.
81. Parent reached out to Student's special education teacher regarding Student refusing to leave the house and get on the bus. Current BCBA spoke with Parent on the phone to provide Parent with strategies to use with Student to coax Student out of the house and onto the bus. Testimony of Current BCBA, Tr.V2, 241:2-13.
82. In December 2021, Current BCBA met with Parent to explain the FBA-08/03/2021, the BIP-08/27/2021, and to update Parent with the progress that Student has made on the goals and objectives in both the IEP-09/16/2021 and BIP-08/27/2021. Testimony of Current BCBA, Tr.V2, 215:20-216:22.
83. Student currently has academic classes in a [REDACTED] special education room with just Student's special education teacher and two (2) RBTs. Student attends physical education and chorus with Student's non-disabled peers. Testimony of

Current BCBA, Tr.V2, 230:14-23.

84. In the general education classes like chorus, Student works separately from the other students to learn skills to allow Student to participate with the non-disabled students.

For example, Student practices different vowel sounds in chorus and also works in both classes on exchanging greetings with other students. Testimony of Current BCBA, Tr.V2, 230:24-232:14.

85. Student has been able to participate in the general education physical education and chorus classes with Student's RBTs present to address Student's behaviors.

Testimony of Current BCBA, Tr.V2, 231:20-232:14.

86. Student also eats lunch in the cafeteria with non-disabled students when accompanied by Student's two (2) RBTs. Testimony of Current BCBA, Tr.V2, 262:15-263:3.

87. One of the teaching strategies that Student's RBTs and special education teacher use with Student is called "errorless teaching" which is where Student is given the answer before being asked to provide the answer. Testimony of Current BCBA, Tr.V2, 264:21-266:15, 268:1-8.

88. In April 2022, an incident occurred wherein Student made physical contact with Student's one-on-one special education teacher, causing the teacher injury. For unexplained reasons, Parent was not notified about the physical contact between Student and the special education teacher until several days after the incident.

Testimony of Parent, Tr.V1, 90:18-91:21, 94:11-95:12; P-Ex.2, p.085-086; *see also* P-Ex.2, audio recording dated 4/11/2022.

89. Shortly after the incident, a meeting was held with Principal, Current BCBA, Parent, and Student's one-on-one special education teacher. As a result of the meeting, a

crisis plan was added to Student's BIP-08/27/2021 to provide guidance to Student's providers on how to address severe behaviors of Student. Testimony of Parent, Tr.V1, 20:3-8; Testimony of Principal, Tr.V2, 353:16-354:14; *see* P-Ex.2, p.082.

## 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 not proven that Respondents denied Student a FAPE by not appropriately implementing the IEP-09/16/2021

Petitioners' first issue argues that Respondents failed to appropriately implement Student's IEP-09/16/2021. Petitioners specifically argue three (3) components of Student's IEP-09/16/2021 that was not properly implemented; Student's speech/language therapy, the use of assistive technology for communication, and quarterly parent/teacher consultations.

Questions of implementation of a student's IEP are procedural in nature and a minor or slight omission of implementation of an IEP will not result in a denial of FAPE. The Ninth Circuit Court of Appeals has reviewed IDEA cases in relation to implementation failures alleged against school districts. In *Van Duyn ex rel. Van Duyn v. Baker School Dist.*, the Court reviewed the IDEA's definition of a free appropriate public education as "special education and related services that ... are provided in conformity with the [child's] individualized education program," and determined that "[t]here is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." 502 F.3d 811, 821 (9<sup>th</sup> Cir. 2007). The Ninth Circuit also explored the analysis done by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000), and recognized the court's conclusion that implementation failures did not violate the IDEA because "the significant provisions of [the child's] IEP were followed, and, as a result, he received an educational benefit." *Van Duyn*, 502 F.3d at 821. Courts hesitate to put forth a standard test to determine implementation because "every child, and every IEP, is different; whether an implementation failure is material will therefore depend on the relevant provision's place and purpose in the IEP, as well as the overall educational context that the IEP

was designed for and the extent and duration of any difference between practice and plan.” *L.J. by N.N.J. v. School Board of Broward County*, 927 F.3d 1203, 1214 (11<sup>th</sup> Cir. 2019) (*citing Andrew F.*, 137 S.Ct. at 998). In determining a failure to implement an IEP case, courts must consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole. *Id.* at 1214.

1. Respondents materially provided Student speech/language therapy

Petitioners assert that speech/language therapy provided remotely by SLP was insufficiently effective for Student and the DOE failed to properly provide Student with the speech/language therapy that was required in Student’s IEP-09/16/2021. At the time of the IEP-09/16/2021’s development, Student was noted to be non-verbal and communicates through a combination of an iPad and a form of sign language. *FOF 7*. Speech/language therapy is a significant part of Student’s IEP to build Student’s skills to communicate with others, including working on receptive language and expressive language. Student’s IEP-09/16/2021 contains at least eight (8) goals that aim toward improving Student’s communication skills. *FOF 59*. Student’s IEP-09/16/2021 provided that Student would receive four hundred fifty (450) minutes of speech/language therapy per quarter during the school year and two (2) twenty (20) minute direct speech/language therapy services during the summer session, as well as one (1) teacher consultation for speech/language during fall/winter/spring breaks. *FOF 60-61*. Speech/language is a significant part of Student’s IEP-09/16/2021.

Petitioners argue that the speech/language services that Student received virtually from Current SLP was insufficient and/or ineffective in providing services to Student. Current SLP originally recommended that Student receive in-person speech/language services due to

Student's inability to attend to virtual services. *FOF 74*. Since Current SLP was notified that in-person services were not available, Current SLP attempted to provide services virtually to Student during the 2021-2022 school year. Current SLP found that after a shift in behavior support for Student in November 2021, Student was able to participate in speech/language services virtually. *FOF 75*. Student has made progress on each of Student's IEP-09/16/2021 goals relating to speech/language. *See FOF 76*. Current SLP, who was qualified as an expert in the field of speech/language pathology and who originally called for Student to receive in-person services, believed that Student's needs were met through the virtual speech/language services that Student was provided in the 2021-2022 school year. *FOF 5, 76-77*. Petitioners have not presented any evidence to show that Student's speech/language has not improved or has suffered due to the alternate provision of services in Student's IEP-09/16/2021. Petitioners have not proven that Respondents failed to materially implement Student's IEP-09/16/2021 with regard to speech/language services.

2. Respondents materially provided assistive technology for communication

Petitioners argue that Student's IEP-09/16/2021 was not implemented with the provision of assistive technology to Student, as provided in the supplementary aids and supports section of the IEP. Petitioners focus on Student's use of an iPad at school and at home using the LAMP program. *See* Petitioners' Closing Brief, page 4.

The IDEA defines "assistive technology device" as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a student with a disability." H.A.R. §8-60-2; 20 U.S.C. §1401(1); 34 C.F.R. §300.5. School districts do not automatically deny students a FAPE by failing to provide the preferred method of assistive technology of the



parents or the student's private service providers. See *Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 90, 94 (2<sup>nd</sup> Cir. 2003); *R.P. ex rel. R.P. v. Alamo Heights Independent School Dist.*, 703 F.3d 801, 814 (5<sup>th</sup> Cir. 2012); compare with *M.C. by and through M.N. v. Antelope Valley Union High School District*, 858 F.3d 1189, 1198-1201 (9<sup>th</sup> Cir. 2017) (holding that based on California's State IDEA statutes, the school district was required to provide a statement of a particular device or service if it required to provide the student a FAPE). The Hawai'i Administrative Rules do not have a requirement that a statement of specific devices or services be placed into a Student's IEP, rather it requires "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research *to the extent practicable*, to be provided to the student, or on behalf of the student, and a statement of program modifications and supports for school personnel that will be provided to enable the student: (A) to advance appropriately toward attaining the annual goals; (B) to be involved in and make progress in the general education curriculum in accordance with paragraph (1), and to participate in extracurricular and other nonacademic activities; and (C) to be educated and participate with other students with disabilities and nondisabled students in the activities described in this section." H.A.R. §8-60-44 (emphasis added); see also H.A.R. §§8-60-2, 8-60-6.

Student's IEP-09/16/2021 provided the supplementary aid of "access to assistive technology for communication." *FOF 64*. The clarification section included a note that "recommendation from medical staff is to limit the usage of iPad to no more than 30 minutes per setting/activity in a school day, along with large icons and print." *FOF 65*. Current SLP uses assistive technology in the form of an iPad for Student's speech/language sessions to teach Student to communicate using yes or no functions. Current SLP also uses picture card assistive technology to work on increasing Student's vocabulary. These are examples of the multi-

modalities method of using assistive technology that is being provided to Student as part of Student's IEP-09/16/2021. *FOF 78.*

Petitioners in this case have not presented evidence that the assistive technology being provided to or used with Student's services do not provide the benefit that the IEP-09/16/2021 envisioned. Indeed, Current SLP has been working specifically on several of Student's goals and objectives with both the iPad and the picture vocabulary cards to increase Student's receptive and expressive language skills. *FOF 59, 76.*

The record in this case shows that in the prior of the school year (2020-2021), an iPad was provided to Student to take between school and home using the LAMP program and training was provided to Parent on how to operate the iPad for Student's use. *FOF 15-16.* However, due to reasons that are unclear from the record, Student's use of that iPad stopped soon after it began. *FOF 18.* While Petitioners argue that this is a failure to implement Student's IEP-09/16/2021, they have not demonstrated what, if any, benefits Student was to gain from the use of this iPad and how Student has not received the same benefits due to the failure to continue use of the iPad. Additionally, the testimony from Parent indicates that even if Student had been provided the use of the iPad for the remainder of the school year, Student may not have been interested in using the iPad at home. *See Testimony of Parent, Tr.V1, 28:12-29:7.* Petitioners have not proven that Respondents failed to materially implement Student's IEP-09/16/2021 due to failure to provide assistive technology to Student.

3. Respondents materially provided quarterly parent/teacher consultations

Petitioners' final argument regarding implementation of Student's IEP-09/16/2021 questions whether Respondents failed to provide quarterly parent/teacher consultations during the 2021-2022 school year. Petitioners assert that the parent/teacher conferences were deemed

important enough for the IEP team to include it in Student's IEP-09/16/2021 and in the discussions at the April 11, 2022 crisis plan meeting.

Student's IEP-09/16/2021 does include a provision that quarterly parent/teacher consultations be provided to "[review] adding additional goals provided by the FBA (at this time parent feels IEP is still new and would like to revisit FBA goals as new setting and placement matures). Parent request ability to monitor different goals and objectives with teacher to ensure [Student] is really able to complete goals with data to support [Student's] progress." *FOF 65*. While Petitioners argue that the quarterly parent/teacher consultations were not provided after the transition of Student from SPED Teacher's classroom to Student's current special education teacher's classroom, this is unsupported by the record. Parent was in communication with SPED Teacher, Current BCBA, and Current SLP throughout the 2021-2022 school year, and several meetings were scheduled for Parent to meet with Student's teachers and support staff. *FOF 77, 79-80, 82*. As the IEP-09/16/2021 does not specify the form in which the parent/teacher consultations would take place, Petitioners have not proven that the communication with Home School resulted in any loss in Student's educational program, a significant infringement on parental participation, or a deprivation of educational benefits.

B. Student's IEP-09/16/2021 was not sufficient to meet Student's needs regarding transportation and/or behavioral interventions

Petitioners' next issue is that Respondents did not provide Student with an appropriate program in the IEP-09/16/2021. In this section, Petitioners include several parts of Student's IEP-09/16/2021; transportation, behavioral interventions, provision of parent education and training, daily communication, assistive technology, sign language, quarterly parent/teacher consultations, and Student's access to peers.

In determining whether an IEP is substantively appropriate, or reasonably calculated to enable the student to make progress in light of the student's unique needs, a reviewing body is to apply a "snapshot rule," meaning that the IEP must be considered based on information that was available to the IEP team at the time of the IEP development. *See L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1004 (9<sup>th</sup> Cir. 2017); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999).

Based on the analysis set forth below, this Hearings Officer concludes that Petitioners have proven that Respondents did not offer Student an appropriate educational program in the IEP-09/16/2021 that was tailored to address Student's unique needs to allow Student to have meaningful benefit and access Student's education. Specifically, Respondents failed to provide appropriate transportation accommodations in Student's IEP-09/16/2021 and failed to adequately address Student's behavioral concerns in the IEP-09/16/2021.

1. Respondents did not provide Student with appropriate transportation in the IEP-09/16/2021

Petitioners' first issue focuses on the provision of transportation for Student in the IEP-09/16/2021, which states that Student needs to be transported separately or have an aide accompany Student on the bus for behavioral reasons, however, does not provide the necessary accommodations in the IEP offer.

The IDEA requires transportation as a related service for a student with a disability if it is necessary for that student to benefit from special education, even if the student has no ambulatory need for some form of specialized transport. *Donald B. by and through Christine B. v. Board of School Com'rs of Mobile County, Ala.*, 117 F.3d 1371, 1374 (11<sup>th</sup> Cir. 1997), *see also Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 890-891, 104 S.Ct. 3371, 3376, 82 L.Ed.2d 664 (1984) (holding that related services are non-medical services that are required to assist a disabled child to benefit from special education); 20 U.S.C. §1401(17).

The extent of the related service to be provided to Student is left up to the discretion of the IEP team based on the information available to them at the time of the development of the IEP. *See Donald B.*, 117 F.3d at 1375 (affirming the court's determination that it was not a denial of FAPE to refuse to provide transportation for a student to attend speech services at a public school three blocks from the student's private school in which the parent unilaterally placed the student). Student's IEP-09/16/2021 stated that Student had the need to be transported to and from school, alone on the bus or with an aide to accompany Student on the bus, to manage Student's behaviors. *FOF 65*. Given that individual transportation of Student or transportation of Student with an aide is a declared need in Student's IEP-09/16/2021, the IEP team needed to provide that service to Student. Staff shortages or limitations due to COVID-19 are not a legitimate reason not to provide a service that the IEP team determined is necessary for the student.

Schools and school districts are required to provide the services that the IEP team deems is necessary for the student to receive a FAPE, regardless of any "onerous burden" on the school district. *Anchorage School Dist. v. N.S. ex rel. R.P.*, 2007 WL 8058163 \*9 (D. Alaska 2007) (holding that a school district must provide door-to-door service, including pushing a student in a wheelchair up a ramp to the front door of the student's home, if it is determined that the student could not access his or her education without the benefit of that service). Here, the IEP team stated clearly in Student's IEP-09/16/2021 what was required for Student's transportation but declined to provide the service due to staff shortages or COVID-19 concerns, neither of which were proven to be insurmountable by Home School. Home School did not seek out other options for transportation of Student, such as private agencies who also provide ABA services or private transportation companies, to see if options were available for Home School to arrange for

alternate transportation to Student. *FOF 72*. Additionally, discussions were had about having Student's BCBA's review the video recordings of the bus transports of Student to try to identify any triggers or determine solutions for problems for Student on the bus, however no efforts were made to obtain the videos or have the board-certified behavior analysts review them. *FOF 32*.

Respondents argue that Student's difficulties on the bus began shortly before the IEP team met on September 16, 2021, so the solution that the IEP team presented in the IEP was a reasonable accommodation provided to Student in the IEP-09/16/2021. Respondents also point out that Student only lives a few blocks from Home School and that Student's problematic behaviors only involve getting on or off the bus. These arguments would be persuasive if the IEP team had not declared in the IEP-06/01/2021 that the FBA to be completed by the end of ESY would include transportation observations to develop a transportation intervention plan for Student to ride the bus to and from home and school. *FOF 13*. The IEP-09/16/2021 also clearly stated that Student needed to be transported either alone or with an aide to assist just Student to manage behaviors, which means that Home School must provide the accommodations necessary to address Student's need. *FOF 65*. Student's IEP-09/16/2021 should have provided Student with transportation to address Student's needs.

Petitioners have proven that Respondents denied Student a FAPE by failing to include the service of Student's transportation alone or with an aide on the bus in Student's IEP-09/16/2021. Petitioners, however, have not argued this as an implementation issue in the instant Complaint, so no further analysis is needed as to whether Respondents failed to implement this section of Student's IEP-09/16/2021.

2. Petitioners have proven that Respondents did not provide Student with adequate behavioral interventions in the IEP-09/16/2021

Petitioners allege that Student's IEP-09/16/2021 did not provide sufficient behavioral interventions for Student, specifically stating that while reference is made to a BIP, only limited behavioral interventions are listed in Student's IEP, which are insufficient.

An IEP must appropriately address a student's behaviors when the behaviors affect the student's ability to access the student's education in a way that maximizes the student's opportunity to be educated with non-disabled students. *Dept. of Education v. L.S. by and through C.S.*, 2019 WL 1421752 \*11-12 (D. Hawai'i 2019) (holding that a student's IEP was deficient because it failed to incorporate a behavior support plan into the IEP); *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022, 1027 (8<sup>th</sup> Cir. 2003) (holding that an IEP that did not have a cohesive behavior management plan for a student that had behavior concerns raised at every IEP meeting was a denial of FAPE).

In the *L.S.* case, the Court noted that the denial of FAPE occurred because supports included in the BSP were not incorporated into the IEP and could be amended or curtailed without parent's knowledge or input, the supports and services in the IEP were insufficient to meet the student's needs. It is important to note that the BSP included in the *L.S.* case was completed prior to a change in the law regarding the provision of ABA services in the State of Hawai'i. In 2018, the State of Hawai'i enacted a statutory scheme for the licensing of providers of ABA due to ensure that those requiring diagnosis and treatment for [REDACTED] receive the care needed. Haw. Rev. Stat. §465D-1 (2018). Since then, the Hawai'i DOE has required that any student with serious maladaptive behaviors have a BIP done pursuant to an FBA by a licensed board-certified behavior analyst. These behavior management plans are based on scientific methods by professionals in the field and do not resemble the concerning BSPs that were considered by the *L.S.* court.

In this case, Student's IEP-09/16/2021 provides Student with a BIP that was completed by Prior BCBA based on FBA-08/03/2021 and is incorporated in Student's IEP, however, the BIP itself is not included in the list of supports and services in the IEP-09/16/2021 and the testimony at the Hearing establishes that the IEP team did not fully discuss the BIP at the IEP meeting. *FOF 30-31, 57, 64-65.* Ordinarily, this defect would not necessarily render the IEP-09/16/2021 insufficient, as BIPs are science-based documents that are completed by ABA professionals. However, the BIP-08/27/2021 and FBA-08/03/2021 in this case do not properly address Student's needs.

Student's FBA-08/03/2021 only addresses one (1) behavior of Student, out of the many behaviors that were described in Student's IEP-06/01/2021. *See FOF 21, 23-24, 28.* Specifically, the FBA-08/03/2021 addresses the behavior of [REDACTED] which is only defined as "staying seated when directed to stand and transition elsewhere." *FOF 34.* While the FBA-08/03/2021 does indicate that Student needs to learn to decrease aggression towards others and self and to decrease disruptive behaviors, no analysis of the antecedents or consequences of those behaviors were included in the FBA-08/03/2021. *See P-Ex.1, p.049; R-Ex.28, p.0138.* The FBA-08/03/2021 appeared to focus on general life skills goals for Student rather than minimizing problematic behaviors demonstrated by Student in school. *See P-Ex.1, p.039-056; R-Ex.28, p.0128-0145.*

The BIP-08/27/2021 was created using only the information from the FBA-08/03/2021 and did not address any other behaviors of Student, since they were not included in the FBA-08/03/2021. *FOF 38-40.* According to Prior BCBA, the FBA-08/03/2021 and BIP-08/27/2021 were appropriate to address the singular behavior of [REDACTED]. *FOF 42-43.* However, by Prior



BCBA's own testimony, the definition of the behavior that the BIP-08/27/2021 addressed did not include all Student's behaviors of [REDACTED] that were displayed at school. *FOF 40.*

While Current BCBA's explanation of why only a single behavior of Student's would be a priority to address since it is the precursor to other behaviors is plausible, nothing in the FBA-08/03/2021, the BIP-08/27/2021, or the IEP-09/16/2021 appear to address Student's problems regarding [REDACTED] the bus or behaviors while riding the bus. *FOF 46-47.* It is conceivable that Student's bus problems are also related to the [REDACTED] behaviors addressed in the FBA-08/03/2021 and the BIP-08/27/2021, however it is impossible to know since they were not addressed in either document or by the IEP team. As noted previously, no serious effort was made to determine the cause or function of Student's behaviors related to refusing to [REDACTED] the bus. *FOF 32-33, 44.* A further review or analysis of these behaviors could have resolved or proposed a resolution for Student's transportation issues, especially given the bus driver shortages and other concerns expressed by the school in Section B1 above.

This Hearings Officer also notes some areas of concern with the behavioral data collection currently in place for Student, such as the imprecise definitions for Student's behaviors of concern, such as [REDACTED] behaviors, as well as the lack of data collection for behaviors that occur outside of Student's [REDACTED] behaviors. *See FOF 47.* The science of ABA requires that the behaviors be specifically defined in the documents for all providers and data collectors to consistently document the incidents of behaviors with fidelity and address them as necessary. This is especially important for behaviors that can interfere with Student's access to Student's education or those of Student's classmates.

Petitioners have proven that Student's IEP-09/16/2021 failed to provide adequate behavioral interventions for Student, specifically due to the failure of the FBA-08/03/2021 to

address all behaviors of concern for Student that were noted in Student's IEP-06/01/2021. Since the IEP team was aware of these problem behaviors of Student prior to the FBA-08/03/2021, FBA BCBA should have either addressed these behaviors or indicated in the FBA-08/03/2021 why the behaviors were not of concern for Student at the time of the FBA. Because the IEP team was aware that Student had behaviors that interfered with Student's ability to participate in the classroom and behaviors that prevented Student from getting on or off the bus, and did not adequately address them in the IEP-09/16/2021, Petitioners have proven that the IEP-09/16/2021 did not provide Student a FAPE.

3. Petitioners have not proven that Respondents did not provide Student with Parent Education and Training in the IEP-09/16/2021

Petitioners' next issue questions whether parent education and training should have been included in Student's IEP-09/16/2021. Petitioners argue that there was no disagreement that parent education and training was essential for behavior consistency, however, do not point to any evidence to support their contention. While it was discussed briefly at the April 11, 2022, crisis plan meeting, when Parent requested parent education and training, no evidence in the record suggests that either Parent or the IEP team members raised a concern regarding parent training and education at the IEP meeting on September 16, 2021. *See FOF 53-71, P-Ex.2, audio recording dated April 11, 2022.* Petitioners have not proven that parent education and training was a service that was discussed and determined to be necessary for Student at the IEP meeting on September 16, 2021. Since it was raised by Parent at the April 11, 2022 crisis plan meeting, the IEP team would be wise to discuss it at the next IEP meeting for Student, but this does not provide a basis for determining that it should have been included in Student's IEP-09/16/2021.

4. Petitioners have not proven that Respondents did not provide Student with daily communication in the IEP-09/16/2021

Petitioners raise a concern that Student's IEP-09/16/2021 does not provide daily communication between Parent and the school, which was determined to be necessary for Student's success at school. It is notable that several of Petitioners' issues that follow include a claim of failure to provide items as part of the list of supplementary supports, program modifications, and supports for school personnel, even though the items are listed in Student's IEP-09/16/2021 in the clarifications of supports and services section, which follows the supplementary aids and supports list. *FOF 65*. Petitioners have provided no legal authority to support the contention that a specific service or support must be listed in a specific area of the IEP to be included as part of the offer of FAPE by the school.

Here, Student's IEP-09/16/2021 clearly provides that "communication logs to be used daily from school and home to assist both parent and school on daily activities and schedule. School provides information to parent on every activity [Student] does from when [Student] gets off the bus till [Student] gets back on the bus." *FOF 65*. Petitioners have not raised any specific concerns that the daily communication that is provided in the IEP-09/16/2021 is deficient in any way.

5. Petitioners have not proven that Respondents did not provide Student with appropriate assistive technology in the IEP-09/16/2021

Petitioners' next issue again questions whether the IEP-09/16/2021 is appropriate because it does not include appropriate assistive technology, presumably in the list of supplementary aids and supports section of the IEP. Student's IEP-09/16/2021 does, however, provide that the "team agreed that using sign language, iPad, and words & pictures works best for [Student]," in addition to listing access to assistive technology for communication in the supplemental aids and

supports. *FOF 65*. Petitioners appear to also combine their argument from the implementation issue in section A2 *supra*, by arguing that since Current SLP did not involve Parent in the use of the iPad for Student at home, this resulted in an insufficient IEP for Student. As noted previously, nothing in the IDEA requires that any service or support must be listed in a specific part of the IEP to be considered part of the offer of FAPE, nor have Petitioners presented any evidence that the assistive technology supports that are listed in Student's IEP-09/16/2021 are not adequate to meet Student's needs.

It is conceivable that Petitioners' argument could be that the IEP-09/16/2021 needed to specifically list how each assistive technology device would be used to provide the necessary supports for Student's education. Petitioners have not provided authority to support that position. On the contrary, it is well-settled that deference needs to be left to educators to determine the specific practices and methodologies for providing special education to students. *See e.g. Rowley*, 458 U.S. 206; 102 S.Ct. at 3051, 73 L.Ed.2d 690; *Forest Grove School Dist. v. Student*, 2014 WL 2592654, \*25 (D. Oregon 2014) (*quoting Lachman v. Illinois St. Bd. of Educ.*, 852 F.2d 290, 297 (7<sup>th</sup> Cir. 1988)). Petitioners have not proven that the IEP-09/16/2021 is not designed to meet Student's needs by not specifying the way that the assistive technology would be provided to Student to meet Student's needs.

6. Petitioners have not proven that Respondents did not provide Student with sign language or sign approximations in the IEP-09/16/2021

Petitioners' next issue with Student's IEP-09/16/2021 is that Student was not provided with sign language or sign approximations as a supplemental aid or support. Student's IEP-09/16/2021 does include the clarification of supplementary aids and supports that "RBT usages sign language with every command, request and question. [Student] will sign back or use the iPad as a yes or no response. [Student] has built a bank of signs [Student] understands and

parent request continual usage of words, pictures, sign and the usage of iPad as a means of communication.” *FOF 65*. While the IEP team inexplicably chose not to include sign language as an option of communication for Student in the list of supplementary aids and supports, by being included in the clarifications of supports and services, it does appear as a necessary support/service that Home School must make available to Student pursuant to Student’s IEP-09/16/2021. Petitioners have failed to prove that the IEP-09/16/2021 does not provide Student with sign language or sign language approximations as a supplementary aid and support.

7. Petitioners have not proven that Respondents did not provide Student with quarterly parent/teacher consultations in the IEP-09/16/2021

As with the previous three (3) issues in the instant Complaint, Petitioners argue that the IEP-09/16/2021 does not provide Student with the supplementary aid and support of quarterly parent/teacher consultations. Petitioners again fail to assert why the aids and supports listed in the clarifications section of the IEP-09/16/2021 do not meet Student’s needs, since they are clarified supports that the IEP team has agreed to provide to Student. The IEP-09/16/2021 provides “quarterly parent/teacher consultation on reviewing additional goals provided by FBA (at this time parent feels IEP is still new and would like to revisit FBA goals as new setting and placement matures). Parent request ability to monitor different goals and objectives with teacher to ensure [Student] is really able to complete goals with data to support [Student’s] progress.” *FOF 65*. Since this support was provided in Student’s IEP-09/16/2021, this service was raised in the instant case for implementation for Home School’s material failure to provide the service, so it is unclear how Petitioners continue to claim that the parent/teacher consultations are not included as a necessary support in Student’s IEP-09/16/2021.

It would be helpful in Student’s future IEPs to include parameters that the IEP team and Parent agree on for the quarterly parent/teacher consultations so that the teachers, service

providers, and Parent understand what is expected as far as the consultation meeting(s). This deficiency does not rise to the level of rendering the IEP-09/16/2021 insufficient in meeting Student's needs.

8. Petitioners have not proven that Respondents did not provide Student with appropriate access to peers in the IEP-09/16/2021

Petitioners' final argument regarding Student's IEP-09/16/2021 is that Student needs greater access to peers. Presumably, Petitioners are claiming that the educational placement of Student is not the LRE, so this Hearings Officer will analyze Petitioners' interestingly worded argument in that fashion.

The purpose of the IDEA was to ensure that children with disabilities be mainstreamed into the general education population to the maximum extent possible to afford them opportunities of being education by and around their similar-aged peers. 34 C.F.R. §300.114(a)(2); *see also Rowley*, 458 U.S. at 202-203, 102 S.Ct. at 3039, 73 L.Ed.2d 690; 20 U.S.C. §1412(a)(5); 34 C.F.R. §300.550; H.A.R. §8-60-44. The determination of the extent to which a child is educated with non-disabled peers is commonly referred to as the "least restrictive environment" or "LRE." In determining whether an educational placement is the LRE for Student, this Hearings Officer reviews a four-factor test adopted by the Ninth Circuit which examines the academic and non-academic benefits for Student in the general education setting, the effect of Student being in the general education classroom environment has on other students or the teacher, and the cost of mainstreaming Student. *Sacramento City Unified School District, Board of Education v. Rachel H.*, 14 F.3d 1398, 1404 (9<sup>th</sup> Cir. 1994).

In the IEP-09/16/2021, Student's LRE is described as being a special education classroom with [REDACTED] students, along with the assistance of two (2) RBTs and the special education teacher. Student is to participate with non-disabled peers for elective classes of

Student's choice when Student's behavior is controlled by the RBTs. Student is included with school activities such as field trips, assemblies, recess, and lunch when Student's behavior is controlled by the RBTs and teacher. *FOF 67*. The record before this Hearings Officer demonstrates that Student has serious behavior concerns, including dropping on the ground and refusing to get up, which can sometimes lead to violent or aggressive behavior by Student against others such as the RBTs and teacher. *See e.g., FOF 8, 34-36, 47, 50*. This factors heavily into the determination of the LRE for Student, as it affects not only Student, but the teachers and other students in the general education classrooms. Student's academic and non-academic benefits from being in the general education setting is also unclear, as Student is non-verbal and unlikely to be able to communicate with peers in a meaningful way. *FOF 7*. Frustration at not being able to communicate with others could also lead to more incidents in the general education class, as that has been noted as a trigger for Student's behaviors. Finally, as Student is in [REDACTED] school and still working on functional life skills, such as toileting, dressing, and basic hygiene, it is not clear how Student would receive academic or non-academic benefits from being in the general education class when Student is far enough behind Student's peers to be left behind in such a setting. *FOF 21-23*. Student's LRE as described in the IEP-09/16/2021 does appear to be the best placement for Student to receive academic and non-academic benefits in the special education setting with some controlled access to Student's peers in subjects that Student chooses. Student has participated in physical education and chorus with general education peers, which has been a successful way to provide Student the ability to socialize and learn societal norms from non-disabled students in a successful way. *FOF 83-86*.

While Petitioners appear to argue in their Closing Brief that Parent's agreement to the educational placement should not be considered as part of why Student's placement is the best

LRE for Student, this argument misses the point. Petitioners cite *Doug C.*, 720 F.3d at 1045, to support the position that the school district cannot just blame a parent for failing to argue for better terms in a student's IEP, however, in this case, Parent and the IEP team collectively agreed to start Student in this new setting to see how Student would adjust and to see if Student's behaviors could improve before reconsidering Student's placement. *FOF 53, 65*. This is exactly the kind of interaction *Doug C.* considered when it noted that parental participation is of utmost importance in the development of a student's IEP. *Id.* Parent understood what the IEP team's position was and agreed to it pending further reviews at a later date to see how Student has adjusted. Petitioners have not proven that the IEP-09/16/2021 does not describe an appropriate LRE for Student.

C. Petitioners remedy of revising Student's IEP is the appropriate remedy for the denial of FAPE by Respondents

This Hearings Officer has found that Respondents denied Student a FAPE by failing to provide Student with appropriate transportation as deemed necessary for Student in the IEP-09/16/2021 and necessary behavioral interventions to adequately address Student's maladaptive behaviors, therefore, an appropriate remedy is warranted. Petitioners' main request in the instant Complaint is a revision of Student's IEP-09/16/2021 to address the issues of concern in Petitioners' Complaint. This is an appropriate remedy and this Hearings Officer notes that since the 2021-2022 school year has ended, the IEP team should be conducting an annual review and revision of Student's IEP for the 2022-2023 school year.

This Hearings Officer also notes that the IEP team should revisit the appropriateness of Student's FBA due to the failure of the FBA-08/03/2021 to address or even mention some of the other behaviors noted as problems in Student's IEP-06/01/2021.



To offer some guidance for the IEP team in developing an appropriate IEP for Student for the upcoming school year, this Hearings Officer points out that any supplementary aid or support that is listed in the clarification of supplementary aids and supports should be listed in the list of supplementary aids, program modifications, and supports for school personnel (box 21) of the IEP to assure Parent that the support will be provided or accessible to Student at the designated frequency and location. For example, if the quarterly parent/teacher consultation were for a designated number of minutes per quarter, then it would be easier for both Parent and the teachers/service providers to understand what is expected of them each quarter.

Transportation for Student must be provided as determined by the IEP is necessary for Student to successfully attend school. This may require outside resources (i.e. private company transportation, transportation by private individuals with RBTs, etc) but if it is determined to be necessary for Student by the IEP team, it must be provided as stated in the IEP.

While the details and terms of the BIP do not need to be fully listed in the IEP, it would be helpful for the IEP team to include some supports and strategies that the RBTs use daily to support Student's BIP, such as a token economy, errorless teaching strategies, or a crisis plan. Nothing in the IDEA prevents the IEP team from including terms of the crisis plan to be included in the IEP to provide even more clarity for both Parent and Student's team as to what steps need to be taken to prevent Student from injuring Student's self or others.

Finally, Petitioners have not offered any evidence of any out-of-pocket or other expenses that Parent incurred during the 2021-2022 school year as a result of the denial of FAPE. To the contrary, while Home School offered to reimburse Parent for the cost of driving Student to school, Parent declined the reimbursement due to the paperwork that would need to be submitted

for what would likely be a minimal amount of reimbursement. Petitioners' request for reimbursement of any costs or related expenses incurred by Parent is denied.

## **VI. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have proven that Respondents denied Student a FAPE by failing to provide transportation that was determined to be necessary by the IEP team in the IEP-09/16/2021 and by failing to adequately address Student's behavioral concerns in the IEP-09/16/2021. This Hearings Officer finds that the appropriate remedy for this denial of FAPE is a review and/or revision of Student's IEP for the upcoming 2022-2023 school year.

This Hearings Officer hereby ORDERS:

1. Within thirty (30) days of this Decision, Respondents shall obtain the services of a licensed board-certified behavior analyst to determine if another FBA is necessary to adequately address Student's behaviors in school. The board-certified behavior analyst may be a DOE employee or a contracted board-certified behavior analyst from a private company. If one is needed, Respondents shall make arrangements as necessary to have the FBA completed within a reasonable time.
2. Within thirty (30) days of the completion of an FBA or the determination that a new FBA is not necessary, Respondents shall hold an IEP meeting for Student to review Student's IEP-09/16/2021 for the upcoming 2022-2023 school year to address transportation for Student and Student's behaviors, as well as any other issues that Parent or other members of the IEP team may have regarding Student's IEP.

3. Parent is expected to provide necessary consents and make Student available for any FBA or other assessment that the IEP team (including Parent) deems necessary for the development of an IEP for Student.
4. Parent is expected to reasonably arrange Parent's schedule to attend the aforementioned meetings.
5. Respondents shall document all attempts to schedule any meetings and/or assessments within the given deadlines and keep record of any scheduling difficulties or delays caused by Parent or a representative of Parent.

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, July 12, 2022.

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