



OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

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

Petitioner(s),

vs.

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

Respondents.

DOE-SY2223-005

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: September 16 & 28,
2022

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On July 29, 2022, the Department of Education, State of Hawai'i and Keith T. Hayashi, 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 August 4, 2022.

A prehearing conference was held on August 17, 2022, before Hearings Officer Chastity T. Imamura; with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners; and District Educational Specialist (hereinafter “DES”), Anne T. Horiuchi, Esq. (hereinafter “Ms. Horiuchi”), and Emma R. Christopherson, Esq. (hereinafter “Ms. Christopherson”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for September 16, 2022, September 28, 2022, and October 12, 2022.

Due to the Hearing dates scheduled, Respondents submitted a request for an extension of the Decision deadline, which was originally October 12, 2022, to November 26, 2022. Petitioners had no objection to the request for an extension of the decision deadline. The Order Granting Respondents’ Request to Extend the 45-Day Decision Deadline was filed on August 24, 2022. The current decision deadline is November 26, 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 September 16, 2022. Present at the Hearing were Parent and Mr. Peck, on behalf of Petitioners; DES, District Resource Teacher, Ms. Horiuchi, and Ms. Christopherson, 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 DOE-contracted Board-Certified Behavior Analyst (hereinafter “DOE BCBA”) to testify. The Hearing continued to September 28, 2022, where Respondents called General Education Teacher (hereinafter “GE Teacher”) and Special Education Teacher (hereinafter “SPED Teacher”) to testify. Petitioners did not have any rebuttal witnesses to present, so the Hearing concluded on September 28, 2022. The hearing date of October 12, 2022 was removed from the calendar.

Each party submitted their exhibits for the Hearing by the disclosure deadline of September 9, 2022. The parties met and conferred regarding the proposed exhibits by September 14, 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 September 28, 2022, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits from their previously disclosed documents that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on October 10, 2022. Any objections to the proposed exhibits were due on October 13, 2022.

Petitioners did not submit any additional exhibits for consideration in this Decision, as Petitioners’ exhibits were all received during the Hearing on September 16 and 28, 2022.

Respondents submitted the following additional exhibits from Respondents’ disclosures for consideration in the Decision in this matter. Respondents’ Exhibit 1, pages 0001-0009; Exhibit 2, pages 0010-0014; Exhibit 3, pages 0129-0130; Exhibit 4, pages 0132-0135, 0405-0414; Exhibit 73, pages 0786-0789; Exhibit 74, pages 0790-0793; Exhibit 107, pages 0907-

0910; Exhibit 157, pages 1027-1121; Exhibit 161, pages 1220-1226; Exhibit 164, pages 1233-1270; Exhibit 181, page 1329; Exhibit 187, page 1339; Exhibit 189, page 1341; Exhibit 195, page 1806; Exhibit 198, pages 1810-1811; Exhibit 200, page 1813; Exhibit 222, pages 1868-1872; Exhibit 243, pages 1928-1931; Exhibit 245, pages 1934-1936; Exhibit 247, pages 1939-1943; Exhibit 251, pages 1953-1957; Exhibit 252, pages 1958-1959; Exhibit 254, pages 1961-1962; Exhibit 257, pages 1965-1966; Exhibit 258, page 1967; Exhibit 259, pages 1968-1969; Exhibit 272, pages 1994-2011; Exhibit 275, page 2080; Exhibit 281, pages 2088-2116; Exhibit 282, pages 2117-2142; Exhibit 288, pages 2178-2180; Exhibit 294, pages 2189-2192; Exhibit 300, pages 2262-2263; and Exhibit 304, pages 2268-2269. Petitioners did not state an objection to any of Respondents' proposed exhibits, so the proposed exhibits listed above were received for consideration in the Decision.

On August 17, 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.²

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-029; Exhibit 2, pages 030-166; Exhibit 3, pages 167-216; Exhibit 4, pages 217-254, and seven (7) audio recordings dated December 9, 2021, April 26, 2022, May 12, 2022, May 24, 2022, June 2022, July 14, 2022, and July 20, 2022.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 1-2, pages 0001-0014; Exhibit 3, pages 0129-0130; Exhibit 4, pages 0132-0135, 0189-0226, 0405-0414; Exhibit 33, pages 0553-0579; Exhibits 73-74, pages 0786-0793; Exhibit 107, pages 0907-0910; Exhibit 113, page 0919; Exhibit 157, pages 1027-1121; Exhibits

² An Amended List of Exhibits Received at Due Process Hearing was filed due to the incorrect identification of a different attorney being present at the Hearing instead of Ms. Christopherson.

160-161, pages 1219-1226; Exhibit 164, pages 1233-1270; Exhibit 181, page 1329; Exhibit 187, page 1339; Exhibits 189-191, pages 1341-1573; Exhibit 195, page 1806; Exhibit 198, pages 1810-1811; Exhibits 200-201, pages 1813-1834; Exhibit 222, pages 1868-1872; Exhibit 227, pages 1882-1886; Exhibit 243, pages 1928-1931; Exhibit 245, pages 1934-1936; Exhibit 247, pages 1939-1943; Exhibits 251-252, pages 1953-1959; Exhibit 254, pages 1961-1962; Exhibits 257-259, pages 1965-1969; Exhibit 272, pages 1994-2011; Exhibits 275-276, pages 2080-2082; Exhibits 280-282, pages 2087-2142; Exhibit 285, page 2174; Exhibit 288, pages 2178-2180; Exhibit 291, pages 2183-2184; Exhibit 294, pages 2189-2192; Exhibit 298, pages 2200-2230; Exhibit 300, pages 2262-2263; Exhibit 304, pages 2268-2269; Exhibit 307, pages 2273-2286; Exhibit 370, pages 2705-2706; Exhibit 372, pages 2709-2712; and Exhibit 373, which consisted of six (6) video recordings dated April 26, 2022, May 12, 2022, May 24, 2022, June 22, 2022, July 14, 2022, and July 20, 2022.³

Both parties wanted the opportunity to submit written closing briefs regarding the legal issues with the use of the transcripts of the Hearing to this Hearings Officer for review. The written closing briefs were timely submitted by both parties by the deadline of October 26, 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.

³ Upon review by this Hearings Officer, the audio recordings of April 26, 2022, May 12, 2022, May 24, 2022, June 2022, July 14, 2022, and July 20, 2022, are recordings of the same meetings that are depicted in Respondents' video recordings with the same dates. Due to some issues with the audio quality of the recordings, some of Petitioners' recordings and some of Respondents' recordings have been used for reference in this Decision. All time stamps referred to for the above-referenced meetings will be clearly referenced as either Petitioners' audio recording or Respondents' video recording. These time stamps may differ slightly from the logs submitted by the parties as the time stamps referenced herein were logged by this Hearings Officer during the review of the recordings on a VLC media player.

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 seven (7) issues in the Complaint to be addressed at the Hearing that involve the individualized education program (hereinafter “IEP”) meetings on April 26, 2022, May 12, 2022, May 24, 2022, June 22, 2022, July 14, 2022, and July 20, 2022, and the written IEP developed therefrom (hereinafter “IEP-07/20/2022”).

Issue 1 – Whether failing to include Student’s private program providers/personnel, during a meeting and/or meetings, denied Student a free appropriate public education (hereinafter “FAPE”).

Issue 2 – Whether the discussion of Student’s extended school year (hereinafter “ESY”) services appropriately addressed:

- a. Least restrictive environment (hereinafter “LRE”)
- b. Frequency and/or duration of the program
- c. Speech/language services
- d. The need for an aide (adult support/registered behavior technician/or other) for Student

Issue 3 – Whether the Supplementary Aids and Services, Program Modifications, or Supports for School Personnel (hereinafter “Supplementary aids and services”) are sufficient regarding:

- a. Behavioral interventions.
- b. Student’s supports were Student to move from Student’s current program to the program that the IEP describes.
- c. Assistive technology for communication; high technology.
- d. Specialized instruction in the special education setting and/or in the general education setting (modification of the content, methodology and delivery of instruction), including but not limited to math manipulatives, seating arrangements, assignment modification, ensuring Student’s attention to directions/instruction, pre-teaching, post-teaching, provision of homework to provide Student with additional support in Student’s ability to master

assignments, modification to academic instruction, visual schedules and the like, and small group instruction and the like.

Issue 4 – Whether the discussion of Student’s Supplementary aids and services was adequate/sufficient regarding:

- a. Behavioral interventions.
- b. Student’s supports were Student to move from Student’s current program to the program that the IEP describes.
- c. Assistive technology for communication; high technology.
- d. Specialized instruction in the special education setting and/or in the general education setting (modification of the content, methodology and delivery of instruction), including but not limited to math manipulatives, seating arrangements, assignment modification, ensuring Student’s attention to directions/instruction, pre-teaching, post-teaching, provision of homework to provide Student with additional support in Student’s ability to master assignments, modification to academic instruction, visual schedules and the like, and small group instruction and the like.

Issue 5 – Whether the discussion regarding the need for an aide (adult support/registered behavior technician/or other) was adequate/sufficient.

Issue 6 – Whether the IEP describes the LRE for Student.

Issue 7 – Whether the IEP process denied Student a FAPE where the DOE discussed and determined Student’s LRE prior to the discussion of the Supplementary aids and services that Student could potentially be provided.

Petitioners request the following remedies to address the alleged violations above:

Remedy 1 – Order the DOE to amend the IEP to address the alleged violations.

Remedy 2 – Order the DOE to fund (direct funding of private programs and/or necessary parental expenditures) the costs of Student’s privately contracted/delivered services, including related services such as transportation.

Remedy 3 – Order the DOE to provide compensatory education for Student as deemed appropriate.

IV. FINDINGS OF FACT

Witness background

1. Parent is employed as a room attendant who works varied shifts and often has trouble getting days off from work with short notice. Parent’s primary language is [REDACTED],

- but Parent spoke and understood enough English to participate in the Hearing without an interpreter. Testimony of Parent, Transcript of Proceedings, Volume 1, page 19, line 22, through page 20, line 9, and page 97, line 16, through page 98, line 7 (hereinafter referenced as “Tr.V1, 19:22-20:9, 97:16-98:7”).
2. DOE BCBA is a board-certified behavior analyst, licensed to practice in the State of Hawai‘i. DOE BCBA works for a private company but is contracted to work in the Hawai‘i DOE schools in the [REDACTED] District. DOE BCBA’s duties include conducting functional behavior assessments (hereinafter “FBAs”), writing behavior plans, and supervising registered behavior technicians (hereinafter “RBTs”) who work with the DOE students. DOE BCBA has completed many FBAs during the course of DOE BCBA’s duties and is familiar with applied behavior analysis (hereinafter “ABA”) therapy. Testimony of DOE BCBA, Tr.V1, 107:14-110:16; Respondents’ Exhibit 370, pages 2705-2706 (hereinafter referenced as “R-Ex.370, p.2705-2706”).
 3. In DOE BCBA’s experience as a board-certified behavior analyst contracted by the DOE, DOE BCBA has been able to observe the various “adult support” personnel at the DOE schools who provide support to students. These “adult support” personnel included educational assistants and paraprofessional tutors. Testimony of DOE BCBA, Tr.V1, 109:22-111:23.
 4. SPED Teacher has been a special education teacher in Hawai‘i for [REDACTED] years. SPED Teacher is currently the resource room special education teacher at Home School. SPED Teacher also taught special education for grades preschool to fifth grade in the classroom and in the resource room. Testimony of SPED Teacher,

Tr.V2, 167:8-168:7.

Student's background

5. Student is [REDACTED] years old and has been diagnosed with [REDACTED] [REDACTED]. Student was first determined to be eligible for special education and related services in [REDACTED]. R-Ex.4, p.0407.
6. Student attended Home School for the 2019-2020 school year and attended Private School for the 2020-2021 and 2021-2022 school years. Student currently attends Private School for the 2022-2023 school year. Testimony of Parent, Tr.V1, 16:19-19:5.
7. Student's tuition at Private School for the 2020-2021 and 2021-2022 school years were paid for by the DOE based on settlement agreements resulting from Due Process Hearings. The most recent settlement agreement covered the tuition for the 2021-2022 school year through July 28, 2022. Testimony of Parent, Tr.V1, 84:7-85:4; R-Ex.276, p.2082.
8. Prior to December 2021, a reevaluation was conducted with Student during which a cognitive assessment, a speech-language assessment, a fine motor assessment, a social work assessment, an academic assessment, an FBA, and observations of Student at Private School were conducted by DOE or DOE-contracted personnel. Each assessment included a behavior section, wherein the assessors all noted that Student easily complied with the instructions from the assessors and did not appear to have any negative reactions with the unfamiliar assessors. See R-Ex.3, p.0129-0130; R-Ex.157, p.1033, 1037, 1044, 1054-1055.
9. The reevaluation team also reviewed Student's progress reports for the 2021-2022

school year, which included work samples and data sheets provided by Private School and Student's treatment plan developed by Private Behavior Therapy (hereinafter "Private BT") in August 2021. R-Ex.4, p.0405-0406.

10. An eligibility meeting was held for Student on December 9, 2021. At the meeting, the reports from all the assessments and observations were reviewed along with Student's progress reports and data from Private School. At the eligibility meeting, Student was determined to be eligible for special education and related services under the category of [REDACTED] (hereinafter "[REDACTED]"). See P-Ex.4, audio recording dated December 9, 2021 (hereinafter referenced as "P-Ex.4, 12/9/2021 audio"); R-Ex.4, p.0405-0414.
11. Parent was present at the eligibility meeting and received copies of all assessments, reports, and documents that the team reviewed for the reevaluation. Parent agreed with the team's decision to find Student eligible for special education and related services under the category of ASD. P-Ex.4, 12/9/2021 audio [1:29:30-1:29:54]⁴; R-Ex.157, p.1027-1121.
12. Parent did not agree with the FBA results, which did not recommend an RBT for Student, and Parent expressed during the meeting that Parent wanted an RBT for Student in Student's IEP. The team members noted that the data and information from Private School showed that Student was easily redirected with verbal, gestural, or physical prompts, which can be done by adult support and do not require the specialized services by an RBT trained in ABA. P-Ex.4, 12/9/2021 audio [48:30-

⁴ All time stamp references to the audio and/or video recordings in this Decision are approximate time stamps based on the VLC media player used by this Hearings Officer to review the audio and/or video recordings.

1:02:15], [1:20:15-1:14:39]; R-Ex.4, p.0405-0406.

13. Private School Director was invited to attend or to send a representative from Private School to attend the eligibility meeting on December 9, 2021. Neither Private School Director nor anyone from Private School attended the eligibility meeting. R-Ex.4, p.0134; R-Ex.160, p.1219.
14. A prior written notice (hereinafter “PWN”), evaluation summary report, and copies of the DOE cognitive, social work, speech-language, academic, and fine motor assessments were sent to Parent on December 20, 2021. R-Ex.4, p.0405-0414; R-Ex.164, p.1233-1270.

Student’s November 2021 FBA

15. One of the assessments that was conducted during the reevaluation for Student was an FBA, which was conducted in November 2021 by DOE BCBA. Testimony of DOE BCBA, Tr.V1, 111:24-113:21; P-Ex.2, p.034-071; R-Ex.4, p.0189-0226.
16. In conducting Student’s FBA, DOE BCBA reviewed Student’s behavior plan that was in place at Private School and interviewed Private School staff that work directly with Student, including Student’s RBT, board-certified behavior analyst, board-certified assistant behavior analyst, teacher, speech-language therapist, and occupational therapist. DOE BCBA also interviewed Parent, reviewed data from Private School and other documents that were provided to DOE BCBA, and conducted two (2) observations of Student at Private School, each lasting approximately three (3) hours. Testimony of DOE BCBA, Tr.V1, 112:1-113:12; P-Ex.2, p.036; R-Ex.4, p.0191.
17. DOE BCBA conducted Student’s FBA observations at Private School because that was Student’s current setting and educational environment, due to Student’s

- attendance at Private School. DOE BCBA did not do any observations of Student at a DOE school and stated that even if Student were brought by Parent to a DOE school for observations, the results of the FBA would be inaccurate since Student would not be familiar with that setting/environment and this would likely affect the number of and type of behaviors observed during the observations. Testimony of DOE BCBA, Tr.V1, 114:12-116:15, 125:1-126:5.
18. DOE BCBA's FBA thoroughly explained the results of the interviews DOE BCBA had with Student's staff at Private School, the observations conducted by DOE BCBA, and the problem behaviors that were being monitored and/or addressed by Private BT. *See* P-Ex.2, p.034-071; R-Ex.4, p.0189-0226.
19. Student's teacher, RBT, board-certified behavior analyst, board-certified assistant behavior analyst, speech-language therapist, and occupational therapist at Private School reported that Student's primary problem behaviors consisted of being easily distracted, eloping, vocal protesting, self-stimulation, and touching of Student's genitals. All reported that Student can be redirected from these behaviors, although sometimes Student requires heavy prompting or physical redirection. *See* P-Ex.2, p.038-041; R-Ex.4, p.0193-0196.
20. The behavioral interventions that DOE BCBA observed Student's RBT using at Private School during the FBA observations consisted of using a token board; using verbal, gestural, and physical prompts; and blocking or redirecting Student's behaviors to appropriate behaviors. In DOE BCBA's experience, these behavioral interventions are not ABA-specific and can be utilized by DOE educational assistants and paraprofessional tutors. Testimony of DOE BCBA, Tr.V1, 113:22-114:11; P-

Ex.4, 12/9/2021 audio [1:08:49-1:09:37].

21. DOE BCBA's FBA did not recommend an ABA behavior intervention plan or the services of an RBT for Student, because Student's behaviors that were reported by Student's Private School staff or that were observed during the FBA were not severe, did not impede Student's ability to learn or other students' ability to learn, and did not cause any risk of injury or harm to Student or others. Testimony of DOE BCBA, Tr.V1, 113:13-113:21.
22. DOE BCBA's FBA did recommend that a behavior support plan (hereinafter "BSP") be developed for Student to be implemented by school personnel. The interventions recommended in the FBA included environmental setting changes, such as having the teacher/staff remain neutral and minimizing visibility of or removing preferred items from Student's sight; and active interventions, such as providing Student with praise and/or other preferred reinforcement; redirecting Student using visual and gestural prompts, with physical prompts only as a last resort; and providing Student with frequent breaks and sensory opportunities. P-Ex.2, p.069-070; R-Ex.4, p.0224-0225.
23. After the eligibility meeting, Parent emailed Principal and requested an independent educational evaluation (hereinafter "IEE") to have the FBA redone by an independent agency. Principal informed Parent that since the FBA was not an assessment required for an evaluation or a reevaluation, it would not be considered an assessment that would qualify for an IEE. P-Ex.3, p.167-171.
24. No privately-funded FBA completed after December 9, 2021 was presented as evidence for this Hearing.

Development of Student's IEP

25. As early as February 15, 2022, SPED Teacher attempted to get proposed dates from Parent for purposes of scheduling Student's IEP development meeting. An IEP meeting was scheduled for March 8, 2022. On February 28, 2022, SPED Teacher sent Parent copies of new observation reports from DOE staff, Student's second quarter progress report from Private School, data graphs, and copies of the DOE assessments that were reviewed in the December 9, 2021 eligibility meeting. R-Ex.190, p.1342-1506.
26. On March 6, 2022, SPED Teacher emailed a courtesy copy of the draft IEP and a meeting reminder to Parent for the March 8, 2022 IEP meeting. In SPED Teacher's emails, SPED Teacher informed Parent that Parent was welcome to invite anyone from Private School or Parent's attorney to attend the IEP meeting. Testimony of Parent, Tr.V1, 63:3-64:22; R-Ex.201, p.1814-1834.
27. The meeting did not take place on March 8, 2022, due to Parent's canceling of the meeting because Parent stated that Parent needed more time to prepare and review the documents sent to Parent by SPED Teacher at Parent's request.⁵ See P-Ex.3, p.172-181.
28. The first IEP meeting date was April 26, 2022, and due to scheduling issues and the IEP team's need to have continued meetings to develop the IEP, the other dates of the IEP meetings in this case are May 12, 2022, May 24, 2022, June 22, 2022, July 14, 2022, and July 20, 2022. Testimony of SPED Teacher, Tr.V2, 187:17-188:16; P-Ex.1, p.001, 022-027; R-Ex.33, p.0553, 0574-0579; *see also generally* P-Ex.4 audio

⁵ This Hearings Officer notes that Parent consulted with Mr. Peck constantly during the IEP meeting scheduling process and was careful not to confirm any meeting dates based on written advice of counsel. See P-Ex.3, p.174.

recordings dated April 26, 2022, May 12 and 24, 2022, June 22, 2022, and July 14 and 20, 2022, R-Ex.373, video recordings dated April 26, 2022, May 12 and 24, 2022, June 22, 2022, and July 14 and 20, 2022.

29. Parent attended all the IEP meetings, and a [REDACTED] interpreter was present for Parent's assistance for each meeting. At the July 14 and 20, 2022, IEP meetings Parent Advocate⁶ (hereinafter "Advocate") was present to assist Parent by speaking on Parent's behalf. No one from Private School attended any of the IEP meetings. *See* P-Ex.1, p.022-027; R-Ex.33, p.0553, 0574-0579; *see also generally* P-Ex.4 audio recordings dated April 26, 2022, May 12 and 24, 2022, June 22, 2022, and July 14 and 20, 2022, R-Ex.373, video recordings dated April 26, 2022, May 12 and 24, 2022, June 22, 2022, and July 14 and 20, 2022
30. Also present at each meeting was SPED Teacher, Principal, Speech-Language Pathologist (hereinafter "SLP"), [REDACTED] (hereinafter "[REDACTED]"), Student Services Coordinator, and another special education teacher. GE Teacher attended the July 14 and 20, 2022 IEP meetings, but a different general education teacher attended the previous meetings. Occupational Therapist (hereinafter "OT") was present at the IEP meetings in April, May, and June, but a different occupational therapist attended the July 2022 IEP meetings. Counselor was present at all IEP meetings except the July 20, 2022 due to a family emergency. P-Ex.1, p.022-027; R-Ex.33, p.0553, 0574-0579; *see also generally* P-Ex.4 audio recordings dated April 26, 2022, May 12 and 24, 2022, June 22, 2022, and July 14 and 20, 2022, R-Ex.373,

⁶ Advocate is Mr. Peck's relative and was identified as an "upcoming college student" when asked by SPED Teacher what agency Advocate was from. Tr.V1, 34:1-12; P-Ex.4, 7/14/2022 audio [32:50-33:29].

video recordings dated April 26, 2022, May 12 and 24, 2022, June 22, 2022, and July 14 and 20, 2022.

31. At the IEP meetings on April 26, 2022 and May 12, 2022, the IEP team discussed Student's present levels of educational performance (hereinafter "PLEPs").⁷ The IEP team relied heavily on the information from the assessments conducted during the December 2021 reevaluation, observations conducted by the IEP team members, the progress reports, work samples, and other data from Private School, and Private BT's treatment plan and information. *See generally* R-Ex.373, 4/26/2022 video [11:35-2:51:23]; R-Ex.373, 5/12/2022 video [6:22-1:25:03].
32. After each section of the PLEPs, Parent was asked for input related to that section of the IEP and Parent listed several items for each section that Parent either wanted Student to work on or that Parent did not consider a strength, despite the information from Private School and Private BT listing it as a strength. R-Ex.373, 4/26/2022 video [11:35-2:51:23]; R-Ex.373, 5/12/2022 video [6:22-1:25:03].
33. For example, the draft IEP discussed in the IEP meetings contained information taken directly from Private School's progress reports and Private BT's treatment plan, such as Student's strengths, weaknesses, goals, and objectives. Parent disagreed with most of the strengths listed because Student did not display those strengths at home. *See e.g.* R-Ex.373, 4/26/2022 video [1:42:50-2:06:25].

⁷ This Hearings Officer notes that the current terminology for this section of the IEP is present levels of academic achievement and functional performance ("PLAAFP"), the DOE IEP forms include the terms PLEPs on the form and the IEP team references that section using PLEPs, so the term PLEPs will be used in this Decision. This Hearings Officer also finds that while the terminology is incorrect, the IEP-07/20/2022 PLEPs section does include Student's PLAAFP information.

34. Parent requested that several other weaknesses be included in Student's PLEPs even though they were either not appropriate for a DOE IEP because they were not skills that general education students were taught in school, such as riding a bicycle, brushing hair, or getting dressed; or because they were weaknesses that Student only exhibited at home, despite them being listed as strengths by Private School. *See e.g.* R-Ex.373, 5/12/2022 video [30:13-47:39], [55:44-1:05:15].
35. The IEP team discussed Parent's disagreements with the strengths listed in Student's PLEPs, made appropriate changes, or for the ones that were not observed in or were not appropriate for the school setting, listed them under "parent input." R-Ex.373, 4/26/2022 video [11:35-2:51:23]; R-Ex.373, 5/12/2022 video [6:22-1:25:03].
36. At the May 12, 2022, May 24, 2022, and June 22, 2022 IEP meetings, the IEP team discussed Student's goals and objectives based on the weaknesses of Student as listed in the PLEPs. During this discussion, SPED Teacher would show the weaknesses listed in the PLEPs and the goals and objectives side-by-side so the team could see how the goals and objectives related directly to the weaknesses for Student. *See* R-Ex.373, 5/12/2022 video [1:29:33-1:48:52]; R-Ex.373, 5/24/2022 video [26:19-1:25:27]; R-Ex.373, 6/22/2022 video [8:05-2:07:10].
37. Many of the goals and objectives discussed in the draft IEP were modeled after the progress reports from Private School or the treatment plan from Private BT. *See* P-Ex.1, p.001-007, P-Ex.2, p.072-104; P-Ex.4, p.228-238; R-Ex.33, p.0553-0579; R-Ex.190, p.1388-1441; R-Ex.191, p.1508-1573.
38. For example, Private School's fourth quarter progress report noted that Student had emerging skills in recognizing and naming ten (10) upper and lowercase letters and

was working on letters “A” through “L.” P-Ex.4, p.228. Student’s first goal for Language Arts in the draft IEP (and the resulting IEP-07/20/2022) was “In one IEP year, [Student] will improve [Student’s] letter recognition skills by matching or accurately pointing in 4 out of 5 opportunities,” and each objective identified a different set of letters that Student would be working on. P-Ex.1, p.009; R-Ex.33, p.0561.

39. Private BT’s treatment plan also includes goals of independent play and parallel play, as well as engaging with other students. P-Ex.2, p.090-091; R-Ex.191, p.1559-1560. The draft IEP (and the resulting IEP-07/20/2022) includes a goal that Student will improve social skills by playing alongside peers and responding to Student’s name, and the objectives call for Student to have opportunities to play alongside a peer, respond to Student’s name, initiate play using Student’s preferred method of communication, and share items using Student’s preferred method of communication. P-Ex.1, p.17; R-Ex.33, p.0569.
40. During each of the meetings on May 12 and 24, and June 22, the IEP team listened to Parent’s concerns and input and discussed how the proposed goals and objectives would work toward getting Student to the goal that Parent wanted. *See e.g.*, R-Ex.373, 5/12/2022 video [1:29:33-1:48:52] (discussion regarding Student’s language arts-reading goal and Parent’s concerns); R-Ex.373, 5/24/2022 video [1:01:00-1:06:56] (SPED Teacher asks Parent to express Parent’s concerns regarding Student’s goals and objectives, but Parent tells the team that Parent is not sure if the goals and objectives are addressing Parent’s concerns); R-Ex.373, 6/22/2022 video [40:05-55:00] (SPED Teacher asks Parent to identify the specific part of Student’s language

arts-writing goal that Parent disagrees with but Parent refuses to answer and says that Parent does not know if there might be another solution to get Student to the place where Parent wants Student to be).

41. One specific example is that Parent wanted Student to work on recognizing sight words as a goal in Student's IEP. Private School data showed that Student could only recognize a handful of letters in the alphabet by sight and Private School was not working with Student on sight words. The IEP team members attempted to explain to Parent that Student needed to be able to first recognize all letters by sight and then combination of letters in order to recognize sight words. Parent insisted, with no basis or support, that Student could learn sight words without needing to learn the individual letters first, so Student should have both goals in Student's IEP. R-Ex.373, 5/24/2022 video [43:30-44:20], [1:01:00-1:07:52]; R-Ex.373, 6/22/2022 video [38:16-55:00].
42. Parent also disagreed with the IEP team's explanation that the school does not teach skills like bicycle riding or hair brushing since they are not skills that students need to have access to their education and noted that in preschool Student learned to ride a swing. R-Ex.373, 6/22/2022 [1:56:42-2:07:10].
43. During the discussion of each section of the IEP, Parent disagreed with the rest of the IEP team members and clearly stated repeatedly throughout the meetings that Parent disagreed with the proposals by the rest of the IEP team members and "was not going to change my mind." Parent then instructed the team to just move on with the rest of the IEP when they attempted to address and/or try to resolve Parent's concerns. *See e.g.*, R-Ex.373, 5/12/2022 video [1:46:30-1:48:52]; R-Ex.373, 5/24/2022 video

- [27:43-1:22:50]; R-Ex.373, 6/22/22 video [35:31-57:40]; P-Ex.4, 7/14/2022 audio [1:08:05-1:13:54]; P-Ex.4, 7/20/2022 audio [36:13-47:54], [54:49-56:49], [1:08:22-1:14:27], [1:32:24-1:34:49].
44. Parent also disagreed with the goals and objectives for Student, despite the IEP's proposed goals and objectives being nearly identical to the goals and objectives that Student was working on at Private School. Parent provided vague explanations for Parent's disagreement, such as Parent was not sure the goals covered all Student's weaknesses, or Parent did not know if there were other solutions that could also meet Student's needs. *See e.g.*, R-Ex.373, 6/22/2022 video [38:16-55:00], [1:49:24-1:52:57].
45. At the July 14, 2022 IEP meeting, the IEP team discussed Student's eligibility for ESY services. The team went through the factors for eligibility and determined that Student was eligible for ESY based on the nature and severity of Student's disability. The team noted that the data and information from Private School showed that Student had little regression over breaks and was able to recoup skills soon after returning to school. P-Ex.4, 7/14/2022 audio [17:50-19:47].
46. The IEP team determined that since ESY was intended for maintenance of Student's skills, the goals and objectives that Student had already mastered would be the focus for ESY services. The team then went through each goal and objective in Student's draft IEP to determine which goals and objectives would be targeted during ESY. P-Ex.4, 7/14/2022 audio [19:47-1:00:43].
47. During this discussion, Parent asked if Student could work on socialization skills, but the IEP team noted that Student did not have data to show that Student had mastered

- socialization skills, so they would not need to work on maintaining those skills, since ESY is designed for maintenance of skills to prevent regression or delayed recoupment. P-Ex.4, 7/14/2022 audio [36:30-56:00].
48. After the discussion of the ESY goals and objectives, the IEP team discussed the length of time Student would need for ESY based on the time it would take for each goal or objective to be targeted during ESY. SPED Teacher, SLP, and OT all provided the number of minutes they believed was necessary to work on maintenance of Student's skills during ESY. The team also discussed the supplementary aids and supports Student would receive during ESY, which included an adult support for the duration of the ESY day. P-Ex.4, 7/14/2022 audio [1:00:45-1:28:10].
49. While the IEP team members were presenting the proposed number of minutes for the ESY services, Parent and Advocate interjected to insist that Student receive a full day of school for ESY and to be with general education peers. Neither Parent nor Advocate had any data, report, or other kind of information to support their request. Parent simply stated that Parent thought that Student should have a full day and socialization with non-disabled peers. P-Ex.4, 7/14/2022 audio [1:07:12-1:28:10].
50. At the July 20, 2022 IEP meeting, Parent told the IEP team that Parent wanted Advocate to speak on Parent's behalf because Advocate knew what Parent wanted to say. Parent also expressed frustration and claimed that the IEP team has heard Parent state Parent's concerns but continued to not address them. P-Ex.4, 7/20/2022 audio [6:39-12:54].
51. After reviewing the completed IEP sections, the IEP team discussed the LRE setting, or educational placement, for Student where Student would be educated with non-

- disabled peers. P-Ex.4, 7/20/2022 audio [15:01-1:25:50].
52. The discussion began with SPED Teacher explaining each of the different settings that are available to Student and then a four-factor test to be used in determining the most appropriate setting for Student. P-Ex.4, 7/20/2022 audio [15:01-19:40].
53. During the LRE discussion, the IEP team discussed each class or subject that Student would have at Home School, including reading, writing, math, science, social studies, computer, music, and library. For each subject, GE Teacher provided information to the team about what the grade level standards were for the classes and what the students in the class would be working on, then the team would weigh whether Student would gain academic or non-academic benefits from each subject/class if Student were in the general education setting. P-Ex.4, 7/20/2022 audio [19:42-1:14:27].
54. Parent agreed that Student should be in the special education setting for reading, writing, and math, but insisted in Student being in the general education class setting for the remainder of the subjects, even when the other team members explained that the assignments would require Student to have basic reading and writing skills to receive any academic or non-academic benefit from the class. Parent simply insisted that Student be in the general education setting. When the other team members attempted to explain their reasoning to Parent, Parent claimed Parent felt 'harassed' again and told the team to move on and stop trying to change Parent's mind. Advocate also prompted Parent to claim that Parent was harassed. P-Ex.4, 7/20/2022 audio [36:13-56:49].
55. After discussing the academic subjects (reading, writing, math, science, social

- studies, computer, music, and library), the team discussed other parts of the school day in which Student could be in the general education setting. These other parts of the day included homeroom and morning business, lunch and recess, physical education, field trips, assemblies, and other school-wide activities. The IEP team members all agreed that Student would benefit from being in the general education in those subjects by being with non-disabled peers. P-Ex.4, 7/20/2022 audio [1:20:38-1:23:55].
56. The IEP team also discussed Student receiving services, such as speech-language and occupational therapy, in both the special education and general education setting. Student would be taught skills in the special education setting and once Student learned the skills, Student could work on generalizing the skills in the general education setting. Parent agreed on the speech-language and occupational therapy services being in both the special education and general education settings. P-Ex.4, 7/20/2022 audio [1:14:33-1:20:32].
57. Based on the discussion and with the agreement of all team members besides Parent, Home School's offer of Student's placement was in the special education setting for reading, writing, math, science, social studies, computer, music, and library; special education and general education setting for speech-language and occupational therapy; and general education setting for physical education, lunch/recess, homeroom, morning business, field trips, and assemblies. P-Ex.4, 7/20/2022 audio [1:20:38-1:25:50].
58. At the conclusion of the LRE discussion, the IEP team asked Parent if Parent could provide information about what Private School offers to Student, specifically in terms

- of content areas or what Student learns while at Private School. Parent dismissively told the IEP team that Parent does not know and that the team can just ask Private School. P-Ex.4, 7/20/2022 audio [1:25:53-1:26:49].
59. The IEP team then moved on to discussing the services and supplementary aids and supports that Student would receive during the regular school year. Included in this discussion was the IEP team proposal to provide adult support for Student for eighteen hundred (1800) minutes per week to assist Student. P-Ex.4, 7/20/2022 audio [1:27:33-1:44:33].
60. During this discussion, Parent had two (2) primary concerns: that Student receive direct speech-language and occupational therapy services, and that Student have an RBT with Student throughout the school day. The IEP team addressed these concerns but explained that Student did not qualify for an RBT based on the FBA that was completed. P-Ex.4, 7/20/2022 audio [1:27:33-1:34:55]
61. In the middle of the discussion of the supplementary aids and supports for Student, when the IEP team was discussing parent education and training, Parent and Advocate began to insist that the IEP team discuss Student's behaviors. SPED Teacher tried to clarify whether Parent wanted to go back to the PLEPs, but Parent and Advocate just insisted that they discuss Student's behaviors. SPED Teacher continued to finish the discussion of the supplementary supports and services and return to Parent's concerns about behaviors and Parent and Advocate disagreed with the process. P-Ex.4, 7/20/2022 audio [1:35:35-1:40:33].
62. SPED Teacher also attempted to explain that the IEP team was unable to discuss a BSP for Student during the IEP meeting because Counselor had a family emergency

and Counselor was the person who had the draft BSP for discussion.⁸ P-Ex.4, 7/20/2022 audio [1:35:35-1:40:33].

63. After the IEP team completed the discussion of the services, supplementary aids and supports, and the clarification of the services, supplementary aids and supports, the team revisited the LRE discussion for Student with the proposed services and supplementary aids and supports. P-Ex.4, 7/20/2022 audio [1:44:33-1:49:25].

64. Principal then provided Home School's offer of FAPE to Parent by reviewing the services, supplementary aids and supports, clarifications of the aids and supports, and the LRE for Student's placement to Parent. Advocate immediately rejected the IEP and informed the IEP team that Parent was sending Student to Private School and would be seeking reimbursement of Student's Private School tuition and related costs. Parent confirmed that what Advocate was saying was accurate. P-Ex.4, 7/20/2022 audio [1:49:26-1:51:46].

65. The IEP team then explained that the team would have another meeting to review the BSP for Student and a transfer plan for Student's transfer from Private School to Home School if Parent were to accept the offer made by Principal. Parent and Advocate stated that Parent has no interest in meeting with the team again since Parent rejected the IEP and would be sending Student to Private School. P-Ex.4, 7/20/2022 audio [1:52:53-1:58:28].

66. While it is unclear if it was due to coaching by Parent's attorney⁹ or Advocate, or

⁸ At the start of the IEP meeting on July 20, 2022, SPED Teacher notified Parent that Counselor would not be at the meeting due to a family emergency and Parent was okay with proceeding with the meeting without Counselor. P-Ex.4, 7/20/2022 audio [00:00-00:47].

⁹ This Hearings Officer notes that while Parent could barely articulate any reasoning behind Parent's objections during the IEP meetings, Parent's arguments and objections are

Parent's own volition, it is apparent in listening to the IEP meeting recordings that Parent had no intention of accepting any IEP proposed by the Hawai'i DOE and that Parent intended to reject the IEP and send Student to Private School. This is evidenced by Parent's refusal to provide specific examples, to listen to the explanations from the school educators, insistence that Parent was not going to change Parent's mind, and Parent's repeated claims that Parent was being harassed when the school team would attempt to explain their reasoning. *See generally* P-Ex.4 audio recordings dated April 26, 2022, May 12 and 24, 2022, June 22, 2022, and July 14 and 20, 2022, R-Ex.373, video recordings dated April 26, 2022, May 12 and 24, 2022, June 22, 2022, and July 14 and 20, 2022.

Student's 2022 IEP

67. The written IEP offer from Home School, developed at the April 26, May 12 and 24, June 22, and July 14 and 20, 2022 meetings (hereinafter "IEP-07/20/2022") was sent to Parent, along with the PWN dated July 26, 2022, from the IEP meetings (hereinafter "PWN-07/26/2022") on July 26, 2022. R-Ex.298, p.2200-2230.

68. SPED Teacher also informed Parent that the team would be meeting on July 28, 2022, to discuss the BSP and transfer considerations, and invited Parent to attend the meeting. R-Ex.300, p.2262-2263.

coincidentally similar to the arguments listed in the Complaint. For example, Parent's insistence that Student have a full day and access to non-disabled peers for extended school year, Parent's (and Parent's advocate's) insistence on discussing Student's behaviors during the supplementary aids and services section of the IEP, Parent's insistence that Student receive a one-to-one RBT despite the findings in the FBA, and Parent's insistence that Student be in the general education setting. This is in addition to the clear "copy-and-paste" of response email from Parent to the DOE that was provided directly from Mr. Peck. *See* P-Ex.3, p.174; *see also generally* P-Ex.4, 7/20/2022 audio.

69. Student's IEP-07/20/2022 accurately reflected Student's present levels of academic achievement and functional performance, including Student's strengths and weaknesses in reading, writing, math, communication skills, behavioral/socialization skills, fine motor skills, adaptive skills, as well as family and medical updates. P-Ex.1, p.001-007; R-Ex.33, p.0553-0559.
70. The PLEPs are consistent with the data from the DOE assessments conducted with Student during the reevaluation, progress reports and data sheets from Private School, and the treatment plan and data graphs from Private BT. The PLEPs also included Parent's input and concerns that were raised to the team at the meetings. P-Ex.1, p.001-007; R-Ex.33, p.0553-0559.
71. Each of the goals and objectives included in Student's IEP-07/20/2022 appropriately addressed each of Student's needs in accessing Student's education. Many of the goals and objectives were directly related or similar to the objectives that Student was working on at Private School or with Private BT's treatment plan. P-Ex.1, p.009-019; P-Ex.2, p.072-129; P-Ex.4, p.228-238; R-Ex.33, p.0561-0571; R-Ex.191, p.1541-1573; *see also generally* R-Ex.373, 5/24/2022 video (SPED Teacher shares a split screen with the team comparing Student's weaknesses to the goals and objectives being discussed).
72. Student was qualified for ESY based on the nature and severity of Student's disability, even though data provided by Private School showed that Student did not have significant regression or lengthy recoupment of skills after breaks in school. P-Ex.1, p.020; R-Ex.0572; R-Ex.191, p.1517-1540; P-Ex.4, 7/14/2022 audio [17:50-19:47], [1:00:45-1:06:30].

73. The IEP-07/20/2022 offer included a list of goals and objectives that would be reviewed during ESY and included two hundred forty (240) minutes per week of special education and adult support for ESY, which was determined to be sufficient time to work on the goals and objectives listed. P-Ex.1, p.020; R-Ex.33, p.0572; R-Ex.373, 7/14/2022 audio [1:06:50-1:08:04].
74. Student's IEP-07/20/2022 offer also included forty (40) minutes of speech-language therapy per week and thirty (30) minutes every two (2) weeks of occupational therapy. The number of minutes for speech-language therapy and occupational therapy were determined by SLP and by an occupational therapist. P-Ex.1, p.020, R-Ex.373, p.0572; P-Ex.4, 7/14/2022 audio [1:16:41-1:26:55].
75. Student's IEP-07/20/2022 offered Student one thousand eight hundred (1800) minutes per week of special education, eight hundred ten (810) minutes of speech-language therapy per quarter, and two hundred seventy (270) minutes of occupational therapy per quarter. Speech-language and occupational therapy were further clarified to include direct individual or group services. The number of minutes offered in the IEP-07/20/2022 is the same as what Student received at Private School for the 2021-2022 school year. P-Ex.1, p.020, P-Ex.4, p.248; P-Ex.4, 7/20/2022 audio [1:27:33-1:31:17]; R-Ex.373, p.0572.
76. Student's IEP-07/20/2022 offered Student the following supplementary aids and supports: token system, augmentative and alternative communication (hereinafter "AAC") device, picture cards, BSP, and adult support, all to be provided daily, and parent education and training for sixty (60) minutes per month. P-Ex.1, p.020, R-Ex.33, p.0572.

77. The primary supplementary supports noted and used at Private School for Student were a token system, an AAC device, and an RBT assisting Student throughout the school day, including providing verbal, gestural, and physical prompting; redirection; and occasional hand-over-hand assistance to Student. *See* R-Ex.190, p.1371-1387; R-Ex.272, p.1999-2011.

78. The special education services and supplementary aids and supports for Student in the IEP-07/20/2022 were further clarified as follows:

Speech-Language therapy service delivery will include direct services in the form of individual and/or small group sessions to address communication needs.

Occupational therapy service delivery will include direct services in the form of individual and/or small group sessions to address fine motor needs.

[Student] requires an Augmentative and Alternative Communication Device on a daily basis to communicate [Student's] wants and needs.

[Student] is currently using [Student's] voice output device with a dynamic display with an application.

Adult Support is needed on a daily basis to address behavioral concerns such as focusing on the task at-hand, task completion, and remaining in a designated area (not elope). Adult Support is also needed for [Student's] limited communication skills and self-help (e.g. toileting) skills.

Parent Education and Training services will be provided for 60 minutes per month to address topics related to the IEP.

P-Ex.1, p.20, R-Ex.33, p.0572.

79. Student's IEP-07/20/2022 describes Student's least restrictive environment placement as follows:

[Student] will not participate with non-disabled peers for English Language Arts, Math, Social Studies, Science, Music, Computer, and Library because [Student] needs specially designed instructions in these activities/subject areas, and will receive educational benefits from an individualized instruction from a special education teacher in a small group setting. [Student] will participate with non-disabled peers for art, P.E., homeroom, lunch/recess, school-wide activities/assemblies, and field trips because [Student] benefits from opportunities to socialize with same-aged peers. [Student] will participate with disabled and non-disabled peers for Speech-Language and Occupational Therapy and will receive opportunities to have practice skills learned across all settings.

[Student's] placement will be in a special education setting on a DOE public school campus.

P-Ex.1, p.21; R-Ex.33, p.0573.

80. Home School's [REDACTED] and [REDACTED] grade science, music, computer, and library classes require students to have the ability to read so they may participate in the assignments or activities during those class periods. For example, in music class, the students need to be able to read lyrics and understand chords and finger placement to sing along and/or play along with the rest of the class. For science, computer, and library, students in Student's grade read passages and have assignments and activities that require the students to read at or near grade level. Testimony of GE Teacher, Tr.V2, 144:1-145:7, 150:24-154:19, 162:12-23; P-Ex.4, 7/20/2022 audio [31:34-1:07:52].
81. On July 26, 2022, SPED Teacher emailed Parent a copy of the final IEP-07/20/2022, the PWN from the IEP meetings, dated July 26, 2022. SPED Teacher also reminded Parent that the IEP team would be meeting on July 28, 2022 to discuss Student's BSP and transfer plan and that an interpreter would be available for Parent at the meeting. R-Ex.298, p.2200-2230.
82. On July 28, 2022, the IEP team met without Parent and drafted a BSP and a list of transfer concerns for Student. Copies of those documents were emailed to Parent on August 1, 2022. R-Ex.307, p.2273-2286.
83. The DOE 2022-2023 school year began on August 1, 2022. Testimony of SPED Teacher, Tr.V2, 191:6-13.

Private School

84. Student currently attends Private School, which is a private facility that only accepts disabled students. Student does not currently have any interaction with non-disabled

- students at Private School. Testimony of Parent, Tr.V1, 30:8-23; P-Ex.4, p.222-227.
85. Private School does not provide ABA, board-certified behavior analyst, or RBT services to Student, nor are the services included in Private School's tuition of Forty Thousand Eight Hundred Forty Dollars (\$40,840) for the 2022-2023 school year. Private School's summer session program is also not included in the yearly tuition costs. Student's ABA program and personnel are provided to Student at Private School through Private BT, which is paid for by medical insurance. Testimony of Parent, Tr.V1, 85:12-24, 94:17-96:7.
86. For the 2022-2023 school year, Parent signed a contract with Private School indicating that the DOE will be paying Student's tuition at Private School. Parent's understanding is that if Petitioners do not prevail on their request for tuition reimbursement, Parent will be responsible for paying Student's tuition for the 2022-2023 school year. Parent has not made any payments toward Student's tuition for the 2022-2023 school year. Testimony of Parent, Tr.V1, 82:13-86:4; P-Ex.4, p.243.
87. Private School's program for Student includes goals and objectives for Student in the areas of reading, writing, math, science/social studies, speech-language therapy, and occupational therapy. Private BT also has an active ABA treatment plan that targets behaviors for Student in the areas of behaviors, language and communication, social skills, and adaptive skills, and also addresses parent/caregiver goals. *See* P-Ex.2, p.072-104; P-Ex.4, p.228-238; R-Ex.191, p.1541-1573.
88. Student has made progress in both Private School's goals and Private BT's goals during Student's attendance at Private School. Parent is satisfied with the services and supports that Student receives at Private School because Parent has also seen

Student make progress. Testimony of Parent, Tr.V1, 20:11-15; *see also* P-Ex.2, p.072-104; P-Ex.4, p.228-238; R-Ex.191, p.1541-1573.

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 including Student's current private program providers/personnel in the IEP development meetings

Petitioners' first issue argues that Respondents failed to include the personnel or providers at Private School or Private BT in Student's IEP development meetings. Petitioners claim that "[t]here is a legal requirement that the school seek the participation of a private provider" in Hawai'i,¹⁰ Petitioners have not cited to any statute or legal precedent to support this claim.

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

¹⁰ See Petitioners' Closing Brief, filed October 26, 2022, page 2-3.

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

The facts of this case are distinguishable from the facts in *Doug C.* Here, Parent was present at all six (6) IEP meetings held in this matter and was accompanied by an interpreter at each meeting and Advocate at the July 14 and 20, 2022 meetings. *FOF 29.* Parent was also reminded by SPED Teacher both in the scheduling emails and at the IEP meetings that Parent could invite whomever Parent wanted at the meetings. *FOF 26.* The IEP team also had various progress reports, data sheets, work samples, and treatment plans from Private School to use in guiding the development of Student's IEP-07/20/2022. *FOF 31.* Indeed, the PLEPs in the IEP-07/20/2022 rely heavily on the information provided by Private School and observations made of Student at Private School. *FOF 33.* Petitioners have failed to demonstrate how having someone from Private School at the IEP meeting would have provided different information for Student's program that was not presented by Parent or by the records submitted by Private School. Student was not denied a FAPE by the IEP team not including Private School personnel at the IEP development meetings.

B. The discussion of Student's ESY services was appropriate and addressed Student's needs during the provision of ESY

Petitioners' next issue is that Respondents failed to appropriately discuss the provision of Student's ESY services, including the least restrictive environment, frequency and/or duration of the program, speech/language services, and the need for an aide for Student.

A school must provide ESY services only if the child’s IEP team determines that the services are necessary ‘for the provision of FAPE to the child.’ *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008). To qualify for extended school year services, “a claimant seeking an ESY must satisfy an even stricter test, because ‘providing an ESY is an exception and not the rule under the regulatory scheme.’” *N.B.*, 541 F.3d at 1211, *quoting Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6th Cir.) *quoting Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), *cert. denied*, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); *see also Dep’t of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 *7 (holding that ESY is “educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information during a break in regularly scheduled classes, such as during the summer.”). The standard for ESY is higher than the standard for the provision of special education and related services due to the requirement to show that the benefits the student gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during school breaks. *Id.*, *quoting MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002); *see also K.K. ex rel. K.S.K. v. Hawaii*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6th Cir. 2004) (confirming that “it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.”).

Here, Student was determined to be eligible for ESY services and the IEP team had over one (1) hour of discussion at the July 14, 2022 IEP meeting regarding Student’s ESY services. *FOF 45*. The IEP team discussed each of the goals and objectives that would be applicable for ESY in order for Student to maintain the skills that Student already mastered. *FOF 46*. The IEP

team also considered Parent's concerns regarding Student needing a longer school day but noted that the length of the school day for ESY was based on the number of minutes it would take to work on each goal and objective discussed. The discussion regarding ESY services for Student also included the provision of speech-language and occupational therapy services for Student, as well as an adult support aide for the duration of Student's ESY program. *FOF 48*. The IEP team also discussed Parent's concerns regarding Student being with general education peers for socialization but noted that the DOE ESY program does not include non-disabled peers because the DOE ESY program is designed for maintenance of skills. *FOF 47*. The IEP team listened to Parent's repeated objections to Student not being with general education peers for ESY, even though Student does not currently have any access to general education peers at Private School and would not need such socialization maintenance for ESY. *FOF 49, 84*.

Petitioners have not provided any evidence that the IEP team's discussion regarding Student's ESY services during the IEP development process was inadequate. Petitioners' only evidence appears to be Parent's refusal to engage in discussion with the IEP team and simply object to anything that Parent disagrees with based on what appears to be coaching by Parent's attorney and/or advocate. *FOF 66*. Parent could not articulate any bases for Parent's objections to the IEP team's proposal except that Parent disagreed and the IEP team could not change Parent's mind.

Petitioners have not proven that the discussion for ESY services for Student was inadequate to address Student's relevant needs that made Student eligible for Student's ESY services, nor have they proven that the ESY services offered by the IEP-07/20/2022 were not appropriate to address Student's needs for maintenance of skills that Student had mastered to prevent regression and/or delayed recoupment.

C. Petitioners have failed to prove that Respondents denied Student a FAPE by failing to discuss or provide appropriate supplementary aids and services for Student in the IEP-07/20/2022

Petitioners third and fourth issues both relate to the supplementary aids and services, wherein Issue 3 addresses the substantive provision of appropriate supplementary aids and services in the IEP-07/20/2022 itself and Issue 4 addresses the discussions during the IEP meetings regarding those supplementary aids and services.

As an initial matter, the IDEA requires that the parents of a student with a disability be involved in the development of the IEP programs for their child, however, it does not explicitly vest parents a power to veto any proposal or determination made by the school. The Ninth Circuit has noted that in developing an IEP, a consensus would be preferred, but in the event that one is not reached, the educational agency has the duty to formulate the IEP to the best of its ability based on the information it possesses but must afford the parents a due process hearing regarding that IEP. *B.B. ex rel. J.B. v. Hawaii, Dept. of Educ.*, 486 F.Supp.2d 1042, 1050-1051 (citing *Doe v. Maher*, 793 F.2d 1470, 1490 (9th Cir. 1986)).

In this case, Parent expressed many disagreements or objections to the IEP-07/20/2022 but refused to discuss or provide explanations or examples to the IEP team during the IEP meetings. *See e.g., FOF 32-34, 40-44, 49, 54, 58, 61, 66.* The IEP team, at the urging of Parent, proceeded with the development of the IEP-07/20/2022 after Parent expressed an unwillingness to change Parent's mind about these matters. Respondents complied with the requirements to have Parent participate in the IEP meeting development and their duty to formulate the IEP to the best of its ability using the vast information provided to the IEP team from Private School, Private BT, and the various assessments in Student's reevaluation. Procedurally, Parent was provided an ample opportunity in the IEP meetings both through an interpreter and an advocate,

to meaningfully participate in the development of Student's IEP-07/20/2022. The evidence in this case has demonstrated that Respondents presented Parent with an appropriate educational program in IEP-07/20/2022 that addressed Student's needs prior to the start of the 2022-2023 school year. Petitioners have not proven that failure to discuss any of the matters listed in Petitioners' Complaint resulted in a lost of educational opportunity, significant infringement on parent participation, or deprivation of educational benefits.

Petitioners specifically argue that the supplementary aids and services are not appropriate to meet Student's needs in the areas of: 1) behavioral interventions; 2) transition services for Student to move from Private School to Home School; 3) assistive technology; and 4) specialized instruction in the special education setting and/or in the general education setting.¹¹ While this Hearings Officer concludes that the discussions at the IEP development meetings in this case and the resulting IEP-07/20/2022 appropriately reviewed and addressed Student's unique needs, each specific area raised by Petitioners will be addressed in turn regarding the discussions at the IEP meetings and what was provided in the IEP-07/20/2022.

1. Behavioral interventions

Petitioners argue that Parent had insisted that the IEP team discuss behavioral interventions for Student at the IEP meeting, rather than at a separate meeting, based on Student's established need for behavior interventions and new behaviors reported by Parent at the IEP meeting. Petitioners cite to '*L.S.*' in their closing brief, and although neither the full

¹¹ This Hearings Officer notes that Petitioners do not address transition services, assistive technology, or specialized instruction anywhere in Petitioners' closing brief. It is unclear whether Petitioners have abandoned the issues to focus solely on behavioral interventions or just prioritized their entire argument on behavioral interventions, despite not being restricted by any page limits on the closing brief. Nonetheless, each area will be addressed in this Decision.

name of the case nor the citation is provided anywhere in Petitioners' brief,¹² it appears that the quoted sections of the case was taken from *Department of Education v. L.S. by and through C.S.*, 2019 WL 1421752 (D.Hawai'i 2019). In *L.S.*, the U.S. District Court Judge found that because Student's behaviors were found to "impede the child's learning or that of others," behavioral interventions should have been incorporated into the student's IEP to afford the parents meaningful participation in the student's IEP development. 2019 WL 1421752 *11-12.

In this case, the IEP team had information from Private School, Private BT, and observations conducted by IEP team members of Student at Private School, in addition to an FBA that was done with Student in November 2021 by DOE BCBA. *FOF 16-22, 25, 31*. The findings of the FBA, which was supported by the other information that the IEP team had, is that Student did not demonstrate behaviors that impeded Student's ability to learn or the ability of others to learn. *FOF 21*. While Parent objected to the FBA done by DOE BCBA, Parent made no attempt to present any alternative FBA to the IEP team. *FOF 23-24*. Based on the verifiable information the IEP team had at the time of the IEP meetings, Student did not display any maladaptive behaviors that affected Student's ability to learn or the ability of other students in the environment to learn. *FOF 19-20*. Parent raised an additional behavior¹³ of ripping Student's clothes and paper outside of school to the IEP team at the meetings, the IEP team did

¹² See Petitioners' Closing Brief, filed October 26, 2022, page 6-7.

¹³ Petitioners claim in their closing brief that Parent raised significant behaviors in a draft BSP from March 2021, these behaviors were not raised in the 2022 IEP meetings, nor were there any mention of those behaviors in the various documents that the IEP team had from Private School. It is also stated clearly in the March 2021 BSP draft that the IEP team did not have any documentation of such behaviors from Student's Private BT treatment plan, which further dilutes the strength of Petitioners' argument for the 2022 IEP. See Petitioners' Closing Brief, filed October 26, 2022, page 5; P-Ex.2, p.030-033.

not have any information to support that behavior in the school setting but noted it in the Parent input section of the IEP-07/20/2022 PLEPs.

The IEP team did address Student's behaviors that were observed in Private School regarding Student's lack of focus or attention to task, the need for redirection, and the need to monitor Student's remaining in a designated area in the IEP-07/20/2022. The information provided by the FBA, Private School, Private BT, and the observations is that Student responded well to a token economy system, where Student received tokens for doing work and upon receiving a certain number of tokens, Student could redeem them for a preferred item; and monitoring and redirection from an adult. *FOF 20, 22*. The IEP team discussed such interventions to be used for Student and the IEP-07/20/2022 provides those supports for Student in the supplementary aids and supports. *FOF 76, 78*. The behavior support plan is not required for Student, since Student's behaviors do not impede Student's ability to learn or that of others, listing it as supplementary aid and support does still address Student's needs, even though the BSP was to be further discussed at a later meeting.

Petitioners have not proven that the IEP team did not sufficiently discuss behavioral interventions for Student at the IEP development meetings. Parent's refusal to agree with what the other IEP team members were saying regarding Student's behaviors and the supplementary aids and services that were being offered is not a refusal or failure to discuss, nor is it a denial of FAPE.

Petitioners have also failed to prove that the supplementary aids and services provided in the IEP-07/20/2022 were not appropriate to address Student's needs. Petitioners have not provided any specific interventions that would have been beneficial to Student, nor have they demonstrated how any of the supplementary aids and services that were provided do not address

Student's needs. Parent's demand for an RBT to provide the adult support to Student is not supported by any evidence in the record, while the evidence has established that a paraprofessional tutor or educational assistant can sufficiently provide the monitoring and redirection that Student would need in the school setting.

2. Transition supports

Petitioners next assert that the IEP team discussions or the IEP-07/20/2022 did not appropriately address Student's need for supports in moving from Private School to Home School with the program that the IEP-07/20/2022 provides. Petitioners do not specify what supports Student would need in such a transition, nor have they provided any support for the allegation that such separate supports are needed by way of evidence or in their closing brief.

The IDEA does not specifically require that a transition plan to address transfers of students between public and/or private school placements be a part of a student's IEP. Courts, however, have determined that the requirement of a transfer or transition plan in a student's is dependent upon the individual students' needs. *See e.g. L.S.*, 2019 WL 1421752 *8; *James M. ex rel. Sherry M. v. Hawai'i*, 803 F.Supp.2d 1150, 1164 (D. Hawai'i 2011); *B.B.*, 483 F.Supp.2d at 1056-1057.

Here, the IEP-07/20/2022 and the discussions at the IEP meeting reviewed Student's needs for an adult support aide to assist Student with minor behaviors, such as focusing, staying on-task, and remaining seated or in a designated area. *FOF 59, 76, 78*. A token economy similar to the one used at Private School and assistive technology was included in Student's IEP-07/20/2022. *FOF 76-77*. The assessments done with Student in the December 2021 reevaluation reflect that Student easily complied with directions by the assessors with the assistance of Student's RBT and did not appear to have any reaction to following directions from

unfamiliar school personnel. *FOF 8*. Petitioners do not raise any specific concerns about Student's transfer from Private School to Home School, nor have they presented any evidence to support the conclusion that a transfer plan is required for Student's IEP program.

Nonetheless, Home School did propose meeting with Parent to discuss a BSP and transfer plan for Student, and when Parent declined to participate, Home School sent Parent a copy of the draft BSP and transfer plan for Parent's review. *FOF 82*. Petitioners have failed to prove that the discussions at the IEP meetings or the IEP-07/20/2022 were not appropriate to meet Student's regarding supports for transfer from Private School to Home School.

3. Assistive technology

Petitioners alleged in the Complaint that the discussions regarding assistive technology as part of the IEP-07/20/2022 and the resulting supplementary aids and services were not appropriate in this area, however they have not articulated any specific problems in the IEP meeting discussions or the IEP-07/20/2022 regarding the issue of assistive technology.

The IDEA requires that an IEP team consider communication needs of a student and whether a student needs assistive technology devices or services. 20 U.S.C. §1414(d)(3)(B); H.A.R. §8-60-48(a)(2). The term "assistive technology device" includes any item, piece of equipment, or product system that is used to increase, maintain, or improve the functional capabilities of a child with a disability. 20 U.S.C. §1401(1)(A); H.A.R. §8-60-2.

In this case, Student's IEP-07/20/2022 provides that Student's supplementary aids and services includes an AAC device to be used on a daily basis to communicate Student's wants and needs, and picture cards. *FOF 76, 78*. Both of these items are currently being used at Private School to assist Student with communication and appear to be reasonable accommodations in Student's IEP-07/20/2022. *FOF 77*. As noted, Petitioners have not presented any argument or

evidence of any other assistive technology that Student requires or that would appropriately address Student's needs. Petitioners have failed to prove that the discussions at the IEP development meetings and the resulting IEP-07/20/2022 did not appropriate address Student's need for supplementary aids and services for assistive technology.

4. Specialized instruction in the special education setting and/or general education setting

Petitioners last area of contention regarding Student's supplementary aids and services is the specialized instruction in the special education and/or in the general education setting (modification of the content, methodology, and delivery of instruction), including but not limited to math manipulatives, seating arrangements, assignment modification, ensuring student's attention to directions/instructions, pre-teaching, post-teaching, provision of homework to provide Student with additional support in Student's ability to master assignments, modification to academic instruction, visual schedules and the like, and small group instruction and the like. Petitioners again have not provided any specific examples of what supplementary aids and services would be appropriate for Student's IEP-07/20/2022, nor have they provided any legal authority to support their contention that these examples must be explained or identified specifically in an IEP.

In this case, the IEP team did extensively discuss the specially designed instruction, including modification of content and delivery of instruction during the IEP meeting, although the discussions took place during a different section of the IEP meetings, namely in Student's IEP goals and objectives. The IEP team discussed these goals and how they would look in a classroom setting with Parent during the IEP meetings, despite Parent's refusal to acknowledge the IEP team's explanation of the process of teaching Student certain skills. *FOF 36-44.*

Each of the goals and objectives in the IEP-07/20/2022 breaks down the way that the grade level content will be broken down to be taught to Student using different quarterly objectives. *FOF 71*. Several methods of providing the instructions, such as using magnets or stamps for matching, or tracing numerals and shapes, are included in the goals and objectives listed in Student's IEP-07/20/2022.¹⁴ While the IEP-07/20/2022 does not contain teaching-specific supplementary aids and services, such as preferred seating arrangements and math manipulatives, Petitioners have not presented any evidence of additional supplementary aids and services, not covered in the goals and objectives, would be necessary to support Student's education.

D. Petitioners have failed to prove that the discussion regarding the need for an aide was not adequate or sufficient

Petitioners' next argument alleges that the discussion regarding the need for an aide for Student was insufficient or inadequate during the IEP development meetings. This issue was not addressed in Petitioners' closing brief and it is unclear whether Petitioners have abandoned this argument as well.

Based on the evidence presented in this case, Student's IEP-07/20/2022 provides Student with adult support daily to address Student's behavioral concerns, such as focusing on the task at-hand, task completion, and remaining in a designated area, as well as for assisting with Student's limited communication skills and self-help. *FOF 76, 78*. Based on the language of the IEP-07/20/2022 and the discussions at the IEP meeting on July 20, 2022, the IEP team provided

¹⁴ For example, Student's annual goal for Writing is "In one IEP year, [Student] will improve [Student's] writing skills and identifying [Student's] first name by tracing and matching in 4 out of 5 opportunities." The objectives include matching magnets and/or letter stamps to Student's name plate and tracing upper case letters containing a straight line. See P-Ex.1, p.10, R-Ex.33, p.0562.

Student with an aide to provide this support to Student, although not specifically an RBT.¹⁵ FOF

59. Petitioners' argument provides that Student needs an aide in the form of "adult support"/RBT or other, so it does not appear that what was provided in the IEP-07/20/2022 was in conflict with Petitioners' argument.

Even assuming *arguendo* that Petitioners stand by Parent's argument that Student requires an RBT instead of the adult support as provided in the IEP-07/20/2022, Petitioners have not presented any evidence to support the contention that Student's behavioral, communication, or life skills concerns cannot be addressed without an RBT. The only evidence presented at the Hearing was that Student did not require the services of an RBT to implement a behavior intervention plan because Student did not have severe or disruptive behaviors that affected Student's or others' ability to learn.

E. Petitioners have failed to prove that Respondents denied Student a FAPE by the description of Student's LRE placement in the IEP-07/20/2022

Petitioners next turn to the IEP-07/20/2022 and allege that it does not describe the least restrictive environment for Student. Petitioners support their argument by pointing to the possibility that a student could enjoy music in a music class or enjoy a book by looking at pictures.

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.

¹⁵ While the IEP-07/20/2022 says that Student will receive "Adult Support" daily, the discussion at the meeting included the provision of 1800 minutes per week of adult support, which is similar to the 240 minutes of adult support provided with special education in Student's ESY offer. Although the final version of the IEP-07/20/2022 is not as clear with the use of the term "daily," this Hearings Officer does not find that substantially affects the content of the IEP-07/20/2022.

§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 (9th Cir. 1994). In each IEP, the IDEA requires “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.” 34 C.F.R. §300.320(a)(5).

In the July 20, 2022 IEP meeting, the IEP team extensively discussed the continuum of placements available for Student and discussed academic and non-academic benefits of each placement, the impact Student would have on the teachers or other students, and the costs of each placement. *FOF 51-57*. The general education teacher present at the meeting discussed the grade level requirements and curriculum that students would be working on in each of the classes and the team considered whether Student would be able to participate and gain academic or non-academic benefits in each subject. *FOF 53*. The IEP team members noted that based on Student’s limited communication skills and Student’s need to learn basic pre-academic skills, such as recognizing letters and numbers, tracing straight lines without assistance, correctly holding a pencil or manipulating Student’s AAC device without assistance, and ability to sit and focus without needing constant redirection, Student would not likely gain any academic benefits from being in the general education classes for reading, writing, math, science, and social

studies. The IEP team further discussed classes such as music, computers, and library and noted that even a minimal proficiency in reading would be required to gain any academic benefit from being in the general education class. *FOF 54*. When Parent asked that Student's assignments be modified to accommodate Student in the general education classes, the IEP team discussed how the teachers could not modify the grade level content to accommodate Student, since Student did not have basic reading proficiency and was still working on recognizing letters and numbers.

The discussion for Student's LRE took at least one (1) hour and ten (10) minutes, and all IEP team members except for Parent agreed with the LRE proposal of having Student in special education for reading, writing, math, science, social studies, music, computer, and library, and in the general education setting for homeroom, recess/lunch, morning business, physical education, field trips, assemblies and other school-wide activities. *FOF 57*. The description of Student's LRE in the IEP-07/20/2022 accurately reflects the least restrictive environment placement of the IEP team, based on Student's academic and non-academic benefits, the affect Student will have on the teacher or other students, and the costs of mainstreaming Student. *FOF 79*.

Petitioners have not proven that the LRE as described in the IEP-07/20/2022 is not the appropriate placement for Student. Petitioners have not provided any evidence to support Student's ability to interact with non-disabled students in an educational setting, or even outside an educational setting. The evidence presented at the Hearing indicates that Student has very limited communication skills, has trouble sitting and focusing on tasks without constant monitoring, does not interact even with same-age peers at Private School, and would not gain any academic benefits from being educated in classes that are far above Student's current levels of proficiency. Parent's claims during the IEP meetings that Student could learn from watching other students in the classroom is unfounded and not supported in any of the programs, progress

reports, or assessments presented in this case. Student's IEP-07/20/2022 does provide that Student will be with non-disabled peers in non-academic settings, such as lunch/recess, physical education, field-trips, assemblies and other school wide-activities. Student would benefit from being with non-disabled peers in such non-academic settings to learn appropriate behaviors and social skills in those settings.

F. Petitioners have failed to prove that Respondents denied Student a FAPE by discussing Student's LRE before discussing Student's supplementary aids and services in the IEP meetings

Petitioners' final argument is that the IEP team improperly discussed Student's LRE before discussing the possible supplementary aids and services that could be provided to accommodate Student in any less restrictive environments. Petitioners provide no legal authority to support the idea that the IEP team discussion must progress in any specific order and argue simply that a student is to be provided the least restrictive environment for the implementation of their program and the supplementary supports are provided in order to provide the student with greater access to the LRE.

In this case, as discussed in Section E, *supra*, Student's least restrictive environment discussion focused on the ability of Student to gain any academic or non-academic benefits from being in the general education or special education setting based on Student's current levels of proficiency. Student's supplementary aids and services were discussed after the LRE but the team revisited the LRE discussion again at the end of the IEP meeting. *FOF 63*. The IEP team members remained consistent on their decision regarding Student's LRE even after the discussion of the supplementary aids and services.

Petitioners have not provided any evidence or support that supplementary aids and services exist that would allow for Student to gain academic and non-academic benefits in

reading, writing, math, science, social studies, music, computer, and library that would have affected the IEP team's decision to place Student in a less restrictive environment. Petitioners have not proven that Student's placement would have been different or that any additional supplementary supports or services would have been added to the IEP-07/20/2022 if the IEP team had discussed the matters in a different order at the meeting.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the allegations in the Complaint by a preponderance of the evidence. The IEP-07/20/2022 is an educational program reasonably calculated to enable Student to make progress appropriate in light of Student's unique needs and circumstances. Respondents have not committed any procedural violations that resulted in a lost educational opportunity for Student, a significant infringement on parental participation, or a deprivation of educational benefits. As Petitioners have failed to prove that Respondents denied Student a FAPE, Petitioners' requests for the IEP team to revise Student's IEP and for tuition reimbursement and/or direct payment to Private School for the 2022-2023 school year are denied.

RIGHT TO APPEAL

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

DATED: Honolulu, Hawai'i, November 18, 2022.

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