



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-SY2223-009

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: November 1-3, 2022

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On August 8, 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 Complaint and Resolution Proposal (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 18, 2022.

A prehearing conference was held on September 6, 2022, before Hearings Officer Chastity T. Imamura; with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners; and Stuart N. Fujioka, Esq. (hereinafter “Mr. Fujioka”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for November 1-4, 2022.

Due to the Hearing dates scheduled, Petitioners submitted a request for an extension of the Decision deadline, which was originally October 22, 2022, to December 6, 2022. Respondents 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 October 10, 2022. The decision deadline was extended to December 6, 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 November 1, 2022. Present at the Hearing were Parent and Mr. Peck, on behalf of Petitioners; District Educational Specialist (hereinafter “DES”) and Mr. Fujioka, on behalf of Respondents; this Hearings Officer; and the assigned court reporter. Petitioners called Parent to testify and began the testimony of Private School Director.

The Hearing continued to November 2, 2022, where Private School Director's testimony was completed, and Petitioners rested their case-in-chief. Respondents called Student Services Coordinator (hereinafter "SSC") to testify, and the Hearing continued to November 3, 2022, when DOE-contracted Board-Certified Behavior Analyst (hereinafter "DOE BCBA") testified and Respondents rested their case. Petitioners did not have any rebuttal witnesses to present, so the Hearing concluded on November 3, 2022.

Each party submitted their exhibits for the Hearing by the disclosure deadline of October 25, 2022. The parties met and conferred regarding the proposed exhibits by October 28, 2022, and noted their objections to this Hearings Officer. Both parties were informed that any exhibits that were discussed or mentioned during the proceeding would be received for consideration in the Decision in this case, but that this Hearings Officer would allow the parties to propose additional exhibits after the Hearing was completed. On November 3, 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 November 15, 2022. Any objections to the proposed exhibits were due on November 18, 2022.

Petitioners did not submit any additional exhibits for consideration in this Decision, as Petitioners' exhibits were all received during the Hearing on November 1-3, 2022.

Respondents submitted the following additional exhibits from Respondents' disclosures for consideration in the Decision in this matter. Respondents' Exhibit 1, pages 0001-0008; Exhibit 2, pages 0009-0014; Exhibit 7, page 0025; Exhibit 8, pages 0026-0027; Exhibit 9, pages 0028-0029; Exhibit 10, pages 0030-0031; Exhibit 11, pages 0032-0033; Exhibit 17, pages 0066-

0073; Exhibit 21, page 0083; Exhibit 32, page 0170; Exhibit 33, pages 0171-0172; Exhibit 34, page 0173; Exhibit 38, page 0223; Exhibit 42, pages 0229-0231; Exhibit 44, pages 0235-0239; Exhibit 46, pages 0245-0318; Exhibit 52, page 0326; Exhibit 53, pages 0327-0328; Exhibit 54, pages 0329-0330; Exhibit 55, page 0331; Exhibit 56, pages 0332-0333; Exhibit 57, pages 0334-0336; Exhibit 58, pages 0337-0339; Exhibit 60, pages 0341-0343; Exhibit 64, pages 0353-0357; Exhibit 65, pages 0358-0362; Exhibit 74, pages 0385-0386; Exhibit 79, page 0403; Exhibit 83, page 0465; Exhibit 85, page 0467; Exhibit 86, pages 0468-0471; Exhibit 88, pages 0517-0531; Exhibit 107, page 0587; Exhibit 114, pages 0608-0610; Exhibit 116, pages 0614-0616; Exhibit 118, pages 0620-0622; Exhibit 122, pages 0634-0636; Exhibit 127, pages 0651-0656; Exhibit 128, pages 0657-0662; Exhibit 138, pages 0695-0696; Exhibit 144, pages 0723-0727; Exhibit 157, pages 0876-0880; Exhibit 164, pages 0913-0918; Exhibit 166, pages 0920-0921; Exhibit 170, pages 0982-0989; Exhibit 178, pages 1033-1039; Exhibit 180, pages 1048-1056; Exhibit 182, pages 1061-1068; Exhibit 185, pages 1082-1090; Exhibit 187, pages 1096-1097; Exhibit 188, page 1098; Exhibit 192, pages 1105-1106; Exhibit 193, page 1107; Exhibit 194, pages 1108-1109; Exhibit 195, pages 1110-1112; Exhibit 197, pages 1116-1118; Exhibit 198, page 1119; Exhibit 199, pages 1120-1121; Exhibit 200, pages 1122-1125; Exhibit 202, page 1130; Exhibit 203, pages 1131-1207; Exhibit 205, pages 1212-1219; Exhibit 206, page 1220; Exhibit 210, pages 1324-1325; Exhibit 213, pages 1403-1452; Exhibit 214, page 1453; Exhibit 216, pages 1616-1776; Exhibit 217, pages 1777-1778; Exhibit 218, pages 1779-1780; Exhibit 220, pages 1783-1784; Exhibit 221, page 1785; Exhibit 223, pages 1789-1791; Exhibit 231, pages 1900-1908; Exhibit 234, pages 1917-1919; Exhibit 235, pages 1920-1922; Exhibit 239, pages 1935-1938; Exhibit 245, pages 1956-1960; Exhibit 247, page 1962; Exhibit 248, page 1963; Exhibit 249, pages 1964-1965; Exhibit 250, pages 1966-1973; Exhibit 251, page 1974; Exhibit

252, pages 1975-1979; Exhibit 253, pages 1980-1982; and Exhibit 255, pages 2026-2027.

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 November 22, 2022, a List of Exhibits Received at Due Process Hearing was filed with the final list of exhibits submitted and received by the parties for consideration in this Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-056; Exhibit 2, pages 057-073; Exhibit 3, pages 074-091; Exhibit 4, pages 092-219; and Exhibit 5, pages 220-313 and one (1) audio recording dated June 23, 2022.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 1-2, pages 0001-0014; Exhibit 4, pages 0017-0018; Exhibit 5, pages 0019-0022; Exhibits 7-13, pages 0025-0062; Exhibits 15-17, pages 0064-0073; Exhibits 18-19, pages 0074-0075; Exhibits 21-24, pages 0083-0159; Exhibit 26, pages 0162-0164; Exhibits 32-36, pages 0170-0176; Exhibit 38, page 0223; Exhibit 40, pages 0225-0226; Exhibit 42, pages 0229-0231; Exhibits 44-49, pages 0235-0323; Exhibits 52-58, pages 0326-0339; Exhibit 60, pages 0341-0343; Exhibits 64-65, pages 0353-0362; Exhibit 68, page 0369; Exhibit 71, pages 0377-0382; Exhibits 73-74, pages 0384-0386; Exhibits 76-77, pages 0389-0401; Exhibits 79-83, pages 0403-0465; Exhibits 85-88, pages 0467-0531; Exhibit 93, pages 0557-0561; Exhibits 107-109, pages 0587-0594; Exhibit 111, pages 0602-0603; Exhibits 113-114, pages 0606-0610; Exhibits 116-118, pages 0614-0622; Exhibit 120, pages 0627-0630; Exhibit 122, pages 0634-0636; Exhibits 126-129, pages 0648-0666; Exhibit 138, pages 0695-0696; Exhibits 140-144, pages 0702-0727; Exhibits 148-150, pages 0743-0760; Exhibits 152-154, pages 0768-0862; Exhibits 156-157, pages 0869-0880; Exhibit 164, pages 0913-0918; Exhibits 166-167, pages 0920-0923;

Exhibits 169-173, pages 0931-1015; Exhibit 175, pages 1024-1026; Exhibits 177-178, pages 1030-1039; Exhibits 180-183, pages 1048-1072; Exhibits 185-188, pages 1082-1098; Exhibit 190, pages 1101-1102; Exhibits 192-203, pages 1105-1207; Exhibits 205-206, pages 1212-1220; Exhibits 209-211, pages 1323-1400; Exhibits 213-218, pages 1403-1780; Exhibits 220-221, pages 1783-1785; Exhibits 223-226, pages 1789-1815; Exhibits 228-229, pages 1819-1898; Exhibit 231, pages 1900-1908; Exhibits 234-235, pages 1917-1922; Exhibit 239, pages 1935-1938; Exhibit 245, pages 1956-1960; Exhibits 247-257, pages 1962-2115; and Exhibit 258, which consisted of one (1) audio recording dated June 23, 2022.²

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. Based on the request by the parties for written closing briefs with the use of the transcripts, Respondents requested an extension of the deadline from December 6, 2022 to January 20, 2023. Based on the anticipated timeline for the transcripts to be prepared and to provide the parties ample time to write their closing briefs, Respondents' request to extend the deadline was granted and the Order Granting Respondents' Request to Extend the 45-Day Decision Deadline was issued on November 9, 2022. The current decision deadline is now January 20, 2023. Both parties submitted their written closing briefs by the deadline of December 2, 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

² Upon review by this Hearings Officer, the audio recordings submitted by both Petitioners and Respondents are recordings of the same meeting. All time stamps referred to for the above-referenced meeting will be clearly referenced as 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.

findings of fact, conclusions of law and decision.

II. JURISDICTION

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

III. ISSUES PRESENTED

Petitioners assert ten (10) issues in the Complaint to be addressed at the Hearing that involve the individualized education program (hereinafter “IEP”) meeting on June 23, 2022 and the written IEP therefrom.

Issue 1 – Whether Private School and/or reimbursement for transportation costs to Parent constitutes Stay-Put program (in relationship to the pending appeal of DOE-SY2021-047 and the underlying basis for ‘stay-put’ relating to the prior hearing decision in DOE-SY2021-004) and as such whether the DOE is required to ensure funding that will allow Student continuing access to this program.

Issue 2 – Whether the DOE assessed Student sufficiently to be able to develop an appropriate IEP on June 23, 2022.

Issue 3 – Whether failing to include Student’s current private program providers/personnel, during an IEP meeting of June 23, 2022, denied Student a free appropriate public education (hereinafter “FAPE”) in this case.

Issue 4 – Whether Student was denied a FAPE by the DOE’s failure to hold a sufficient Annual IEP meeting prior to the start of the 2022-2023 school year.

Issue 5 – Whether Student was denied a FAPE because the DOE failed to hold an Annual IEP meeting prior to the start of the 2022-2023 school year.³

Issue 6 – Whether the discussion of Student’s Extended School Year (hereinafter “ESY”) services appropriately addressed eligibility.

Issue 7 – Whether the Supplementary Aids and Services, Program Modifications and Supports for Student Personnel are sufficient regarding:

- a) Behavioral interventions
- b) Student’s supports were Student to move from Student’s current program to the program the IEP describes
- c) Assistive technology for communication, high technology

³ Petitioners assert that Issue 4 and Issue 5 are being argued in the alternative to address potential defenses by Respondents.

- d) Specialized instruction in the special education setting and/or in the general education setting, included 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 8 – Whether the discussion regarding the need for an aide for Student was adequate/sufficient.

Issue 9 – Whether the IEP adequately describes the Least Restrictive Placement for Student.

Issue 10 – Whether Student was denied a FAPE where the IEP team held an insufficient discussion on placement.

Petitioners noted in their closing brief that Issue 1 is an issue that is usually resolved by Petitioners through a pre-hearing motion, which was not done in this case. *See* Petitioners' Closing Brief, filed December 2, 2022. Petitioners did not address the merits of Issue 1 in their written brief and noted that Student currently has stay-put placement under DOE-SY2021-004, due to the matter being on appeal in the U.S. District Court for the District of Hawai'i. Therefore, Issue 1 will not be addressed in this Decision.

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

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

Remedy 2 – Order the DOE to fund Student's private program during the pendency of this administrative process.

Remedy 3 – Order the DOE to fund (direct funding of private programs and/or reimbursement of necessary parental expenditures) the costs of Student's privately contracted/delivered services, including related services such as transportation.

Remedy 4 – Order the DOE to provide compensatory education as demonstrated appropriate at hearing.

Remedy 5 – Order other equitable relief as appropriate.

IV. FINDINGS OF FACT

Witness background

1. Private School Director is a board-certified behavior analyst and speech-language

pathologist and has been working in that capacity for over [REDACTED] years.

Private School Director has a bachelor's of science degree in communication sciences and disorders and a master's degree in speech-language pathology. Private School Director is the owner of Private School and has been qualified as an expert witness in the area of verbal behavior, the development of verbal behavior programs for children in schools, and generally in the field of applied behavior analysis (hereinafter "ABA"). Testimony of Private School Director, Transcript of Proceedings, Volume 1, page 91, line 7, through page 103, line 21 (hereinafter referenced as "Tr.V1, 91:7-103:21"); Petitioners' Exhibit 5, page 249 (hereinafter referenced as "P-Ex.5, p.249").

2. DOE BCBA is a board-certified behavior analyst-doctorate level, licensed to practice in the State of Hawai'i. DOE BCBA owns and operates a private company that is contracted to work with the Hawai'i DOE schools. DOE BCBA has been working as a board-certified behavior analyst-doctorate level since around 2014. DOE BCBA has extensive experience in the field of ABA and has several publications and has presented numerous times in the field of ABA. Testimony of DOE BCBA, Tr.V3, 300:21-302:19; Respondents' Exhibit 257, pages 2114-2115 (hereinafter referenced as "R-Ex.257, p.2114-2115").
3. SSC has been working as the student services coordinator at Home School for four (4) years, and prior to that was a special education teacher in Hawai'i for seven (7) years. SSC has a bachelor's degree in speech pathology and audiology and a master's degree in special education. Testimony of SSC, Tr.V2, 271:7-272:2.

Student's background

4. Student is [REDACTED] years old and has been diagnosed with [REDACTED]

- ██████████ (hereinafter ██████████). Student was first determined to be eligible for special education and related services in 2018. P-Ex.1, p.027; R-Ex.12, p.0035.
5. Student has attended Private School since 2019 and was re-enrolled at Private School for the 2022-2023 school year. Student's tuition at Private School is currently paid by the DOE based on a pending appeal in U.S. District Court for the District of Hawai'i. P-Ex.1, p.027; R-Ex.12, p.0035; *see also* Petitioners' Closing Brief, filed December 2, 2022, page 2.

Prior Due Process Proceeding in DOE-SY2021-047

6. In June 2021, Petitioners filed a Complaint and Resolution Proposal in DOE-SY2021-047 relating to an IEP that was developed for Student in June 2021 (hereinafter referenced as "IEP-June 2021"). The Complaint alleged that Respondents denied Student a FAPE for the following reasons: 1) lack of parental involvement in the development of the IEP; 2) Student's ineligibility for ESY services; 3) the use of the term "as available" for Student's individual instructional support; 4) no transportation services provided; 5) inadequate description of behavior interventions for Student; 6) lack of transition plan in the IEP; and 7) vague language as to Student's access to assistive technology. *See* R-Ex.256, p.2036.
7. In January and February 2022, a due process hearing was held in DOE-SY2021-047 before Administrative Hearings Officer Charlene S.P.T. Murata (hereinafter "AHO Murata"). Based on the evidence and argument presented at the due process hearing, AHO Murata issued her decision on May 13, 2022. R-Ex.256, p.2030.
8. In the Decision, AHO Murata found that Respondents denied Student a FAPE by the use of the term "as available" for Student's individual instructional support. AHO

- Murata noted that the DOE was responsible for providing Student with the necessary services required for Student to access Student's education and conditioning the registered behavior technician (hereinafter "RBT") services for Student on availability was a substantive violation of the IDEA. R-Ex.256, p.2088-2090.
9. AHO Murata concluded that Petitioners failed to prove all other allegations raised in the Complaint under DOE-SY2021-047, including the allegations regarding ESY, behavioral interventions, assistive technology, transition supports, and transportation. R-Ex.256, p.2084-2105.
 10. Specifically, AHO Murata found that Petitioners failed to prove that Respondents committed a substantive violation by finding that Student was not eligible for ESY services. AHO Murata determined that based on the evidence presented at the due process hearing, no evidence supported a need for Student to have ESY services. No evidence was presented regarding Student's regression and the inability to recoup the regressed skills. Notably, the evidence that was presented in the due process hearing was that Student regressed but was able to recoup the skills lost within a few days to a week after returning to school. R-Ex.256, p.2084-2088.
 11. AHO Murata concluded that after listening to the recordings of the pertinent IEP meetings, Petitioners' claims regarding a failure of the IEP team to discuss appropriate behavioral interventions during the development of Student's IEP-June 2021 were without merit. R-Ex.256, p.2095.
 12. AHO Murata determined that the IEP-June 2021 itself also appropriately described behavioral interventions to address Student's needs at Home School. These interventions included a choice board, movement breaks, limiting visual and auditory

- fields, ABA services with an RBT, and a behavior intervention plan to be developed and overseen by a board-certified behavior analyst and implemented by an RBT. R-Ex.256, p.2095-2097.
13. AHO Murata concluded that Petitioners did not prove that the language in the IEP- June 2021, although vague by the use of the term “system” instead of “device,” amounted to a procedural violation that resulted in a denial of FAPE. R-Ex.256, p.2102-2105.
14. AHO Murata also found that while Private School was an appropriate placement for Student for the tuition reimbursement remedy requested by Petitioners, equitable considerations warranted a reduction in the amount of tuition reimbursement awarded to Parent.⁴ R-Ex.256, p.2108-2111.
15. AHO Murata found that Parent’s conduct was unreasonable regarding scheduling and attending the IEP meetings for Student. AHO Murata found several instances of Parent’s delays in responding, requests to cancel meetings, failure to follow up with Home School, and not attending Student’s IEP meeting. The tuition reimbursement award was reduced by twenty-five percent (25%) specifically due to Parent’s conduct. R-Ex.256, p.2109-2111.
16. As a result of AHO Murata’s decision in DOE-SY2021-047, Student remained at

⁴ AHO Murata noted that the contract for the 2021-2022 school year was not presented at the due process hearing, so the total amount awarded for tuition and services would be capped based on the award in DOE-SY2021-004, which was presented as evidence. AHO Murata reduced any possible award by eliminating any special education consultant services, due to Student not being ready to receive such services, and found that Private School’s tuition was excessive in that the total amount charged for the RBT services included a thirty (30) minute per day charge if Parent was late picking up Student. AHO Murata found that Parent should be responsible for payment if Parent is late picking Student up and reduced the award by the thirty (30) minutes per day for RBT services. R-Ex.256, p.2108-2109.

Private School for the 2021-2022 school year, with the DOE being responsible for payment of Student's tuition at the reduced amount. R-Ex.256, 2111-2113.

17. The IEP team was also ordered to meet to determine whether any additional data or information was needed to determine Student's current needs. The IEP team was allowed ten (10) days to hold the meeting and forty (40) days to complete any necessary assessments or information gathering. Any delays caused by Parent or Private School in meeting the deadlines provided by the decision would extend the deadlines allowed to the IEP team. R-Ex.256, p.2112.

IEP meeting scheduling

18. As early as August 2021, after Petitioners had filed their Complaint in DOE-SY2021-047, Home School had made attempts to hold an IEP meeting with Parent. These attempts also included invitations for Mr. Peck and Private School Director to attend the meetings. *See e.g.* R-Ex.22, p.0084-0157; R-Ex.23, p.0158; R-Ex.34, p.0173; R-Ex.38, p.0223; R-Ex.40, p.0225-0226; R-Ex.42, p.0229-0231; R-Ex.46, p.0245-0318; R-Ex.52, p.0326; R-Ex.53, p.0327-0328; R-Ex.54, p.0329-0330; R-Ex.55, p.0331; R-Ex.56, p.0332-0333; R-Ex.58, p.0337-0339; R-Ex.60, p.0341-0343; R-Ex.65, p.0358-0362; R-Ex.68, p.0369, R-Ex.129, p.0663-0666.
19. During this time, Home School requested information from Private School regarding Student's current levels of performance and any data that Private School had regarding Student's strengths and needs. *See e.g.*, R-Ex.44, p.0235-0239; R-Ex.45, p.0240-0244; R-Ex.71, p.0377-0382; R-Ex.76, p.0389-0394; R-Ex.77, p.0395-0401; R-Ex.93, p.0557-0561; R-Ex.127, p.0651-0656; R-Ex.128, p.0657-0662; R-Ex.138, p.0695-0696; R-Ex.150, p.0755-0760; R-Ex.170, p.0982-0989; R-Ex.171, p.0990-

- 0998; R-Ex.180, p.1048-1056; R-Ex.205, p.1212-1219.
20. On November 15, 2021, Private School Director sent a batch of information to Home School, in the form of graphs of data for Student's behaviors at Private School, as well as attendance logs and Student's daily schedule. R-Ex.87-88, p.0472-0531.
 21. On March 7, 2022, Private School Director sent Home School Student's updated Verbal Behaviors Milestones Assessment and Placement Program (hereinafter "VB-MAPP") results for Student's February 2022 assessment. R-Ex.154, p.0854-0862.
 22. On April 22, 2022, Private School Director sent Home School Student's newest Individualized Applied Behavior Analysis Education Program (hereinafter "IAEP"), Student's class schedule at Private School, and a list of supplemental supports Student received for the 2021-2022 school year at Private School. R-Ex.173, p.1002-1015.
 23. On June 22, 2022, Private School Director sent Home School information on Student's progress at Private School, which included Student's attendance log for May 2022, Student's schedule, a list of minutes of reverse inclusion Student received in May 2022, the list of supplemental supports Student receives at Private School for the 2021-2022 school year, and a list of Student's goals and objectives for June 2022.
 24. Between September 2021 and May 2022, Parent asked to reschedule at least three (3) IEP meetings shortly before they were to occur. *See* R-Ex.47, p.0319 (email dated 9/11/21 rescheduling a meeting on 9/15/21); R-Ex.156, p.0869-0875 (email dated 3/7/22 rescheduling a meeting on 3/8/22); R-Ex.177, p.1030-1032 (email dated 5/5/22 rescheduling a meeting on 5/6/22).
 25. Home School rescheduled an IEP meeting scheduled for November 8, 2021. R-

- Ex.82, p.0464.
26. No IEP meetings were held for Student between August 2021 and June 2022. *See* Testimony of Parent, Tr.V1, 71:14-75:9; Testimony of SSC, Tr.V2, 272:23-275:20.
27. On Tuesday, May 17, 2022, after AHO Murata's decision was filed, SSC contacted Parent to schedule the meeting to discuss whether any additional information, data, or assessments were necessary to develop Student's IEP as ordered by AHO Murata. R-Ex.188, p.1098.
28. On Tuesday, May 24, 2022, SSC contacted Private School Director regarding availability for the meeting to discuss whether any additional information, data, or assessments are needed to develop Student's IEP as ordered by AHO Murata. Private School Director responded by stating that it is not Private School Director's place to determine whether any additional information would be necessary for the DOE. R-Ex.195-196, p.1110-1115.
29. Private School Director noted that since Private School is an ABA-based program, Private School Director would not have knowledge of what would be required to develop an IEP for the DOE; for example, Private School does not need a cognitive assessment to develop a student's program, and Private School Director is not knowledgeable as to whether a cognitive assessment would be necessary for the DOE to develop an IEP. Testimony of Private School Director, Tr.V2, 218:19-220:4.
30. Parent did not respond to SSC's request for availability for the meeting in compliance with AHO Murata's order and/or for Student's annual IEP meeting until May 27, 2022. R-Ex.201, p.1126-1129.
31. A meeting was scheduled for June 13, 2022, with both Parent and Private School

- Director confirming their availability for attending the meeting. On June 13, 2022, Private School Director sent an email to SSC stating that Private School Director was no longer available for the meeting. SSC contacted Parent via telephone to ask Parent if Parent still wanted to proceed with the meeting or reschedule for Private School Director to be present. R-Ex.196, p.1113-1115; R-Ex.197, p.1116-1118; R-Ex.201, p.1126-1129; R-Ex.209, p.1323; R-Ex.210, p.1324-1325.
32. Based on Private School Director's inability to attend the June 13, 2022 meeting, Parent agreed to extend the June 23, 2022 deadline for Student's annual IEP review to allow the team to reschedule the meeting in compliance with AHO Murata's order and then complete Student's IEP. SSC explained to Parent that if the team determined that additional assessments or information was needed for the development of Student's IEP, then the IEP development meeting would resume after the assessments were completed. R-Ex.211, p.1326-1400.
33. A student support team (hereinafter "SST") meeting was held on June 23, 2022 to discuss whether the team needed any additional information, data, or assessments to develop Student's IEP. Parent was previously informed that Private School Director was unavailable on June 23, 2022 but agreed to proceed with the SST meeting despite Private School Director not being available for the meeting. Testimony of SSC, Tr.V2, 287:25-288:6; R-Ex.226, p.1813-1815.
34. Present at the SST meeting were Parent, SSC, Principal, a speech-language pathologist, DOE BCBA, an occupational therapist, a general education teacher, a school psychologist, and a special education teacher. P-Ex.5, audio recording of June 23, 2022 meeting, approximate time stamp [2:17-2:52] (hereinafter referenced as P-

Ex.5, 6/23/22 [2:17-2:52].

35. At the SST meeting, Parent was asked to provide information on Student's progress based on what Parent has observed since Student has been attending Private School. Parent attempted to answer questions from the occupational therapist and speech-language pathologist but was not familiar with exactly what Student was working on at Private School. Parent also gave updates about Student's behaviors and medical concerns. Parent also provided information about Student's ability to use sign approximations for requests or words. P-Ex.5, 6/23/22 [3:56-27:00].
36. The team discussed possible assessments that they would seek due to Student not being at their school for a significant time and also due to not having enough information from Private School regarding Student's needs in occupational therapy, speech, and academics. Based on the discussion, which included Parent, the team determined that a reevaluation would be done with Student, which would include assessments for cognitive function, adaptive behavior, fine motor and sensory, speech-language, and functional behavior. P-Ex.5, 6/23/22 [27:08-35:49].
37. Parent agreed with the team to do the reevaluation of Student and with the assessments that the team proposed. Parent did not have any questions or concerns and was informed that the prior written notice (hereinafter "PWN") for the meeting and the consent forms for the assessment would be sent to Parent soon. P-Ex.5, 6/23/22 [35:50-36:30].
38. An IEP meeting was held immediately after the SST meeting. At the IEP meeting, Home School proposed that Student's IEP be edited to comply with AHO Murata's Decision regarding the language of Individual Instructional Support "as available"

- and language for Student's assistive technology access, and then the IEP team would meet again after the reevaluation is done with Student to develop a new IEP for Student. P-Ex.5, 6/23/22 [37:11-38:05].
39. The IEP team reviewed Student's IEP-June 2021 and highlighted the portions of the IEP that would be edited to comply with AHO Murata's decision and explained the changes to be made to Parent. The team also noted that Student's present levels of educational performance (hereinafter "PLEPs") section would be updated to include information that they had received from Private School. P-Ex.5, 6/23/22 [46:35-55:10].
40. The IEP team then agreed to meet again after the reevaluation for Student was completed and update the IEP to address Student's current PLEPs and needs. P-Ex.5, 6/23/22 [55:11-55:25].
41. Parent asked about the timeline for the reevaluation and was informed that the assessors have sixty (60) days to complete the assessments for the reevaluations and that the school would need to work with Parent to bring Student in to do the assessments. The team also considered conducting additional observations of Student at Private School. P-Ex.5, 6/23/22 [55:54-57:18].

Student's IEP-06/23/2022 and PWN

42. On June 27, 2022, a PWN was produced from the SST meeting held on June 23, 2022 (hereinafter "PWN-06/27/2022"). On June 28, 2022, a PWN was produced from the IEP meeting on June 23, 2022 (hereinafter "PWN-06/28/2022"). P-Ex.1, p.052-053, p.054-056; R-Ex.4, p.0017-0018; R-Ex.13, p.0060-0062.
43. The PWN-06/27/2022 was sent to Parent on June 27, 2022, by SSC along with a

- Consent for Assessments form, which would allow Home School's assessors to begin the assessment process for Student's reevaluation. Also included in the email were a copy of the procedural safeguards notice and a mediation information flyer. R-Ex.228, p.1819-1868.
44. On June 28, 2022, SSC sent Parent a copy of the PWN-06/28/2022, along with Student's IEP dated June 23, 2022 (hereinafter "IEP-06/23/2022"). R-Ex.229, p.1870-1898.
45. The PWN-06/27/2022 listed the assessments that the SST team decided would be part of Student's reevaluation, including cognitive, adaptive behavior, behavior, academic, fine motor, sensory, and speech-language assessments. P-Ex.1, p.052-053; R-Ex.4, p.0017-0018.
46. The PWN-06/28/2022 listed Home School's offer for special education and related services for Student from June 23, 2022 to June 23, 2023 that were also included in Student's IEP-06/23/2022. The PWN-06/28/2022 indicated that the team considered creating new goals and objectives for Student but determined that they needed additional information from the reevaluation before updating Student's goals and objectives. P-Ex.1, p.054-055; R-Ex.13, p.0060-0062.
47. Student's IEP-06/23/2022 included information in the PLEPs section that was provided to the IEP team from Private School in Student's March 2022 IAEP, information based on observations of Student at Private School by a speech-language pathologist in April 2022, and information from Parent provided at the June 23, 2022 meeting. *See* P-Ex.1, p.027-033; R-Ex.12, p.0035-0041.
48. Student's IEP-06/23/2022 included goals and objectives were similar to objectives

that Student was working on at Private School as of June 2022. For example, Student's IEP-06/23/2022 goal of "increas[ing] [] meaningful social interactions with peers by requesting 5 items or actions from peers, responding to 5 peer requests and engaging in 5 minutes of cooperative play in a 30 minutes time observation for three consecutive data collection days is comparable to Student's Private School goal of social behavior and play to "spontaneously mand to peers 5 times in 60 minutes" and "will engage in sustained social play with peers for 3 minutes without adult prompts or reinforcement," *See e.g.*, P-Ex.5, p.223-224, 244-246; *compared with* P-Ex.1, p.039; R-Ex.12, p.0047.

49. Student's IEP-06/23/2022 goals and objectives also included information provided by Private School as to Student's current abilities as listed in the VB-MAPP given to Student in February 2022. For example, Student's language arts goal for recognizing uppercase letters noted that "according to the VB-MAPP Milestones Master Scoring Form (February 2022 submitted by [Private School]), scores suggest that [Student] can identify 5 uppercase letters on demand; specific letters were not provided." Student's mathematics goal relating to listener identification of numbers states that "Currently, according to the VB-MAPP Milestones Master Scoring Form (February 2022 submitted by [Private School]), scores suggest that [Student] can identify as a listener numbers 1-5." *See* P-Ex.1, p.035, 038; R-Ex.12, p.0043, 0046.

50. Student's IEP-06/23/2022 included the following special education and related services:

- speech-language therapy, three hundred fifty (350) minutes per quarter
- special education, one thousand fifty (1050) minutes per week
- occupational therapy services, one hundred sixty (160) minutes per quarter.

P-Ex.1, p.049; R-Ex.12, p.0057.

51. The special education and related services in the IEP-06/23/2022 are identical to the special education and related services included in the IEP-June 2021. P-Ex.1, p.022, 049; R-Ex.12, p.0057; R-Ex.22, p.0154.

52. Student's IEP-06/23/2022 included the following supplementary aids, program modifications, and supports for school personnel:

- access to low-tech augmentative/alternative communication system, daily
 - speech/language consultation to the team, sixty (60) minutes per quarter
 - movement/regulation breaks, at least three times (3x) throughout the day, daily
 - limited visual field, daily
 - access to headphones, daily
 - ABA services, four hundred (400) minutes per month
 - Individual Instructional Support, one thousand eight hundred thirty (1830) minutes per week
 - behavior intervention plan
 - visual supports
- P-Ex.1, p.049; R-Ex.12, p.0057.

53. The supplementary aids, program modifications, and supports for school personnel included in the IEP-06/23/2022 are the same as what was provided in the IEP-June 2021. P-Ex.1, p.022, 049; R-Ex.12, p.0057; R-Ex.22, p.0154.

54. The IEP-06/23/2022 also included the following clarifications for the services and supports listed above:

- Access to low-tech augmentative/alternative communication systems may include but is not limited to: picture/word symbols, communication boards.
- Movement/regulation breaks can include but are not limited to exercise with deep pressure or isometric quality such as push-hands, chair push-ups, stretch band pulls with hands/feet.
- Limiting visual field and auditory fields can look like having only items out needed for the task at hand, using a work-station facing a plain wall or with back to the main room, use of headphones.
- ABA Services to be provided by a Board-Certified Behavior Analyst (BCBA or BCaBA). ABA services include, but are not limited to, Teacher Consultation, RBT Training and Supervision, BIP Development/Revision, Program Implementation, Parent Education and Training, Monitoring of Data collection, Analysis of Data, and Developing reports and other appropriate documentation.

-Individual Instructional Support will be provided by a Registered Behavior Technician (RBT) under the supervision of a licensed Board-Certified Behavior Analyst (BCBA or BCaBA).

-Visual Supports (to include choice boards, visual schedules, and may include first/then, visual task analysis of routines, etc.).

P-Ex.1, p.049; R-Ex.12, p.0057.

55. The clarifications of services and supports in the IEP-06/23/2022 were written in the same manner as the IEP-June 2021, except for the Individual Instructional Support, which removed the “as available” statement from the IEP-June 2021 and provided further clarification for the access to low-tech augmentative/alternative communication support. P-Ex.1, p.022, 049; R-Ex.12, p.0057; R-Ex.22, p.0154.

56. Student’s least restrictive placement statement in the IEP-06/23/2022 reads as follows: “[Student] will not participate with non-disabled peers for academic instruction. [Student] will have opportunities to participate with [Student’s] non-disabled peers during non-academic activities such as recess, lunch, school-wide activities, special classes (such as PE, Music, art, library), and field trips for the purposes of practicing and generalizing [Student’s] IEP goals.” P-Ex.1, p.050; R-Ex.12, p.0058.

57. Student’s least restrictive placement statement in the IEP-06/23/2022 was identical to the IEP-June 2021, except removed the statement “[Student] will attend [Student’s] home school.” P-Ex.1, p.023, 050; R-Ex.12, p.0058; R-Ex.22, p.0155.

Post June 23, 2022 meeting events

58. Parent did not return the signed Consent for Assessment forms to SSC until July 12, 2022, and did not indicate on the forms whether Parent did or did not consent. SSC had to follow up with Parent to get the fully completed forms, which were not received by Home School until July 14, 2022. R-Ex.234, p.1917-1919; R-Ex.239,

- p.1935.
59. On July 15, 2022, upon receiving the signed consent forms, SSC attempted to schedule with Parent dates and times when Student could be brought to Home School to conduct the assessments as outlined in the PWN-06/27/2022. R-Ex.239, p.1935.
60. Parent did not respond to SSC's request for dates and times for Student's assessments until July 25, 2022. R-Ex.245, p.1956-1960.

Private School

61. Student currently attends Private School, which is a private facility that only accepts disabled students, and uses an ABA-based verbal behavior program to design each student's individual education program. Testimony of Private School Director, Tr.V2, 242:18-246:19.
62. Private School does not utilize cognitive, adaptive behavior, fine motor, or speech-language assessments because Private School's entire program is based upon the VB-MAPP, which contains all the information regarding those subjects that Private School believes is necessary to develop a student's program. Testimony of Private School Director, Tr.V1, 108:11-114:3.
63. Private School limits observations of students at Private School to in-person observations (i.e. no streaming or videoconference observations available) where the observer sits in a separate room from the student and watches the student through a live-stream video feed. Testimony of Private School Director, Tr.V2, 222:9-223:19; *see also* Testimony of DOE BCBA, Tr.V3, 309:24-311:2.
64. Private School's last Functional Behavior Assessment (hereinafter "FBA") conducted with Student was in November 2020 for the 2020-2021 school year. No new FBA

- has been conducted with Student because the modifications made to Student's ABA program could be made without the need of a new FBA. Testimony of Private School Director, Tr.V1, 141:2-142:20.
65. Private School's educational program for Student is based entirely on the VB-MAPP and does not necessarily align with the DOE's educational standards or goals and objectives. Testimony of Private School Director, Tr.V1, 147:14-24; Tr.V2, 168:4-169:8, 171:13-172:20.
66. Private School does not maintain data in the form of progress reports utilized by the DOE. Instead, Private School uses a software program to input, maintain, and analyze the data that is recorded by Student's teachers and RBTs and the information in the output from the software program would include information that could be contained in a DOE progress report, but in a different form. Private School summarizes the data collected into Student's IAEP. Testimony of Private School Director, Tr.V2, 173:11-180:25.
67. Student does not receive separate speech-language therapy at Private School because the verbal behavior program that Private School uses for Student includes goals and objectives for speech and does not need to be worked on separately. Testimony of Private School Director, Tr.V2, 225:10-226:16.
68. The VB-MAPP that Private School bases their program on has a specific set of clearly-defined parameters that provide information on what a student's current specific skills are. The results of the assessments do not need to be interpreted since the data is based on such defined parameters and measurements. Testimony of Private School Director, Tr.V2, 240:13-22, 258:15-259:18.

69. Student's IAEP at Private School contains all the information that Private School uses to create Student's program and includes everything that is a part of Student's program. Testimony of Private School Director, Tr.V2, 257:10-258:11, 265:10-23.
70. Parent signed an enrollment contract with Private School for Student's enrollment for the 2022-2023 school year on August 26, 2022. This contract was an estimate of the maximum amount that Student's tuition and related services would be for the 2022-2023 school year, but each student is billed monthly based only on the services actually provided. For example, if a student was absent on a particular day, the RBT charge would not be invoiced, and the five percent (5%) of RBT supervision hours for that day would be reduced since the RBT service hours would be reduced. Testimony of Private School Director, Tr.V2, 231:12-237:16; 262:11-21.
71. Based on the enrollment contract signed by Parent, the maximum total cost for Student's tuition and related services at Private School for the 2022-2023 school year is Two Hundred Thirty-Three Thousand Four Hundred Ninety-Two Dollars and Sixty-Eight Cents (\$233,492.68). P-Ex.5, p.220-221.

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.*

Burden of Proof

Pursuant to H.A.R. Section 8-60-66(a)(2)(A), "the party initiating the due process complaint has the burden of proof." The H.A.R. also states that "[t]he burden of proof is the responsibility of the party initiating and seeking relief in an administrative hearing under the IDEA or this chapter to prove, by a preponderance of the evidence, the allegations of the complaint. H.A.R. §8-60-66(a)(2)(B).

This burden was confirmed in *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58, 126 S.Ct. 528, 535, 163, L.Ed.2d 387 (2005), where the Court concluded that the burden of persuasion in an IDEA case lies "where it usually falls, upon the party seeking relief."

A. Petitioners have not proven that the IEP-06/23/2022 was not an appropriate offer for special education and related services for Student for the 2022-2023 school year⁵

Petitioners raise the issue of whether the DOE assessed Student sufficiently to be able to develop an appropriate IEP for Student at the June 23, 2022 meeting. Petitioners' argument, however, is misleading. Petitioners have maintained throughout the Hearing that the DOE has denied Student a FAPE basically by not having completed a revised annual IEP for Student prior to the start of the 2022-2023 school year. While this would normally be considered a violation under the IDEA, Petitioners disregard the fact that Parent agreed to have Student undergo a reevaluation, based in part on AHO Murata's Decision filed in May 2022, prior to developing a new IEP for Student.

While Petitioners have attempted to frame their arguments based on the idea that the IEP-06/23/2022 was not appropriate based on the information available to the DOE at the time of its creation, this Hearings Officer disagrees with Petitioners' stance. AHO Murata's Decision addressed all the alleged faults with Student's IEP-June 2021 and found only one (1) specific substantive problem with the IEP, namely that the RBT was listed as being provided "as available." AHO Murata also ordered the DOE to have a meeting to determine whether additional assessments, information, or data was necessary to develop an appropriate IEP for Student. The DOE was allowed time to have such a meeting, and if necessary, to complete the information gathering process.

⁵ While Petitioners' issues in the Complaint are listed separately as different allegations of how the DOE denied Student a FAPE, after hearing all the evidence and arguments presented, this Hearings Officer believes that all Petitioners' allegations can be addressed under this single issue.

Due to the timing of the Decision, along with delays caused by Parent⁶ and Private School Director that postponed the meeting and the start of the assessments, the DOE was essentially prevented from completing all necessary assessments and developing a revised annual IEP for Student prior to the expiration of the IEP-June 2021 and start of the 2022-2023 school year. Instead, the DOE provided Parent with an offer to implement Student's IEP-June 2021 with necessary revisions (which was presented to Parent as the IEP-06/23/2022), based on AHO Murata's decision until the reevaluation and new IEP were completed.

Petitioners allege that the IEP-06/23/2022 is deficient because the IEP meeting was not held prior to the filing of the Complaint in this matter and at the same time, argue that the DOE failed to assess Student appropriately before developing a new IEP for Student for the new school year. Based on the reasons given below, this Hearings Officer finds that the DOE's procedures in conducting the SST meeting, proceeding with a reevaluation of Student, and providing an offer to implement the IEP-06/23/2022 to Parent until the new IEP was developed was reasonable given the circumstances and did not result in a denial of FAPE to Student.

1. Delays in scheduling Student's IEP meeting prior to the filing of the Decision

Home School attempted to contact Parent as early as August 2021, while Student's last due process hearing complaint was pending, to schedule an IEP meeting with Parent. Repeated contacts were made with Parent to schedule a meeting, along with invitations and availability inquiries with Private School Director and Parent's attorney. Despite these repeated attempts to coordinate everyone's schedules, including Private School Director, the IEP team did not hold

⁶ This Hearings Officer notes that Parent was the cause of significant delays and/or cancellations of meetings prior to the Decision in May 2022, and Parent's delays in the DOE-SY2021-047 case was grounds for a reduction in the reimbursement award by AHO Murata based on equity, so the delays caused by Parent after the Decision in May 2022 are not being taken lightly by this Hearings Officer.

any meetings between September 2021 and May 2022. Three (3) of the meetings were canceled by Parent and one (1) was canceled by Home School.

This Hearings Officer notes that in this specific instance,⁷ Home School went beyond their requirements to ensure that the necessary participants were at the IEP meeting by trying to accommodate Private School Director and Mr. Peck's schedules. Nowhere in the IDEA does it require the DOE to accommodate the schedules of participants that parents want present at the meeting. Indeed, H.A.R. Section 8-60-45 requires that "the Department shall ensure that the IEP team for each student with a disability includes:

- 1) The parents 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:
 - a. Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;
 - b. Is knowledgeable about the general education curriculum;
 - c. Is knowledgeable about the availability of and has the authority to commit the resources of the department;
- 5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (2) through (6);
- 6) At the discretion of the parent or the department, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and
- 7) Whenever appropriate, the student with a disability.

Further, H.A.R. Section 8-60-45(c) provides that "[t]he determination of the knowledge or special expertise of any individual described in subsection (a)(6) shall be made by the party (parents or department) *who invited the individual* to be a member of the IEP team." Only IEP

⁷ This Hearings Officer cautions that just because Private School Director is not a necessary participant under this particular set of circumstances, it is not necessarily a forgone conclusion that Private School Director may not become a necessary participant in an IEP meeting in the future.

team members described in Sections 8-60-45(a)(2) through (a)(5) are required to be present at the IEP meeting. *See* H.A.R. Section 8-60-45(e). In this case, Parent's desire to have either Private School Director or Mr. Peck at the IEP meetings was the responsibility for Parent to schedule, not the DOE.

While Petitioners argue that the DOE's failure to include Student's current private program providers/personnel in the IEP meeting on June 23, 2022 was a denial of FAPE,⁸ Petitioners offer no authority or evidence to support their position. In this case, Private School Director was invited to the IEP meetings, which led to many scheduling difficulties for the IEP meetings, even though Private School Director was not required to be part of an IEP team meeting. *FOF 18, 28, 31*. Private School Director's inability to attend the June 23, 2022 after originally confirming attendance on that date did not render the meeting insufficient. Parent was present at the meeting and had agreed to attend the meeting in Private School Director's absence. *FOF 33*.

Petitioners cite to *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038 (9th Cir. 2013)⁹ to support their contention that Private School personnel were necessary participants in Student's IEP meeting on June 23, 2022, however Petitioners misapply the ruling in *Doug C.* The Court in that case found that parental participation was a more important consideration than an annual IEP deadline and that the DOE should have accommodated the parent's schedule over the school IEP team members schedules in scheduling an IEP meeting. The Court in that case noted that *since the parent was not present at the meeting*, a representative from the student's private school

⁸ *See* Issue #3.

⁹ This Hearings Officer notes that while Petitioners cite frequently to *Doug C.* in their closing brief, any full citation to the case is missing from the brief. This Hearings Officer assumes that the references to "*Doug C.*" in the brief is in reference to this case.

could have attended to provide insight into the student's progress at the private school as an acceptable alternative to proceeding without the parent. Nowhere in *Doug C.* does the Ninth Circuit require the presence of a private school's personnel at an IEP meeting when the parent(s) of the student are in attendance.

In this case, Parent was present at both the SST and IEP meetings and was able to state Parent's position, provide information, ask any questions, or raise any concerns that Parent had at the meeting on June 23, 2022. *FOF 34-41.* Private School provided Home School with documentation of Student's progress and what Private School provided to Student for the 2021-2022 school year. *FOF 20-22.* Parent's and Student's interests were represented at the IEP meeting through Parent and Private School's documents, unlike what the Court found in *Doug C.* The facts of this case are completely distinguishable from *Doug C.*

This Hearings Officer also notes that Private School Director specifically indicated to SSC that determining whether additional information is needed to develop Student's IEP is not Private School Director's place, so Private School Director made it clear that Private School Director was not a necessary participant to the SST meeting. *FOF 28-29.* Additionally, Private School's program for Student is based entirely on the results of the VB-MAPP assessment, which is a tool that can be interpreted by other ABA professionals. *FOF 62, 65, 68, 69.* Since Student's IAEP and the other documents provided by Private School to Home School were the entirety of what Private School records of Student's progress, needs, and strengths in school; Private School Director's presence at the IEP meeting would, at best, be advisory to provide additional information about the documents provided. Student also does not receive occupational therapy or have a separate speech-language therapy program at Private School, so Private School Director or other personnel from Private School would not be able to provide that

information to the team. *FOF 62*. Petitioners' claim that Private School Director was a necessary participant at the IEP meeting on June 23, 2022 is without merit.

2. Lack of Information from Private School necessary for the development of Student's IEP

Home School requested information from Private School from the start of the 2021 school year and continuously throughout the 2021-2022 school year. Private School does not have the information requested from Home School, such as progress reports or report cards, and only sporadically provided raw data as information to Home School. *FOF 66*. Private School did provide Student's IAEP, which was an educational program based entirely on ABA principles using the VB-MAPP, the list of supplemental supports provided to Student during the 2021-2022 school year, Student's attendance logs, and the number of minutes that Student received reverse inclusion. *FOF 20-23*. No information was provided by Private School to Home School regarding Student's progress and program for speech-language therapy, occupational therapy, the reverse inclusion program (i.e., what skills were being generalized in reverse inclusion), or any academic instruction that Student was receiving at Private School. Private School additionally had not done a recent FBA for Student since no behaviors at Private School warranted such an assessment. *FOF 64*. Since Private School is not required to meet or abide by the grade-level standards set for the DOE, it does not have a similar educational program in place that would equal the educational standards maintained by the DOE. *FOF 65*.

Based on the very little data and information that was gathered and provided by Private School, the SST members were warranted in seeking further assessments and information to develop and IEP that was appropriate for Student given the DOE standards. The requested assessments for speech-language, occupational therapy, adaptive behavior, and functional behavior were reasonable given the different setting and educational standards applied at Private

School versus Home School. Additionally, due to Private School Director's unfamiliarity with the DOE policies and procedures and the fact that Private School does not collect data similar to what is required at the DOE, it was reasonable for the DOE not to solely rely upon the information provided by Private School.

3. AHO Murata's Decision and delays in scheduling meetings by Parent

On May 13, 2022, AHO Murata issued the Decision in DOE-SY2021-047 which ordered the DOE to hold a team meeting within ten (10) days of the Decision and determine if any assessments or other information were necessary to develop Student's IEP. On May 17, 2022 SSC diligently contacted Parent and Private School Director to attempt to schedule the meeting within the allotted time. *FOF 27*. Private School Director was invited to the meetings despite Private School Director's statement that Private School Director had no place in making those determinations. Parent did not respond to the request until May 27, 2022, and the first availability for the meeting was on June 13, 2022. *FOF 30-31*. Private School Director's emergency and Parent's unwillingness to proceed with the meeting without Private School Director caused the meeting to be delayed to June 23, 2022, when Parent agreed to proceed without Private School Director. *FOF 31-33*. Further delays were caused by Parent even after the June 23, 2022 SST meeting, wherein the team determined that further assessments were necessary. Despite being sent the Consent for Assessment forms on June 27, 2022, Parent did not return the signed forms until July 12, 2022, and did not indicate actual consent on the forms until SSC followed up with Parent on July 14, 2022. *FOF 58*. Without the consent forms, the DOE could not proceed with scheduling the assessments for Student's reevaluation. Even after the consent forms were signed, Parent continued to provide delayed responses to the assessors for scheduling to bring Student to the assessments. Parent did not respond to SSC's request to

bring Student in for an academic assessment until ten (10) days after SSC had originally emailed Parent. *FOF 59-60*. Any delays in the completion of the reevaluation and the development in the new IEP for Student that were presented at the Hearing were due to the actions of Parent and Private School Director.

While Petitioners claim that Parent did not realize that Student did not have an IEP until after speaking with Mr. Peck after the June 23, 2022 IEP meeting¹⁰ and that Parent did not fully understand what was going on when Parent agreed to the reevaluation and did not understand that the reevaluation would cause a delay in the development of the IEP,¹¹ this Hearings Officer finds Petitioners' claims to be disingenuous. The PWN-06/28/2022 provided the DOE's offer for Student to Parent and the IEP-06/23/2022 clearly indicated the special education and related services, supplementary aids and supports, the goals and objectives, and the least restrictive environment for Student from June 23, 2022 to June 23, 2023. *FOF 46-56*. AHO Murata's Decision itself explained that the team would have an additional forty (40) days after the team meeting to schedule and complete the additional assessments, and that an IEP meeting would be held after that forty (40) day period. *FOF 17*. AHO Murata's Decision also spelled out that any delays in responding or scheduling by Parent and/or representatives of Parent or Private School would extend the timeline for the meetings and assessments to be completed. The team also explained to Parent at the June 23, 2022 IEP meeting that the assessments would take some time and that they would need to schedule Parent to bring Student to conduct the assessments. *FOF 41*. While parents generally are not required to know the laws and procedures required under the IDEA, the extension of the timeline for conducting any additional assessments and developing

¹⁰ See Petitioners' Opening Statement, Tr.V1, 10:15-11:2.

¹¹ See Testimony of Parent, Tr.V1, 19:17-20:20.

Student's IEP after AHO Murata's Decision was issued was clearly spelled out to Parent in this case. Here, Parent clearly received an IEP offer from the DOE in the IEP-06/23/2022 and the PWN-06/28/2022, and Parent should have been aware based on the Decision that the DOE would have until at least August 2, 2022,¹² to complete the agreed-upon assessments, and until August 12, 2022, to have the new IEP meeting.

4. Offering to implement Student's IEP-06/23/2022 was appropriate while the reevaluation was pending

Petitioners claim that Student was left without a viable IEP while the reevaluation was being conducted, forcing Parent to reenroll Student at Private School.¹³ The IEP-06/23/2022 and the PWN-06/28/2022 make it clear that Student would still be offered special education and related services at Home School during the period until the new IEP was developed. Petitioners have not demonstrated that Student's IEP-06/23/2022 was no longer appropriate for Student during the interim while Student was being reevaluated.

The standard for evaluating the appropriateness of an IEP is commonly known as the "snapshot rule," as it is determined whether the IEP was designed to appropriately address a student's unique needs based on what was objectively reasonable at the time the IEP was developed. *J.W. ex rel. J.E.W. v. Fresno Unified School Dist.*, 626 F.3d 431, 439 (9th Cir. 2010) (citing *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)).

In this case, AHO Murata reviewed the evidence at the due process hearing in DOE-SY2021-047 and determined that nearly all the issues raised about deficiencies in the IEP-June 2021 were without merit. *FOF 6-13*. The only issue that was determined to be a denial of FAPE

¹² As AHO Murata's Decision noted that any delays caused by Parent and/or representatives of Parent would extend the deadlines, these dates are the earliest deadlines that would have resulted if the assessments were timely scheduled and conducted after the June 23, 2022 meeting.

¹³ See Petitioners' Closing Brief, filed December 2, 2022, page 8-9.

was the provision of an RBT “as available,” and the IEP team amended the IEP-06/23/2022 to reflect that Student would (unconditionally) be provided an RBT for one thousand eight hundred thirty (1830) minutes per week. *FOF 38-39, 51.* The IEP team also amended the language for the assistive technology to address AHO Murata’s discussion in the Decision.

Petitioners have not demonstrated that the IEP-06/23/2022’s goals and objectives were not appropriate for Student. The IEP-06/23/2022 has goals and objectives that have been revised from the IEP-June 2021 to include information from Private School’s IAEP and VB-MAPP from March 2022. *FOF 47-49.* These goals and objectives address some of the skills that are included in Student’s target behavior objectives in the IAEP from Private School. The supplementary aids and supports provided in the IEP-06/23/2022 are not significantly different from the IEP-June 2021, which AHO Murata found were appropriate for Student. *FOF 52-54.*

No evidence has been presented that the IEP-06/23/2022 was not appropriate based on the information that the IEP team had at the time of its development. It is undisputed that the team wanted more information before revising Student’s IEP further, but the IEP-06/23/2022 was appropriate to provide special education and related services to Student while the reevaluation was being conducted. The lack of discussion regarding each specific area of the IEP at the June 23, 2022 meeting does not render the IEP-06/23/2022 inappropriate to meet Student’s needs since the team, including Parent, agreed to the reevaluation of Student to get more information to develop an appropriate new IEP for Student.

This Hearings Officer concludes that the remainder of Petitioners’ issues need not be addressed individually as they concern whether the IEP-06/23/2022 is sufficient to meet Student’s needs as a new IEP that was not offered under the circumstances discussed above. It is undisputed that the IEP team did not have thorough discussions to develop Student’s IEP-

06/23/2022 because the team was going to wait until they gathered the additional information from assessments, as was provided in AHO Murata's decision. The IEP-June 2021 was deemed sufficient based on the information that the IEP team had at the time of its creation, except for the listing of the RBT services "as available," by AHO Murata. The IEP team revised the IEP-06/23/2022 to address the RBT services and included updated information for Student's goals and objectives from the information provided to them by Private School. The IEP team updated Student's IEP-06/23/2022 with all the information that was available to them at the time of the meeting and provided that to as a continued offer of FAPE for Student during the pendency of the reevaluation. Parent agreed to this procedure until consulting with Mr. Peck and being told that Parent was not provided an IEP or offer of FAPE by the DOE. Petitioners have not provided any evidence that any of the special education or related services offered by the DOE in the IEP-06/23/2022 was not reasonably calculated to make appropriate progress in light of Student's unique needs.

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. Petitioners have not proven that the IEP-06/23/2022 is not an appropriate educational program reasonably calculated to enable Student to make progress appropriate in light of Student's unique needs and circumstances that can be implemented while the IEP team develops Student's new IEP after the reevaluation is complete. Respondents have attempted to comply with the Decision issued by AHO Murata on May 13, 2022, and in doing so, 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 tuition reimbursement and/or direct payment to Private School for the 2022-2023 school year is 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, January 20, 2023.

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