



OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

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

Petitioner(s),

vs.

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

Respondents.

DOE-SY2223-011

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing:  
November 7, 9, and 10, 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,

<sup>1</sup> [REDACTED]

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 7, 9, 10, and 14, 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 7, 2022. Present at the Hearing were Parent and Mr. Peck, on behalf of Petitioners; District Educational Specialist (hereinafter “DES”), Mr. Fujioka, and Emma Christopherson, Esq., on behalf of Respondents; this Hearings Officer; and the assigned court reporter. Petitioners called Parent and Private School Director to

testify and rested their case-in-chief. The Hearing continued to November 9, 2022, where Respondents called DOE-contracted Board-Certified Behavior Analyst (hereinafter “DOE BCBA”) and Student Services Coordinator (hereinafter “SSC”) to testify, and the Hearing continued to November 10, 2022, when Principal testified, and Respondents rested their case. Petitioners did not have any rebuttal witnesses to present, so the Hearing concluded on November 10, 2022.

Each party submitted their exhibits for the Hearing by the disclosure deadline of October 31, 2022. The parties met and conferred regarding the proposed exhibits by November 4, 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 10, 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 18, 2022. Any objections to the proposed exhibits were due on November 22, 2022.

Petitioners did not submit any corrections or additional exhibits for consideration in the Decision.

Respondents did not have any corrections to the updated exhibit lists sent to the parties by this Hearings Officer. Respondents submitted the following additional exhibits from Petitioners’ and Respondents’ disclosures for consideration in the Decision in this matter.

Petitioners’ Exhibit 2, pages 039-104, pages 111-132, and pages 135-151.

Respondents' Exhibit 1, pages 001-008; Exhibit 2, pages 009-015; Exhibit 6, pages 021-049; Exhibit 7, pages 050-053; Exhibit 9, pages 056-057; Exhibit 10, page 058; Exhibit 19, pages 127-142; Exhibit 20, page 284; Exhibit 22, page 314; Exhibit 25, pages 319-321; Exhibit 26, pages 322-327; Exhibit 28, pages 329-330; Exhibit 29, page 331; Exhibit 32, pages 336-337; Exhibit 35, page 343; Exhibit 36, pages 344-345; Exhibit 37, page 346; Exhibit 38, pages 347-351; Exhibit 39, page 352; Exhibit 40, page 353; Exhibit 41, pages 354-357; Exhibit 42, pages 358-360; Exhibit 45, page 371; Exhibit 47, pages 374-378; Exhibit 52, pages 385-386; Exhibit 54, pages 388-392; Exhibit 56, pages 394-395; Exhibit 57, pages 396-398; Exhibit 58, pages 399-400; Exhibit 59, pages 401-403; Exhibit 60, pages 404-405; Exhibit 64, pages 439-443; Exhibit 65, pages 444-448; Exhibit 67, page 462; and Exhibit 69, pages 466-468.

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 28, 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 001-038; Exhibit 2, pages 039-104, 107-108, 111-151; Exhibit 3, pages 152-180; Exhibit 4, pages 181-189, and one (1) audio recording dated June 7, 2022.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 1-2, pages 001-015; Exhibits 6-7, pages 021-053; Exhibits 9-11, pages 056-061; Exhibits 17-19, pages 110-142; Exhibit 20, page 284; Exhibits 22-23, pages 314-316; Exhibits 25-26, pages 319-327; Exhibits 28-29, pages 329-331; Exhibit 32, pages 336-337; Exhibits 34-43, pages 340-368; Exhibit 45, page 371; Exhibits 47-48, pages 374-381; Exhibit 52,

pages 385-386; Exhibit 54, pages 388-392; Exhibits 56-72, pages 394-537.

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 23, 2022. The current decision deadline is now January 20, 2023. The original deadline for the written closing briefs was set for December 9, 2022, but was extended to December 16, 2022, at the request of Petitioners. Both parties submitted their written closing briefs by the deadline of December 16, 2022.

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

## **II. JURISDICTION**

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

## **III. ISSUES PRESENTED**

Petitioners assert nine (9) issues in the Complaint to be addressed at the Hearing that involve the individualized education program (hereinafter "IEP") meeting on June 7, 2022 and

the written Prior Written Notice (hereinafter “PWN”) therefrom.

- Issue 1** – Whether the DOE assessed Student sufficiently to be able to develop an appropriate IEP on June 7, 2022.
- Issue 2** – Whether failing to include Student’s current private program providers/personnel, during an IEP meeting of June 7, 2022, denied Student a free appropriate public education (hereinafter “FAPE”) in this case.
- Issue 3** – 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 4** – 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.<sup>2</sup>
- Issue 5** – Whether the discussion of Student’s Extended School Year (hereinafter “ESY”) services appropriately addressed eligibility.
- Issue 6** – 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
  - 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 7** – Whether the discussion regarding the need for an aide for Student was adequate/sufficient.
- Issue 8** – Whether the IEP adequately describes the Least Restrictive Placement for Student.
- Issue 9** – Whether Student was denied a FAPE where the IEP team held an insufficient discussion on placement.

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.

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<sup>2</sup> Petitioners assert that Issue 3 and Issue 4 are being argued in the alternative to address potential defenses by Respondents.

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

**Remedy 5** – Order other equitable relieve 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 was 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 79, line 24, through page 94, line 8 (hereinafter referenced as "Tr.V1, 79:24-94:8");

Petitioners' Exhibit 3, page 169 (hereinafter referenced as "P-Ex.3, p.169").

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 in 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. DOE BCBA was qualified as an expert witness in the area of ABA and the administration and interpretation of the Verbal Behavior Milestones Assessment and Placement Program (hereinafter "VB-MAPP"). Testimony of DOE BCBA, Tr.V2, 168:3-177:4; Respondents' Exhibit 70,

- pages 469-470 (hereinafter referenced as “R-Ex.70, p.469-470”).
3. SSC has been working as the student services coordinator at Home School for over [REDACTED] years, and prior to that was a student services coordinator at another school for [REDACTED] years, and a special education teacher in Hawai‘i for [REDACTED] years. SSC has a bachelor’s degree in special education and a master’s degree in special education and a master’s certificate in disability studies. Testimony of SSC, Tr.V2, 205:21-207:6.
  4. Principal is the principal of Home School and has worked in education with the Hawai‘i DOE for approximately [REDACTED] years. Principal started as a general education teacher, then became a vice principal, a district educational specialist, and a principal. Testimony of Principal, Tr.V3, 239:25-241:1.

Prior IDEA proceedings

5. Student is [REDACTED] years old and has been diagnosed with [REDACTED] (hereinafter “[REDACTED]”). Student has been determined to be eligible for special education and related services under the IDEA. R-Ex.6, p.022.
6. Student attended Home School for preschool in [REDACTED] and was enrolled in a program run by Private School Director. After the end of that school year in [REDACTED], Student attended a private camp run by Private School Director. Private School Director then opened a pilot private school program, and Student was enrolled in that program for the [REDACTED] year. Testimony of Parent, Tr.V1, 16:3-18:5; Testimony of Private School Director, Tr.V1, 91:15-93:6.
7. During the 2019-2020 school year, Home School did not review Student’s IEP or develop a new IEP for Student for the 2020-2021 school year. Petitioners filed a due



process complaint under DOE-SY1920-053, alleging, *inter alia*, that Student was denied a FAPE due to the DOE failing to review and/or revise Student's IEP prior to the expiration of the prior IEP or before the start of the 2020-2021 school year.

Petitioners' prevailed on that due process complaint and was awarded tuition reimbursement for Student's attendance at Private School for the 2020-2021 school year. The decision in DOE-SY1920-053 was rendered by this Hearings Officer and issued on November 19, 2020. R-Ex.71, p.482-483.

8. In December 2020, the DOE conducted a reevaluation for Student, during which speech-language, occupational therapy, and psycho-educational assessments, as well as a VB-MAPP, and a functional behavior assessment (hereinafter "FBA"), were conducted with Student. R-Ex.71, p.483.
9. In January and February 2021, the IEP team met and drafted an IEP for Student. The IEP team thoroughly discussed Student's needs and created an educational plan that addressed Student's needs and provided Student with supports to allow Student to access Student's education. R-Ex.71, p.488-498.
10. Parent expressed concerns with Student's IEP from the January and February 2021 meetings and requested to hold off on a transition meeting for Student until after the FBA was completed. The IEP team met again in May 2021 to discuss the completed FBA. R-Ex.71, p.498-499.
11. On May 12, 2021, the IEP team met and reviewed Student's IEP and addressed questions and concerns that Parent had expressed to the team. The IEP team developed a new IEP for Student (hereinafter "IEP-05/12/2021"), in which Student was placed in the general education setting for over eighty percent (80%) of the day

- with special education services of six hundred (600) minutes per week, occupational therapy services for two hundred forty (240) minutes per quarter, and speech-language services for four hundred eighty (480) minutes per quarter. Student would not be in the general education setting for speech-language and occupational therapy services. R-Ex.6, p.044.
12. Student's IEP-05/12/2021 also provided supplemental aids and supports including Individualized Instructional Support by a Registered Behavior Technician (hereinafter "RBT"), ABA services, a behavior intervention plan (hereinafter "BIP") developed and maintained by a board-certified behavior analyst, parent education provided by a board-certified behavior analyst, quarterly IEP team meetings, sensory supports, visual supports, transition priming, use of "first/then" language, the use of a token economy, and a daily home/school communication log. R-Ex.6, p.044-045.
13. Student's IEP-05/12/2021 found Student eligible for ESY services and provided Student with ESY after a ten (10) day break from school. The ESY services were to last for four (4) hours each day, Monday through Friday (excluding holidays), and provided RBT services, ABA services, speech-language services, occupational therapy consultation, and occupational therapy direct services for the summer session.
14. Some of the goals and objectives in Student's IEP-05/12/2021 included skills under language arts (reading and writing), math, speaking and listening, physical education, and health. For example, one (1) of Student's reading annual goals was "[b]y the end of the school year, [Student] will improve English Language Arts skills by answering comprehension questions and retelling stories with at least 90% accuracy in 4 out of 5 trials." R-Ex.6, p.032.

15. Another of Student's IEP-05/12/2021 annual goals for writing was "[b]y the end of the school year, [Student] will improve writing skills by writing 1-3 sentences with at least 90% in 4 out of 5 trials." R-Ex.6, p.033.
16. A speech and listening goal for Student in the IEP-05/12/2021 was "[Student] will improve Language Skills for requesting, labeling, describing, answering questions, and retelling by demonstrating the following objectives in 4/5 sessions." The objectives listed included "[Student] will make 5 requests using phrases with adjectives in 4/5 sessions. [Student] will answer 5 what, where, who questions about pictures in 4/5 sessions. Given pictures, [Student] will identify and describe 10 items using 2-3 semantic features (ex: has wings, flies, is an animal, not a food, etc.) in 4/5 sessions. [Student] will identify and label 5 pronouns and 5 positional words in pictures in 4/5 sessions. Given object and picture cues, [Student] will retell 3 steps or activities completed using visual cues (ex: I colored, I cut, I glued) in 4/5 sessions." R-Ex.6, p.036.
17. Student's IEP-05/12/2021 also included an annual goal that read "[b]y the end of the IEP year, [Student] will increase [Student's] social skills by requesting 5 items and actions from peers, respond to 5 peers requests for items or actions, asking peers 3 'wh' questions and following the rules of a structured game for 5 minutes in a 30 minute observation for five consecutive data collection days." R-Ex.6, p.040.

Prior Due Process Proceeding in DOE-SY2021-046

18. In June 2021, Petitioners filed a Complaint and Resolution Proposal in DOE-SY2021-046 relating to the IEP-05/12/2021. The DOE-SY2021-046 Complaint alleged that Respondents denied Student a FAPE for the following reasons:

-Whether the IEP-05/12/2021 is appropriate where the Extended School Year (hereinafter “ESY”) portion of the Student’s IEP:

- a. Involved no discussion of the appropriateness of Student’s access to non-disabled peers.
- b. There was no discussion of the frequency (length of day) of ESY to individualize Student’s program.

-Whether the IEP-05/12/2021 is appropriate where there were insufficient discussions of Student’s behavioral needs during the Supplementary Aids section of the IEP development process and/or whether there are sufficient behavioral interventions described in the IEP-05/12/2021 to address Student’s needs in the Supplementary Aids section of the IEP-05/12/2021.

-Whether the IEP-05/12/2021 is appropriate where the current (privately-provided) classroom supports/accommodations were not discussed.

-Whether the supplementary supports are insufficient substantively for Student to succeed where no assistive technology and other important supports are not described in the written IEP-05/12/2021 offer that Student now relies upon at Student’s private program.

-Whether the IEP-05/12/2021 is appropriate where there was insufficient participation of Student’s current providers and/or insufficient efforts to gain attendance of those providers at the IEP development meetings, resulting in lost educational opportunity for Student and an impairment to parental participation.

-Whether during the IEP-05/12/2021 meeting, Parent was told that a Registered Behavior Technician (hereinafter “RBT”) would be provided for the entire school-day during the IEP meeting but the description in the written IEP-05/12/2021 and Prior Written Notice (hereinafter “PWN”) provides contradictory statements that only guarantees that an RBT will be provided for thirty (30) hours per month.

-Whether the IEP-05/12/2021 is appropriate where there was no discussion of transportation as a potentially needed related service and no actual related services offered and/or described in the IEP-05/12/2021 for transportation.

-Whether the IEP-05/12/2021 is appropriate where Student needs to successfully change from Student’s private program to the public program is unaddressed in the IEP-05/12/2021 document. Additionally, whether the transfer plan relies upon the participation of the private program while that program has not been asked to participate for free or otherwise and does not agree to provide free services where those services will be at further expense to the private program.

*See R-Ex.71, p.478-479.*

19. In August 2021, a due process hearing was held in DOE-SY2021-046 before this

Hearings Officer. This Hearings Officer reviewed the December 2020 reevaluation

material, Student’s IEP-05/12/2021, and listened to the video/audio recordings of the

three (3) meetings during which the IEP-05/12/2021 was developed, as well as all other evidence and arguments presented at the due process hearing. Based on the evidence and argument presented at the due process hearing, this Hearings Officer rendered the Decision in DOE-SY2021-046 on November 9, 2021. R-Ex.71, p.471-528.

20. In the Decision, this Hearings Officer found that Student's IEP-05/12/2021 is an educational program that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. This Hearings Officer also found that Respondents did not commit any procedural or substantive violations of the IDEA that resulted in a denial of FAPE. R-Ex.71, p.527-528.

21. This Hearings Officer specifically found that the reevaluation assessments provided the IEP team with the necessary information to develop an appropriate IEP for Student and that Student's IEP-05/12/2021 properly addressed Student's needs regarding ESY, behavioral interventions for Student, supplementary aids and supports for Student, and transition supports for Student. R-Ex.71, p.514-522, 525-527.

22. This Hearings Officer also noted that Student's educational placement, in the general education setting for over eighty percent (80%) of the day, was appropriate based on the discussion had with the IEP team, including Parent. R-Ex.71, p.524.

23. This Hearings Officer made specific findings that the IEP-05/12/2021 IEP team did not need to have Private School representatives present to develop an appropriate IEP for Student because Home School had conducted a reevaluation of Student in December 2020 through April 2021 and had gathered sufficient information to develop an appropriate program for Student for the 2021-2022 school year. The

reevaluation specifically included a VB-MAPP assessment completed by the DOE. R-Ex.71, p.482-488, 522-524.

24. This Hearings Officer found that Parent had agreed to the IEP-05/12/2021 and participated in a transition meeting on May 19, 2021 to transfer Student back to Home School, and it was only after Parent spoke with Mr. Peck and Private School Director that Parent expressed any dissatisfaction with Student's IEP-05/12/2021. Further, Parent's primary concern with the IEP-05/12/2021 was the DOE's ability to implement the IEP, and not the contents of the IEP-05/12/2021 itself. R-Ex.71, p.505-509.
25. This Hearings Officer found that Parent was also counseled by Mr. Peck that due to the prior decision in DOE-SY1920-053, Student would be allowed to stay at Private School at the DOE's expense under the 'stay-put' provision if any appeals were filed on Student's behalf. Parent testified at the Hearing that Parent authorized Mr. Peck to file any appeals as necessary and signed the enrollment contract with Private School on June 22, 2021 based on the belief that Student's tuition would be paid by the DOE under 'stay-put.' R-Ex.71, p.509.
26. This Hearings Officer denied Petitioners' requests to have the IEP team revise Student's IEP-05/12/2021 and denied Petitioners' request to award tuition reimbursement for Student's placement at Private School for the 2021-2022 school year. R-Ex.71, p.527-528.
27. Petitioners filed an appeal of the Decision in DOE-SY2021-046 on December 10, 2021 in U.S. District Court, District of Hawai'i under 1:21-CV-00486-JMS-WRP. The appeal is pending a Hearing currently set for March 6, 2023. See U.S. District

Court docket report for 1:21-cv-00486-JMS-WRP.

28. Parent's current understanding is that the appeal filed in U.S. District Court invokes the stay-put provision that requires the DOE to pay Student's tuition at Private School while the appeal is pending. Parent was informed by Mr. Peck that based on the Decision in DOE-SY2021-046, Parent may not be entitled to stay-put for Student's tuition at Private School for the 2022-2023 school year. Testimony of Parent, Tr.V1, 33:19-34:25, 51:13-53:14, 64:10-65:3.
29. Parent did not attempt to send Student back to Home School under the IEP-05/12/2021 after the Decision in DOE-SY2021-046 was issued on November 9, 2021 and Mr. Peck filed an appeal of the DOE-SY2021-046 decision. *See* R-Ex.71, p.509; *see also* U.S. District Court docket report for 1:21-cv-00486-JMS-WRP.
30. During the Hearing, after being prompted by Mr. Peck, Parent claimed that Parent would prefer to send Student to the DOE for school than having to going through the process of litigation but continued to send Student to Private School under the stay-put provision and based on the advice of Mr. Peck. Testimony of Parent, Tr.V1, 33:19-34:25.
31. Private School Director is paying Mr. Peck's legal fees for Petitioners' appeal of the DOE-SY2021-046 through an arrangement made between Private School and Mr. Peck. Private School Director has agreed to pay the legal fees for Student because Parent wanted to keep Student at Private School after the Decision in DOE-SY2021-046 was rendered. Testimony of Private School Director, Tr.V1, 115:5-22, 144:10-145:15, 150:16-151:23.
32. Parent signed an enrollment contract with Private School for Student to attend Private

School for the 2022-2023 school year at the maximum cost of Two Hundred Forty-Four Thousand Four Hundred Twelve Dollars and Sixteen Cents (\$244,412.16) on August 25, 2022. Student has been attending Private School since that time and the DOE has been paying Student's tuition under stay-put for Student's appeal from the Decision in DOE-SY2021-046. Testimony of Parent, Tr.V1, 42:25-44:11; P-Ex.3, p.167.

33. Private School developed an Individualized Applied Behavior Analysis Education Plan (hereinafter "IAEP") for the 2020-2021 and 2021-2022 school year. This plan was dated June 2, 2021 (hereinafter "IAEP-06/02/2021"). The IAEP-06/02/2021 was based on a VB-MAPP assessment given to Student in May 2021. See R-Ex.71, p.485, 486, 409-510.

34. For the 2021-2022 school year, Student was provided the following supplementary supports at Private School under IAEP-06/02/2021:

- RBT daily/weekly rotation for generalization
- Reverse inclusion opportunities
- Parent communication books
- Timers
- Extra time
- Prepare student for upcoming transitions
- Preferential seating
- Table divider for center learning
- Visual Aides (*sic*)
- Visual schedule
- Math Manipulatives
- Access to preferred sensory items and activities
- Token system
- First-then system

R-Ex.71, p.511.

35. This list of supports was not provided to Home School or anyone in the DOE until the due process hearing in DOE-SY2021-046. R-Ex.71, p.511.



Events leading up to the IEP meeting on June 7, 2022

36. As early as November 15, 2021, Home School requested data and information on Student's progress from Private School and requested opportunities to observe Student at Private School for information that could assist in developing a new IEP for Student. Testimony of SSC, Tr.V2, 208:11-20, 209:3-7, 210:8-212:25; P-Ex.2, p.047-048, 064, 069-070; R-Ex.20, p.284; R-Ex.23, p.315-316; R-Ex.28, p.329-330; R-Ex.29, p.331; R-Ex.35, p.343; R-Ex.48, p.379.
37. SSC made several attempts between April 2022 and May 2022 to observe Student at Private School; however, was only able to observe Student on May 19, 2022 for thirty (30) minutes. After the thirty (30) minute period, the observation was ended by Private School staff. Testimony of SSC, Tr.V2, 215:7-217:9, 228:25-229:7; *see* P-Ex.2, p.052-054, 062-063, 065-066; R-Ex.25, p.319-321; R-Ex.26, p.326; R-Ex.28, p.329-330; R-Ex.48, p.379-381.
38. DOE Speech-Language Pathologist (hereinafter "DOE SLP") scheduled several observations of Student at Private School during the 2021-2022 school year; however, these observations were very limited (approximately fifteen (15) minutes per month), due to Private School's scheduling and observation policies. P-Ex.2, p.041-042, 043-046, R-Ex.26, p.322-327; R-Ex.34, p.340-342; R-Ex.47, p.377-378.
39. DES also attempted to observe Student at Private School to obtain information that could be used in developing Student's IEP. DES was met with difficulties in scheduling and conducting observations of Student based on Private School's policies of not allowing more than one DOE observer to observe students at a time and due to another district educational specialist's alleged attempts at recording the observation

procedures at Private School. P-Ex.2, p.050-051, 055-061, 071-080, 081-094; *see also* P-Ex.2, p.095-102 (note that the emails in this thread also include disagreements between the DOE and Private School regarding payment, which is irrelevant to this case).

40. Private School's policies for DOE observations make observing students whose tuition and related expenses that are being paid for by the DOE very difficult. These policies do not allow for online observations, despite the in-person observers watching a live-feed of a student from a separate room; does not allow the DOE to photograph or video the area in which the observations are taking place (where no students or Private School personnel are located); and only allow for a limited time for observations. Despite Private School Director's claim that Private School accommodates all DOE requests to observe students, it is worth noting that these observations were very difficult to schedule for Home School and did not allow for the IEP team observers to glean much information about Student's program to develop Student's IEP.<sup>3</sup> Testimony of Private School Director, Tr.V1, 106:24-111:8; Testimony of SSC, Tr.V2, 215:7-217:9, 226:17-227:18; Testimony of Principal, Tr.V3, 263:20-264:8; *See e.g.*, P-Ex.2, p.081-082.

41. Despite repeated requests for Student's updated educational program for the 2021-2022 school year, attendance records, and other data related to Student's program,

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<sup>3</sup> Private School Director, while testifying, stated that the reasons for the many restrictions are due to confidentiality of the other students who may be observed during the observations; however, during cross examination, Private School Director acknowledged that all students who are involved in the observations have consent forms to be observed, even if they are not the student to be observed, leaving the reasonableness of Private School's observations policies subject to question. *See* Testimony of Private School Director, Tr.V1, 109:18-111:8, 130:1-18.

Private School did not provide any information to Home School until May 17, 2022, and only provided Student's attendance records and a three (3) page progress update for Student as of May 2022. P-Ex.3, p.152-154; R-Ex.43, p.361-368; R-Ex.63, p.434-438.

42. The three (3) page progress update listed thirteen (13) skills/milestones taken directly from the VB-MAPP with a summary for Student's abilities under each milestone. No daily schedule, list of supplementary supports, or updated IEP was provided to Home School prior to the June 7, 2022 IEP meeting. P-Ex.3, p.152-154.

43. The three (3) page progress report from Private School in May 2022 read as follows:

Mand – [Student] gives directions, instructions, or explanations as to how to do something or how to participate in an activity 5 times and is inconsistently manding for others to attend [Student's] own intraverbal behavior 5 times.

Tact - [Student] tacts 43 two-component verb-noun or noun-verb combinations and tacts the color, shape, and function of 5 objects when each object and question is presented in a mixed order. [Student] is also able to tact four different prepositions. [Student's] ability to tact four pronouns is emerging.

Listener Responding - [Student] follows 2 instructions involving 6 different prepositions and will follow 3-step direction for 7 different directions.

Target Behavior: Visual Perceptual Skills and Matching-To-Shape

Objectives: [Student] spontaneously matches any part of an arts and crafts activity to another person's sample 1 time and will complete 8 different block designs, parquetry, shape puzzles, or similar tasks with at least 8 different pieces.

Target Behavior: Independent Play

Objectives: [Student] repeats a gross motor behavior to obtain a better effect for 2 activities.

Target Behavior: Social Behavior and Play

Objectives: [Student] spontaneously responds to the mands from peers inconsistently between 1-5 times and will spontaneously mand to peers for participate in games, social play, etc., 2 times when engaged in a highly preferred activity and when the peer is needed for the activity to occur.

Target Behavior: Motor Imitation

Objectives: [Student] spontaneously imitates the motor behaviors of others on 5 occasions.

Target Behavior: LRFFC

Objectives: [Student] selects items from a book based on 2 verbal components: either a feature, function, or class for 19 LRFFC tasks.

Target Behavior: Intraverbal

Objectives: [Student] spontaneously emitted an average of 4.8 intraverbal comments daily over 5 consistent data collection days.

Target Behavior: Classroom routines and Group Skills

Objectives: [Student] responds to 5 different group instructions or questions with inconsistent prompts to attend in a group of 3 or more children.

Target Behavior: Reading

Objectives: After [Student] is read 2-3 sentences from a book, [Student] is inconsistently answering questions about those sentences. [Student] is able to read first and most second grade sight words and requires inconsistent prompts to spell these words correctly. [Student] can read Level 2 books with inconsistent minimal prompts to read various words and produces some words using word approximations vs the correct production.

Target Behavior: Writing

Objectives: [Student] independently and legibly writes each of the 26 uppercase letters when they are named in random order and is learning to write lowercase letters. [Student] is learning to write words using both upper and lower case letters and requires inconsistent prompts to write first grade sight words with lowercase letters.

Target Behavior: Math

Objectives: [Student] identifies as a listener 8 different comparisons involving measurement, counts out 1-20 items from a larger set of items with 1 to 1 correspondence and correctly draws a line from a written number to a quantity to match for the numbers 1-5 on a math worksheet. [Student] is tacting single digit addition equations and answering them correctly for 4 equations.

P-Ex.3, p.154; R-Ex.43, p.365-367.

44. On May 18, 2022, SSC sent an email asking for Private School Director to provide additional information or clarification regarding the three (3) page May 2022 progress update provided by Private School Director.<sup>4</sup> Private School Director did not respond

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<sup>4</sup> The email from SSC asked private school to provide more specific data to create an accurate IEP. SSC provided examples of the type of information that Home School needed for Student's IEP. These examples included: for "mand," what specific direction is given, who is Student's audience, what is the frequency and number of trials for this data; for "tact," what type of words are being used, verb/noun or verb-noun combinations, what colors, shapes, or functions; for "listener responding," what are the instructions given to Student, what are the seven 3-step directions that Student is able to follow; for behaviors, who are peers that are involved in this social play, what is the frequency, what are the specific tasks; for reading, what book is Student reading, what grade level is the book, does Student follow along or just sit and listen when being read to, can Student answer comprehension questions; for writing, what specific letters does Student know, please provide samples of Student's writing; and for math, what are the four equations that Student is being asked to complete?

- to the email. Testimony of Principal, Tr.V3, 262:20-263:19; P-Ex.2, p.068.
45. Student's attendance record provided by Private School showed that from August 2021 through May 2022, Student attended school for one hundred one (101) days. Private School Director noted that Student did have a lot of absences during the 2021-2022 school year due to illness.<sup>5</sup> Testimony of Private School Director, Tr.V1, 135:13-136:20; R-Ex.43, p.368.
46. Home School made repeated requests from Private School for Student's new educational program or assessments conducted with Student. In May 2022, Private School Director informed SSC that Private School had initiated a new VB-MAPP assessment process and would provide Home School with the updated VB-MAPP results as soon as they were completed. Private School began conducting a VB-MAPP assessment with Student in May 2022, but did not complete the assessment until July 8, 2022, and did not provide the results or Student's IAEP (hereinafter "IAEP-07/08/2022") to Home School until October 6, 2022. Testimony of Principal, Tr.V3, 261:9-262:9; P-Ex.2, p.062, 068, 116-119, 122-125, 137; P-Ex.3, p.155-162; R-Ex.48, p.379; R-Ex.58, p.399-400; R-Ex.63, p.434-438.
47. Private School Director claimed that the delay in providing Student's updated IAEP-07/08/2022 to Home School until October was due to Private School being a small operation and having difficulties providing all the DOE requests that were received at the beginning of the school year. P-Ex.2, p.119-125.
48. Private School charges, as part of the enrollment costs under the contract with

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<sup>5</sup> As a guide, the DOE school year calendar has one hundred eighty (180) days of instruction for students. See Hawai'i DOE school year calendar 2021-2022, available at [Hawaiipublicschools.org/DOE%20Forms/2021-22calendar.pdf](https://hawaiipublicschools.org/DOE%20Forms/2021-22calendar.pdf).

parents, an administrative fee of fifteen percent (15%) of the total costs of the enrollment contract to cover administrative expenses. P-Ex.3, p.167.

49. Private School Director and/or another staff member from Private School were invited to Student's IEP meetings, which were tentatively scheduled for May 17, 2022, and June 7, 2022. The May 17, 2022 meeting was canceled by Parent due to illness and the meeting was held on June 7, 2022. R-Ex.32, p.336-337; R-Ex.38, p.347-351.

50. No one from Private School was able to attend the IEP meeting on June 7, 2022, despite being provided three (3) weeks' notice of the new IEP meeting date. Private School Director was asked whether Private School Director had any information to provide to the team for the meeting, but Private School Director did not respond to the inquiry. R-Ex.52, p.385-386.

#### IEP meeting on June 7, 2022

51. On June 7, 2022, an IEP team meeting was held with Parent, Special Education Teacher (hereinafter "SPED Teacher"), General Education Teacher (hereinafter "GE Teacher"), District Resource Teacher, DOE SLP, DOE BCBA, DOE Occupational Therapist (hereinafter "DOE OT"), and Principal. P-Ex.4, June 7, 2022 audio recording, approximate time stamp [00:45-01:40] (hereinafter referenced as "P-Ex.4, 6/7/22 audio [00:45-01:40]").

52. At the start of the meeting, SPED Teacher explained to Parent that they had not received a new education plan or much other information from Private School and would be gathering information from Parent and any observations that were made of Student at Private School for the purpose of drafting Student's IEP. P-Ex.4, 6/7/22

- audio [1:55-2:18].
53. The team discussed the areas for the PLEPs section to see what information Parent, the team members, or the Private School documents had as updates for Student. They discussed the academic areas of reading, math, writing, as well as Student's functional performance, gross motor, communication, and functional living skills, such as swimming, initiating play, and dressing and hygiene. P-Ex.4, 6/7/22 audio [4:32-35:58].
54. SPED Teacher shared the May 2022 three (3) page progress update provided by Private School Director and asked Parent if Parent could provide additional information to the team regarding each of the areas discussed in Private School's update. Parent could not provide much information to clarify the May 2022 progress report from Private School. P-Ex.4, 6/7/22 audio [9:19-15:34].
55. At the meeting, the IEP team asked Parent if Parent had received an updated IAEP or VB-MAPP from Private School for Student for the upcoming school year (2022-2023), since Home School had not received either. Parent informed the IEP team that Parent also had not received the documents. P-Ex.4, 6/7/22 audio [9:41-10:01].
56. The IEP team asked Parent for input regarding some of the updates provide by Private School and asks Parent to describe some improvements that Student has made at home that Parent has been able to observe. P-Ex.4, 6/7/22 audio [5:13-9:09](reading), [12:48-14:32](math), [15:53-19:43](writing), [20:22-21:45](functional performance), [24:50-32:06](communication), [32:08-35:58](functional life skills).
57. District Resource Teacher was able to make some observations of Student at Private

- School in approximately March 2022 and reported the observations during the IEP meeting. For example, District Resource Teacher observed that Student was good at counting and could add using manipulatives, but not just numbers, and that Student was also able to use Student's fingers to put beads on a string in an activity. P-Ex.4, 6/7/22 audio [14:33-15:34], [21:50-22:28].
58. DOE BCBA stated at the meeting that DOE BCBA did not have any behavioral concerns because Student did not demonstrate significant behaviors during an observation DOE BCBA was able to make of Student in October 2021, and because Student's IEP-05/12/2021 already had an FBA with a BIP in place to address any needs that Student may have. DOE BCBA did note that they should start working on a transition for Student to get Student familiar with Home School's environment and school day schedule for Student's return. P-Ex.4, 6/7/22 audio [36:07-36:47].
59. The IEP team expressed concern to Parent that they had not received a new VB-MAPP report or a new education plan for Student and that based on the little information that they were able to get from Private School, Parent, and their observations of Student at Private School, the team believed that more information was needed before they could develop an appropriate IEP for Student. P-Ex.4, 6/7/22 audio [36:48-37:09].
60. Principal explained that the team wanted to get more information and was proposing a timeline extension. Principal clearly stated that by doing a timeline extension, they would be continuing the IEP-05/12/2021 so that Student would continue to have an IEP in place during the time the team gathered more information to develop Student's new IEP. P-Ex.4, 6/7/22 audio [37:10-37:37].



61. Parent agreed with Principal's proposal and asked if Student would need to undergo additional assessments with the DOE. Principal told Parent that there was no need for assessments, since the assessments the team had recently done were still current. Parent informed the team that Parent was concerned about Student being behind grade-level standards for math and writing, and offered to bring Student into Home School for testing if the team wanted. P-Ex.4, 6/7/22 audio [37:37-48:16].
62. At the time of the meeting the IEP team did not know whether Student would be capable of sitting through another round of assessments, since the IEP team did not have information on how much Student had progressed since the last time Student was assessed. Student was also not due for another reevaluation until 2024, therefore the IEP team did not request additional assessments for Student. Testimony of Principal, Tr.V3, 246:20-247:19; R-Ex.6, p.021.
63. Before ending the meeting, Principal repeated to the IEP team and Parent that Student's IEP-05/12/2021 would be in place until the IEP team can gather the information that they needed to develop Student's new IEP. Parent again agreed to this procedure that was proposed by the IEP team and volunteered to bring Student into the school for testing. P-Ex.4, 6/7/22 audio [47:06-48:20].

Prior Written Notice from the June 7, 2022 meeting

64. A PWN dated June 10, 2022 (hereinafter "PWN-06/10/2022") was drafted and sent to Parent via email and regular mail on June 11, 2022. The PWN-06/10/2022 detailed the discussion and information from the June 7, 2022 IEP meeting. R-Ex.54, p.388-392.
65. The PWN-06/10/2022 specifically described the DOE's proposal to continue

Student's IEP-05/12/2021 until the team could get more information from Private School and/or from assessments conducted with Student before developing a new IEP for Student. The PWN-06/10/2022 also included information taken directly from Student's last IEP (IEP-05/12/2021) and the PWN from that IEP, dated May 14, 2021 (hereinafter "PWN-05/14/2021").

66. The PWN-06/10/2022 stated:

1. Description of proposed or refused action:

The Hawaii Department of Education (HIDOE) is proposing the following services in [Student's] IEP continue until the team is able to meet again and develop a new IEP:

1. Special Education services: 600 minutes per week
2. Speech/Language Therapy: 400 minutes per week
3. Occupational Therapy: 240 minutes per quarter made up of 180 minutes of direct services and 60 minutes of consultation with [REDACTED] members
4. [Student] will be given daily sensory supports. [Student] will receive daily visual supports, priming before transitions and non-preferred activities, first/then language, and use of a token economy. A communication log will be used daily. Parent Education will be provided by a BCBA for 120 minutes per quarter. The team will have meetings on a quarterly basis. [Student] will receive ABA services for 360 minutes per month. [Student's] Behavior Intervention Plan (BIP) will be implemented throughout [Student's] school day and [Student] will receive Individual Instructional Support (IIS) daily. During the IEP revision meeting on 5/12/21, the following services were removed from the supplementary aids and services section—close adult supervision, Behavior Support Plan, and ABA consultation services.
5. [Student] will receive Extended School Year (ESY) services after a break of no more than 10 calendar days.
6. [Student] will not participate in statewide assessments.
7. [Student's] disabling condition impacts [Student's] ability to develop and access academic skills, expressive, receptive and social communication skills, social skills, fine motor skills, visual-motor integration and motor coordination skills, sensory-motor integration skills, and adaptive behaviors. [Student] requires individualized and specially-designed instruction, supports, and services to address these areas of need and to make progress toward educational standards.
8. [Student] will be able to access [Student's] program and placement at [Home School].

2. Explanation of why the action is proposed or refused:

1. [Student's] delays in the areas of academic skills, expressive, receptive and social communication skills, social skills, fine motor skills, visual-motor

integration and motor coordination skills, sensory motor-integration skills, and adaptive behaviors warrant the need for special education services in order for [Student] to access specially designed instruction to help [Student] successfully meet [Student's] needed goals and objectives.

2. [Student] requires individualized speech and language services in order to address [Student's] areas of need with [Student's] expressive, receptive and social communication skills.

3. Delays in the areas of fine motor skills, visual-motor integration and motor coordination skills, sensory motor-integration skills indicate the need for additional Occupational Therapy services which will include both direct service and consultation with team members.

4. [Student] will be given daily sensory supports which will include strategies for sensory/movement breaks needed throughout [Student's] day and will be provided in consultation with the Occupational Therapist. [Student] will receive daily visual supports such as pictures, writing, drawings, visual schedules, social stories, first/then boards, token boards, etc., which will be used to support [Student's] understanding of directions, positive behaviors and build independence in the classroom. [Student] has difficulty with transitions.

Therefore, priming or previewing what is coming next prior to a transition or beginning a non-preferred activity, will help [Student] to know what to expect and demonstrate less resistance to the change. First/then prompts will be utilized throughout [Student's] day to help [Student] complete tasks, attend to [ ] instructional activities and transition to and from activities and places. (e.g. "first work, then drawing.") [Student] will benefit from the use of a token economy which will reinforce positive and on-task behaviors. A communication log will be used daily in order to assist with the home-school connection. Parent education services will be provided by a BCBA in order to facilitate the generalization of learned behaviors and concepts at home, as well as assisting parent(s) with learning strategies and techniques to support [Student] at home.

The team will have meetings on a quarterly basis so that the team can monitor and discuss progress on a more frequent basis. Meetings can happen more often than quarterly if needed. [Student's] delays in the areas of academic skills, expressive, receptive and social communication skills, social skills, fine motor skills, visual-motor integration and motor coordination skills, sensory motor integration skills, and adaptive behaviors warrant the need for ABA services in order for [Student] to access specially designed instruction to help [Student] successfully meet [Student's] needed goals and objectives. ABA services will include supervision of the Registered Behavior Technician (RBT) according to BACB standards, collection and analysis of data, programming support for skill acquisition programs and reinforcement, consultation with IEP team members, and training in the implementation of the Behavior Intervention Plan (BIP) and related teaching protocols. A Behavior Intervention Plan (BIP) has been developed based on the data gathered from the Functional Behavior Assessment. The BIP is required in order to distinguish problem behaviors and provide [Student] with replacement behaviors. This plan will help build positive behaviors and replace or reduce challenging behaviors. [Student's] BIP will be implemented throughout

[Student's] school day. Individual Instructional Support (IIS) will be provided daily by a Registered Behavior Technician (RBT) throughout [Student's] school day. This support is necessary to assist [Student] with increasing [Student's] independence in the classroom setting and reducing/replacing behaviors that interfere with [Student's] ability to make progress towards [Student's] identified goals and objectives. The removal of close adult supervision, implementation of Behavior Support Plan, and ABA consultation services from the supplementary aids and services section was agreed to as these services were replaced with IIS, BIP and direct ABA services, as opposed to just consultation services.

5. Based on the nature and severity of [Student's] disabling condition and the observed regression of critical skills, [Student] does meet the eligibility criteria for extended school year services. [Student] requires ESY services in the areas of communication, social/behavioral development, fine motor and motor coordination skills, sensory-motor integration skills, and adaptive behavior skills after a break of no more than 10 days. Based on [Student's] needs, [Student] requires ESY services Monday-Friday for 4 hours each day, excluding any holidays. [Student] will receive direct speech therapy services for 30 min/week during ESY sessions. Occupational Therapy consultation will be conducted with the ESY teacher/staff prior to each qualifying ESY period for the winter term. For the summer ESY term, OT consultation will be provided one time before and two times during the session. [Student] will receive direct occupational therapy for 60 minutes over the summer ESY session. ABA services will occur during ESY for 1 hour/week. The IIS services during ESY will be provided by an RBT. The IIS services and BIP implementation will happen daily during ESY.

6. [Student] is not in a grade level that participates in statewide assessments.

7. [Student] qualifies for IDEA services under the eligibility category of [REDACTED]. [Student's] disability impacts [Student's] ability to develop and access academic skills, expressive, receptive and social communication skills, social skills, fine motor skills, visual-motor integration and motor coordination skills, sensory motor-integration skills, and adaptive behaviors. [Student] requires individualized and specially-designed instruction, supports and services to address these areas of need and to make progress towards educational standards. [Student] will participate with [Student's] general education peers for academic and non-academic activities. [Student] will receive 600 minutes of special education services per week to address [Student's] areas of need in the general education setting for 80% or more of the day. [Student] will not participate with [Student's] general education peers while [Student] receives Occupational Therapy and Speech/Language Therapy services.

8. The team thoroughly reviewed all of the placement considerations within the least restrictive environment continuum. All team members agreed that an educational environment where [Student] would spend the majority of [Student's] day with [Student's] typically-developing peers is the best learning environment for [Student]. It was specifically noted that [Student] would benefit from access to the good speech and language models provided by [Student's] peers, the development of social skills through on-going social opportunities with [Student's] typically-developing peers and being exposed to standards-based

academics while receiving [Student's] necessary supports within this educational environment. The team discussed the potential benefits of [Student's] current private school placement as being a VB MAPP-specific educational environment (targeted interventions are provided based on the VB MAPP assessment) and the consistency of [Student] remaining in the same setting all day and not having to transition from place to place. The team discussed that [Student's] educational programming developed together for [Student's] IEP is also based on the results of [Student's] most recent VB MAPP assessment and [Student's] areas of need are addressed and supported. Services and supports are also included in [Student's] IEP to address [Student's] difficulties with transition and to help [Student] make progress in this area. After reviewing all of the placement options, it was determined that [Student] would most benefit from a least restrictive environment that is in the general education setting for more than 80% of [Student's] school day while all of [Student's] necessary services and supports are provided within this environment, with the exception of when [Student] receives speech/language therapy and occupational therapy services. During the revision IEP on 5/12/2021, the previous LRE discussion was reviewed and the continuation of this discussion noted that the addition of ABA services, the implementation of the BIP, and the addition of IIS provided by an RBT will support [Student's] ability to access [Student's] instruction within the general education setting with even more success. Therefore, all of [Student's] programming and placement needs can be met at [Student's] neighborhood school.

3. Description of other options considered:

The IEP team considered completing the IEP without information from [Private School Director] that was promised – current VB MAPP and individual education plan used at Private School. They also considered a re-evaluation.

4. Reasons these options were rejected:

HIDOE and IEP Team agreed they need the data from [Private School] to write relevant and appropriate goals. They need input from [Private School] because the data provided did not align with the goals and objectives in the IEP and they did not have an educational plan to reference. [Parent] reported that [Parent] also had not received these from [Private School]. The IEP team also agreed that re-evaluation assessments were not appropriate because the evaluations are current. [Parent] offered to bring student to school for [Home School] to complete academic assessment and observations. SPED teacher to arrange for this.

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R-Ex.7, p.050-052.

Post June 7, 2022 events

67. Parent received the PWN-06/10/2022 but did not thoroughly read the document.

Testimony of Parent, Tr.V1, 21:15-23, 68:5-22.

68. After receiving the PWN-06/10/2022, Parent consulted with Mr. Peck and was

informed that Parent did not have an IEP for Student and may not be able to get Student's tuition for Private School paid based on the fact that there was no new IEP to file a due process complaint on to get stay-put. Testimony of Parent, Tr.V1, 33:19-34:10, 34:17-25.

69. On July 19, 2022, after consulting with Mr. Peck, Parent send an email to SPED Teacher saying "I'm writing to you to request an IEP as soon as possible. I can't afford to pay for [Private School] and I don't think the IEP is good at this time. So I need an IEP before the beginning of the new school year. I was just thinking that we haven't really Changed anything from last year and I believe [Student] has improved on certain areas from the last time and the IEP has a lot of issues." Testimony of Parent, Tr.V1, 35:1-5; P-Ex.2, p.107-108.

70. Parent testified that Parent's main concerns with Student's IEP that Parent was referring to in the July 19, 2022 email was "the long break for summer. I didn't want [Student] to be out of school for that long," "I wanted [Student] to be in like for [ ], for social program, there wasn't – I didn't feel like there was a lot for [Student] socially," and "I wanted it to update what I said and for [Student] to update the assessments to be done ... I didn't want to just leave it as the current goals because I thought that maybe [Student] did already receive the goals they wrote prior inside of the IEP. So there was no updating. That was one of my bigger problems with it." Testimony of Parent, Tr.V1, 71:5-72:5.

71. When further questioned, Parent confirmed that Parent's concerns were mainly with Student having extended school year services, having a social program or being in a general education program to interact with neurotypical peers throughout the day, and

having the goals and objectives updated based on Student's progress. Parent acknowledged that Parent had agreed to and was willing to have Student undergo additional assessments to update the goals and objectives for Student's IEP.

Testimony of Parent, Tr.V1, 72:6-73:2, 74:6-17.

72. Parent noted that Student's assessment process was still ongoing at the time of the Hearing in this case and that Parent did not realize that the process was going to take this long. Testimony of Parent, Tr.V1, 73:1-2.

73. Parent testified that Parent does not usually receive and did not receive a copy of Student's IAEP from Private School and did not know whether at the time of the June 7, 2022 IEP meeting, Private School had created a new IAEP for Student. Testimony of Parent, Tr.V1, 73:3-16.

74. On June 9, 2022, DES scheduled an observation of Student at Private School, however, DES was notified that morning that Student was absent from school that day, so the observation was canceled. P-Ex.2, p.071-072.

75. Since the June 7, 2022 IEP meeting, the IEP team has conducted several assessments with Student. These assessments included the Essential for Living (hereinafter "EFL") assessment in August 2022, the Star assessments for literacy and math for grade 2. R-Ex.19, p.127-142; R-Ex.68-69, p.463-468.

76. In August 2022, Home School sent DOE BCBA some proposed goals and objectives for Student based on the information that Home School had at that time (which did not include Student's updated VB-MAPP assessment or IAEP-07/08/2022) to see if DOE BCBA could provide the IEP team some guidance as to how to write Student's goals and objectives in a new IEP, since Private School had not provided any updated

- information to Home School. Testimony of DOE BCBA, Tr.V2, 181:1-182:19;  
Testimony of Principal, Tr.V3, 247:20-248:15; R-Ex.62, p.426-433.
77. In September 2022, SSC received a copy of Student's records from Student's private speech-language providers for services that Student had received in August 2022. R-Ex.66, p.449-461.
78. In July and August 2022, SPED Teacher and Principal were in contact with Parent to bring Student in for assessments as discussed at the June 7, 2022 IEP meeting. Parent agreed to bring Student in to Home School on August 15, 2022 to conduct assessments. P-Ex.2, p.103-104, 107-108, 113-115; R-Ex.54, p.388-389; R-Ex.56, p.392-395; R-Ex.57, p.396-398; R-Ex.59, p.401-403.
79. On August 15, 2022, the EFL assessment was conducted by Essentials For Living Assessor (hereinafter "EFL Assessor"). The EFL assessment is an assessment the DOE uses to determine adaptive skills and functional skills for students who receive special education and related services. The EFL assessment is designed for students that have moderate to severe disabilities and looks at the student's basic abilities to function for living in areas of communication, behavior, and skills such as making requests and waiting after making requests; accepting removals, making transitions, sharing, and taking turns; completing tasks; accepting "no;" following directions related to health and safety; completing daily skills related to health and safety; and tolerating situations relating to health and safety. R-Ex.19, p.127-142.
80. On August 16, 2022, the EFL assessment report was completed and sent to Principal and DES. R-Ex.61, p.406-425.
81. On August 10, 2022, SSC contacted Private School Director to get Student's updated



VB-MAPP assessment that Private School Director said they were working on, as well as to try to get an observation scheduled of Student at Private School. Private School Director provided SSC with the date of September 9, 2022 for possible observation, however the observation was canceled on September 8, 2022. Private School scheduled an observation with SSC on September 15, 2022, and it appears from the record that SSC was able to attend that thirty (30) minute observation.<sup>6</sup> SSC followed up with Private School Director on October 12, 2022 and October 17, 2022 regarding an observation for Student at Private School. An observation was offered by Private School for an observation of Student on November 4, 2022. P-Ex.2, p.111-112, 116-117, 127-132; R-Ex.58, p.399-400; R-Ex.60, p.404-405; R-Ex.63, p.434-438; R-Ex.64, p.439-443; R-Ex.67, p.462.

82. In August 2022, Home School contacted Parent to try to schedule an IEP meeting for Student. Two dates were proposed for September 6, 2022 and September 12, 2022, however the IEP team determined that they wanted to wait to schedule the IEP meeting for after they received the VB-MAPP and updated education plan from Private School. P-Ex.2, p.120-121, 126.

83. On September 13, 2022, Parent brought Student to Home School to complete the Star assessments. The reports for the Star assessments were completed by September 15, 2022. R-Ex.68-69, p.463-468.

84. After receiving the updated IAEP-07/08/2022 from Private School on October 6,

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<sup>6</sup> While this Hearings Officer notes that Petitioners' Exhibit 2, page 127, indicates that the observation date written by both SSC and Private School Director indicates "10/15/22" from 9-9:30 a.m., a subsequent string of emails submitted by Petitioners and the "Thursday" date mentioned in SSC's original email indicate that the observation was actually scheduled for September 15, 2022. See P-Ex.2, p.127, 133-134.

- 2022, an IEP meeting was scheduled for October 10, 2022, however Parent did not confirm the meeting so the meeting was rescheduled. P-Ex.2, p.135.
85. On October 13, 2022, EFL Assessor was scheduled to do an observation of Student at Private School. P-Ex.2, p.138-141.
86. On October 13, 2022, a DOE occupational therapist requested some information from Private School Director and an observation of Student at Private School. Private School Director responded ten (10) days later, but did not provide any responses to the questions asked by the occupational therapist. Private School Director did provide an observation date for Student at Private School of November 4, 2022. P-Ex.2, p.144-145.
87. An IEP meeting was scheduled for November 1, 2022 and was held with Parent present. The IEP team began the process of developing Student's new IEP, however did not get through the entire document. The IEP team continued the meeting to continue developing Student's IEP. Testimony of Parent, Tr.V1, 62:15-64:2.
88. At the time of the Hearing, the IEP team was still in the process of developing Student's new IEP. Testimony of Principal, Tr.V3, 248:16-249:2.

#### Private School

89. Student currently attends Private School, which is a private facility that uses an ABA-based verbal behavior program to design each student's individual education program. Testimony of Private School Director, Tr.V1, 118:11-16, 130:15-131:11.
90. 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, 130:15-

132:3.

91. 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.V1, 106:24-111:8.
92. Private School did not do an FBA for Student for the 2021-2022 school year or during Student's most recent assessment period at the end of the 2021-2022 school year because Student's behaviors have been "excellent" and has not had any problem behaviors that required an FBA. Testimony of Private School Director, Tr.V1, 126:1-8.
93. Private School developed Student's IAEP-07/08/2022 for the 2021-2022 and 2022-2023 school years on July 8, 2022. The VB-MAPP testing process took some time for Student since Student is at a higher level of functioning on the assessments, so one milestone can include criteria for several hundred different kinds of responses or a thousand different responses. Additionally, Student had many absences in May and June, which caused further delays in the assessment. Testimony of Private School Director, Tr.V1, 135:10-136:5.
94. Student's VB-MAPP milestone scores indicate that Student has mastered all level 1 ( ) skills, all but three (3) level 2 ( ) skills, and two-thirds (2/3) of the level 3 ( ) skills. P-Ex.3, p.161.
95. A list of supplemental supports that were provided to Student at Private School was also developed, although it does not appear that the list was provided to the IEP team. Testimony of Private School Director, Tr.V1, 143:15-144:9.

96. For the 2022-2023 school year, the supplemental supports provided to Student included: RBT daily services, reverse inclusion opportunities, parent communication books, timers, prepare student for upcoming transitions, visual aides (*sic*), visual schedule, access to preferred sensory items and activities, token system, and a first-then system, among other items. P-Ex.3, p.164.
97. Student has received speech-language therapy from a private insurance-paid provider intermittently since 2019. This service was provided to Student after school and was based on a reference from Student's pediatrician, who provided the initial referral. Testimony of Parent, Tr.V1, 69:6-70:20.
98. 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.V1, 147:17-150:5.
99. Student's IAEPs and progress reports 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.V1, 146:14-147:16.
100. Student's IAEP-07/08/2022 contains thirteen (13) goals for Student, including the following:
- [Student] will give directions, instructions, or explanations as to how to do something or how to participate in an activity 10 times. [Student] will mand for others to attend to [Student's] own intraverbal behavior 5 times.  
[Student] will tact 4 different prepositions (e.g., in, out, on, under) and 4 pronouns.  
[Student] will tact 4 different adjectives, excluding colors and shapes and 4 adverbs.  
[Student] will tact with complete sentences containing 4 or more words, 20 times.

[Student] will follow 2 instructions involving 6 different prepositions and 4 different pronouns.

[Student] will follow 3-step directions for 10 different directions.

...

[Student] will spontaneously respond to the mands from peers 5 times.

[Student] will spontaneously cooperate with a peer to accomplish a specific outcome 5 times.

[Student] will select the correct items from a book or the natural environment given 4 different rotating LRFEC questions about a single topic.

...

[Student] will answer two questions about the content of a story after being read 2-3 sentences from that book/story.

[Student] will spell first grade sight words correctly for 80% of opportunities.

[Student] will write all 26 lowercase letters legibly when named.

[Student] will independently and legibly write single words using lowercase letters for 80% of opportunities.

P-Ex.3, p.159-160.

101. On August 26, 2022, Parent signed an enrollment contract with Private School for Student's enrollment for the 2022-2023 school year on August 25, 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. Testimony of Private School Director, Tr.V1, 98:23-102:1.

102. 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 Forty-Four Thousand Four Hundred Twelve Dollars and Sixteen Cents (\$244,412.16). P-Ex.3, p.166-167.

## **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.” *Andrew 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 Student was denied a FAPE by the DOE extending the timeline and continuing Student’s IEP-05/12/2021 until the IEP team could gather the information necessary to develop Student’s new IEP<sup>7</sup>

Petitioners raise the issue of whether the DOE assessed Student sufficiently to be able to develop an appropriate IEP for Student at the June 7, 2022 meeting. In this case, Petitioners have maintained 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 extend the deadline for the IEP team to develop a new IEP due to Private School not providing Home School with Student’s updated VB-MAPP assessment or educational program. The IEP team informed Parent that while the IEP team waited for additional information from Private School, it would extend the IEP-05/12/2021 so that Student would continue to have an offer of services if Student were to transition back to Home School before the new IEP was completed. *FOF 46*. Parent agreed to this arrangement at the IEP meeting on June 7, 2022, and it was only after discussions with Mr. Peck that Parent appeared to change Parent’s mind. *FOF 61, 67-68*.

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<sup>7</sup> 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.



Based on the reasons set forth below, this Hearings Officer finds that Petitioners have not proven that Student was denied a FAPE when the IEP team extended the timeline to gather additional information to develop a new IEP for Student and offered Student's IEP-05/12/2021 to Student if Student transitioned back to Home School for the 2022-2023 school year.

1. The IEP team reasonably relied upon Private School's representation that it was conducting a new VB-MAPP assessment and would provide it to Home School upon its completion

Petitioners argue that Home School should have been aware that they would need additional information to develop Student's IEP well before the IEP meeting in June 2022 and should have made attempts to gather information or assess Student well before the IEP meeting was scheduled.<sup>8</sup> In the prior proceeding, DOE-SY2021-046, this Hearings Officer reviewed the extensive assessments that the DOE conducted with Student as part of Student's reevaluation. *FOF 8, 19.* The assessments were thorough and provided the IEP team at the time with information to develop Student's IEP-05/12/2021. *FOF 21.* Student had been attending Private School since the assessments and the IEP team had reason to believe that Private School was collecting data of Student's progress. *FOF 29, 32.* The IEP team members had very little opportunity to observe Student at Private School, with only limited time sessions and observation sessions being canceled and rescheduled. *FOF 37-39.* Since Student was not due for another reevaluation until 2024, the IEP team had no reason to subject Student to another battery of assessments while waiting for Private School's updated VB-MAPP assessment of Student. *FOF 62.*

The record in this case is that as early as November 2021, Home School attempted to gather information from Private School in the form of requests for Student's progress reports and

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<sup>8</sup> See Testimony of Principal, Tr.V3, 268:3-270:14.

data and observations of Student at Private School. *FOF 36*. It was persistent delays in responding to Home School and scheduling or canceling observations of Student by Private School Director that caused the IEP team to find itself with no information that could be used for the IEP team meeting in June 2022. *FOF 36-44, 46*. Despite having only received a vaguely worded three (3) page progress report and two (2) to three (3) observations done by DOE personnel at Private School by the June 7, 2022 meeting, the IEP team attempted to gather as much information as they could from Parent to see if they could develop an new IEP for Student. *See FOF 51-57*. Parent unfortunately was not able to provide the detail of information on Student's studies and academics at Private School that the IEP team needed to develop appropriate goals and objectives for Student at the time of the meeting, so the IEP team, with Parent's agreement, chose to delay the meeting until Private School could complete their updated VB-MAPP assessment. *FOF 59-61*. In May 2022, Private School Director had indicated that Private School had already begun the process of assessing Student, so the IEP team had no reason to believe that the VB-MAPP assessment would not be completed prior to the start of the 2022-2023 school year. *FOF 46*.

Home School continued to contact Private School, requesting additional observations and the updated VB-MAPP assessment and educational plan and arranged for Parent to bring Student to Home School to do additional assessments to use in developing Student's IEP. *FOF 46, 75-76, 79-80, 82, 84, 85-86*. Despite the repeated requests from SSC, Private School did not provide the IEP team with Student's updated IAEP-07/08/2022 until October 6, 2022. *FOF 46*. Upon receiving Student's updated IAEP-07/08/2022, the IEP team attempted to schedule a meeting to develop Student's IEP. *FOF 84*. By this time, additional observations of Student had been made at Private School and assessments had been completed with Student at Home School.

FOF 79-81, 83, 85. The only cause of the lengthy delay in developing Student's IEP was the fact that Private School did not provide Home School with Student's updated IAEP-07/08/2022 for three (3) months after it was completed.

Petitioners have not demonstrated any areas of concern where the IEP team should have assessed Student prior to the IEP meeting on June 7, 2022. Private School did not provide any information that Student had significant behaviors, or any regression in any areas of the VB-MAPP in which Student had previously made progress. The IEP team had relied upon Private School's information that a new VB-MAPP assessment was being conducted with Student, which is a lengthy and time-consuming process based on Student's level of capabilities, so the IEP team would not have had any reason to conduct another assessment of their own. All the other assessments that were conducted with Student were completed well within the time that Private School took to provide the IEP team with the information they had been requesting since November 2021.

2. The IEP team had no reason to believe that Private School Director was a necessary participant at the IEP meeting, but still invited Private School Director to come to the June 7, 2022 IEP meeting

Petitioners argue that the IEP team denied Student a FAPE by failing to include Private School Director or other personnel from Private School in Student's IEP meeting on June 7, 2022. Petitioners allege that inviting Private School Director would have been one of the easiest ways to get information from Private School about Student's program and that based on the Court's ruling in "*Doug C.*," this resulted in a denial of FAPE.

The Court in *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038 (9<sup>th</sup> Cir. 2013),<sup>9</sup> found that parental participation was a more important consideration than an annual IEP deadline and

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<sup>9</sup> This Hearings Officer notes that while Petitioners cite frequently to *Doug C.* in their closing

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 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 the IEP meeting and was able to state Parent's position, ask any questions, or raise any concerns that Parent had at the meeting on June 7, 2022. *FOF 51.* While Principal did testify that Private School Director would have been a great person to have at the meeting to answer the IEP team's questions, the IEP team did not have any reason to believe that Parent would not be able to answer the questions that the IEP team had about Student's progress and program at Private School. Additionally, the IEP team in this case did attempt to invite Private School Director to the IEP meeting and send specific questions to Private School Director that the IEP team had about the progress report that Private School had provided to Home School. *FOF 44, 49-50.* Private School Director failed to respond to SSC's questions about the progress report and did not respond to another email asking if Private School Director would like to provide the team with any information since Private School Director was unable to attend the meeting. *FOF 44, 50.*

This Hearings Officer notes that Private School Director has a vested interest in keeping Student at Private School, specifically at the expense of the DOE. Private School is paying for

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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 the case cited above.

the services of Mr. Peck to file an appeal in Student's prior case so that Student can attend Private School at the rates charged by Private School under the stay-put doctrine. *FOF 31*. Private School hired another attorney to investigate the legalities of this arrangement and used some of the administrative costs that are charged as part of the enrollment contract to pay for those legal expenses.<sup>10</sup>

No evidence has been presented to show that Private School Director's failure to timely respond to requests for information, failure to answer questions about the progress reports that were asked by the IEP team, and the failure in this case of Private School to provide Student's VB-MAPP results and Student's updated IAEP-07/08/2022 over three (3) months after it was completed, and well after the school year began, were malicious or intentionally done to prevent the IEP team from developing a timely IEP before the start of the school year. However, this Hearings Officer finds that Petitioners' argument that Principal or the IEP team should have known earlier that more information was needed to timely develop an IEP for Student is disingenuous at best.<sup>11</sup>

Nonetheless, this Hearings Officer finds that while it would have been helpful to have Private School Director at the IEP meeting on June 7, 2022, it was Private School Director's decision not to attend the meeting, refusal to answer the questions posed by Home School, and untimely provision of Student's information to Home School that was the actual cause of the delays in this case. Parent was in attendance at the IEP meeting on June 7, 2022 and was able to provide the IEP team with the information that Parent had. The IEP team had no reason to

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<sup>10</sup> Testimony of Private School Director, Tr.V1, 151:19-152:7.

<sup>11</sup> See Petitioners' Closing Brief, filed December 16, 2022, page 7-9; Testimony of Principal, Tr.V3, 268:3-270:14.

believe that Parent could not, and Private School Director would not provide the team with the information that they needed prior to the meeting on June 7, 2022.

3. Offering to implement Student's IEP-05/12/2021 was appropriate while the IEP waited on the information from Private School

Petitioners claim that when Parent revoked Parent's agreement to extend the timeline and asked for another IEP meeting prior to the start of the school year, the IEP team should have met and developed a new IEP for Student. Petitioners further argue that since the IEP team did not meet by the start of the school year, or at least by the time Parent signed the enrollment contract on August 25, 2022, then Parent was forced to enroll Student at Private School for the 2022-2023 school year.

As an initial matter, this Hearings Officer's November 9, 2021 Decision found that the DOE provided Student with an appropriate educational program that was reasonably calculated to address Student's needs in the IEP-05/12/2021. *FOF 20-26*. At that point, Parent could have worked with the DOE to transition Student back to Home School for the remainder of the 2021-2022 school year. The IEP-05/12/2021 addressed all Parent's alleged concerns with the IEP, namely that Student receive services during the summer, that Student have a program that allowed Student access to non-disabled peers, and that Student's goals and objectives be appropriately updated. *FOF 11-17, 70-71*. These parts of the IEP-05/12/2021 were still appropriate for the 2021-2022 school year, and the IEP team, with Parent, had even created a transition plan that could be used to transition Student from Private School to Home School. While it is unclear whether Parent was counseled by both Mr. Peck and Private School Director to not transition Student back to Home School, it is clear that Private School Director and Mr. Peck had a large role in the decision to file the appeal in the DOE-SY2021-046 case to get stay-put and keep Student at Private School at the DOE's expense. *FOF 27-28, 31, 68*.

When Parent chose not to reenroll Student at Home School during the 2021-2022 school year, the situation was created where Home School had to rely upon Private School to provide them both access to observe Student and information about Student's progress and program. Petitioners have pointed out during Parent's testimony,<sup>12</sup> and in their closing brief,<sup>13</sup> that there are two (2) cases with similar "plans" by the DOE to extend timelines to complete IEPs, it is notable that both cases also involve Mr. Peck, Private School Director, and students whose tuition at Private School are currently being paid by the DOE under the stay-put doctrine while the cases are on appeals.<sup>14</sup>

In this case, the IEP-05/12/2021 addressed Student's strengths and needs, considered all assessments, data, observations, and other information that the IEP team had at the time of its creation. *FOF 21*. The IEP-05/12/2021 provided Student with ESY services that were designed to address possible areas of regression for Student; supplementary aids and supports that would allow Student to make progress in the general education setting; and placed Student in a setting where Student would have access to non-disabled peers to generalize Student's skills. *FOF 11-14*. Petitioners have not presented any evidence that the time of the June 7, 2022 IEP meeting, the IEP team had information that Student's needs had drastically changed so that the IEP-05/12/2021 would no longer be appropriate for Student. The only information that the IEP team had was the information provided by Parent and the observation reports presented at the IEP meeting, as well as the vaguely worded progress report from Private School. *FOF 41*. While the

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<sup>12</sup> Testimony of Parent, Tr. V1, 35:6-36:24.

<sup>13</sup> See Petitioners' Closing brief, filed December 16, 2022, page 2.

<sup>14</sup> This Hearings Officer did both this Hearing and the other hearing in which the allegations were the same and the DOE had continued the student's IEP until they gathered additional information to complete a new IEP for the student. Mr. Fujioka was also the attorney assigned to represent Respondents in both cases.

team attempted to get Private School Director to the meeting and get answers from Private School Director to questions about the May 2022 progress report, it was Private School Director that did not provide responses to the questions or attend the meeting. *FOF 44, 50.* Petitioners have not proven that the IEP-05/12/2021 was no longer appropriate for Student as a viable offer of FAPE while the IEP team awaited the information it had requested from Private School.

This Hearings Officer notes that while the IEP team did not have Student's updated IAEP-07/08/2022 at the time of the June 7, 2022 meeting, some of the goals and objectives in Student's IEP-05/12/2022 are still similar enough for Student to make appropriate progress while the new IEP is being developed. For example, Student's IEP-05/12/2021 language arts goal for requesting, labeling, describing, answering questions, and retelling is similar to the goals in the IAEP-07/08/2022 of mand, tact, listener responding, and LRFCC goals; while Student's language arts goal of increasing social skills by requesting items and responding to peer requests, etc., is similar to the IAEP-07/08/2022 goal of social behavior and play, where Student will spontaneously respond to mands from peers and will cooperate with peers to accomplish a specific outcome. *FOF 14-17, 100.* The IEP-05/12/2021 supplementary aids and supports are also similar in nature to many of the supplementary supports provided by Private School in the list for the 2022-2023 school year, such as RBT services, parent communication logs, preparation for upcoming transitions, visual aids, visual schedule, access to sensory items, a token system, and a first-then system. *FOF 12, 96.* Student's IEP-05/12/2021 also addresses Parent's concerns about Student not being on a long break from school by providing Student with ESY services after ten (10) days, and Parent's concern about access to non-disabled peers by placement in the general education setting, except during speech-language and occupational therapy services. *FOF 11, 13.*



#### 4. Equitable considerations

This Hearings Officer finds that Student's IEP-05/12/2021 addresses Student's needs and provides Student a reasonable education plan that would allow Student to make appropriate progress while the IEP team continues to meet to develop Student's new IEP. Based on the information that the IEP team had at the time of the June 7, 2022 IEP meeting, due to Private School's delay in providing such information to the team, the continuation of the IEP-05/12/2021 was appropriate, especially in light of the review of the IEP-05/12/2021 in the DOE-SY2021-046 case. Private School's delay in providing the IAEP-07/08/2022 in a timely manner after its completion further prevented the IEP team from completing an IEP for Student prior to the start of the 2022-2023 school year. Even after the IAEP-07/08/2022 was completed, SSC made additional requests from Private School Director for the document, and Private School Director continued not to provide it to SSC.<sup>15</sup> *FOF 46*. As was demonstrated in the record, upon receiving the completed IAEP-07/08/2022 in October 2022, the IEP team immediately attempted to schedule a meeting to develop Student's new IEP. *FOF 84*. Had Private School timely provided the IAEP-07/08/2022 to the IEP team, a meeting could have been scheduled before the start of the 2022-2023 school year in August 2022. Petitioners have presented nothing in the

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<sup>15</sup> Private School Director's justification that Private School is a small facility with difficulty providing all documents in a timely fashion is difficult to comprehend when Private School charges a fifteen percent (15%) administration fee off an approximate yearly tuition and related services estimated charge of over Two Hundred Thousand Dollars (\$200,000). Given Private School Director's demonstrated interest in keeping Student at Private School at the expense of the DOE, where Private School Director is willing to pay the costs of Mr. Peck to file the appeal for Petitioners, calls into question the nature or motives behind Private School Director's actions in this case, such as Private School Director's three (3) month delay in providing the updated IAEP-07/08/2022, refusal to answer emailed questions from Home School regarding Student's progress report, and failure to attend the June 7, 2022 meeting, even with three (3) weeks notice of the meeting.

record shows that the IEP team would have delayed the IEP meeting if they had received the requested information from Private School in a timely fashion.<sup>16</sup>

This Hearings Officer also finds that the actions of Private School Director and Mr. Peck to counsel Parent to file an appeal to keep Student at Private School under stay-put, rather than work with the IEP team to return Student to Home School under the IEP-05/12/2021 after the November 9, 2021 decision, further prevented Home School from obtaining the necessary information to develop an appropriate IEP for Student prior to the start of the 2022-2023 school year. Had Student been reenrolled at Home School after the issuance of the November 9, 2021 decision, the IEP team would have had the remainder of the school year to collect data and assess Student in a timely fashion to develop Student's new IEP for the 2022-2023 school year. Instead, Student remained at Private School, where the DOE personnel had limited access to observations of Student and had to rely upon Private School to provide the necessary information the IEP team needed to update Student's IEP.

This Hearings Officer finds that Petitioners have failed to prove that the actions of the DOE resulted in a denial of FAPE in this case. The IEP team reasonably gathered as much information as they could by the June 7, 2022 IEP meeting with the limited access that they had to observe or gather information for Student, and the upon determining that they did not have sufficient information to develop an appropriate IEP for Student for the upcoming school year, continued the IEP meeting and extended the timeline to wait for the information from Private School. *FOF 36-44, 50, 52-56.* The IEP team had reason to believe that Private School would

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<sup>16</sup> For example, although the IEP team completed the EFL and Star assessments with Student, the IEP team continued to wait for the IAEP-07/08/2022 from Private School before holding the meeting. Nothing has been presented that would imply that the IEP team would have waited to complete the assessments done by Home School if the IAEP-07/08/2022 had been received shortly after its completion.

be submitting the results of Student's new assessment before the start of the school year, given that the assessment began in May 2022, and extended the IEP-05/12/2021. *FOF 46*. The IEP team had reason to believe that the IEP-05/12/2021 was an appropriate educational plan to allow Student to make progress in light of Student's needs based on the November 9, 2021 Decision in DOE-SY2021-046. *FOF 20*. Parent agreed to continue the IEP-05/12/2021 until the team could get the updated information from Private School and even offered to bring Student in for additional assessments so that the team could get updated academic information for Student. *FOF 61, 63*. It was not until Parent was counseled by Mr. Peck that Parent changed Parent's mind and tried to demand an immediate IEP meeting to develop Student's IEP. *FOF 68-69*. Parent admitted that Parent did not even read or understand the PWN-06/10/2022 that laid out the entire plan and the services that would be provided to Student while the IEP team developed Student's new IEP. *FOF 67*.

Even, *assuming arguendo*,<sup>17</sup> if the IEP team's decision to extend the timeline and continue the IEP-05/12/2021 until the new IEP could be developed for Student was not an appropriate way to address the situation in which it found itself, this Hearings Officer finds that the cause of the delay that prevented the IEP team from developing a timely IEP for Student was entirely due to the actions of Private School and/or Private School Director, whose vested interest in keeping Student at Private School at the DOE's expense certainly call into question Private School Director's motives behind the delays and actions taken in this case. Due to Private School Director's actions on behalf of Petitioners in this matter being the cause of any alleged violations on the DOE's part, this Hearings Officer would find that the equitable

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<sup>17</sup> This Hearings Officer reiterates that the primary finding in this matter is that the DOE's actions were reasonable and justified in this case and did not result in a procedural or substantive violation of the IDEA and did not result in a denial of FAPE for Student.

considerations prevent an award of tuition reimbursement for Student for the 2022-2023 school year to Petitioners for Private School. Since Petitioners have not proven that the IEP-05/12/2021 is not an appropriate educational plan for Student, Student was not left without a viable IEP under which Student could return to Home School for Student's education.

## **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-05/12/2021 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 receiving the necessary information from Private School. 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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