



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

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

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAI‘I, and KEITH T. HAYASHI,
Superintendent of the Hawai‘i Public
Schools,

Respondents.

DOE-SY2223-014

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:
November 29-30, 2022
December 1 & 6, 2022

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On August 10, 2022, the Department of Education, State of Hawai‘i and Keith T. Hayashi, Superintendent of the Hawai‘i Public Schools (hereinafter “Respondents” or “DOE”) received a Complaint and Resolution Proposal (hereinafter “Complaint”) under the Hawai‘i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities

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

A prehearing conference was held on September 13, 2022, before Hearings Officer Chastity T. Imamura; with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners; and Ryan W. Roylo, Esq. (hereinafter “Mr. Roylo”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for November 29-30, and December 1, 2022.

Due to the Hearing dates scheduled, Respondents submitted a request for an extension of the Decision deadline, which was originally October 24, 2022, to December 8, 2022, and from December 8, 2022 to January 22, 2023. Petitioners had no objection to the request for an extension of the decision deadline. The Order Granting Respondents’ Request to Extend the 45-Day Decision Deadline was filed on September 15, 2022. The decision deadline was extended to January 22, 2023.

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 29, 2022. Present at the Hearing were Parent and Mr. Peck, on behalf of Petitioners; District Educational Specialist (hereinafter “DES”) and Mr. Roylo, on behalf of Respondents; this Hearings Officer; and the assigned court reporter.

Petitioners called Private School Director to testify and the Hearing continued to November 30, 2022, when Petitioners called DOE Board-Certified Behavior Analyst (hereinafter “DOE BCBA”) to testify. Petitioners presented Parent as their last witness on December 1, 2022 and rested their case-in-chief. On that same date, Respondents called Student Services Coordinator (hereinafter “SSC”) to testify. Due to scheduling issues, an additional day was added to for witness testimony, and the Hearing continued to December 6, 2022, when Respondents re-called DOE BCBA and also called Principal to testify, and Respondents rested their case. Petitioners did not have any rebuttal witnesses to present, so the Hearing concluded on December 6, 2022.

Each party submitted their exhibits for the Hearing by the disclosure deadline of November 21, 2022. The parties met and conferred regarding the proposed exhibits by November 28, 2022, and noted their objections to this Hearings Officer. Both parties were informed that any exhibits that were discussed or mentioned during the proceeding would be received for consideration in the Decision in this case, but that this Hearings Officer would allow the parties to propose additional exhibits after the Hearing was completed. On December 6, 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 December 14, 2022. Any objections to the proposed exhibits were due on December 16, 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 requested the following additional exhibits for

consideration in the Decision in this case. Respondents' Exhibit 21, pages 067-068; Exhibit 22, pages 069-075; Exhibit 23, page 076; Exhibit 25, page 078; Exhibit 27, pages 081-082; Exhibit 29, page 084; Exhibit 31, page 086; Exhibit 32, pages 087-088; Exhibit 38, page 104; Exhibit 39, page 105; Exhibit 43, page 112; Exhibit 48, page 119; Exhibit 51, page 122; Exhibit 54, page 125; Exhibit 56, page 127; Exhibit 57, page 128; Exhibit 59, page 130; Exhibit 60, pages 131-136; Exhibit 61, page 137; Exhibit 62, page 138; Exhibit 63, page 139; Exhibit 64, page 140; Exhibit 65, page 141; Exhibit 66, pages 142-145; Exhibit 67, page 146; Exhibit 68, page 147; Exhibit 69, pages 148-150; Exhibit 72, page 153; Exhibit 73, pages 154-155; Exhibit 74, page 156; Exhibit 76, page 158; Exhibit 77, page 159; Exhibit 78, pages 160-162; Exhibit 81, page 165; Exhibit 82, page 166; Exhibit 83, page 167; Exhibit 84, page 168; Exhibit 85, page 169; Exhibit 87, page 171; Exhibit 88, page 172; Exhibit 89, page 173; Exhibit 90, page 174; Exhibit 91, page 175; Exhibit 94, pages 178-179; Exhibit 95, page 180; Exhibit 97, pages 182-206; Exhibit 98, page 207; Exhibit 99, page 208; Exhibit 100, page 209; Exhibit 101, page 210; Exhibit 102, pages 211-212; Exhibit 103, page 213; Exhibit 104, page 214; Exhibit 105, page 215; Exhibit 106, page 216; Exhibit 107, page 217; Exhibit 108, page 218; Exhibit 110, page 220; Exhibit 111, page 221; Exhibit 112, page 222; Exhibit 113, page 223; Exhibit 114, page 224; Exhibit 115, page 225; Exhibit 116, page 226; Exhibit 117, page 227; Exhibit 118, page 228; Exhibit 119, page 229; Exhibit 120, pages 230-252; Exhibit 121, page 253; Exhibit 125, pages 269-272; Exhibit 126, pages 273-274; Exhibit 127, page 275; Exhibit 128, page 276; Exhibit 130, page 302; Exhibit 131, page 303; Exhibit 132, page 304; Exhibit 145, pages 326-327; Exhibit 146, page 328; Exhibit 154; and Exhibit 156. 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 December 23, 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 001-048; Exhibit 2, pages 049-054, 094, 148; Exhibit 3, pages 149-190; Exhibit 4, pages 239-295, and one (1) audio recording dated March 30, 2022.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 6-15, pages 006-060; Exhibits 18-19, pages 064-065; Exhibits 21-23, pages 067-076; Exhibit 25, page 078; Exhibit 27, pages 081-082; Exhibit 29, page 084; Exhibits 31-33, pages 086-089; Exhibit 35, pages 091-100; Exhibits 38-40, pages 104-109; Exhibit 43, page 112; Exhibits 45-49, pages 114-120; Exhibit 51, page 122; Exhibit 54, page 125; Exhibits 56-69, pages 127-150; Exhibits 72-74, pages 153-156; Exhibits 76-78, pages 158-162; Exhibits 81-91, pages 165-175; Exhibits 94-95, pages 178-180; Exhibits 97-108, pages 182-218; Exhibits 110-121, pages 220-253; Exhibits 125-128, pages 269-276; Exhibits 130-135, pages 302-310; Exhibits 138-139, pages 313-314; Exhibit 141, page 316; Exhibits 143-148, pages 320-331; and Exhibits 152-157, which consisted of six (6) video recordings dated August 3, 2021, October 26, 2021, November 24, 2021, January 19, 2022, March 9, 2022, and March 30, 2022.²

Both parties wanted the opportunity to submit written closing briefs regarding the legal issues with the use of the transcripts of the Hearing to this Hearings Officer for review. Based on the request by the parties for written closing briefs with the use of the transcripts,

² Based on this Hearing Officer's review of the audio file and video file submitted by Petitioners and Respondents, respectively, dated March 30, 2022, the audio submitted by Petitioners is a recording that was prepared by Parent and the video submitted by Respondents is the same meeting but with a video recording from the videoconferencing platform.

Respondents requested an extension of the deadline from January 22, 2023 to February 21, 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 December 14, 2022. The current decision deadline is now February 21, 2023. The deadline for the written closing briefs was set for January 6, 2023, and both parties timely submitted their written closing briefs by the deadline.

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 six (6) issues in the Complaint to be addressed at the Hearing that involve the individualized education program (hereinafter "IEP") meetings on January 19, 2022, March 9, 2022, and March 30, 2022, and the written IEP developed therefrom.

Issue 1 – Whether failing to include Student's current private program providers/personnel, during an IEP meeting and/or meetings, denied Student a free appropriate public education ("FAPE") in this case.

Issue 2 – Whether discussion of Student's Extended School Year (hereinafter "ESY") services appropriately addressed and/or whether the written IEP is appropriate regarding:

- a. Least restrictive environment (hereinafter "LRE")

- b. Frequency and/or duration of the program
- c. Speech-language services
- d. The need for an aide for Student

Issue 3 – Whether the ‘Supplementary Aids and Services, Program Modifications and Supports for School Personnel’ are sufficient and/or the discussions were 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 4 – Whether the discussion regarding the need for an aide for Student was adequate/sufficient.

Issue 5 – Whether the IEP describes the least restrictive environment for Student.

Issue 6 – Whether the IEP process denied Student a FAPE whether the DOE discussed and determined Student’s LRE prior to a discussion of the supplementary aids and services Student could potentially be provided.

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

Remedy 1 – Order the DOE to reimburse Parent for any private school tuition and related expenses that were paid, including costs of transportation and order the DOE to directly fund Student’s private program.

Remedy 2 – Order compensatory education if Parent is unable to provide all the services Student requires.

Remedy 3 – Order other equitable relief as appropriate.

IV. FINDINGS OF FACT

Witness background

1. Private School Director is a board-certified behavior analyst and speech-language pathologist and has been working in that capacity for over [REDACTED] years.

Private School Director has a bachelor's of science degree in communication sciences and disorders and a master's degree in speech-language pathology. Private School Director has consulted, guided, developed, and implemented applied behavior analysis (hereinafter "ABA") programs, with an emphasis in verbal behavior programs in both public and private schools, as well as hospital, clinic, and other settings. Testimony of Private School Director, Transcript of Proceedings, Volume 1, page 10, line 13, through page 12, line 8 (hereinafter referenced as "Tr.V1, 10:13-12:8"), Tr.V1, 20:10-24:5; Petitioners' Exhibit 3, page 189 (hereinafter referenced as "P-Ex.3, p.189").

2. Private School Director is the owner of Private School and was qualified as an expert witness in the areas of verbal behavior, the development of verbal behavior programs for children in schools, and generally in the field of ABA. Testimony of Private School Director, Tr.V1, 26:18-28:15.
3. 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. Testimony of DOE BCBA, Tr.V4, 275:21-281:18; Respondents' Exhibit 148, pages 330-331 (hereinafter referenced as "R-Ex.148, p.330-331").
4. DOE BCBA was qualified as an expert witness in the field of ABA and as a board-certified behavior analyst. Testimony of DOE BCBA, Tr.V4, 275:21-281:18.

5. SSC has a bachelor's degree in elementary education and a master's degree in special education and is licensed as a elementary education teacher and a special education teacher. SSC has been working as the student services coordinator at Home School for four (4) to five (5) years, and prior to that was a general education and special education teacher in Hawai'i. Testimony of SSC, Tr.V3, 87:1-88:19.
6. Principal has a bachelor of arts degree in history and a master's degree and a doctorate degree in education. Principal is licensed as an administrator in the State of Hawai'i and is the principal of Home School and has also worked as a vice principal of elementary schools in Hawai'i since 2015. Testimony of Principal, Tr.V4, 320:11-322:7.
7. ABA is the study of principles of behavior and how to modify the environment to change behaviors. Verbal behaviors is a field of ABA study that analyzes how verbal behaviors have to do with language, learning, and social skills. One of the tools frequently utilized in ABA verbal behavior programs is the Verbal Behavior Milestones Assessment and Placement Program (hereinafter "VB-MAPP"). Testimony of Private School Director, Tr.V1, 14:16-15:8, 23:12-25:21; Testimony of DOE BCBA, Tr.V2, 136:3-11, 137:20-138:20.
8. The VB-MAPP analyzes the development of skills in typically developing children through age four (4) to determine what skills children with disabilities may not have developed. The VB-MAPP uses a developmental hierarchy of skills needed to promote language, learning, and social skills. Testimony of Private School Director, Tr.V1, 34:1-12; 39:17-40:11.
9. The VB-MAPP has two (2) primary sections of the assessment: the milestones

assessment, which provides information about the skills the student may or may not have developed, and the barriers assessment, which provides information about impediments to learning that the student may have. *See e.g.* P-Ex.3, p.149-156; P-Ex.3, p.168-175; R-Ex.15, p.053-060.

10. A functional behavior assessment (hereinafter “FBA”) is an ABA tool used to determine the function of behavior, commonly used as a problem behavior reduction method. The FBA analyzes the antecedents that are present immediately before a behavior occurs, the behavior itself, and any consequences of the behavior to hypothesize the function or purpose of the behavior. Testimony of Private School Director, Tr.V1, 48:7-25; Testimony of DOE BCBA, Tr.V4, 283:9-14, 307:8-19.
11. Based on the results of the FBA, a behavior intervention plan (hereinafter “BIP”) can be developed for a student to address the student’s problem behaviors using theories under ABA. The BIP may be revised periodically based on the data collected on the progress or regression of the student and other information available to the board-certified behavior analyst using their expertise in the field of ABA. Testimony of DOE BCBA, Tr.V2, 144:22-145:7, 154:16-157:14.

Student’s background

12. Student is [REDACTED] years old and has been diagnosed with [REDACTED]. Student has been determined to be eligible for special education and related services under the IDEA. Testimony of Parent, Tr.V3, 25:4-8; P-Ex.1, p.002; R-Ex.13, p.025.
13. Student attended Home School for [REDACTED] from [REDACTED] through [REDACTED] and ESY program in the summer of [REDACTED]. On [REDACTED], Student was withdrawn from Home School and enrolled in a school run by Private School

Director. Student currently attends Private School, which is run by Private School Director. P-Ex.1, p.002; R-Ex.7, p.025.

14. Student's disability makes it difficult for Student to engage in programs for

[REDACTED]

[REDACTED]. Testimony of Parent, Tr.V3, 15:13-16:14.

15. For example, at a ski trip that Student's family went on, Student needed to have a private instructor and could not participate in a group lesson. Student also regularly has headphones to use if the sounds or situations around Student become too overwhelming. Testimony of Parent, Tr.V3, 15:13-20:9.

16. Student can communicate verbally without the use of any aids, such as an electronic device, a picture exchange communication system, or sign language. Testimony of Parent, Tr.V3, 61:11-62:2.

Prior Due Process Proceeding in DOE-SY2021-042

17. On May 24, 2021, Petitioners filed a Complaint and Resolution Proposal in DOE-SY2021-042 relating to an IEP that was developed through meetings on January 14 and 25, 2021 (hereinafter "IEP-01/25/2021"). The DOE-SY2021-042 Complaint alleged that Respondents denied Student a FAPE for the following reasons:

1. Whether the IEP-01/25/2021 is appropriate where the ESY portion of the Student's IEP:
 - a. Provides a special education-only placement with no non-disabled peers, and no discussion of Student's least restrictive environment LRE occurred during the ESY section of the IEP, but Student was provided a less restrictive placement for the school year program.
 - b. There was no discussion of the frequency (length of day) of ESY to individualize Student's program for this period of time.
2. Whether the IEP-01/25/2021 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

to address Student's needs in the Supplementary Aids section of the IEP.

3. Whether the IEP-01/25/2021 is appropriate where the current (privately-provided) classroom supports/accommodations were not discussed where Parent repeatedly stated that these supports were essential to Student's success in Student's current program and if Student were to change from the current private program to a public program; a new environment and distinct supports (program). Also, whether the supplementary supports are insufficient, substantively, for Student to succeed where no assistive technology and other important supports are not described in the IEP offer.

4. Whether the IEP-01/25/2021 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.

5. Whether during the meetings on January 14, 2021 and January 25, 2021, Parent was promised a Registered Behavior Technician (hereinafter "RBT") for 2055 minutes per week but the written IEP-01/25/2021 and prior written notice provides contradictory statements that Parent cited as issues needing clarity when Parent received the written IEP but Parent's concerns went unaddressed. These included:

- a. Clarification of Services and Supports: "Placement will be in a classroom with at least 1 personnel trained in ABA strategies.
- b. "BCBA to provide consultation, Applied Behavior Analysis (ABA) intervention, placement in a classroom with at least 1 personnel trained in ABA strategies, Program RBT."

6. Whether the IEP-01/25/2021 is appropriate where there was no discussion of transportation as a potentially needed related service.

See P-Ex.4, p.243-244.

18. In August 2021, a due process hearing was held in DOE-SY2021-042 before this Hearings Officer. This Hearings Officer reviewed all the exhibits submitted by the parties, the testimony of the witnesses at the hearing, and arguments made by counsel. Based on the evidence and argument presented at the due process hearing, this Hearings Officer rendered the Decision in DOE-SY2021-042 on October 6, 2021. P-Ex.4, p.239-295.

19. In the Decision, this Hearings Officer found that the DOE denied Student a FAPE by failing to discuss the details of the ESY services and appropriate behavior interventions for Student and by failing to put such details and/or necessary supports

into Student's IEP-01/25/2021. This Hearings Officer further found that Private School was an appropriate placement for tuition reimbursement for Student and awarded payment of Private School's tuition to Petitioners for the 2021-2022 school year. P-Ex.4, p.293-294.

Correspondence leading up to the IEP team meetings

20. As early as June 15, 2021, SSC contacted Private School Director regarding scheduling IEP meetings and requesting information about Student's progress and any assessments completed by Private School. R-Ex.18, p.064; R-Ex.19, p.065.
21. On June 28 and July 1, 2021, Private School Director responded to SSC and provided some information in response to SSC's questions about the data that Private School had sent to Home School. R-Ex.21, p.067-068; R-Ex.22, p.069-075.
22. On July 2 and 8, 2021, SSC attempted to get confirmation of possible meeting dates at which Private School Director could attend the meeting and also requested observations of Student by both SSC and another DOE board-certified behavior analyst. R-Ex.25, p.078.
23. After email communications with Parent and Private School Director, both confirmed with SSC that they could attend an IEP meeting on August 3, 2021. R-Ex.27, p.081-082.
24. SSC sent email requests for assessments, data, and other information for Student in anticipation of the August 3, 2021 IEP meeting to Private School Director. Private School Director provided Student's updated individualized ABA education plan (hereinafter "IAEP") dated July 15, 2021 (hereinafter "IAEP-07/15/2021") on July 28, 2021. R-Ex.29, p.084; R-Ex.31, p.086; R-Ex.33, p.089; R-Ex.35, p.091-100.

25. SSC conducted an observation of Student at Private School on July 26, 2021. The observation was for forty-five (45) minutes and was conducted by SSC watching Student through a live video feed. After the forty-five (45) minute period, the video feed was shut off. R-Ex.32, p.087-088.
26. Between September 8, 2021 and September 21, 2021, DOE BCBA contacted Private School Director to set up interviews with either Student's teachers or support staff at Private School or with Private School Director as part of DOE BCBA's FBA. Testimony of DOE BCBA, Tr.V4, 286:17-289:19; R-Ex.45, p.114; R-Ex.46, p.115; R-Ex.49, p.120; R-Ex. 51, p.122.
27. Private School Director did not agree to a meeting with DOE BCBA for Student's DOE FBA and instead told DOE BCBA that since Private School was conducting their own FBA for Student, two (2) FBAs were not necessary. R-Ex.60, p.131-136.
28. Since neither Private School Director nor anyone else from Private School would meet with DOE BCBA for the DOE FBA, DOE BCBA set up an interview with Parent to get the information that was necessary for the FBA. Testimony of DOE BCBA, Tr.V4, p.23-291:3; R-Ex.6, p.8-9; R-Ex.56, p.127; R-Ex.65, p.141-145; R-Ex.67-68, p.146-147; R-Ex.73, p.154-155.
29. SSC, Parent, and Private School Director had further communications regarding scheduling of an IEP meeting in September/October 2021. An IEP meeting was eventually confirmed with Parent and Private School Director and held on October 26, 2021. R-Ex.47, p.116-118; R-Ex.48, p.119; R-Ex.54, p.125; R-Ex.59, p.130; R-Ex.61-64, p.137-140; R-Ex.69, p.148-150; R-Ex.72, p.153.
30. After the October 26, 2021 IEP meeting, SSC continued to communicate with Parent

- and Private School Director regarding possible meeting dates for a continued IEP meeting to complete Student's IEP. A meeting was scheduled for November 24, 2021. R-Ex.74; p.156; R-Ex.76, p.158.
31. On November 12, 2021, SSC informed Parent that since the FBA was completed by DOE BCBA, the team needed to have an eligibility meeting to review the FBA. The meeting on November 24, 2021 was changed from an IEP development meeting to an eligibility meeting. Parent was sent the completed DOE FBA by SSC on November 17, 2021 and again on November 22, 2021. Private School Director was sent the completed DOE FBA on November 23, 2021. R-Ex.77-78, p.159-162; R-Ex.84, p.168; R-Ex.87, p.171.
32. Prior to the November 24, 2021 meeting, SSC attempted to coordinate new dates for an IEP development meeting with Parent and Private School Director. A copy of a draft IEP was sent to both Parent and Private School Director on January 14, 2022. An IEP meeting was eventually confirmed and held on January 19, 2022. R-Ex.81-83, p.165-167; R-Ex.85-86, p.169-170; R-Ex.89-91, p.173-175; R-Ex.94, p.178-179; R-Ex.95, p.180; R-Ex.97, p.182-206.
33. After the January 19, 2022 meeting, SSC again coordinated with Parent and Private School Director through email for new IEP development meeting dates. After some scheduling difficulties, Parent let SSC know that Parent would be willing to attend the IEP meeting without Private School Director being present. A meeting was eventually scheduled for and held on March 9, 2022. R-Ex.99-102, p.208-212; R-Ex.104, p.214; R-Ex.105-106, p.215-216; R-Ex.108, p.218; R-Ex.111-113, p.221-223; R-Ex.127, p.275.

34. SSC also sent a request for information, assessments, and/or other data to Private School Director on January 28, 2022 and followed up with Private School Director on the request on February 7, 2022, February 9, 2022, February 17, 2022, February 28, 2022, and March 7, 2022. Private School Director provided SSC updated information for Student in the evening of March 7, 2022. R-Ex.103, p.213; R-Ex.107, p.217; R-Ex.110, p.220; R-Ex.114, p.224; R-Ex.117, p.227; R-Ex.121, p.253; R-Ex.125, p.296-272.
35. A copy of the draft IEP was sent to both Parent and Private School Director on March 7, 2022 for the meeting on March 9, 2022. R-Ex.120, p.230-252.
36. SSC was able to do another observation of Student at Private School for thirty (30) minutes on March 8, 2022. R-Ex.126, p.273-274.
37. On March 10, 2022, SSC reached out to Private School Director to see if Private School Director would be able to attend a continued IEP development meeting on March 30 or 31, 2022. SSC also requested that Private School Director provide Home School with a list of supplementary aids and services that Student receives at Private School. R-Ex.128, p.276.
38. The continued IEP development meeting was later confirmed to accommodate Parent's schedule for March 30, 2022 and Private School Director was invited to attend the meeting by SSC on March 21, 2022. Private School Director informed SSC that Private School was on spring break but provided the list of supplementary aids and services to SSC. R-Ex.133-134, p.305-308.
39. SSC followed up with Private School Director for additional information and details on some of the items listed in the list sent by Private School Director on March 23,

2022 and Private School Director responded to SSC's request for additional information and details on March 30, 2022. Private School Director notified SSC that Private School Director was unable to attend the March 30, 2022 IEP meeting on March 29, 2022. R-Ex.135, p.309-310; R-Ex.138-139, p.313-314.

2021 IEP and other team meetings

40. On August 3, 2021, the IEP team met virtually via videoconference to review Student's IEP and address Parent's concerns. Present at the meeting was Parent, Mr. Peck, Private School Director, Mr. Roylo, DES, Principal, SSC, DOE BCBA, Special Education Teacher (hereinafter "SPED Teacher"), General Education Teacher (hereinafter "GE Teacher"), Speech-Language Pathologist (hereinafter "SLP"), Occupational Therapist (hereinafter "OT"), and a district resource teacher. R-Ex.39, p.105; R-Ex.152, video recording dated August 3, 2022 at approximate time stamp [00:00-01:05] (hereinafter referenced as "R-Ex.152, 08/03/2022 [00:00-01:05]").
41. At the August 3, 2021 meeting, Private School Director needed to leave the meeting early. By agreement of the Parent and Mr. Peck, the IEP team started reviewing just the sections of the draft IEP for which Private School Director could provide information. The team discussed Student's present levels of educational performance (hereinafter "PLEPs")³ and requested any updates or additional information that Private School Director could provide. R-Ex.152, 08/03/2022 [12:08-37:28].
42. Private School Director provided information and updates regarding Student's PLEP

³ This Hearings Officer notes that the current terminology for a student's levels of performance is the present levels of academic achievement and functional performance (PLAAFP); however, the Hawai'i DOE's IEP forms and teams use the term PLEP, so it will be referenced in this Decision as PLEPs for consistency.

- in reading and the supplementary aids and supports that Student receives at Private School before Private School Director had to leave the meeting. R-Ex.152, 08/03/2022 [12:08-37:28].
43. On October 26, 2021, the IEP team met again virtually via videoconference to review Student's IEP. Present at that meeting were all the participants from the August 3, 2021 meeting except for DES, who was not present. R-Ex.153, October 26, 2021 video recording, approximate time stamp [00:00-00:56] (hereinafter referenced as "R-Ex.153, 10/26/2021 [00:00-00:56]").
44. At the October 26, 2021 IEP meeting, the IEP team continued reviewing Student's PLEPs and got updates from both Private School Director and Parent in the areas of reading, occupational therapy (fine motor and sensory), math, social skills, behavior, communication, and functional skills. The team also got updated information about Student's current interests and preferred items and/or activities. R-Ex.153, 10/26/2021 [05:49-1:50:05].
45. Using the IEP team's previous information and the updated information from Private School Director and Parent, the IEP team then reviewed Student's goals and objectives for the IEP. After thorough discussion, the team agreed with the goals and objectives in the draft IEP, with some modifications, except for the communication goals and objectives, which SLP was going to revise based on the information provided by Private School Director. R-Ex.153, 10/26/2021 [1:50:33-2:20:56].
46. The IEP team then moved on to discussing Student's eligibility for ESY and it was agreed by the team that Student was eligible for ESY services based on the nature and severity of Student's disability. R-Ex.153, 10/26/2021 [2:21:07-2:28:12].

47. The discussion moved to determining the number of days Student would be on break before receiving ESY services. After receiving input from Private School Director on Student's regression and ability to recoup skills after extended breaks from school, the team agreed that Student would be eligible for ESY services after a ten (10) day break from school. R-Ex.153, 10/26/2021 [2:29:21-2:40:22].
48. Due to time limitations, the IEP team meeting ended after the determination of the ten (10) day break for ESY services and another meeting was to be scheduled after coordination of schedules by the IEP team members, including Parent and Private School Director. R-Ex.153, 10/26/2021 [2:40:23-2:43:19].
49. On November 24, 2021, an eligibility meeting was held to review the FBA that was completed by DOE BCBA on November 17, 2021. Present in the videoconference eligibility meeting was Parent, SSC, Principal, DOE BCBA, SLP, SPED Teacher, OT, and GE Teacher. R-Ex.154, video recording dated November 24, 2021, approximate time stamp [00:00-01:48] (hereinafter referenced as "R-Ex.154, 11/24/2021 [00:00-01:48]").
50. At the meeting, DOE BCBA reviewed the completed FBA with the team and noted the recommendations for Student was to have a behavior intervention plan (hereinafter "BIP") that would be implemented throughout Student's school day by a registered behavior technician (hereinafter "RBT"). The DOE FBA had also suggested goals for Student's IEP to focus on Student's problem behaviors. R-Ex.6, p.013-014; R-Ex.154, 11/24/2021 [07:08-09:18].
51. After reviewing the DOE FBA, the team members discussed Student's eligibility for special education and related services under the IDEA, and the team unanimously

agreed that Student would continue to be eligible for IDEA special education and related services under the category of Disability. R-Ex.154, 11/24/2021 [09:50-19:15].

Student's DOE FBA

52. The FBA conducted by DOE BCBA with Student included a review of Student's educational and other records, an interview with Parent, three (3) assessments, and one (1) direct observation of Student at Private School. R-Ex.6, p.007-010.
53. The DOE FBA focused on one (1) problem behavior with Student, labeled as "tantrum" and defined as "[t]antrums include screaming (e.g., raising voice above noise level in room), laying on the ground (out of context of on-going situation), kicking, and spitting. The episode is counted if any of the aforementioned behaviors last for more than 5 seconds or more and is counted as a new incident if separated by one or more minutes. R-Ex.6, p.012.
54. The DOE FBA had three (3) long-term goals with short-term objectives to address Student's tantrum behaviors. R-Ex.6, p.014.

Private School's FBA

55. Private School also conducted an FBA with Student in November 2021. The Private School FBA was conducted by Private School Director and included Student's educational history and background information from Private School, a previous VB-MAPP assessment from June 2021 conducted at Private School, an assessment, and three (3) observations of Student at Private School. P-Ex.3, p.160-167.
56. Private School's FBA also focused on a single problem behavior of Student, also labeled "tantrum" and defined as "any occurrence of the following for any period of

- time: lying on the floor when doing so is not part of the class activity, crying: any vocalizations accompanied by facial contraction with and without tears, screaming: occurrence of vocalizations above normal conversational volume.” P-Ex.3, p.162.
57. Private School’s FBA had two (2) ABA objectives for addressing the target behavior of “tantrum” for Student’s school plan. P-Ex.3, p.166-167.

2022 IEP meetings

58. On January 19, 2022, the IEP team met virtually via videoconference after Student had been determined to be eligible for IDEA special education and related services to review and develop Student’s IEP. Present at the IEP meeting were Parent, Private School Director, Principal, DOE BCBA, DES, OT, GE Teacher, SLP, and SSC. R-Ex.155, January 19, 2022 video recording, approximate time stamp [00:00-00:55] (hereinafter referenced as “R-Ex.155, 01/19/2022 [00:00-00:55]”).
59. During the IEP meeting on January 19, 2022, the draft IEP and other documents that were discussed during the meeting were displayed using the shared screen feature on the videoconference application that the team used to hold the meeting. The participants of the meeting could see the documents being shared using the function. *See generally* R-Ex.155, 01/19/2022.
60. At the January 19, 2022 meeting, the IEP team reviewed Student’s PLEPs that were drafted at the August and October 2021, and asked Private School Director and Parent to give updates as to Student’s current levels and any progress that Student has made since the meeting in October 2021. R-Ex.155, 01/19/2022 [08:15-1:08:58].
61. Private School Director and Parent were able to provide updates for Student’s PLEPs in the areas of reading, fine motor, sensory, and toileting skills before the team

- needed to end the meeting due to time constraints. R-Ex.155, 01/19/2022 [08:15-1:08:58].
62. The IEP team met again through videoconference on March 9, 2022. Present at the meeting were Parent, SSC, SLP, GE Teacher, OT, DES, DOE BCBA, and Principal. R-Ex.156, March 9, 2022 video recording, approximate time stamp [00:16-00:56] (hereinafter referenced as “R-Ex.156, 03/09/2022 [00:16-00:56].
63. On March 7, 2022, the IEP team received updated information from Private School Director regarding Student’s progress as of that date to be used for the IEP meeting. The IEP draft that the team reviewed during the meeting had been updated to include the information received from Private School. R-Ex.156, 03/09/2022 [03:23-05:38].
64. At the March 9, 2022 IEP meeting, DES used the shared screen function to display a working draft IEP, where changes could be made on the language of the IEP during the meeting so the team could see the changes as they were being made. This function allowed the team to see DES typing the information onto the draft document while the team was discussing the specific areas of the IEP. Testimony of Parent, Tr.V3, 67:6-18; *see* R-Ex.156, 03/09/2022.
65. The IEP team began the meeting by reviewing what was discussed at the last meeting on January 19, 2022. The team then moved on to discuss Student’s PLEPs in the areas of math, social skills, behavior, functional skills, and toilet training. The team reviewed the previous PLEPs to determine if older information should be removed from the draft IEP since the team had updated information from Private School. Changes were agreed upon and made during the meeting. *See* R-Ex.156, 03/09/2022.
66. During the discussions of Student’s PLEPs, Parent was asked to and provided a great

- deal of information to the IEP team members about Student's abilities, as well as Parent's concerns, especially in the areas of math, social skills, behavior, functional skills, and toileting. R-Ex.156, 03/09/2022 [03:23-1:39:00].
67. For the behavior section of Student's PLEPs, Parent raised additional concerns about new problem behaviors that Student was displaying at home, even though it was not noted in Private School's update. A lengthy discussion was held primarily between Parent, Principal, and DOE BCBA regarding ways to address Student's behaviors, and changes were made to the IEP draft immediately after the IEP team discussed them. R-Ex.156, 03/09/2022 [25:45-53:39].
68. This discussion of Student's behaviors also extended into the review of the communication PLEPs, as one of Student's emerging problem behaviors was to ask "why" every time Student was instructed to do things at home, like brushing Student's teeth. R-Ex.156, 03/09/2022 [56:59-1:04:10].
69. The team also extensively discussed Student's functional skills, including getting dressed, Student's sensory needs, and toileting skills, and added that information into the IEP PLEPs section. R-Ex.156, 03/09/2022 [1:05:10-1:39:50].
70. Parent was able to update the IEP team regarding Student's current interests before the team reviewed the draft goals and objectives that were prepared at the October 2021 IEP meeting. Parent provided an update for Student's occupational therapy goal and objectives and OT agreed to make changes to the goal and objectives based on Parent's update. R-Ex.156, 03/09/2022 [1:41:05-1:51:22].
71. Other goals and objectives were reviewed, and the team got into a discussion about Student's social skills goals and that Parent wanted to have a goal to address the need

for Student to learn safety skills. The IEP team discussed Parent's concerns and due to time constraints, decided that it would be discussed at the next IEP meeting.

Parent did note that since Student would likely be receiving the services of a one-to-one aide in the form of an RBT, it was not as big of a concern for Parent. R-Ex.156, 03/09/2022 [2:22:58-2:45:01].

72. The IEP team's final meeting to review and develop Student's IEP was held on March 30, 2022. Present at the meeting were Parent, SSC, SLP, GE Teacher, OT, DES, Principal, and DOE BCBA. R-Ex.157, March 30, 2022 video recording, approximate time stamp [00:25-00:57] (hereinafter referenced as "R-Ex.157, 03/30/2022 [00:25-00:57]").⁴

73. At the March 30, 2022 meeting, the IEP team quickly reviewed what was discussed at the March 9, 2022 meeting and moved onto the IEP goal and objectives that address Student's tantrum behavior, since that was where the team left off at the last meeting. DOE BCBA discussed the goals and objectives that came from the FBA that DOE BCBA conducted in November 2021. R-Ex.157, 03/30/2022 [01:13-06:53].

74. The team reviewed the IEP goals and objectives for speech-language, Student's eating protocols, and other goals and objectives. At the end of the discussion, none of the team members, including Parent, had any questions, concerns, or objections to the goals and objectives that were reviewed by the team. R-Ex.157, 03/30/2022 [07:00-11:42].

⁴ This Hearings Officer notes that although Petitioners' audio and Respondents' video recordings are very similar, Respondents' video recording is being used for reference in large part because the video shows the shared screen feature that the team was using to make real-time changes while the IEP team was discussing parts of the IEP.

75. The IEP team reviewed Student's prior IEP for the special education and related services that the team had proposed previously and discussed whether any changes needed to be made to the number of service minutes for the special education, speech-language, and occupational therapy minutes. Parent noted that Parent had no objection to the minutes at the time of the meeting but wanted to review the completed IEP in its entirety before making a final decision. The IEP team agreed with Parent's position and no changes were made to the special education, speech-language, and occupational therapy services minutes to be provided to Student under the new IEP. R-Ex.157, 03/30/2022 [12:04-18:52].
76. DES noted to Parent that the IEP would be post-dated with services to begin at a later date to allow time for Parent to receive the completed documents and make a decision about the IEP team's offer. R-Ex.157, 03/30/2022 [17:51-18:45].
77. The IEP team discussed transportation as a service to Student and based on Parent's statement that Student did not need transportation at that time, the team did not include transportation as a related service for Student. The team did remind Parent that if transportation was needed at a later time, Parent could let the IEP team know and they could discuss it at a future meeting. R-Ex.157, 03/30/2022 [19:45-22:55].
78. The IEP team then discussed the proposed supplemental aids and supports that would address Student's needs. The discussion began by a review of what was offered in the previous IEP and clarifications were made by DOE BCBA and other team members. The IEP team also reviewed the list that was provided by Private School of supplemental supports that was offered to Student at Private School to see whether any of those supports should be included in Student's IEP. After discussion, the team

decided to include some of the supports on the list. R-Ex.157, 03/30/2022 [44:10-54:07].

79. During the discussion, DOE BCBA suggested to the team that if the IEP offer is accepted by Parent, the team would need to meet again to create a transition plan for Student to transition from Private School to Home School, and that DOE BCBA would try to replicate as much of Private School's schedule, techniques, and other tools and supports to provide Student with a smooth transition to Home School. But DOE BCBA noted that the information from Private School was incomplete at this point and they would need to get more detailed information from Private School for that to occur.⁵ R-Ex.157, 03/30/2022 [48:40-57:58].

80. SSC informed the team that Private School Director had emailed SSC a response to SSC's inquiry about the specifics of the program that Private School uses with Student. DOE BCBA noted that the information was still too vague, and that more information was needed from Private School before a transition were to occur. Parent suggested that DOE BCBA reach out to speak with Private School Director to get more information. R-Ex.157, 03/30/2022 [54:07-59:19].

81. The team reviewed the proposed supplementary aids and supports that had been discussed and DES updated the draft IEP during the discussion. Parent expressed

⁵ DOE BCBA informed the IEP team that they would want to have specific details into the program that Private School is implementing, such as how many tokens are used for Student's token economy before a reward is provided to Student; what kinds of tasks Student is working on at the time of the transition for 'task analysis,' what types of icons or pictures are being used at Private School for Student's visual schedule, how the timers and visual aids are used, and what specific items or rewards Private School is using to motivate or positively reinforce Student at the time of the transition. R-Ex.157, 03/30/2022 [48:40-54:07]. Private School Director testified that this type of information is constantly changing based on how Student is doing at the time. Testimony of Private School Director, Tr.V1, 44:7-16, 53:5-56:19.

- concern about Student's exposure to non-disabled peers being addressed in the IEP, so the team moved the discussion onto determining Student's educational placement. R-Ex.157, 03/30/2022 [59:24-1:11:11].
82. Parent expressed concern about Student currently being in a contained environment with a small number of peers to moving to a public-school environment and noted that Parent wanted to keep Student in as similar an environment at Home School as Student currently had with Private School. R-Ex.157, 03/30/2022 [1:13:59-1:14:12].
83. Parent noted to the IEP team that Parent's greatest concern is that if Student is overwhelmed by Home School's setting, for example if Student is thrown into the general education population without transition or supports, then Student may withdraw and not want to try socializing anymore or the Home School campus might become an adverse place for Student like Student's previous school setting became. R-Ex.157, 03/30/2022 [1:21:54-1:30:12].
84. The IEP team discussed keeping Student in a fully self-contained special education classroom (hereinafter "FSC") setting, which would be most similar to Student's current environment at Private School. The team had extensive discussion on how Student could have opportunities to engage with nondisabled peers through a slow process to introduce Student in a non-overwhelming fashion. R-Ex.157, 03/30/2022 [1:14:13-1:40:15].
85. The IEP team proposed having Student in a FSC setting with Student having the support of the RBT and access to nondisabled peers at lunch and recess, and preferred activities as tolerated by Student. The team discussed several preferred areas of interest that Student may want to engage with nondisabled peers (music, PE, outdoor

- field trips, assemblies with singing were discussed). Parent did agree with the “as tolerated” language to ensure that Student would not be averse to the situation. R-Ex.157, 03/30/2022 [1:43:33-1:50:22].
86. Parent requested that the team be able to ‘scale back’ the inclusion opportunities if it turns out that Student does not tolerate them and the team reminded Parent that Parent can call an IEP meeting at any time to revisit and discuss Parent’s concerns. R-Ex.157, 03/30/2022 [1:50:22-1:51:44].
87. After the discussion regarding Student’s LRE, the IEP team discussed Student’s eligibility for ESY services. The team reviewed information provided to the team at the October 2021 meeting from Private School Director and got input from Parent about Student’s regression and recoupment after returning to school from breaks. Based on the discussion, the team determined that Student was eligible for ESY services due to the nature and severity of Student’s disability and the regression and difficulty recouping skills related to Student’s behavior after breaks in school. R-Ex.157, 03/30/2022 [1:53:35-2:16:49].
88. The team then moved on to a lengthy discussion about the nature of Student’s ESY services and reviewed the goals that Student would be working on during ESY sessions, the length of the ESY day for Student, and the team revisited the number of days of break before Student received ESY services. Based on the discussion and Parent’s concerns, the team decided to change the IEP to shorten the break from ten (10) days to five (5) days before Student would receive ESY. R-Ex.157, 03/30/2022 [1:52:50-2:19:21].
89. The discussion for ESY services for Student also focused on the length of day for

- Student and the team agreed that a four (4) hour session for ESY was appropriate to work on maintaining Student's skills while still allowing Student to enjoy a break from school. The team also determined that Student would receive occupational therapy and speech therapy consults at the beginning and in the middle of ESY to address Parent's concerns that someone would be responsible for monitoring Student's skill maintenance during ESY. R-Ex.157, 03/30/2022 [2:20:04-2:38:27].
90. The IEP team determined that Student would receive the services of an RBT throughout the ESY school day and the board-certified behavior analyst services would be at five percent (5%) supervision hours, similar to what was provided during the regular school year. R-Ex.157, 03/30/2022 [2:03:15-2:04:22], [2:22:19-2:37:20].
91. Finally, the IEP team discussed the access to nondisabled peers that Student could have during certain ESY sessions (specifically the summer ESY session), such as setting Student up in a buddy program during the summer with nondisabled children that attend a private summer program hosted at Home School. R-Ex.157, 03/30/2022 [2:20:04-2:28:47].
92. Parent agreed with the discussion and decision that the team had reached but still wanted time to review the completed IEP before making a decision. Parent also shared a concern about someone monitoring Student's progress during ESY to ensure that Student is not regressing. The IEP team added in a daily communication log with Parent and occupational therapy and speech-language consultation services in the middle of ESY to make sure that Student is on track. Parent agreed with the additions to address Parent's concerns. R-Ex.157, 03/30/2022 [2:29:40-2:38:27].
93. The IEP team briefly discussed a school shut-down contingency plan but noted that

the discussion would be more appropriate at a transition planning meeting if Parent accepted Home School's IEP offer so the discussion was postponed to that time. R-Ex.157, 03/30/2022 [2:39:10-2:41:30].

94. The IEP team determined that they had completed Student's IEP and that the written IEP and prior written notice (hereinafter "PWN") would be sent to Parent for Parent to review with Parent's attorney and let Home School know if Parent would be accepting Home School's IEP offer. Parent did not express any additional questions or concerns to the team at the end of the March 30, 2022 IEP meeting. R-Ex.157, 03/30/2022 [2:38:39-2:42:04].

Student's IEP-03/30/2022

95. The written IEP from the January 19, 2022, March 9, 2022, and March 30, 2022 meetings (hereinafter referenced as "IEP-03/30/2022") and PWN for the IEP-03/30/2022, dated April 4, 2022 (hereinafter "PWN-04/04/2022") were sent to Parent on April 4, 2022. R-Ex.141, p.316.
96. Student's IEP-03/30/2022 was twenty-six (26) pages long and included the changes made and language proposed in the IEP meetings. P-Ex.1, p.001-026; R-Ex.13, p.024-049.
97. The IEP-03/30/2022 PLEPs section included information from Parent provided at the meetings, information from Student's VB-MAPP conducted by Private School in July 2021, updates from Private School as of March 7, 2022, and the FBA by DOE BCBA in November 2021. P-Ex.1, p.002-007; R-Ex.13, p.025-030.
98. Student's IEP-03/30/2022 included eleven (11) goals and objectives, which included one (1) social skills goal involving play with peers, two (2) goals aimed at having

- Student transition in school and participate in academic activities, one (1) toileting goal, three (3) goals taken from DOE BCBA's FBA, and one (1) eating protocols goal. *See* P-Ex.1, p.012-018, 020; R-Ex.13, p.035-041, 043.
99. The ESY section of the IEP-03/30/2022 clearly explains the reasons that the IEP team used to determine Student's eligibility for ESY; the five (5) day break before Student is eligible for ESY services; the specific dates that Student would receive for summer and winter breaks in 2022, and spring break in 2023; the services that Student will receive during ESY, including occupational therapy and speech-language consultations at the beginning and middle of ESY; the RBT and board-certified behavior analyst services that Student will receive throughout ESY, and the opportunities that Student will have to interact with non-disabled peers during ESY, as discussed during the IEP meetings. P-Ex.1, p.021; R-Ex.13, p.044.
100. Student's IEP-03/30/2022 provides Student with one thousand eight hundred thirty (1830) minutes per week (which is the entire school week) of special education, three hundred sixty (360) minutes per quarter of speech-language therapy, and one hundred thirty-five (135) minutes per quarter of occupational therapy. P-Ex.1, p.021; R-Ex.13, p.044.
101. The supplementary aids and supports in the IEP-03/30/2022 includes Individual Instructional Support (hereinafter "IIS") for two thousand fifty-five (2055) minutes per week,⁶ ABA services for one hundred five (105) minutes per week, an emergency action plan for Student's medical condition, a sensory diet, the BIP, a token economy,

⁶ Per the IEP team's discussions at the meeting, the two thousand fifty-five minutes accounting for having the individual instructional support being present before school for drop-off and after school for pick-up. R-Ex.157, 03/30/2022 [25:49-33:00].

- writing utensil adaptations, spring-loaded scissors, a visual schedule, the use of first/then statements, and a daily school to home communication log. P-Ex.1, p.022; R-Ex.13, p.045.
102. The clarifications of supplementary aids and supports clarifies that “ABA services include those of a BCBA to conduct the following activities, including but not limited to designing, monitoring and updating the BIP, supervising the individual(s) (RBT) implementing the BIP, monitoring data collection and analyzing data, preparing reports and other documents, and attending meetings. Sensory Diet includes daily movement and sensory feeding approach to increase food acceptance.” P-Ex.1, p.022, R-Ex.13, p.045.
103. The educational placement or ‘least restrictive environment’ statement for Student’s IEP-03/30/2022 states:
- “[Student] will be placed in a fully self contained special education classroom and will not be with nondisabled peers except for the following circumstances: [Student] has Individual Instructional Support throughout the day during academic and non academic times. [Student] will be able join nondisabled peers during lunch and recess. [Student] will join [Student’s] non disabled peers for preferred activities such as music, field trips, PE, assemblies or presentations particularly those involving music, as tolerated.” P-Ex.1, p.023; R-Ex.13, p.046.
104. The PWN-04/04/2022 summarized the IEP offer for Student from Home School and further clarified some of the supplementary aids and supports, including clarifying that the IIS would be an RBT working under the supervision of the board-certified behavior analyst. P-Ex.1, p.044-046.
105. On June 1, 2022, SSC contacted Parent to inquire whether Student would be enrolling at Home School for the ESY session that was provided in Student’s IEP-03/30/2022. R-Ex.143, p.320.

106. On June 14, 2022, Principal followed up with a letter received by Parent via certified mail on June 17, 2022 regarding Student's offer for ESY services at Home School pursuant to the IEP-03/30/2022. R-Ex.144, p.321-325.
107. Parent did not respond to either inquiry from SSC or Principal and did not enroll Student in the summer ESY program offered by Home School pursuant to Student's IEP-03/30/2022. Parent also did not contact Home School to express any concerns about Student's IEP-03/30/2022 and filed the Complaint and Resolution Proposal on August 10, 2022. Testimony of Parent, Tr.V3, 46:8-49:17.

Private School

108. Private School is a for-profit school licensed by the Hawai'i Council of Private Schools and utilizes an ABA VB-MAPP-based program for the students that attend. Private School currently has [REDACTED] enrolled students, and no nondisabled students attend Private School as students. Testimony of Private School Director, Tr.V1, 26:18-27:13, 31:17-41:15, 85:6-13.
109. Private School conducted a VB-MAPP with Student in April 2021 and provided the results of the assessment, along the IAEP-07/15/2021, to Home School on July 28, 2021. R-Ex.15, p.053-060; R-Ex.35, p.091-100.
110. Student's IEP-03/30/2022 included information from the IAEP-07/15/2021 throughout the PLEPs section.⁷ See P-Ex.1, p.002-007; R-Ex.13, p.025-030.
111. In April 2022, another VB-MAPP assessment was conducted with Student by Private

⁷ For example, the reading section cites to results taken from the April 2021 VB-MAPP milestones assessment; the social skills section includes a lengthy summary of Student's abilities from the VB-MAPP milestones assessment; the behaviors section includes results from the VB-MAPP barriers assessment; and the functional skills section includes a section on toileting that notes the results from the VB-MAPP milestones assessment.

- School. These results were included in an IAEP dated June 2022 (hereinafter “IAEP-06/2022”). Testimony of Private School Director, Tr.V1, 32:16-39:16; P-Ex.3, p.149-156.
112. Student’s VB-MAPP results show that Student had slight improvement in some areas of the milestones assessment, specifically in the areas of manding (asking or protesting), visual perceptual skills and matching-to-sample, social skills and social play, intraverbal, group skills, linguistic skills, and writing. Student stayed at the same level for the other areas of the assessment. P-Ex.3, p.150.
113. The results of Student’s VB-MAPP barriers assessment show that Student’s barriers all remained at the same levels as the VB-MAPP completed in April 2021. Student had several barriers scores at zero in both April 2021 and April 2022 assessments. P-Ex.3, p.151.
114. Student’s IAEP-06/2022 contained fourteen (14) target behaviors and objectives based on the VB-MAPP. Some of these target behaviors and objectives included “manding” and “tacting,” both of which involve Student speaking since Student is verbal and communicates orally; independent play, social behavior and play, classroom routines and group skills, reading, writing, math, and feeding. P-Ex.3, p.152-153.
115. Private School had provided Home School with a list of supplemental supports that Student was receiving at Private School for the 2021-2022 school year prior to the 2022 IEP meetings. Private School also has a list of supplemental supports for the 2022-2023 school year. The list of supplemental supports for the 2022-2023 school year was not provided to the IEP team during the development of the IEP-03/30/2022

due to it being completed after the IEP meetings were completed. Testimony of Private School Director, Tr.V1, 98:7-99:9; P-Ex.3, p.157.

116. The 2022-2023 school year supplemental supports list from Private School includes math manipulatives, broken crayon for writing tasks, soft grip and spring loaded scissors, a token system, a first-then system, a visual schedule, visual aids, timers, RBT daily/weekly rotation for generalization, a consistent one-to-one RBT trained in verbal behaviors and Student's program, access to preferred sensory items and activities, parent communication books, preparation for upcoming transitions, and reverse inclusion opportunities. P-Ex.3, p.157.
117. At Private School, Student participates in a reverse inclusion (hereinafter "RI") program. The RI program is designed to provide the students at Private School with opportunities to interact with nondisabled peers. To participate in the RI program, a student must have learned a skill to the point where the student can use or display the skill with the student's rotating RBTs across settings. Once the student is able to demonstrate the skill with different RBTs and across settings, the nondisabled peers are brought into Private School to allow the student to demonstrate the skill with the nondisabled peers. Testimony of Private School Director, Tr.V1, 51:11-52:6.
118. For the RI program, Private School has specific behavior technicians that work directly with the nondisabled students to explain what they will be doing, how to participate, and what to expect. The Private School student and the nondisabled peer are then able to interact with the support by the student's RBT and the nondisabled peer's behavior technician. Testimony of Private School Director, Tr.V1, 52:7-53:2.
119. Private School does not have a designated schedule for the RI program, as each

- student's needs and abilities to participate in the RI program for the skill on which they are working vary between students. Testimony of Private School Director, Tr.V1, 84:7-13, 92:3-15, 117:9-17.
120. Students at Private School can participate in the RI program either in a one-to-one fashion or with a group, depending on the skills and the abilities of the participating students. The group setting would consist of multiple Private School students with multiple nondisabled peers, not multiple nondisabled peers for one (1) Private School student. Testimony of Private School Director, Tr.V1, 85:14-87:10.
121. For the 2022-2023 school year, the enrollment contract signed by Parent on August 26, 2022, estimated that the maximum total cost for Student's tuition and related services at Private School would be Two Hundred Thirty-Seven Thousand Seven Hundred Two Dollars and Sixty Cents (\$237,702.60). P-Ex.3, p.177.
122. The enrollment contract specifies the number of estimated minutes of service to be provided and the hourly rates of the service providers and includes an administrative fee of fifteen percent (15%) and the Hawai'i excise tax. P-Ex.3, p.176-177.
123. The tuition and hourly rates charged by Private School are comparable to other schools that provide similar services on the island on which Student resides. *See* P-Ex.3, p.178-188.

V. CONCLUSIONS OF LAW

IDEA framework

The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91,

102 S.Ct. 3034, 3037-3043 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F.Supp.2d 89, 98 (D.D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)). A FAPE includes both special education and related services. H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education. *Id.* To provide a FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.” *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988). It is “a written statement for each child with a disability that is developed, reviewed, and revised” according to specific detailed procedures contained in the statute. H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22. The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs. H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048. However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*, held that the educational benefit must be more than *de minimus*. 137 S.Ct. 988, 197 L.Ed.2d 335 (2017). The Court held that the IDEA

requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335; *see also, Blake C. ex rel. Tina F. v. Hawai‘i Dept. of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Hawai‘i 2009).

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures set forth in IDEA; and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051. “A state must meet both requirements to comply with the obligations of the IDEA.” *Doug C. v. Hawai‘i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013); *see also, Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

Procedural violations do not necessarily constitute a denial of FAPE. *Amanda J.*, 267 F.3d at 892. If procedural violations are found, a further inquiry must be made to determine whether the violations: 1) resulted in a loss of educational opportunity for Student; 2) significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or 3) caused Student a deprivation of educational benefits. *Id.*

Burden of Proof

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

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

A. Petitioners have not proven that Student was denied a FAPE by failing to include Student’s current private program providers/personnel, during Student’s IEP meetings

Petitioners argue that Respondents denied Student a FAPE by failing to include Private School Director or other personnel from Private School in Student’s IEP development meetings. Petitioners allege that inviting Private School Director would have enhanced the discussions regarding Student’s needs, supports, and services, 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 (9th Cir. 2013),⁸ found that parental participation was a more important consideration than an annual IEP deadline and that the DOE should have accommodated the parent’s schedule over the school IEP team members schedules in scheduling an IEP meeting. The Court in that case noted that *since the parent was not present at the meeting*, a representative from the student’s private school 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.

⁸ This Hearings Officer notes that while Petitioners cite frequently to *Doug C.* in their closing brief, any full citation to the case is missing from the brief. This Hearings Officer assumes that the references to “*Doug C.*” in the brief is in reference to the case cited above.

Based on the record in this case, a total of five (5) IEP meetings were held in the development of Student's IEP-03/30/2022. *See FOF 40-48, 58-94.* While the IEP-03/30/2022 only lists the 2022 IEP meetings, it is clear from the recordings that the discussion on Student's needs and the development of the IEP started before the eligibility meeting in November 2021. The team had the same information from July 2021 at the meetings in August 2021 and October 2022 and was able to update that information in the 2022 IEP meetings based on additional information provided by Private School Director. *See FOF 40-48, 58-94.* Private School Director was present at the IEP meetings on August 3, 2021, October 26, 2021, and January 19, 2022, and provided the team with information during those meetings regarding Student's PLEPs and needs. *See FOF 40-48, 58-61.* Private School Director provided the IEP team with Student's IAEP-07/15/2021 and the list of supplemental supports and services that Student received at Private School for the 2021-2022 school year, as well as updated information on Student's current levels of performance shortly before the March 9, 2022 meeting. *FOF 24, 34.* All this information was discussed at the IEP meetings and was included in Student's IEP-03/30/2022. *See FOF 40-48, 58-94.*

The record also demonstrates that SSC made many diligent attempts to get *both* Parent and Private School Director to agree upon dates for upcoming meetings and it was only after not being able to coordinate a date in the entire month of February that Parent opted to attend the meeting without Private School Director on March 9, 2022. *See FOF 20-23, 29-30, 32-33.* Private School Director was also invited to the March 30, 2022 IEP meeting and did not inform SSC until the day before that Private School Director was unable to attend the meeting. *FOF 38-39.* Nothing in the record demonstrates that the IEP team did not make diligent efforts to obtain Private School Director's attendance at the IEP meetings. Petitioners have also failed to point

out any information that Private School Director could have added to the development of the IEP-03/30/2022 that was not shared at the IEP meetings that Private School Director attended or the information that Private School Director provided to the team.

Petitioners argue that DOE BCBA testified that DOE BCBA would have liked additional information regarding the details of Student's program to ensure a smooth transition from Private School to Home School in the event that Petitioners accepted the IEP-03/30/2022. *See* Petitioners' Closing Brief, filed January 6, 2023. Petitioners have not presented evidence that Home School would not have made diligent attempts to obtain Private School Director's attendance at a transition planning meeting or meetings if Parent informed Home School that Parent would be accepting the IEP-03/30/2022 offer.

The evidence in the record is clear that Parent was unwilling to agree to the terms of the IEP-03/30/2022 before receiving the written IEP document, PWN, and consulting with Parent's attorney. *FOF 92, 94.* Pursuant to the Decision in DOE-SY2021-042, Student's tuition and fees were to be paid by the DOE for the 2021-2022 school year, so the IEP team did not have reason to believe that Student would be attending Home School prior to the ESY summer session in 2022. *FOF 19.* Both SSC and Principal contacted Parent to inquire about Student's attendance at ESY, which was reasonable considering Parent's statement at the IEP meeting that ESY might be a good opportunity for Student to transition to Home School. *FOF 105-106; see also R-Ex.157 [2:27:54-2:28:20].* Parent did not respond to the inquiries by Home School or enroll Student for the ESY summer session. *FOF 107.*

Petitioners have failed to meet their burden of proving that Student was denied a FAPE by the failure of the IEP team to ensure Private School Director's attendance at Student's IEP meetings, as Private School Director was consulted regarding scheduling and invited to all the

IEP meetings held for Student. Private School Director did attend three (3) of the meetings and provided updated information and responses to inquiries about the information to Home School, which provided them with sufficient information to develop Student's IEP.

B. The discussions regarding Student's ESY services and the resulting IEP-03/30/2022 appropriately addressed Students' needs for ESY

Petitioners next argument questions whether the discussions at the IEP meetings and the resulting IEP-03/30/2022 appropriately addressed Student's needs during ESY for the LRE placement, the frequency or duration of the ESY program, speech-language services, and the need for an aide for Student. In Petitioners' closing brief, Petitioners only address the issue of the LRE placement for Student for ESY and do not address any arguments regarding the other three (3) areas listed in the Complaint.

A school must provide ESY services only if the child's IEP team determines that the services are necessary 'for the provision of FAPE to the child.' *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County Mont.*, 541 F.3d 1202, 1211 (9th Cir. 2008). To qualify for extended school year services, "a claimant seeking an ESY must satisfy an even stricter test, because 'providing an ESY is an exception and not the rule under the regulatory scheme.'" *N.B.*, 541 F.3d at 1211, quoting *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 315 (6th Cir. 2007) quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), cert. denied, 552 U.S. 1042, 128 S.Ct. 693, 169 L.Ed.2d. 513 (2007); see also *Dep't of Educ. v. L.S. by C.S.*, 74 IDELR 71, 2019 WL 1421752 *7 (D. Hawai'i 2019) (holding that ESY is "educational instruction beyond the normal academic year provided to students who need the additional instruction to retain information during a break in regularly scheduled classes, such as during the summer."). The standard for ESY is higher than the standard for the provision of special education and related services due to the requirement to show that the benefits the student

gains during the regular school year will be significantly jeopardized if he or she is not provided with an educational program during school breaks. *Id.*, quoting *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-538 (4th Cir. 2002); see also *K.K. ex rel. K.S.K. v. Hawai'i*, 66 IDELR 12, 2015 WL 4611947; *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269, 279 (6th Cir. 2004) (confirming that “it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.”).

The record of the IEP meetings in this case demonstrate that the IEP team determined that Student was eligible for ESY services based both on the nature and severity of Student’s disability and behavioral regression concerns. *FOF 87*. At the March 30, 2022 IEP meeting, the team spent approximately forty-five (45) minutes discussing Student’s ESY eligibility and the details of the ESY program. *See FOF 87-91*. The team had information that was provided by Private School Director at the October 26, 2021 IEP meeting, as well as information and data provided by Parent regarding Student’s abilities after returning to school from a break. *FOF 87*. The IEP team had discussed Student’s ESY program after having determined that Student’s LRE placement for the school year would be in a fully self-contained special education classroom with access to nondisabled peers for lunch, recess, and classes or assemblies for Student’s preferred activities. *FOF 84-86*. The discussion regarding Student’s LRE access to nondisabled peers was based on Student’s ability to enjoy and participate in the activities without being overwhelmed. For the ESY discussion, the team focused on Student’s primary environment being a special education environment with access to nondisabled peers as would be acceptable to Student. Principal informed Parent that at least during the summer ESY sessions, Home School could arrange for Student to have interaction and/or class sessions with nondisabled students that attended Home School for a private summer program in a fashion that would not be

overwhelming to Student. *FOF 91*. The IEP-03/30/2022 also provided that during ESY sessions, Student would have opportunities to interact with nondisabled peers to work on communication and social skills, which were the areas that the team decided Student needed to focus on for ESY. *FOF 99*.

While Petitioners seemed to have abandoned the other sections listed under this issue, this Hearings Officer points out that each of the other items listed in Petitioners' issue was clearly addressed during both the IEP meetings and the IEP-03/30/2022. The IEP team discussed the frequency and duration of the program and had agreement from the team that the four (4) hour session for ESY was appropriate to address Student's needs while not being overwhelming for Student to spend a whole school day in ESY. *FOF 89*. The IEP-03/30/2022 also listed the hours for ESY, the length of the break before Student would receive ESY, and the specific dates for Student's ESY session for summer and winter 2022 and spring 2023. *FOF 99*.

Petitioners have not proven that Respondents denied Student a FAPE by failing to appropriately address Student's need for ESY services in the IEP-03/30/2022.

C. The discussions regarding supplementary aids and services, program modifications, and supports for school personnel and those listed in the IEP-03/30/2022 are appropriate to address Student's needs.

Petitioners' third issue questions whether the discussions at the IEP meetings leading to the development of the IEP-03/30/2022 and/or whether the written IEP-03/30/2022 itself contain supplementary aids and services, program modifications, and supports for school personnel that appropriately address Student's needs to allow Student to access Student's education.

Specifically, Petitioners allege that the IEP-03/30/2022 does not have sufficient behavioral interventions, supports for Student to move from Student's current program to the program that the IEP-03/30/2022 describes, assistive technology for communication, and specialized

instruction in the special education and/or general education setting. In Petitioners' Closing Brief, Petitioners only address behavioral interventions and supports for Student to move from Student's current program to the IEP-03/30/2022 program, so only these two (2) areas will be addressed in this Decision.⁹

1. Behavioral interventions

Petitioners cite to the "L.S." case to support their position that behavioral interventions, such as a behavioral support plan, must be included in an IEP. In *Department of Education, Hawai'i v. L.S. ex rel. C.S.*, 2019 WL 1421752 (D. Hawai'i 2019), the U.S. District Court Judge found that the IEP team's failure to address the student's behaviors in the student's IEP was a denial of FAPE. The student in that case had major behavioral problems, including leaving class and refusing to return, making verbal threats to staff and peers, and refusing to obey the teacher's instructions, which affected the student's ability to access her education. *Id.* at *12. In that case, the IEP team did not provide a draft IEP nor a draft behavioral support plan to the parent prior to the IEP meeting. *Id.* Components of the behavioral support plan was not included in the student's IEP and the Court found that the school district could amend or curtail the behavior support plan at any time without parent's knowledge or input, and therefore it infringed on the

⁹ While these two (2) areas, assistive technology for communication and specialized instruction in a special and/or general education setting appear to have been abandoned by Petitioners in their closing brief, this Hearings Officer notes that ample evidence exists in the record to show that Student did not need any assistive technology for communication, since Student is verbal and can use spoken words to communicate with others. Neither Private School nor Parent uses any assistive technology to assist Student with communication. The evidence contained in the recorded IEP meetings also demonstrate that the specialized instruction that is at issue in Petitioners' complaint is built into Student's program in the IEP-03/30/2022 and specific methodology for teaching Student the skills and any additional teaching tools that may be used are part of the knowledge and expertise of the special education teacher.

parent's ability to meaningfully participate in the development of the student's IEP. *Id.* at *11-12.

The facts of this case are entirely distinguishable. First, Student does not have significant behavioral problems that interfere with Student's ability to access Student's education. Student had FBAs done in November 2021 by both Private School and DOE BCBA and in both FBAs Student's target (or most problematic) behaviors were engaging in tantrum behaviors. *See FOF 52-57.* The tantrums included yelling, screaming, lying on the ground, spitting, and kicking. Student's behaviors at Private School were appropriately addressed by the program resulting from Private School's FBA, and Petitioners have not demonstrated how Student's behaviors would not also be appropriately addressed by the BIP created by DOE BCBA. Petitioners have also not presented any evidence that Student had or demonstrated any other problematic behaviors that the IEP team did not address in the meetings or in the IEP-03/30/2022.

Second, an FBA was conducted with Student by two (2) certified and licensed professionals in the field of ABA, both of whom recommended that Student receive one-to-one support from an RBT being supervised by a board-certified behavior analyst. Unlike the facts in the *L.S.* case, where school personnel created a behavior support plan, the FBAs and resulting BIPs were based on data, observations, and science-based hypotheses. *See 7, 10-11.* Parent was provided results of the FBA by DOE BCBA and the goals that were recommended by the FBA were included in Student's IEP-03/30/2022, along with the supplementary aids and supports of the RBT and ABA services. *FOF 31, 98, 101-102.* The concerns of the *L.S.* court, specifically that the behavior support plan could be changed by the school at any time without knowledge or input from parents, do not exist with the methods used in Student's program.

Finally, even though the BIP itself was not incorporated into the IEP-03/30/2022, many of the recommendations from DOE BCBA's FBA were included in both the discussions at the IEP meetings and the resulting IEP-03/30/2022. *See FOF 50, 54, 73, 98.* DOE BCBA reviewed the goals that were included in the IEP-03/30/2022 that related directly to Student's behavioral concerns from the FBA at the meeting and all three (3) goals with their objectives were written into the IEP-03/30/2022. The IEP team also discussed the list of supplementary supports that was provided to the team by Private School and incorporated several of them into Student's IEP-03/30/2022, such as a token economy, writing utensil adaptations, spring-loaded scissors, a visual schedule, using first/then statements, and a daily communication log. *FOF 101; see also FOF 79.*

The import of the *L.S.* was that school personnel could not draft and amend behavior plans for students with significant behavioral problems that interfered with their ability to access their information in a way that could exclude IEP team member or parent input and participation. Here, Student did not have significant behavioral problems that interfered with Student's ability to access Student's education, nor did Home School draft a behavioral support plan that could be easily changed without knowledge of Parent. The BIP was created by a professional in the field of ABA and would only be amended based on data and scientific analysis of the data to determine if the program was working for Student. Finally, many behavioral supports similar to the supports Student received at Private School were included in Student's IEP-03/30/2022 after discussions with input from Parent and other IEP team members. Petitioners have failed to prove that the IEP-03/30/2022 did not include appropriate behavioral interventions to allow Student to access Student's education.

2. Supports for Student to move from Private School to Home School

Petitioners argue that Home School did not discuss or address supports that Student would need if Student were to transfer to Home School from Private School. While it is not specifically outlined in this section of Petitioners' Closing Brief, Petitioners appear to place emphasis on the testimony by DOE BCBA that the IEP team would need additional details and information from Private School in order to ensure a smooth transition from Private School to Home School.

While the testimony and the IEP meeting recordings do indicate that the IEP team would want to meet with or get additional information from Private School before Student, Petitioners have not suggested any additional supports that Student would need in the IEP-03/30/2022. In the IEP meeting recordings, DOE BCBA did point out that to develop a smooth transition plan, DOE BCBA would want specific details about the way that Private School provides the supports that is in the list of supplementary supports for Student. *FOF 79*. These details include questions such as how many tokens Student receives before getting a reward in the token economy, what specific circumstances Private School is using the first/then statements, what pictures or icons are used for the visual schedule, and what are the reinforcements and motivators that Private School is using for positive reinforcement for Student. The fact that the IEP-03/30/2022 (like the IAEP-07/15/2021 and IAEP-06/2022) does not contain these specific details, does not mean that Home School is not willing to offer the supplemental aids and supports that would be necessary for Student to move to Home School. All the actual supports that DOE BCBA had questioned are included in Student's IEP-03/30/2022, but the specific details regarding what is being used at the time that Student would move from Private School to Home School are what the IEP team was questioning, and would be reasonable to obtain after the team began planning for Student's transition to Home School. *FOF 101-102*.

Petitioners have not proven that the IEP team did not discuss or provide appropriate supports to allow Student to transition from Private School to Home School or that the IEP-03/30/2022 did not contain appropriate supports for such a move. At the conclusion of the IEP meeting on March 30, 2022, Parent was adamant that Parent would not accept the IEP offer until receiving the written IEP document and consulting with Parent's attorney. *FOF 75-76, 92-93.* Parent did not make any attempts to contact Home School to indicate whether Parent wanted to accept the offer of the IEP-03/30/2022 or have a meeting to address specific concerns that Parent had with the IEP-03/30/2022. *FOF 104.* As Parent did not accept Home School's IEP offer, the IEP team did not have the opportunity to have a transition planning meeting to get the information necessary from Private School and develop a plan to ensure a smooth transition from Private School to Home School.

D. Petitioners have failed to prove that Respondents denied Student a FAPE by failing to sufficiently discuss Student's need for an aide

Petitioners' fourth issues in the Complaint questions whether the IEP team had an appropriate discussion regarding the need for Student to have the support of an aide for Student's education. This Hearings Officer does note that while this issue appears to have been abandoned by Petitioners, ample evidence exists in the record to show that the IEP team thoroughly discussed Student's need for a one-to-one RBT and provided the one-to-one RBT service for Student both during the regular school year and during ESY sessions. *FOF 78-81, 85, 90, 101-102.* The RBT services even included additional time before and after school to allow for Student to be greeted at drop-off and escorted to pick-up after school.

E. The IEP-03/30/2022 appropriately describes the LRE for Student

Petitioners' next issue questions whether the educational placement statement in Student's IEP-03/30/2022 describes the least restrictive environment for Student. While

Petitioners do not address this issue in their closing brief, this Hearings Officer will include this issue in the Decision.

The IDEA provides that “procedures to assure that, to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...” *Sacramento City Unified School Dist., Bd. of Educ. v. Rachel H. by and through Holland*, 14 F.3d 1398, 1403 (9th Cir. 1994) (citing 20 U.S.C. §1412(5)(b)); see also H.A.R §8-60-15. The Ninth Circuit has adopted a four-factor test that examines the academic and non-academic benefits for a student in the general education setting, the effect of the student being in the general education environment has on other students and the teacher, and the cost of mainstreaming the student. *Holland*, 14 F.3d at 1404.

In this case, Student’s disability has the effect of Student being overwhelmed by too many sounds or people, or in some situations, and Student also has the behavior of engaging in tantrum behaviors. *FOF 14-15*. During the IEP meeting discussions, Parent expressed concern about having Student enter a large public-school setting like Home School without proper supports. *FOF 66, 82-83*. Parent and the other IEP team members agreed that Student would not benefit from a general education setting, but would be better supported in a small, special education classroom, with limited exposure to nondisabled students in subjects that Student enjoys and only in an amount that is tolerable to Student. *FOF 84*. At the March 30, 2022 meeting specifically, Parent agreed that the language of “as tolerated” is important so that the team could scale back the exposure to other students if Student was not reacting to it well. *FOF*

85-86. Based on the record, Student would not have academic or non-academic benefits from a general education setting but would have benefits from both in a special education setting with small, managed exposure to other peers. The LRE statement in Student's IEP-03/30/2022 describes that specific scenario, where Student would be in a fully self-contained classroom with opportunities to interact with nondisabled students during activities that Student prefers. *FOF 103.*

The IEP team took Parent's concerns into consideration when discussing the exposure of Student to nondisabled peers, particularly noting that Student may start to regress if Student is thrown into a setting without thorough preparation and guidance from Student's RBT or another adult. The IEP team discussed with Parent keeping Student in the special education classroom, which would be similar to the environment that Student currently has at Private School but having planned occasions when Student would be able to interact with peers. *FOF 108, 117-120.* The IEP team asked Parent to recommend subjects and activities that Student enjoys so Student's exposure to other children would be associated with something positive for Student, and the team included those activities, such as PE, music class, and assemblies or presentations involving music. The language of the LRE statement in Student's IEP-03/30/2022 allows for flexibility for Student's teachers and RBT to determine whether Student is tolerating the interactions before adding opportunities for Student.

Petitioners have not proven that the IEP-03/30/2022 failed to accurately describe the LRE for Student.

F. The IEP team appropriately discussed and determined Student's LRE and supplementary aids and services at the IEP team meetings

Petitioners' final argument in the Complaint questions whether the IEP team appropriately discussed Student's LRE; particularly whether the IEP team discussed the LRE for

Student prior to determining the supplementary aids and services that Student would receive in the IEP. In Petitioners' closing brief, Petitioners also argue that the IEP team did not have an appropriate discussion regarding the LRE for Student because they did not go through each of the *Holland* factors.

Petitioners have failed to provide any authority regarding the issue of whether the LRE must be discussed after the supplementary aids and services portion of the IEP; but notwithstanding the lack of authority, the facts of this case do not support Petitioners' argument. As discussed, *supra*, the IEP team went through the discussion of the services and supplementary aids and supports that would be offered to Student prior to discussing Student's LRE. The team moved onto the LRE discussion when Parent informed the team that Student needed a program similar to Private School's RI program so Student would have opportunity to interact with nondisabled children. At the time the IEP team had moved onto the LRE discussion, the special education, speech-language, and occupational therapy services had already been discussed and inserted into the draft IEP, along with supplementary aids and supports, such as RBT services, the BIP, token economy, visual schedule, and the daily communication log.

Regarding Petitioners' argument in their closing brief, that the IEP team did not review each of the *Holland* factors in determining Student's LRE, the record presented does not support Petitioners' case. In the IEP team meeting, the team recognized that even in Student's small setting with [REDACTED] other students with disabilities at Private School, Student needed extra care and support when it came to interacting with other children. Parent informed the team during the IEP meeting that Student cannot just interact with other children because Student would be overwhelmed and could react negatively. It was clear from the discussions held throughout the IEP team meetings in August, October, January, and March that Student did not belong in a

general education class. The *Holland* factors are aimed at determining how to best mainstream a disabled student with nondisabled peers to the maximum extent possible. The team clearly took into consideration that based on Student's needs, Student would not receive any benefits from being in the general education class and moved quickly onto the special education setting where the IEP team members, including Parent, believed was best for Student. The IEP-03/30/2022 included language to allow Student opportunities to interact with other children while still maintaining an appropriate learning environment for Student throughout the school day. Even though the team did not specifically review each of the *Holland* factors in their LRE discussion, Petitioners have not proven that the failure to do so was a denial of FAPE or resulted in the IEP-03/30/2022 not being reasonably appropriate to address Student's unique needs.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the allegations in the Complaint by a preponderance of the evidence. Petitioners have not proven that the IEP-03/30/2022 is not an appropriate educational program reasonably calculated to enable Student to make progress appropriate in light of Student's unique needs and circumstances. 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, February 17, 2023.

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