



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-SY2223-016

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: November 15-16, 2022

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On August 15, 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 25, 2022. Respondents submitted a Notice of Insufficiency on August 29, 2022, alleging that Petitioners’ Complaint did not comply with the requirements of Hawai‘i Administrative Rules (hereinafter “H.A.R.”) Section 8-60-62. A Determination of Insufficiency was filed on August 29, 2022, finding that Petitioners’ Complaint did not provide Respondents with sufficient facts to provide Respondents with notice of the alleged problem. Petitioners were granted leave to file an amended complaint, and Petitioners filed Petitioners’ First Amended Complaint and Resolution Proposal (hereinafter “First Amended Complaint”) on September 9, 2022. Respondents submitted DOE’s Response to Petitioners’ First Amended Complaint and Resolution Proposal on September 19, 2022.

A prehearing conference was held on October 10, 2022, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Michael R.S. Azuma, Esq. (hereinafter “Mr. Azuma”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for November 15-17, 2022.

Based on the dates of the Hearing, Respondents requested an extension of the Decision deadline from November 23, 2022, to January 7, 2023, to allow sufficient time for the Hearing to be completed, and to allow time for the parties to submit written closing briefs with the use of transcripts. Petitioners did not object to the request for extension of the deadline, and an Order Granting Respondents’ Request to Extend the 45-Day Decision Deadline was issued on November 14, 2022. The current deadline for the instant Decision to be filed is January 7, 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 15, 2022. Present at the Hearing were Parent and Mr. Peck, on behalf of Petitioners; District Educational Specialist and Mr. Azuma, on behalf of Respondents; this Hearings Officer; and the assigned court reporter. Petitioners called Private School Director and Parent to testify and rested their case-in-chief. The Hearing continued onto November 16, 2022, where Respondents called DOE Board-Certified Behavior Analyst (hereinafter “DOE BCBA”) to testify and rested their case. Petitioners did not have any rebuttal witnesses to present, and the Hearing concluded on that date.

Each party submitted their exhibits for the Hearing by the disclosure deadline of November 4, 2022. The parties met and conferred regarding the proposed exhibits by November 10, 2022, and did not have any objections to either the witnesses or exhibits submitted by the opposing party. Both parties were informed that any exhibits that were discussed or mentioned during the proceeding would be received for consideration in the Decision in this case, but that this Hearings Officer would allow the parties to propose additional exhibits after the Hearing was completed. On November 16, 2022, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits from their previously disclosed documents that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on November 23, 2022. Any objections to the proposed exhibits were due on November 30, 2022.

On November 29, 2022, a status conference was held and an extension of the submission of exhibits deadline was granted to December 2, 2022, with objections due on December 6, 2022.

Petitioners requested the following exhibits for consideration in the Decision: Petitioners' Exhibit pages 001-024; Exhibit 2, pages 025-028, 030-032, 038, 040-047, and 050; Exhibit 3, pages 055-180; Exhibit 4, pages 242-338; and Respondents' Exhibit 84, pages 1000-1006.

Respondents did not state an objection to the additional exhibits requested by Petitioners, so the above-mentioned exhibits were received. On December 7, 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 001-024; Exhibit 2, pages 025-036, 038, 040-047, 049-050; Exhibit 3, pages 051-238; and Exhibit 4, pages 242-338.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 84, pages 1000-1006; and Exhibit 88, page 1015.

Both parties wanted the opportunity to submit written closing briefs regarding the legal issues to this Hearings Officer for review. The written closing briefs were originally due on December 15, 2022; however, Petitioners requested an extension of the written closing brief deadline to December 19, 2022, due to medical concerns. Petitioners' request was granted and both parties timely submitted their briefs by the new deadline of December 19, 2022.

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

II. JURISDICTION

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

III. ISSUES PRESENTED

Petitioners assert one (1) issue in the First Amended Complaint to be addressed at the Hearing:

Issue 1 – Whether the July 14, 2022 and June 28, 2022 Individualized Education Program (hereinafter “IEP-07/14/2022”) was appropriately implemented with regard to the provision of two (2) registered behavior technicians (hereinafter “RBTs”) that were listed in Student’s IEP-07/14/2022. Petitioners allege that only one (1) RBT was provided to Student.

Petitioners propose the following remedies as resolutions for this case:

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

Remedy 2 – Find that the DOE has violated Student’s rights by denying Student a free appropriate public education (hereinafter “FAPE”).

Remedy 3 – Order the DOE to provide compensatory education as demonstrated appropriate at hearing.

Remedy 4 – Order other equitable relief as appropriate.

IV. FINDINGS OF FACT

Witness background

1. Private School Director is the clinical director at Private School and has been in that position since July 2021. Private School Director is a board-certified assistant behavior analyst who is awaiting licensure by the State of Hawai‘i, due in December 2022. Private School Director is also currently enrolled in a doctorate program for education law and is completing a licensure program to be a special education teacher

- in the State of Hawai‘i. Testimony of Private School Director, Transcript of proceedings, volume 1, page 13, line 6, through page 17, line 16 (hereinafter referenced as “Tr.V1, 13:6-17:16”).
2. Prior to being the clinical director at Private School, Private School Director was a clinical director at another private school in Hawai‘i and actively worked as an RBT with the program there. Private School Director is familiar with and has training and expertise in applied behavior analysis (hereinafter “ABA”) and has been qualified as an expert witness as a board-certified assistant behavior analyst. Testimony of Private School Director, Tr.V1, 10:23-32:17.
 3. DOE BCBA has a bachelor’s degree in biology and a master’s degree in exceptional student education with a specialization in ABA. DOE BCBA was certified as a board-certified behavior analyst in October 2021. Prior to that DOE BCBA worked as a behavior technician, paraprofessional, and therapeutic staff support. DOE BCBA is licensed as a board-certified behavior analyst in the State of Hawai‘i. DOE BCBA was qualified as an expert witness in the field of behavior analysis. Testimony of DOE BCBA, Tr.V2, 138:3-144:11; Respondents’ Exhibit 84, page 1015 (hereinafter referenced as “R-Ex.84, p.1015”).

Student’s background

4. Student is [REDACTED] years old and has been diagnosed with [REDACTED] [REDACTED] (hereinafter “[REDACTED]”), [REDACTED], and [REDACTED]. Testimony of Parent, Tr.V1, 119:13-120:2; *see also* Petitioners’ Exhibit 1, page 002 (hereinafter referenced as “P-Ex.1, p.002”).
5. Student has been determined to be eligible for special education and related services

- under the category of [REDACTED], which includes [REDACTED]. P-Ex.1, p.002.
6. Student is non-verbal and has communication needs that are addressed in Student's IEP-07/14/2022. P-Ex.1, p.002.
 7. Student has behavioral needs that impede Student's ability to engage in learning, and a functional behavior assessment (hereinafter "FBA") was completed with Student in August 2021. The FBA focused on a behavior of "dropping," which was the sole behavior addressed in the behavior intervention plan dated August 27, 2021.
 8. Despite having an FBA, a BIP, and data collection focused on Student's "dropping" behavior, DOE BCBA could not find a pattern or understanding as to the cause or antecedents to the behavior due to the varied nature of the behavior itself and the circumstances surrounding the dropping behavior. Testimony of DOE BCBA, Tr.V2, 150:8-153:5.
 9. On February 9, 2022, Petitioners filed a due process complaint, alleging *inter alia*, that the DOE denied Student a FAPE by failing to provide Student with appropriate transportation or behavioral interventions to meet Student's needs. *See* P-Ex.4, p.243-248.
 10. This Hearings Officer found that Student was denied a FAPE because although the DOE acknowledged that Student needed specialized transportation, they failed to provide for such transportation in Student's IEP and because the DOE did not appropriately address Student's several behavioral needs that impeded Student's ability to access Student's education. P-Ex.4, p.277-284.
 11. Respondents were ordered to hold a team meeting to determine whether another FBA was necessary to appropriately address all Student's behavioral needs, to complete

any FBA or additional assessments determined necessary by the team, and to develop a new IEP prior to the start of the 2022-2023 school year. P-Ex.4, p.290-293.

Post-Decision events

12. DOE BCBA took over Student's case in June 2022, taking over from Student's last board-certified behavior analyst, who had testified in the prior due process hearing. Testimony of DOE BCBA, Tr.V2, 144:16-145:10; *see also* P-Ex.4, p.242, 245.
13. On June 28 and July 14, 2022, the IEP team for Student met to develop Student's IEP-07/14/2022 for the 2022-2023 school year. *See* P-Ex.1, p.020-021.
14. Student's IEP-07/14/2022 listed Student's needs in the areas of reading, writing, mathematics, functional skills, behavior, social skills, fine motor and sensory processing, and communication. P-Ex.1, p.002-006.
15. In the behavior section of the present levels of educational performance in Student's IEP-07/14/2022, the IEP team noted that Student had a behavior of dropping that was a precursor to other behaviors and that Student's dropping behavior had improved with the use of a behavior intervention plan and with movement breaks and sensory strategies. The IEP-07/14/2022 noted that Student had not engaged in disrobing or elopement since 2021. Parent concerns noted in that section of the IEP-07/14/2022 included a new behavior of Student biting Student's nails or picking at the skin on Student's fingers. P-Ex.1, p.003-004.
16. The IEP-07/14/2022 contained eight (8) annual goals and objectives relating to Language Arts, Math, and Health. One (1) of these goals related directly to Student demonstrating appropriate behaviors. P-Ex.1, p.008-015.

17. Student's IEP-07/14/2022 provided, *inter alia*,² that Student would receive Individual Instructional Support from two (2) RBTs for one thousand nine hundred five (1905) minutes per week, which was the equivalent of Student's entire school day. The clarifications for the supplementary supports indicated that the RBTs will implement a behavior intervention plan for Student throughout the day. P-Ex.1, p.016-017.
18. The IEP-07/14/2022 also provided that Student would receive RBT services during transportation of Student on the bus to and from school to monitor Student's behavior and implement the behavior intervention plan. P-Ex.1, p.017.
19. Parent did not have Student attend extended school year (hereinafter "ESY") at Home School during a period between June and July 2022 due to Student's family having a vacation. Testimony of Parent, Tr.V1, 109:11-110:2.
20. DOE BCBA supervised Student's program during the ESY program when Student attended; reviewed Student's data to switch Student's program to a different data collection system; and met with Student's RBTs, teachers, and other service providers. Testimony of DOE BCBA, Tr.V2, 146:10-147:1.
21. Student attended ESY at Home School in July 2022 and received the services of two (2) RBTs. Testimony of Parent, Tr.V1, 109:11-110:14; *see also* R-Ex.84, p.1000-1002.
22. DOE BCBA observed Student during the ESY program when Student attended at least three (3) times for two (2) to three (3) hours each time. Testimony of DOE BCBA, Tr.V2, 147:2-19.

² Since Petitioners are not contesting the substance of the IEP-07/14/2022 or whether the IEP-07/14/2022 appropriately addressed Student's needs, the other sections of the IEP-07/14/2022 are not relevant to this Decision.

23. Student attended Home School at the start of the 2022-2023 school year. For the first four (4) days of instruction, Student received services from two (2) RBTs. R-Ex.84, p.1003-1004.
24. Student attended Home School for an additional five and a half (5 ½) days and received services from one (1) RBT. The RBT that provided Student's services during these five and a half (5 ½) days was the same RBT that had worked with Student since 2021 and had a good rapport with Student. Testimony of DOE BCBA, Tr.V2, 148:1-10; R-Ex.84, 1005-1006.
25. DOE BCBA observed that on the days that Student only had one (1) RBT, there were other staff in the room to support Student, including a teacher and educational assistants. The speech-language pathologist also spent a lot of time in Student's classroom getting to know Student and Student's program. Testimony of DOE BCBA, Tr.V2, 148:1-18.
26. During the five and a half (5 ½) days that Student only had one (1) RBT, Student's only notable maladaptive behavior was dropping for an extended period of time on August 9, 2022. On that date, the school called Parent to see if Parent would be able to pick Student up from school early. Parent was not able to pick Student up early, and Student stayed at school. P-Ex.2, p.036, 040.
27. Student stayed at school on August 9, 2022, and eventually got up on Student's own accord and completed the rest of the school day successfully. During the time Student had dropped for an extended period of time, Student's behaviors did not escalate, nor did Student get upset or try to hurt Student's self or others. P-Ex.2, p.038.

28. On August 9, 2022, despite the prolonged time that Student had dropped, Student was still able to work on Student's IEP goals and objectives, including motor imitation, identifying familiar people, listener/response performance verbs, using assistive technology to answer "yes" or "no" questions, matched pictures from a field of three (3), and identified community signs and helpers. P-Ex.2, p.038.
29. On August 11, 2022, when Student again only had one (1) RBT, Student had a dropping incident that day, but Student also was able to work on IEP goals, participate in baking cookies, complete Student's morning work of coloring pictures and a warm-up worksheet, sit with a group of peers with no behaviors, work on community signs, and watch two (2) videos with classmates. P-Ex.2, p.046.
30. DOE BCBA noted that there was no apparent correlation with Student's dropping behavior and Student having only one (1) RBT with Student on that date. DOE BCBA believed that Student's minimal maladaptive behaviors even with just one (1) RBT was due to Student being with Student's familiar RBT on the days when only one (1) RBT was provided. Testimony of DOE BCBA, Tr.V2, 151:19-153:15, 172:12-173:9, 187:13-188:19.
31. Student did not display any extreme maladaptive behaviors at Home School during the 2022-2023 school year when Student attended, such as disrobing or eloping. Testimony of DOE BCBA, Tr.V2, 153:16-154:22.
32. On August 16, 2022, Parent sent an email to Student Services Coordinator (hereinafter "SSC") and informed SSC that Parent was "pulling [Student] out of school starting today 08/16/2022," claiming that the lack of a second RBT is hindering Student's success. P-Ex.2, p.049.

33. After Parent removed Student from Home School in August 2022, Student remained at home with around twelve (12) to twenty (20) hours of ABA services being provided from Parent's insurance to Student at home. Testimony of Parent, Tr.V1, 120:3-22.
34. While Parent has made allegations that Student's behaviors at home escalated while Student was not receiving the services of two (2) RBTs at Home School for the start of the 2022-2023 school year, this Hearings Officer does not find Parent's allegations to be credible or supported by the evidence presented in the record. *See, e.g.*, Testimony of Parent, Tr.V1, 99:19-102:19.
35. For example, Parent alleged that on a date in August, Student demonstrated an extreme behavior at home, namely removing Student's clothing and urinating in public. This incident happened when Student's grandparent was caring for Student, and it was unclear what prompted the behavior. According to Parent, this behavior had not occurred in several years prior to that incident. It was unclear based on the testimony whether Parent actually witnessed this incident, and Parent had no specific recollection of the date that it occurred. Testimony of Parent, Tr.V1, 101:15-102:11, 113:22-114:13.
36. Parent also testified that Student's behaviors had intensified at the start of the 2022-2023 school year, in that Student was hitting Parent and head-butting Parent and was very tense; however, the notes that Parent kept and the communication with SPED Teacher at Home School were completely devoid of any incidents besides having trouble getting Student to get on the bus to attend school on August 3, 2022. *See* Parent's testimony, Tr.V1, 99:19-102:19; P-Ex.2, p.030-036, 038, 040-047, 049.

37. To the contrary, the testimony provided by Private School Director contradicted Parent's assertion that the behaviors of hitting, spitting, disrobing, and urinating occurred while Student was attending Home School. Private School Director testified that Parent informed Private School Director that the behaviors occurred on the day that Student first attended Private School and after that date. Testimony of Private School Director, Tr.V1, 54:24-55:15.
38. Private School Director also noted that since Student had been in the home setting for so long and was not accustomed to being in a school-type environment or with people with whom Student was not familiar, the escalation in behaviors was not unusual. Testimony of Private School Director, Tr.V1, 43:10-44:11, 46:10-48:7, 55:4-15, 71:24-73:18, 76:10-77:6, 79:6-18.

Private School

39. Student began attending Private School in October 2022. From the time Student was pulled out from Home School until Student began Private School in October 2022, Student did not attend school or program, or receive any school-type services. Testimony of Parent, Tr.V1, 112:11-112:23.
40. Private School assigned Student two (2) RBTs and Private School Director to attend to Student on Student's first day of attendance at Private School. Testimony of Private School Director, Tr.V1, 46:20-24.
41. When Student began attending Private School, Student exhibited extreme behaviors of disrobing, urinating in vehicles and in school, and running out onto the road while at home. Student also engaged in spitting, hitting, task refusal, and aggression at Private School. Testimony of Private School Director, Tr.V1, 43:4-44:11.

42. Private School Director characterized Student's behaviors when Student first attended Private School as an "extinction burst," because the behaviors that Student demonstrated had previously been considered extinct but increased dramatically after the intervening situation, which in this case was Student meeting Private School's RBTs. Testimony of Private School Director, Tr.V1, 79:2-18, 80:13-81:5, 85:6-86:18.
43. Private School Director noted that while at Private School, Student was likely receiving higher levels of stress due to Student engaging in behaviors that had been dormant for a long time. Private School Director decided to start working with Student at the home environment before bringing Student back to school. Testimony of Private School Director, Tr.V1, 46:25-47:16.
44. By Student's third day at Private School, Student's services from RBTs were reduced from the two (2) RBTs to having one (1) RBT providing services and one (1) RBT who was just within a line of sight to provide support in case of emergencies. Testimony of Private School Director, Tr.V1, 75:6-19.
45. Private School has a program for Student that addresses Student's individual needs. Student has a weekly schedule, the services of an RBT, supervision of Student's ABA program by a licensed behavior analyst, and access to neuro-typical peers. Private School's program also works with Student's family at their home to provide Student with continuity among Student's environments. *See generally* Testimony of Private School Director, Tr.V1, 36:1-66:23; P-Ex.3, p.051-080.
46. Private School charges less than the average cost of similar programs in the area where Student resides, and their fees are comparable to the fees assessed for

professionals in the areas of expertise that they provide. Testimony of Private School Director, Tr.V1, 62:4-22; P-Ex.3, p.185.

47. Private School has not compiled a breakdown of services that Student would receive for the 2022-2023 school year and the estimated total cost of Student's tuition and fees for Private School is unknown at this time. Testimony of Parent, Tr.V1, 124:25-126:18; Testimony of Private School Director, Tr.V1, 61:14-62:22, 81:14-84:22.

48. No data has been provided as evidence to demonstrate Student's progress made at Private School for the time since Student began attending in October 2022, however, Parent and Private School Director have both testified that Student has made progress while at Private School. Testimony of Parent, Tr.V1, 93:17-21, 95:3-96:8, 102:20-103:7; Testimony of Private School Director, Tr.V1, 49:1-51:22, 56:19-57:24, 75:6-19.

V. CONCLUSIONS OF LAW

IDEA framework

The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91, 102 S.Ct. 3034, 3037-3043 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F.Supp.2d 89, 98 (D. D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)). A FAPE includes both special education and related services. H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education. *Id.* To provide a FAPE in compliance with the

IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.”

Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W., 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

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

The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048. However, the United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*, held that the educational benefit must be more than *de minimus*. 137 S.Ct. 988, 197 L.Ed.2d 335 (2017). The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335; *see also, Blake C. ex rel. Tina F. v. Hawai’i Dept. of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Hawai’i 2009).

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures set forth in IDEA; and (b) whether the student’s

IEP is reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051. “A state must meet both requirements to comply with the obligations of the IDEA.” *Doug C. v. Hawai‘i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013); *see also, Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

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

A. Petitioners have not proven that Respondents denied Student a FAPE by not appropriately implementing the IEP-7/14/2022

Petitioners’ First Amended Complaint’s single issue argues that Respondents failed to appropriately implement Student’s IEP-07/14/2022. Petitioners specifically argue that the DOE failed to provide Student with the services of two (2) RBTs during the first two (2) weeks of the 2022-2023 school year when Student attended Home School.

Questions of implementation of a student’s IEP are procedural in nature and a minor or slight omission of implementation of an IEP will not result in a denial of FAPE. The Ninth Circuit Court of Appeals has reviewed IDEA cases in relation to implementation failures alleged against school districts. In *Van Duyn ex rel. Van Duyn v. Baker School Dist.*, the Court reviewed the IDEA’s definition of a free appropriate public education as “special education and related services that ... are provided in conformity with the [child’s] individualized education program,” and determined that “[t]here is no statutory requirement of perfect adherence to the IEP, nor any

reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.” 502 F.3d 811, 821 (9th Cir. 2007). The Ninth Circuit also explored the analysis done by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), and recognized the court’s conclusion that implementation failures did not violate the IDEA because “the significant provisions of [the child’s] IEP were followed, and, as a result, he received an educational benefit.” *Van Duyn*, 502 F.3d at 821. Courts hesitate to put forth a standard test to determine implementation because “every child, and every IEP, is different; whether an implementation failure is material will therefore depend on the relevant provision’s place and purpose in the IEP, as well as the overall educational context that the IEP was designed for and the extent and duration of any difference between practice and plan.” *L.J. by N.N.J. v. School Board of Broward County*, 927 F.3d 1203, 1214 (11th Cir. 2019) (citing *Endrew F.*, 137 S.Ct. at 998). In determining a failure to implement an IEP case, courts must consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole. *Id.* at 1214.

It is undisputed based on the record in this case that there were at least five and a half (5 ½) days when Student did not have a second RBT to provide individual instructional support to Student. *FOF 23*. Student did receive RBT support from the RBT with whom Student was familiar, since the RBT was the same person Student had been receiving services from since 2021. *FOF 21*. Whether or not Student was denied a FAPE by the DOE’s failure to have a second RBT in school on the days in question requires this Hearings Officer to examine if the failure to have a second RBT in school for Student was a material failure to implement Student’s

IEP-07/14/2022, or, in other words, how important the withheld services were in view of the IEP-07/14/2022 as whole. *L.J.*, 927 F.3d at 1214.

Student's prior assessments and behavior plans establish that Student has a behavior of dropping to the ground and refusing to get up. *FOF 7*. This behavior has been the focus of an FBA and a behavior intervention plan and was noted as the primary maladaptive behavior that Student demonstrated in the school setting. Student's dropping behavior has not had any patterns or clearly established antecedent, thus far preventing Student's ABA providers from understanding the specific function of the behavior to eliminate it. *FOF 8*. Student's dropping behavior had improved with the behavior intervention plan used with Student, which included the use of movement breaks and sensory strategies, as well as with de-escalation techniques and other environmental changes. *FOF 14*. Parent's new concern regarding Student's behavior as listed in the IEP-07/14/2022 was Student picking at Student's skin on Student's fingers or biting Student's nails.

Petitioners argue that Student dropped to the ground on the days that Student was only provided with one (1) RBT and was a result of a failure to materially implement Student's IEP-07/14/2022. Petitioners have not established, however, that the dropping behavior had any correlation to the fact that only one (1) RBT was present on the day that a dropping behavior occurred. Indeed, DOE BCBA testified that Student's dropping behavior had no pattern of cause and effect, and that nothing in the data showed any correlation with Student only having one (1) RBT on the dates of incidents. *FOF 30*. Further, on the dates where the dropping occurred when Student had only one (1) RBT, Student was still able to participate in working on IEP goals and objectives and engage in classroom activities with Student's class. *FOF 27-29*. Finally, while Student's dropping behavior continued at Home School on the days when Student only had

one (1) RBT, no credible evidence has been presented that Student's behaviors either in school or at home escalated as a result of Student not having two (2) RBTs. *FOF 26-29, 31, 34-36*. The only evidence presented of an escalation in Student's maladaptive or inappropriate behaviors was the testimony of Private School Director, which correlated directly with Student's transition from the home environment to Private School's environment in October 2022. *FOF 37-38, 41-43*.

While this Hearings Officer does not condone the actions of Home School or the DOE of only providing Student with one (1) RBT when the IEP-07/14/2022 explicitly required Student to have the services of two (2) RBTs, it cannot be found based on the evidence presented at this Hearing that the failure to implement Student's IEP-07/14/2022 was a material failure to implement. While the Court and administrative hearings officer in *Van Duyn* found that a failure to provide the required number of hours of math instruction was a material failure due to it being a failure to provide required educational instruction for the student, the circumstances in this case are not the same. Student was not required to have a two (2) RBTs in order to receive a certain amount of education at Home School; instead, the two (2) RBTs were provided to allow Student access to Student's education by addressing and/or preventing Student's inappropriate behaviors. Student was still able to work on IEP goals and objectives on the days that Student was only provided one (1) RBT and was still able to access Student's education in Student's educational setting. *See e.g. FOF 27-29*. Student additionally did not demonstrate any additional behaviors or a correlating increase in behaviors due to the provision of only one (1) RBT to Student. *FOF 30*. Similar to the Court in *Van Duyn*, this Hearings Officer finds that Petitioners have not demonstrated that the failure to have two (2) RBTs interfered with Student's ability to access

Student's education at Home School, and therefore did not amount to a material failure to implement Student's IEP-07/14/2022.³

B. Petitioners requested remedy of tuition reimbursement for Student's attendance at Private School is not the appropriate remedy in this case

Petitioners are requesting that the tuition for Student at Private School be paid by Respondents as a result of the failure to implement Student's IEP-07/14/2022. As noted above, this Hearings Officer does not find that the DOE's failure to provide two (2) RBTs to Student for the five and a half (5 ½) days of school that Student attended in August 2022 was a material failure to implement Student's IEP-07/14/2022. Therefore, Petitioners would not be entitled to any such remedy for a denial of FAPE.

Notwithstanding the above decision, this Hearings Officer further finds that while Petitioners have established that Private School has developed an appropriate program for Student, Petitioners have not proven that the requested tuition reimbursement is reasonable or appropriate. The evidence in the record has established that neither Petitioners nor Private School have ascertained a specific tuition reimbursement amount for Student's program, nor have any payments been made by Parent toward Student's program. While Private School's rates do appear to be reasonable, that alone is not sufficient to establishing that the DOE should be made to pay whatever is later determined to be the total costs for Student's attendance at Private School.

³ This Hearings Officer also notes that while it is not dispositive on the outcome of the case, Parent willingly pulled Student out of the ESY program on at least two occasions prior to Student starting school in August 2022 and also pulled Student from Home School prior to the anticipated date where two (2) RBTs would be provided to Student, thereby limiting the amount of work that could have been done on Student's IEP goals and objectives with the assistance of two (2) RBTs. Parent also did not enroll Student into a program or engage the services of Private School until October 2022. *FOF 19, 39.*

Additionally, even if Petitioners were entitled to an award for an alleged denial of FAPE, the appropriate remedy in this case would only be a minimal compensatory education award for the DOE's lack of staffing for the second RBT while Student was in attendance. Petitioners have not established that Student's attendance at Private School was the only necessary option for Parent to get Student the services that the DOE failed to provide, and in fact, the evidence established in this case is that Parent kept Student at home for approximately two (2) months without services, rather than allowing the DOE to obtain the second RBT and provide full services to Student from that point forward. Parent pulled Student from school just two (2) days prior to when Parent was informed that the second RBT would start working with Student. *See* P-Ex.2, p.042-043, 049.

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 that Respondents denied Student a FAPE by failing to implement Student's IEP-07/14/2022. The DOE's failure to provide a second RBT for Student for the five and a half (5 ½) days in August 2022 did not rise to the level of a material failure to implement Student's IEP, and Petitioners have not proven that this procedural violation resulted in a lost educational opportunity for Student or a deprivation of educational benefits. As Petitioners have failed to prove a denial of FAPE, Petitioners' requests for remedies are also 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, December 27, 2022.

CHASTITY T. IMAMURA
Hearings Officer
Richards Building
707 Richards Street, Suite 520
Honolulu, Hawai'i 96813
Phone: (808) 587-7680
Fax: (808) 587-7682
atg.odr@hawaii.gov