



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

In the Matter of STUDENT, by and through
the Parent¹,

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAII,

Respondent.

DOE-SY2223-023

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:
March 21-22, 2023

Hearings Officer: Charlene S.P.T. Murata

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION**

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act (“IDEA”), as amended in 2004, codified at 20 U.S.C. §§ 1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R. Part 300; and the Hawaii Administrative Rules §§ 8-60-1, et seq.

II. INTRODUCTION

A Request for IDEA Impartial Due Process Hearing Complaint, dated January 11, 2023 (“Due Process Hearing Complaint” or “Complaint”), was received by the Department of Education (“DOE” or “Respondent”) on January 17, 2023 from Petitioners Student, by and through Student’s Parent, Parent-1. The Due Process Hearing Complaint was filed by the Office of Dispute Resolution on January 17, 2023.

Respondent’s response, dated January 24, 2023, to Petitioners’ Complaint was filed on January 26, 2023.

On February 9, 2023, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for February 13, 2023.

On February 13, 2023, a prehearing conference was held with Eric A. Seitz, Esq. (“Mr. Seitz”) appearing on behalf of Petitioners, and Deputy Attorney General Anne T. Horiuchi (“Ms. Horiuchi”) appearing on behalf of Respondent. During the prehearing conference, the parties agreed to have the due process hearing on March 21-24, 2023 using the Zoom video conferencing platform. A Prehearing Order was issued on February 13, 2023.

Disclosures were due March 14, 2023. Both parties timely submitted their respective disclosures.

The due process hearing took place on March 21-22, 2023, using the Zoom video conferencing platform. All participants in the due process hearing appeared remotely using both the video and audio functions on Zoom, except for Deputy Attorney General Bradford K. Chun (“Mr. Chun”), who observed the due process hearing with his video and audio functions turned off. Petitioners did not object to Mr. Chun observing the proceedings. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Seitz, and

Respondent was represented by Ms. Horiuchi. Parent-1 and District Educational Specialist (“DES”) were present for the entire proceeding. The due process hearing concluded on March 22, 2023 and the remaining two days were stricken from the calendar. Tr. Vol. II, 187:8-10².

Petitioners called Parent-1 and Doctor-2 as witnesses during the due process hearing. Respondent called DOE-RBT, BCBA and SPED Teacher as witnesses during the due process hearing. Petitioners did not present any rebuttal witnesses.

The following Petitioners’ exhibits were admitted into evidence without objection: Exhibits 1-3. Tr. Vol. I, 8:4-6.

The following Respondent’s exhibits were admitted into evidence without objection: Exhibits 7 (pp. 12-31), 8 (pp. 32-33), 10 (pp. 36-55), 11 (pp. 56-57), 13 (pp. 60-79), 14 (p. 80), 16 (pp. 83-102), 17 (pp. 103-104), 27 (p. 133), 85 (p. 249), 88 (pp. 254-277), 109 (p. 414), 115 (pp. 424-457), 116 (pp. 458-490), 117 (pp. 491-536), 118 (pp. 537-564), 121 (pp. 598-611), 122 (pp. 612-627), 125 (p. 630), 127 (pp. 663-790), 129 (pp. 873-884), 131 (pp. 897-903), 134 (pp. 942-950), 138 (pp. 968-970), 141 (pp. 1088-1089), 143 (pp. 1093-1098). Tr. Vol. II, 115:22-116:24, 185:20-187:7.

On April 10, 2023, Petitioners filed Petitioners’ Motion to Supplement Record of Hearing; Declaration of Eric A. Seitz; Exhibits 1 and 2 (“Motion to Supplement”). On April 11, 2023, Respondent filed Respondent’s Memorandum in Opposition to Petitioners’ Motion to Supplement Record of Hearing, filed on April 10, 2023; Declaration of Anne T. Horiuchi; Exhibit “A.” On April 11, 2023, an order denying Petitioners’ Motion to Supplement was issued.

On April 12, 2023, both parties timely submitted their closing briefs.

² “Tr. Vol. II, 187:8-10” means Transcript Volume II, page 187, lines 8 through 10.

The deadline to issue a decision in this matter is April 26, 2023. The deadline by which a decision must be issued was extended from April 2, 2023 to April 26, 2023. See Order Granting Respondent’s Request to Extend the 45-Day Decision Deadline from April 2, 2023 to April 26, 2023; Declaration of Anne T. Horiuchi, dated February 15, 2023, issued on February 16, 2023.

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.

III. ISSUE PRESENTED

In their January 17, 2023 Request for Impartial Due Process Hearing Complaint, Petitioners allege a violation of the IDEA. Specifically, Petitioners allege that Respondent denied Student a free appropriate public education (“FAPE”) and raise the following issue for determination at the due process hearing:

Whether Student was denied a FAPE when Student was not provided registered behavior technician (“RBT”) services and as a consequence it is necessary to place Student in a residential treatment program.

Petitioners request the following remedy: Place Student in a residential treatment program.

IV. FINDINGS OF FACT

1. Student is currently [REDACTED] years old and in the [REDACTED] grade.
2. Student has qualified for special education services since kindergarten. Parent-1, Tr. Vol. I, 16:10-12.
3. Student is eligible for special education and related services pursuant to the IDEA and Hawaii Administrative Rules Chapter 60 under the category of [REDACTED] that included Disability-1 and Disability-2. DOE Ex. 7 at 0013.

4. Student's "delays in communication, fine/gross motor, functional skills, social skills, coping skills and academics impact [Student's] ability to participate fully and progress in the general education setting." DOE Ex. 7 at 0013.
5. Parent-1 and Parent-2 are divorced. Before Parent-2 relinquished physical custody of Student on July 26, 2022, Student lived half the time with Parent-1 and the other half with Parent-2. Parent-1, Tr. Vol. I, 52:9-53:1. After July 26, 2022, Student lived with Parent-1 full time. Parent-1, Tr. Vol. I, 54:22-24.
6. Living in Parent-1's home are Parent-1, Spouse, Student's biological brother, two stepbrothers, and up to a certain point Student's biological sister. Parent-1, Tr. Vol. I, 12:2-8; DOE Ex. 116 at 0472.
7. On August 3, 2021, Student started [REDACTED] grade at Home School. DOE Ex. 116 at 0458.
8. In October of 2021, DOE-RBT was assigned to work with Student. DOE-RBT was not assigned to work with any other students. DOE-RBT, Tr. Vol. I, 77:9-16. As Student's RBT, DOE-RBT provides Student with one-to-one Applied Behavior Analysis ("ABA") services; implements strategies in Student's behavior intervention plan ("BIP"); and takes data on Student's behavior. DOE-RBT is also frequently observed by DOE-RBT's supervisor, BCBA. DOE-RBT, Tr. Vol. I, 79:11-80:23.
9. ABA is the use of strategies to replace challenging behaviors on a day-to-day basis. A BIP is a type of intervention used in the provision of ABA services. A BIP is used to address a child's behavioral needs and has antecedent-based interventions, responses to specific challenging behaviors and their functions, and strategies and reinforcement systems to increase functional communication, social skills, and use of identified

replacement behaviors. DOE Ex. 7 at 0029; BCBA, Tr. Vol. II, 122:24-123:2; DOE-RBT, Tr. Vol. I, 92:17-20.

10. On January 11, 2022, Parent-1 and Parent-2 were contacted to pick up Student because Student was sick. Parent-1 picked up Student. DOE Ex. 116 at 0463.
11. On February 18, 2022, Parent-2 expressed to SPED Teacher the frustration Parent-2 was feeling about Student's extreme aggression towards Parent-2 at home. Parent-2 told SPED Teacher that Student had a major aggressive incident the week before where Student repeatedly hit Parent-2 in the head outside of a restaurant. Parent-2 could not get away and had to push Student into the bushes to stop Student. Parent-2 was very emotional and stated that Parent-2 did not know what to do as Parent-2 did not have support from Parent-1 who had expressed that Parent-1 had not seen the same aggression at Parent-1's home. SPED Teacher talked to Parent-2 about setting up a meeting with Parent-1 and DOE-Doctor, the school's psychologist; contacting community resources through the Department of Health; and receiving parent consult training. DOE Ex. 118 at 0538.
12. On February 22, 2022, SPED Teacher emailed Parent-1 website links to community resources that could offer ABA and behavioral health support services. SPED Teacher also gave Parent-1 Doctor-1's name, informing Parent-1 that Doctor-1 was a child psychologist on Island-1 who was not affiliated with Home School. DOE Ex. 27 at 0133; DOE Ex. 115 at 0427; SPED Teacher, Tr. Vol. II, 147:13-149:3.
13. Student has an IEP, dated March 9, 2022 ("3/09/2022 IEP"), that provides Student with 1860 minutes per week of Special Education; daily transportation; and 360 minutes per quarter of speech/language therapy. DOE Ex. 7 at 0027.

14. Student's 3/09/2022 IEP also provides Student with numerous Supplementary Aids and Services, Program Modifications and Supports for School Personnel ("Supplementary Aids and Services"). Some Supplementary Aids and Services provided to Student are 1800 minutes per quarter of ABA Services; a BIP; 1860 minutes per week of Individual Instructional Support ("IIS"); and One-on-One Support, while allowing opportunities for independence. DOE Ex. 7 at 0027-0028.
15. Student's 3/09/2022 IEP contains a "Clarification of Services and Supports" section. The Clarification of Services and Supports section lists, among other things, the following information: (A) "Due to the nature and severity of [Student's] disability, [Student] needs Individual Instructional Support (IIS) by an RBT to monitor safety and assist with academic and functional skills....The IIS is needed concurrently with other services to maintain [Student's] behaviors including elopement, self-regulation, socialization, communication, academic support, self advocacy and functional independence." (B) "It is recommended that [Student] receive a Behavior Intervention Plan (BIP) to be implemented by a Registered Behavior Technician (RBT) for 1,860 minutes per week." (C) Some of the interventions included in the ABA services are the development and implementation of a BIP; creation of a crisis response plan to respond to dangerous behaviors (i.e., elopement and aggression); provide designated areas where Student can de-escalate and/or utilize coping strategies; data graphing and review bi-monthly; and "[p]rovide 1:1 instructional support services throughout the school day. Given [Student's] need for Applied Behavior Analysis (ABA) treatment to address [Student's] intensive behavioral and communication needs, a Registered Behavior

Technician (RBT) credential is recommended for 1:1 instructional support.” DOE Ex. 7 at 0028-0029.

16. Student is provided one-to-one supervision because Student needs help with Student’s behavioral problems, ability to pay attention, staying on task, making good choices, and to keep Student safe inside and outside of the classroom. SPED Teacher, Tr. Vol. II, 174:25-175:6.
17. According to the 3/09/2022 IEP, Student will be given extended school year (“ESY”) services for breaks longer than twenty-one (21) calendar days. DOE Ex. 7 at 0027.
18. According to the 3/09/2022 IEP, Student’s least restrictive environment (“LRE”) for the remainder of Student’s █ grade year was a “small group, functional life skills/community based classroom setting for six periods...[and] in the general education setting for one elective class...and any other non-academic extracurricular activities with supports. Next school year 2022-2023 [Student] will participate in a small group, functional life skills/community based classroom setting for five periods...[w]ith two elective classes with [Student’s] general education peers []” and all non-academic activities (such as lunch, recess, changing bells, assemblies) with general education peers. DOE Ex. 7 at 0030; SPED Teacher, Tr. Vol. II, 140:11-20.
19. At the time of the 3/09/2022 IEP meeting, the IEP team discussed how Student was able to calm down after moments of extreme frustration, talk about what went wrong, and then get back to Student’s daily routine. The IEP team also discussed that when Student becomes frustrated, anxious, overwhelmed, or is denied a preferred activity/item: Student would hit him/herself or another person, throw things, elope to the break area, cry, point or whine, and in the past spit and scream. The IEP team discussed that

“[Student’s] aggressive behaviors and elopement during times of frustration have been minimal during [Student’s] █ grade school year; however, [Student] has had three aggressive episodes this year where [Student] required intensive adult support in order to stop [Student] from hurting staff or [Student].” During the IEP meeting, Parent-2 shared that Parent-2 had seen some violent/physical behaviors from Student; and Parent-1 shared that Student had shown violent behavior toward Parent-1’s spouse, Spouse. DOE Ex. 7 at 0014; SPED Teacher, Tr. Vol. II, 158:24-25.

20. Following the 3/09/2022 IEP meeting, a Prior Written Notice of Department Action, dated March 21, 2022 (“3/21/2022 PWN”), was issued to summarize, among other things, the IEP team’s proposal to provide IIS services to Student through an RBT for 1860 minutes per week. DOE Ex. 8 at 0032-0033.
21. On May 6, 2022, Parent-1, Parent-2, DOE-Doctor and SPED Teacher had a virtual meeting to discuss support for the family with Student’s rise in emotions and aggression. DOE-Doctor provided advice to parents, and encouraged parents to look into the Department of Health services that were emailed to Parent-1 in February. DOE-Doctor also encouraged parents to consider seeing a psychiatrist to get more support. Parent-2 expressed frustration and stress over Student’s aggression. Parent-1 expressed that Parent-1 had never seen the aggression but Spouse had seen it once. After the meeting, SPED Teacher and DOE-Doctor emailed to Parent-1 links to Department of Health services and psychologists on the island. DOE Ex. 118 at 0542; SPED Teacher, Tr. Vol. II, 147:13-149:20.
22. On May 19, 2022, Student had an aggressive episode. Student threw objects, tapped Student’s chest repeatedly and increased “hum tone,” flipped over a chair, and spat.

When directed to sit down, Student advanced towards SPED Teacher and repeatedly struck SPED Teacher while yelling. Quality behavioral strategies (“QBS”) responses were used to diffuse and redirect Student’s aggression. DOE-RBT-2 attempted to assist in deflecting the strikes and removing Student from the classroom, but Student advanced towards SPED Teacher and DOE-RBT-2. As Student was being removed from the classroom, Student hit another student in the neck and face. SPED Teacher, DOE-RBT and DOE-RBT-2 directed Student outside of the classroom. Once outside, Student struck SPED Teacher, DOE-RBT and DOE-RBT-2. Student was placed into QBS certified seated 2-person stability hold by DOE-RBT and SPED Teacher. Student’s aggression lowered and was in this state for approximately another 30 minutes. Parent-1 was called to pick up Student because Student could not take the bus in such an aggressive state, and the school bus had already left because school had ended. Parent-1 expressed to SPED Teacher that Parent-1 has never seen Student act like this at home and Student has never been aggressive around Parent-1. Parent-1 took Student home. DOE Ex. 115 at 0430; DOE Ex. 118 at 0543-0544.

23. On June 23, 2022, Student had an aggressive episode. Student came to school upset and crying but was able to calm down. Later, Student started hitting Student’s desk, and was instructed by SPED Teacher to go outside to take a break. On the way out the door, Student struck SPED Teacher in the arms several times with minimal force. While outside, Student continued to yell and scream, pound on a table, and threw sticks and leaves at the staff. Student then repeatedly struck SPED Teacher and an education assistant in the face, head, and arms with extreme force. A male nurse attempted to help and Student struck the male nurse as well. SPED Teacher guided Student to a picnic

table where Student continued to cry and pound on the table. Student eventually calmed down, cleaned up, and got on the school bus to go home. The incident lasted for approximately an hour and 45 minutes. DOE Ex. 118 at 0545.

24. On July 26, 2022, Parent-2 sent Parent-1 a note relinquishing physical custody of Student (“7/26/2022 Note”). The 7/26/2022 Note states: “Do not drop [Student] off at my house tomorrow or any other day. I am no longer willing to have physical custody of [Student]. If you continue to drop [Student] off at my house I will be forced to call child welfare services and you will be forced to deal with them.” DOE Ex. 115 at 0449.
25. On July 29, 2022, Parent-1 informed SPED Teacher that Student would be living with Parent-1 full time. Parent-1 sent SPED Teacher a copy of the 7/26/2022 Note. DOE Ex. 115 at 0431; DOE Ex. 118 at 0546.
26. On July 31, 2022, Parent-2 informed SPED Teacher that Parent-2 would be giving full legal custody to Parent-1. Parent-2 also informed SPED Teacher that Parent-2 has “been unable to control [Student’s] episodes and am no longer willing to take any more abuse. [Student] has also been violent with [Student’s] sister...[Parent-1] is making this very difficult even though [Parent-1] has made it clear that [Parent-1] will take full custody. I will be on standby to pick [Student] up on Wednesday and Friday this week if [Parent-1] refuses to take [Student]....” DOE Ex. 116 at 0466; DOE Ex. 118 at 0547.
27. On August 3, 2022, Student returned to school from summer break and started [REDACTED] grade. DOE Ex. 116 at 0466.
28. On August 8, 2022, SPED Teacher informed Parent-2 that when Student got off the school bus in the morning, Student whined for a while asking for Parent-2, but Student was still able to have a good day at school. DOE Ex. 116 at 0467.

29. On August 16, 2022, Student was quite tired and had a runny nose that progressed through the day. After lunch, Student became upset and attempted to hit and head-butt DOE-RBT. DOE-RBT blocked Student and guided Student outside of the classroom. Student sat down on a bench, threw a few objects, yelled, and spat for about 45 minutes before calming down. DOE Ex. 117 at 0496.
30. On August 17, 2022, Parent-1 was called to pick up Student because Student was sick. DOE Ex. 115 at 0433-0434.
31. On August 18, 2022, Parent-1 was called again to pick up Student because Student was still sick. SPED Teacher reminded Parent-1 that Home School had strict rules about students not coming to school when sick. DOE Ex. 115 at 0434, 0452.
32. On August 23, 2022, Parent-2 asked SPED Teacher if Parent-2 could go to school to see Student or if Parent-2 could FaceTime Student at school. Parent-2 informed SPED Teacher that Parent-1 had taken their daughter's phone away from daughter so now Parent-2 could not see Student. SPED Teacher informed Parent-2 that SPED Teacher had asked school administration for approval to allow Parent-2 to visit and drop off snacks, but school administration had denied SPED Teacher's request. SPED Teacher informed Parent-2 that SPED Teacher would try again to get approval. DOE Ex. 116 at 0468.

DOE-RBT goes on Maternity Leave

33. On August 25, 2022, DOE-RBT went on maternity leave and returned to school on November 7, 2022. DOE-RBT did not provide services to Student while DOE-RBT was on maternity leave. DOE-RBT, Tr. Vol. I, 78:9-22.

34. While DOE-RBT was out on maternity leave, Home School tried to bring in an RBT to support Student but was not able to due to a shortage of RBTs [REDACTED]. SPED Teacher, Tr. Vol. II, 162:3-7.
35. As a special education teacher at Home School, SPED Teacher only teaches special education students in a “functional skills classroom.” SPED Teacher has seven (7) students and multiple RBTs and education assistants in SPED Teacher’s classroom. SPED Teacher, Tr. Vol. II, 139:3-7, 162:23-163:1, 175:23-178:16.
36. While DOE-RBT was on maternity leave, various school personnel pitched in to support Student. The RBTs in the classroom provided support to Student on a rotational basis so that Student would always have individual support. For instance, an RBT assigned to another student in the classroom provided support to Student after that RBT’s student left school every day at noon. During times when there was no RBT available to support Student, SPED Teacher or an education assistant would support Student. When SPED Teacher is teaching the class, an education assistant or an RBT would support Student. SPED Teacher, Tr. Vol. II, 162:3-163:4, 175:23-177:12; BCBA, Tr. Vol. I, 104:24-105:10.
37. When Student is not in SPED Teacher’s classroom, Student would be in general education classes or at lunch or recess. SPED Teacher would take Student to Student’s general education classes, lunch and recess during SPED Teacher’s “prep periods” and SPED Teacher’s lunch break. SPED Teacher’s other students would be in their respective general education classes. SPED Teacher, Tr. Vol. II, 163:5-12, 179:2-12.

38. SPED Teacher and another staff member took data on Student's behaviors between September 3, 2022 and November 4, 2022³. There was a period from September 15, 2022 to October 18, 2022 when no data was taken. DOE-RBT resumed taking data on Student's behavior on November 7, 2022. DOE Ex. 127 at 0780-0790; DOE Ex. 129 at 0873-0884; DOE Ex. 131 at 0897-0903; DOE-RBT, Tr. Vol I, 80:24-85:24.
39. Between August 25, 2022 to November 7, 2022, Student was not in school during Labor Day (September 5), fall break (October 3-7)⁴, Waiver Day⁵ (██████████), Complex Day⁶ (██████████), and days when Student was absent from school (August 31 – September 2⁷; October 10-14⁸). SPED Teacher, Tr. Vol. II, 160:12-162:2; DOE Ex. 138 at 0968-0970; DOE Ex. 115 at 0437-0438; DOE Ex. 115 at 0439; DOE Ex. 118 at 0555.
40. On August 30, 2022, Student had an aggressive episode. Student came to school extremely tired and was moody throughout the morning. While Student was working with SPED Teacher, Student very suddenly and quickly reached across the table and slapped SPED Teacher across the face. SPED Teacher stood up in front of the other students to block them and Student walked out of the classroom crying. While outside, Student yelled; spat; hit a table with Student's open palm; took off Student's shoes and threw them on the roof; and picked up and threw a large metal garbage can and a large

³ SPED Teacher took data during this period except for October 19, 2022 when a staff member took the data.

⁴ The undersigned takes judicial notice of the dates for Labor Day and fall break in 2022. DOE Ex. 118 at 0552; DOE Ex. 115 at 0437.

⁵ Waiver Day is a day when teachers have meetings and no students are in school. SPED Teacher, Tr. Vol. II, 160:22-24.

⁶ Complex Day is a day when schools within a certain school complex have their teachers attend meetings and trainings and there are no students in these schools. SPED Teacher, Tr. Vol. II, 161:9-13; DOE Ex. 118 at 0552.

⁷ Student was crisis removed from school on August 31, 2022 to September 2, 2022.

⁸ Student was in the hospital on October 10-15, 2022.

garbage bag. Student then charged through shrubs that separated SPED Teacher and Student and hit⁹ SPED Teacher. SPED Teacher walked away from Student as Student continued to hit. A security guard intervened, and Student hit the security guard. As Student continued to hit SPED Teacher and the security guard with an open palm across their faces and heads, the vice principal of Home School told the security guard to put Student in a “hold.” The security guard gently held Student’s arm. When the security guard released Student, Student resumed hitting and kicking SPED Teacher, the security guard, and the vice principal. Student was placed in another “hold,” and when Student was released, Student resumed hitting SPED Teacher, the security guard, and the vice principal. Student was placed in a hold for a third time until Student calmed down, laid down on the ground in a fetal position and cried. After the classroom was cleared, SPED Teacher helped Student stand up and led Student back into the classroom to lay down in the “chill out room.” Parent-1 was called to take Student home. As a result of this incident, Student was “crisis removed” from school for three days. DOE Ex. 115 at 0435; DOE Ex. 116 at 0468; DOE Ex. 118 at 0548-0549; Parent-1, Tr. Vol. I, 59:6-22.

41. On August 31, 2022, SPED Teacher informed Parent-2 that due to the extreme aggression Student displayed on August 30, 2022, Student was crisis removed from school for three days while a new behavior and crisis plan was being put in place. SPED Teacher also informed Parent-2 that there was aggression last week when SPED Teacher was not in school. DOE Ex. 116 at 0468.

⁹ When Student hits a person, Student swings Student’s arm back with an open hand and slaps the person. SPED Teacher, Tr. Vol. II, 153:9-13.

42. On September 26, 2022, Student had an aggressive episode. While in class, another student took off Student's shoes. SPED Teacher took the shoes and gave them back to Student. As SPED Teacher walked away, Student threw Student's socks at SPED Teacher. SPED Teacher told Student to pick up Student's socks. Student picked up Student's socks and sat back down to put them back on. Student then suddenly threw the shoes and socks at SPED Teacher but missed. Student then jumped up and began hitting SPED Teacher across the face and head with an open palm. An education assistant intervened, held Student's arms, and sat Student down on the ground. The classroom was cleared. After a couple of minutes, Student stood up and repeatedly kicked and hit two education assistants and SPED Teacher. Student was then guided to the "chill out space" and SPED Teacher moved a couch in between Student and staff. Parent-1 was called and Parent-1 came to school to pick up Student. DOE Ex. 118 at 0551.
43. On September 29, 2022, Student cried a lot at school, talking about going to Parent-2's house next week. SPED Teacher asked Parent-2 if Student was going over to Parent-2's home next week because Student was talking about it a lot that morning. Parent-2 informed SPED Teacher that although Parent-2 wanted to see Student, there were no plans for Student to go over to Parent-2's house. Parent-2 then asked when school administration will approve Parent-2 going to school to see Student. SPED Teacher informed Parent-2 that SPED Teacher would have school administration call Parent-2. DOE Ex. 116 at 0470; DOE Ex. 117 at 0507.
44. On September 30, 2022, Parent-1 dropped off Student at Parent-2's house in the morning without first informing Parent-2. Within two hours, Student became aggressive

- with Parent-2. Student attempted to head-butt Parent-2's friend who was standing between them. Parent-2 called the police and Parent-1 eventually picked up Student from Parent-2's house. DOE Ex. 116 at 0470; DOE Ex. 118 at 0552.
45. On October 10, 2022, SPED Teacher communicated separately with Parent-1 and Parent-2. Parent-1 spoke to SPED Teacher and informed SPED Teacher that fall break had been rough at home. Parent-1 stated that Student had multiple moments of aggression where Student gave Parent-1 a bloody nose; kicked Spouse; and hit little brother. Parent-1 stated that Parent-1 would be taking Student to Hospital-1 after school to get Student help. DOE Ex. 118 at 0552; DOE Ex. 116 at 0470. Parent-2 informed SPED Teacher that Parent-2 has "lost hope" but that Parent-2 will not give up legal custody of Student and asked SPED Teacher to keep Parent-2 informed about Student's status. Both parents told SPED Teacher about the September 30, 2022 incident at Parent-2's house. DOE Ex. 116 at 0470.
46. On October 11, 2022, Parent-1 informed SPED Teacher that Student would not be going to school because Student was admitted into Hospital-1 on October 10, 2022. Student was later medevacked to Hospital-2 where Student was admitted into the emergency department for aggressive behavior by Doctor-2. Student was subsequently admitted into the Family Treatment Center ("FTC") in Hospital-2. DOE Ex. 115 at 0437-0438; Pet. Ex. 3 at 2 of 6 (Date of Service: 10/14/22 0951); Pet. Ex. 3 at 1 of 4 (Date of Service: 10/15/22 1024); Parent-1, Tr. Vol. I, 21:17-22, 26:2-9; Doctor-2, Tr. Vol. I, 40:24-41:7.
47. On October 12, 2022, Social Worker at Hospital-2 had two phone conversations with Parent-1. According to Social Worker's report, during the first conversation, Parent-1

“confirmed [Student’s] aggression and recent behavior just started recently after [Parent-2] left and prior to this, aggression only got to this point 1x before.” Parent-1 also informed Social Worker that “[Spouse] is worried about [Student’s] aggression towards [Spouse] and the other kids in the home.” Pet. Ex. 3 at 1 (Date of Service: 10/12/22 1114). During the second conversation, Social Worker obtained consent to contact SPED Teacher to coordinate Student’s care. They further discussed Parent-2’s recent lack of involvement. Parent-1 shared with Social Worker aggressive incidents Parent-2 had with Student, including an incident where Student ““whacked [Parent-2] on the head with a hydroflask.”” Parent-1 was tearful talking about Spouse and their children moving out because of concerns for their safety and Parent-1 worrying about losing Parent-1’s job. Parent-1 shared that Student had given Parent-1 a bloody nose and that Parent-1 had to hold down Student for an hour at a friend’s house. Pet. Ex. 3 at 1 (Date of Service: 10/12/22 1233).

48. On October 13, 2022, Student had a seizure in Hospital-2 due to a reaction to the medication. Pet. Ex. 3 at 5-6 of 6 (Date of Service: 10/14/22 0951).

49. Also on October 13, 2022, Parent-2 called Home School and spoke to SPED Teacher to discuss sharing of information because Parent-1 would not let Parent-2 know where Student was and what was going on. Parent-2 sent SPED Teacher the following message: “Hi [SPED Teacher]...You have always done more then [sic] could even be reasonably expected of you. I realize that [Parent-1] pressures you to keep information about [Student] from me. What’s [sic] [Parent-1 is] trying to do violates my legal rights as [Student’s parent]. Should [Parent-1] continue this course of action I will begin taking steps to put an end to it. It’s unfair to you for [Parent-1] to put you in this

position. Please continue to keep me informed about the current situation. If it's any consolation, I do not share the information that you give me with [Parent-1]. We don't even communicate." DOE Ex. 116 at 0471; DOE Ex. 118 at 0554.

50. Also on October 13, 2022, Parent-1 signed "Consent for Release of Information" forms to allow Home School to receive and release information from/to Hospital-2. DOE Ex. 134 at 0948-0950.
51. According to Hospital-2's records, Student "was transferred from [Hospital-1] to FTC on 10/11/22 for increasing aggressive and violent behavior at home." Pet. Ex. 3 at 2 of 6 (Date of Service: 10/14/22 0951). Student "was transferred to FTC for increasing aggression/violence towards family and school staff since [Parent-2] stopped caring for [Student] several months ago." Hospital-2's records also state that Student will require a medication regimen to help with agitation and violence. Pet. Ex. 3 at 5-6 of 6 (Date of Service: 10/14/22 0951).
52. On October 14, 2022, Social Worker received a call from SPED Teacher. Social Worker provided SPED Teacher with a brief overview of Student's hospitalization, and SPED Teacher faxed to Social Worker a copy of the Consent for Release of Information forms signed by Parent-1. Pet. Ex. 3 at 1 (Date of Service: 10/14/22 1103); DOE Ex. 134 at 0948-0950.
53. Also on October 14, 2022, a child psychiatrist made medication recommendations and recommended that Student see an outpatient psychiatrist at Hospital-2's Counseling Services until Student could follow up with Doctor-1 on Island-1 in December. Pet. Ex. 3 at 1 of 6 (Date of Service: 10/14/22 0951).

54. On October 15, 2022, Student was discharged from Hospital-2. DOE Ex. 115 at 0439; DOE Ex. 118 at 0555. Following Student's discharge, Doctor-2 kept in contact with Student and Parent-1 to continue providing care to Student. Doctor-2, Tr. Vol. I, 40:24-41:7, 44:10-19. A pediatric hospitalist wrote, among other things, in a "Discharge Summary" that "For the past three months, patient has been more aggressive/agitated since [Student's] biologic [parent] left....Admitted because [Student] was being aggressive. Hitting family members. Hitting classmates at school. [Student] had been sent home a couple times due to aggression." The Discharge Summary provided Student with contact information for doctors, government services, counseling services at Hospital-2, and ABA services via insurance. DOE Ex. 134 at 0942-0946¹⁰.
55. On October 17, 2022, Social Worker faxed a copy of the Discharge Summary to SPED Teacher. Pet. Ex. 3 at 1 of 1 (Date of Service: 10/17/22 1020); DOE Ex. 134 at 0942.
56. On October 26, 2022, SPED Teacher informed Parent-1 that SPED Teacher was "seeing a lot of our old [Student] lately...[Student] is making lots of progress." Parent-1 informed SPED Teacher that Student is being monitored to see if the current medication is appropriate for Student and that Student is being helped by a psychologist. DOE Ex. 115 at 0441.
57. On November 2, 2022, Parent-2 informed SPED Teacher that Parent-2's daughter is now living full time with Parent-2 and that daughter told Parent-1 that daughter did not

¹⁰ DOE was provided a copy of a "Discharge Summary" with "Date of Service: 10/14/22 1350," which pre-dates Student's actual discharge date. The Discharge Summary was a part of DOE's disclosures for the due process hearing. Petitioners' disclosures contain a "Discharge Summary Addendum" with "Date of Service: 10/15/22 1350." Besides some handwritten markings, the word "[REDACTED]," and sections entitled "Revision History" and "Routing History" in DOE's Discharge Summary, the two documents are almost identical. DOE Ex. 134 at 0943-0946; Pet. Ex. 3 (Date of Service: 10/15/22 1350).

want to live in Parent-1's home anymore. Parent-2 also informed SPED Teacher that Parent-2 and daughter are going through therapy. DOE Ex. 116 at 0472.

58. On November 3, 2022, Student had an aggressive episode. SPED Teacher approached Student to tell Student not to throw away Student's carrots. Student immediately began hitting SPED Teacher in the head and arm. SPED Teacher pointed outside. As Student walked outside, Student began repeatedly hitting SPED Teacher and an education assistant. Student then took off Student's shoes and tried to throw them at SPED Teacher. Student continued hitting the education assistant and SPED Teacher and grabbed an orange bucket and threw the bucket towards BCBA who then put Student into a one-person stability hold. Student calmed down after 5 minutes. Parent-1 was called to pick up Student. When Parent-1 arrived, Parent-1 questioned why Home School repeatedly called Parent-1 to pick up Student whenever Student had an aggressive episode. SPED Teacher spoke to Parent-1 and BCBA and with the approval of school administration decided to keep Student at school because at this point Student had calmed down. After lunch, Student became agitated and threw a bucket and recycling tool. SPED Teacher and an RBT moved Student to a bench. Student eventually calmed down, followed directions, and was sent home on the school bus. DOE Ex. 118 at 0557; DOE Ex. 115 at 0441; Parent-1, Tr. Vol. I, 59:23-60:6.

DOE-RBT Returns from Maternity Leave

59. On November 7, 2022, DOE-RBT returned to school from maternity leave. DOE-RBT, Tr. Vol. I, 84:23-85:1.
60. On November 9, 2022, SPED Teacher shared with Parent-2 what had occurred on November 3, 2022. In response to Parent-2's reaction that SPED Teacher was hit by

Student and Parent-2's inquiry about Student being sent home, SPED Teacher stated: "It's ok. It's kind of part of the job and we will work through this. We did not send [Student] home early. [Student] calmed down so we made the choice to have [Student] stay. It was touch and go all the rest of the day. We will be determining that on a case by case basis from this point on. We would like for [Student] to stay here as long as it is safe for [Student] and everyone involved. But depending on the different factors of the events we will determine that with admin[istration] for each occurrence." DOE Ex. 116 at 0472-0473.

61. On November 13, 2022, Parent-1 spoke to SPED Teacher and informed SPED Teacher that Parent-1 wanted to call an IEP meeting because Parent-1 had found out from a family friend, who was a social worker, that there was a residential treatment facility on the mainland that Student could be placed in if it was written in Student's IEP. SPED Teacher told Parent-1 that SPED Teacher would schedule an IEP meeting immediately. DOE Ex. 118 at 0558.
62. On November 17, 2022, Parent-1 spoke to SPED Teacher and told SPED Teacher that Parent-1 had spoken to someone at the mainland residential treatment facility. Parent-1 told SPED Teacher that the residential treatment facility told Parent-1 about FAPE and LRE and Parent-1 asked SPED Teacher if SPED Teacher knew what FAPE and LRE were. SPED Teacher explained LRE to Parent-1 and said that it will be a big component of their discussion at the upcoming IEP meeting scheduled for December 2, 2022. SPED Teacher talked about the different levels of LRE and that a change in LRE had not been brought up because Student was doing well enough in school and was functioning in Student's "FSC" environment with general education electives and lunch

and recess with general education peers. Parent-1 did not agree with SPED Teacher. DOE Ex. 118 at 0559; DOE Ex. 115 at 0442.

63. On November 21, 2022, Parent-1 informed SPED Teacher that Parent-1 did not have time to prepare Student's lunch because Student was taken to the emergency room in the morning for hitting Student's little brother. Parent-1 asked that Student be provided school lunch. DOE Ex. 115 at 0442; DOE Ex. 118 at 0560.
64. On November 22, 2022, while discussing the IEP meeting scheduled for December 2, 2022, SPED Teacher informed Parent-1 that whoever Parent-1 wanted to attend the meeting could attend so long as Parent-1 provided SPED Teacher with their names and email addresses. SPED Teacher also asked Parent-1 if it was okay to include Parent-2 in the meeting as DOE had a legal obligation to include Parent-2. Parent-1 responded: "I don't care who is there! I'm voicing and fighting for [Student] and what's best for [Student]. That's where my interest lies." DOE Ex. 115 at 0442-0443.
65. On November 28, 2022, Parent-1 informed SPED Teacher about incidents that occurred during the weekend: (1) during a walk, Student was aggressive towards Parent-1 and threw a rock at Parent-1; and (2) during a Thanksgiving event, Student was aggressive with him/herself and Parent-1 had to take Student home first and then return later to get the rest of the family. Parent-1 also informed SPED Teacher that Parent-1 would be picking up Student early from school today because Student had an intake appointment at Health Clinic. DOE Ex. 115 at 0443.
66. On November 29, 2022, Doctor-2 wrote a letter ("11/29/2022 Letter") recommending that Student be placed in a residential treatment facility due to symptoms of "increase in violence directed against [Student's] family which has partially responded but not

completely responded to medication management.” Doctor-2 opined in the 11/29/2022 Letter that “[i]n a controlled setting such as a residential treatment program, the medication management could be more vigorous in an attempt to ameliorate [Student’s] violence.” Doctor-2 also opined that “[Neuropsychological testing] would also complement behavioral analysis which would then allow for comprehensive treatment so that [Student] can take advantage of [Student’s] free and public education if there is continued violence in the family.” Pet. Ex. 1; DOE Ex. 85 at 0249.

67. Prior to writing the 11/29/2022 Letter, Doctor-2 spoke to Student’s treating physicians, and reviewed Student’s medical records from Hospital-2, consisting of physician’s notes, discharge summary, and a plan for Student’s return home. Doctor-2 did not review any of Student’s educational records before and after writing the 11/29/2022 Letter. Doctor-2 did not speak with any DOE personnel regarding Student before and after writing the 11/29/2022 Letter. Doctor-2, Tr. Vol. I, 45:2-19, 46:21-23, 47:24-48:2, 48:8-19.
68. Student saw Doctor-1, a psychiatrist on Island-1, once in December of 2022 but Parent-1 preferred to Doctor-2. Parent-1, Tr. Vol. I, 24:14-25:20.
69. On December 2, 2022, an IEP meeting took place to discuss Student’s LRE. During the 12/02/2022 IEP meeting, Parent-1 brought up concerns about Student’s aggression. The IEP team listened to Parent-1’s concerns and agreed to look at the data on Student’s progress and how Student was doing in Student’s current LRE. SPED Teacher, Tr. Vol. II, 140:21-141:10. The IEP team revised Student’s IEP on December 2, 2022 (“12/02/2022 IEP”) to include “SBBH¹¹ Teacher Consult Services” and “BCBA Parent

¹¹ “SBBH” stands for school based behavioral health. SPED Teacher, Tr. Vol. II, 183:10-20.

Consult Services.” DOE Ex. 10 at 0052. With the exception of adding these two services and comments made by Parent-1 during the 12/02/2022 IEP meeting, Student’s 12/02/2022 IEP is the same as the 3/09/2022 IEP. In the “Clarification of Services and Supports” section, the 12/02/2022 IEP states that “[Student’s] parents and family will receive support from BCBA to help transfer skills learned at school to home as well be trained on QBS de-escalation strategies including some in home visits. Teacher will receive support from SBBH through consult to better support [Student].” DOE Ex. 10 at 0053.

70. BCBA Parent Consult Services is offered when behaviors at home need support. The support provided by BCBA is intended to fill the gap between home and school implementation. BCBA, Tr. Vol. II, 125:6-11.
71. According to the 12/02/2022 IEP, during the IEP meeting, Parent-1 stated that Parent-1 was “concerned for the safety of [Student], [Student’s] family, younger siblings, classmates, teachers, and staff. [Student] has had highly sporadic outbursts of intense aggression at home and at school. [Parent-1] is frustrated that [Parent-1] has had to pick [Student] up from school due to aggression three times this semester. Concerned for safety of [Student’s] heart when [Student] pounds on [Student’s] chest when angry. [Parent-1] has had very little luck with any support from in home services outside of school. [Parent-1] feels it is best for [Student] to be full time in a facility. [Parent-1] has been advised from a psychiatrist at [Hospital-2] that that is best.” According to the 12/02/2022 IEP, Parent-2 stated that “[Parent-2] will not allow [Student] to be sent out of state without [Parent-2’s] consent. [Parent-2] voiced [Parent-2’s] frustration over not

being able to communicate with [Parent-1] and know what is going on in [Student's] life." DOE Ex. 10 at 0038.

72. On December 2, 2022, Parent-1 gave a copy of Doctor-2's 11/29/2022 Letter to the IEP team. SPED Teacher, Tr. Vol. II, 151:7-18.
73. On December 6, 2022, BCBA had the first BCBA Parent Consult Services meeting with Parent-1. During the meeting, BCBA explained to Parent-1 what ABA services entailed, and what QBS, de-escalation strategies, physical holds and pairing were. BCBA, Tr. Vol. I, 107:5-109:19; DOE Ex. 125 at 0630.
74. On December 8, 2022, the IEP team met again to discuss the IEP team's review of the data and records. The resulting December 8, 2022 IEP ("12/08/2022 IEP") is the same as the 12/02/2022 IEP. No changes to the IEP were made and the school members of the IEP team declined to change Student's placement to a residential treatment facility. SPED Teacher, Tr. Vol. II, 142:24-143:14; DOE Ex. 13 at 0060-0079; DOE Ex. 14 at 0080.
75. Parent-1 did not inform the IEP team that Doctor-2 was Student's treating psychiatrist during the December meetings. SPED Teacher, Tr. Vol. II, 151:13-22.
76. Two Prior Written Notice of Department Action, dated December 9, 2022 ("12/09/2022-1 PWN" and "12/09/2022-2 PWN"), were issued. The 12/09/2022-1 PWN summarized the IEP team's proposed and refused actions during the 12/02/2022 IEP meeting. The 12/09/2022-1 PWN documented that Parent-1 had requested placement at a residential treatment facility and the IEP team rejected the request on December 2, 2022 because the IEP team needed to analyze the data and review Student's current behavior and academic records before making any determination about placement and program

changes. DOE Ex. 11 at 0056-0057; SPED Teacher, Tr. Vol. II, 141:11-17. The 12/09/2022-2 PWN summarized what occurred during the 12/08/2022 IEP meeting. The 12/09/2022-2 PWN documented that based on a review of available behavioral data, reports and observations, the IEP team declined to change Student's placement to a residential treatment facility. The 12/09/2022-2 PWN provided the following explanation: "The IEP team recognizes that [Student's] behavior can be difficult at home (more severe) than at school. The IEP school team is greatly empathetic of this request and is doing it's [sic] best to facilitate the family's access to public and private services that can support [Student] and [Student's] family both in and out of school (e.g., with consent, facilitating communication with various private and public community service partners, and implementing after school parent education and coaching)." DOE Ex. 14 at 0080; SPED Teacher, Tr. Vol. II, 143:15-21.

77. On December 9, 2022, SPED Teacher emailed Parent-1 a copy of Student's 12/08/2022 IEP¹² and 12/09/2022-1 PWN. DOE Ex. 88 at 0254-0277.
78. On December 12, 2022, Student went to school sick with a cough and runny nose. Student returned to school on December 13, 2022 while still sick. SPED Teacher told Student to go to the restroom to clean up. While walking into the restroom, Student slapped another student across the face, spat on the ground, and yelled. SPED Teacher told Student to sit down. Student complied, whined, and cried for a couple of minutes before using self-calming strategies to calm down. Student later kicked a peer and DOE-RBT guided Student to leave the area. Student was later taken to the school

¹² The IEP attached to the email is dated "12/08/2022, 12/02/2022." The IEP attached to the email is the same as the 12/08/2022 IEP, except that the "IEP Meeting Information" pages at the end of the IEP are different. DOE Ex. 13 at 0079; DOE Ex. 88 at 0274-0275.

nurse's office and the school nurse called Parent-1 to pick up Student because Student was sick. DOE Ex. 116 at 0474; DOE Ex. 118 at 0561; DOE Ex. 129 at 0877; DOE Ex. 131 at 0898; DOE-RBT, Tr. Vol. I, 90:21-91:5.

79. On December 14, 2022, Student came to school still showing signs of sickness: runny nose, coughing, sneezing, lethargy, and a low-grade fever. Student was taken to the school nurse. The school nurse attempted to call Parent-1 and Parent-2 numerous times throughout the day. Parent-1 told the school nurse to call Parent-2 because Parent-1 could not pick up Student. Parent-2 stated Parent-2 could not physically handle Student so Parent-2 could not pick up Student. The school nurse called school administration who then called Parent-1 to pick up Student. Parent-1 came and picked up Student around 1:00 p.m. DOE Ex. 116 at 0475; DOE Ex. 118 at 0562; DOE Ex. 115 at 0445. DOE-RBT was not able to take behavioral data of Student because DOE-RBT spent the day caring and cleaning after Student. DOE Ex. 129 at 0877.
80. On December 15, 2022, Student returned to school still not feeling well but better than yesterday. DOE Ex. 116 at 0475. Student had one instance of aggression on this day where Student tried to hit DOE-RBT. DOE Ex. 129 at 0877; DOE Ex. 131 at 0898.
81. On January 4, 2023, Parent-2 sent the following message to SPED Teacher: “[Parent-1] and [Spouse] have made it impossible for me to have a healthy relationship with [Student]. I’m putting my hands up and stepping back. My children don’t need to be exposed to the hatred that they show me, anymore then already are. I won’t be attending the meeting. Maybe I can visit [Student] at school someday.” “I went to see [Student] on Christmas morning. [Student] was very happy to see me. [Spouse] swore[d] [sic] and yelled at me the entire time I sat with [Student] and opened a few presents.” “My poor

daughter was crying. [Parent-1] kept yelling in between [Spouse], it was awful.” DOE Ex. 116 at 0475-0476.

82. On January 9, 2023, SPED Teacher informed Parent-2 that since the initial burst of behaviors in August and September, Student has been doing better at school without major aggressions, although it was still somewhat turbulent. DOE Ex. 116 at 0476-0477.
83. BCBA and Parent-1 had a BCBA Parent Consult Services meeting scheduled for January 10, 2023; however, the meeting was cancelled because Parent-1 could not make the meeting. BCBA, Tr. Vol. I, 107:5-109:19; DOE Ex. 125 at 0630.
84. On January 13, 2023, the IEP team met to discuss Student’s ESY services and Parent-1’s desire for a re-evaluation. The IEP team discussed the difference between a re-evaluation and assessments and determined that conducting a new academic assessment would be the most appropriate course of action. SPED Teacher, Tr. Vol. II, 144:6-145:7; DOE Ex. 16 at 0084. The IEP team also determined that Student’s ESY services should remain the same. DOE Ex. 17 at 0103. Parent-1 expressed continued concerns over Student’s aggression and heart and still wanted Student placed in a residential treatment facility. A private insurance social worker who was present at the IEP meeting informed the IEP team that Student was approved for ABA home services and that they were waiting for the approval to be finalized. DOE Ex. 17 at 0104. The IEP meeting resulted in an IEP dated January 13, 2023 (“1/13/2023 IEP”). The 1/13/2023 IEP is substantially the same as the 12/08/2022 IEP with the exception that the 1/13/2023 IEP contains additional information provided by Parent-1. DOE Ex. 16 at 0084, 0086.

85. During the 1/13/2023 IEP meeting, Parent-1 did not inform the IEP team that Doctor-2 was Student's treating psychiatrist. SPED Teacher, Tr. Vol. II, 151:13-22.
86. Sometime after the 1/13/2023 IEP meeting, Student started to receive ABA services at home through private insurance. Parent-1, Tr. Vol. I, 64:2-65:11; Doctor-2, Tr. Vol. I, 46:24-47:7.
87. On January 17, 2023, DOE received Petitioners' Request for IDEA Impartial Due Process Hearing, dated January 11, 2023.
88. BCBA and Parent-1 had a BCBA Parent Consult Services meeting scheduled for January 17, 2023; however, the meeting was cancelled because Parent-1 could not make the meeting. BCBA, Tr. Vol. I, 107:5-109:19; DOE Ex. 125 at 0630.
89. On February 2, 2023, BCBA and Parent-1 had a BCBA Parent Consult Services meeting. During this meeting, they identified triggers (events that are likely to cause behaviors to occur) and precursors (signals that indicate a behavior will escalate), and they reviewed Student's BIP. BCBA, Tr. Vol. I, 107:5-109:19; DOE Ex. 125 at 0630.
90. On February 9, 2023, Student attempted to hit a peer and a teacher with a newspaper. Thirty-five minutes of QBS strategies was used before Student was able to stay calm. DOE Ex. 131 at 0901. Later that day, Student had lunch with Parent-2 at school. DOE Ex. 115 at 0448.
91. On February 23, 2023, a school field trip was canceled due to rain. This caused Student frustration and Student hit SPED Teacher once on the arm. Student was then able to calm down and deal with the disappointment. DOE Ex. 117 at 0534. Later that day, while in lunch line, Student hit a peer on the neck and hit him/herself. DOE-RBT blocked Student from peers and Student later calmed down. A little while later, while

walking to a water fountain in the cafeteria, Student elbowed a peer in the stomach and attempted to chest bump. DOE-RBT prompted Student to sit down and Student complied. DOE Ex. 131 at 0903.

92. Doctor-3 was Student’s primary care physician. Parent-1, Tr. Vol. I, 22:1-11. Student saw Doctor-3 between July or August 2022 to November of 2022. Parent-1, Tr. Vol. I, 23:8-24:12. Recently, Student sees Doctor-2 more than Doctor-3. Parent-1, Tr. Vol. I, 22:7-11, 24:7-12. Student is no longer on the medication prescribed by Doctor-3. Student’s medication is now being monitored by Doctor-2. Parent-1, Tr. Vol. I, 27:8-11, 28:6-10.
93. On March 5, 2023, Doctor-3 wrote a letter stating that Doctor-3 concurred with Doctor-2’s recommendation that Student should be enrolled in a residential program. Doctor-3 also wrote that “[Student] is prone to increasing bouts of frustration and angry outburst, which have resulted in incidents of harmful behavior against family members, as well as teachers in the special education classes....This spontaneous acting out without warning has further alienated [Student] from the proper medical, social, and behavioral health care [Student] needs to learn—in order to help [Student] cope with [Student’s] [REDACTED]” Pet. Ex. 2.
94. Parent-1 did not share Doctor-2’s medical records with Doctor-3, nor did Parent-1 share Student’s educational records with Doctor-3. Parent-1, Tr. Vol. I, 26:14-27:14.
95. On March 14, 2023, Parent-1 took Student to Hospital-3 because Student was very aggressive with all of Student’s siblings. The oldest sibling had to restrain Student to keep Student from harming him/herself and others. Student was medevacked to

Hospital-2. On March 20, 2023, Doctor-2 saw Student in Hospital-2. Parent-1, Tr. Vol. I, 17:15-18:18; Doctor-2, Tr. Vol. I, 41:8-15.

Student's Progress at Home School

96. Student's progress in meeting Student's goals and objectives in Student's 3/09/2022 IEP was evaluated on May 26, 2022, October 19, 2022, and January 10, 2023. Through these three reporting periods, Student generally made steady progress towards Student's goals. DOE Ex. 122 at 0612-0627. Student's progress during the first quarter of 2022 (beginning of school in August to fall break in October) was reported on October 19, 2022. Student was either "emerging" or "progressing" on Student's 3/09/2022 IEP goals during the first quarter of the school year. "Emerging" means making little progress towards a goal, and "progressing" means making a lot of progress but not yet mastering the goal. Student's progress in the second quarter (return from fall break to winter break) was reported on January 10, 2023. During the second quarter, Student had made a lot of progress towards Student's 3/09/2022 IEP goals. During the third quarter (return from winter break to March 2023), Student mastered most of the IEP goals. SPED Teacher, Tr. Vol. II, 163:13-165:16.
97. From November 11, 2022 to December 16, 2022, the average percentage of Student engaging in aggression per day in school was approximately 2%. With the exception of December 13, 2022, the occurrence of aggression was relatively low in school¹³. DOE

¹³ December 13, 2022 was an outlier with 22% because Student was sent home early that day. Data is taken in 15-minute intervals. There are approximately 26 intervals in a school day. The percentage is based on the number of intervals per day. Since Student left school early on December 13, 2022, there were less intervals which resulted in a higher percentage. BCBA, Tr. Vol. II, 118:10-120:24.

- Ex. 143 at 1093. From January 4, 2023 to March 9, 2023¹⁴, Student's average percentage of engaging in aggression per day at school was 1%. DOE Ex. 143 at 1096.
98. From November 11, 2022 to December 16, 2022, the average percentage of Student engaging in self-injurious behavior per day in school was approximately 0.1%. DOE Ex. 143 at 1095. From January 4, 2023 to March 9, 2023, the average percentage of Student engaging in self-injurious behavior per day in school was 0.15%. DOE Ex. 143 at 1098.
99. According to BCBA, "[w]ith [Student's] current behavior data and the graphs, [Student] is showing progress with [Student's] behavioral skills at school." BCBA, Tr. Vol. II, 125:23-126:3.
100. BCBA testified that based on the data that BCBA observed, Student can continue to be served and receive Student's educational services at Home School in the current classroom. BCBA, Tr. Vol. II, 127:15-23.
101. SPED Teacher testified that SPED Teacher did not believe Student belongs in a private residential treatment facility because Student is doing really well in school. Student is able to attend general education classes and eat lunch with Student's non-disabled peers; able to go out into the community for excursions; able to handle loud assemblies; enjoys being around peers; making huge academic progress; learned to go to the store and make purchases with money; Student's behavior has improved and Student is able to use coping skills; and Student is able to function and give back to the school community. SPED Teacher, Tr. Vol. II, 165:23-167:5.

¹⁴ Although the graph shows data from January 4, 2023 to March 17, 2023, March 13-17, 2023 was spring break. The quarter ended on March 10, 2023. DOE Ex. 143 at 1096; BCBA, Tr. Vol II, 120:25-122:13.

Witnesses

Doctor-2

102. Doctor-2 is an attending physician at Hospital-2; a member of the Hospital-2's University Medical Group; and a professor emeritus of psychiatry at the John A. Burns School of Medicine. Doctor-2 is board-certified in psychiatry and pediatrics. Doctor-2 has been a child psychiatrist since 1979. Doctor-2, Tr. Vol. I, 40:5-18.

DOE-RBT

103. DOE-RBT has been a certified registered behavior technician since June of 2020. DOE-RBT has been an RBT with the DOE for almost three (3) years. Before becoming an RBT with the DOE, DOE-RBT was an education assistant for the DOE for almost three (3) years. DOE-RBT, Tr. Vol. I, 76:3-24, 92:25-93:14.

BCBA

104. BCBA is a board-certified behavior analyst for Agency-1 and has been with Agency-1 for approximately four (4) years. BCBA, Tr. Vol. I, 101:14-22. Agency-1 has a contract with the DOE to provide ABA services to students. BCBA, Tr. Vol. I, 102:16-25.

105. As a board-certified behavior analyst, BCBA provides supervision to RBTs who are providing direct ABA services to students. BCBA ensures that RBTs are implementing students' BIPs with integrity. BCBA, Tr. Vol. I, 103:14-104:4.

106. BCBA started supervising DOE-RBT on November 7, 2022. BCBA supervises DOE-RBT by reviewing DOE-RBT's data sheets; going over the data with DOE-RBT; and observing DOE-RBT work with Student. BCBA also models how to implement certain behavior strategies. BCBA, Tr. Vol. I, 105:17-107:1.

107. BCBA has been working with SPED Teacher since August of 2022. BCBA and SPED Teacher have biweekly teacher consults where they discuss ways in which strategies are being implemented in the classroom; SPED Teacher asks BCBA questions about how to manage behaviors in the classroom; and they talk about individual students. BCBA, Tr. Vol. I, 102:7-9, 104:5-23.

SPED Teacher

108. SPED Teacher is Student's special education teacher and a care coordinator on Student's IEP team. SPED Teacher, Tr. Vol. II, 139:8-10. As a care coordinator, SPED Teacher facilitates team meetings, and writes IEPs and progress reports. SPED Teacher, Tr. Vol. II, 169:12-17.
109. SPED Teacher is currently employed at DOE as a special education teacher in Home School. In 2015-2017, SPED Teacher was a Response to Intervention ("RTI") teacher for DOE. In 2017-2021, SPED Teacher was employed at Agency-2 to provide services to DOE. Initially, SPED Teacher was an individual support person providing similar services as an RBT to DOE, but when SPED Teacher became an RBT in May of 2020, SPED Teacher provided RBT services to DOE through Agency-2. SPED teacher was a long-term substitute teacher in a special education class and became a special education teacher for ESY in May of 2021. In fall of 2022, SPED Teacher became a special education teacher at Home School. SPED Teacher, Tr. Vol. II, 135:13-137:11.
110. SPED Teacher is no longer certified as an RBT. SPED Teacher, Tr. Vol. II, 137:12-17.
111. SPED Teacher first met Student when Student visited Middle School while in elementary school in the 5th grade. When Student attended Middle School in the 6th and 7th grade, SPED Teacher was a substitute teacher in Student's classroom on a rotational

basis with other substitute teachers. As a substitute teacher, SPED Teacher was involved in Student's care. During Student's ■ grade year at Middle School, SPED Teacher moved to Home School. In June of 2021, Student entered SPED Teacher's classroom for ESY and has been there since. SPED Teacher, Tr. Vol. II, 137:18-139:2.

V. CONCLUSIONS OF LAW

A. **BURDEN OF PROOF**

Pursuant to Hawaii Administrative Rules ("H.A.R.") § 8-60-66(a)(2)(A), "the party initiating the due process complaint has the burden of proof." The Hawaii Administrative Rules also state 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 is to prove, by a preponderance of the evidence, the allegations of the complaint." H.A.R. § 8-60-66(a)(2)(B).

The Supreme Court held in Schaffer that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005). The Court "conclude[d] that the burden of persuasion lies where it usually falls, upon the party seeking relief." Id. at 535. Neither Schaffer nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases. The "party objecting to the IEP's implementation...[has] the burden of proof at the administrative hearing." Van Duyn, 502 F.3d 811, 820 (9th Cir.2007).

B. **IDEA REQUIREMENTS**

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 (2008)

(citing 20 U.S.C. §1400(d)(1)(A)). A free and appropriate public education (“FAPE”) includes both special education and related services. H.A.R. § 8-60-1; H.A.R. § 8-60-3; 20 U.S.C. § 1401(9); 34 C.F.R. § 300.34; 34 C.F.R. § 300.39; 34 C.F.R. § 300.101.

“Special education” means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” and “related services” are the supportive services required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34; 34 C.F.R. § 300.39; 20 USC § 1401(26) and (29). To provide 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.” Dept. of Educ. of Hawaii v. Leo W., 226 F.Supp.3d 1081, 1093 (D. Haw.2016).

In Bd. of Educ. v. Rowley, the Court set out a two-part test for determining whether the school offered a FAPE: (1) whether there has been compliance with the procedural requirements of the IDEA; and (2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-207, 102 S. Ct. at 3050-3051 (1982). “A state must meet both requirements to comply with the obligations of the IDEA.” Doug C. v. Hawaii Dept. of Educ., 720 F.3d 1038, 1043 (9th Cir.2013) (quoting Rowley). See also, Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001).

The school is not required to “maximize the potential” of each student; rather, the school 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. However, the United States Supreme Court in Andrew F. v. Douglas County Sch. Dist. held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a

child to make progress appropriate in light of the child's circumstances." Andrew F. v. Douglas County Sch. Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. ex rel. Tina F. v. Hawaii Dept. of Educ., 593 F.Supp.2d 1199, 1206 (D.Haw.2009).

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program ("IEP") for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child's teacher, parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child's present levels of academic achievement and functional performance, a statement of the child's annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1414(d). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. § 1414(d). The IEP is, in effect, a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Burlington v. Dept. of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002 (1985). An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2012).

Procedural violations do not necessarily constitute a denial of FAPE. Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001). 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 the 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 the student a deprivation of educational benefits. Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001).

C. ISSUE FOR DETERMINATION

This case presents one issue for determination:

Whether Student was denied a FAPE when Student was not provided RBT services and as a consequence it is necessary to place Student in a residential treatment program.

Petitioners allege that beginning in August of 2022 and for a period of over two months¹⁵, Student did not have RBT services because DOE-RBT was on maternity leave and [REDACTED] had a shortage of substitute RBTs. Petitioners' Closing Brief, p. 2. Respondent is not contesting that Student did not have the services of DOE-RBT when DOE-RBT was on maternity leave; however, Respondent argues that DOE-RBT's absence was not a material failure to implement Student's IEP as substitute school personnel—education aides, other RBTs and SPED Teacher--provided Student with one-to-one support. DOE's Closing Brief, p. 13. Respondent further argues that even if the use of substitute school personnel was a denial of FAPE, placing Student in a residential treatment program is not the appropriate remedy. DOE's Closing Brief, p. 14. Based on the evidence, there was a failure to implement Student's IEP; however, the failure was not material. Even if there was a material failure to implement Student's IEP, placement at a residential treatment facility is not the appropriate remedy.

(i) **Failure to Implement Student's IEP was Not Material**

The Ninth Circuit Court of Appeals in Van Duyn v. Baker Sch. Dist. 5J held that “when a school district does not perform exactly as called for by the IEP, the district does not violate the

¹⁵ Parent-1 testified that Student did not have RBT services from August 30, 2022 to November 7, 2022. Parent-1, Tr. Vol. I, 69:15-70:5.

IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 815 (9th Cir.2007). "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." Van Duyn, 502 F.3d at 822.

In Van Duyn, the Ninth Circuit Court found, *inter alia*, that a student did not work towards all of the short-term objectives in his IEP and his personal aide did not have the state training in autism as called for in his IEP. However, with respect to these findings, the Ninth Circuit Court held that "He did not work toward all of the short-term objectives laid out in his IEP, but this failure was not material given the extremely large number of such objectives....And even though she was never trained at the state level, Ms. Baxter did attend classes and meet with people knowledgeable about Van Duyn's experience with the condition. Accordingly, the District did not materially fail to implement Van Duyn's IEP in any of these areas." Van Duyn, 502 F.3d at 816, FN 5.

"The term 'free appropriate public education' means special education and related services that are provided in conformity with the individualized education program...." 20 U.S.C. § 1401(9)(D). Special education and related services "need only be provided 'in conformity with' the IEP. There 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." Id. at 821.

To properly apply the *Van Duyn* standard, the Hearings Officer must analyze whether the DOE failed to implement specific provisions of C.J.'s IEP. *See Van*

Duyn, 502 F.3d at 822. If the DOE has failed to implement specific provisions of C.J.'s IEP, the Hearings Officer must decide whether the failure was material. *Id.* In doing so, the Hearings Officer is required to determine whether "there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Id.* In this case, the Hearings Officer must determine whether the DOE materially failed to implement specific provisions of C.J.'s IEP despite its efforts after furloughs began.

Dept. of Educ., Hawaii v. C.J., 2011 WL 6002621, CV. No. 10-00257 AWT-BMK, at *4 (D.Haw. Nov. 29, 2011).

According to Student's 3/09/2022 IEP¹⁶, and subsequent IEPs, Student was to have IIS by an RBT for the entire school day. (FOF 14, 15, 69, 74, 84). The 3/09/2022 IEP does not name a specific person to provide IIS or to be Student's RBT. DOE-RBT was assigned to work with Student in October of 2021. (FOF 8). When DOE-RBT went on maternity leave on August 25, 2022, school personnel coordinated their schedules so that Student would have supervision at all times during school. (FOF 35-36). While in SPED Teacher's classroom, Student had one-to-one supervision from either an education assistant, RBT or SPED Teacher. (FOF 36). When Student left SPED Teacher's classroom to go to general education classes, recess or lunch, SPED Teacher provided supervision. (FOF 37). Student's behavioral data was collected by SPED Teacher and another staff member during the period when DOE-RBT was on leave. (FOF 38, 39). However, education assistants are not certified RBTs; and although SPED Teacher is a trained RBT, SPED Teacher is no longer certified. (FOF 109-110). Therefore, during times when Student was being supervised by an education assistant and SPED Teacher, DOE failed to implement the provision of Student's 3/09/2022 IEP that required RBT services. This failure, however, is not material.

¹⁶ The focus of this decision will be on Student's 3/09/2022 IEP because the 3/09/2022 IEP was the operative IEP during the period (August 2022 to November 2022) that Student did not have a designated RBT.

There was no material failure to implement Student's 3/09/2022 IEP while DOE-RBT was on leave. Although there is no evidence to show exactly who provided supervision to Student on a particular day, Student was supervised by RBTs for some days. (FOF 36). An RBT other than DOE-RBT providing services to Student is not a violation because "school districts have the sole discretion to assign staff" and "school districts have the prerogative to assign staff to provide educational services without parental consent." Slama by Slama v. Independent Sch. Dist. No. 258, 259 F. Supp.2d 880, 884 (Minn. USDC, March 24, 2003). Although SPED Teacher was no longer certified as an RBT in August – November of 2022, SPED Teacher did receive training and practiced as an RBT for a period of time. (FOF 109). Furthermore, DOE-RBT was on maternity leave on August 25, 2022 and returned on November 7, 2022—approximately ten (10) weeks. (FOF 33). During those 10 weeks, Student was not in school for sixteen (16) days. (FOF 39). Student receiving supervision from a non-RBT for a certain period of time while DOE-RBT was on maternity leave constitutes a minor discrepancy between the services provided to Student and what was required by the 3/09/2022 IEP.

Furthermore, Student's educational progress indicates that the services rendered to Student by a non-RBT was a minor shortfall in the services provided. Student made steady progress towards Student's annual goals during the first quarter and second quarter while DOE-RBT was on leave. (FOF 96). Student continued to make progress in the third quarter after DOE-RBT returned. (FOF 96). Also, the evidence does not show that DOE-RBT's absences resulted in an increase of aggressive behavior by Student. At the time the IEP team met on March 9, 2022 when Student was in the ■■■ grade, Student had already had three aggressive episodes that required intensive adult support to stop Student from hurting staff or Student. (FOF 19). After 3/09/2022 IEP meeting, Student had an aggressive episode on May 19, 2022

where Parent-1 was called to pick up Student (FOF 22) and another aggressive episode on June 23, 2022 where Parent-1 was not called to pick up Student (FOF 23). While DOE-RBT was on leave, Student had two aggressive episodes (August 30, 2022, September 26, 2022) where Parent-1 was called to pick up Student (FOF 40, 42) and one aggressive episode on November 3, 2022 where Parent-1 was called to pick up Student but Student was allowed to stay at school because Parent-1 had complained and Student had calmed down (FOF 58). While these three aggressive episodes occurred during DOE-RBT's absence, there is no evidence to establish that three aggressive episodes during a two-month period is abnormally high¹⁷; or that DOE-RBT's absence was the cause of these aggressive episodes and not some other event in Student's life, such as Student no longer being able to live with Parent-2. (FOF 24, 25). Therefore, the discrepancy in services is minor and the services provided was in conformity with the 3/09/2022 IEP—although it was not perfect adherence to the IEP. Accordingly, even though DOE failed to implement a specific provision of Student's 3/09/2022 IEP, the failure was not material.

For the reasons stated above, the undersigned Hearings Officer finds that Petitioners have not met their burden in showing that DOE materially failed to implement Student's IEP.

(ii) Residential Treatment Program not Appropriate Remedy

Assuming that DOE materially failed to implement Student's 3/09/2022 IEP, which it did not, Petitioners fail to establish that a residential treatment program is the appropriate remedy.

According to 34 C.F.R. § 300.104,

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

¹⁷ Student has had other less aggressive incidents at school where Parent-1 was not called to pick up Student. Incidents of aggression are documented in DOE Ex. 127 at 0663-0790; DOE Ex. 129 at 0873-0884; DOE Ex. 131 at 0897-0903.

The analysis to determine if a residential placement is appropriate is “whether [the residential] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process.” Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 643 (9th Cir.1990). See also Ashland Sch. Dist. v. Parents of Student E.H., 587 F.3d 1175, 1185 (9th Cir.2009). “In situations where a child’s educational needs are inseparable from the child’s emotional needs and an individual determination is made that the child requires the therapeutic and habilitation services of a residential program in order to ‘benefit from special education,’ these therapeutic and habilitation services may be ‘related services’ under the Act.” Federal Register, Vol. 71, No. 156, Monday, August 14, 2006, at 46581.

Placing Student in a residential treatment facility is not necessary for educational purposes. While it is true that Home School called Parent-1 on three occasions while DOE-RBT was on leave to pick up Student due to Student’s aggressive behavioral problems, there is no evidence that three aggressive episodes in a two-month period is abnormally high. Pet. Closing Brief, p. 2. And if it is abnormally high, there is no evidence of the cause of the spike in aggressive episodes. Student’s progress in meeting Student’s 3/09/2022 IEP goals belies the argument that the cause of Student’s aggressive episodes is linked to DOE-RBT’s absences or that Student needs to be in a residential treatment facility to have Student’s educational needs met. (FOF 96). Both SPED Teacher and BCBA opined that Student is showing progress with Student’s behavioral skills (FOF 99, 101) and that Student’s educational needs can be met in the current setting. (FOF 100, 101).

SPED Teacher met Student when Student was in the 5th grade; intermittently worked with Student in the 6th and 7th grade as a substitute teacher; and became Student’s special

education teacher during ESY in June of 2021 and continues to be Student’s special education teacher¹⁸. (FOF 111). SPED Teacher is also Student’s care coordinator—participating in IEP meetings, and writing IEPs and progress reports for Student. (FOF 108). The evidence shows that SPED Teacher is frequently the recipient of Student’s aggression. (FOF 22, 23, 40, 42, 58, 91). Although placing Student in a residential treatment facility would remove Student from SPED Teacher’s classroom, SPED Teacher accepts that being hit by Student is part of being a special education teacher and continues to believe that Student’s educational needs can be met in Student’s current setting. (FOF 60, 101). SPED Teacher was a credible witness.

Although Doctor-2 was also a credible witness, Doctor-2’s knowledge about Student’s educational needs is limited because Doctor-2 did not review Student’s educational records or speak with any DOE personnel about Student. (FOF 67). Similarly, Doctor-3 did not review Student’s educational records. (FOF 94). Additionally, Doctor-2 and Doctor-3 have not known Student for a significant amount of time: Doctor-2 became Student’s doctor on October 11, 2022 (FOF 46) and Doctor-3 saw Student in July or August of 2022 to November of 2022. (FOF 92). As such, SPED Teacher’s testimony is given more weight than Doctor-2’s testimony and Doctor-3’s opinions.

Furthermore, Doctor-2’s testimony shows that Doctor-2’s understanding of Student’s aggression is mainly towards Student’s family. Doctor-2 testified that Student showed “considerable violence in the family” (Doctor-2, Tr. Vol. I, 40:24-41:7); that Parent-1 “described considerable symptoms within the family with violence directed against [Student’s] siblings” (Doctor-2, Tr. Vol. I, 46:24-47:7); and “[a]n increase in family violence and violence directed

¹⁸ “‘Special education teacher’ means a person assigned by the department who is highly qualified under state standards to provide the specifically designed instruction that meets the definition of special education in this section.” H.A.R. § 8-60-2.

against [Student] cause [Student's] concerned [Parent-1] to bring [Student] to the emergency department on [Island-1]" (Doctor-2, Tr. Vol. I, 41:8-15). Consistent with Doctor-2's testimony, the evidence shows that Student is much more aggressive, and sometimes uncontrollable, at home. (FOF 11, 19, 26, 45, 47, 51, 54, 63, 65, 76, 95). The evidence also shows that there is much discord within the family. Although there was no expert testimony about how an unhappy family life can affect Student, it is reasonable to conclude that family arguments and major changes in living arrangements can have some negative effects on Student. (FOF 24-26, 32, 43, 44, 49, 57, 64, 71, 79, 81). Parent-1 testified: "I know it increased with [Parent-2]. And [Parent-2] didn't want nothing to do with [Student]. And then it increased at school. But this has been going on since, you know, 5/19 was the first time I was called to pick [Student] up from school last year." Parent-1, Tr. Vol. I, 33:15-34:3. Although Student has aggressive episodes at school, as discussed above, Student's learning process has not been adversely affected by Student's aggression. As such, Parent-1's request for placement at a residential treatment facility is a "response to medical, social or emotional problems that is [] quite apart from the learning process."

Lastly, the educational placement of a student with a disability must be in the least restrictive environment ("LRE"). H.A.R. § 8-60-17(1)(B). Placement in the least restrictive environment means "to the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, are educated with students who are nondisabled" and "special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." H.A.R. § 8-60-15. While in [redacted] grade at Home

School, Student was placed in a special education setting for six periods, and in a general education setting for one elective class and all non-academic activities with supports. In [REDACTED] grade, Student was placed in a special education setting for five periods, and in a general education setting for two elective classes and all non-academic activities with supports. (FOF 18). Student's exposure to nondisabled peers increased in the [REDACTED] grade and Student has made meaningful progress towards Student's goals this academic year. (FOF 96). The undersigned Hearings Officer will not second-guess BCBA and SPED Teacher's professional opinion (when no contradictory expert opinion exists), nor will the undersigned second-guess the IEP team's provision of special education services. N.S. v. Hawaii, Dept. of Educ., Civil No. 09-00343 SOM/KSC, 2010 WL 2348664, *5 (D.Haw. June 9, 2010) ("The mother's conclusion, without more, does not counter the testimony of the experts who reviewed the reports and determined that services were not necessary.")

Plaintiffs presented no data, expert opinion, or other evidence that the IEP's provision...[of special education] was insufficient. The Court will not second-guess the IEP team's provision of special education services, absent contrary evidence. The IDEA relies heavily upon the expertise of school districts to meet its goals and this Court will not substitute its own judgment of sound educational policy for that of the educational authorities. [Citation omitted]. Although Plaintiffs are not satisfied with the DOE's offer of FAPE, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C.2002) (stating that the IDEA does not provide for an "education...designed according to the parent's desires") (citation omitted).

G.A. v. Hawaii, Dept. of Educ., Civil No. 10-00730 LEK-BMK, 2011 WL 3861431, *14 (D.Haw. Aug. 31, 2011).

While Petitioners have demonstrated that Student needs supervision and engages in aggressive, and sometimes uncontrollable, behaviors at home, Petitioners fail to meet their burden in showing that a residential placement is appropriate for Student. Petitioners did not

show that Student's struggles outside of school prevented Student from making educational progress in school. Also, Student's educational needs are not inseparable from Student's behavioral needs such that Student requires residential placement. Therefore, based on the evidence, Petitioners fail to show that a "placement in a public or private residential program is necessary to provide special education and related services" to Student.

(iii) Issues Not Alleged in Due Process Hearing Complaint

An impartial due process hearing is limited to issues that are raised in a due process hearing complaint:

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

20 U.S.C. §1415(f)(3)(B). See Dept. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, *8 (D.Haw. May 1, 2012). There is no agreement that the undersigned is aware of that DOE is agreeing to allow Petitioners to raise the following issues: (1) Student's IEP lacks mental health services; and (2) DOE discriminated against Student in violation of Section 504 of the Rehabilitation Act of 1973, as amended in 1974 ("Section 504"). Pet. Closing Brief, p. 2. Therefore, these two issues are beyond the scope of this due process hearing and are denied. However, in the event that a reviewing court determines that the two aforementioned issues were raised in Petitioners' due process hearing complaint, the undersigned will address them in turn.

Petitioners fail to meet their burden in proving that Student's IEP does not provide sufficient mental health services. Other than the allegations of failing to provide Student with one-to-one IIS by an RBT and that Student's placement should be in a residential treatment facility, there are no other allegations in Petitioners' Complaint that Student's IEP is deficient.

Student's 3/09/2022 IEP provides Student with ABA services; IIS by an RBT; a BIP and a crisis response plan. (FOF 14, 15). Student's 12/02/2022 IEP, 12/08/2022 IEP, and 1/13/2023 IEP also provide SBBH Teacher Consult Services and BCBA Parent Consult Services. (FOF 69, 74, 84). While these services will not be directly provided to Student, the intent is to educate and equip Student's parents and teachers with the necessary skills to better support Student. (FOF 69, 70). Student's 3/09/2022 IEP and subsequent IEPs were intended to address Student's behaviors that include elopement, self-regulation, socialization, communication, academic support, self-advocacy, functional independence, and dangerous behaviors (i.e., elopement and aggression). (FOF 15). While Petitioners argue that "despite full knowledge of [Student's] mental health needs, [Student] has not received any actual mental health services at home or at school," Petitioners have not established or argued what mental health services DOE should have provided but did not. Pet. Closing Brief, p. 4. The undersigned Hearings Officer declines to guess what type of mental health services should have been in Student's IEP but was not. Furthermore, DOE was not informed that Doctor-2 was Student's treating psychiatrist (FOF 75, 85) and DOE was only provided a copy of the Discharge Summary for Student's admission into Hospital-2 on October 11, 2022. (FOF 55).

Petitioners' allegation of discrimination in violation of Section 504 is without merit. There is no evidence in the record that DOE or any individuals responsible for Student's education and care acted discriminatorily. Based on the record, SPED Teacher, who Parent-1 and Parent-2 primarily interacted with, was respectful, supportive, responsive, and performed his/her job with the utmost professionalism and compassion. (FOF 11, 12, 21, 32, 37, 43, 45, 49, 52, 60, 61). DOE was responsive to Parent-1's request to change Student's placement from special education at Home School to a residential treatment facility. On November 13, 2022,

Parent-1 expressed an interest in placing Student in a residential treatment facility. (FOF 61). The IEP team met on December 2, 2022 to discuss Student's LRE and determined that the IEP team needed to perform data analysis and review of Student's current behavior and academic records before making any placement changes. (FOF 69). In the meantime, the 12/02/2022 IEP team added SSBH Teacher Consult Services and BCBA Parent Consult Services to Student's IEP. (FOF 69). The IEP team reconvened on December 8, 2022 to discuss changing Student's LRE and declined to do so. (FOF 74). DOE not agreeing with Parent-1 is not discrimination. "In developing the IEP, a school district is not required to provide a specific program or employ a specific methodology requested by the parents." R.S., Individually and on Behalf of J.S. v. Lower Merion Sch. Dist., 123 LRP 8976, at 11 (U.S. East. Dist. of Penn. March 6, 2023). There is not a scintilla of evidence in the record to support a Section 504 claim.

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 by preponderance of the evidence that Student was denied a FAPE when Student was not provided RBT services and as a consequence it is necessary to place Student in a residential treatment program. As Petitioners have failed to prove their claim, Petitioners' requested remedy 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 to file a civil action, with respect to the issue 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, Hawaii, April 26, 2023.

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Redacted Hearing Decision