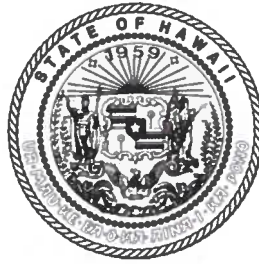


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OFFICE OF DISPUTE RESOLUTION  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE OF HAWAI'I

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

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE  
OF HAWAI'I,

Respondents.

DOE-SY2324-005

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing:  
October 23-24, 2023

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On August 1, 2023, the Department of Education, State of Hawai'i (hereinafter "Respondents" or "DOE") received a Request for IDEA Impartial Due Process Hearing (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 filed DOE's Notice of Insufficiency on August

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<sup>1</sup> Personal identifiable information is contained in the Legend.

3, 2023, wherein they alleged that Petitioners' Complaint was insufficient. This Hearings Officer issued a Determination of Insufficiency on August 3, 2023, wherein Petitioners' Complaint was deemed insufficient, and leave was granted to Petitioners to submit an amended complaint.

On August 4, 2023, Petitioners submitted Petitioners' Amended Complaint. On August 8, 2023, Respondents submitted DOE's Insufficiency Notice to Petitioners' Amended Complaint. On August 9, 2023, this Hearings Officer issued a Determination of Sufficiency, finding that Petitioners' Amended Complaint was sufficient and met the requirements under the IDEA, but allowed for Petitioners to submit another amended complaint if they wanted to respond to the allegations in the Notice of Insufficiency.

Petitioners filed their Second Amended Complaint on August 10, 2023. On August 14, 2023, Respondents filed DOE's Response to Petitioners' Second Amended Complaint. A prehearing conference was held on September 6, 2023, before Hearings Officer Chastity T. Imamura; with Eric A. Seitz, Esq. (hereinafter "Mr. Seitz"), representing Petitioners; and Emma R. Christopherson, Esq. (hereinafter "Ms. Christopherson"), representing Respondents. The prehearing conference was continued to September 28, 2023. At the prehearing conference, the Due Process Hearing (hereinafter "Hearing") was scheduled for October 23, 24, and 25, 2023.

The parties agreed to conduct the Hearing via the Zoom videoconferencing application. An Order Regarding Videoconference Due Process Hearing was issued on September 28, 2023, which set forth the parameters for the due process hearing. A court reporter participated in the video conference hearing to swear in the witnesses and transcribe the proceedings. Each witness was given a set of instructions with their Zoom meeting invitation and prior to being sworn in for their testimony. All witnesses were required to participate in the Hearing using both the video

and audio functions of the Zoom platform, and witnesses and parties were instructed to ensure the confidentiality of the proceedings by participating in a private setting.

The Due Process Hearing began on October 23, 2023. Present at the Hearing were Parent and Mr. Seitz, on behalf of Petitioners; District Educational Specialist, District Resource Teacher, and Ms. Christopherson, on behalf of Respondents; this Hearings Officer; and the assigned court reporter. Petitioners called Pediatrician, Parent, Advocate, and Grandparent to testify. Pediatrician's testimony was not completed on October 23, 2023, and was continued to October 24, 2023, where it was completed, and Petitioners rested their case-in-chief.

Respondents called Speech-Language Pathologist (hereinafter "SLP") and [REDACTED] Resource Teacher (hereinafter "PRT") to testify and rested their case. Petitioners did not have any rebuttal witnesses to present, so the Hearing concluded on the same date. Petitioners requested that the parties provide an oral closing argument, while Respondents requested the opportunity to provide a written closing brief. This Hearings Officer allowed Petitioners to provide an oral closing argument at the close of the Hearing on October 24, 2023. Respondents waived an oral closing argument, and the Hearing was completed.

Both parties were provided the opportunity to submit written closing arguments by the deadline of November 24, 2023. Petitioners, having the burden of proof, requested the opportunity to provide an oral response to Respondents' written brief, if one is submitted. A further hearing date was scheduled on Tuesday, November 28, 2023, at 9:30 a.m. for Petitioners to present an oral response to Respondents' closing brief.

Each party submitted their exhibits for the Hearing by the disclosure deadline of October 16, 2023. Petitioners objected to Respondents' submitted exhibits generally based on relevance. This Hearings Officer noted that Petitioners' objection to Respondents' exhibits would be

addressed at the hearing itself to allow Respondents to proffer the relevance for the proposed exhibits. 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 October 24, 2023, 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 October 30, 2023. Any objections to the proposed exhibits were due on November 3, 2023.

On October 30, 2023, Respondents timely submitted their request that that the following exhibits be received into evidence for consideration in the Decision in this case.

Respondents' Exhibit 1, pages 1-2; Exhibit 2, pages 3-5; Exhibit 3, pages 6-8; Exhibit 4, page 9; Exhibit 5, pages 10-12; Exhibit 7, pages 14-16; Exhibit 11, page 70; Exhibit 12, page 71; Exhibit 14, page 74; Exhibit 15, page 75-77; Exhibit 16, page 78; Exhibit 24, pages 104-118; Exhibit 26, pages 120-121; Exhibit 28, page 124; Exhibit 29, pages 125-139; Exhibit 43, pages 160-184; Exhibit 47, pages 189-190; Exhibit 48, pages 191-197; Exhibit 49, pages 198-201; Exhibit 58, pages 236-238; Exhibit 77, page 260; Exhibit 78, page 261; Exhibit 80, page 263; Exhibit 81, page 264; Exhibit 82, page 265; Exhibit 93, page 284; Exhibit 117, pages 367-371, 394-400; Exhibit 119, pages 403-404; Exhibit 126, pages 447-454; Exhibit 127, pages 455-457; and Exhibits 134-138, which are five (5) audio/video recordings of IEP meetings dated May 25, 2023; June 16, 2023; July 14, 2023; July 25, 2023; and August 1, 2023, respectively.

On October 30, 2023, Petitioners objected to any of Respondents' exhibits being admitted into evidence as irrelevant and not authenticated by any witness(es) at the hearing. This

Hearings Officer considered both Respondents' proffers for each exhibit regarding the relevance of the exhibit and Petitioners' objections. This Hearings Officer allowed some of Respondents' additional proposed exhibits to be received into evidence but excluded some other exhibits. The final ruling is detailed in the List of Exhibits Received at Due Process Hearing issued on November 3, 2023.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 01-25.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 15-16, pages 075-078; Exhibit 24, pages 104-118; Exhibit 26, pages 120-121; Exhibits 28-30, pages 124-141; Exhibit 43, pages 160-184; Exhibits 47-49, pages 189-201; Exhibits 57-58, pages 229-238; Exhibits 77-78, pages 260-261; Exhibits 80-81, pages 263-264; Exhibits 126-127, pages 447-457; Exhibit 132, pages 488-489; Exhibits 134-138, audio/video recordings dated May 25, 2023; June 16, 2023; July 14, 2023; July 25, 2023; and August 1, 2023.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding,<sup>2</sup> 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

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<sup>2</sup> This Hearings Officer notes that while the testimony of all witnesses and all received exhibits were reviewed by this Hearings Officer, only the relevant information taken from the testimony and exhibits are cited to in this Decision. Not all witness testimony or exhibits are cited herein.

Administrative Rules (hereinafter “H.A.R.”) §8-60-1, *et seq.*

### III. ISSUES PRESENTED

Petitioners raised three (3) issues in the Complaint to be addressed at the Hearing:

**Issue 1** – For the 2021-2022 school year, Parent met with Home School and asked for services, but other than minimal OT services, no other services were provided, and Student did not attend school.

**Issue 2** – For the 2022-2023 school year, Home School placed Student in a special education classroom instead of an inclusion classroom, which had been recommended. Placement was offered at 2022-2023 School in an inclusion classroom, but Parent objected due to Student having to catch the bus for 2022-2023 School. Student did not attend school or receive services.

**Issue 3** - For the 2023-2024 school year, Parent attended multiple IEP meetings and Parent was not satisfied with the DOE’s IEP offer, specifically regarding transportation and Parent’s request for compensatory services for recreation and music therapy.

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

**Remedy 1** – Order the DOE to implement an appropriate IEP for Student.

**Remedy 2** – Comprehensive compensatory services at school, after school, and at home for the times that Student was not provided services.

**Remedy 3** – Extended school year services.

**Remedy 4** – Placement in an appropriate educational setting, including placement in a private school at the DOE’s expense.

**Remedy 5** – Order such other relief as appropriate and/or justified under equity and/or the law.

While Petitioners asserted three (3) issues in the Complaint, as written in the Prehearing Order issued on September 28, 2023, this Hearings Officer notes that Petitioner did not present any evidence or argument on Issue 1, regarding the 2021-2022 school year.<sup>3</sup> Therefore, this Hearings Officer finds that Issue 1 has been abandoned by Petitioners and will not address Issue 1 in this Decision.

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<sup>3</sup> This Hearings Officer notes that the only evidence presented at the Hearing about the 2021-2022 school year is that Student did attend a [REDACTED] program at Home School for the remainder of the school year after the IEP was completed. *See* Testimony of Grandparent, Transcript of Proceedings, Volume 1, page 90, line 4 through line 10 (hereinafter referenced as “Tr.V1, 90:4-10”).

#### IV. FINDINGS OF FACT

##### Witness background and other information

1. Pediatrician is a licensed and board-certified pediatrician in the State of Hawai'i who has been treating Student as a patient since Student's birth. Testimony of Pediatrician, Tr.V1, 10:8-11:11.
2. Advocate is currently the education and training coordinator for a nonprofit organization that provides advocacy and training for parents who have children with special needs. Testimony of Advocate, Tr.V1, 28:13-21.
3. Advocate has a bachelor's degree in [REDACTED] education with a minor in special education, as well as graduate degree education. Advocate was a special education teacher for about sixteen and a half (16 ½) years and a [REDACTED]. Testimony of Advocate, Tr.V1, 28:22-29:21.
4. PRT is a Hawai'i DOE [REDACTED] resource teacher and has held that position for about twenty (20) years. Prior to that PRT was a special education teacher and a district resource teacher. Testimony of PRT, Tr.V2, 132:12-133:8.
5. PRT has a bachelor's degree in social work and a master's degree in education with a focus on special education. Testimony of PRT, Tr.V2, 133:9-12.

##### Student's background

6. Student is currently [REDACTED] years old and lives within [REDACTED] distance of Home School. Testimony of Pediatrician, Tr.V1, 11:10-11; Testimony of Advocate, Tr.V1, 32:9-15; Testimony of Parent, Tr.V1, 55:15-16, 56:11-12; Testimony of Grandparent, Tr.V1,

7. Student has been diagnosed with [REDACTED] and [REDACTED]. Testimony of Pediatrician, Tr.V1, 11:12-14; Testimony of Parent, Tr.V1, 56:14-58:4.
8. Due to Student's diagnoses, Student has difficulty with [REDACTED] and [REDACTED]. Testimony of Pediatrician, Tr.V1, 11:15-25.
9. Based on Student's difficulty with transitions and sensory overstimulation, transition plans are important for Student to successfully transition away from home to a school setting. Testimony of Pediatrician, Tr.V1, 12:6-13:14.
10. Student has difficulty with speech and communication, particularly with disfluency, stuttering, and putting words together to form a sentence. Student also has some social skills deficiency with separating from Parent and engaging with strangers. Testimony of Advocate, Tr.V1, 30:15-31:7.
11. Student began receiving occupational therapy and speech services from the Early Intervention Program since Student was a [REDACTED] old. Testimony of Parent, Tr.V1, 57:5-15.
12. Student currently receives medical insurance-based applied behavior analysis (hereinafter "ABA") services in Student's home for approximately [REDACTED] hours per week. Testimony of Parent, Tr.V1, 57:16-58:4, 77:14-18.
13. Student gets distressed in long car rides, resulting in Parent needing to hold Student's hand while Student is in the car to calm Student from crying. Testimony of Parent, Tr.V1, 78:17-79:9; Testimony of Grandparent, Tr.V1, 88:16-89:6.
14. Parent takes Student to places on the [REDACTED]. Student has not ridden a school bus alone or otherwise. Testimony of Advocate,



Tr.V1, 47:11-17; Testimony of Parent, Tr.V1, 79:18-25.

2021-2022 school year

15. Since Student turned [REDACTED] years old in November 2021, Student became eligible for Hawai'i DOE special education services. Home School's Individualized Education Program (hereinafter "IEP") team began to develop an IEP for Student in around November 2021 and placed Student in a fully self-contained special education [REDACTED] classroom at Home School. Testimony of Advocate, Tr.V1, 32:16-33:2.
16. The IEP team had planned a thorough transition plan for Student for the 2021-2022 school year to transition Student from the [REDACTED] program to Home School's fully self-contained special education program due to Student's difficulties with transitions. Testimony of Advocate, Tr.V1, 48:8-49:8.
17. Student was successful at Home School's special education classroom and the IEP team determined that Student should be placed in an inclusion classroom for the 2022-2023 school year. Testimony of Advocate, Tr.V1, 33:2-8.

2022-2023 school year

18. Home School does not have an inclusion [REDACTED] classroom and their inclusion classes start at [REDACTED]. Testimony of Advocate, Tr.V1, 33:9-34:5.
19. The DOE informed Student's family that Student would be placed at 2022-2023 School and would be provided transportation to and from Student's home to 2022-2023 School daily. Testimony of Advocate, Tr.V1, 34:6-35:8.
20. The approximate travel time by car from 2022-2023 School to Student's residence is [REDACTED] to [REDACTED] minutes; however, it takes approximately [REDACTED] to get from 2022-2023 School from Student's home by public city bus. Testimony of

Advocate, Tr.V1, 34:17-20; Testimony of PRT, Tr.V2, 139:13-16.

21. Parent had concerns about Student attending 2022-2023 School due to the distance of the school from Student's home and Parent's difficulty with getting to 2022-2023 School in a reasonable amount of time.<sup>4</sup> Testimony of Advocate, Tr.V1, 35:4-8; Testimony of Parent, Tr.V1, 58:18-59:3; Testimony of Grandparent, Tr.V1, 87:18-88:8, 97:16-20; Testimony of PRT, Tr.V2, 148:9-12, 168:8-15.
22. The IEP team had developed a written IEP offer dated May 13, 2022 (hereinafter "IEP-05/13/2022") for the 2022-2023 school year. Respondents' Exhibit 24, pages 104-118 (hereinafter referenced as "R-Ex.24, p.104-118").
23. The IEP-05/13/2022 did not have information about the location of the school that Student would attend or any information about the bus transportation that would be provided to Student for the school year. Testimony of Advocate, Tr.V1, 33:17-35:19; R-Ex.24, p.104-118.
24. The IEP team had another meeting after the location for Student's services was determined on August 4, 2022. 2022-2023 School representatives were supposed to be present to discuss transitioning Student from Home School to 2022-2023 School, however when Parent expressed to Home School that Student would not be attending, the IEP team canceled the attendance of 2022-2023 School representatives.  
  
Testimony of PRT, Tr.V2, 142:14-143:16, 150:8-15.
25. Prior to the August 4, 2022 meeting, PRT discussed possible bus transportation

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<sup>4</sup> While Parent and Grandparent testified that Parent's concerns regarding 2022-2023 School were based on Student's ██████, this Hearings Officer notes that Student's ██████ was not raised as a concern by Pediatrician, nor was expressed as a concern in Student's IEP dated May 13, 2022 (hereinafter "IEP-05/13/2022"). Respondents' Exhibit 24, p.104-118.

options with the district superintendent for how Student would get to 2022-2023 School from Student's home. Testimony of PRT, Tr.V2, 147:11-148:8.

26. This discussion included information such as having a one-to-one adult on the bus for a short period of time to transition Student to riding the bus and having a smaller bus with less stops pick Student up. It is unclear from the evidence presented whether this information was ever provided to Parent at the IEP meetings in May and August 2022. Testimony of PRT, Tr.V2, 147:11-148:8.

27. At the August 4, 2022 meeting, Advocate proposed alternative programs for Student, including [REDACTED] programs and private [REDACTED] programs. The IEP team encouraged Parent to apply Student for Headstart, but there were no locations available near Student's home. Testimony of Advocate, Tr.V1, 44:2-10; R-Ex.30, p.141; Testimony of Grandparent, Tr.V1, 92:14-25; Testimony of PRT, Tr.V2, 139:22-140:25.

28. [REDACTED] programs are privately-run programs that have requirements, such as meeting an income threshold, and accept both nondisabled and disabled students. For inclusion classrooms required by the Hawai'i DOE, [REDACTED] will set aside a certain number of spots for disabled students to be placed by the Hawai'i DOE, however not every location that [REDACTED] is operated has inclusion classrooms. Testimony of PRT, Tr.V2, 137:20-138:10, 140:3-142:2, 180:23-182:20.

29. Advocate had located private [REDACTED] programs near Student's home that were proposed to the IEP team as possible placements for Student for the 2022-2023 school year. The IEP team declined to send Student to a private [REDACTED] program as they could not be sure that Student would receive special education services as laid

out in the IEP-05/13/2022. Testimony of Advocate, Tr.V1, 35:22-37:5, 43:18-45:17; Testimony of PRT, Tr.V2, 142:3-13; R-Ex.30, p.140-141.

30. An updated IEP was developed for Student as a result of the August 4, 2022 IEP meeting (hereinafter “IEP-08/04/2022”), but that IEP did not contain any detailed information about the proposed location for Student’s services, a transition plan for transitioning Student between the schools, or the bus services that Student would be provided. Testimony of Parent, Tr.V1, 59:4-15, 67:2-15; R-Ex.29, p.125-139.
31. The Prior Written Notice (hereinafter “PWN”) issued on August 8, 2022 (hereinafter “PWN-08/08/2022”) regarding the August 4, 2022 IEP meeting did note that the DOE offered Parent daily transportation services to 2022-2023 School and a one-to-one adult to ride the bus to 2022-2023 School with Student for a one (1) month transition period, or alternatively mileage reimbursement for a family member to transport Student to and from 2022-2023 School daily. Testimony of PRT, Tr.V2, 145:1-146:15; R-Ex.30, p.140-141.
32. Parent declined the DOE’s IEP-08/04/2022 offer to send Student to 2022-2023 School and Student did not attend any school or receive any private services that were paid out-of-pocket by Parent for the 2022-2023 school year. Testimony of Parent, Tr.V1, 58:5-25; Testimony of PRT, Tr.V2, 159:9-11; R-Ex.30, p.140-141.

2023-2024 school year

33. Student’s IEP team held several meetings in preparation for and the development of Student’s IEP for the 2023-2024 school year beginning on March 28, 2023 and ending in August 1, 2023. See P-Ex.1, p.1.
34. A written IEP was developed through this series of meetings and issued after the

- August 1, 2023 meeting (hereinafter “IEP-08/01/2023”). P-Ex.1, p.1-25; R-Ex.43, p.160-184.
35. In the IEP meetings leading up to the IEP-08/01/2023, Parent expressed to the IEP team that Student’s [REDACTED] had gotten worse and was triggered by a number of environmental variables, [REDACTED] P-Ex.1, p.6-7; R-Ex.43, p.165-166.
36. Parent also expressed additional concerns for Student having difficulty separating from Parent due to being home for the 2022-2023 school year and concerns riding the bus. These concerns were discussed by the IEP team but no actual transition or transfer plan was made with 2023-2024 School representatives present. Testimony of PRT, Tr.V2, 146:25-147:4, 183:3-184:2; P-Ex.1, p.7-8; R-Ex.43, p.167-168.
37. Parent requested that the IEP team provide a special education teacher to implement Student’s IEP in Student’s home due to Home School not having an appropriate inclusion setting for Student. Parent also requested music therapy and gymnastics classes from the DOE for Student’s education. P-Ex.1, p.7-8; R-Ex.43, p.167-168.
38. During the IEP meetings for the development of Student’s IEP for the 2023-2024 school year, Parent and Grandparent repeatedly told the IEP team that they would refuse to send Student to any location that was not within [REDACTED] distance from Student’s home or put Student on school bus transportation. *See* R-Ex.135, audio recording dated June 16, 2023, approximate time stamp [1:37:10-1:58:52].
39. The IEP team discussed Parent’s and Grandparent’s concerns and requests but ultimately determined that the DOE’s offer for Student’s IEP for the 2023-2024 school year would be implemented in an [REDACTED] setting on a DOE public

- school campus. P-Ex.1, p.18; R-Ex.43, p.177; *see generally*, R-Exs.134-138.
40. Student's IEP-08/01/2023 again placed Student in an inclusion setting and provided transportation and a number of supplementary aids and supports for Student. One of the supplementary aids and supports was a behavior support plan that was to be developed with the school and Parent. No detailed information about the location where Student's IEP would be implemented or any information about what the behavior support plan or any type of bus plan or transition plan was included in the IEP-08/01/2023. P-Ex.1, p.16-18; R-Ex.45, p.175-177.
41. A PWN for the DOE's offer for Student for the 2023-2024 school year was issued on August 8, 2023 (hereinafter "PWN-08/08/2023"). R-Ex.47, p.189-190.
42. Neither the IEP-08/01/2023 nor the PWN-08/08/2023 contained information regarding the location of Student's proposed placement for the 2023-2024 school year, any details on the bus transportation services that would be offered for Student, or a transition plan for Student to attend the proposed location. *See* P-Ex.1, p.1-25; R-Ex.43, p.160-184; R-Ex.47, p.189-190.
43. The proposed location for Student to attend for the 2023-2024 school year was closer to Student's residence, but still required [REDACTED] to [REDACTED] of travel time by car. Testimony of PRT, Tr.V2, 151:10-23.
44. No meeting with representatives from 2023-2024 School was held to discuss Student's IEP-08/01/2023 implementation at that location. The DOE reached out to Parent in October 2023 regarding setting up such a meeting, however no response was received. Testimony of PRT, Tr.V2, 183:22-184:16.

Other relevant information

45. Based on both Parent and Grandparent's testimony, the only acceptable program that they would send Student to would be a school within [REDACTED] distance from Student's home. *See* Testimony of Parent, Tr.V1, 73:5-23; 76:2-22; Testimony of Grandparent, Tr.V1, 87:6-9, 97:21-98:1; Testimony of PRT, Tr.V2, 158:5-9;
46. Petitioners have requested a music therapy program and gymnastics program as compensatory education for Student, however no evidence of the specific programs, the details of the programs, or the cost of the programs have been presented at the Hearing. Testimony of Parent, Tr.V1, 77:19-78:9; P-Ex.1, p.7-8; R-Ex.43, p.166-167.

## **V. CONCLUSIONS OF LAW**

### IDEA framework

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

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education. *Id.* To provide a FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.”

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

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

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

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures set forth in IDEA; and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 206-7; 102 S.Ct. at 3050-3051. “A state must meet both requirements to comply with the



obligations of the IDEA.” *Doug C. v. Hawai‘i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013); *see also, Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

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

#### Burden of Proof

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

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

#### A. Respondents failed to provide a complete IEP offer for Student for the 2022-2023 school year, which resulted in a loss of educational opportunity for Student

Petitioners’ first argument<sup>5</sup> is that the DOE failed to provide Student an acceptable offer of an IEP for Student, specifically regarding the location of Student’s IEP implementation and

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<sup>5</sup> As noted above in the “Issues Presented” section, Petitioners did not argue or present evidence regarding their issue in the Complaint regarding the failure to provide occupational therapy

transportation to the school. While it is undisputed that the DOE has the authority to determine the location of Student's services, an IEP offer must contain the necessary services and supplemental aids and supports that Student may require to access Student's education at whatever location in which the DOE places Student.

An IEP is a "formal written offer that creates a clear record that will do much to eliminate troublesome factual disputes about when placements are offered, what placements are offered, and what additional education assistance was offered to supplement a placement, if any. The IEP must specify the anticipated frequency, location, and duration of educational services." *M.C. by and through M.N. v. Antelope Valley Union High School District*, 858 F.3d 1189, 1196-1197 (9<sup>th</sup> Cir. 2017)(*internal quotations omitted*)(*citing Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9<sup>th</sup> Cir. 1994)).

The IDEA requires transportation as a related service for a student with a disability if it is necessary for that student to benefit from special education, even if the student has no ambulatory need for some form of specialized transport. *Donald B. by and through Christine B. v. Board of School Com'rs of Mobile County, Ala.*, 117 F.3d 1371, 1374 (11<sup>th</sup> Cir. 1997), *see also Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 890-891, 104 S.Ct. 3371, 3376, 82 L.Ed.2d 664 (1984) (holding that related services are non-medical services that are required to assist a disabled child to benefit from special education); 20 U.S.C. §1401(17). The extent of the related services to be provided to the student is left up to the discretion of the IEP team based on the information available to them at the time of the development of the IEP. *See Donald B.*, 117 F.3d at 1375 (affirming the court's determination that it was not a denial of FAPE to refuse to

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services to Student; therefore, this Hearings Officer finds that Petitioners have abandoned this issue and will not be addressing it in this Decision.

provide transportation for a student to attend speech services at a public school three blocks from the student's private school in which the parent unilaterally placed the student).

While transition plans are not required for all students with IEPs, plans for services and supports for students that have particular difficulties that may arise during the course of their attendance at school is required to be in their IEPs. In this case, the evidence presented at the Hearing has established that Student has difficulty with transitions and, at the age of [REDACTED] years old, had not ridden a bus independently from Parent. *FOF 8-9, 14*. Petitioners have also presented evidence that Student has difficulty in car rides that could contribute to difficulties for Student riding the bus alone on a [REDACTED] to [REDACTED] bus ride. *FOF 13*. Student had previously undergone a lengthy transition process to attend Home School successfully from the [REDACTED] program that Student had previously attended. *FOF 16-17*. The evidence presented at the Hearing indicates that Student needed a transition plan for Student to learn to successfully ride the bus to and from 2022-2023 School.

The IEP team did not discuss or provide any transition plan for Student to ride the bus to attend 2022-2023 School. A meeting was scheduled for representatives from 2022-2023 School to attend so that the details for Student's successful transition could be discussed, however the representatives from 2022-2023 School did not attend when informed that Student would not be attending the school. *FOF 24*. It is conceivable that if the DOE was open to discussing other options for Student's education program for the 2022-2023 school year at the meeting on August 4, 2022, then there was no need for representatives from 2022-2023 School to attend. However, based on the documents resulting from that meeting, the DOE did not consider the other options presented by Parent or Advocate to be feasible and instead went ahead with their original offer of Student's IEP-08/04/2022 to be implemented at 2022-2023 School, but with no plan or

information provided to Parent to make an informed decision on whether to send Student to that program for the 2022-2023 school year. *FOF 26-27, 29-31.*

As noted by Respondents, a school district or educational agency “has the duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meetings but must afford the parents a due process hearing in regard to that plan.” *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1490 (9<sup>th</sup> Cir. 1986). The IDEA does not “vest within parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student’s placement.” *B.B. ex rel. J.B. v. Hawaii, Dept. of Educ.*, 483 F.Supp.2d 1042, 1050 (*citing Doe v. Maher*, 793 F.2d 1470, 1490 (9<sup>th</sup> Cir. 1986)). In this case, the DOE let Parent’s refusal to discuss Student’s attendance at 2022-2023 School affect their ability to provide a complete offer of FAPE to Petitioners. If the DOE was aware that at the time of the August 4, 2022 IEP meeting, the only available placement for Student that the DOE was seriously considering was 2022-2023 School, then the IEP team should have insisted that 2022-2023 School representatives be present to inform Parent of the details of Student’s proposed program and so that the team could discuss the bus transportation details and address any concerns raised by Parent at that time. If, even after all the discussions with 2022-2023 School representatives, no consensus was reached with Parent and Grandparent about the proposed location and transportation to 2022-2023 School, the IEP team could have provided a comprehensive IEP offer with the details of the program and the transportation for Parent’s consideration.

Respondents contend that Student’s program at 2022-2023 School would have had several considerations that were appropriate for Student’s education, such as having one (1) [REDACTED] teacher and one (1) special education teacher; one (1) [REDACTED] aide and one (1)

special education aide; a small class size limited to twenty (20) students; and nondisabled peers for Student to learn with in the classroom. Respondents also noted that Student's bus ride would be only approximately [REDACTED] to [REDACTED] on a special education bus that would not be full of other students. *See FOF 25-26; see also* Respondents' Closing Brief, page 4. Unfortunately, the evidence is that the above information provided by Respondents in their closing brief and through the testimony of PRT was not conveyed to Parent through Student's IEP-08/04/2022. *See FOF 30-31*. Had the information indicated above, along with any documentation of a transition plan been included in the IEP-08/04/2022, then the document would have provided a clear offer of what placement was being offered and the educational assistance that would be offered to support the placement for Student. Had that information been provided to Petitioners in the IEP-08/04/2022, then it would have been clear to Parent what the DOE was offering, and Parent's rejection of the offer would have likely resulted in a different outcome. Instead, the IEP-08/04/2022 was incomplete and did not provide any of the necessary information that Parent should have had to make an informed decision about rejecting the proposed offer by the DOE.

While Petitioners argue that the problem with Student's IEP is that the location was too far from Student's home and Parent had concerns about Student's safety due to Parent's inability to get to the school in a reasonable amount of time in an emergency; this is not a valid concern under the IDEA. The IDEA requires that the IEP team focus on what services and supplementary aids would be required based on Student's unique needs based on Student's disability and not whether Parent could get to the school by a certain amount of time. *See e.g., Irving Independent School District v. Tatro*, 104 S.ct. 3371, 3378 (1984). Had Parent been provided a complete offer in the IEP-08/04/2022 that contained detailed information about the

transfer and/or bus plan that would be in place for Student to attend 2022-2023 School, Parent's refusal to send Student to 2022-2023 School would likely not have resulted in a denial of FAPE.

However, since Parent was not provided a complete offer in the IEP-08/04/2022, this resulted in a loss of educational opportunity for Student for the 2022-2023 school year.

Petitioners have proven a denial of FAPE by Respondents due to the failure to present an adequate IEP for Student for the 2022-2023 school year.

B. Respondents failed to provide a complete IEP offer for Student for the 2023-2024 school year, which resulted in a loss of educational opportunity for Student

Petitioners' second argument is that the DOE, despite holding multiple IEP meetings for the 2023-2024 school year, failed to present a reasonable IEP offer to Parent for Student, particularly regarding transportation and Parent's request for compensatory education for Student. This Hearings Officer finds that for reasons similar to what occurred for the 2022-2023 IEP, the DOE denied Student a FAPE by failing to provide a complete IEP offer to Parent for Student's education for the 2023-2024 school year. This Hearings Officer finds, however, that the DOE's refusal to provide compensatory education in the form of music therapy and gymnastics in Student's IEP-08/01/2023 was not a denial of FAPE.

For the 2023-2024 school year, the IEP team again placed Student in an inclusion program, which was not available at Home School. *See FOF 34, 40-41.* While the DOE was able to secure a spot in a location closer to Student's home for the 2023-2024 school year, the IEP team again failed to discuss the transition and/or bus plan for Student's attendance at 2023-2024 School. Similar to the IEP-08/04/2022, Student's IEP-08/01/2023 failed to include any information about a transition plan and/or bus plan for Student to attend 2023-2024 School. *FOF 40-41.*

The evidence in this case is that the IEP team had additional concerns about Student's ability to transition to school due to Student being home for the 2022-2023 school year. While Student did not appear to regress academically, the evidence presented at the Hearing is that Student may have had a greater need for a transition plan and/or a bus plan for Student's attendance for the 2023-2024 school year. *FOF 35-36*. The IEP-08/01/2023 did include a behavioral support plan that would be developed, presumably due to the concerns that Student would have difficulty with transitioning to school and have behaviors that would require such a plan. *FOF 40*.

As with the prior IEP-08/04/2022, the IEP team did not have a meeting with representatives from 2023-2024 School present to discuss the details for the program at 2023-2024 School and/or any transition and/or bus plan for Student to attend 2023-2024 School. *FOF 44*. The IEP team did not discuss a draft transition plan at any of the meetings held to develop the IEP-08/01/2023 what the actual plan would be for the transition for Student to attend 2023-2024 School. A draft transition plan was sent to Parent in October 2023, well after the IEP-08/01/2023 had been sent to Parent as the DOE's offer for the 2023-2024 school year. *FOF 44*.

For the same reasons as outlined in Section A, *supra*, this Hearings Officer finds that the DOE denied Student a FAPE by failing to provide a completed IEP offer for Student for the 2023-2024 school year.

Petitioners also argue that the IEP was insufficient because the IEP team declined to provide Petitioners with compensatory education in the form of a music or gymnastics program in the IEP-08/01/2023. Petitioners have not presented evidence of any specific music or gymnastics program that would specifically address the needs of Student that were unmet due to Student's non-attendance at school for the 2022-2023 school year. The only evidence of such

programs presented at the Hearing was Parent’s testimony that Parent had researched some gymnastics programs close to their residence and a music therapy program that would need to be accessed through a city bus ride. *FOF 46*. No details of the programs, such as how they would specifically address Student’s needs or make up for the loss of services for the 2022-2023 school year was presented at the Hearing. Likewise, the cost, length, or duration of the programs were not presented at the Hearing.

While it is a reasonable request by Petitioners for compensatory education services for Student due to the denial of FAPE for the 2022-2023 school year, it was also reasonable for the DOE to reject the specific requests by Petitioners due to the failure to provide information to the IEP team. This Hearings Officer finds that Respondents did not deny Student a FAPE by failing to provide the compensatory education requested by Petitioners in Student’s IEP-08/01/2023.

### C. Equitable considerations

Petitioners have requested several remedies for the DOE’s denial of FAPE in this case, including ordering the DOE to provide a suitable IEP for Student, ordering compensatory education services, extended school year (hereinafter “ESY”) services, and placement in an appropriate setting, including private placement if appropriate.

#### Request for new IEP

Petitioners’ first request for remedy is a request for the DOE to implement an appropriate IEP for Student. This Hearings Officer finds that the appropriate remedy for the denial of FAPE in this case is for the IEP team to meet and update Student’s IEP for the remainder of the 2023-2024 school year. This updated IEP should include details for the location where Student’s program would be implemented, a transition plan for Student to ride the bus to school and/or to attend school at the new location, if necessary. This information may be included in the IEP



under the clarifications of supports and services section of Student's IEP to clarify all the details of the plans so that Parent has a clear expectation of what services and plans would be included, as well as the information necessary for Parent about the new program from which Parent can make an informed decision of whether to send Student to the program for the remainder of the school year. Since Student has been out of school since the end of the 2021-2022 school year, the IEP team should also consider whether any assessments are necessary to determine if Student has additional needs to be addressed in Student's new IEP.

This Hearings Officer is NOT requiring the DOE to find an alternative location for Student's program to conform with Parent's request that that program be within walking distance from Student's home, as that is not a valid request based on Student's needs for Student's disability, as required under the IDEA. The remedy for the updated IEP to be developed is based on the lack of a complete offer in Student's IEP-08/01/2023, which should include details of the program and the transportation supports that the DOE is willing to provide to Student as part of Student's special education and related services.

#### Request for Compensatory Education

When a child with a disability is deprived of a FAPE in violation of the IDEA, a court and/or hearing officer fashioning appropriate relief may order compensatory education. *See 20 Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985); *see also R.P. ex rel. C.P. v. Prescott Unified School Dist.*, 631 F.3d 1117, 1125 (9<sup>th</sup> Cir. 2011) (*citing Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C.Cir. 2005); U.S.C. 1415(i)(2)(C)(iii); 34 C.F.R. 300.516(c)(3). Compensatory education is an equitable remedy that attempts to account for the educational deficit caused by a deprivation of educational services that a student should have received in the first place. *Department of Educ., Hawaii v. R.H. ex*

*rel. K.R.*, 2013 WL 3338581 \*7 (D. Hawai'i 2013) (*citing R.P.*, 631 F.3d at 1125). The goal of compensatory education is to “place disabled children in the same position they would have occupied but for the school district’s violation of the IDEA.” *R.P.*, 631 F.3d at 1125. An award of compensatory education “must be reasonably calculated to provide the educational benefits that likely would have accrued.” *Reid*, 401 F.3d at 524. “This standard ‘carries a qualitative rather than quantitative focus,’ and must be applied with ‘[f]lexibility rather than rigidity.’” *Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland*, 555 F. Supp. 2d 130, 135, 50 IDELR 134 (D.D.C. 2008) (*quoting Reid*, 401 F.3d at 524). In crafting the remedy, the court or hearing officer is charged with the responsibility of engaging in “a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student’s unique needs.” *Mary McLeod*, 555 F. Supp. 2d at 135 (*citing Reid*, 401 F.3d at 524). For some students, the compensatory education services can be short, and others may require extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE. *Id.*

Compensatory education can come in many forms and both hearing officers and courts have fashioned varying awards of services to compensate for denials of FAPE. Awards have included, but are not limited to, prospective tuition award, reimbursement for out-of-pocket educational expenses, and private placement. *Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008, *cert. denied*, 131 S. Ct. 342, 110 LRP 57266 (2010)); *Foster v. Bd. of Educ. of the City of Chicago*, 611 F. App’x 874, 65 IDELR 161 (7th Cir. 2015) (unpublished).

While Petitioners’ request for compensatory education is understandable due to Student’s loss of educational opportunity for the 2022-2023 school year and the start of the 2023-2024 school year until a new IEP is developed for Student, this Hearings Officer does not find that the

music therapy and gymnastics programs that Petitioners are requesting are appropriate remedies in this case. Not only is there a lack of necessary information about the curriculum, the length, and the costs of the programs, but it is unclear whether Student would be accepted into these programs, or whether Student would even benefit from these programs based on Student's needs. Therefore, Petitioners' request for music therapy and gymnastics programs as compensatory education is denied.

Petitioners also have requested ESY services to compensate for the denial of FAPE. This request is reasonable and appropriate in this case. While ESY services are usually reserved only for students who have a demonstrated need for services during extended breaks from school due to regression, this Hearings Officer finds that at this age, Petitioners have proven that Student has a demonstrated need for a transition plan to ensure that Student is able to attend school. This Hearings Officer finds that the IEP team, in developing the new IEP for Student for the remainder of the 2023-2024 school year, shall also include ESY services for Student for the summer of 2024 to provide any additional services that are deemed necessary for Student to attend ██████████ for the 2024-2025 school year. If no additional services are necessary, the IEP team may provide a program for a minimum of two (2) hours per day for a minimum of two (2) days per week, beginning no later than July 15, 2024, to allow Student to socialize with other students and work on transitioning from home to an ██████████ school environment. The IEP team may provide additional services or service hours, but it will not be required under this Decision. This Hearings Officer notes that the IEP team may include information in the new IEP that the ESY services are ONLY being provided to Student as a direct result of this Decision and not due to Student being otherwise eligible for ESY services under the DOE's typical criteria.

Lastly, this Hearings Officer finds that Petitioners' request for placement in an appropriate setting, including a private setting, is not a reasonable remedy for the denial of FAPE in this case. This Hearings Officer finds that the location and program presented at the Hearing for Student's IEP implementation is appropriate for Student to attend, provided that a transition and/or bus plan is included in the newly developed IEP for the remainder 2023-2024 school year. Petitioners have not disputed the educational placement of Student in an inclusion setting, and that appears to be appropriate based on the evidence presented at the Hearing.

## **VI. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have met their burden of proving some of the allegations in the Complaint by a preponderance of the evidence. Specifically, this Hearings Officer finds that the IEP team's failure to provide Parent with a complete IEP offer for the 2022-2023 and 2023-2024 school years resulted in a loss of education opportunity for Student and a denial of FAPE.

This Hearings Officer finds that the appropriate remedy in this case is for the IEP team to reconvene and address the concerns specified in this Decision.

For the reasons stated above, IT IS ORDERED –

1. Within thirty (30) calendar days of this Decision, the IEP team shall schedule an IEP meeting with Parent to update Student's IEP-08/01/2023 as noted in this Decision.
2. The IEP team shall include representatives from 2023-2024 School to provide information on the program available for Student. The IEP team shall discuss a transition plan and transportation plan for Student to attend 2023-2024 School for the remainder of the school year. This discussion should take place regardless of whether

Parent refuses to send or states any intention not to send Student to 2023-2024 School or participates in the discussion.

3. The IEP team shall discuss the location and/or any anticipated supports or transition plans that may be necessary for Student's short ESY session for the summer of 2024 based on this Decision. The ESY session for the summer of 2024 shall begin no later than July 15, 2024, and shall consist of a minimum of two (2) hours per day for a minimum of two (2) days per week until the start of the school year or the end of the program's typical ESY summer session, whichever is sooner. This information shall be included in Student's updated IEP.
4. The ESY session ordered may be at a location other than Student's Home School (even though it is anticipated that Student will attend ██████████ at Home School) as this Hearings Officer is unaware of whether Home School has an ESY session. If there are no ESY sessions at any DOE location that would assist with Student's socialization and transition from being at home to attending ██████████ (i.e., inclusion or general education ESY sessions), the DOE may explore other summer programs (such as summer fun programs or other private summer programs) to find a placement suitable for the brief ESY session as ordered in this Decision. DOE will be responsible for payment of such a program and any supplementary aids or supports that the IEP team determines is necessary for the Student to attend the program.
5. Due to the late timing of the anticipated IEP meeting, the IEP team may consider developing Student's IEP for part of the 2024-2025 school year OR may reconvene a meeting at a later date to develop Student's IEP for the 2024-2025 school year. Nothing in this Decision requires that the updated IEP that will be developed be an

annual IEP or that it moves the anticipated date for the annual review of Student's IEP.

6. Parent shall work with the IEP team to schedule and develop Student's updated IEP as ordered by this Decision. Any refusal of Parent to work with the IEP team in developing the updated IEP for Student as ordered by this Decision may result in a forfeiture of the compensatory ESY for the summer 2024 as ordered above.
7. Any delays in the scheduling of meetings, provision of consents, scheduling of assessments or observations of Student, or for any other reason caused by Petitioners and/or Petitioners' advocates or representatives shall be carefully documented by Respondents and shall extend the timelines set herein by the number of days attributable to Petitioners and/or Petitioners' advocates or representatives.

### **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 6, 2023.



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